



Citizens Advice Scotland response Consultation on the Investigation of Offences regulations and Code of Practice for Investigations October 2018

Citizens Advice Scotland (CAS), our 60 member Citizen Advice Bureaux (CAB), the Citizen Advice consumer helpline, and the Extra Help Unit, form Scotland's largest independent advice network. Advice provided by our service is free, independent, confidential, impartial and available to everyone. Our self-help website Advice for Scotland provides information on rights and helps people solve their problems.

In 2017/18 the Citizens Advice Service network helped over 295,100 clients in Scotland and dealt with almost 800,000 advice issues. With support from the network clients had financial gains of over £138 million and our self-help website Advice in Scotland received approximately 3.2 million page views.

Introduction and context of response

Citizens Advice Scotland (CAS) welcomes the opportunity to respond to the consultation. Whilst the Scottish social security system should make provision for the investigation of fraud, it is important that a clear distinction is drawn between intentional fraud and unintentional error, such as not reporting a change of circumstances unknowingly.

It should also be recognised that despite public perceptions, the overall levels of benefit fraud are low. From the most recent official statistics, the rate of fraud for Personal Independence Payment (PIP) is just 1.2%, with Disability Living Allowance (DLA) at 0.5% and Carer's Allowance at 3.9%, though figures for the latter two have not been published in a number of years.¹ Similarly, the amount of advice provided relating to alleged benefit fraud provided by Scotland's CAB network is also relatively low, with 1,686 issues advised on out of a total of 332,298 pieces of advice related to social security matters. Just 224 of these related to the benefits due to be devolved.²

It is also of paramount importance that the process of investigating alleged fraud is shaped by the social security principles, in particular that respect for the dignity of individuals is to be at the heart of the Scottish social security system, and that social security is itself a human right and essential to the realisation of other human rights.

Due to the nature of the questions in the consultation document, we have responded 'No' to a number of questions. This should however, not be taken as an indication

¹ Fraud and Error in the Benefit System, 2017/18 Preliminary Estimates – Department for Work and Pensions, May 2018

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707831/fraud-and-error-preliminary-estimates-2017-2018.pdf

² Alleged fraud issues: Carer's Allowance – 55; DLA (Mobility) – 50; DLA (Care) – 44; PIP (Daily Living) - 33; PIP (Mobility) – 22; Attendance Allowance – 19; Funeral Payment – 1; Cold Weather Payment – 0; Sure Start Maternity Grant – 0; Winter Fuel Payment – 0.

that the section needs to be entirely re-written – in some cases we have suggested minor alterations or additions only.

General comments

As part of its wider approach, CAS recommends the Scottish Government draws a distinction between overpayments and fraud. We also recommend the Government consults further on the best way to identify circumstances in which people have deliberately provided incorrect information or withheld relevant information.

Responses from CAB advisers suggests that one of the most common circumstances in which overpayments are recovered from an individual is due to individuals being unaware of the rules or making an error. However, CAS would like to raise the concern that it is incredibly difficult to make an assessment of people's intentions. Under the current system, many cases which are categorised as 'fraud' are in fact unintentional errors or a lack of understanding.

"It should need to be deliberate, on the balance of probabilities, to be deemed 'fraud'. However, the problem is, that included amongst the actions that the DWP consider to be fraud is 'not declaring a pension'. A joint bank account can also be viewed as fraud." CAB adviser.

The Scottish Government must carefully consider the methods it will use for identifying the difference between intentional fraud and unintentional error, and what types of evidence could be used to identify one or the other.

CAS recommends that the Scottish Government seeks to better understand the circumstances in which people currently commit fraud, and their reasons for doing so in order to develop an adequate strategy for preventing fraud.

CAS recommends that the Scottish Government works with other public sector services and third sector services to raise awareness and ensure that people are reminded of their responsibilities at every possible opportunity.

One aspect of the approach to fraud as outlined by the Scottish Government in the 'A New Future for Social Security in Scotland' consultation document is: "maintaining comprehensive procedures for preventing and detecting fraud." CAS is of the view that this is the most important aspect of the strategy proposed, and in order to prevent fraud it is necessary to understand the circumstances in which people commit fraud. As a trusted, independent advice network, the Scottish CAB Service is well placed to understand the circumstances in which people commit fraud. Through our 'Designing a Social Security System for Scotland' online survey and consultation events in 2016³, CAS asked CAB advisers to respond to the question "in what circumstances do people commit benefit fraud?" drawing on their experiences as advisers.

³ Pages 230 – 232, Response to A New Future for Social Security consultation – Citizens Advice Scotland, October 2016

https://www.cas.org.uk/system/files/publications/social_security_consultation_-_response_from_citizens_advice_scotland.pdf

Advisers tended to recognise that any system that pays cash will be open to exploitation and fraud, but a number responded that it was rare to come across a client who had knowingly committed fraud. For example, one respondent said she had only had one client in many years who intentionally committed fraud to increase their income though claiming Housing Benefit for three properties.

“To be frank, I personally think that the numbers in this area are small, but those that do are doing so quite knowingly.”

However, for those who had come across the phenomenon, the most common circumstances in which people committed fraud are listed below, and it can be seen that this list includes both intentional and unintentional causes of fraud.

- Claiming as a single person when part of a couple, particularly when the individuals in question do not live together on regular basis (mentioned by three respondents)
- Cases where circumstances change but the benefits agency is not notified (mentioned by three respondents)
- Not declaring private pensions (mentioned by three respondents)
- Not reporting changes in health (mentioned by two respondents)
- Not reporting changes in caring responsibilities (mentioned by two respondents)
- Claiming whilst receiving some other income
- People trying to hide cash in other people’s bank accounts
- Those who will *“do it because they can”*

Further detail about common circumstances leading to intentional or unintentional fraud can be found in our response to ‘A New Future for Social Security in Scotland’.⁴

Powers to Investigate and Safeguards

Q1a. Do you agree with our approach to requesting information in regulation 4 of the Investigation of Offences regulations, as shown in Box 1 and outlined in paragraphs 26 to 30?

No

Q1b. If No, please explain why.

CAS is concerned that the approach proposed in the consultation document and draft regulations may have potentially serious unintended consequences for citizens advice bureaux and other independent benefits advice agencies.

The consultation proposes that the Scottish Government could have wider powers to compel people and organisations to provide information to investigate suspected benefit fraud. Unlike the current system, which limits the Department for Work and

⁴ Pages 216 – 222, Ibid.

Pensions (DWP) to being able to request info from prescribed list of bodies, the proposed power appears to bring **all** organisations, including CAB, into its scope.

The draft regulations would allow social security fraud investigators to compel organisations to provide any information they have, including electronic records, and would give them the power to enter and search premises, as well as question anyone they find there.

The consultation document notes that *"...many organisations are bound by a duty of confidentiality to their customers and may be uncertain or cautious about exercising the discretion required to decide whether they should provide information, even where they are allowed to do so under the Data Protection Act...The creation of statutory information gathering powers that allow authorised officers to compel people and organisations to provide information addresses this problem. It removes any doubt about whether or not they should comply with a request for information. It also shifts the onus of accountability onto Social Security Scotland to make judgements about what is requested and to be able to justify those requests."*

CAS would not welcome discretion around confidentiality and information-sharing being removed from CAB. Confidentiality, impartiality and independence are fundamental principles of the CAB network. Except when authorised under the CAS Breach of Confidentiality Consultation Procedure no information regarding the client, including the fact of their visit, will be passed on to anyone outside the service without the client's express permission.

Circumstances under which disclosure of confidential information may be considered, within the terms of the CAS Breach of Confidentiality Consultation Procedure, are strictly limited. They include where:

- There is a legal obligation to do so, such as a request from the police
- There is a danger or risk of significant harm to clients or others, particularly in the case of children
- There is a potential conflict of interest because a bureau is advising both parties in a dispute.

Whilst existing social security legislation gives wide powers to inspectors to make enquiries and to examine case records, in practice these powers have never yet been used in this way in social security investigations and the Child Support Agency confirms that there is no intention to do so in their investigation procedures. Additionally, a letter from the then Department of Social Security in 1997 stated:

"The Citizens Advice Bureau is of course a responsible and knowledgeable body providing a valuable and good quality service and which seeks to act at all times within legislation. Where a Citizens Advice Bureau has given advice in good faith and there was no evidence of actively assisting someone in an attempt to defraud the Department, we would clearly not seek to bring a prosecution against them."

Guidance to CAB staff is clear that bureaux must not knowingly assist clients to make fraudulent claims. Current good practice guidelines state that all clients should be advised of the need to disclose any relevant changes of circumstances and to

make full and accurate disclosure of all relevant facts. It is essential to take clear case notes of all interviews and ensure that case records show that a client was advised of this.

But bureaux are not part of the social security 'policing' system. Therefore, it would not be appropriate for advisers to 'make a guess' as to whether or not a client is pursuing a fraudulent claim.

CAS understands that it is not the Scottish Government's intention to specifically target citizens advice bureaux or legitimate welfare rights agencies. However, as currently drafted there is very little protection in the regulations from a future government from using the powers to request CAB case records if they believe that an individual who is suspected of social security fraud may have received advice from a CAB.

This might have major implications for CAB's ability to advise clients impartially (as CAB are not currently part of social security fraud 'policing') and ability to reassure clients that they can share information in confidence. This is important because it means that clients feel able to honestly disclose issues, allowing full advice to be given.

CAS recommends that the regulations are amended to prevent this power being inappropriately used against citizens advice bureaux and their staff, as well as other legitimate agencies.

Possible options for doing so might be:

- To create a specific exemption for named organisations, such as CAB
- To restrict the powers to request information from a prescribed list of organisations (such as the current DWP powers described on page 6 of the consultation document)
- To remove any possibility of the powers to be used speculatively, or in a 'fishing exercise'.

Q2a. Do you agree with our approach to obtaining electronic information under regulation 5 shown in Box 2 and outlined in paragraph 31?

No

Q2b. If No, please explain why.

Citizens advice bureaux maintain electronic case records which could be subject to the powers in scope. For the reasons detailed in our answer to question 1b, CAS feels it would be inappropriate for them to fall into the scope of these regulations.

Q3a. Do you agree with our approach to entry and search of premises for the purposes of a fraud investigation under regulation 6, shown in Box 3 and outlined in paragraphs 32 to 34?

No.

Q3b. If No, please explain why.

As drafted, the powers of entry and search would appear to extend to citizens advice bureaux without sufficient limitations. As detailed in our response to question 1b above, CAS believes this would be inappropriate.

Q4a. Do you agree with our proposal for new offences relating to delay or obstruction of an investigation, as outlined in paragraphs 35 to 36 and in regulation 7 shown in Box 4?

Agree in part.

Q4b. If No, please explain why.

Notwithstanding points made above relating to the scope of other powers being inappropriate, the proposal would appear to be appropriate in relation to individuals who knowingly and wilfully obstruct an investigation.

Q5. Do you have any other comments about Chapter 1 of the Code of Practice for Investigations?

As detailed in our response to question 1b, we believe that regulations should include guarantees that requests for information are not made in a speculative manner, in addition to the Code of Practice.

As detailed in our response to question 1b, CAS believes that citizens advice bureaux should not be subject to requests that breach client confidentiality.

CAS would also be concerned that the proposals to grant powers of covert surveillance (Paragraphs 37 – 39) to social security fraud investigators would not be proportionate, nor consistent with the principles of dignity and respect and a human rights-based approach. The legislation proposed to be relied upon, the Regulation of Investigatory Powers (Scotland) Act 2000 is most commonly associated with counter-terrorism and national security matters, which would not appear to be appropriate for investigations of alleged social security fraud, which as noted above is relatively uncommon. The proposed safeguards outlined would not appear to be sufficient to treat people with fairness, dignity and respect.

Standards for Counter Fraud Officers

Q6a. Do you agree with our approach to authorising a person to use the information gathering powers set out in the Investigation of Offences regulations, as shown in regulation 3 in Box 5 and outlined in paragraph 38?

No

Q6b. If No, please explain why?

Whilst CAS agrees that all counter-fraud officers should be specially trained, we believe that the training described in Chapter 2, as it stands, would be inadequate. Detail of what might be included in training is detailed in our response to question 8 below.

Q7a. Do you think the restrictions placed on authorised officers are correct as shown in regulation 3 in Box 5 and outlined in paragraphs 39 and 40?

Agree in part.

Q7b. If No, what other restrictions do you feel are required?

Whilst CAS would agree with the restrictions, in addition CAS believes that authorised officers should only use these powers as an absolute last resort, and should consider whether there are less intrusive means of gathering the information, such as through contacting the claimant directly. In order to ensure that these powers are used with the highest degree of dignity and respect, CAS is of the view that the claimant should in the majority of cases be notified in writing that, unless they provide the information themselves within a given timeframe, the authorised officers will seek to gather the information from third parties.

Q8. Do you have any other comments about the contents of Chapter 2 of the Code of Practice for Investigations?

Whilst the chapter notes that 'all counter fraud officers will be specially trained members of staff', no further detail of this special training is given, aside from the mandatory data protection, equality and diversity training which is given to all Social Security Scotland staff. CAS believes that, as it stands, this would be inadequate and that a rigorous and bespoke training programme for all counter-fraud officers should be provided. In addition to the mandatory areas above, this could include training in the following areas:

- Investigation practices
- The Social Security Principles and Charter
- Human rights legislation and practice
- Inclusive communications
- Causes of fraud in the benefits system
- Distinguishing between unintentional error and intentional fraud in the benefits system

CAS also notes the work of the Centre for Counter Fraud Studies at the University of Portsmouth⁵, which may be able to offer further advice and insight on what would constitute a robust training programme, with dignity and respect at its heart.

⁵ Centre for Counter Fraud Studies <http://www2.port.ac.uk/centre-for-counter-fraud-studies/>

What to expect if you are being investigated

Q9a. Does Chapter 3 of the Code of Practice provide sufficient detail to explain how a person will be treated with fairness, dignity and respect during a fraud investigation?

Chapter 3 contains a reasonable level of detail. However, there are a number of further points which have emerged from consultation with CAB advisers that might be considered for inclusion (detailed below in our response to question 9b).

Q9b. If No, please explain what else you think could be added to ensure this

If interviews under caution are to play a role in the Scottish social security system, they should be guided by the Scottish Social Security Principles, but also, the following principles which ensure good investigative practice:

- The aim of investigative interviewing is to obtain accurate and reliable accounts from victim's witnesses or suspects about matters under investigation
- Investigators must act fairly when questioning victims, witnesses and suspects. Vulnerable people must be treated with particular consideration at all times
- Interviewing should be approached with an investigation mind-set. Accounts obtained from the person who is being interviewed should always be tested against what the investigator already knows or what can reasonably be established⁶

However, good investigative technique should not be followed at the expense of respect for the dignity of the individual in question.

CAS recommends that interviews under caution are carried out with respect for the dignity of the accused person, and with a presumption of innocence at the outset.

CAS recommends that people are always told that they have the right to advice and advocacy when undergoing fraud investigation. This should be done well in advance of the interview to ensure that a person is able to secure support on the day, and discuss the interview with the adviser or advocate beforehand.

Through our 'Designing a Social Security System for Scotland' online survey and consultation events, CAB advisers provided their views around how fraud investigations could be improved:

- The importance of making people aware that they can access advice, advocacy and representation;

⁶ Fraud Guide: staff guide Interviews Under Caution, 01 Planning and Preparation, page 515 – Department for Work and Pensions
www.gov.uk/government/uploads/system/uploads/attachment_data/file/523527/fraud-guide-feb-2016.pdf

- Improvements to communications to make sure people understand what is happening and what is expected of them, for example, making the language used in the initial letter clear and accessible;
- Two survey respondents mentioned that improvements could be made to speed of processing;
- Three respondents mentioned that investigations could be improved by cultivating a culture of fairness and trust, and treating people with respect;
- A quarter of survey respondents mentioned the presumption of innocence: that people should be treated as 'innocent until proven guilty'

CAB case evidence has shown that current fraud investigations can cause people distress and would not appear to be dignified or respectful.

An East of Scotland CAB reports of a client who was very distressed as she had been telephoned by the DWP Fraud and Error Service to ask her why she had not come to her appointment that day. The client had not received any letter to ask her to come to a meeting. After some conversation it was discovered that letters had been sent to another address. This was an address that the client had lived at as a child but never under her married name. The DWP have client's correct address on her benefit award letters, so it is hard to understand why the appointment would have been sent out to the incorrect address. The fraud investigator accused the client of working for a TV company, but she has not done any work for a long time. She had previously done some transcription work for a university but because this was paid in lump sums and not regularly she found it messed up her tax credits, despite her telling them all the information as she went along, so much that she decided it was less stressful not to work. She has never worked for the TV company they were suggesting she had worked for. The client was very concerned that the call may have been a scam and she had given away her National Insurance number.

An East of Scotland CAB reports of a client who telephoned in a very distressed state with regard to a letter that she has received with regard to her DLA (Disability Living Allowance). The client had previously received advice because she was being investigated by the DWP for a fraudulent claim - she had not received an outcome with regard to this. The client advised that her son's ex-girlfriend had contacted the DWP to advise that she was claiming DLA fraudulently. The client advised that she had been under surveillance. The client was extremely upset on the telephone and advised that when she had received this letter yesterday, she "wanted to end it all as she is at the end of her tether". The client advised that everything is getting on top of her and she feels terrible because she can't shift her mood even though her daughter is due to get married in two weeks.

Outcome of an investigation

Q11a. Does Chapter 4 of the Code of Practice clearly set out how the potential outcome of an investigation will be explained to an individual?

In part.

Q11b. If No, what else should this chapter explain?

Whilst CAS strongly agrees that decisions should be communicated in writing, in keeping with the recognition of inclusive communication and accessible information set out in sections 4 and 5 of the Social Security (Scotland) Act, the information should be given to the individual in a format that is accessible to them. For instance, this could include giving the decision in an audio file, or similar alternative method if that is the most appropriate permanent record of a decision to give to an individual.

Q12a. Do you believe that our approach set out in Chapter 4 of the Code of Practice will help to ensure a person is treated fairly, with dignity and respect?

In part.

Q12b. If No, please indicate what else you think we might do to ensure this.

In addition to the process described in chapter 4, CAS would recommend that individuals are referred to independent advice and advocacy, or others means of support:

- if they are being contacted to notify them a determination of entitlement was wrong,
- if a benefit was paid incorrectly,
- if Social Security Scotland are requesting money be paid back, or
- if the case has been referred to the Procurator Fiscal.

Complaints

Q13a. Do you agree with our approach to complaints in Chapter 5 of the Code of Practice for Investigations?

Agree in part, although CAS is unable to comment fully as the full Social Security Scotland complaints process has not yet been published.

Q13b. If No, please tell us what else you would like to see included.

As outlined above, it is difficult to comment on the summarised process in the consultation document without having access to the full Social Security Scotland complaints process, which is yet to be published.

It is particularly important to have guarantees around complaints in a rights-based system, and that unlike feedback and complaints in other areas, such as the NHS, there is a fear amongst people who receive benefits that they will face disadvantage or sanction from complaining.

Citizens Advice Scotland's recommendations for complaints and redress in the new social security system can be found below. Further detail can also be found in our response to 'A New Future for Social Security'.⁷

CAS generally agrees that the Complaints Handling Procedure (CHP) on the Scottish Public Services Ombudsman's (SPSO) 'Statement of Complaints Handling Principles' should be adopted by the Scottish Social Security Agency.

CAS welcomes the general approach of the SPSO's statement of CHP principles.

CAS recommends that users should have the right to raise a complaint directly to a visibly independent feedback/complaints team that are able to investigate the matter, rather than having to go through a frontline member of normal service delivery staff if they do not feel able or willing to raise their complaint through this means.

CAS agrees that the SPSO is best placed to be the final option of escalation to have the complaint determined independently and free of charge.

CAS believes the best ways of overcoming barriers to complaining are by ensuring that service complaints are proactively identified and handled by the Agency within

⁷ Pages 183 - 191, Response to A New Future for Social Security consultation – Citizens Advice Scotland, October 2016

https://www.cas.org.uk/system/files/publications/social_security_consultation_-_response_from_citizens_advice_scotland.pdf

all procedures, including internal reviews, without requiring the user to expressly ask to raise a separate service complaint; by establishing a separate feedback/complaints service team that users can contact directly; and by training all frontline staff on complaint handling procedures.

From consultation with CAB advisers, there are a number of barriers their clients face which discourage those clients from raising a complaint under the current social security system. These include:

- 'Biting the hand that feeds you' – concern about their complaint influencing any pending decisions on benefits, being sanctioned, or complaining about frontline staff who they may have to continue to deal with.
- 'What's the point' – not feeling that anything would be gained from raising a complaint, not expecting to be listened to, or not wanting to prolong their dealings with the service.
- Not knowing how to complain, having difficulty setting out their complaint comprehensively, or not wanting to ask the person who they wish to complain about how to access the complaints procedure.

Q15a. Is the content of the Codes of Practice for Investigations right?

Our comments on the Codes are detailed in the answers to the questions above and below.

Impact Assessments on the Code of Practice and Investigation of Offences Regulations

Q18a. Have we identified all of the business related impacts?

The business impact assessment correctly identifies that the introduction of a new set of regulations could cause additional requests for information and support from existing advice services, and has noted the importance of the agency working with citizens advice bureaux and other services. Additionally, there could be a further impact on CAB if the powers granted to counter-fraud officers lead to additional requests for information on clients, as discussed above.

Q19a. Are you aware of any equality issues we have not identified in terms of introduction of the Investigation of Offences regulations and fraud investigations more generally?

No