

# **Social Security (Amendment) (Scotland) Bill**

## **Data Protection Impact Assessment**

## Data Protection Impact Assessment

### Social Security (Amendment) (Scotland) Bill

Version date: 23 October 2023

The purpose of this impact assessment is to consider the potential for privacy impacts and GDPR implications associated with proposals that make up the Social Security (Amendment) (Scotland) Bill ('the Bill'). This document will also provide an evaluation of how the protection of personal data has been considered and demonstrate how the rights to privacy and confidentiality of the users are appropriately protected through mitigations.

The Bill introduces provisions aimed at effecting the continuous improvement of the social security system across a range of topics, in line with the Scottish social security principles laid out in Part 1 of the Social Security (Scotland) Act 2018 ('the 2018 Act').<sup>1</sup> These core principles, endorsed unanimously by the Scottish Parliament, deliberately correspond to some of the fundamental aspects of the right to social security, as set out in key human rights instruments such as the International Covenant on Economic, Social and Cultural Rights,<sup>2</sup> the Universal Declaration of Human Rights,<sup>3</sup> and the European Social Charter.<sup>4</sup>

In particular, the principles which connect most closely to the provisions included within the Bill state that –

“opportunities are to be sought to continuously improve the Scottish social security system in ways which –

- (i) put the needs of those who require assistance first, and
- (ii) advance equality and non-discrimination”

and

“the Scottish social security system is to be efficient and deliver value for money”

The majority of provisions included within the Bill are designed to enhance administration of the Scottish social security system, with a focus on measures to improve client experience and to deliver value for money. In addition, a provision is included allowing Ministers to create, by way of regulations, financial assistance for people with experience of being in care.

Each proposal has been examined as a separate entity to ensure that the full range of considerations for each has been considered as part of this assessment.

This Data Protection Impact Assessment (DPIA) works in conjunction with the [Article 36\(4\) ICO](#) consultation form submitted in advance of this, as the proposals require consultation with the Information Commissioner's Office (ICO).

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<sup>1</sup> [Social Security \(Scotland\) Act 2018 \(legislation.gov.uk\)](#)

<sup>2</sup> Article 9, [International Covenant on Economic, Social and Cultural Rights](#)

<sup>3</sup> Article 22, [Universal Declaration of Human Rights](#)

<sup>4</sup> Article 12, [European Treaty Series no. 163 – European Social Charter \(Revised\)](#)

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### 1. Contact and schedule information

1.1 **SG department:** Social Security Directorate: Social Security Policy

1.2 **Contact email:** [socialsecurityCI@gov.scot](mailto:socialsecurityCI@gov.scot)

1.3 **Data protection support email:** [dpa@gov.scot](mailto:dpa@gov.scot)  
**Data protection officer:** [dataprotectionofficer@gov.scot](mailto:dataprotectionofficer@gov.scot)

1.4 **Is your proposal primary legislation, secondary legislation or other form of statutory measure?**

Primary legislation

1.5 **What stage is the legislative process at? Please indicate any relevant timescales and deadlines.**

This is an iterative impact assessment at the stage of Bill introduction, which may need to be amended as the Bill makes its way through Parliament.

### 2. Introductory information

#### 2.1 Summary of proposal

An overview of the proposals included in the Bill and the specific aim of each policy is set out below.

#### **Taking a regulation-making power for childhood assistance**

New enabling powers are provided within the Bill, allowing the Scottish Ministers to make regulations for childhood assistance, which will help towards meeting some of the costs associated with having a child in the family. Scottish Ministers intend to use the new powers for childhood assistance in due course as a new legislative footing for Scottish Child Payment (SCP) to allow better alignment of Social Security Scotland benefits.

SCP is currently delivered under s79 of the 2018 Act<sup>5</sup> as a 'top-up' where an individual is receiving a qualifying UK Government benefit.<sup>6</sup> Placing the payment on a new legislative footing will offer the opportunity for greater alignment across the five family payments (including the Best Start Grants and Best Start Foods) and will afford flexibility in the way the payment is delivered in the future.

This proposal will be used in future to change the legislative footing on which the payment is based, but will not result in any change to the data collected, which was previously consulted on with ICO. Regulations resulting from this provision in the Bill could in future lead to the collection of some additional data relating to clients'

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<sup>5</sup> [s79, Social Security \(Scotland\) Act 2018](#)

<sup>6</sup> [Who should apply - mygov.scot](#)

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personal circumstances which goes beyond the data currently gathered by Social Security Scotland. Further consideration will be given to the impact on data protection in future during the development of regulations.

### **Financial support for people with care experience**

A provision will be included in the Bill allowing Scottish Ministers to create, by way of regulations, financial support for people with care experience. The current intention is that these powers will be used initially for a payment called the Care Leaver Payment (CLP).

The CLP will fulfil the commitment made in the Promise Implementation Plan published in March 2022 to ‘provide some additional financial security for young people with care experience and will help reduce some of the financial barriers that young people face whilst moving on from care and into adulthood and more independent living’.

The delivery of this assistance will involve the collection and processing of applicants’ personal information. Information will be gathered relating to people’s care experience. It is proposed that this information will be gathered through an application process but data sharing with local authorities could also be involved.

A 12 week public consultation will be held in late 2023 covering the policy intent and eligibility criteria of a care leaver payment and the broader package of support for people who have experience of being in care, which is separate to the provision included in the Bill.

Secondary legislation will be required to set out the eligibility criteria, the application process and the delivery body for this assistance. The impacts on data protection will be further considered during the development of those regulations.

### **Making amendments to coronavirus (COVID-19) measures introduced in 2020**

In 2020, due to the coronavirus (COVID-19) pandemic, sections 52A and 52B were amended into the 2018 Act by the Coronavirus (Scotland) Act 2020.

Section 52A means requests for re-determinations must be considered valid beyond the maximum period of one year prescribed by the 2018 Act, where the reason for delay was related to COVID-19. Section 52A also allows for appeals to be brought beyond the maximum prescribed period of one year, where the Tribunal gives permission on the basis of being satisfied that the reason for the delay was related to COVID-19. Section 52B allows a late application to be treated as being made within the prescribed period for a given benefit under Chapter 2 of the 2018 Act, where the reason for delay was related to COVID-19.

The provisions in the Bill will give Social Security Scotland discretion to accept late requests for re-determination beyond the one-year prescribed period on the basis of ‘exceptional circumstances’, rather than only COVID-19. The provisions in the Bill will repeal section 52A of the 2018 Act and allow appeals to be brought, with the

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permission of the Tribunal, beyond the one-year prescribed period on the basis of 'exceptional circumstances', rather than only COVID-19. Provisions in the Bill will remove section 52B from the 2018 Act and revert application periods to existing pre-COVID deadlines.

The proposal allowing Social Security Scotland to give permission for re-determination requests beyond a year in exceptional circumstances builds on existing processes and does not have implications for data protection.

The reason for the lateness of the re-determination request could involve medical or personal data about the exceptional circumstances. If the exceptional circumstances are accepted, processing the late re-determination may also involve the processing of new supporting information provided by the client or a third party.

This introduces no new processing of personal data; existing Social Security Scotland systems and processes will be used to handle this type of processing.

There are no implications for data protection arising from the provision to repeal section 52B.

### **Withdrawing a request for re-determination**

Under the 2018 Act, where a determination of entitlement to assistance is made, an individual has a right to a re-determination. If a client asks for a re-determination, the Scottish Ministers are under a statutory duty to make a new determination. A client cannot subsequently withdraw their request for re-determination, even if their circumstances have changed since making their request, or if they have otherwise changed their mind.

The Bill includes provision enabling clients to withdraw a re-determination request if they no longer wish to challenge the decision. This policy builds on the person-centred, rights-based approach already adopted for challenge rights in line with the Scottish social security principles and the Social Security Charter ('the Charter').<sup>7</sup>

### **Completing re-determinations beyond the period allowed**

Where a re-determination is not completed by the Scottish Ministers in the timescales set out in the relevant regulations, the re-determination becomes out-of-time and the client is notified that they have a right to appeal to the First-tier Tribunal (Social Security Chamber) without waiting for the re-determination to be made. The Scottish Ministers are, at that point, no longer under a duty to make the re-determination. However, in practice, they continue to consider the re-determination request.

Provisions are included in the Bill so that the Scottish Ministers remain under the duty to make the re-determination beyond the period allowed, unless the client opts to exercise their right to appeal. This will offer legal clarity in terms of what happens in practice when a re-determination runs late.

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<sup>7</sup> [Social Security Scotland - Our Charter](#)

These provisions relating to re-determinations may involve the processing of supporting information provided by the client. However, this type of personal information is data that Social Security Scotland already routinely processes in current re-determinations procedures. There will be no new or additional processing of personal information. As these provisions build on procedures which currently take place there are no implications for data protection.

### **Making a new determination of entitlement whilst there is an ongoing appeal**

Under the 2018 Act, Scottish Ministers cannot make a new determination after a valid appeal has been brought, even if an error has been identified, or new evidence received, which shows that a client has been underpaid, or not received an award that they were entitled to. The appeal must continue unless it is withdrawn by the client.

In instances where the Scottish Ministers recognise that an individual should have received a higher, or more advantageous, award, the provisions in the Bill allow a new determination to be made after an appeal has been lodged and the appeal to stop as a result. The new determination can only be made if the client agreed, and will come with challenge rights.

These provisions build on existing processes utilising current systems and technology. Clients (or third parties) may provide additional supporting information but this personal data is already routinely processed by Social Security Scotland on behalf of Scottish Ministers during current re-determinations processes and shared with Scottish Courts and Tribunals Service during current appeal procedures. This process has been privacy and risk assessed when first introduced. Relevant operational DPIA and data sharing agreements are in place in line with ICO data sharing code of practice.

### **Appeal to First-tier Tribunal against process decisions**

The 2018 Act provides at section 61 that individuals can appeal to the First-tier Tribunal for Scotland against certain decisions made by the Scottish Ministers on the process of applying for benefits, or the process of challenging determinations.

The provisions in the Bill set out the powers of the Tribunal to uphold or set aside decisions in process appeals, and the effect of a Tribunal decision in a process appeal. The Bill also sets out further circumstances in which a process appeal may be raised, to include the new types of process introduced by the Bill.

The provisions about process appeals serve to clarify current processes and do not have any implications for data protection. There is no new processing of personal information, the current Redetermination and Appeal process has been assessed and an operational DPIA is held. This is a living document and is reviewed regularly.

## **Overpayment liability and challenge rights**

Under the 2018 Act, a client has a statutory liability to repay any overpayment made in error, except where they did not cause or contribute to that error, and if it was the sort of error a person could not reasonably be expected to have noticed.

### Liability of individual/individual's representative for assistance given in error

The provisions in the Bill set out that liability extends to clients who have a representative acting on their behalf, except where the representative uses the assistance for a purpose which is a breach of their duties or responsibilities, in which case the representative will be personally liable.

Where an overpayment is made in respect of a person who has a representative acting on their behalf, Scottish Ministers' policy is that it should be repaid by the person who benefitted from it. That could be the entitled individual or their representative, if they have not acted in good faith. This policy is not yet on a statutory footing and a contractual liability has been imposed for representatives through use of declarations and letters.

The provisions in the Bill will broaden statutory liability to entitled individuals who have benefitted from an overpayment, even where it was the fault of their representative. Where a representative has acted in bad faith and/or used the money for their own personal gain, liability will fall to them instead. As this is merely a change of legal basis, the personal data handled by Social Security Scotland will remain the same.

### Challenging decisions about liability

Currently, where Social Security Scotland determines that an overpayment has occurred, it makes a new determination on a client's entitlement to benefit. Although this new determination will bring re-determination and appeal rights if the client wants to challenge the decision, there is not any formal right to challenge the decision that an individual is liable to repay the overpayment.

The provisions in the Bill also introduce a right to a review (followed by a right to appeal to the First-tier Tribunal for Scotland (Social Security Chamber)) against a finding of liability for an overpayment. The further review and appeal provisions in part 6 of the Tribunals (Scotland) Act 2014 will also be available.

These provisions improve existing processes. Currently where a person is found liable for an overpayment they can ask Social Security Scotland, acting on behalf of Scottish Ministers, to review that decision. If, following the review, the decision remains unchanged and the person still disagrees that they are liable for the overpayment, they would currently need wait for Social Security Scotland to enforce the recovery and raise a defence to a Sheriff Court recovery action or deduction determination raised by Social Security Scotland.

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The provisions in the Bill seek to create a new statutory right to proactively challenge the liability decision mirroring the process for other challenges against Social Security Scotland determinations (redetermination and appeal), and avoids the delay and expense of potentially lengthy and stressful Sheriff court proceedings.

Personal data collected by Social Security Scotland on behalf of the Scottish Ministers is already routinely shared with the Scottish Courts and Tribunal Service for the purposes of processing appeals of entitlement. These new challenges will include largely include the same types of information.

When the provisions are commenced the sharing of data will be necessary for the performance of a task carried out in the public interest and in the exercise of official authority vested in the controller in terms of Article 6(1)(e) of the GDPR. Where special category data is processed, this will only be where necessary for the establishment, exercise or defence of legal claims and/or whenever the tribunal is acting in a judicial capacity in terms of Article 9(f) of the GDPR. A Data Sharing Agreement in respect of appeals is already in place and it is expected this new challenge right could either be added or a broadly similar agreement be reached.

### **Recognising Appointments made by a Minister of the Crown**

Where a person lacks capacity to manage their own financial affairs, the Department for Work and Pensions (DWP) and Scottish Ministers both have provisions that allow them to appoint a person or organisation, known as an appointee, to act on that person's behalf.

Due to differences in the law and the processes that govern appointments in Scotland and the rest of the United Kingdom, a DWP appointee – which is an appointment made by a Minister of the Crown – cannot automatically be treated as equivalent to an appointee under the 2018 Act.

The Bill will introduce powers for Scottish Ministers to make provision in regulations prescribing circumstances in which a DWP appointee may be treated as though they had been appointed by Scottish Ministers to act on a client's behalf, pending an assessment by Social Security Scotland.

DWP currently share appointee information with Social Security Scotland who act on behalf of Scottish Ministers. Secondary legislation will set out the circumstances where Social Security Scotland may accept a DWP appointee. Further consideration will be given to the impact on data protection in future during the development of these regulations.



## **Liability of appointees**

Currently, there is no provision within the 2018 Act with the effect that an appointee will be liable to account to the individual for any mismanagement of the individual's property (either in relation to children or adults). There are provisions respectively, in terms of the Children (Scotland) Act 1995 and the Adults with Incapacity (Scotland) Act 2000, which make other types of representatives liable to the individual for mismanagement of their property.

The Bill provides that an appointee will be liable to account to the individual for whom they were appointed, for their use of the individual's funds outwith their authority or power, or after having received intimation of the termination or suspension of their authority or power to intervene. They are to be liable to repay the funds to the account of the individual. No liability will be incurred where the appointee acted reasonably and in good faith in their use of the individual's funds.

Any dispute arising under these provisions would be a private dispute between the individual and their representative and as such no personal data would be handled by Scottish Ministers or Social Security Scotland on their behalf.

## **Information for audit of the social security system**

Social Security Scotland need to produce effective measurements and estimates of the extent of client error, official error, and fraud as assurance that the social security system is efficient and delivering value for money in line with the Scottish social security principles.

Currently Scottish Ministers can only request that people provide information for the specific purpose of determining an individual's entitlement to social security assistance, where :

- a person applies for assistance for the first time;
- a person reports a change in their circumstances;
- a review of entitlement has been scheduled by Scottish Ministers; or
- a review of entitlement is needed because new information has come to light that may indicate there has been change of circumstances.

Provisions in the Bill will give Scottish Ministers powers to require individuals to provide information when reasonably requested to do so, in order to review their entitlement for the purposes of audit. Safeguards will be built in to ensure that where a person has good reason they might be exempted from the process.

This proposal will initially use personal data already held by Social Security Scotland to select cases for review. Once selected any new information gathered will be of the same type as that collected routinely when deciding a person's entitlement to the benefit in question. Each form of assistance has a separate DPIA which is regularly reviewed and the DPIA will be updated to reflect any new processing.

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The outcomes of these exercises will be recorded and anonymised for use in statistics. For transparency the Social Security Scotland privacy notice does advise data subjects that data is processed for statistical purposes and to carry out quality and compliance monitoring.

Where anomalies are discovered in individual cases such as overpayments, underpayments or fraudulent activity, Social Security Scotland will follow business as usual procedures which are already subject to their own DPIA. Existing DPIAs are reviewed regularly as are all data sharing agreements. If as part of the audit processes, further information is required to determine whether an individual's entitlement is still correct.

### **Recovering Scottish social security assistance from awards of compensation**

A person affected by accident, injury, or disease due to the fault of a third party may be entitled to compensation. Depending on the nature of their accident, injury, or disease they may also be entitled to social security assistance. The Scottish Government believes that a third party's legal obligation to fully compensate those they have harmed should not be subsidised by Scotland's social security system.

The provisions in the Bill allow the Scottish Government to recover relevant forms of Scottish assistance from awards of compensation, avoiding the risk of a person being 'doubly compensated' for the same incident. The policy on compensation recovery is consistent with the responsibilities in the Scottish Public Finance Manual<sup>8</sup>, and aligns with the Scottish social security principle that the Scottish social security system is to be efficient and deliver value for money.<sup>9</sup>

As a result of the provisions in the Bill compensators will be required to collect data regarding the injured party with the data subject's permission and submit this to the administrator of the Scottish compensation recovery scheme. Once this information has been submitted, Social Security Scotland will be required to share data with the scheme administrator. This data will include Special Category data - health. There will be no requirement to process any criminal offence data.

The scheme administrator will use this data to generate a certificate of recoverable assistance and a copy of this will be provided to both the compensator and the data subject or their legal representative. The legal gateway for this data being shared with compensators will involve utilising section 85 of the 2018 Act, where at subsection (5) the Scottish Ministers can supply information held for a social security purpose to persons specified at section 85(2), which does not currently include compensators. In order to use this, there will be a requirement to make regulations to add compensators to the list of persons at section 85(2) to whom information can be given under section 85(5). This will likely be by amendment of the Social Security Information-sharing (Scotland) Regulations 2021/178.

The new provisions within the Bill will not require any new personal data collection from the clients by Social Security Scotland as the data to be shared was previously

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<sup>8</sup> [Scottish Public Finance Manual - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>9</sup> [s1\(h\), Social Security \(Scotland\) Act 2018](#)

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collected to determine the clients award of assistance. Social Security Scotland are developing an operational data protection Impact Assessment, this will provide low level process and impacts all data processing, including the data sharing mechanism.

### **Making changes to the remit and status of the Scottish Commission on Social Security**

The Scottish Commission on Social Security (SCoSS) reviews certain social security policies, by way of consideration of draft regulations, and provides the Government and the Scottish Parliament with scrutiny reports on each piece of legislation it reviews.

The provisions in the Bill expand the types of regulations that SCoSS is able to review, and replace the requirement for SCoSS to prepare accounts for external audit, with a requirement to submit an annual report on their work to Scottish Ministers. The Scottish Ministers will then share this report with the Scottish Parliament.

The Bill also removes the status of SCoSS as a body corporate. SCoSS will continue to be recognised as an advisory non-departmental public body which better reflects how it operates in practice.

The proposed changes relating to SCoSS will not have an impact on data protection.

Consideration has been given to each proposal in the Bill and further data protection analysis is required for the proposals intended to: introduce challenge rights for overpayment liability; allow Scottish Ministers to request information for the purpose of audit and recover Scottish social security assistance from awards of compensation.

Each discrete proposal requiring relevant data protection analysis has been analysed individually below.

## **Information for audit of the social security system**

### **2.2 Description of the personal data involved**

#### **Please also specify if this personal data will be special category data, or relate to criminal convictions or offences**

This proposal will use personal data already held by Social Security Scotland for the alternative purpose of selecting a subset of cases for review for audit. Once selected most new information gathered will be of the same type as that collected routinely when deciding a person's entitlement to the benefit in question.

However, the Bill makes provision that where a person has been selected for audit, and they have good reason, they may request that Scottish Ministers deselect them from further participation in the exercise. The reasons provided are likely to be about

their personal circumstances and will not necessarily be the type of information routinely held in processing of that benefit. A formal decision about this would be made and the person advised on whether they had been removed from the sample or not. This particular data is only likely to be needed temporarily until the person is either exempted or the audit exercise concludes.

The Bill also provides that Scottish Ministers can prescribe in regulations categories of people who will be automatically exempted entirely from this process, in which case they would be deselected as soon as it was known that particular conditions were met. Those regulations will be subject to their own DPIA in due course.

### **2.3 Will the processing of personal data as a result of the proposal have an impact on decisions made about individuals, groups or categories of persons?**

**If so, please explain the potential or actual impact. This may include, for example, a denial of an individual's rights, or use of social profiling to inform policy making.**

Provision in the Bill gives Scottish Ministers the power to require that individuals receiving benefits co-operate with requests for information in relation to their award, payment, or entitlement for the purposes of audit. Where they unreasonably fail to do so, their entitlement may be suspended.

If they continue to refuse to provide the information without good reason an unscheduled review of their entitlement, which is a routine activity of Social Security Scotland, may be triggered. This could result in reinstatement at the same rate, an increase, decrease or end to benefit entitlement. Individuals will have re-determination and appeal rights as per current processes if any change is made to entitlement. The re-determination and appeal processes in Social Security Scotland follow established and fully compliant procedures where data-sharing takes place.

Where the person provides the information required and anomalies are discovered such as overpayments, underpayments or fraudulent activity, Social Security Scotland will follow business-as-usual procedures to correct them. Robust existing processes and systems are already in place to manage personal data and mitigate any associated risks within these processes, which are subject to their own DPIA.

The outcomes of audit exercises will be recorded and anonymised for use in statistics, reporting and estimates relating to the regularity of payments in the social security system and the monetary value of error and fraud. These will help Social Security Scotland to identify trends and areas for improvement, ensure individuals are receiving the benefit they are entitled to, and prevent financial losses through prevention and detection of error and crime.

## **2.4 Necessity, proportionality and justification**

### **What issue/public need is the proposal seeking to address?**

Estimating the extent to which error and fraud are present within the caseload of Social Security Scotland is a critical tool in preventing loss to the public finances. Measuring the propriety and regularity of payments in the Social Security System allows Social Security Scotland's accountable officer to discharge obligations under sections 15(6) and s15(7) Public Finance and Accountability Act 2000.

Audit Scotland has highlighted a need for Social Security Scotland to measure and report as accurately as possible on overall error levels and to take steps to manage them. However, Scottish Ministers and Social Security Scotland have a wider duty to be accountable to the Scottish Parliament and the people of Scotland for the regulatory of expenditure. The proposed powers mandate participation with audit to ensure estimates are robust and reliable, particularly where a person may be acting in bad faith.

### **What policy objective is the legislation trying to meet?**

The 2018 Act is underpinned by the principles that the Scottish social security system is to be designed on the basis of evidence, it should be efficient and deliver value for money, and that opportunities are to be sought to continuously improve.

In addition the Scottish Government believe that the Scottish Social Security benefits should be paid to the right person, at the right amount, and at the right time. All of these require regular estimates to be made of the amount of underpayment, overpayment and fraud, and analysis of underlying the causes.

### **Were less invasive or more privacy-friendly options considered, and if so why were these options rejected?**

An alternative option considered was to request that information is provided voluntarily to support the audit of entitlement. This option was rejected as the sample would be self-selecting rather than a random statistical sample. In addition it is unlikely that individuals acting in bad faith would willingly participate in any process that is likely to scrutinise their entitlement, defeating the purpose of the audit. Without mandatory participation on the part of the individuals selected in a sample, it would not be possible to provide reliable estimates.

### **Are there any potential unintended consequences with regards to the provisions e.g., would the provisions result in unintended surveillance or profiling?**

Data already gathered by Social Security Scotland for their public task to administer the assistance would be used to select participants according to selection criteria devised by statisticians to produce as close to a representative sample of the benefit

caseload as possible. The methodology used would in itself be subject to equalities impact assessment as is it further developed.

**Have you considered whether the intended processing will have appropriate safeguards in place? If so briefly explain the nature of those safeguards and how any safeguards ensure the balance of any competing interests in relation to the processing.**

Legislating to require individuals to provide information to review their entitlement for the purposes of audit is a necessary and proportionate measure.

The sole purpose of the provision is to allow Scottish Ministers to confirm that individuals are receiving the correct amounts and produce reliable estimates of overpayments, underpayments and fraud along with an analysis of the causes. It is therefore in also Scottish Ministers interests that they are supported in as far as possible to provide that information. Entitlement will never be ended without Social Security Scotland having gone to some lengths to secure their cooperation, or without the person having had ample the opportunity to provide a good reason that they should be exempted from the review of their entitlement.

The Bill provides that anyone selected for audit will in addition have access to the same support they would have had in applying for the benefit in question i.e. they will be entitled to have a supporter present during any discussion or assessment, and right of access to independent advocacy where required.

### **2.5 Will the implementation be accompanied by guidance or by an associated Code of Conduct?**

The implementation of these provisions will be accompanied by internal Social Security Scotland process maps and guidance. Their staff will use these powers on behalf of Scottish Ministers, to select participants and make the request that they provide information for the purpose of audit.

## **3. Data Controllers**

**Organisation:** Social Security Scotland

**Activities:** Social Security Scotland acts on behalf of the Scottish Ministers as controller for the personal data processed. Social Security Scotland is an Executive Agency of the Scottish Government. It has the responsibility for managing and administering the benefits that are devolved to Scotland.

**Is the organisation a public authority or body as set out in Part 2, Chapter 2, section 7 of the Data Protection Act 2018? : Yes**

**Lawful basis for processing under UK General Data Protection Regulation (UK GDPR) Article 6 for the collection and sharing of personal data – general processing:** Article 6(1)(e) – processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller

**Lawful basis for processing under UK General Data Protection Regulation (UK GDPR) Article 9 – special category data or Article 10 – criminal convictions data**

**(Include condition from Schedule 1 or 2 of the Data Protection Act 2018):**

The Article 9 condition that applies for processing the special category data is (b) Employment, social security and social protection (if authorised by law).

The condition from Schedule 1 of the Data Protection Act 2018 is met if:

(a) the processing is necessary for the purposes of performing or exercising obligations or rights which are imposed or conferred by law on the controller or the data subject in connection with employment, social security or social protection, and

(b) when the processing is carried out, the controller has an appropriate policy document in place.

**Law Enforcement – if any law enforcement processing will take place – lawful basis for processing under Part 3 of the Data Protection Act 2018:**

Not applicable

**Legal gateway for any sharing of personal data between organisations, eg as part of existing common interest investigation processes with DWP:**

Not applicable

## **4. Consultation**

### **4.1 Have you consulted with the ICO using the Article 36(4) form?**

An Article 36(4) form was sent to the ICO prior to publication of the consultation in 2022 and an updated form was sent in August 2023. The Scottish Government has engaged with the ICO and addressed their feedback.

### **4.2 Do you need to hold a public consultation and if so has this taken place? What was the result?**

The Scottish Government is clear that requiring information be provided for the purposes of audit is high priority, fundamental to the functioning of the Scottish social security system and aligns with the practice of other government departments. Stakeholder engagement will take place around the processes put in place by Social Security Scotland when implementing reviews for audit purposes.

**4.3 Were there any Comments/feedback from the public consultation about privacy, information or data protection?**

As above the Scottish Government has not consulted in relation this power which is necessary to allow Social Security Scotland to fulfil its duties under the Public Finance and Accountability (Scotland) Act 2000.

**5. Further assessment and risk identification**

**5.1 Will the proposal require the creation of new identifiers, or require the use of existing ones?**

The proposal will not require the creation of new identifiers but will require the use of existing identifiers held by Social Security Scotland such as National Insurance Number, name or date of birth to select individuals for the purpose of audit.

**5.2 Will the proposal require regulation of:**

- **technology relating to processing**
- **behaviour of individuals using technology**
- **technology suppliers**
- **technology infrastructure**
- **information security**

There are no legislative measures relating to technology.

**5.3 Will the proposal require establishing or change to operation of an established public register (e.g. Accountancy in Bankruptcy, Land Register etc.) or other online service/s?**

No

**5.4 Please provide details of whether the proposal will involve the collection or storage of data to be used as evidence or use of investigatory powers (e.g.in relation to fraud, identify theft, misuse of public funds, any possible criminal activity, witness information, victim information or other monitoring of online behaviour)**

The proposal does not introduce any new requirements regarding the collection or storage of data to be used as evidence or use of investigatory powers. Where the use of this power uncovered information that suggested any illegal or irregular activity Social Security Scotland's existing investigatory powers under the 2018 Act and associated regulations and processes would be engaged which are subject to their own DPIA and the Social Security Code of Practice for Investigations<sup>10</sup>.

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<sup>10</sup> [Social Security Fraud: Code of Practice for Investigations - gov.scot \(www.gov.scot\)](http://www.gov.scot)



**5.5 Would the proposal have an impact on a specific group of persons e.g. children, vulnerable individuals, disabled persons, persons with health issues, persons with financial difficulties, elderly people? (Please specify) In what way?**

The proposal will have an impact on people who are receiving assistance from Social Security Scotland. Scottish Ministers may request that they provide information when reasonably requested in order to review their entitlement for the purposes of audit. No additional data over and above the types of data already used by Social Security Scotland for the purpose of determining a person's entitlement would be gathered or processed.

**5.6 Is there anything potentially controversial or of significant public interest in the policy proposal as it relates to processing of data? For example, is the public likely to view the measures as intrusive or onerous?**

No

**Are there any potential unintended consequences with regards to the provisions e.g. would the provisions result in unintended surveillance or profiling.**

No

**Have you considered whether the intended processing will have appropriate safeguards in place? If so briefly explain the nature of those safeguards and how any safeguards ensure the balance of any competing interests in relation to the processing.**

Ministers requesting information for the purposes of audit in particular for undertaking exercises to estimate the monetary value of error and fraud is already a standard feature of the reserved benefit system and affects very small numbers of people. It is unlikely, as a result, that the public should view the measures included in the Bill as intrusive or onerous.

The Bill makes provision that where a person has good reason they might be exempted from the process and also provides that Scottish Ministers can, by way of regulations, prescribe categories of people who will be exempted entirely from this process. It also ensures that anyone selected has the right to access the same support measures as they would when making their original application for Scottish benefits i.e. a supporter and/or access to independent advocacy services.

These safeguards ensure that people will not be required to participate in this process where they have a good reason while supporting them to do so, and balancing the need for a sample to be randomly selected in order to produce robust estimates.

No unintended consequences have been identified and this will continue to be reviewed during parliamentary passage. A full operational data protection impact assessment will be undertaken prior to implementation.

**5.7 Are there consequential changes to in other legislation that need to be considered as a result of the proposal or the need to make further subordinate legislation to achieve the aim?**

Provision has been made in the Bill for Scottish Ministers to make secondary regulations in respect of those who might be exempt from the audit process , and the form in which information might be sought and required.

**5.8 Will this proposal necessitate an associated code of conduct? If so, what will be the status of the code of conduct (statutory, voluntary etc.)?**

No

**5.9 Have you considered whether the intended processing will have appropriate safeguards in place, for example in relation to data security, limitation of storage time, anonymisation? If so briefly explain the nature of those safeguards**

**Please indicate how any safeguards ensure the balance of any competing interests in relation to the processing.**

Social Security Scotland on behalf of Scottish Ministers will handle personal data for the purpose of selecting participants at random for the purpose of requesting information for audit.

Social Security Scotland holds and processes personal data in compliance with UK General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018. [Social Security Scotland's privacy notice](#) details their robust measures to handle and store personal data.

The measures included in the Bill to request information for audit will usually ask individuals to share information of a type already listed in the examples of personal data that Social Security Scotland might collect. They will also have access to the same support as any other person applying for Scottish social security benefits, throughout the audit process.

In exceptional circumstances where a person refuses to comply with requests for information or with the unscheduled review process that is triggered as a result, they will have full redetermination and appeal rights to any new determination of their entitlement.

**5.10 Will the processing of personal data as a result of the proposal have an impact on decisions made about individuals, groups or categories of persons? If so, please explain the potential or actual impact. This may include, for example, a denial of an individual's rights or use of social profiling to inform policy making.**

The Bill gives Scottish Ministers the power to require that individuals receiving assistance co-operate with requests for information in relation to the individual's payment or entitlement for the purposes of auditing the monetary value of fraud and error and associated or carrying out corrections of apparent errors and investigations into potential fraud (and other activities connected to auditing). Where they unreasonably fail to do so, their entitlement may be suspended.

Where, following suspension, they still fail to provide the requested information by the end of the further specified period for a response, an unscheduled review of their entitlement may be triggered, which could ultimately lead to an increase, reduction or termination of the benefit in question.

If an individual provides the information requested by the Scottish Ministers and anomalies are discovered such as overpayments, underpayments or fraudulent activity, Social Security Scotland will follow business-as-usual procedures to correct them, which are already subject to their own DPIA.

Data collected from audit exercises will be usually be recorded and anonymised for use in statistics, reporting and estimates relating to the regularity of payments in the social security system.

Social Security Scotland has robust existing processes and systems in place to manage clients' personal data and mitigate any associated risks.

**5.11 Will the proposal include automated decision making/profiling of individuals using their personal data?**

No

**5.12 Will the proposal require the transfer of personal data to a 'third country'? (Under UK GDPR this is defined as country outside the UK.)**

The proposal will not require the transfer of personal data to a 'third country'.

## **6. Risk Assessment**

### **6.1.1 Risk to individual rights**

- **right** to be informed
- **right** of access
- **right** to rectification
- **right** to erasure
- **right** to restrict processing

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- **right** to **data** portability
- **right** to object
- **rights** in relation to automated decision making and profiling

### **Will this initiative result in any detriment if individuals do not want their personal data to be processed? This is particularly relevant if special category data is being processed**

Personal data of individuals who are entitled to assistance is already handled by Social Security Scotland, on behalf of Scottish Ministers, for the purposes of making a determination of entitlement.

The data will be used for the alternative purpose of selecting participants to provide information for the purpose of audit. For transparency, processing personal data for this purpose is already documented in the Privacy Notice.

Where an individual fails to provide updated or new information necessary for audit purposes this may trigger an unscheduled review of their ongoing entitlement. Section 54(1) of the Act would apply to this review and places an obligation on the individual to provide information they require in order to satisfy Scottish Ministers about any matter material to the making of a determination. A failure to cooperate with requests for information could ultimately lead to the ending of entitlement under section 54(2).

#### **Solution or Mitigation:**

**Likelihood: Low**

**Severity: Amber**

**Result: Accepted**

#### **6.2.1 Privacy risks**

Purpose limitation

#### **Solution or Mitigation:**

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

### 6.2.2 Privacy risks

**Transparency** – data subjects may not be informed about the purposes and lawful basis for the processing, and their rights

**Solution or Mitigation:** Data Subjects are advised of how their data is processed, details are on the privacy notice, data subject is also advised on outcome letter or supporting evidence requests.

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

### 6.2.3 Privacy risks

Minimisation and necessity

**Solution or Mitigation:** Only the minimum of data is processed where there is a legitimate purpose. The data is minimised by ensuring only the least amount of information is requested to enable an assessment to be undertaken. This includes where data is sourced from a third party like Medical practitioners (in agreement with data subject) or other Government Departments. ICO data-sharing code of practice is followed and data-sharing agreements are in place with external stakeholders.

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

### 6.2.4 Privacy risks

Accuracy of personal data

**Solution or Mitigation:** In the scenario where further information is requested for audit this data is supplied by the data subject, there is an expectation that the data subject provides the most up to date information. If third party details are required see note above if medical practitioner or OGD. However this is not a new process and will re-use existing established processes and data sharing mechanisms.

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

### **6.3.1 Security risks**

Keeping data securely

Retention

#### **Solution or Mitigation:**

Uses established system and sharing mechanism. No new processes being introduced.

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

### **6.3.2 Security risks**

Transfer – data may be lost in transit

#### **Solution or Mitigation:**

No new data sharing, established methods used.

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

## **Overpayment Challenge Rights**

### **2.2 Description of the personal data involved**

Social Security Scotland already shares information digitally on public task basis with the Scottish Courts and Tribunal Service in relation to process and entitlement appeals. These may include data on their health condition, financial circumstances or residence. The Social Security Scotland privacy notice explains that Social Security Scotland has implemented appropriate technical and organisational measures to ensure a level of security appropriate to the risk of processing personal data.

Challenges to decisions about overpayment liability are likely to include largely same information because they are about the circumstances and history of a person's entitlements and payments of the same forms of assistance. It is expected that either

same or similar digital methods would be used to share information and either an amended or broadly similar data sharing agreement with SCTS would be required.

**Please also specify if this personal data will be special category data, or relate to criminal convictions or offences**

As above, it is reasonable to assume in cases in relation to disability assistance that some data relating to the health of an individual may be gathered if germane to the disputing of liability. Where fraudulent activity by a person has caused or contributed to an overpayment Social Security Scotland may have reported an offence to the Crown Office and Procurator Fiscal Service. The documentation in relation to the liability under challenge may contain information that forms part of that report.

**2.3 Will the processing of personal data as a result of the proposal have an impact on decisions made about individuals, groups or categories of persons?**

The provisions within the Bill would allow individuals to dispute liability for an overpayment in line with other challenges against process and entitlement challenges in the social security system. Therefore the only individuals/groups affected by this are those clients who are considered liable for an overpayment by the agency and who choose to dispute this.

**If so, please explain the potential or actual impact. This may include, for example, a denial of an individual's rights, or use of social profiling to inform policy making.**

The provisions in the Bill seek to create a right of challenge which will allow the individual to dispute liability in the same manner as other challenges against Social Security Scotland decisions. Exercising this will avoid the delay and expense of potentially lengthy and stressful court proceedings for clients. It will lead to no denial of an individual's rights or use of social profiling to inform policy making.

**2.4 Necessity, proportionality and justification**

**What issue/public need is the proposal seeking to address?**

Currently, any dispute around liability for an overpayment is addressed by a non-statutory informal internal process. The only formal right of challenge comes if and when Social Security Scotland decide to enforce recovery of the overpaid sums. These provisions put the challenge for liability on the same footing as other challenges within the devolved social security system. This provides for transparency and ensures that individuals have the ability to proactively apply to the First-tier Tribunal to challenge Scottish Ministers decision that they are liable for an overpayment.

**What policy objective is the legislation trying to meet?**

Transparency, consistency of challenge processes within the system, and improved access to administrative justice.

**Were less invasive or more privacy-friendly options considered, and if so why were these options rejected?**

As the same process exists for other challenges within the devolved social security system, and consistency and transparency of approach were key drivers of this proposed legislation, there were no other available options to achieve the same outcomes. As noted above, the Social Security Scotland privacy notice explains that Social Security Scotland has implemented appropriate technical and organisational measures to ensure a level of security appropriate to the risk of processing personal data.

**Are there any potential unintended consequences with regards to the provisions e.g., would the provisions result in unintended surveillance or profiling?**

No unintended consequences such as unintended surveillance or profiling have been identified.

**Have you considered whether the intended processing will have appropriate safeguards in place? If so briefly explain the nature of those safeguards and how any safeguards ensure the balance of any competing interests in relation to the processing.**

It will be for individuals to instigate this process and provide the information required to demonstrate that they are not liable for an overpayment. As noted above, this is likely to be data regarding their original entitlement determination or subsequent related processing or events. Safeguarding and data protection processes are already in place within the social security Scotland agency to protect individual's data and this would be subject to the same processes and safeguards. As above, it is reasonable to assume that the only special category data that could conceivably be gathered would be in relation to those cases of disability assistance where there is a dispute over liability and that some data relating to the health of an individual may be gathered if germane. Safeguards are already in place to protect special category of data. The Social Security Scotland privacy notice explains that Social Security Scotland has implemented appropriate technical and organisational measures to ensure a level of security appropriate to the risk of processing personal data.

**2.4 Will the implementation be accompanied by guidance or by an associated Code of Conduct?**

As above, the Social Security Scotland privacy notice explains that the agency has appropriate technical and organizational measures in place to ensure a level of security appropriate to the risk of processing personal data.

**If the latter, what will be the status of the Code of Conduct? (statutory or voluntary?)**

Not applicable



### 3. Data Controllers

**Organisation:** Social Security Scotland

**Activities:** Social Security Scotland acts on behalf of the Scottish Ministers as controller for the personal data processed. Social Security Scotland is an Executive Agency of the Scottish Government. It has the responsibility for managing and administering the benefits that are devolved to Scotland.

**Is the organisation a public authority or body as set out in Part 2, Chapter 2, section 7 of the Data Protection Act 2018? :** Yes

**Lawful basis for processing under UK General Data Protection Regulation (UK GDPR) Article 6 for the collection and sharing of personal data – general processing:**

Article 6(1)(e) – processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller

**Lawful basis for processing under UK General Data Protection Regulation (UK GDPR) Article 9 – special category data or Article 10 – criminal convictions data**

**(Include condition from Schedule 1 or 2 of the Data Protection Act 2018):**

The Article 9 condition that applies for processing the special category data is (b) Employment, social security and social protection (if authorised by law).

The condition from Schedule 1 of the Data Protection Act 2018 is met if:

(a) the processing is necessary for the purposes of performing or exercising obligations or rights which are imposed or conferred by law on the controller or the data subject in connection with employment, social security or social protection, and

(b) when the processing is carried out, the controller has an appropriate policy document in place.

**Law Enforcement – if any law enforcement processing will take place – lawful basis for processing under Part 3 of the Data Protection Act 2018:**

Where fraudulent activity by a person has caused or contributed to an overpayment Social Security Scotland may have reported an offence to the Crown Office and Procurator Fiscal Service. The documentation in relation to the liability under challenge may contain information that forms part of that report. Fraud processes are already subject to a separate DPIA.

**Legal gateway for any sharing of personal data between organisations, eg as part of existing common interest investigation processes with DWP:**

Data Sharing will be required with Scottish Courts and Tribunal Service as a result.

Article 6(1)(e) – once the provisions become law processing will be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

## 4. Consultation

### 4.1 Have you consulted with the ICO using the Article 36(4) form?

An Article 36(4) form was sent to the ICO prior to publication of the consultation in 2022 and an updated form was sent in August 2023. The Scottish Government has engaged with the ICO and addressed their feedback.

### 4.2 Do you need to hold a public consultation and if so has this taken place? What was the result?

The public consultation “Scotland’s social security system: enhanced administration and compensation recovery” was published in August 2022. Respondents were asked whether they agreed or disagreed that the Scottish Government should introduce rights of challenge against Social Security Scotland's decision that someone was liable to repay an overpayment. All consultation respondents who answered this question agreed (100%) with the proposal.

### 4.3 Were there any Comments/feedback from the public consultation about privacy, information or data protection?

No

## 5. Further assessment and risk identification

### 5.1 Will the proposal require the creation of new identifiers, or require the use of existing ones?

Unknown. There is currently capability for the Scottish Government to use automatic transmission capability for benefits that are live however further development would be required for both the Scottish Government and SCTS to support the expansion to include new case types therefore this functionality is not in existence yet.

### 5.2 Will the proposal require regulation of:

- **technology relating to processing**
- **behaviour of individuals using technology**
- **technology suppliers**
- **technology infrastructure**
- **information security**

No

### 5.3 Will the proposal require establishing or change to operation of an established public register (e.g. Accountancy in Bankruptcy, Land Register etc.) or other online service/s?

No

**5.4 Please provide details of whether the proposal will involve the collection or storage of data to be used as evidence or use of investigatory powers (e.g.in relation to fraud, identify theft, misuse of public funds, any possible criminal activity, witness information, victim information or other monitoring of online behaviour)**

This process may involve the use of data gathered during a fraud investigation which is also subject of a report to the Crown Office and Procurator Fiscal Service. Where a person is disputing Scottish Minister's decision that they are at fault, or that an individual could have been reasonably expected to notice an overpayment, they may offer new information or explanations for their actions. Oral or documentary evidence provided to a tribunal could also be pertinent to Criminal Proceedings however distinct fraud processes for any disputes in which this type of information needs to be handled by SCTS are already subject to their own DPIA.

**5.5 Would the proposal have an impact on a specific group of persons e.g. children, vulnerable individuals, disabled persons, persons with health issues, persons with financial difficulties, elderly people? (Please specify) In what way?**

It will be for individuals to instigate this process and provide the information required to demonstrate that they are not liable for an overpayment. It is not expected that this would impact upon any specific group.

Furthermore, section 4 of the 2018 Act requires Scottish Ministers to communicate with individuals in an inclusive and accessible manner. This should reduce any potential impact on individual members of vulnerable groups.

**5.6 Is there anything potentially controversial or of significant public interest in the policy proposal as it relates to processing of data? For example, is the public likely to views the measures as intrusive or onerous?**

No

**Are there any potential unintended consequences with regards to the provisions e.g. would the provisions result in unintended surveillance or profiling.**

No

**Have you considered whether the intended processing will have appropriate safeguards in place? If so briefly explain the nature of those safeguards and how any safeguards ensure the balance of any competing interests in relation to the processing.**

Safeguarding and data protection processes are already in place within the social security Scotland agency to protect individual's data and this would be subject to the

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same processes and safeguards. The Social Security Scotland privacy notice explains that Social Security Scotland has implemented appropriate technical and organisational measures to ensure a level of security appropriate to the risk of processing personal data.

### **5.7 Are there consequential changes to/in other legislation that need to be considered as a result of the proposal or the need to make further subordinate legislation to achieve the aim?**

Regulations will be required to

- prescribe the period in which a person can request a review
- prescribe the time that Scottish Ministers can take to carry out the review
- amendments to the First-tier Tribunal procedural rules in relation to this type of dispute
- amendments to the FtT Composition regs in relation to who should hear this type of dispute
- amendments to the regulations for Scottish Child Payment to align it with the Bill provisions in relation to liability challenge rights

### **5.8 Will this proposal necessitate an associated code of conduct? If so, what will be the status of the code of conduct (statutory, voluntary etc.)?**

No

### **5.9 Have you considered whether the intended processing will have appropriate safeguards in place, for example in relation to data security, limitation of storage time, anonymisation? If so briefly explain the nature of those safeguards**

The Social Security Scotland privacy notice explains that Social Security Scotland has implemented appropriate technical and organisational measures to ensure a level of security appropriate to the risk of processing personal data.

### **Please indicate how any safeguards ensure the balance of any competing interests in relation to the processing.**

Not applicable

### **5.10 Will the processing of personal data as a result of the proposal have an impact on decisions made about individuals, groups or categories of persons? If so, please explain the potential or actual impact. This may include, for example, a denial of an individual's rights or use of social profiling to inform policy making.**

No

### **5.11 Will the proposal include automated decision making/profiling of individuals using their personal data?**

No

**5.12 Will the proposal require the transfer of personal data to a ‘third country’? (Under UK GDPR this is defined as country outside the UK.)**

No

## **6. Risk Assessment**

### **6.1.1 Risk to individual rights**

- **right** to be informed
- **right** of access
- **right** to rectification
- **right** to erasure
- **right** to restrict processing
- **right** to **data** portability
- **right** to object
- **rights** in relation to automated decision making and profiling

**Will this initiative result in any detriment if individuals do not want their personal data to be processed? This is particularly relevant if special category data is being processed**

It will be for individuals to instigate this process and provide the information required to demonstrate that they are not liable for an overpayment.

#### **Solution or Mitigation:**

The Social Security Scotland privacy notice explains the purpose of the processing and that it has implemented appropriate technical and organizational measures to ensure a level of security appropriate to the risk of processing personal data.

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

### **6.2.1 Privacy risks**

Purpose limitation

#### **Solution or Mitigation:**

The Social Security Scotland privacy notice, application forms and outcome letters explain the purpose for the collection of the information.

As lawful basis is public task any processing for a new purpose would only be considered if there was a legal obligation or a function set out in law.

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Operational DPIA are undertaken and regularly reviewed, processes in place to govern new processes involving personal data

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

### 6.2.2 Privacy risks

**Transparency** – data subjects may not be informed about the purposes and lawful basis for the processing, and their rights

**Solution or Mitigation:** The Social Security Scotland has a Privacy Notice that is regularly reviewed, application process and outcome letters all advise the client on where to find information regarding the processing of their personal data. There is also a route if the client is not digital aware, this is through requesting information direct from the Data Protection Officer, this can be requested in writing

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

### 6.2.3 Privacy risks

Minimisation and necessity

**Solution or Mitigation:** Work is undertaken by Social Security Scotland to embed a privacy by design and default approach in the processing of personal data. Data minimisation is key part of the data requirements at the outset of all projects and when data sharing work is undertaken with all stakeholders to ensure only the minimum data is collected, stored and shared to undertake the task

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

### 6.2.4 Privacy risks

Accuracy of personal data

**Solution or Mitigation:** This change relies on the client providing the information therefore the client would provide the most accurate up to date information.

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

### 6.3.1 Security risks

Keeping data securely

Retention

**Solution or Mitigation:** Social Security Scotland has implemented appropriate technical and organizational measures to ensure a level of security appropriate to the risk of processing personal data.

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

### 6.3.2 Security risks

Transfer – data may be lost in transit

**Solution or Mitigation:** The Social Security Scotland privacy notice explains that Social Security Scotland has implemented appropriate technical and organizational measures to ensure a level of security appropriate to the risk of processing personal data.

Where data is shared out with Social Security Scotland data is encrypted at rest and in transit.

**Likelihood: Low**

**Severity: Green**

**Result: Accepted**

## **Recovering Scottish social security assistance from awards of compensation**

### **2.2 Description of the personal data involved**

In relation to compensation recovery, the Bill specifies that the full name and address of parties who will receive a certificate of recoverable assistance is provided.

Secondary legislation will be required to detail how the compensation recovery scheme will operate. This will include the types of personal data that may be required to generate a certificate of recoverable assistance such as:

- Full name, address, date of birth and national insurance number of the injured party.
- Full name and address of liable third party.
- Rates, types, amounts and dates of benefits paid.
- Previous health conditions that gave rise to benefit eligibility (special category data)
- Medical information regarding the illness or injury (special category data).
- Any changes in the medical diagnosis relating to the condition arising from the accident, injury or disease. (special category data).

At the time of drafting of the necessary secondary legislation, a further legislative DPIA will be carried out to consider these types of personal data.

There will be no requirement to collect data in relation to criminal convictions or offences.

### **2.3 Will the processing of personal data as a result of the proposal have an impact on decisions made about individuals, groups or categories of persons?**

**If so, please explain the potential or actual impact. This may include, for example, a denial of an individual's rights, or use of social profiling to inform policy making.**

In Scotland, to begin the process of claiming compensation, the data subject or their legal representative must contact the compensator and provide the required personal data otherwise the claim cannot proceed. Personal injury lawyers inform the data subjects that there is a mandatory duty to provide their personal data to the Department for Work and Pensions as part of the claims process in the generation of a certificate, this would be extended to include the administrator of the Scottish compensation recovery scheme once the Bill provisions come into force.

All injured parties must provide permission for their personal data to be used in the process of claiming compensation including both the sharing and receiving of data with and from the administrators of the UK and Scottish compensation recovery schemes. This permission is gained by either the compensator or the data subject's legal representative. If the data subject refuses to agree to the data being shared then this will prevent the case from being settled so no compensation can be



awarded. In the UK legislation, compensators have a legal obligation to seek out the amounts owed to the DWP and are liable to pay these amounts back to the DWP before any compensation is paid to the data subject, the Bill provisions will replicate this for the recovery of Scottish assistance.

Once the compensator has provided the personal data to Scottish Ministers and it has been processed, the data subject will be provided with a copy of the certificate of recoverable assistance being provided to the compensator. If the data subject believes that any information on the certificate is incorrect, then they can request a review. Following on from the review, if they are still dissatisfied with the contents of the certificate, they can request a reconsideration of the certificate and then finally they can appeal if appropriate.

Immediately prior to settlement, the compensator will have a legal duty to inform the data subject of the deduction of the amount owed to Scottish Ministers and confirm the date that the compensation payment will be made.

The processing of this personal data will result in decisions made on the sum of money that compensators will be liable to pay back to Scottish Ministers. This may result in the injured party's compensation payment being reduced.

A similar process using the same information required is already in place, this is detailed in the Personal Injuries (NHS Charges) (Amounts) (Scotland) Regulations 2006. NHS Scotland, through Scottish Ministers and Scottish Government Health Directorates, has a power to recover the cost of ambulance and hospital treatment required by injured parties from payments of compensation when a third party is liable for the accident, injury or disease. This compensation recovery process is currently in place recovering equivalent amounts of benefits paid by the DWP and the Bill provisions aim to provide a consistent approach to compensation across the whole of the UK.

### **2.4 Necessity, proportionality and justification**

#### **What issue/public need is the proposal seeking to address?**

Scottish Ministers do not currently have powers to recover newly created social security assistance from compensation paid to individuals by liable third parties as a result of accidents, injuries or diseases. The introduction of Adult Disability Payment (ADP) and Child Disability Payment (CDP) have resulted in a discrepancy in that equivalent amounts received in relation to accidents, injuries or disease are not recoverable from the compensator. While provisions were not made within the 2018 Act, it has always been the intention of the Scottish Government that, if possible, a process should be put in place within a reasonable timeframe that allows the recovery of social security assistance as appropriate, preventing the use of public funds being used as additional compensation.

**What policy objective is the legislation trying to meet?**

The objective of the policy is to address this discrepancy as well as provide a consistent approach to the recovery of compensation UK wide.

**Were less invasive or more privacy-friendly options considered, and if so why were these options rejected?**

Due to the nature of the proposal, the objective of the policy could not be achieved without additional data processing. The special category data relates to health conditions and without this key information, the administrators of a Scottish compensation recovery scheme would not be able to calculate the amounts that were received by the data subject in relation to the accident, injury or disease.

Scottish benefits remaining unrecoverable was a less invasive option considered. In this option, equivalent amounts to Scottish benefits such as Adult Disability Payment (ADP), Child Disability Payment (CDP), Pension Age Disability Payment (PADP) and Scottish Child Payment (SCP) received by injured parties would not be recovered from compensation payments. However, the Department for Work and Pensions would continue to recover UK benefits paid to Scottish recipients.

This was rejected as injured parties would receive payments from Scottish Ministers as well as compensation from liable third parties for the same accident, injury or disease, resulting in double compensation. One of the principles laid out in the 2018 Act was that a Scottish social security system should 'be efficient and deliver value for money' and this option would not help the Scottish Government to achieve this.

**Are there any potential unintended consequences with regards to the provisions e.g., would the provisions result in unintended surveillance or profiling?**

We are committed to adhering to the data protection principles and will take a privacy by design approach. No unintended consequences have been identified and a further DPIA will be carried out when secondary legislation specifies the collection of any additional personal data. If additional data sharing is required regarding the passporting of related benefits, this will also be explored in more detail within a further legislative DPIA.

**Have you considered whether the intended processing will have appropriate safeguards in place? If so briefly explain the nature of those safeguards and how any safeguards ensure the balance of any competing interests in relation to the processing.**

The intended processing will have technical, administrative and physical safeguards in place. This will be fully explored during the design phase. Technical safeguards will be in place through existing system controls and controls that will be developed to ensure the secure transfer and sharing of personal data. For example, Social Security Scotland have robust existing safeguarding measures already in place.

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These include:

- Retention schedule to delete or anonymise personal data where there is no longer purpose to retain.
- Data minimisation of the information retained.

### **2.5 Will the implementation be accompanied by guidance or by an associated Code of Conduct?**

All data sharing will adhere to the ICO Data Sharing code of practice.  
All Social Security Scotland staff are bound by the Civil Service Code of Conduct, to ensure individual confidentiality, integrity and accuracy of personal data.

### **If the latter, what will be the status of the Code of Conduct? (statutory or voluntary?)**

Voluntary for ICO  
Mandatory for Civil Service Code of Conduct

## **3. Data Controllers**

**Organisation:** Social Security Scotland

**Activities:** Social Security Scotland acts on behalf of the Scottish Ministers as controller for the personal data processed. Social Security Scotland is an Executive Agency of the Scottish Government. It has the responsibility for managing and administering the benefits that are devolved to Scotland.

**Is the organisation a public authority or body as set out in Part 2, Chapter 2, section 7 of the Data Protection Act 2018? :** Yes

**Lawful basis for processing under UK General Data Protection Regulation (UK GDPR) Article 6 for the collection and sharing of personal data – general processing:** Article 6(1)(e) – processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller

**Lawful basis for processing under UK General Data Protection Regulation (UK GDPR) Article 9 – special category data or Article 10 – criminal convictions data**

**(Include condition from Schedule 1 or 2 of the Data Protection Act 2018):**

The Article 9 condition that applies for processing the special category data is (b) Employment, social security and social protection (if authorised by law).

The condition from Schedule 1 of the Data Protection Act 2018 is met if:  
(a) the processing is necessary for the purposes of performing or exercising obligations or rights which are imposed or conferred by law on the controller or the data subject in connection with employment, social security or social protection, and

(b) when the processing is carried out, the controller has an appropriate policy document in place.

**Law Enforcement – if any law enforcement processing will take place – lawful basis for processing under Part 3 of the Data Protection Act 2018:**

Not applicable

**Legal gateway for any sharing of personal data between organisations, eg as part of existing common interest investigation processes with DWP:**

There will be a requirement to share data between Social Security Scotland and the DWP.

Section 34 of the Scotland Act 2016 allows data sharing between the delivery agency and other external partners.

## **4. Consultation**

### **4.1 Have you consulted with the ICO using the Article 36(4) form?**

An Article 36(4) form was sent to the ICO prior to publication of the consultation in 2022 and an updated form was sent in August 2023. The Scottish Government has engaged with the ICO and addressed their feedback.

### **4.2 Do you need to hold a public consultation and if so has this taken place? What was the result?**

The public consultation “Scotland’s social security system: enhanced administration and compensation recovery” was published in August 2022. The question related to compensation recovery proposed the taking of a power to recover Scottish assistance from awards of compensation. After it closed in October 2022, the responses were mixed, 27% of those who responded to the overall consultation agreed with the proposal, 10% disagreed, 27% did not know and 36% did not answer the question. Of those that agreed, the main view was that liable third parties should not be subsidised by Social Security Scotland in their obligation to fully compensate a person for the injury or disease they have contracted.

Among those respondents who disagreed with the proposal, the main point raised was that they considered it important that the proposal did not result in any undue hardship or stress on those who have been harmed by a third party. Some respondents were unsure about the proposal as the subject matter was out with their area of expertise. Furthermore, a large proportion of those who participated in the consultation did not answer the question.

As compensation recovery could be considered a niche subject matter, it was the view of the Scottish Government that further exploration with potentially impacted stakeholders, who may have experience of the UK scheme, will provide feedback that will prove useful in the design of the new scheme. To this end, a targeted engagement event aimed at the insurance and personal injury industry was held in

March 2023. The purpose of this event was to communicate the proposal and reassure participants that our aim is to limit the impact on their business and on clients by ensuring a consistent approach to the recovery of social security assistance across both UK and Scottish Governments.

#### **4.3 Were there any Comments/feedback from the public consultation about privacy, information or data protection?**

There were no issues or comments raised regarding privacy, information or data protection in the proposed approach to compensation recovery within the public consultation or the targeted engagement event. When representatives of the insurance and personal injury industries were asked about their thoughts on the initial proposal, there was a strong preference expressed for having one unit or platform handling the generation of certificates of recoverable assistance for the whole of the UK. This is because a separate system will require more guidance, training, resources and system log ins for claims handlers.

### **5. Further assessment and risk identification**

#### **5.1 Will the proposal require the creation of new identifiers, or require the use of existing ones?**

#### **5.2 Will the proposal require regulation of:**

- **technology relating to processing**
- **behaviour of individuals using technology**
- **technology suppliers**
- **technology infrastructure**
- **information security**

There are no legislative measures relating to technology. It is expected that there will be a requirement to further develop data processing technology, however this is still to be explored, and any impacts on data will be considered during design.

#### **5.3 Will the proposal require establishing or change to operation of an established public register (e.g. Accountancy in Bankruptcy, Land Register etc.) or other online service/s?**

There will be no requirement to establish or make a change to the operation of an established public register.

#### **5.4 Please provide details of whether the proposal will involve the collection or storage of data to be used as evidence or use of investigatory powers (e.g.in relation to fraud, identify theft, misuse of public funds, any possible criminal activity, witness information, victim information or other monitoring of online behaviour)**

Initially, the proposal did not introduce any new requirements regarding investigatory powers; these were already included in the 2018 Act. However, as part of the Business Regulatory Impact Assessment (BRIA), it was identified that further

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investigatory powers may be required to ensure that compensators are complying with the provisions within the Bill. Within the Bill, a provision has been included to make regulations to detail further investigatory powers. Any further data collection or storage in relation to this will be explored in the DPIA for those regulations.

Social Security Scotland is a competent authority in paragraph 2 of Schedule 7 of the Data Protection Act 2018 (Scottish Ministers devolved through the 2018 Act). Any processing will satisfy the conditions as per The Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences, and the Data Protection Act 2018 Part 3 which sets out a separate regime for law enforcement authorities in the UK.

### **5.5 Would the proposal have an impact on a specific group of persons e.g. children, vulnerable individuals, disabled persons, persons with health issues, persons with financial difficulties, elderly people? (Please specify) In what way?**

This proposal relates to the processing of data and information in relation to clients, receiving benefits administered by Social Security Scotland. As such the group may contain children, vulnerable individuals, disabled persons, persons with health issues, persons with financial difficulties and elderly people. As such, the appropriate impact assessments have been carried out.

### **5.6 Is there anything potentially controversial or of significant public interest in the policy proposal as it relates to processing of data? For example, is the public likely to view the measures as intrusive or onerous?**

It is not anticipated the provisions will be controversial, intrusive or onerous, or will be of significant public interest as it relates to data processing and administrative process.

A security risk assessment is completed for all new processes and one will be completed for compensation recovery. This will be contained in the Operational Data Protection Impact Assessment.

The operational DPIA will consider the data subject rights of individuals associated with the processing and payment of Compensation Recovery and ensure that any risks are mitigated to ensure the rights of data subjects are not impacted.

### **Are there any potential unintended consequences with regards to the provisions e.g. would the provisions result in unintended surveillance or profiling.**

No unintended consequences have been identified in relation to the provisions.

**Have you considered whether the intended processing will have appropriate safeguards in place? If so briefly explain the nature of those safeguards and how any safeguards ensure the balance of any competing interests in relation to the processing.**

Social Security Scotland already has robust policies and procedures in place for the handling of data, and are well versed in the sensitivities and legal requirements for processing any of the personal data engaged by the measures in the Bill. As now, they will continue to ensure they comply with their statutory duties and have appropriate safeguards in place.

**5.7 Are there consequential changes to in other legislation that need to be considered as a result of the proposal or the need to make further subordinate legislation to achieve the aim?**

The provisions in the Bill relating to compensation recovery provide Scottish Ministers with the power to recover social security assistance from compensation as well as laying out the parameters of a Scottish compensation recovery scheme. There are also regulation making powers taken within the Bill which will detail how the scheme will operate. A number of further amendments have been identified to be necessary by way of a section 104 Order.

An amendment will however be required to the Sheriff Courts (Scotland) Act 1907 c. 51 ("the 1907 Act") at appendix 4 (the personal injury pre-action protocol), paragraph 33, so that any deduction from damages in accordance with paragraphs 3.51-3.57 of these instructions will be disregarded, in the same way as deductions under section 7 of the 1997 Act, for the purposes of calculating the payment in respect of liability for the solicitors fees under paragraph 31 of schedule 1 to the 1907 Act.

**5.8 Will this proposal necessitate an associated code of conduct? If so, what will be the status of the code of conduct (statutory, voluntary etc.)?**

There will be no requirement for an associated code of conduct.

**5.9 Have you considered whether the intended processing will have appropriate safeguards in place, for example in relation to data security, limitation of storage time, anonymisation? If so briefly explain the nature of those safeguards.**

**Please indicate how any safeguards ensure the balance of any competing interests in relation to the processing.**

Social Security Scotland has in place the appropriate safeguards in relation to data security, limitation of storage time and anonymisation. These include:

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- Staff who access personal data must:
  - have appropriate security clearance.
  - only access personal data if there is a business need to do so.
  - complete mandatory data protection training.
- Social Security Scotland has in place a Data Protection Team who are responsible of providing advice, monitoring compliance and is the first point of contact for data protection matters.
- Retention schedule to minimise personal data where there is no longer purpose to retain.
- Pseudonymisation of any equalities data.

**5.10 Will the processing of personal data as a result of the proposal have an impact on decisions made about individuals, groups or categories of persons? If so, please explain the potential or actual impact. This may include, for example, a denial of an individual's rights or use of social profiling to inform policy making.**

There will be no impact on decisions made about individuals as a whole, groups or categories of people as a result of the processing of the personal data.

**5.11 Will the proposal include automated decision making/profiling of individuals using their personal data?**

In cases where an individual is not in receipt of any recoverable social security assistance, the data provided will be used to generate a nil certificate. This is an automated decision making process.

**5.12 Will the proposal require the transfer of personal data to a 'third country'? (Under UK GDPR this is defined as country outside the UK.)**

Data will not be processed or sent outside the UK or EEA without suitable safeguards being in place.

## 6. Risk Assessment

### 6.1.1 Risk to individual rights

- **right** to be informed
- **right** of access
- **right** to rectification
- **right** to erasure
- **right** to restrict processing
- **right** to **data** portability
- **right** to object



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- **rights** in relation to automated decision making and profiling

Will this initiative result in any detriment if individuals do not want their personal data to be processed? This is particularly relevant if special category data is being processed.

Yes

### **Solution or Mitigation:**

If individuals do not want their personal data processed, this may impede the ability for the compensator to settle the compensation claim with the injured party.

**Likelihood: Low**

**Severity: Amber**

**Result: Accepted**

### **6.2.1 Privacy risks**

Purpose limitation

### **Solution or Mitigation:**

The data captured will only be used to identify the injured party and any benefits received within a defined period that was received as a result of an accident, injury or disease caused by a liable third party. This data processing is involved in the generation of the certificate of recoverable assistance which is usually requested by the compensator prior to settlement.

**Likelihood: Low**

**Severity: Amber**

**Result : Reduced**

### **6.2.2 Privacy risks**

**Transparency** – data subjects may not be informed about the purposes and lawful basis for the processing, and their rights

### **Solution or Mitigation:**

Social Security Scotland provides full details on their privacy notice and there is information provided on the client's outcome notice directing clients to the privacy notice. The telephony system also provided client with details of how their data is processed.

**Likelihood: Low**

**Severity: Red**

**Result: Eliminated**

### **6.2.3 Privacy risks**

Minimisation and necessity

#### **Solution or Mitigation:**

The gathering of information from the data subject and other sources is justified on the basis that the subject is required to provide their permission for this information to be gathered.

**Likelihood: Low**

**Severity: Amber**

**Result: Accepted**

### **6.2.4 Privacy risks**

Accuracy of personal data

#### **Solution or Mitigation:**

The UK General Data Protection Regulation (UK GDPR) and Data Protection Act 2018 provides individuals with rights around the use of their personal data. These rights include:

- the right to request that Social Security Scotland confirm what personal data is held about the individual and to provide the subject with a copy.
- the right to request that any inaccuracies in the data is corrected.
- The client is the data source for the personal application information.
- The client is responsible for ensuring their personal details are updated when they have a live application.
- Data is also sourced from other UKG departments to determine entitlement these include: HMRC & DWP. All organisations have a vested interest in ensuring personal data is up-to-date.

The client is responsible for ensuring that their personal details are updated when they have an active application for social security assistance. Guidance and advice is provided to clients to advise what information or changes that need to be reported to Social Security Scotland. Data is also sourced from other government

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departments to determine entitlement, such as the DWP and His Majesty's Revenue and Customs (HMRC) with all organisations having a vested interest in ensuring personal data remains accurate and up to date.

**Likelihood: Medium**

**Severity: Amber**

**Result: Mitigated**

### 6.3.1 Security risks

Keeping data securely

Retention

**Solution or Mitigation:**

The Social Security Scotland Information Handling, Storage and Disposal Policy is in place to mitigate risks to data security and retention. The data will be retained for no longer than is required to meet the purpose for which it was originally obtained.

**Likelihood: Low**

**Severity: Red**

**Result: Reduced**

### 6.3.2 Security risks

Transfer – data may be lost in transit.

**Solution or Mitigation:**

There are already highly secure and safe data transfer arrangements between Social Security Scotland and the DWP. Data files are encrypted.

At this current time, the process and mechanism of sharing data with the DWP has not been explored, however, a data sharing agreement with the DWP will be required. Further impacting on this will be carried out within the design phase.

**Likelihood: Low**

**Severity: Amber**

**Result: Reduced**

#### 6.4.1 Other risks

##### **Solution or Mitigation:**

Impact assessments have been drafted, including an Equalities Impact Assessment and Children's Rights and Wellbeing Impact Assessment to take into consideration other impacts or risks.

**Likelihood: Low**

**Severity: Amber**

**Result: Reduced**

##### **Data Protection Officer (DPO)**

The DPO may give additional advice, please indicate how this has been actioned.

<b>Advice from DPO</b>	<b>Action</b>
Advice was sought from DPO in Scottish Government and Social Security Scotland's information governance team. Advice received was around terminology, roles and responsibilities and engaging with ICO.	Comments from DPO and information governance team were taken on board.

**I confirm that the Social Security (Amendment) (Scotland) Bill has been sufficiently assessed in compliance with the requirements of the UKGDPR and Data Protection Act 2018**

<b>Name and job title of a IAO or equivalent</b>	<b>Date each version authorised</b>
Ian Davidson, Deputy Director, Social Security Directorate, Scottish Government	October 2023



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