



**Social Security (Scotland) Bill**

**Stage Two**

**Briefing and Suggested Amendments**

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## Introduction

1. Established in 1957, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the British section of the International Commission of Jurists. In Scotland we work under our title JUSTICE Scotland and through the assistance of our expert volunteers.
2. Given JUSTICE’s remit we would not wish to comment on the principles or policies underlying the Bill. We do, however, seek to raise our concerns regarding the proposed offences set out in Part 5 of the Bill. In our view, these are in some respects overbroad and imprecise, and criminalise conduct which is careless or negligent rather than dishonest.

## Briefing

### *Offences under UK Social Security Legislation*

3. The Bill creates new offences relating to benefits claims. In this respect it is helpful to understand the equivalent provisions in UK legislation, which will be retained in relation to claims under that legislation. The Social Security Administration Act 1992 created a pair of matching offences, both of which penalise the making of false statements or failure to notify a relevant change in circumstances.<sup>1</sup> The first of those (s111A) is directed towards the *dishonest* making of a statement or representation or failure to notify; and the penalty for contravention is correspondingly more severe (a maximum of seven years imprisonment as opposed to three months). It should be noted that in Scotland *dishonestly* is to be read as *knowingly* and holds the same meaning.<sup>2</sup>

111A. Dishonest representations for obtaining benefit etc.

(1) If a person **dishonestly**—

(a) makes a false statement or representation; [ or]

(b) produces or furnishes, or causes or allows to be produced or furnished, any document or information which is false in a material particular;

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<sup>1</sup> Sections 111A and 112 of the Social Security Administration Act 1992

<sup>2</sup> 111A (4)

with a view to obtaining any benefit or other payment or advantage under the [relevant ] social security legislation (whether for himself or for some other person), he shall be guilty of an offence.

(1A) A person shall be guilty of an offence if—

(a) there has been a change of circumstances affecting any entitlement of his to any benefit or other payment or advantage under any provision of the relevant social security legislation;

(b) the change is not a change that is excluded by regulations from the changes that are required to be notified;

(c) he knows that the change affects an entitlement of his to such a benefit or other payment or advantage; and

(d) **he dishonestly fails** to give a prompt notification of that change in the prescribed manner to the prescribed person.

(emphasis added)

4. In our experience, the majority of prosecutions in Scotland are brought under section 111A. Knowingly making a false statement or failing to report a change in circumstances, are regarded as serious offences by the courts. In *Gill v Thomson*<sup>3</sup> the High Court issued sentencing guidelines for Sheriffs to the effect that a period of custody may be appropriate where the sum involved exceeds £5,000.
5. It will be immediately appreciated that these are significant penalties when imposed in relation to failure to notify changes affecting entitlement under complex social security legislation. The issue of whether a couple are to be regarded as cohabiting is but one example of the difficulties which the courts have required to resolve.<sup>4</sup>
6. Against this background the courts have interpreted the legislation strictly, requiring proof to the criminal standard of all elements of the offence.<sup>5</sup> In particular, they have held that the prosecution require to prove that a claimant knew that a change in circumstances *would* affect benefit entitlement as

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<sup>3</sup> 2012 JC 137.

<sup>4</sup> See among others, *R v Zorlu* [2009] EWCA Crim 589.

<sup>5</sup> *King v Kerrier* [2006] EWHC 500 Admin (DC), per Newman J.

opposed to *might* be capable of doing so.<sup>6</sup> “Dishonestly” or “knowingly” is therefore a high standard to meet.

“The offence (111A(1A)) is committed when the claimant knows that a change affects benefit entitlement and dishonestly fails to give prompt notification of that change.” *R v Tilley*<sup>7</sup>

“It must be proved that the defendant knew that the change would – as opposed to could – affect his entitlement to the relevant benefit. That confirms one mental element in the offence, and an element of some significance, namely a high degree of knowledge the prosecution have to prove with regard to the effect on entitlement to benefit by the change of circumstances. ... subsection (c) sets a substantial hurdle for the prosecution to overcome. As this is a criminal provision, that is hardly surprising.” *Coventry City Council v Vassell*<sup>8</sup>

#### Sections 39 – 42 - Offences

7. The offences created by the Bill do not follow the framework of matching offences in the Social Security Administration Act, distinguished by the presence or absence of dishonesty. Sections 39 and 40 create the offences of trying to obtain assistance by deceit and of failing to notify; both of which are punishable by maximum sentences of five years imprisonment. This simplified structure is in principle, in the context of Scottish criminal law, an improvement. However, in our view the substance is problematic.
8. The policy memorandum on the Bill states that the approach to the offences set out in the Bill draws a distinction between the criminal offence of fraud and an unintentional error by an individual.<sup>9</sup> It states that there must be an intention to provide false or misleading information for this conduct to be criminalised. The memorandum adds that “the policy intention is not to criminalise genuine errors made by individuals” and suggests that where an

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<sup>6</sup> *R v Passmore* [2007] EWCA Crim 2053; *Thorburn v McLeod* 2013 GWD 26-250.

<sup>7</sup> [2010] 1 WLR 605.

<sup>8</sup> 2011 EWHC 1542 (Admin).

<sup>9</sup> Available at

[http://www.parliament.scot/Social%20Security%20\(Scotland\)%20Bill/SPBill18PMS052017.pdf](http://www.parliament.scot/Social%20Security%20(Scotland)%20Bill/SPBill18PMS052017.pdf)  
paras 281-282.

individual has misunderstood an element of an application form, or has made a genuine error, a prosecution will not follow.

9. However, the drafting of section 39 does not follow the UK approach of a discrete offence aimed at dishonest behaviour, with correspondingly heavier sanctions. Despite the section's heading, there appears room for confusion as to the scope of the new offence. The section does not specify that the person need know that the statement was misleading. Without this ingredient it would be possible to criminalise the making of the statement whether dishonest or not. We do not consider this approach to be appropriate or in line with the policy intention set out above. The potential penalties are severe and in line with those attracted by the dishonesty offence under the UK legislation.
10. The distinction may well be significant in practical terms. For example, take the case of a woman who has failed to declare on her benefits form that she is in receipt of a small, monthly occupational pension. She explains that she failed to do so because she did not understand that it was an occupational pension. She would not be regarded as being deceitful or dishonest in any ordinary context. Nonetheless, she has provided misleading information with the intention of receiving assistance, and is guilty of the section 39 offence.
11. Section 40 creates an offence of failing to notify, which is punishable by a maximum sentence of five years imprisonment. Failure to notify a change attracts criminal liability when:

[T]he person knew *or ought to have known* that the change *might* result in an individual ceasing to be entitled to assistance, or becoming entitled to less assistance.

(emphasis added)

12. We are concerned that the section, in its present form, is overbroad and has the potential to penalise conduct which has not hitherto been criminal. The wording follows that commonly found in benefit regulations, so, for example, the Housing Benefit regulations provide that:<sup>10</sup>

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<sup>10</sup> Regulation 88, Housing Benefit Regulations 2006.

If ... there is a change of circumstances which the claimant, might reasonably be expected to know might affect the claimant's right to, the amount of or the receipt of housing benefit, that person shall be under a duty to notify that change of circumstances ...

13. In such a context, the sanctions for breach are civil – the cessation of benefit. However, in the criminal context the phrase “ought to have known” would allow for the conviction of a claimant who had no actual knowledge that a change in circumstances might affect her benefit. Additionally, the category of circumstance which requires to be notified is those which *might* affect assistance as opposed to *would* affect, as is currently required under the equivalent UK provision. Section 40 does not contain the safeguard of the need for a high degree of knowledge (the “substantial” hurdle for the prosecution referred to above). The section, as presently drafted, would allow the conviction of an honest claimant who it was deemed *should have known* that change in circumstances might affect her benefits – even when at the end of the day there was no effect on her benefits whatsoever.<sup>11</sup>

14. Section 42 creates the offence of individual culpability for offending by an organisation. Once again, our concern is that the provision is potentially over broad. It provides that where commission of an offence under the Bill involves the connivance or consent of, *or is attributable to the neglect of*, a responsible official of the organisation, the responsible official, as well as the organisation, commits the offence.

15. The section allows for the conviction of an individual, and the imposition of criminal penalties, for neglect or lack of care, as opposed to the intent to commit an offence. What is unclear is to what extent the offence requires to be caused by the individual before he is criminally liable? Is it sufficient that there is some causal connection; or must the neglect be the sole cause of the offence? The section criminalises an honest mistake by an official, which gives rise to an offence and renders him liable to a sentence of up to five years imprisonment on conviction. The official who fails to check figures on a form or forgets to send off a notification is potentially subject to criminal penalties under the Bill.

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<sup>11</sup> The same formulation is used in section 41. The restrictive approach of the courts to such third-party offences can be seen in *R v Tilley ibid*.

## **Suggested Amendments**

### **Section 39 – Offence of trying to obtain assistance by deceit**

Subsection (1) (a), page 14, line 6:

After “the person” insert “knowingly”

### **Section 40 – Offence of failing to notify**

Subsection (1) (a), page 14, line 22:

After “the person” insert “knowingly”

Subsection (1)(b), page 14, line 24:

After “the person knew” delete the words “or ought to have known”

After “that the change” delete the word “might” and insert the word “would”

### **Section 41 – Offence of causing a failure to notify**

Subsection (1) (a), page 15, line 12:

After “the person” insert “knowingly”

Subsection (1)(b), page 15, line 15:

After “the person knew” delete the words “or ought to have known”

Subsection (1)(b)(i), page 15, line 16:

After “the change” delete the word “might” and insert “would”

### **Section 42 – Individual culpability for offending by an organisation**

Subsection (1) (b), page 16, line 5:

After “or consent of” delete the words “or is attributable to the neglect of.”

## Conclusion

16. The Bill creates offences which do not require criminal intent on the part of the accused. It criminalises behaviour or conduct which is careless or negligent, rather than intentionally dishonest. Additionally, the safeguard of a requirement for proof that benefits *would* have been affected is absent.

17. In our view, such an approach, given the practical difficulties of applying social security legislation, and the level of the potential penalties, is unduly punitive. Evidence to the Social Security Committee has raised similar concerns, with the Committee supporting “calls for the bill to be clarified to ensure that genuine errors or misunderstandings will not result in someone being criminalised. It is the Committee's view that the bill does not reflect the Scottish Government's stated policy intention.”<sup>12</sup>

18. In its response to the Committee, the Scottish Government stated that:

The Scottish Government recognises the particularly sensitive issues around social security offences and takes this responsibility very seriously. It will continue to reflect carefully on the evidence submitted to the Committee, and will consider whether this section of the Bill could be clarified further ahead of Stage 2.<sup>13</sup>

19. We welcome the Scottish Government's commitment to reflect on these provisions. The Bill should not seek to create vague offences likely to catch those who may be vulnerable and liable to make mistakes. In JUSTICE's view, it should provide clear offences, with the specific requirement that a person must *knowingly* provide false information for gain in order to commit an offence.

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<sup>12</sup> Social Security Committee, Stage 1 Report on the Social Security (Scotland) Bill, SP Paper 244 3<sup>rd</sup> Report, 2017 (Session 5) (Scottish Parliament, 11<sup>th</sup> December 2017), pp 45-47, available at <https://sp-bpr-en-prod-cdn.azureedge.net/published/SC/2017/12/11/Stage-1-Report-on-the-Social-Security--Scotland--Bill/SOCS52017R3.pdf>

<sup>13</sup> Stage 1 Report on the Social Security (Scotland) Bill, Scottish Government Response (15<sup>th</sup> December 2017), paras 100-102, available at [http://www.parliament.scot/S5\\_Social\\_Security/Inquiries/20171214\\_ScottishGovernmentResponse.pdf](http://www.parliament.scot/S5_Social_Security/Inquiries/20171214_ScottishGovernmentResponse.pdf)



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