

Social Security Committee – Social Security Administration and Tribunal Membership (Scotland) Bill - Call for Views

Around since 1923, SAMH is Scotland's national mental health charity. Today, in over 60 communities we work with adults and young people providing mental health social care support, services in primary care, schools and further education, among others. These services together with our national programme work in See Me, respectme, suicide prevention and active living; inform our policy and campaign work to influence positive social change.

SAMH is pleased to respond to the committee's call for views. Our response focuses on part three of the call for views – Claimant Appointees.

Summary

- SAMH broadly welcomes provisions in the Bill
- SAMH believes claimants should be provided with clear guidance regarding appointees and claimants rights
- SAMH believes applications to become an appointee should be witnessed by a third party
- SAMH believes non-disclosure of harmful information should only occur in exceptional circumstances
- SAMH believes the Bill should be amended to include a definition of "serious harm to physical or mental health"
- SAMH believes the reasons for non-disclosure of harmful information should be recorded and retained by Social Security Scotland, with reasons shared with the claimants appointee
- SAMH believes the Experience Panel and DACBEAG should be consulted on both proposals for appointees for adults with capacity and the non-disclosure of harmful information

Claimant Appointee

The political memorandum to the Bill provides suggested circumstances where a claimant with capacity may wish to appoint another adult to act on their behalf. The examples given relate to a claimant with a terminal illness or "for other personal reasons unable to act on their own behalf (without lacking capacity to do so)".¹ This scope for application of these provisions is therefore broad with any adult able to appoint an appointee if they wish to. SAMH believes that due to the significant powers that a claimant appointee will have it is essential that clear detailed guidance and advice, including the claimant's rights, is provided to anyone considering appointing someone to act on their behalf. We strongly welcome the safeguards in the Bill ensuring that consent for an appointee must be given and that the claimant can withdraw this consent at any time. To ensure that someone making an application for Social Security through the devolved social security system is not unduly pressurised into appointing a claimant appointee, we believe any application for an appointee must be witnessed by a third party as well as the claimant.

¹ Scottish Government [Social Security Administration and Tribunal Membership \(Scotland\) Bill – Political Memorandum](#) 2020

Non-Disclosure of Harmful Information

The Bill provides powers allowing information which is deemed harmful to a claimant (after a clinical judgement) to be withheld and shared with an appointee instead. In accordance with the Social Security Scotland Charter, SAMH strongly believes that the Scottish social security system should support people's wellbeing and avoid causing harm.² We therefore understand the rationale for the proposals regarding non-disclosure of harmful information, but are concerned about the lack of clarity about when the provisions will apply. The political memorandum provides the example of terminal illness and the possibility that medical evidence for a Disability Assistance claim could, if provided to the claimant, cause serious harm. Despite this, the proposed legislation itself does not limit the ability to withhold information to people with terminal illness or people lacking capacity. We are clear that the default position should be that everyone engaging with the Scottish Social Security system is provided with all information relating to their applications and awards. Indeed this is outlined in the Social Security Charter as a clear obligation on the Scottish Social Security Agency.³ As such the non-disclosure of information should only occur in exceptional circumstances. We welcome that the Bill ensures that any decision to withhold information can only be made after a clinical judgement from a medical practitioner.

While we welcome the safeguard that a clinical judgement is required before non-disclosure of information we believe that additional safeguards are required to ensure this provision is proportionate and does not infringe on the rights of claimants. Firstly we believe that the Bill (Section 62(A) 3) should be amended to include a clear definition of "serious harm to the physical or mental health". Currently this is left undefined in the bill, with the political memorandum providing the following definition:

"Harmful information is anything that would be considered detrimental to an individual's health and wellbeing if they were to become aware of it (e.g. a diagnosis of malignancy). This information may be withheld from a patient where that is thought to be in the patient's best interests because disclosure would be likely to cause serious harm to the patient's physical or mental health."⁴

This definition is very broad and could cover a substantive amount of information about a claimant, including information about their mental health and medical prognosis. We are clear that any definition of serious harm must be narrowly defined to include only exceptional circumstances. We believe this is a point the committee should explore in depth to ensure there is an adequate balance between the right for information and the right to support a claimant's wellbeing.

Mental health law in Scotland provides some precedent for the non-disclosure of information to a patient, including in cases where the person has capacity. For example, in limited circumstances under the Mental Health (care and treatment) (Scotland) Act a Responsible Medical Officer (RMO) can withhold a copy of a Section 86 Order to extend a Compulsory Treatment Order (CTO) from the patient.⁵ This can only occur where the RMO believes sending the report to the patient would risk significant harm to the patient or others.⁶ Safeguards include the RMO being

² Scottish Government [Our Charter](#) 2019

³ Scottish Government [Our Charter](#) 2019

⁴ Scottish Government [Social Security Administration and Tribunal Membership \(Scotland\) Bill – Political Memorandum](#) 2020

⁵ Scottish Government [Mental Health \(care and treatment\) \(Scotland\) Act 2003 code of practice volume 2 civil compulsory powers \(part 5,6,7, and 20\)](#) 2005

⁶ Scottish Government [Mental Health \(care and treatment\) \(Scotland\) Act 2003 code of practice volume 2 civil compulsory powers \(part 5,6,7, and 20\)](#) 2005

required to still share a copy of the report with the Mental Health Tribunal, the Mental Welfare Commission, the patient's Named Person and the patient's mental Health Officer (MHO). The MHO also still has a duty to inform the patient of their rights.⁷

Taking learning from mental health law safeguards to the non-disclosure of information in the context of social security should include the reasons for non-disclosure being recorded and held by the Scottish Social Security Agency. The appointee should also be informed of the reasons for non-disclosure to the claimant.

Finally we believe the Experience Panel and Disability and Carers Expert Advisory Group (DACBEAG) should be consulted on both the proposals for appointees in cases where the claimant has capacity and on provisions for the non-disclosure of information.

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⁷ Scottish Government [Mental Health \(care and treatment\) \(Scotland\) Act 2003 code of practice volume 2 civil compulsory powers \(part 5,6,7, and 20\)](#) 2005