

STATES OF JERSEY



DRAFT SOCIAL SECURITY (AMENDMENT No. 23) (JERSEY) LAW 201-

**Lodged au Greffe on 10th April 2018
by the Minister for Social Security**

STATES GREFFE



Jersey

DRAFT SOCIAL SECURITY (AMENDMENT No. 23) (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Minister for Social Security has made the following statement –

In the view of the Minister for Social Security, the provisions of the Draft Social Security (Amendment No. 23) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Deputy S.J. Pinel of St. Clement**

Minister for Social Security

Dated: 10th April 2018

REPORT

Introduction

This report presents amendments to the [Social Security \(Jersey\) Law 1974](#) (“the Social Security Law”) which focus primarily on the Long-Term Incapacity Allowance (“LTIA”). The amendments seek to improve the functioning of the benefit by establishing the right to redeterminations, clarifying the role of the determining officer, and creating Order-making powers under which the operation of the benefit can be adjusted to offer more options and increased flexibility in the management of incapacity assessments.

Unrelated to LTIA, further changes update the descriptions of a ‘cared for person’ in relation to HCA, and amend provisions regarding overlapping benefits. This drafting has also presented an opportunity to make other improvements to the operation of the Law and dispense with duplicated functions.

Long-Term Incapacity Allowance (amended by Articles 2–4 and 9–14)

Long-Term Incapacity Allowance is a weekly benefit which may be awarded to an insured person who, as a result of a disease or injury, has suffered a loss of faculty which is likely to be permanent. The claimant is required to attend a Medical Board (comprising one or two doctors) which will conduct an assessment to establish the extent of the loss of faculty and determine a percentage award. The percentage governs the amount of benefit received in relation to the standard rate of benefit – thus a 100% award would result in payment of the full standard rate of benefit. In addition, the Board will also decide over what period the percentage award should apply. For example, the Board may set a 60% award for a period of one year, recommending that a review is conducted after that period, as the nature of the condition suggests that improvement or deterioration is likely.

Claimants who do not agree with the Medical Board’s decision have the right to appeal to the Social Security Medical Appeals Tribunal (“SSMAT”); however, a great many of these appeals could be dealt with more effectively under a redetermination process. Such cases include those where claimants wish to present further clinical evidence to the Department, believing there are grounds to increase the initial award. Therefore amendments are proposed to introduce a redetermination process, which will maintain the claimant’s right to appeal, but require that a second Medical Board (comprising different doctors) has first reviewed the evidence and offered an assessment. The right to redetermination is common across decisions made under the Social Security Law, and this amendment offers significant improvements to the operational functioning of the benefit, and will save many claimants the burden of a formal tribunal appeal process.

The amendments also strengthen the role of the Determining Officer in deciding whether a claimant’s condition has unexpectedly improved or deteriorated and should thus be sent to a Medical Board for an early review. Any such decision could be challenged by the claimant by asking for a redetermination, and any such redetermination could be appealed to the independent tribunal. In line with other tribunals, these amendments clarify that the decisions of the Social Security Medical Appeals Tribunal are final, other than questions on a point of Law which may be escalated to the Royal Court.

To achieve these improvements in the process of determination, redetermination, appeals and appeal to the Royal Court, additional Order-making powers have been drafted in the Law. The processes described will be brought forward primarily in

amendments to the [Social Security \(Determination of Disablement Questions\) \(Jersey\) Order 1974](#).

LTIA may not overlap with Short-Term Incapacity Allowance (“STIA”), and this is achieved in the Social Security Law by reference to the period during which each benefit is payable. Amendments to the eligibility criteria for STIA are proposed which will strengthen this principle, and exclude any relevant disease or injury which is already subject to an LTIA award. This amendment will offer improvement in the relationship between STIA and LTIA.

New Order-making powers are also drafted in these amendments to allow provisions to be made to backdate LTIA in certain circumstances. This will allow the award of benefit to be more flexible in certain circumstances where, for example, a person has been unable to attend a Medical Board with just cause, and the period over which benefit is payable set by the previous Board has expired. Under the *vires* established in the Law, the Department will also bring forward amended Orders which allow the Determining Officer to extend an award without the claimant’s attendance at a Medical board. Such powers will be particularly useful in cases where a claimant is, for example, under palliative care.

Home Carer’s Allowance (amended by Article 5)

Home Carer’s Allowance was introduced in 2013 and pays the standard rate of benefit to an insured person who undertakes care for a person whose care needs are significant. In the Law the cared-for person’s needs are defined by referring to the [Income Support \(Jersey\) Law 2007](#) and the assessments which are completed when determining which level of impairment component should be paid. These amendments suggest the description is expanded to include people who have been assessed under the [Long-Term Care \(Jersey\) Law 2012](#) as needing permanent help with activities that are an essential part of normal daily living (such as bathing, dressing, grooming, eating).

Overlapping Benefit (amended by Article 6)

Circumstances arise where a contributory benefit is paid in respect of a period of time where the claimant has received Income Support, and this creates an overpayment in Income Support which must be recouped. Such occurrences are not uncommon in the case of incapacity benefits (such as LTIA) where there is an inevitable delay in processing the application while medical evidence is gathered, submitted and assessed. The Social Security Law already addresses overlapping contributory benefits, and this drafting seeks to extend existing provisions to create Order-making powers whereby a contributory benefit payment may be offset by an Income Support payment which has already been made, thus reducing the risk of overpayment.

Other amendments

Actuarial Review (amended by Article 7)

The obligations of the Minister to conduct a regular actuarial review of the Social Security Fund is aligned with the timetable set down for the Medium Term Financial Plan. This will provide for an actuarial review every 4 years.

Contributions Class (amended by Article 8)

Restrictions are lifted whereby an insured person may, under these amendments, appeal their contribution class.

Social Security Advisory Council (“SSAC”) (amended by Article 16)

The Social Security Advisory Council was established to create a formal forum empowered to independently consider proposals to amend the Social Security Law and amend or introduce new benefits and place its findings in the public domain. The Council has been in existence for many years, and its members have offered valuable feedback to the Minister in a number of areas. However, since the introduction of ministerial government and the creation of Scrutiny Panels, there is duplication between the SSAC and the Health and Social Security Scrutiny Panel, therefore these amendments propose that the SSAC is dissolved.

Oath of Office (amended by Article 17)

Schedule 3 of the Social Security Law sets out an Oath to be taken by officers of the Social Security Department. This Oath is avowed in the Royal Court by all new recruits and binds officers of the Department to treat data and information confidentially. The Oath of Office has been superseded by the responsibilities of officers under the [Data Protection \(Jersey\) Law 2005](#). Under these amendments, the Officer’s Oath would be removed from the Law, saving court and officer time.

Collective responsibility under Standing Order 21(3A)

The Council of Ministers has a single policy position on this proposition, and as such, all Ministers, and the Assistant Minister for Social Security, are bound by the principle of collective responsibility to support the proposition, as outlined in the Code of Conduct and Practice for Ministers and Assistant Ministers ([R.11/2015](#) refers).

Financial and manpower implications

The Department does not anticipate budgetary impacts or require increased manpower to deliver the improvements and efficiencies intended by these amendments.

Human Rights

The notes on the human rights aspects of the draft Law in the **Appendix** have been prepared by the Law Officers’ Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX TO REPORT

Human Rights Notes on the Draft Social Security (Amendment No. 23) (Jersey) Law 201- (“the draft Law”)

These Notes have been prepared in respect of the Draft Social Security (Amendment No. 23) (Jersey) Law 201- (the “**draft Law**”) by the Law Officers’ Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers’ opinion, the draft Law is compatible with the European Convention on Human Rights (“**ECHR**”).

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The provision of social security entitlement may give rise to human rights issues, particularly in terms of right to possessions (**Article 1 of Protocol 1 to the Convention**), unjustified discrimination (**Article 14**) and their impact on providing respect for private and family life (**Article 8**). However, this human rights interest is subject to a broad margin of appreciation, such that there will not be a violation unless a measure can be sure to be manifestly without reasonable foundation. It is not normally the place of the European Convention to determine when the state should intervene to support the well-being of those in the relevant jurisdiction – indeed, there is no human right for there to be a social security system at all. Hence, issues arise normally arise in respect of unjustifiable and discriminatory distinctions.

In the present case, there is nothing in terms of substantive entitlements that gives rise to such concerns. For example, in the new Article 15(3), there can be no objection for an incapacity benefit not being available to those who work, or who are in receipt of a different benefit. The reasons for such restrictions are obvious, and do not come remotely close to crossing the high threshold.

Social security rights typically fall within the definition of civil rights for Article 6 purposes (**right to a fair determination of civil rights**). Although there can be fine distinctions as to what sort of judicial oversight is required for different social entitlements, there is no need to go down that route. The provisions of the draft Law maintain the position where a determination by a government body (e.g. the medical board) can be appealed on the merits to a judicial tribunal (i.e. the Social Security Medical Appeals Tribunal). From there, matters can be appealed on a point of law to the Royal Court, but no further. There is thus no need to consider whether this is a type of case where recourse to judicial review would be a sufficient remedy, as we say, there is an appeal on the facts to an independent tribunal. The upwards appeals on points of law is limited to the Royal Court, but that itself is unobjectionable. The Convention does not require that appeals should be allowed to the highest court of the land.

For these reasons, there are no human rights concerns.

Explanatory Note

This draft Law would further amend the Social Security (Jersey) Law 1974 (the “Law”), chiefly in relation to the benefit known as long term incapacity allowance (“LTIA”).

Article 1 is an interpretation provision.

The remainder of the Articles of this draft Law are described in this Note by reference to their subject matter (rather than their numerical sequence, which is determined by the sequence of the Articles of the Law).

The amendments made to Article 16 of the Law by *Article 3* would set out the basis on which assessments of incapacitation, for the purposes of LTIA, are to be carried out. The scheme would comprise the provisions of Article 16 itself, of any Order made under that Article or Article 34AA, and of Article 34A of the Law (as they would be amended), and assessments would be required to take into account the degree and period of incapacitation. *Article 4* would make corresponding amendments to the Order-making powers under Article 18 (which deals with general provisions concerning incapacity benefits).

Articles 11 to 14 would amend, respectively, Articles 34A to 34D of the Law to introduce new elements of procedure relating to such assessments and determination of entitlement to LTIA. *Article 11* would introduce, into Article 34A, provision for determination (and redetermination) by a medical board of certain matters relating to qualification for LTIA (namely, whether a relevant disease or injury has resulted in a loss of faculty; whether a loss of faculty is likely to be permanent; the degree of incapacitation resulting from the loss of faculty, and the period to be taken into account in assessing that degree of incapacitation). *Article 12* would amend Article 34B, which deals with appeals from determinations of medical boards, so as to provide that no appeal to the Social Security Medical Appeals Tribunal can be brought until a second medical board has reconsidered the decision in question. *Article 13* would substitute Article 34C so as to enable the Minister to refer decisions of second medical boards to that Tribunal, within 14 days of a decision. The amendments made by *Article 14* to Article 34D would give power to a determining officer to refer a decision to a further medical board for review, where the officer is satisfied by fresh evidence that a decision of a medical board or of that Tribunal was given because of non-disclosure or misrepresentation. Those amendments also confer power on a further medical board to review an assessment of a medical board or that Tribunal, on the ground that since the making of the assessment there has been a substantial aggravation or amelioration of the results of the relevant disease or injury, where a determining officer has determined that the aggravation or amelioration in question is sufficiently substantial to justify such a review (which must be carried out within 3 months of the assessment).

As a consequence of the introduction of these provisions, *Article 8* would amend Article 33 of the Law so as to limit the application of the Order-making power in paragraph (1) of that Article to determination of questions by determining officers only (determinations by medical boards and second medical boards being dealt with instead by Orders made under the new powers which would be inserted into Article 34AA by *Article 10*). (*Article 8* would also remove a restriction in Article 33(5) on appeals from persons who wish to challenge a decision as to classification in one of the two Classes of ‘insured person’ within the meaning given by Article 3 of the Law.) *Article 10* would confer power on the Minister to make

Orders prescribing procedures to be followed by medical boards in discharging their functions, and for redeterminations by second medical boards.

Article 9 would insert into Article 34 of the Law power to make provision by Order for reference, to the Inferior Number of the Royal Court, of questions of law arising in connection with determinations by the Social Security Medical Appeals Tribunal, and as to appeals against such determinations.

Article 2 would amend Article 15 of the Law so as to preclude entitlement to short term incapacity allowance in respect of any disease or injury for which a person is entitled to LTIA.

Articles 5, 6, 7 and 15 to 17 would make various other amendments unrelated to LTIA.

Article 5 would amend Article 18A of the Law to update certain criteria which must be met by a cared for person, as a precondition of entitlement to home carer's allowance.

Article 6 would enable provision to be made by Order to prevent overlap between any benefit payable under the Law and income support under the Income Support (Jersey) Law 2007.

Article 7 would amend Article 32 of the Law so as to provide for actuarial review of the operation of the Law in any year that is a base year (as defined by Article 9A(6) of the Law) or in such other year as the Minister may direct.

Article 15 would correct a minor typographical error in Article 36(4) of the Law.

Article 16 would repeal Article 42 of the Law, which is now otiose.

Article 17 would amend Article 49 of, and Schedule 3 to, the Law so as to remove the requirement for administration of oaths to officers (other than the chief officer administering the Law).

Article 18 would give the title by which this Law may be cited and provide for it to come into force 7 days after registration.



Jersey

DRAFT SOCIAL SECURITY (AMENDMENT No. 23) (JERSEY) LAW 201-

Arrangement

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Jersey

DRAFT SOCIAL SECURITY (AMENDMENT No. 23) (JERSEY) LAW 201-

A LAW to amend further the Social Security (Jersey) Law 1974 and to make consequential amendments

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Interpretation

In this Law, the “Law” means the Social Security (Jersey) Law 1974¹ and a reference to an Article by number and without more is a reference to an Article of that Law.

2 Article 15 amended

For Article 15(3) there shall be substituted the following paragraph –

- “(3) A person shall not be entitled to short term incapacity allowance –
- (a) for any period in which he or she works; or
 - (b) in respect of any disease or injury for which he or she is entitled to long term incapacity allowance.”.

3 Article 16 amended

(1) For Article 16(2) there shall be substituted the following paragraph –

- “(2) The assessment of a claimant’s incapacitation for the purposes of long term incapacity allowance –
- (a) shall be made by a medical board appointed under Article 34AA, in accordance with –
 - (i) this Article,

- (ii) the provisions of any Order made under this Article or Article 34AA, and
 - (iii) Article 34A; and
 - (b) shall take into account any period (as to the commencement and duration of which further provision may be made by Order) during which the claimant has suffered and may be expected to continue to suffer from loss of faculty resulting in such incapacitation.”.
- (2) Article 16(4) shall be deleted.
- (3) For Article 16(5) there shall be substituted the following paragraph –
 - “(5) The assessment shall specify –
 - (a) as a percentage, the degree of incapacitation resulting from the loss of faculty; and
 - (b) the period taken into account by the assessment.”.
- (4) In Article 16(7) and (8) for the word “order” in each place there shall be substituted the word “Order”.

4 Article 18 amended

- (1) In Article 18(2) and (3) for the word “order” in each place there shall be substituted the word “Order”.
- (2) At the end of Article 18 there shall be added the following paragraph –
 - “(5) Without prejudice to paragraphs (2) and (4), provision may be made by Order for all or any of the following matters relating to long term incapacity allowance –
 - (a) the period for which, and grounds on which, any award of long term incapacity allowance may be backdated; and
 - (b) the calculation of the amount of any backdated award such as is mentioned in sub-paragraph (a).”.

5 Article 18A amended

For Article 18A(3)(a) there shall be substituted the following sub-paragraph –

- “(a) meet the criteria for –
 - (i) the rate payable in respect of the personal care element of the impairment component under paragraph 6(3)(c) of Schedule 1 to the Income Support (Jersey) Regulations 2007², or
 - (ii) being assessed as being in need of long-term care under Article 5(1) of the Long-Term Care (Jersey) Law 2012³; and”.

6 Article 28 amended

In Article 28(1)(a) –

- (a) after clause (ai) there shall be inserted the following clause –
- “(aii) any payment has been made under the Income Support (Jersey) Law 2007⁴, to or in respect of that person, or to or in respect of a person who is a member of that person’s household for the purposes of that Law,”;
- (b) in clause (i) the words “excluding any payment under the Income Support (Jersey) Law 2007, but” shall be deleted.

7 Article 32 amended

In Article 32(1) for the words “and, after that,” to the end there shall be substituted the words “and, after that, in a year which is a base year within the meaning given by Article 9A(6), and in such other year as the Minister may direct, an actuary shall review the operation of this Law.”.

8 Article 33 amended

- (1) In Article 33(1)(b) for the words “the claimant” there shall be substituted the words “a person”.
- (2) In Article 33(2) after the word “determination” there shall be inserted the words “by a medical board”.
- (3) In Article 33(5) –
- (a) at the end of sub-paragraph (b) there shall be added the word “or”;
- (b) in sub-paragraph (c) –
- (i) at the beginning there shall be inserted the words “as to”, and
- (ii) at the end the word “or” shall be deleted; and
- (c) sub-paragraph (d) shall be deleted.

9 Article 34 amended

At the end of Article 34 there shall be added the following paragraph –

- “(3) Orders under this Article shall provide for –
- (a) the reference to the Inferior Number of the Royal Court for decision of any question of law arising in connection with the determination of an appeal to the Social Security Medical Appeals Tribunal; and
- (b) appeals to the Inferior Number of the Royal Court from a decision of that Tribunal on any question of law,
- and a decision of the Inferior Number of the Royal Court on any such reference or appeal shall be final and without further appeal, without prejudice to the right of the Inferior Number of the Royal Court to refer the question at issue to the Superior Number of the Royal Court.”.

10 Article 34AA amended

For Article 34AA(2) there shall be substituted the following paragraphs –

- “(2) Subject to the provisions of this Law –
- (a) the Minister may, by Order, prescribe the procedures to be followed by a medical board in the discharge of its functions under this Law; and
 - (b) where –
 - (i) a person claiming long term incapacity allowance is dissatisfied with any determination of a question by a medical board, or
 - (ii) the Minister considers that a question decided by a medical board should be reconsidered,the question shall be reconsidered by a second medical board, and further provision as to the procedures to be followed in relation to such reconsideration may be made by Orders under this Article.
- (3) For the purposes of this Article and Articles 34B and 34C, a ‘second medical board’ means a board consisting of one or 2 medical practitioners who are not the same medical practitioners as those appointed to the medical board whose determination or (as the case may be) decision is to be reconsidered.”.

11 Article 34A amended

For Article 34A(1) to (3) there shall be substituted the following paragraphs –

- “(1) Where a person claims long term incapacity allowance, any question as to a matter listed in paragraph (2) shall be referred by the Minister to a medical board for determination.
- (2) The matters mentioned in paragraph (1) are –
- (a) whether a relevant disease or injury has resulted in a loss of faculty;
 - (b) whether a loss of faculty is likely to be permanent;
 - (c) the degree at which incapacitation resulting from a loss of faculty is to be assessed; and
 - (d) the period to be taken into account in the assessment of the degree of incapacitation.
- (3) Where the medical board has assessed the degree of incapacitation in accordance with paragraph (2)(c), before the end of the period to be taken into account as determined by the medical board under paragraph (2)(d), the Minister shall refer the case again to a medical board, for further determination of the matters listed in paragraph (2).”.

12 Article 34B amended

- (1) In Article 34B(1) before the words “medical board” there shall be inserted the word “second”.
- (2) For Article 34B(3) there shall be substituted the following paragraph –
 - “(3) For the avoidance of doubt, the Social Security Medical Appeals Tribunal shall not have jurisdiction to hear an appeal from a decision of a medical board unless a second medical board has first reconsidered the matter in accordance with an Order made under Article 34AA(2)(b).”.

13 Article 34C substituted

For Article 34C there shall be substituted the following Article –

“34C References by Minister to Social Security Medical Appeals Tribunal

- (1) Where the Minister considers that a decision of a second medical board ought to be considered by the Social Security Medical Appeals Tribunal, the Minister may refer the case to that Tribunal for its consideration.
- (2) A reference by the Minister under paragraph (1) shall be made within 14 days of the decision in question.
- (3) On considering a case referred by the Minister, the Social Security Medical Appeals Tribunal may confirm, reverse or vary the decision in question.
- (4) The Minister may by Order amend the period in paragraph (2).”.

14 Article 34D amended

- (1) For Article 34D(1) to (4) there shall be substituted the following paragraphs –
 - “(1) Where a determining officer is satisfied by fresh evidence that a decision of any medical board or by the Social Security Medical Appeals Tribunal was given as a result of non-disclosure or misrepresentation of a material fact (whether by the claimant or another person, and whether fraudulently or innocently), the determining officer shall refer the decision to a further medical board for review.
 - (2) The medical board to which the reference is made under paragraph (1) may, subject to paragraphs (3) and (4), review an assessment by any medical board or by the Social Security Medical Appeals Tribunal on the ground that, since the making of the assessment, there has been either –
 - (a) a substantial aggravation; or
 - (b) a substantial amelioration,of the results of the relevant disease or injury.

- (3) A medical board shall not under paragraph (2) review an assessment unless a determining officer has considered any fresh evidence and determined whether any aggravation or (as the case may be) amelioration is so substantial as to merit such review of the assessment.
 - (4) A medical board shall not under paragraph (2) review an assessment on any application made within 3 months of the assessment.”.
- (2) Article 34D(5), (6) and (7) shall be deleted.
 - (3) In Article 34D(8) the words “and, in particular, may make a provisional assessment notwithstanding that the assessment under review was final” shall be deleted.

15 Article 36 amended

In Article 36(4) for the words “Provision made” there shall be substituted the words “Provision may”.

16 Article 42 deleted

Article 42 shall be repealed.

17 Article 49 and Schedule 3 amended

- (1) For Article 49(1) and (2) there shall be substituted the following words –
“The chief officer appointed to administer this Law (the ‘Controller’) shall, before he or she begins to act in execution of this Law, take oath of office before the Royal Court in the form set out in Schedule 3, but notwithstanding the oath of office the Controller may disclose such information as may be required for any purpose approved by the Minister.”.
- (2) In Schedule 3 the heading “Form of oath to be taken by other officers.” and the text following that heading shall be deleted.

18 Citation and commencement

This Law may be cited as the Social Security (Amendment No. 23) (Jersey) Law 201- and shall come into force 7 days after the day on which it is registered.

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- ¹ *chapter 26.900*
 - ² *chapter 26.550.30*
 - ³ *chapter 26.600*
 - ⁴ *chapter 26.550*