# Social Security (Recovery of Benefits) Bill

**[Bill 75 1996/7]**

**Research Paper 97/13**

**30 January 1997**

This paper summarises the proposed changes to the system of recovering social security benefits from compensation payments made to people who have suffered as a result of injury or disease. These proposals are contained in the *Social Security (Recovery of Benefits) Bill* [HL]

**Richard Cracknell and Tim Jarvis**
**Social Policy Section**

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## A. Summary

Currently, people who receive social security benefits after an accident or disease can find that an amount is recovered by the DSS from a subsequent damages award. The aim of this is to prevent people being compensated twice, through both the benefits system and a damages award. Awards under £2,500 are not subject to recovery.

Peter Lilley, Secretary of State for Social Security, announced his intention to reform the scheme for compensation recovery on 9 October 1996[1]. This followed a Social Security Select Committee report[2] after an enquiry into the operation of the scheme and consultation by the DSS on how the suggested reforms might be implemented.

The Bill redrafts and amends Part IV of the *Social Security Administration Act 1992*.

In brief the changes will:

- enable victims of personal injury or disease who have been receiving social security benefits to keep their damages for pain and suffering. Previously all damages could be subject to recovery to recoup social security benefits paid;
- remove the £2,500 ceiling below which compensation recovery does not currently take place.

The Government intends the provisions will come into force for settlements made after October 1997. It anticipates the provisions in the Bill will lead to net public expenditure savings of £50 million[3].

The Bill was introduced in the House of Lords and received its second reading there on 19 November 1996 and completed its Report stage on 21 January 1997.

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[1] Department of Social Security press notice *Peter Lilley announces reform of compensation recovery scheme*, 96/197.

[2] *Compensation Recovery*, Fourth Report of the Social Security Committee HC 196 1994/5, 21 June 1995

[3] Department of Social Security Press Notice 241, 8 Nov 1996. (The projected saving of £50 million is revised from the previous estimate of £40 million in press notice 96/197)

## B. Introduction

A person who has been incapacitated by accident or disease may be entitled to social security benefits. If that injury or disease was caused by negligence of a third party they may also be entitled to compensation from that third party. In practice this compensation is usually paid by insurance companies after a settlement between the parties or enforced through the courts. It is a long established principle that the benefits which are paid to the 'victim' do not serve as double compensation for the same loss but should simply meet their needs while a settlement is being reached[4]. Prior to 1989, courts were instructed to take into account the value of benefits received, and the amount of future benefits, through a reduction in damages awarded[5].

Between 1948 and the 1980's a number of changes to the system were made in terms of the benefits to be taken into account and the proportion of benefits to be recovered. The amount deducted varied according to the benefit concerned. For example, 50% of industrial injuries benefits and invalidity benefit was taken into account while statutory sick pay was deducted in full. Attendance allowance and mobility allowance were ignored. Also, courts deducted amounts from compensation payments but these did not have to be paid to the DSS by compensators. In effect therefore, the negligent party (or his insurer) could be argued to have been receiving a subsidy at the expense of the taxpayer who was meeting the cost of the benefits paid. A summary of the former treatment of social security can be found in a National Audit Office Report - *Recovery of social security benefits when damages in tort are awarded.*[6] One crucial difference between the present and old systems is that, before the 1989 Act, benefit was recovered solely from damages awarded for loss of earnings. Since 1989 recovery is made from total damages including those awarded for pain and suffering in addition to loss of earnings.

The Government introduced a recovery scheme in the *Social Security Act 1989* in an attempt to deal with the inconsistencies between the treatment of different benefits. This followed a consultation exercise and recommendations by the Public Accounts Committee.[7] This scheme is now incorporated in the *Social Security Administration Act 1992*.

The Compensation Recovery Scheme is administered by the Compensation Recovery Unit (CRU) which is part of the Benefit Agency and is staffed by around 200 civil servants.

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4 *Social Insurance and Allied Services*, Report by Sir William Beveridge, November 1942 Cmd 6404, para 260: 'An injured person should not have the same need met twice over.'

5 *Law Reform (Personal Injuries ) Act 1948*

6 HC 353 of 1985/6

7 *Recovery of social security benefits when damages in tort are awarded* HC 120 1987/88

## C. The Current System of Recovery

The current rules on recovery of social security benefits from damages were introduced by the *Social Security Act 1989* with effect from 3 September 1990. They are now contained in Part IV the *Social Security Administration Act 1992*. They apply to payments over £2,500 made after 2 September 1990 to compensate for injuries or diseases which took place on or after 1 January 1989. Under this scheme, an amount equal to 100% of certain social security benefits may be deducted from compensation awards before they are paid to the claimants. The relevant benefits are shown in **Figure 1**

**Social security benefits currently subject to recovery**

***Figure 1***

| | | |
|---|---|---|
| **Attendance allowance** | **Incapacity benefit (previously invalidity & sickness benefits)** | **Severe disablement allowance** |
| **Constant attendance allowance** | **Mobility allowance** | **Statutory sick pay (up to April 1994)** |
| **Disablement benefit** | **Old Cases Act benefits** | **Unemployment benefit** |
| **Disability living allowance** | **Reduced earnings allowance** | **Jobseekers allowance** |
| **Disability working allowance** | **Retirement allowance** | |
| **Family credit** | | **Dependency increase payable with any of the above** |
| **Income support** | | |

Deductions are paid direct to the CRU by whoever pays the compensation (usually an insurance company). The period during which benefit may reduce the amount of compensation begins on the day following an accident or injury or, in the case of a disease, from the date on which the first claim to benefit is received in consequence of the disease in question. It ends on the date final compensation is paid or 5 years from the beginning of the period, whichever comes first.

If total compensation for an injury or disease is £2,500 or less the DSS does not claim back any amount paid in benefits.

Injuries occurring before 1 January 1989 are not covered by the same rules. However, compensation may still be reduced, but the money will be kept by whoever pays the compensation, not paid over to the DSS.

The current system does not differentiate between compensation paid for loss of earnings and that paid for pain and suffering.

The number of cases, amounts recovered by the CRU and its running costs are as follows:

**DSS Compensation recovery unit - cases, recoveries and costs**

*Figure 2*

| *Financial year* | *Number of cases* | *Amount recovered £m* | *Operating costs £m* |
|---|---|---|---|
| *1989/90* | - | - | *0.1* |
| *1990/91* | *3,950* | *3.7* | *1.7* |
| *1991/92* | *20,781* | *25.3* | *1.9* |
| *1992/93* | *30,782* | *51.3* | *2.1* |
| *1993/94* | *36,094* | *81.9* | *2.7* |
| *1994/95* | *39,915* | *110.1* | *2.8* |
| *1995/96* | *37,000* | *139* | *3.1* |

Source: DSS Press Notice 9 October 1996, HC Deb 13 June 1996 c253W, 4 June 1996 c317W, 13 March c48W, 29 Nov 1994 c627-8W (letter to Archy Kirkwood from Michael Bichard), DSS Bill Briefing

## D. The Social Security Select Committee Enquiry

### I The Report

In July 1995, the Social Security Select Committee published a report on the work of the CRU.[8] This Report made a number of criticisms of the present system.[9] It argued that a number of cases the Committee had encountered were "revolting to the ordinary man's sense of justice" and that the system of compensation recovery as it currently stands "appears to be having at least some deterrent effect on the pursuit of claims." In particular, the recovery from damages other than for those for loss of earnings was identified as being "central to the unfairness identified with the present scheme." The report's main proposal was that the scheme should be revised so that damages awarded for loss earnings should be treated differently from those given for pain and suffering. The Committee could see that not to clawback benefits paid for loss of earnings would be compensating them twice over, once

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[8] *Compensation Recovery*, Fourth Report of the Social Security Committee, HC 196 1994-95, 21 June 1995.

[9] Ibid. paras 65-79.

through the benefits system and once through the damages award. However, it was unable to see how this argument could be extended to apply to damages paid for pain and suffering for which no benefits would have been paid.

The Committee outlined these arguments as follows:[10]

> To ensure that there is no double compensation, the amount included for benefit recovery should be distinguished from the amount within the settlement for special damages for loss of earnings in excess of the level received by the claimant in the form of DSS benefits. If the amount of compensation for loss of earnings is lower than the amount paid in benefits, the amount equivalent to the total amount of benefit received should nevertheless be included in the claim. Most importantly, the amounts in the settlement for pain, suffering, future earnings and any other element other than compensation for loss of earnings should not be subject to any clawback. In this way, the taxpayer would be fully protected, receiving back through recovery all the money paid out in benefits. The individual would receive the full compensation settlement apart from damages paid for loss of earnings up to the amount he had already received in the form of benefit. This method of recovery and reimbursement would answer the varied complaints made about the present scheme: the distortions of the small payments limit would be eliminated and any disincentives to pursue claims because of fear of loss of settlements through recovery would be removed.
>
> If the taxpayer is protected and the individual gains, then the money in this financial equation must come from somewhere. **We believe that it is right that the compensator and insurer bear the cost reimbursing the taxpayer for benefits paid to claimants as the result of accidents or injury or disease.**

The report went on to acknowledge that this would result in increased insurance premiums, but it argued that spreading the cost in this way would be better than burdening individuals who have had accidents or diseases caused by others. It might also be an incentive to settle claims quicker.

The Committee was concerned that the £2,500 threshold could be an incentive for claims to be settled at or below this unrecoverable level rather than above it when the whole might be subject to recovery. It did not, however, make any specific recommendation about the threshold.

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[10] op cit paras 76 & 77

## II Government Response

The Government response to the Select Committee report was published on 2 October 1995[11]. It welcomed the recognition by the Select Committee of the necessity for some form of compensation recovery to exist to avoid double compensation. It also believed the Committee's recommendations that compensation should only be recovered from that part of the award made for loss of earnings were important but it was unable to decide whether the Compensation Recovery scheme should be amended to this end. It therefore launched a consultation exercise to determine the wider implications of the reforms suggested by the Select Committee. Any reforms would be in the light of this and a compliance cost assessment, showing the likely cost to business. In reaching its decision the Government's stated central objective was "to deliver a system that is fair and is seen to be fair - to the plaintiff and the defendant, to Business and to the taxpayer".[12]

The consultation document was included with the Government response and the closing date for submissions was 13 November 1995. When the initial consultation period ended, a further exercise, including consultation, was mounted to assess the full effects on business of amending the current scheme. The consultation period for this Compliance Cost Assessment ended on 29 April 1996.

## III The Compliance Cost Assessment

The compliance cost assessment, produced by Price Waterhouse for the DSS, estimated there would be additional annual costs to insurers of between £54 million and £79 million which if passed on to customers would increase employer liability premiums by between 3.7% and 5.6%.[13]

Price Waterhouse also looked at the effect on the CRU. They estimated that abolition of the small payments limit of £2,500 would lead to an increase of between 47% and 55% in the volume of cases processed by the CRU. They also concluded that additional staff, between 100 and 200 would be required if the time taken to process cases were not to be increased by more than 20%. Although some of this increase could be absorbed through improved IT systems some rise in staffing and consequently larger premises, may be required. There would also be an increase in workload of local Benefit Agency offices which would be required to provide detailed information on benefits received for CRU staff.

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[11] *Reply by the Government to the Fourth Report of the Select Committee on Compensation Recovery,* Cm 2997

[12] DSS Press Release 2 Oct 1995 *Government to consult on compensation recovery scheme*

[13] *Compliance cost assessment: compensation recovery scheme.* Prepared at the request of Dept of Social Security. Price Waterhouse. 1996.

In terms of the increase in the amount of benefit recoverable if the small payments limit was abolished, Price Waterhouse concluded 'a reasonable conservative estimate is that in total a further £58 million to £65 million of benefit could potentially be recouped.'

## E. Reactions to the Consultation Exercise

A summary of the responses to the Government's consultation exercise was placed in the Library by the Secretary of State.[14] There was a broad consensus on the principle of protecting damages awarded for pain and suffering from benefit recovery. The abolition of the small payments limit was more contentious. The Association of British Insurers believes:

> that the real objectives of government will be better achieved by ring-fencing pain and suffering and loss of amenity whilst at the same time preserving the small payments limit (SPL). Indeed, we believe that abolition of the SPL would generate little extra revenue for Government whilst imposing an onerous administrative burden on all parties concerned.[15]

The Law Society also had reservations about abolishing the small payments limit. It recognised that the existing limit could mean that some claims are settled at or below £2,500 to avoid recovery but thought that complete abolition of the limit could deter some plaintiffs with small claims and that the resulting increased administrative burden on the DSS would make the scheme unworkable.

> While we are not necessarily advocating retention of exactly the present limit, we would strongly recommend that both for administrative reasons and to give plaintiffs with small claims an incentive to pursue them, a small payments exemption limit should remain.[16]

The National Consumer Council acknowledged that 'once the repayments are taken from a separate head of damages ... it is for the Government to decide if the taxpayer should go on absorbing payments of up to £67 million per year that the courts might well consider to be legally the responsibility of those who caused injury and their insurers.' However, they went on to express reservations if the two central recommendations were linked and 'protecting damages from clawback is sacrificed because of the costs of abolishing the small payments limit.'[17]

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[14] Deposited Paper 2819 February 1996

[15] ABI *Compensation Recovery Scheme* 4 June 1996

[16] The Law Society Civil Litigation Committee *Response to Compliance Cost Assessment of the Compensation Recovery Scheme*, April 1996

[17] NCC *The cost of compensation recovery* May 1996

## F. The Bill's Proposals

The Bill redrafts and amends Part IV of the *Social Security Administration Act 1992* Sections 81-105. A number of the clauses are therefore a rewording of the original legislation.

The main changes which would be brought about by the Bill will:

- restrict recovery of specified benefits to the part(s) of a compensation award made for loss of earnings, loss of mobility and the cost of care. This will enable victims of personal injury or disease to keep their damages for pain and suffering.

- remove the £2,500 ceiling below which compensation recovery does not currently take place. The Bill does retain the power to disregard small payments in the future[18]. The Government have said that they do not intend to use this power but wish to retain it if it becomes necessary to introduce a limit in the light of experience of the new system.[19] The small payments limit was the subject of significant discussion during the Committee stage in the Lords[20].

During its passage in the Lords, the Bill received general support from Labour and Liberal Democrat frontbenches.

The Bill does not include provision to adjust recovery of compensation in cases where there is contributory negligence, nor has any exemption from recovery for those suffering from asbestos related conditions been included. Both these were the subject of recommendations of the Select Committee, and some respondents to the consultation exercise.

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[18] Schedule 1, Part II
[19] HL Deb 10 Dec 96 c951
[20] HL Deb 10 Dec 1996 c943-952

**Clause 1** sets out the cases to which the Bill applies. It provides for any case where a payment is made either by an individual, or on behalf of an individual, to another person as a result of an accident, injury or disease. It applies where any of the listed benefits have been paid during the relevant period. The listed benefits and the heads of compensation to which they apply are contained in Schedule 2 and detailed in **Figure 3.**

Subsection (3) allows for payments to come under the scheme regardless of whether they have been made as result of a court order or through mutual agreement between the parties. It also covers payments made from outside the United Kingdom.

Subsection (4) defines the terms "injured person", "compensation payment" and "recoverable benefit". These definitions are in line with those under section 81 of the *Social Security Administration Act 1992.*

**Benefits and recovery under the new system**

**Figure 3**

| *Head of compensation* | *Recovered Benefit* |
|---|---|
| **1. Compensation for earnings lost during relevant period** | **Disability working allowance<br>Disablement pension and gratuity<br>Incapacity benefit<br>Income support<br>Invalidity pension and allowance<br>Jobseeker's allowance<br>Reduced earnings allowance<br>Severe disablement allowance<br>Sickness benefit<br>Statutory sick pay<br>Unemployment benefit** |
| **2. Compensation for cost of care incurred during the relevant period** | **Attendance allowance<br>Care component of disability living allowance** |
| **3. Compensation for loss of mobility during the relevant period** | **Mobility allowance<br>Mobility component of disability living allowance** |

**Clause 2** defines the compensation payments to which the Act will apply. These will generally be payments made on or after the day on which Section 2 is brought into force (by commencement order). The exception is payments made in pursuance of a court order or agreement made before that day.

It is the Government's intention to apply the new rules to settlements made after October 1997.[21]

The new system is therefore likely to be applied to outstanding cases and to injuries and diseases that have already taken place or been diagnosed. The Law Officers are said to be content with this element of retrospection. The insurers who may have to make larger overall payments as a result of the provisions of the Bill, will have had a year's notice in which to reset premia.[22]

**Clause 3** defines the "relevant period" for benefit recovery. This means that benefit recovery can take place for five years from the date following any accident or injury or five years from the date of claim of a listed benefit in respect of a disease, or up to the date of the final settlement or award if that is sooner. This is the same as under the 1992 Act except subsection (4) allows that in the case when an earlier payment is later decided to be the final one the end of the relevant period is the date of that agreement and not the date of the earlier payment. This would mean that benefit could be reclaimed for a period after a payment which turns out to be the final settlement.

During the passage of the Bill in the House of Lords, Baroness Hollis of Heigham criticised the definition of the 'relevant period' arguing that people who suffered a disease are treated less fairly than those who have suffered an accident:

> With injury the clock starts ticking from the point when the injury occurs, but with disease the clock starts ticking from when the victim makes a benefit claim and not when the disease is first diagnosed. [23]

For the Government, Lord Mackay of Ardbrecknish responded to this by pointing out that the Bill's provisions largely mirror those used in the post-1989 system and that these had worked well. He believed there would be significant dangers to the smooth operation of the scheme if the definition of the period were changed to incorporate the date of diagnosis.

**Clauses 4 and 5** set out the procedures under which a compensator must apply for a certificate of recoverable benefits before a compensation payment is made and the information

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[21] DSS Press Notice 8 Nov 96

[22] DSS *Social Security (Recovery of Benefits Bill) Notes on Clauses House of Lords* Nov 1996

[23] HL Deb 10 December 1996 c 968

to be provided. Subsections (2) and (3) would require the Secretary of State to acknowledge an application for a certificate within 4 weeks.

**Clauses 6 and 7** are the provisions which cover the liability of the compensator to pay the total amount of the recoverable benefits. Compensators would be liable for the amount of recoverable benefit immediately before the compensation payment is made. **Clause 7** allows the Secretary of State to demand immediate payment of recoverable benefits in cases where payment has not been made, or a compensator has not applied for a certificate, and allows for civil proceedings to recover the amount due.

**Clauses 8 and 9** are new provisions. **Clause 8** sets out the relationship between compensation paid against certain heads of compensation and the related benefits listed against those heads. The heads of compensation and the related benefits are listed in columns 1 and 2 of Schedule 2 to the Bill (see figure 3). All compensation can be recovered against the list of benefits except that awarded against a head of pain and suffering. There is no such distinction under the current legislation. **Clause 9** would require the compensator to inform the injured party of the details of the payment and any reductions made in respect of recoverable benefits.

**Clauses 10-14 Reviews and Appeals**

In the 2nd reading of the Bill in the House of Lords, Lord Mackay of Ardbrecknish, Minister of State for Social Security outlined the Government's plans to reform the current appeals process:

> We plan to streamline the present appeal system for benefit recover decisions, which is complex and has led to difficulties. I should make it plain that we have no intention of diminishing the rights to appeal which exist in this area; in fact our reforms should make the process more intelligible and therefore more accessible.[24]

As under the current legislation the Secretary of State would be allowed to review a certificate of recoverable benefit. An extra provision allows the Secretary of State to increase the amount shown on the certificate if it is believed that the person who applied for the certificate supplied incorrect or insufficient information (**Clause 10** subsection(3)).

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[24] HL Deb 19 November 1996 c 1204

**Clause 11** contains the provisions for appeals. These are similar to those currently contained in Section 98 of the *Social Security Administration Act 1992*. Subsection (5) allows for regulation to make provisions for the manner and time limits of appeals as under the current legislation.

**Clause 12** provides for appeals against a certificate of recoverable benefits to be referred to medical appeal tribunals. Currently, appeals are dealt with by either a social security appeal tribunal or a medical appeal tribunal depending on the nature of the appeal. All appeals would in future be dealt with by a medical appeal tribunal as part of the Government's attempts to simplify the procedures. Subsection (3) confirms the current legislation in imposing a duty on any tribunal to take into account a previous decision of a court. An opposition amendment in the House of Lords to bind a tribunal to any previous court decision was defeated.

**Clause 13** reconfirms existing provisions which allow an appeal to a Social Security Commissioner on the grounds that a decision was wrong in point of law.

**Clause 14** provides that if in the event of an appeal or review changing the amount of recoverable benefit, payment of the balance is to be paid by the party concerned. This largely restates existing provisions.

**Clauses 15-17 The Courts**

In order to differentiate between the various heads of damages outlined in Schedule 2 the courts need to identify the amounts of the compensation payment attributable to each head of compensation. **Clause 15** imposes a duty on the court to specify the amounts when making an order for compensation. This enables the amount of recoverable benefit to be established.

**Clause 16** provides for regulations to modify the sections of the Bill which relate to payments made into court. The provisions which regulations could allow are currently included in the existing legislation. **Clause 17** restates the current legislation which does not allow the amount of recoverable benefit to be considered in an assessment of damages by the court.

**Clauses 18 and 19** provides for regulations which may make provision to modify existing clauses in complex cases involving more than one payment in respect of the same injury or disease. These are currently contained within the *Social Security Administration Act 1992*.

In their notes on the clauses, the DSS argue that interim payments form only a small part of the scheme and it is therefore appropriate that they should be governed by regulations.

**Clauses 20-24** are miscellaneous technical clauses. **Clause 20** allows for regulations to govern the recovery of benefits when the injured party has received an overpayment of benefit. Under current legislation, overpayments of benefit can only be recovered from the injured party who has received them. Under this clause regulations could be made which would allow the repayment of any overpayment to be made directly from the compensation payment. **Clause 21** sets out the provision for disregarding compensation payments when a compensator has followed the procedures for applying for a certificate of recoverable benefit but has not received the correct notification from the department within the specified time. **Clause 22** was added by a Government amendment in the House of Lords and covers the liability of insurers to repay recoverable benefits when they are responsible for making compensation payments. Lord Mackay of Ardbrecknish said the amendment was necessary to "put it beyond doubt that policies of insurance cover the liability to repay benefit."[25] **Clause 23** restates Section 94 of the *Social Security Administration Act 1992* which covers the provision of information to the Secretary of State (ie the Department of Social Security) of the details of a compensation case. The time and manner of the notification would be covered by regulations as at present. **Clause 24** allows Schedule 2 to be amended by regulations under the affirmative procedure. The benefits to be recovered and the heads of damages under which payments could be recovered, could therefore be amended without primary legislation but the amendments would have to go before both Houses of Parliament.

### Clauses 25-27 Northern Ireland

These clauses replicate existing provisions where a compensator and/or injured party is resident in Northern Ireland.

### Clauses 28-31 General

These clauses define the terms used in the Bill, provide for any power under the Bill to make regulations to be exercisable by statutory instrument and restate existing legislation which allows for payments to and from the National Insurance and Consolidated Funds to the extent it is estimated they relate to compensation payments.

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[25] HL Deb 14 January 1997 c 138

**Clause 32 and 33** provide for regulations to make transitional arrangements considered necessary.

**Clause 34** details the formal citation for the Act should the Bill be passed.

## G. References

**Relevant Parliamentary and other official papers:**

*Recovery of social security benefits when damages in tort are awarded* National Audit Office HC 353 of 1985/6

*Recovery of social security benefits when damages in tort are awarded* Public Accounts Committee HC 120 1987/88

*Compensation Recovery*, Fourth Report of the Social Security Committee HC 196 1994/5, 21 June 1995

*Reply by the Government to the Fourth Report of the Select Committee on Compensation Recovery,* Cm 2997, October 1995 (includes consultation paper)

*Compliance Cost Assessment: Compensation Recovery Scheme* Price Waterhouse for the DSS, January 1996

*Social Security (Recovery of Benefits) Bill: Notes on Clauses, House of Lords* DSS Nov 1996

**The Bill's proceedings so far:**

**Lords**
HL Bill 15 1996/97
1st Reading LH 7 Nov 1996 (vol 575)
2nd Reading LH 19 Nov 1996 (vol 575)
Committee LH 10 Dec 1996 (vol 576)
Report LH 14 Jan 1997 (vol 577)
3rd Reading LH 21 Jan 1997 (vol 577)

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HC Bill 75 1996/97
1st Reading 21 Jan 1997

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