

This document relates to the Social Security Administration and Tribunal Membership (Scotland) Bill (SP Bill 68) as introduced in the Scottish Parliament on 27 April 2020

Social Security Administration and Tribunal Membership (Scotland) Bill

Financial Memorandum

Introduction

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is published to accompany the Social Security Administration and Tribunal Membership (Scotland) Bill, introduced in the Scottish Parliament on 27 April 2020.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 68-EN);
- a Policy Memorandum (SP Bill 68-PM);
- Statements on Legislative Competence by the Presiding Officer and the Scottish Government (SP Bill 68-LC).

3. This Financial Memorandum has been prepared by the Scottish Government to set out the costs associated with the measures introduced by the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Context

4. The overarching policy objectives of the Bill are:

- To allow for the appointment of a person to act on behalf of a child where there is no person with legal authority who is willing and able to so act;

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- To allow for the appointment of a person to act on behalf of an adult who does not lack capacity but due to difficult circumstances wishes for an appointee to act on their behalf.
- To ensure the Scottish Ministers do not disclose information about an individual's health where that would be likely to cause serious harm to the recipient's physical or mental health;
- To introduce powers for the Scottish Ministers to make provision in regulations about the investigation of offences in relation to top up assistance created under section 79 of the Social Security (Scotland) Act 2018 ('the 2018 Act');
- To create statutory fraud offences in relation to the types of top up assistance created under section 79 of the 2018 Act;
- To enable the Scottish Ministers, by regulations, to transfer to the First-tier Tribunal (FTT) for Scotland some or all of the competence and jurisdiction of the sheriff courts in relation to the recovery of top up assistance created under section 79 of the 2018 Act;
- To modify the power to make regulations under schedule 5 of the 2018 Act, to widen the category of qualified persons whose clinical judgment, based on the appropriate guidance, will be accepted in relation to a diagnosis of terminal illness for the purpose of entitlement to Disability Assistance; and
- To enable other types of judges to be temporarily authorised to sit in the FTT and the Upper Tribunal.

Background

5. The full background to each of the policy changes is set out in the Policy Memorandum.

Costs on the Scottish administration

Social security

6. A full consideration of the impact of the devolution of social security powers was set out in the Financial Memorandum which accompanied the 2018 Act.¹ Further information on the whole of life costs and benefits of the

¹ Social Security (Scotland) Bill Financial Memorandum

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social security programme over a thirty-year timeframe are set out in detail in the Social Security Programme Business Case² published on 12 February 2020.

7. The costs arising from this Bill were not drawn out in either of the documents above. Changes to social security legislation should consider three potential cost impacts:

- The potential impact on benefit expenditure;
- The potential impact on social security implementation costs;
- The potential impact on Social Security Scotland’s ongoing delivery costs.

8. The Scottish Fiscal Commission (SFC) has a statutory duty to provide independent and official forecasts of Scottish GDP, devolved tax revenues and devolved social security expenditure. Under the Scottish Fiscal Commission Act 2016, the SFC may also produce forecasts on other “fiscal factors”, defined as “anything which the Scottish Ministers use to ascertain the amount of resources likely to be available for the purposes of sections 1 to 3 of the Public Finance and Accountability (Scotland) Act 2000”. The Protocol for engagement between the Scottish Fiscal Commission and the Scottish Government³ notes that the SFC may produce forecasts where it considers the policy, or policies, to have a “non-negligible impact on receipts or expenditure”.

9. Having considered the measures in the Bill, the SFC chose not to produce forecasts for it on the basis that the Bill is not expected to change the SFC’s forecasts from those published in February 2020. All the measures are expected to have an immaterial effect on benefits expenditure in particular.

² Social Security Programme Business Case

³ Protocol for Engagement with the Scottish Government

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Appointees for children

Appointees for adults with capacity and non-disclosure of harmful information

10. Allowing for appointees for children and adults with capacity will not impact on total benefit spend forecasts. The change aligns with the current DWP rules and therefore the impact is built into the funding which the Scottish Government will receive through the Block Grant Adjustment for the relevant benefits.

11. The total estimated costs for developing the application process, including staff costs, case management system development, digital portal systems development and process and technology development is £60 million.⁴ It is difficult to attribute a specific proportion of that total cost directly to appointee applications. However, it may be reasonable to expect the costs directly attributable to appointee applications to be a relatively small proportion of the total cost.

12. By way of context, the Scottish Parliament Information Centre (SPICe) estimated that the number of children subject to informal care is between 7,000 and 13,000 and, if an estimated 9% of these have a disability (as per NRS census data for 2011), this would represent between 630 and 1,170 who may fall into this category. Of those, not all will necessarily have an appointee. This compares with the 2021/22 estimate of Child Disability Payment (CDP) clients of 47,000. This forms a very small proportion of overall activity, as CDP is one of several benefits to be delivered by Social Security Scotland.

13. The provisions for appointees for adults with capacity are primarily aimed at protecting the rights of clients where Social Security Scotland receives information from a medical practitioner to support an application that the practitioner has deemed harmful and should not be shared with the individual. The Department for Work and Pensions (DWP) does not hold information in relation how many applications it receives where harmful

⁴ Social Security Programme Business Case - page 73; Table 5.6

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information is withheld, however; the Scottish Government understands that this happens rarely.

14. If a high estimate of 5% of applications (based on overall Personal Independence Payment and Attendance Allowance terminal illness caseload) is applied, this could result in up to 350 terminally ill clients having an appointee in place at any given time. The actual number would be likely to be much lower and in line with DWP experience since the client may not agree to an appointee and some may already have a legal representative in place.

15. This compares with an associated caseload of over 400,000, which also illustrates that the costs associated with this are likely to be very low in relation to the overall costs of processing applications for adults with disability and will apply to both social security implementation costs and Social Security Scotland's running costs.

Top up assistance: offences

16. The provisions within this Bill will amend section 79 of the 2018 Act and allow the Scottish Ministers, by regulations, to make provision regarding statutory offences in relation to forms of assistance provided for under section 79 of the 2018 Act. The Bill also creates a new default position so that, where no contrary provision is made in regulations, the offences in sections 71 to 73 of the Act apply in the context of top-up assistance provided under section 79 of the 2018 Act. This will ensure consistency where appropriate between these forms of assistance and those forms of assistance provided for under Chapter 2 Part 2 of the 2018 Act. It is also consistent with the Scottish Government's responsibilities under the Scottish Public Finance Manual (SPFM).

17. The provisions relating to the creation of statutory fraud offences for top up benefits do not significantly impact on forecast demand-led benefit expenditure for top up benefits, because without statutory fraud offences it was still expected that normal good practice in claim evaluation and over-claiming would apply. It does however allow the Scottish Government to take action to detect, investigate and take enforcement action (which includes recovery of overpayments and prosecution where appropriate) for fraudulent claims. It also provides the benefit of the associated deterrent

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effect which is expected to have a net positive effect on the Scottish Government's budget position.⁵

18. The DWP estimates that in financial year 2018-19 around 1.2% of total benefit expenditure was overpaid due to fraud.⁶ For Universal Credit, the main qualifying benefit for the Scottish Child Payment (SCP) – the first form of assistance to be introduced under section 79 of the 2018 Act, the rate of overpayment due to fraud is estimated to be 5.8%. Total forecast benefit expenditure for SCP is £157 million⁷ per annum by full roll out. This forecast was based on the assumption that the statutory fraud offences provisions would exist.

19. Levels of overpayments due to fraud may reasonably be estimated to range between 1% and 6% of actual benefit expenditure. It is expected that this value could be significantly higher without the associated deterrent effect provided by having statutory fraud offences in place; therefore the Bill may help to limit losses due to fraud. Therefore, if statutory fraud offences were not in place and a 3% increase in benefit expenditure were assumed as a result, this would lead to an increase in costs of approximately £4.7 million per year based on 2023-24 benefit forecasts for SCP. That would rise to approximately £6.3 million for an estimate of 4%.

20. The creation of fraud offences will require supporting fraud prevention, detection, and management and delivery costs within Social Security Scotland. This function is required for all benefits which will be administered by Social Security Scotland.

21. The costs of developing a fraud function have been built into the total Social Security implementation programme forecast costs and are estimated to be in the region of £10 million. These costs are built into the “Enabling

⁵ Scottish Public Finance Manual - Fraud

⁶ Department for Work and Pensions - Fraud and Error in the Benefits System - Estimates 2018-19 – Page 3

⁷ Scottish Fiscal Commission - Scotland's Economic and Fiscal Forecasts February 2020 Page 29; Table 2.2.

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Capabilities” line of Table 5.6 in the Social Security Programme Business Case⁸, the total value of which is £141 million.

22. The total cost is to deliver fraud services to support £4 billion of benefit expenditure, of which £162 million, (approximately 4%), is forecast to relate to SCP at full roll out. Therefore, while it is difficult to attribute a specific proportion of that total cost to external fraud detection specifically for SCP and top-up benefits, it may be reasonable to expect the costs directly attributable to SCP fraud to be a relatively small proportion of the total cost. As SCP will account for approximately 4% of overall benefit expenditure at full roll out, pro-rata this would represent approximately £405,000 of the £10 million total cost of developing a fraud function.

23. It is not anticipated that the creation of the fraud offences for SCP and other top up benefits will result in additional ongoing resource requirements or administration costs for Social Security Scotland beyond those already identified.

Widening the category of qualified persons whose clinical judgment will be accepted in relation to a diagnosis of terminal illness

24. Accepting terminal diagnosis from appropriate healthcare professionals which will now include registered nurses will not impact on current benefit expenditure forecasts. The SFC forecasts of CDP already assume the processes are aligned with the current DWP rules; in addition the SFC does not expect this to make a material difference to its forecasts.

25. The implementation cost for this change is built into the total Social Security Implementation Programme forecast cost as set out in the Social Security Business case. There is just one form being developed which any appropriate healthcare professional may complete. The set up costs for this process (development, accessing and submission of the form) will not be affected as a result of a registered nurses now also being able to perform this function.

⁸ Social Security Programme Business Case - page 73; Table 5.6

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26. With regards to training, it is the Chief Medical Officer guidance itself which will support all appropriate healthcare professionals in reaching their judgement; this has already been developed. Support which Social Security Scotland will offer to clinicians, for example a helpline, is equally necessary for registered medical practitioners as registered nurses and consequently the inclusion of registered nurses creates no additional costs. Similarly, it is not anticipated that there will be an additional ongoing administration cost to Social Security Scotland beyond the resource already identified for the processing of applications.

Enabling other types of judges to be temporarily authorised to sit in the First-tier Tribunal (FTT) and the Upper Tribunal

27. The Bill itself will not give rise to any immediate financial implications but the use of the mechanism which it provides for, will. The provisions within the Bill have the purpose of broadening the pool of people who may be appointed to particular roles. Irrespective of this, someone will have to take on these roles and be remunerated accordingly. The choice therefore is who to appoint rather than whether the work is required to be done.

28. The Tribunals provisions in the Bill widen the list of judicial office holders eligible to be temporarily authorised to sit in the Upper Tribunal and enable temporary authorisation to sit in the First-tier Tribunal. The need for the ability to temporarily authorise this wider group flows from decisions already taken to expand the work of the Social Security Chamber in the Scottish Tribunals. It is anticipated that the President of the Scottish Tribunals will request that these provisions are used to permit members within the reserved tribunal system, including salaried full-time members, to sit within the devolved Social Security Chamber and may result in additional spending above that currently associated with fee-paid Scottish Tribunal members. The terms and conditions for members in the reserved tribunal system are different from the terms offered to devolved tribunal members and include higher daily fees and salaries, pensions for legal members and occupational holiday and sick pay.

29. Those who are temporarily authorised to sit in the devolved system (i.e. salaried reserved judges) will retain their existing Ministry of Justice (MoJ) terms and conditions and continue to be paid by Her Majesty's Courts and Tribunal Service (HMCTS) however, the Scottish Administration will

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meet the costs of those appointed in this way for their prescribed period of appointment to Scottish Tribunals. Costs will only be incurred if it becomes necessary to make such appointments.

30. Under section 18 of the Tribunals (Scotland) Act 2014, the temporary authorisation is for a period as prescribed by the Scottish Ministers. At the end of the prescribed period, the authorisation can be extended, as business requires. A First-tier Tribunal judge in the reserved tribunal system has an annual salary of £112,542, with a total cost of £184,907 p.a., including National Insurance and employer's pension contribution. This does not include any other expenses or allowances that the judge might receive (e.g. travel and subsistence costs if working away from their principal hearing centre).

31. To ensure that the devolved Social Security Chamber is adequately resourced to deal with the forecast in appeals from 2021 onwards, approximately five salaried members may be required. By comparison, the total cost of a fee paid devolved legal tribunal member for the equivalent number of working days as a full-time salaried member would be £94,160 p.a. This equates to a difference in cost of up to £90,747 per salaried member authorised on a yearly basis at current rates. Therefore, the potential additional cost relating to this provision would be between £0 and approximately £455,000 p.a., depending on how many salaried members are required up to the stated potential requirement of five such appointments.

32. It is not anticipated that there would be any additional administration cost to Social Security Scotland in this form of appointment beyond the resource already identified for resourcing the Chamber.

Risks

33. Temporary authorisation of a reserved member to sit in the Scottish Tribunals presents risks associated with costs and the possibility of creating full-time comparators for the purposes of a part-time worker's less favourable treatment claim or an equal pay claim, both in Scottish Tribunals and across the wider tribunal and judicial system in Scotland. In particular, the higher pro rata rate of daily fee and the continuance of pension arrangements for reserved legal members creates risk of successful legal challenge as regards other devolved tribunal members, including legal

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members and Chamber Presidents in Scottish Tribunals, members of devolved tribunals which are yet to transfer to Scottish Tribunals and other part-time judicial office holders appointed by the Scottish Ministers.

34. The Scottish Government has considered that any difference in terms of appointment as between transferring reserved and part-time members is capable of being objectively justified in the event of legal challenge.

35. If, however, a successful legal challenge is made in consequence of the Scottish Government using the ability to temporarily authorise reserved salaried members, it may need to consider extending pensions to legal members of Scottish Tribunals, including current Chamber Presidents. If the Scottish Ministers opt to extend pension provisions to Chamber Presidents, it is likely to lead to a cost of approximately £500k per year.

Costs to the Scottish courts and Tribunals service (SCTS)

36. All tribunals administered by SCTS are funded by the relevant policy areas within the Scottish Government. For 2021/22, the estimated forecast of expenditure for the Social Security Chamber is £7.86m. As costs associated with this Bill are expected to be covered within existing funding arrangements or met by recharge from SCTS to Social Security Scotland, there are not expected to be any additional costs to SCTS arising from this Bill.

Costs on local authorities

37. It is not anticipated that there will be any new costs falling on any local authorities as a result of any of the provisions within the Bill.

Costs on other bodies, individuals and businesses

Extending responsibility for diagnosis of terminal illness to registered nurses

38. Accepting terminal diagnosis from registered nurses aligns with current DWP processes, therefore any associated cost is already being met by Health Boards. As such, there is no anticipated new additional cost or resource implications for Health Boards as the same people who currently

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perform the function of diagnosing terminal illness will continue to do so once Disability Assistance is devolved.

Creating statutory fraud offences

39. SCP eligibility is linked to reserved qualifying benefits. Therefore, it is anticipated that the majority of SCP fraud cases referred to the Crown Office and Procurator Fiscal Service (COPFS) or Police Scotland will relate to collaborative investigations with the DWP, where the fraud also relates to the reserved, qualifying benefit. The duration of, and activity related to, investigations varies considerably depending on the allegation type and complexity of the case.

40. Therefore, there is not yet any available analysis of the cost to investigate and pursue an individual case relating solely to SCP offences. It is anticipated that any new additional costs as a result of the creation of fraud offences for SCP may be minimal, due to the connection to the reserved benefit case. It is not possible at this stage to estimate what the additional cost would be to the COPFS or Police Scotland relating to fraud offences for any future top up benefit that may be introduced at a later date. The Scottish Government is at present unable to quantify the financial impact on the COPFS or Police Scotland, however it will continue consulting with both organisations to develop appropriate analysis as plans evolve in this area.

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