

# Social Security (Scotland) Bill

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## Policy Memorandum

### Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Social Security (Scotland) Bill introduced in the Scottish Parliament on 20 June 2017.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 18-EN);
  - a Financial Memorandum (SP Bill 18-FM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 18-LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

## Policy objectives of the bill

### General Overview

4. The Social Security (Scotland) Bill ("the Bill") is brought forward as a result of measures following the changes to the devolution settlement enacted in the Scotland Act 2016.<sup>1</sup> These measures give the Scottish Parliament legislative competence over disability, industrial injuries and carer's benefits, benefits for maternity, funeral and heating expenses, and Discretionary Housing Payments. They also provide the ability to top up benefits which

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2016/11/contents/enacted>

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remain reserved to the UK Parliament, and allow new benefits to be created in any area except old age pensions or where there is a connection to a matter reserved to the UK Parliament (such as child support maintenance or reserved aspects of employment support). As a result of the changes in the devolution settlement, eleven existing social security benefits will become a devolved responsibility.

5. The Bill transposes the eleven social security benefits onto a Scottish legislative platform, allowing the Scottish Ministers to shape a distinctly Scottish benefits system, with dignity and respect being core to its approach. These benefits are: Disability Living Allowance, Personal Independence Payment, Attendance Allowance, Severe Disablement Allowance and Industrial Injuries Scheme; Carer's Allowance; Sure Start Maternity Grants; Funeral Payments; Cold Weather Payments and Winter Fuel Payments; and Discretionary Housing Payments. The Bill includes powers to create new benefits for early years and to provide for top up of reserved benefits. It provides for a supplementary payment to persons receiving Carer's Allowance, pending the transposition of that benefit onto a Scottish legislative platform.

6. The principal policy objective is to put in place a legislative framework that will underpin a process by which people will be given assistance, once a determination is made that they are entitled to that assistance. People will either apply for the types of assistance for which they are eligible or, in some circumstances, a determination will be made without an application being required. A guiding assumption is that, at a high level, the overall process should be more or less the same for all types of assistance provided.

7. There will be exceptions because the criteria and the rules for each type of assistance will vary but a common process will be simpler and easier to explain, and set out in guidance. This process would have several stages although not every person, on applying, would necessarily have to go through every stage.

8. Having a legislative framework that underpins a common process would address an issue that has arisen, in the Scottish Government's view, as a consequence of the way in which different existing benefits and the policies of different UK Governments have changed over a period of several decades. The issue is that the existing legislation is unclear and confusing. This is not just the Scottish Government's view. In a 2008 case about Discretionary Housing Payments, an appeal court judge, Lord Justice Wall, remarked that:

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“... the appellant cannot be criticised for either ignorance or incomprehension of the statutory regime ... it remains an apparently non-eradicable blemish on our operation of the rule of law that the poorest and most disadvantaged in our society remain subject to regulations which are complex, obscure and, to many, simply incomprehensible<sup>2</sup>.”

9. This lack of clarity and confusion may be said to be a consequence of the hybrid approach taken, in some instances, by the UK Government. The UK Government’s approach has been to put its benefit rules partly in primary legislation while, at the same time, also requiring that its primary legislation has to be read alongside further rules in subordinate legislation. In the Scottish Government’s view, this approach makes the equivalent UK social security legislation confusing, difficult to follow and open to different interpretations. The Scottish Government believes that the clearest approach to setting out the rules relevant to a particular type of assistance is to put the rules together in a single piece of subordinate legislation.

10. Towards this end, the Bill sets out an over-arching legislative framework for the administration of social security in Scotland making provision for operational functions such as overpayments, fraud, error, re-determinations and appeals. A significant body of secondary legislation that provides detail on each type of assistance and the operation of the social security system will then be required once the Bill enters into law, and it is anticipated that this legislation will come into force within the current Parliamentary term.

11. Putting the detailed rules in subordinate legislation is a deliberate choice and is key to the Scottish Government’s approach to making the legislation accessible. These rules will have to change from time to time to reflect changes in economic and social conditions. The Scottish Government is committed to continuously improving the delivery of social security and to do so with, rather than for, the people receiving assistance. Putting the rules entirely in primary legislation would not allow for this, and would impair their responsiveness to circumstances.

12. The Scottish Government’s view is that taking this approach should improve Parliament’s ability to scrutinise executive action. Instead of scrutinising the benefit rules once, when they are made in primary legislation, Parliament will scrutinise the enabling framework in the Bill (including

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<sup>2</sup> R (on the application of Gargett) v London Borough of Lambeth: [2008] EWCA Civ 1450. Case No: C1/2008/0987

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illustrative, draft regulations which will explain how the powers in the Bill will be used), then the detailed benefit rules in each set of regulations, then any changes to these rules, which are made subsequently. On each occasion, Parliament will have the scope to ensure that the rules for individual benefits operate in the way that it (Parliament) has determined.

13. In order to achieve this, the Bill includes schedules linked to each type of assistance that Scottish Ministers are to make provision for. The schedules set out the core eligibility criteria that the Scottish Ministers must use the power to set. For example, in relation to funeral expense assistance, the regulations must provide that a person's eligibility for that type of assistance depends on the person being responsible for meeting the costs of a funeral. The schedules also give a non-exhaustive list of other eligibility criteria that may be set in the regulations. Some of these are common to more than one assistance type, such as the proposition that eligibility may be made to depend on applying for assistance within a specified period. Others are particular to the type of assistance in question, for example a further eligibility criteria for funeral expense assistance may be that it depends on where the funeral takes place. Similarly, the schedules provide a non-exhaustive list of the provision that may be made in regulations concerning what people are to be entitled to by way of assistance. The purpose of each of the subordinate legislation provisions in the Bill and the reasons for seeking the proposed powers is set out in the Delegated Powers Memorandum.

14. The Scotland Act 2016 ("the 2016 Act") gives the Scottish Ministers powers to make three types of flexibility in how Universal Credit (UC) operates. No Bill provision is needed for these as they are delivered by regulations. The powers are:

- Section 11(4) of the Welfare Reform Act 2012– provision about determination and calculation of the UC housing cost element in respect of liabilities for rented accommodation;
- Section 5(1)(i) of the Social Security Administration Act 1992 – provision about the person to whom, or time when, UC is paid; and
- Section 5(1)(p) of that Act – provision for payments to another person on behalf of a UC recipient, in respect of rented accommodation liabilities.

15. Draft regulations for flexibilities in relation to twice-monthly payments and direct payments to landlords have been consulted on and are currently in development. Further discussions and policy development will be taken

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forward with stakeholders on flexibility to 'split payments' between members of a household.

## Background

### Legislative background

16. In response to the outcome of the Scottish independence referendum, on 14 September 2014, the UK Government announced that Lord Smith of Kelvin had agreed to oversee a process, working with representatives from all five of Scotland's main political parties (Conservative, Green, Labour, Liberal Democrat and the SNP) to establish an agreement on further powers that could be devolved to the Scottish Parliament.

17. On 27 November 2014 the Smith Commission published its report detailing Heads of Agreement on further devolution of powers to the Scottish Parliament. In terms of social security, Smith recommended that the Scottish Parliament has:

- control over a number of benefits including Disability Living Allowance, Personal Independence Payment, winter fuel payments and power to vary the housing elements of Universal Credit, including the under-occupancy charge (commonly known as the bedroom tax); and
- new powers to make discretionary payments in any area of welfare without the need to obtain prior permission from the Department for Work and Pensions (DWP).

18. In response, the UK Government published its Command Paper on 22 January 2015 putting forward draft legislative proposals and introduced the Scotland Bill in May 2015 that received Royal Assent on 23 March 2016.

### Policy background

19. The Scottish Government's vision and principles for social security were developed after a substantial programme of engagement which the Scottish Government took forward under the banner of its national, year-long 'Fairer Scotland' conversation.

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20. This engagement was captured in a paper, “Creating a Fairer Scotland: Social Security, the Story So Far and Next Steps<sup>3</sup>”, which was published in October 2015 and summarised what the Scottish Government learned from its conversations with citizens and organisations from all over the country. The Scottish Government listened carefully to, and reflected on, the information stakeholders provided in order to develop its vision and principles.

21. A further paper, “A New Future for Social Security in Scotland<sup>4</sup>” was published in March 2016. In this paper, the Scottish Government outlined its vision and the initial set of principles which it has used to underpin the development and implementation of Scotland’s new social security powers. Based on the evidence gathered during the Fairer Scotland conversation, the Scottish Government has incorporated the views and ideas of those who are affected by the powers: primarily those who will receive the devolved benefits and groups who represent their interests. The vision states that “Social Security is important to all of us and able to support each of us when we need it” and is supported by the principles that:

- Social security is an investment in the people of Scotland;
- Respect for the dignity of individuals is at the heart of everything we do;
- Our processes and services will be evidence based and designed with the people of Scotland;
- We will strive for continuous improvement in all our policies, processes and systems, putting the user experience first; and
- We will demonstrate that our services are efficient and value for money.

22. The Scottish Government’s National Performance Framework<sup>5</sup> also provides broad measures of national wellbeing covering a range of economic, health, social and environmental indicators and targets. It contains a number of National Outcomes that describe what the Scottish Government wants to achieve and the kind of Scotland it wants to see. The legislative framework for social security in Scotland, will be aligned with other public services to

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<sup>3</sup> <http://www.gov.scot/Publications/2015/10/3498/0>

<sup>4</sup> <http://www.gov.scot/Publications/2016/07/9955>

<sup>5</sup> <http://www.gov.scot/Resource/0049/00497339.pdf>

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make a direct and significant contribution to several of the National Outcomes, most notably:

- We live longer, healthier lives;
- We have tackled the significant inequalities in Scottish society;
- Our people are able to maintain their independence as they get older and are able to access appropriate support when they need it; and
- Our public services are high quality, continually improving, efficient and responsive to local people's needs.

23. Successful transition of new benefit powers (including the eleven benefits) and delivering on new manifesto commitments in relation to social security is the biggest programme of change that the Scottish Government has undertaken since devolution, and the most complex. It will gain powers over 15% of social security spending with 85% remaining at the UK Parliament, estimated at £2.9 billion in 2017/18. This means that, while the Scottish Government will do everything within its powers to transform the social security system in Scotland that it is responsible for, it cannot redress all of the unfairness that exists within the current UK system. Transferring the devolved benefits requires a large-scale programme of transition, implementation and, where appropriate, reform; especially as there is no existing Scottish Government infrastructure for social security in Scotland. Part of this approach will rely as much on what the UK Government needs to stop doing.

24. The Scottish Ministers' main priority is to ensure the safe and secure transfer of benefits to those who receive them. The Scottish Government will continue to work with the UK Government to achieve this transfer. The Joint Ministerial Working Group on Welfare, which comprises Ministerial representatives from the Scottish Government, Scotland Office and UK Government, is the vehicle for making decisions about the timescales for transferring and exercising the new powers.

## Alternative Approaches

25. The first option is to do nothing. However, to do so would leave approximately 1.4 million people, who currently receive support from the benefits that will be devolved to Scotland, in a system that has been described as inhumane, complex and difficult to navigate. A system that is no longer fit

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for purpose, that fails to meet the needs of those it is meant to help and which does not deliver on the Scottish Government's social security principles.

26. This view was voiced again and again at the engagements held alongside the social security consultation in 2016. The Scottish Government recognises the responsibility it has to take action where it can and to use its new powers to help the people of Scotland. To do nothing is therefore not an option.

27. The second option, which is the one the Scottish Government has chosen, is to transpose the devolved powers into Scots law under the terms of the 2016 Act. This requires a process with multiple stages. First, the relevant sections of the 2016 Act have been commenced by regulations made by the UK Government. Second, the Scottish Parliament must make its own legislation. Third, the necessary operational infrastructure must be put in place.

28. The UK Government commencement regulations, which devolve competence for the areas listed at sections 22 and 23 of the 2016 Act, came into force on 17 May 2017 (except Discretionary Housing Payments, which came into force on 1 April 2017).

29. This Bill represents the second stage in the process, and in the 2016-17 Programme for Government, the Scottish Government made a commitment to bring forward a Social Security Bill within the first year of this Parliament.

30. In relation to the third stage, in March 2016 it was announced that the Scottish Government would set up a new agency, which will sit at the heart of the overall social security system. The Minister for Social Security subsequently announced in the Scottish Parliament on 27 April 2017, that the preferred option for the social security agency is a central executive agency with enhanced phone and on-line support which incorporates face-to-face pre-claims advice and support services co-located, where possible, in places people already visit. A significant amount of work was undertaken to reach this decision in the form of a two-stage options appraisal, culminating in an Outline Business Case (OBC)<sup>6</sup> that selected the preferred option.

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<sup>6</sup> <http://www.gov.scot/Publications/2017/04/9565>

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31. The preferred option for the executive agency offers both value for money and is capable of delivering well against the Scottish Government's National Performance Framework and its National Outcomes, which make up the framework. The benefits that will be administered by the agency include those supporting disabled people, older people, children, young people, families and those on low incomes. The agency's work will therefore be particularly supportive of the aim of a Fairer Scotland that offers improved opportunities and a better quality of life for everyone regardless of their circumstances.

32. As the agency will be an executive agency - which is a specific category of public body under the direct control of the Scottish Ministers and directly accountable to the Scottish Ministers and the Scottish Parliament - there is no requirement to make legislative provision to bring the agency into being. Other public organisations such as Non-Departmental Public Bodies have different arrangements requiring a Board to be appointed and legislation introduced but this is not the case with an executive agency. Both the Bill and this Policy Memorandum, therefore, treat the Scottish Ministers and the agency as though they are the same.

33. The Scottish Government believes this is a significant opportunity to use these powers to develop different policies for Scotland that are fairer and help tackle inequalities and poverty. The Scottish Government will work in partnership with all those who have experience of the current UK system and those that have an interest, to create a social security system that treats individuals with dignity and respect, is accessible, supportive and better meets the needs of the people of Scotland.

34. The Scottish Government intends to take a managed and staged approach to delivering the new devolved benefits, recognising that this will be key to ensuring a safe and secure transition. On 30 May 2017, the Cabinet Secretary made a statement to Parliament announcing that the 'first wave' of devolved benefits to be delivered, subject to this Bill receiving Royal Assent, will be a Carer's allowance supplement in Summer 2018, and then the new Best Start Grant and Funeral expense assistance by Summer 2019.

## Consultation

35. On 29 July 2016 the Scottish Government issued a public consultation, "A New Future for Social Security, Consultation on Social Security in

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Scotland”<sup>7</sup>, to inform the content of the Bill. The consultation set out the vision and key principles (above) for social security in Scotland. The consultation was in three parts, covering:

- a principled approach;
- the devolved benefits; and
- operational policy.

36. The consultation contained a total of 234 key questions and was designed in a modular way, to allow people to focus on the areas of most interest or relevance to them. It was available in a variety of formats, either produced initially, or available on request, including online through Citizen Space, word, html, pdf, and in large print, easy read, braille and BSL. Foreign language versions were made available on request in Mandarin and Cantonese.

37. An overwhelming total of 521 responses were received, 280 from individuals and 241 from organisations. Respondents represented a wide range of individuals and organisations with knowledge and experience of, or an interest in, social security matters. Copies of the non-confidential responses can be viewed on the Scottish Government website<sup>8</sup>.

38. In addition to the formal consultation, the Scottish Government held over 120 engagements carried out with partners across 32 local authorities in Scotland between July and October 2016. These events provided stakeholders and those with experience of the current UK system, the opportunity to communicate their views and contribute to the development of the proposals contained in the Bill. The independent analysis of the responses, by Research Scotland, along with the Scottish Government response was published together on 22 February 2017<sup>9</sup>.

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<sup>7</sup> <http://www.gov.scot/Publications/2016/07/9955/0>

<sup>8</sup> [https://consult.scotland.gov.uk/social-security/social-security-in-scotland/consultation/published\\_select\\_respondent](https://consult.scotland.gov.uk/social-security/social-security-in-scotland/consultation/published_select_respondent)

<sup>9</sup> <https://consult.scotland.gov.uk/social-security/social-security-in-scotland/>

## Summary of responses

39. Issues raised during the consultation that are relevant to specific measures in the Bill are discussed under the relevant section in this memorandum, including, where applicable, the alternative approaches that were considered.

40. Of the 521 responses received, some reflected the balance of views across a wider membership or audience. A summary of the key themes from the independent analysis report is set out below:

- overall, respondents welcomed the principles of dignity and respect and were frequently discussed as principles lacking in the current UK system; and
- social security system should be transparent and accountable; and simple and easy to access.

## Disability benefits

- there is scope to modernise and simplify the approach;
- the new Scottish social security system should be more flexible, accessible and person-centred;
- the importance of having access to welfare advice and advocacy support, to help applicants through the application, assessment and appeals processes, as and when required;
- the importance of transparency and fairness;
- the importance of having a process that is responsive, streamlined and fair;
- the importance of having a simplified approach based on evidence;
- the need to minimise stress and anxiety; and
- that people should be offered increased choice and flexibility.

## Other benefits

- support for continuing or expanding eligibility;

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- across a range of benefits, respondents called for improved awareness raising and information provision and access;
- ensuring that benefits are person-centred services and offer choice;
- the importance of ensuring systems are simple and straightforward; and
- ensuring that the system operates in as fair a way as possible.

## Next steps

41. The consultation process was valuable and respondents helped to shape the content of the Bill. The Scottish Government is grateful to all who contributed their time, input and assistance in the development of social security administration and solutions for the people of Scotland. The findings from the consultation and these engagements provide the foundation for how the Scottish Government will legislate, use and operate its new powers, and provide a reference point over the coming months and years.

42. The Scottish Government will continue to engage with stakeholders through a range of advisory groups and the establishment of 'Experience Panels'. The Scottish Government is committed to putting people with lived experience first and involving the people of Scotland in the design of processes and services. By participating in a panel, people can share their experience of receiving benefits and help to shape the new system with - and for - the people of Scotland. As of 12 May 2017, well over 2,000 people had volunteered to join the Experience Panels, from across Scotland and representing all of the devolved benefits.

## Part 1: Principles, charter & accountability

### The Scottish social security principles

#### **Policy objectives**

43. The policy objective is to deliver on the commitment, which the Scottish Government has made and reiterated since March 2016, that decisions on social security policy and delivery will be governed by a series of key principles. These principles are set out under paragraph 21.

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44. The policy objective for the Bill, therefore, is to move the principles from their current position, as a commitment and an aim, to one where they can rightly be said to ‘govern’ decisions. Placing them in primary legislation means that another Bill will be needed to amend them. As stakeholders such as Inclusion Scotland have said, “enshrining the principles in legislation is about showing a strong commitment to them.”

45. The Scottish Government has decided to embed human rights in its legislation, by adding a further principle that, “social security is itself a human right and essential to the realisation of other human rights”.

46. This new principle deliberately reflects the requirement set out in General Comment 19 on the right to social security by the United Nations Committee on Economic, Social and Cultural Rights, that social security systems should “*be established under national law and ensure the right of individuals and organisations to seek, receive and impart information on all social security entitlements in a clear and transparent manner.*”<sup>10</sup> In adding this principle, the Scottish Government recognises that the right to social security is respected and protected in international law.

47. The Scottish Government’s position is that it is necessary and appropriate to explicitly include the principle that social security is a human right, along with its other guiding social security principles, on the face of the Bill. This is because the principle is fundamental to the nature of the system the Scottish Government intends to create and it is therefore important that the Bill supports the establishment of a social security system that will operate on the basis that people are entitled to apply for support by right.

48. In coming to this view, the Scottish Government has been mindful of the wealth of feedback that it has received from stakeholders and respondents to its consultation and of other matters such as: the concerns raised by the UN Special Rapporteurs on Housing, Disabilities, Poverty and Food, in their joint letter sent to the UK Government on 8 April 2016<sup>11</sup>, and the concluding observations of the UN Committee on Economic, Social and Cultural Rights. Its sixth periodic report on the UK published in July 2016, stressed particular concerns for the negative impacts felt by “disadvantaged and marginalised individuals and groups, including women, children, persons with disabilities,

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<sup>10</sup> <http://www.refworld.org/docid/47b17b5b39c.html>

<sup>11</sup> [https://spdb.ohchr.org/hrdb/33rd/Public\\_-\\_AL\\_GBR\\_08.04.16\\_\(1.2016\).pdf](https://spdb.ohchr.org/hrdb/33rd/Public_-_AL_GBR_08.04.16_(1.2016).pdf)

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low-income families and families with two or more children<sup>12</sup>". The Committee stated that it was:

"Deeply concerned about the various changes in the entitlements to, and cuts in, social benefits introduced by the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016, such as the reduction of the household benefit cap, the removal of the spare-room subsidy (bedroom tax), the four-year freeze on certain benefits and the reduction in child tax credits. The Committee is particularly concerned about the adverse impact of these changes and cuts on the enjoyment of the rights to social security and to an adequate standard of living by disadvantaged and marginalized individuals and groups, including women, children, persons with disabilities, low-income families and families with two or more children. The Committee is also concerned about the extent to which the State party has made use of sanctions in relation to social security benefits and the absence of due process and access to justice for those affected by the use of sanctions."

49. If the Scottish Government's policy objective - for its proposal to adopt and embed its social security principles in the Bill - can be summarised in a single sentence then it is this: "That no future Scottish Government is criticised by the UN, or an equivalent organisation, for failing to guarantee a right to social security", as laid out in General Comment 19 of the UN Committee on Economic, Social and Cultural Rights.<sup>13</sup>

50. The Scottish Government has also decided to add a further principle, and that is "the Scottish Ministers have a role in ensuring that individuals are given what they are eligible to be given under the Scottish social security system." This reflects the Scottish Government's commitment to help maximise people's incomes and encourage the take-up of all benefits to ensure that those who are eligible, but who are not currently making claims, receive the benefits to which they are entitled. The Scottish Government is already investing in benefit take-up campaigns to help raise awareness and

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<sup>12</sup> UN Committee on Economic, Social and Cultural Rights Concluding Observations:<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/152/41/PDF/G1615241.pdf?OpenElement>  
9 UN Special Rapporteur Joint Communication on human rights impacts of welfare

<sup>13</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

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encourage people to get the help they're entitled to, and placing this additional principle on the face of the Bill thus cements the commitment in legislation.

## Current process

51. There is currently no social security equivalent to the Scottish Government's principles, to guide policy and delivery in Scotland. DWP has published a customer charter<sup>14</sup>, which is based on the features of their services that people have told them are important, along with a series of "responsibilities" and "priorities"<sup>15</sup>. However, these are focussed narrowly on the services that DWP delivers and the way in which it goes about delivering them.

## Consultation

52. A summary of the key themes from responses to the relevant section of the consultation were:

- overall, respondents welcomed the principles of dignity and respect and these were frequently discussed as principles lacking in the current UK system;
- the Scottish social security system should be transparent and accountable; and simple and easy to access; and
- respondents were generally in favour of embedding the principles in legislation.

53. The Scottish Government recognises the issues that respondents describe as existing, and often lacking, within the current UK system and agrees that the core principles of dignity, respect and fairness should be at the heart of delivery of the social security system in Scotland.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/292673/customer-charter-dwp.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/292673/customer-charter-dwp.pdf)

<sup>15</sup><https://www.gov.uk/government/organisations/department-for-work-pensions/about>

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## What the Bill does

54. The Bill sets out the seven Scottish social security principles which are to inform and be reflected in the Scottish social security charter, described from paragraph 57 below. For example, the charter will provide for how respect for the dignity of individuals will be placed at the heart of the system when Ministers are exercising functions such as determining a person's entitlement to assistance.

## Alternative approaches

55. The Scottish Government's consultation set out two approaches, to embedding its social security principles in legislation. These were:

- a claimant charter; and
- writing principles into legislation.

56. The responses to the consultation were fairly evenly divided between the two options and the Scottish Government has therefore decided to pursue both.

## The Scottish social security charter

### Policy objectives

57. The policy objective for a duty to prepare and publish a charter is to make the principles meaningful by translating them from statements of aspiration into more focussed aims. Taking this approach will enable the principles to be embedded in a way that is open to monitoring, reporting and scrutiny, and available in a format that can be easily understood. It will also support the Scottish Government's clear commitment that key information will be available in ways that are accessible to all. The need for legal precision in a legislative document, such as a Bill, can get in the way of making it an easy read. People are likely to find a charter more accessible than legislation.

58. The Scottish Government intends that the charter will be used to set out the necessary next level of detail, in relation to its social security principles. The requirements, which the Scottish Government proposes should be placed

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on the Scottish Ministers - to translate the principles into a charter, and to review and revise the charter periodically - are duties with clear, meaningful outcomes. The Scottish Government also proposes to ensure, via the reporting requirement, that there will be proper accounting for how these objectives are being realised in practice.

59. The process for updating the charter will be more open to collaboration than the process to amend the primary legislation. While anchored by the principles, the Scottish Government intends that the charter will be used as an instrument to facilitate a 'two-way' dialogue between users and the Scottish Government, embedding accountability and enabling it to drive improvement. In line with the Scottish Government's commitment to a rights based approach, the charter will therefore introduce to the Scottish system a further, important layer of accountability and participation; both key requirements set out in General Comment 19 of the UN Committee on Economic, Social and Cultural Rights.

## Current process

60. As with the Scottish Government's guiding principles, there is currently no exact equivalent to the proposed social security charter, to set out its aims for social security in Scotland. As above, DWP's customer charter is focussed narrowly on the services that DWP delivers and the way in which it goes about delivering them rather than the system as a whole.

61. The Scottish Government also expects that the charter, when published, will differ from the NHS Patient Rights and Responsibilities Charter (as established by the Patient Rights (Scotland) Act 2011), which was cited as an example in the Scottish Government's consultation document. This is because the NHS Charter was set-up to summarise patients' rights - where these rights were already provided for in law elsewhere. The social security charter provided for in this Bill won't summarise rights that exist outside of it; it will constitute peoples' rights in relation to social security in Scotland.

## Consultation

62. As mentioned in paragraphs 55-56, although the consultation was framed as an either/or, i.e. 'embedding the principles in legislation' or 'a claimant charter'; both options were well supported. On the charter, Citizens Advice Scotland said - "the charter is far more likely to be accessible to

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claimants for the purposes of understanding their rights and feeling empowered”.

63. Respondents made it clear that the Scottish Government should involve stakeholders, as part of a representative group, to ensure that a draft charter meets with their ambitions and expectations. They also felt that the representative group should be informed by or should include service users and a range of organisations. There was a strong consensus that people who use or may use social security services should be involved in the process. The Scottish Government agrees.

## What the Bill does

64. The Bill makes provision for a statutory duty on the Scottish Ministers, to prepare and publish a charter no more than six months after the Bill has come into force and to review it every five years. This should ensure that every new and subsequent Scottish Parliament reviews it. The charter is to set out what should be expected from the Scottish Ministers and persons who seek and receive assistance from the Scottish social security system. It will also be a statutory requirement that the charter must be drafted to reflect the Scottish Government’s guiding principles, which will include the principle that social security is a human right.

65. In developing the charter, the Scottish Government must consult with people currently in receipt of the benefits to be devolved to Scotland. It is envisaged that the charter will be a link between the principles and the way in which the social security system in Scotland performs.

66. After each review, the Scottish Ministers must provide a report to Parliament explaining the consultation undertaken and what changes to the charter have been made, with reasons why changes have been made, or not made.

## Proposal

67. The Scottish Government proposes to make the charter as widely available as possible. This means taking into account the need to ensure that the charter is accessible - for example, by making it possible for someone to

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request it in a range of formats such as digital, large print, easy read, braille or an audio version.

68. In taking forward the development of the charter, the Scottish Government intends to involve organisations from a cross-section of society, encompassing the expertise of a wide range of people and organisations, to make sure it is fit for purpose. As well as those in receipt of the devolved benefits, this will include organisations, such as local authorities, which play a key role in the wider delivery of social security in Scotland. The Scottish Government already has in place a range of engagement vehicles. These include its Experience Panels and the Disability and Carer's Benefits Expert Advisory Group. These existing groups can be supplemented if required.

69. Feedback on the practical operation of the NHS Patient Rights and Responsibilities Charter is that the Charter is often only invoked in complaints cases, as an example of the expected standards that have not been met. The Scottish Government proposes that the social security charter should be more than a benchmark to determine whether performance is above or below expectations - it should be an engine to drive improvement across the system.

70. The Scottish Government also recognises that the benefits being devolved do not represent the totality of the social security provision that is delivered in Scotland. Local authorities, for example, play an important role in administering Discretionary Housing Payments and the Scottish Welfare Fund. The Scottish Welfare Fund already has a principle (at section 5 of the Welfare Funds (S) Act 2015) in relation to dignity and respect. Similarly, there are other organisations doing crucial work in providing advice and advocacy for claimants. While this Bill does not place statutory duties on the bodies involved in this wider delivery, the Scottish Government expects they will welcome the introduction of the principles and charter, and will work closely with the Scottish Government to ensure they can be used collaboratively as tools to drive improvement in policy and delivery across the whole social security system in Scotland.

## Alternative approaches

71. As above, the Scottish Government has decided to pursue both approaches, to embed its social security principles in legislation by writing the principles into legislation, and the charter. This is in contrast to the UK approach, which does not have these principles, or their equivalent at its heart

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and which has been subject to criticism by the UN and other organisations for failing to guarantee people's rights, including their right to social security.

## Accountability and interpretation

### Policy objectives

72. The policy objective for this section, which links with the policy objective of the previous section, is to ensure appropriate scrutiny and continuous improvement, by creating a requirement for the Scottish Ministers to report on the performance of the Scottish social security system.

### Current process

73. There is currently no requirement on either the UK or Scottish Government, to report on the performance of the social security system in Scotland.

### Consultation

74. The consultation did not seek respondents views on a reporting duty, to be placed on the Scottish Ministers. Where other sections of the consultation were relevant, these were taken into account.

### What the Bill does

75. The Bill places a duty on the Scottish Ministers to report annually to the Scottish Parliament on the performance of the Scottish social security system during the previous financial year. The report is to describe what the Scottish Ministers have done in that year to meet the expectations on them set out in the charter.

### Proposal

76. The Scottish Government's aim is to report on the social security system more widely than just the parts it is responsible for delivering. This is because some outcomes and aspects of some people's experience of the system will

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be dependent on the interaction between elements that are under the direct control of the Scottish Ministers (such as the social security agency) and elements that are not (such as Discretionary Housing Payments and the Scottish Welfare Fund, which are delivered by local authorities). Unless the system is reported on as a whole, it will not be possible to see whether these linkages are working effectively or not.

77. Information on the performance of other elements of the system will be available which can be collated to provide a view of the whole system. For example, the Bill provides that local authorities will have a duty to provide information about Discretionary Housing Payments to the public in a local area. This will include information on how to apply, or apply for a review, and information on how a local authority will come to a decision.

## Alternative approaches

78. The Scottish Government has considered the UK Government's approach to reporting annually on the performance of its social security system and has decided that the UK approach does not reflect the Scottish Government's principles or its ambition to ensure that the legislation supports improvement across the whole, Scottish social security system. For example, DWP's Annual Report and Accounts<sup>16</sup> do not report on the interaction between DWP's systems and services and relevant services provided by others (e.g. welfare advice, housing support) provided by local authorities.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/534933/dwp-annual-report-and-accounts-2015-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/534933/dwp-annual-report-and-accounts-2015-2016.pdf)

## Part 2: Giving of assistance by the Scottish Ministers

### Chapter 1: Assistance to be given according to determination of entitlement

#### Policy objectives

79. The policy objective is to move the Scottish Government's rights-based approach to social security onto a legislative base which establishes the right to assistance as the source from which all other rights and entitlements will flow and make clear how the Scottish social security system will respond to people's rights, including their fundamental right to social security.

80. If social security is a human right, then the corollary is that the Scottish Ministers must uphold that right by giving people the assistance that they are entitled to.

81. The Scottish Government is clear that it views this right as one for everyone in Scotland. The nature of the assistance to be provided by Scotland's social security system - spanning, as it does, assistance at birth to assistance after bereavement - means that anyone in Scotland may seek assistance at some point in their lives. The system exists because, in a democratic society, people come together to support each other in times of need and everyone benefits from the protection that the right to social security provides.

82. The Cabinet Secretary for Communities, Equalities and Social Security made this clear, on 29 July 2016, at the launch of the Scottish Government's consultation on social security, when she said:

“We believe in a contract between the government and the people. And we believe that social security is the living proof of that contract. People contribute to society in all sorts of different ways. In return, it's only right that the government contributes support and care, where and when it's needed. That's how healthy societies work and that's how we want our social security system to work.”

83. The word, “determination” is used deliberately in this Memorandum and throughout the Bill. This is because there may be lower-level, administrative

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decisions that sit beneath a determination of entitlement. For example, on receipt of an application, the Scottish Ministers may decide to request further information from the individual. The fact that the Scottish Ministers have made this administrative decision (to request further information) should not, in and of itself, effect the determination of entitlement. There may be multiple, administrative decisions in the course of a determination. Parties other than the Scottish Ministers, such as the First-tier Tribunal, may also make determinations. Throughout, the word 'determination' should be taken to indicate the crucial point at which it is determined that the individual is or is not entitled to assistance.

## Current process

84. Most, if not all, current UK social security legislation does not flow from a right to assistance. Instead, it starts with the premise that entitlement arises by operation of law. In other words, the UK system operates on the basis that not everyone is entitled but those who are will be able to demonstrate their entitlement to the Secretary of State. As the Scottish Government is taking a rights based approach, the Scottish system, by contrast, will operate on the basis that anyone may be entitled and the Scottish Ministers will first determine only those who are not (later determinations may be made by other bodies, such as the First-tier Tribunal). The practical effect may be similar in most cases but the principle and, thereafter, the legislative basis are different.

## Consultation

85. A summary of the key themes from responses to the relevant section of the consultation were:

- dignity and respect were frequently discussed as principles lacking in the current UK system;
- respondents indicated that people receiving benefits felt stigmatised and uncomfortable, rather than feeling entitled to support;
- respondents hoped that establishing the principles and working towards the outcomes outlined in the consultation would address the stigma and instigate wider cultural change;
- respondents commented on the language used around social security, with most feeling that there were some words or phrases that were inappropriate and should not be used; and

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- a key point raised was the need for improved staff training and working conditions, which could help change the overall culture and improve the user experience.

## What the Bill does

86. The Bill places a duty on the Scottish Ministers to give people the assistance that they are entitled to as determined under Chapter 2. The Bill provides that - whilst, in most cases, determinations will be made by the Scottish Ministers (in the form of the Scottish social security agency, acting on the Scottish Ministers' behalf) - other bodies can also make determinations. These other bodies are:

- The First-tier Tribunal (after hearing an appeal against a determination by the Scottish Ministers);
- The Upper-tier Tribunal (after hearing an appeal against, or following a review of a determination by the First-tier Tribunal); and
- The Court of Session (after hearing an appeal against a decision of the Upper-tier Tribunal).

87. The Bill also provides that the assistance people receive is established by the latest determination made on their entitlement. Therefore if a determination is made, and the person exercises their right to request that the decision be taken again, the later determination will supersede the earlier one. This is a natural corollary of the proposal that the process should operate on the basis that the individual has a right to assistance. That right cannot be taken away unless the first determination is superseded or replaced by a later determination - either by the Scottish Ministers or by another body (such as the First-tier Tribunal on appeal).

88. The positioning of this Chapter, in the overall structure of the Bill, makes clear all assistance given as part of the Scottish social security system flows as a consequence of this right and duty.

## Alternative approaches

89. The Scottish Government has considered the UK Government's approach to people's rights, including their fundamental right to social security and - after noting the criticism of the UK approach by respected international

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bodies such as the UN Committee on Economic, Social and Cultural Rights - has decided that the UK approach does not reflect the Scottish Government's principles or its ambition to establish a social security system that will operate on the basis that people have a right to apply for support.

## Chapter 2: Types of assistance to be given

90. References in the Bill to “types of assistance” reflect the way in which the transfer of responsibilities, from the UK to the Scottish Parliament, has been effected by the 2016 Act. Sections 22 and 23 of that act transfer responsibility for benefits under general headings (“Disability, industrial injuries and carer’s benefits” - section 22, and “Benefits for maternity, funeral and heating expenses” - section 23).

91. This Bill follows that approach, insofar as the provision for individual benefits is organised into various ‘types’. Ten of the eleven benefits devolved under the 2016 Act are each categorised, in the Bill, under the eight types set out below. Discretionary Housing Payments are treated separately, to reflect their distinct funding, delivery and governance arrangements (i.e. they are currently delivered by local authorities).

92. As well as reflecting the approach in the 2016 Act, this structure has an additional advantage in that it means that - if required, in the future - any new benefits that may be created can be slotted in under the relevant assistance type without disrupting the Bill’s overall structure and narrative. In the event of the further devolution of social security powers, additional types of assistance could also be added. An additional type, ‘Short-term assistance’ has already been added to the Bill.

93. Careful consideration has been given to the terminology used throughout the Bill, in this instance, to the use of the word, ‘assistance’. The Scottish Government notes that the 1948 Act, which established a social safety net for those who did not pay national insurance contributions (such as the homeless and people with disabilities), was called the “National Assistance Act 1948”. That being the case, the Scottish Government’s view is that ‘assistance’ is an appropriate term for present purposes - not least because of its links with the founding legislation of the UK social security system.

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94. The Bill defines the types of social security assistance which the Government will give (e.g. assistance for disabled people, carers, maternity and funeral expenses, heating costs and so forth). It goes on to give a brief description of each type of assistance, and confer powers on the Government to set out the rules for eligibility and entitlement in subordinate legislation. The Bill provides the Scottish Ministers with the power to vary the rates of assistance, which can be used to deliver the Government's commitment to uprate disability and employment-injury assistance in line with inflation.

95. The eight types of assistance are:

- Carer's assistance (including Carer's Allowance);
- Cold-spell heating assistance (including Cold Weather Payment);
- Winter heating assistance (including Winter Fuel Payment);
- Disability assistance (including Disability Living Allowance, Personal Independence Payment, Attendance Allowance and Severe Disablement Allowance);
- Early years assistance (including Sure Start Maternity Grant and Best Start Grant);
- Employment-injury assistance (including Industrial Injuries Scheme);
- Funeral expense assistance (including Funeral Payment); and
- Short-term assistance.

## Carer's assistance

### Policy objectives

96. The policy objective is to allow the Scottish Ministers to provide assistance to individuals who provide, or have provided, care for another disabled individual, currently known as Carer's Allowance. In doing so the Scottish Government will examine how best assistance can be provided in order to recognise the important role that carers have in society.

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## Current process

97. Carer's Allowance is currently administered by DWP and is paid to a person who cares for someone who is severely disabled.
98. The current UK Government eligibility criteria requires a recipient to:
- be aged over 16;
  - spend at least 35 hours a week caring for a person who qualifies for specified disability benefits;
  - not earn more than £116 per week (after deductions);
  - not be in full-time education (21 hours or more); and
  - satisfy the residence conditions and not be subject to immigration control.

## Consultation

99. A large number of respondents (89%) to the social security consultation supported the Scottish Government's proposals for developing a Scottish carers benefit in the longer term, and 85% of respondents agreed with the short to medium priorities. Respondents made the following comments:
- many welcomed an increase in Carer's Allowance to the level of jobseeker's allowance;
  - some welcomed the Scottish Government's plans to introduce a Young Carer's Allowance;
  - some welcomed the Scottish Government's commitment to increasing Carer's Allowance for those looking after more than one disabled child;
  - some felt that improvements could be made in the application process, such as the speed of decision-making and simplification of the process;
  - enable carers to receive the carer benefit while studying full time;
  - increase the earnings limit; and
  - remove the rule that means Carer's Allowance is stopped if the person they care for is admitted to hospital for a prolonged period.

## What the Bill does

100. The Bill sets out how the Scottish Ministers may provide assistance to individuals who provide, or have provided, care for another disabled individual. Eligibility may be determined on criteria relating to residency, age and dependency of other types of state assistance, and the Bill provides that these details are to be established in regulations.

## Proposal

101. The Scottish Government's immediate priority is to ensure a safe and secure transition so that those in receipt of Carer's Allowance at the point of transition continue to receive it at the right time and the right amount.

102. The approach taken in the Bill will enable the Scottish Ministers to develop options for a future Scottish carers benefit that is more responsive to any changes in economic and social conditions. In the short to medium term, the Scottish Government has committed to:

- increasing Carer's Allowance to the level of Jobseeker's Allowance (more detail is provided on this at section 47);
- actively considering the introduction of a Young Carer's Allowance;
- increasing Carer's Allowance for carers looking after more than one disabled child; and
- improving the carers' experience so that people can easily access help and advice, and feel that the application process is quick and user-friendly.

103. In the longer term, the Scottish Government intends to develop a Scottish carers benefit that, although not a payment for care, provides financial support for those who choose to, or who have had to give up or limit their employment or study because of caring responsibilities. The Scottish Government will consider taking forward changes to the eligibility rules and the rules relating to the stopping and starting of the benefit.

104. The Scottish Government in partnership with the Young Carer's Allowance Working Group, the Carers Benefit Advisory Group, and the Disability and Carers Benefits Expert Advisory Group will consider options for short, medium and longer-term commitments.

## Alternative approaches

105. Legislation is required to enable the Scottish Ministers to deliver Carer's assistance. In developing this Bill, the Scottish Government has considered the UK Government's approach to Carer's Allowance and has decided that the UK approach does not reflect the Scottish Government's principles or the need to recognise the important role that carers have in society.

## Cold-spell heating assistance

### Policy objectives

106. The policy objective is to allow the Scottish Ministers to provide assistance to individuals to help towards meeting heating costs, currently known as a Cold Weather Payment. In doing so, the Scottish Government will examine how best assistance can be provided in order to help contribute to reducing fuel poverty in Scotland more effectively.

### Current process

107. Cold Weather Payment is a UK Government grant given to certain qualifying households, made when the temperature drops below zero degrees Celsius for one consecutive week. Cold Weather Payments are paid automatically and provided to, under certain conditions, households that are in receipt of either Pension Credit, Income support and income-based Jobseekers Allowance, Income-related Employment and Support Allowance, or Universal credit<sup>17</sup>.

### Consultation

108. In general, respondents supported a broad continuation of current eligibility, with support for the expansion of some benefits, though a few respondents cautioned against more generous approaches where there was not a strong case for this, or called for a more targeted approach. In addition, the independent Fuel Poverty Strategic Working Group and Rural Fuel

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<sup>17</sup> Full eligibility criteria can be found on the DWP website - <https://www.gov.uk/cold-weather-payment/overview>

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Poverty Task Force both made recommendations about the use of the Cold Weather Payment in helping to reduce fuel poverty including that: the Cold Weather Payment should be retained with minor changes to take account of the locality effects of cold, wind and rain, and also that payments should be prioritised to householders in greatest fuel poverty and be in the form of discounts from bills rather than a cash payment.

## What the Bill does

109. The Bill sets out how the Scottish Ministers may provide assistance to help an individual towards meeting the heating costs during a period of cold weather, and the Bill provides that these details are to be established in regulations.

## Proposal

110. This approach will enable the Scottish Ministers to be more responsive to any changes in economic and social conditions whilst also allowing for full consideration to be given to the recommendations of the Fuel Poverty Strategic Working Group and Rural Fuel Poverty Task Force and how they can be factored in to eligibility design criteria of Cold Weather Payments as part of the development of the new fuel poverty strategy.

## Alternative approaches

111. Legislation is required to enable the Scottish Ministers to deliver Cold-spell heating assistance. In developing this Bill, the Scottish Government has considered the UK Government's approach and has decided that the UK approach does not offer sufficient flexibilities, nor does it reflect the Scottish Government's principles or the need to reduce fuel poverty in Scotland more effectively.

## Winter heating assistance

### Policy objectives

112. The policy objective is to allow the Scottish Ministers to provide assistance to individuals to help towards meeting heating costs. In doing so

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the Scottish Government will look to see how best assistance can contribute to reducing fuel poverty in Scotland more effectively, whilst also looking to extend Winter Fuel Payments to families with disabled children on the higher rate of Disability Living Allowance.

## Current process

113. As at 23 May 2017, DWP's Winter Fuel Payment is paid annually at various rates to all persons over qualifying ages (basically, everyone over the female state pension age), normally in November or December and is unrelated to any particular weather patterns.

## Consultation

114. In general, respondents were divided on whether current eligibility should be maintained or not. Some supported a broad continuation of current eligibility, with support for the expansion of some qualifying benefits, though a few respondents cautioned against more generous approaches where there was not a strong case for this, or called for a more targeted approach. In addition, the independent Fuel Poverty Strategic Working Group, the Rural Fuel Poverty Task Force and the report of the independent adviser on poverty and inequality have all made recommendations about fuel poverty programmes being better focussed on those that need help the most, and that consideration should be given to potential changes to eligibility for the Winter Fuel Payment, how it is paid and what it is used for.

## What the Bill does

115. The Bill sets out how the Scottish Ministers may provide assistance to individuals to help towards meeting heating costs during the winter months, and that the eligibility criteria be established in regulations.

## Proposal

116. This approach will enable the Scottish Ministers to be more responsive to any changes in economic and social conditions. It will also allow for full consideration of the recommendations of the Fuel Poverty Strategic Working

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Group and Rural Fuel Poverty Task Force to be factored in to eligibility design criteria of winter fuel payments in Scotland.

## Alternative approaches

117. Legislation is required to enable the Scottish Ministers to deliver Winter heating assistance. In developing this Bill, the Scottish Government has considered the UK Government's approach and has decided that the UK approach does not offer sufficient flexibilities, nor does it reflect the Scottish Government's principles or the need to reduce fuel poverty in Scotland more effectively.

## Disability assistance

### Policy objectives

118. The policy objective is to allow the Scottish Ministers to provide assistance to disabled individuals on account of the impact of the disability (physical or mental). Disability assistance is currently provided through a number of benefits including Disability Living Allowance (DLA), Personal Independence Payment (PIP), Attendance Allowance (AA) and Severe Disablement Allowance (SDA). These are described below. SDA is very different from the three main disability benefits and is described separately.

119. Disabled people incur additional daily living costs, such as energy and transport, as a direct result of the impact of their disability or long-term ill health. These benefits recognise this, and help meet the costs and support people to lead as independent lives as possible.

### Current process

120. DLA is currently for children aged under 16 and for people over the age of 65. DLA was previously for people of working age and some are currently still receiving it. However, they are being transferred to the new PIP benefit and, when the powers over DLA and PIP are transferred to the Scottish Parliament, the UK Government expects that all working age people will be receiving PIP rather than DLA. There are two components – care and mobility.

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The care component has three rates of award and the mobility component two rates.

121. PIP is a new benefit introduced by the UK Government in 2013, to replace DLA for people aged 16 - 65. It has attracted extensive criticism from people claiming the benefit and the organisations supporting them, and full roll-out has been delayed because of various issues including delays to assessments. Eligibility for PIP is assessed on the impact of the disability or ill health, using a points based system. There are two components – care and mobility – each with a higher and lower rate of award.

122. AA is non-means tested, available to people over 65 who are disabled or in ill health, with two different rates of award to help meet the costs of their care needs. It does not include a mobility component, unlike DLA and PIP. People, who are already on DLA when they become 65, can continue on DLA although there are some limiting rules e.g. if they only receive DLA care component they cannot claim a mobility component after they become 65. People claiming a disability benefit after they are 65 must apply for AA. Entitlement to DLA, PIP and AA provides a gateway or passport to other benefits, such as Carer's Allowance and schemes such as the Blue Badge Scheme.

## Consultation

123. In the social security consultation, the most commonly mentioned themes on the positive aspects of the disability benefits were:

- DLA promotes independence and choice;
- holistic approach to assessment;
- application process simple and clear;
- non-means tested benefit; and
- on PIP, special provisions for certain groups.

124. The most commonly mentioned negative themes were:

- lack of mobility component;
- eligibility limiting and discriminatory;
- application process stressful, complex and intimidating;

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- lack of awareness of entitlement;
- too much focus on physical disability;
- assessment does not look at impact on daily life; and
- for PIP, impact of face-to-face assessments, and transition from DLA to PIP.

125. The most commonly mentioned themes for the new Scottish disability benefits were:

- need for a more flexible and accessible application process;
- simpler and more streamlined application process;
- people with the appropriate skills and expertise should undertake assessments;
- access to support and advice; and
- right to be treated with dignity and respect.

## What the Bill does

126. The Bill sets out how the Scottish Ministers may provide assistance to individuals who have a disability. It proposes that the eligibility may be determined on criteria relating to residency, age, and the impact of the disability, and that these details be established in regulations. The Bill also provides for assistance to persons who are terminally ill.

## Proposal

127. The Scottish Government's immediate priority is to ensure a safe and secure transition of the disability benefits so that those in receipt of DLA, PIP and AA at the point of transition continue to receive it at the right time and in the right amount. There will be new claims for DLA and AA but the Scottish Government expects the majority of new claims will be for PIP. DLA, PIP and AA will continue to be non-means tested benefits. For DLA and PIP, there will be two components to the awards - care and mobility - and different rates of awards depending on the severity of impact. Passporting arrangements for all three of the benefits will continue.

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128. The approach taken in the Bill will enable the Scottish Ministers to develop options for improvements to the disability benefits in the future. For example, when assessing people's applications for DLA, PIP and AA, the Scottish Government intends to reduce face to face assessments and to use communication channels which suit the individuals' needs. The Scottish Government is also committed to introducing longer term or lifetime awards for people whose condition is unlikely to improve.

129. The Scottish Government is committed to giving children in receipt of DLA when the benefits are transferred an automatic entitlement to continue to receive it until they are 18. This will support transition to adulthood and address some of the stress felt by young people and their families on the current transition to PIP at 16. The Scottish Government will work with organisations, families and young people to develop detailed proposals on this.

130. The Scottish Government has engaged extensively with experts, organisations and with people in receipt of the benefits to gather views and to develop options. This has included face to face meetings and co-production projects. People with direct personal experience of DLA, PIP and AA are members of the new Experience Panels, and will share their experience of receiving benefits, thus helping to shape the new benefits in Scotland.

131. The Scottish Government has established the independent Disability and Carers Benefits Expert Advisory Group to provide recommendations and advice to the Scottish Ministers on the policy and practice options being developed on disability and carers benefits. The Group will specifically advise on key areas for reform, including, but not limited to: reform of assessment (from application to final decision and including data and evidence); award periods, automatic awards and lifetime awards; eligibility criteria; appeals; accessibility and take up of benefits. The Group will use evidence from a number of sources to provide recommendations and guidance to the Scottish Ministers on options for the existing benefits when powers over them are transferred to the Scottish Parliament, and options that would be developed and implemented after the safe and secure transfer of the benefits.

## Alternative approaches

132. Legislation is required to enable the Scottish Ministers to deliver Disability assistance.

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133. The Scottish Government asked in the consultation whether or not DLA, PIP and AA should be means tested. Stakeholders overwhelmingly agreed with the Scottish Government that the purpose of the benefit is to help meet the costs of the impact of a disability and that disability can impact anyone, regardless of their income. Therefore, DLA, PIP and AA will remain non-means tested.

134. The Scottish Government also considered whether alternatives to cash should be introduced, similar to the Motability scheme. While there was some support for this, people claiming benefits and the organisations that support them were clear that this should be a choice for people and that cash payment should remain the default as it promotes choice and independent living. The Scottish Government is exploring with stakeholders what alternatives to cash might be offered, always as a choice, to people receiving benefits.

## Severe Disablement Allowance (SDA)

### Policy objectives

135. The policy objective is to transfer responsibility for SDA (even though the benefit is now closed to new applications) and to continue making payments to existing Scottish recipients, on the same basis as they are currently made, in order to support and protect the small number of people who will be in receipt of the benefit when it is transferred.

### Current process

136. SDA is a non-contributory benefit, introduced in 1984 and closed to new applicants in 2001. It is intended for those who cannot work because of long-term illness or disability. The benefit will continue to provide replacement income for this group of people who have significant disabilities or ill health, contributing to better quality of life and outcomes.

137. SDA is very different from the three main disability benefits because it is work-related and designed to replace income that arises from someone being unable to work due to illness or disability.

138. The main qualifying criterion for SDA was that recipients must have been unable to work for at least 28 consecutive weeks because of illness or

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disability. This eligibility does not align with the other disability benefits being devolved. People who receive this benefit are unable to work and will tend to be older as it has been closed to new applicants since 2001. When this benefit transfers to Scotland, the Scottish Government expects 2,000 - 2,500 people to be in receipt of the benefit. Over time this number will gradually fall. The equivalent benefit available now for people unable to work due to illness or disability is Employment Support Allowance (ESA) which will remain the responsibility of the UK Government.

## Consultation

139. The Scottish Government discussed how to approach the devolution of SDA with those who receive the benefit and the organisations who support them, and through the social security consultation. There is broad support for the Scottish Government's approach to SDA, that is to make no changes and continue to pay SDA as it is currently administered by DWP, citing the main reasons for doing so as continuity and fairness.

## What the Bill does

140. There is no explicit provision for SDA in the Bill, as the Scottish Government intends to use existing powers to run and administer it once devolved. The existing powers to deliver SDA are those in section 68 of the Social Security Contributions and Benefits Act 1992<sup>18</sup>, and related regulations. Section 53 of the Scotland Act 1998<sup>19</sup> allows the Scottish Ministers to take over these functions, and operate the powers to deliver, without the need to provide for anything in this Bill.

## Proposal

141. The Scottish Government proposes to continue to maintain SDA as it currently operates to protect those in receipt of it, without introducing unnecessary changes. This approach is felt to be most consistent with the Scottish Government's priority of a safe and secure transition for the devolution of social security, and of treating people with dignity, fairness and respect. As SDA is now closed to new applications, it is unlikely that the

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<sup>18</sup> <http://www.legislation.gov.uk/ukpga/1992/4>

<sup>19</sup> <http://www.legislation.gov.uk/ukpga/1998/46/section/53>

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Scottish Government will make material provision in regulations, in relation to this benefit, beyond that required to uprate payments.

## Alternative approaches

142. This benefit has been closed since 2001 and will have only a small number of recipients once it is devolved. The replacement benefit for SDA is ESA, which will remain the responsibility of the UK Government. There is therefore little scope to consider alternative approaches.

## Early years assistance

### Policy objectives

143. The policy objective is to allow the Scottish Ministers to provide assistance to families and carers on low incomes at key transitions through early years as part of a package of early years support to give every child born in Scotland the best start in life.

### Current process

144. Sure Start Maternity Grant (SSMG), provided for in the Social Fund Maternity and Funeral Expenses (General) Regulations 2005 (as amended), is a one-off payment of £500 provided by DWP to help towards the costs of having a first child. It is available to recipients of certain qualifying benefits, which are used as a proxy for low income. These are:

- Income support;
- Income based jobseekers allowance;
- Income based employment support allowance;
- Child tax credit;
- Working tax credit that includes a disabled worker or severe disability element;
- Any element of Universal Credit; and
- Pension credit.

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145. It is paid for the first child in a household only, except in the case of multiple births. Recipients are required to have received advice from a health professional to qualify for a grant.

## Consultation

146. Respondents to the social security consultation and those that attended events were broadly supportive of the proposals to introduce a new Best Start Grant (BSG), to replace SSMG, and to the changes set out in the consultation. The main themes emerging were:

- structure – respondents welcomed the proposed increase in the value of the grant for the first child, from £500 to £600, the inclusion of payments for subsequent children and the additional two payments at key stages in the early years;
- application process – there was support for extending application windows, checking eligibility at each stage, simplifying the process and maintaining the requirement for health advice to be given;
- integration – there was widespread support for the integration of the BSG and Healthy Start Voucher application processes, if an integrated process would be less bureaucratic and make it simpler for people to apply; and
- eligibility – three options for eligibility were set out. There was most support for retaining current SSMG eligibility with some support for more specific targeting for vulnerable groups and inclusion of additional qualifying benefits.

147. The Scottish Government has also undertaken user research with recipients of the SSMG and parents on low incomes to gather their views on how the BSG should work. In addition to the formal consultation, the Scottish Government has engaged with experts and organisations with an interest in the BSG on various platforms, such as, a half day event, one to one meetings and setting up a Best Start Grant Reference Group which includes third sector organisations, health professionals and local authorities.

## What the Bill does

148. The Bill sets out how the Scottish Ministers may provide assistance to help towards meeting the costs associated with having, or expecting to have,

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a child in the family, and that the eligibility criteria are to be established in regulations.

## Proposal

149. Using these powers, the Scottish Government intends to introduce a new BSG, which will replace the SSMG and expand provision to:

- increase the maternity payment for the first child from £500 to £600;
- introduce payments of £300 on the birth of second and subsequent children; and
- introduce payments of £250 at 2 key points in the early years, at around the time of starting nursery and school.

150. The increase in the value of the payment from £500 to £600 recognises that the SSMG payment has remained unchanged for a number of years and has been eroded by inflation. It will provide families with enough to buy basic essentials for a first baby or can be used to meet whatever needs they have at the time. Re-introducing a payment to second and subsequent children will provide increased support to larger families on low incomes.

151. There are costs for families associated with starting nursery, for example in travel costs, providing changes of clothing and footwear, and in providing items for starting school. Financial pressure has negative effects on maternal health, mental health and family breakdown. Introducing two new payments will help to reduce household costs at these key transitions.

152. In response to the consultation, it has been confirmed that the application window will be extended to six months rather than the three months for the SSMG, to make the grant more accessible to people who apply after their baby is born.

## Alternative approaches

153. Legislation is required to enable the Scottish Ministers to deliver Early years assistance. Some consideration was given to whether provision of items could offer better value for money by providing an opportunity for bulk purchase, and still meet the need. User research shows that this would not meet the needs of all families and the Scottish Government has concerns about the potential stigma attached to the provision of items. Provision of a

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catalogue of items was welcomed by some who live remotely, need adapted items or would like guidance in choosing what they need. The Bill therefore also includes provision to provide assistance in kind so that, in the future, the BSG may be able to offer this option as a choice to parents and carers.

## Employment-injury assistance

### Policy objective

154. The policy objective is to allow the Scottish Ministers to provide assistance to individuals who have suffered an injury, or contracted a disease, at work. It will provide no-fault compensation to recognise what can be health and safety failures at work and negate the need for individuals to take legal action against their employers.

### Current process

155. The Industrial Injuries Scheme (IIS) provides non-contributory no-fault benefits for disablement because of an accident at work, or because of one of over 70 prescribed diseases known to be a risk from certain jobs. The scheme also covers people working on approved employment training schemes or courses. The benefits payable under the scheme are known as Industrial Injuries Scheme benefits, these include:

Benefits with a current caseload and open to new claimants

- Industrial Injuries Disablement Benefit (IIDB);
- Constant Attendance Allowance (CAA) - this is a benefit paid to IIDB recipients if assessed as in need of constant care. It is paid at four rates;
- Exceptionally Severe Disablement Allowance (ESDA) - this is a benefit paid to IIDB claimants if they receive the top two rates of CAA;
- Reduced Earnings Allowance (REA) – a weekly benefit paid to compensate for loss of earnings as a consequence of an injury or disease that occurred prior to 1 October 1990. Can be paid on its own or alongside IIDB; and

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- Retirement Allowance - a weekly benefit paid to REA claimants who reach state pension age and have given up regular employment.

## Benefits with a current caseload but closed to new claimants

- Unemployability Supplement - a weekly benefit paid to IIDB claimants who are incapable of any work, and are likely to remain so, as a result of work related disablement. This benefit was abolished for new claimants in 1987, but remains in payment for existing claimants; and
- Industrial Death Benefit - a weekly benefit paid to the dependents of employees who died as a consequence of a work related disease or injury. This benefit was abolished for new claimants in 1988, but remains in payment for existing claimants.

156. These benefits are currently delivered by the UK Government through DWP. The accident must take place in Great Britain and the disease and occupation must be 'prescribed'. Self-employed workers are excluded from the scheme. IIDB is non-means tested, no-fault and non-contributory. There is no requirement to have been in an occupation for a defined time and a claim can be made at any time with some exceptions (deafness and asthma), but 90 days must have elapsed since the date of the accident or onset of prescribed disease.

## Consultation

157. A large number of respondents to the social security consultation supported the continuation of IIS as a separate scheme. Some of these suggested ways that the current UK system could be improved. The main reason given for retaining the scheme was its role in compensating those who were injured at work. A few of those who responded described ways in which the system should be refined. These were mainly around the list of prescribed diseases (which reflects a more industrial age when the scheme was introduced) and the gender impact of this.

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## What the Bill does

158. The Bill sets out how the Scottish Ministers may provide assistance to individuals who have suffered an injury, or contracted a disease, at work, and that the eligibility criteria be established in regulations.

## Proposal

159. The Scottish Government's immediate priority is to ensure a safe and secure transition so that those in receipt of IIS at the point of transition continue to receive it at the right time and the right amount. The Scottish Government is not actively considering changes to eligibility, as it currently stands, at the point of transition. The Scottish Government believes there are improvements to be made, such as: providing employment support to those who want it; increasing awareness of occupational health and safety; and the assessments process. The Scottish Government, in partnership with those in receipt of ill-health and disability benefits, and the Industrial Injuries Advisory Group will continue to consider options.

160. The approach taken in the Bill will enable the Scottish Ministers to develop options for future changes to Employment-injury assistance in the medium-term, such as changing the list of prescribed diseases and to add or change the existing model for eligibility and administration of awards.

161. The 2016 Act prevents the current UK Industrial Injuries Advisory Council (IIAC) providing advice to the Scottish Ministers. The IIAC continuously monitor emerging and new scientific evidence and provide advice and recommendations to the UK Ministers on prescribed diseases and relevant occupations. The Scottish Government recognises the important role that this Committee has and is currently considering options for how this function could be provided in Scotland.

## Alternative approaches

162. Legislation is required to enable the Scottish Ministers to deliver IIS benefits. In developing this Bill, the Scottish Government has considered the UK Government's approach to IIS and has decided to develop options for future changes to Employment-injury assistance over the medium-term. The

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legislation also provides scope for assistance to be given in kind so that, in the future, a choice could be offered to individuals.

## Funeral expense assistance

### Policy objectives

163. The policy objective is to allow the Scottish Ministers to provide assistance to people on low incomes to help meet the costs associated with organising the funeral of a relative or close friend.

### Current process

164. The Funeral Expenses Payment, provided for in the Social Fund Maternity and Funeral Expenses (General) Regulations 2005 (as amended), is a payment available to people on certain qualifying benefits, which are used as a proxy for low income, who are responsible for arranging a funeral. In order to be eligible, the person arranging a funeral must also be in a specified relationship with the deceased person. The payment covers the costs for the purchase of graves and burial or cremation fees. The amount awarded to meet these fees is uncapped. The payment also provides up to £700 towards other costs associated with a funeral.

### Consultation

165. In addition to the social security consultation, the Scottish Government has undertaken a range of engagement activities with stakeholders on improvements to the current Funeral Expenses Payment. This includes a stakeholder reference group, round table discussions with different sectors, and the National Conference on Funeral Poverty in November 2016.

166. Themes emerging from the consultation and other stakeholder engagement include:

- broad agreement that it takes too long to process claims and make payments at present;
- it is difficult to determine in advance whether someone is likely to be eligible for the payment;

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- while many supported the current three month timeframe, some respondents to the consultation suggested that a longer time period for applications would be desirable;
- there was most support to include: removal or collection of the deceased; care and storage of the deceased before the funeral; hearse or transport; and professional funeral directors fees;
- many respondents believed that funeral costs had increased substantially in recent years and that the payment should be more in line with actual costs; and
- awareness of the benefit is low: a large number of respondents to the consultation supported awareness raising of the benefit by funeral directors, homes and registrars, while many respondents supported awareness raising by NHS or health professionals, local authorities, Scottish Government, DWP, Scottish social security agency, advice services, third sector and community groups.

## What the Bill does

167. The Bill sets out how the Scottish Ministers may provide assistance to people on low incomes to meet the costs associated with organising the funeral of a relative or close friend, and provides that these details are to be established in regulations.

## Proposal

168. The approach taken in the Bill will enable the Scottish Ministers to be more responsive to any changes in economic and social conditions.

169. The Scottish Government intends to create a more predictable benefit, so that people can make better informed decisions when they are committing to paying for a funeral.

170. Recognising that one of the stresses caused in the process is delays in hearing about an award decision, the Scottish Government will aim to process applications for the new benefit within ten working days of receipt of a completed application and make payments as soon as practicable thereafter.

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171. When developing regulations on Funeral expense assistance, the Scottish Government will build on the range of engagement with experts and organisations that has already been undertaken, including the views of the Funeral Payment and Funeral Poverty Reference Group. It will also look to learn from the experience of people who have previously received the Funeral Expenses Payment, including through its Experience Panels. The Scottish Government also expects to work with individuals and organisations when developing the application for Funeral expense assistance, in order to streamline this process and improve the parts that applicants find most difficult at present.

## Alternative approaches

172. Legislation is required to enable the Scottish Ministers to deliver funeral expense assistance. In developing this Bill, the Scottish Government has considered the UK Government's approach to the Funeral Expenses Payment and has decided that the UK approach does not reflect the Scottish Government's principles or the need to create a benefit which will be more predictable and transparent and which can be paid out more easily following a less intrusive process. The legislation also provides scope for assistance to be given in kind so that, in the future, this option could be offered, if this was considered to be a more suitable way to deliver support.

## Short-term assistance

### Policy objectives

173. The policy objective is to enable the Scottish Ministers to make payments to individuals on a short-term basis. The policy intention is, principally, to protect the individual's right to challenge decisions and to access administrative justice. It will ensure that - in circumstances where a determination is made which results in the individual's payments being reduced or stopped - the individual is not discouraged from challenging that decision or from accessing administrative justice by having to manage, for a period, with a reduced income.

174. For the avoidance of doubt - the policy intention, in providing for short-term assistance in this Bill, is not to supplement or supplant the provision of

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hardship assistance by local authorities under the Welfare Funds (Scotland) Act 2015.

## Current process

175. There is no equivalent form of short-term social security assistance currently provided by the UK Government. There are forms of discretionary hardship assistance, such as that formerly provided on a UK basis via the Social Fund and now provided in Scotland via the Scottish Welfare Fund, but these are a separate matter and will not cut across the provision of Short-term assistance under this Bill.

## Consultation

176. The consultation did not directly seek respondents' views on the provision of Short-term assistance. Any relevant responses to other sections of the consultation have been taken into account in developing policy in this area.

## What the Bill does

177. The Bill delegates an enabling power to the Scottish Ministers to set out in regulations who is eligible for short-term assistance and what someone who is entitled to it is to be given by way of assistance. Whilst it will allow the Scottish Ministers to give assistance on a short-term basis to meet ad hoc needs, it's main purpose is to be available to persons who have been entitled to assistance of an on-going nature (as opposed to a one-off payment) in the event that the person's entitlement to that on-going assistance has been stopped, or reduced, and the decision to stop or reduce the person's entitlement is subject to a re-determination or an appeal. Further details of the circumstances in which Short-term assistance will be given and of any further eligibility criteria will be set out in regulations.

## Proposal

178. The purpose of this proposal is to ensure that an individual's rights to challenge a decision and/or to access administrative justice are not impeded - as might otherwise be the case if the individual had to manage for a period

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with a reduced income due to lowered payments or their payment being stopped.

## Alternative approaches

179. The Scottish Government has considered the UK Government's approach to ensuring that people are supported when challenging social security decisions and has decided that the UK approach does not reflect the Scottish Government's principles or its ambition to establish a social security system that will operate on the basis that people have a right to administrative justice.

## Chapter 3: Determining entitlement

### Policy objectives

180. The policy objective is to ensure that the process by which an individual's entitlement is determined reflects the Scottish Government's guiding principles, including the principle that people should be treated with dignity and respect. A further policy objective is that the process should operate on the basis that people have specific rights, which should be supported by the legislation.

181. The word "determination" is used to indicate the crucial point at which it is determined that the individual is or is not entitled to assistance. The Scottish Government's policy is that people should have a right to a determination of their entitlement, which the Scottish Ministers must make. This means that there should be no administrative discretion, to allow the Scottish Ministers to refuse to make a first determination on receipt of an application in the appropriate form. If the determination is that the individual is entitled, then the individual should then have a right to receive assistance.

182. If the individual has a right to assistance, it follows that their right cannot be taken away unless the first determination is overturned, either by a new determination, re-determination or on appeal. By extension, this means that once any determination is made (whether the result is that the person is found to be entitled or not entitled), then that determination should stand until it is overturned by either a re-determination or an appeal.

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183. The individual then has a further right, which is their right to a re-determination and appeal if they disagree with the outcome of their earlier determination. Putting these rights together, which must happen because neither right can be taken away (although the individual can decide to waive their rights) means that the process of making a determination (either a first determination or any future determinations) is not finished until the individual has either waived or exhausted their rights to a re-determination and appeal.

184. A further policy objective is to put in place an effective process by which people may apply for assistance. Achieving this will balance two different interests - the interest of the individual and the interest of the process. People will need to make applications in different ways for different types of assistance, so the process will need to be flexible in order to accommodate this. For example, a person may receive Winter heating assistance by virtue of their being also in receipt of a qualifying benefit, such as a state pension. In this example, the individual would not have to make an application; their benefit would be paid automatically into their bank account. However, the process also has to operate within defined parameters - for example, so that it is clear when the application process is complete and the individual can expect a decision. In addition, it is necessary to have a process in place whereby an individual decides not to proceed with their application.

185. A final policy objective is to put in place a process by which the individual may be notified of the results of any determination made and of their right to a re-determination should they disagree with the determination that has been made.

## Current process

186. The UK Government has not developed a common process for applications, determination or notification of entitlement to different types of assistance that applies, even at a high level, to all of the benefits that will be devolved to Scotland. Different existing UK benefits have different application processes - for example, Carer's Allowance allows for applications online but an application for Industrial Injuries Disablement Benefit can only be made by completing a hard-copy, paper form. The Scottish Government believes these different rules and processes are confusing and unfair, because the process will be more accessible to people applying for some benefits than it will be for others. The Scottish Government also believes that a generic process that

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applies, at a high-level, to all types of devolved assistance will be simpler and easier to understand.

## Consultation

187. The consultation did not directly seek respondent's views on the process by which determination of entitlement to different types of assistance might be made. However, some of the responses to the consultation section, "Delivering social security in Scotland", are relevant and have been taken into account in developing policy in this area. Examples of relevant responses include:

- information and communication should be clear, concise and available in the format most preferred by the individual; and
- the new social security system should be fairer and more consistent, avoiding the current 'postcode lottery' that people said they experience at present.

## What the Bill does

188. In order to put in place an effective process for an individual to apply for a determination, the Bill creates certain requirements - that an application must be made in such form and accompanied by such evidence as may be required. This means that an individual's application will not be complete - i.e. it will not trigger the individual's right to a determination - until it is properly made in the specified form - so it will be clear when the individual has provided all of the information required for a determination and when they have not.

189. The Bill does not specify the form in which an application must be made. This is to allow for full accessibility and for people to apply in the way that best suits their individual needs and circumstances.

190. Similarly, the Bill does not specify the evidence that must accompany an application. Although the process, at a high level, should be more or less the same for all types of assistance provided, different types of assistance will require different evidence. The Bill provides that the specific evidence required for each type of assistance should be set out in regulations.

191. In recognition of the need to ensure that people have all the information they need, before making an application, the Bill places a duty on the Scottish

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Ministers, to publicise what information is required. In practice, this will mean setting the requirements, and the evidence required, clearly in regulations and guidance, and working with stakeholders, and others to ensure that these requirements are communicated and understood.

192. The Bill also clarifies what will happen if an individual decides not to proceed with their application. For operational reasons, it is necessary to be clear when an application has been withdrawn or 'closed' - as opposed to being open or incomplete - for example, because the individual has not yet provided all of the necessary evidence.

193. Once a determination as to their entitlement has been made, the Bill provides that the individual should be informed of the outcome. This should apply in all cases, even when determinations have been made 'across the board', for example when the amount paid to all recipients is uprated to take account of inflation.

194. The Bill is not prescriptive about precisely how the individual is informed. Again, the channel of communication will be guided by the aim to be fully accessible and to meet the needs and circumstances of the individual for example by post, email, online or phone call.

195. The Bill also requires that Scottish Ministers must provide the reasons for the determination that has been made. This should happen in all cases, even when the determination is straightforward. For example, in relation to Winter heating assistance, the Scottish Government proposes that they should be told that they are being given Winter heating assistance because they are in receipt of a state pension.

196. When the individual is notified, they are also to be notified of their right to request a re-determination and appeal, should they disagree with the determination, and how to exercise it. The right to a re-determination and appeal is another fundamental right that is prescribed in legislation and is discussed from paragraph 200.

## Proposal

197. The development of detailed operational procedures and systems that will support the application, determination and notification processes are on-going. The Scottish Government also expects to involve stakeholders - such

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as those who have enlisted to take part in Experience Panels, the members of its Disability and Carer's Benefits Expert Working Group and the members of other advisory groups - in its on-going and future operational policy development and service design. The Scottish Government would be pleased to say more about this work, at such stages during the Bill process as may be appropriate.

## Alternative approaches

198. The Scottish Government's proposals for the process[es] by which an individual's entitlement may be determined, either by the Scottish Ministers or by other bodies, have been developed on the basis of the Scottish Government's guiding principles and evidence provided in response to the consultation.

199. In developing this Bill, the Scottish Government has also considered the UK Government's approach to the application process and has decided that the UK approach does not reflect the Scottish Government's principles or the need to ensure that the high-level process is consistent, easy to understand and accessible across the board.

## Re-determination

### Policy objectives

200. The policy objective is to ensure a process that provides a right for individuals to challenge a determination, should they disagree with it. This process, known as a 're-determination' should have clearly published procedures and timescales, and options for redress should the agency fail to meet those. This will ensure that the agency and individuals are clear on their responsibilities under the Scottish social security system.

### Current process

201. In the current DWP process for challenging decisions, the individual has one calendar month to ask DWP for a Mandatory Reconsideration (MR). There is no published time limit in which DWP must respond to the MR request.

## Consultation

202. The responses to the Scottish Government consultation on social security highlighted a strong desire to introduce a different review process from that used by DWP, with many particularly requesting that MR should not be used and that clear procedures and timescales are set for reviews. In particular, a number of issues with DWP's current MR process were raised:

- the lack of a time limit for the reconsideration;
- the long delays experienced;
- the lack of clarity about the process;
- the belief that it is not always based on a fair appraisal of all evidence;
- the belief that it hinders the process of challenging decisions, as very few reconsiderations result in changes to decisions;
- concern that individuals don't retain their entitlement as they await the outcome of the reconsideration; and
- the hardship, uncertainty and poverty caused as a result of lengthy reconsideration processes.

## What the Bill does

203. The Bill places a duty on Scottish Ministers to re-determine an individual's entitlement to assistance, where a request is made, and that the timescales for doing so should be set in regulations. It requires that Scottish Ministers publicise the form in which a request for a re-determination should be made. For example a written and signed request might be required (though in practice most applications are likely to be capable of being made electronically). Scottish Ministers must then inform the individual of the outcome of the re-determination, the reasons for it, and that they have the right to appeal the determination if they so wish.

204. Where a decision following a request for re-determination is not made within the period allowed by regulations, the Scottish Ministers must inform the individual of their right immediately to appeal to the First-tier Tribunal for Scotland. The individual could choose to wait for the Scottish Ministers' re-determination before deciding whether or not to go to the Tribunal.

## Proposal

205. The Scottish Government proposes that individuals should have a right to ask that their entitlement be looked at again by the Scottish Ministers if they disagree with a determination. This will consist of 2-stages, first a re-determination stage and then an appeal to a First-tier Tribunal.

206. For those benefits, and decisions within benefits, that will have a right of appeal, the process for challenging a decision will first require a re-determination. It is called a 're-determination' as during this stage, the agency would put aside the original determination and go through the entire process of making a new determination rather than just examining whether the original decision was right or not. If payments are being made (for example, if the determination being challenged is a decision to reduce the payment level of a continuing payment) the Bill makes provision (in the form of Short-term assistance) which will allow payments to continue at their original level until the individual has waived or exhausted their rights to a re-determination and appeal.

207. To ensure a rights-based approach, an individual would be able to request a re-determination without the need to provide further evidence. The individual will also be able to supply further evidence, if they so wish, which the agency will take into consideration during the re-determination process.

208. A different agency staff member would carry out the re-determination independently of the original decision maker. The agency will also engage with the individual throughout the re-determination process. As the re-determination would be a new decision process from the start, there is a possibility that the re-determination outcome may be less favourable for the individual. However, in keeping with a rights based approach, the individual would be notified of that being a potential outcome when they receive a notification of their first determination.

209. Once a re-determination has been made, the individual will be notified of the outcome, the reasons and their further right to appeal to a First-tier Tribunal should they still disagree with the outcome. There will be clear procedures and timescales for re-determinations, published in accessible formats. The Scottish Government will also publish information on the options for redress, in the event that the agency does not meet the timescales. The Scottish Government proposes that appropriate redress would be for the

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individual to immediately be able to exercise their right to lodge an appeal to the First-tier Tribunal, to have their case determined by the Tribunal - unless they choose to await the outcome of the agency's re-determination.

210. This will ensure where an applicant disagrees with a decision, they will know how to request a re-determination, when they are likely to get a response, and how to make contact if they want to find out more. If someone disagrees with the outcome of the re-determination, then they will be able to appeal against it and will know what they need to do to raise an appeal and the timescale in which they need to do it.

## Alternative approaches

211. Consideration was given to whether a re-determination stage should exist before an individual could appeal to the First-tier Tribunal. Having a re-determination stage ensures decisions will be reconsidered quickly, is more accessible for the applicant than a tribunal, and gives the agency an opportunity to review its decisions and put right errors it identifies. Without a re-determination stage, it would mean that all decisions being challenged would go to a tribunal. This could lead to the tribunal being inundated with large volumes of appeals, which will increase the likely waiting times for individuals to have their cases heard, resulting in a frustrating experience.

## Right to appeal to First-tier Tribunal

### Policy objectives

212. The policy objective is to ensure a process that provides a right for individuals to appeal to a First-tier Tribunal (should they disagree with the agency's re-determination). The process should have clearly published procedures and timescales for appeals that are accessible to users. This will ensure individuals are clear on their responsibilities under the Scottish social security system.

### Current process

213. If the MR does not alter the original decision, then the individual can appeal to the First-tier Tribunal's Social Security and Child Support chamber

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that is administered by Her Majesty's Courts and Tribunals Service (HMCTS) within 1 month of the MR.

## Consultation

214. A total of 104 people answered the question of whether a tribunal should be used as the forum for dispute resolution for the Scottish social security system. The majority of those responding (94%) were supportive, with respondents believing it to be proportionate and independent.

## What the Bill does

215. The Bill provides a right of appeal to the First-tier Tribunal for Scotland if an individual disagrees with the outcome of a re-determination or if the duty to make such a re-determination has not been completed within the timescale set by regulations. An appeal should be made within 31 days. Beyond the 31 days, an appeal can only be made with the Tribunal's permission. In no event can an appeal be taken more than a year after the date of notification.

216. The First-tier Tribunal can uphold the determination (in effect, refuse the appeal), or it can make a different determination of its own as to the person's entitlement to assistance.

## Proposal

217. If an individual remains dissatisfied with the re-determination made by the agency, they will be able to make an application to a First-tier Tribunal to appeal the outcome of the re-determination. A further appeal right will exist for onward appeal to the Upper Tribunal only on the ground of error of law. Alongside this, there will be clearly published procedures and timescales that are accessible to users.

218. The Tribunals (Scotland) Act 2014 allows for separate entitlement chambers to be created in the Scottish Tribunals. It is the intention of the Scottish Ministers to set up a new chamber that will hear appeals for devolved benefits. As part of the 2016 Act devolution programme, the management and operation of certain reserved tribunals, including the existing Social Security Tribunal is being devolved to Scotland. Once up and running, the devolved Tribunal will be administered by Scottish Courts and Tribunal

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Services (SCTS) and will hear appeals on devolved benefits, as well as appeals made by Scottish claimants on reserved benefits.

219. To ensure that individuals are aware of their responsibilities and the timescales in which they must lodge their appeal with the Tribunal, it is proposed that following the re-determination by the agency, they will have 31 days from the date of notification to lodge an appeal with the tribunal. There will be occasions, however, when an individual may not be able to lodge an appeal within 31 days. In those cases and where good reasons exist, an appeal may be made after this but only with the permission of the First-tier Tribunal. A maximum time limit of 12 months from the date of the notification would be for exceptional circumstances.

220. This will ensure that, if someone disagrees with the outcome of the re-determination, then they will be able to appeal against it and know what they need to do to raise an appeal and the timescale in which they need to do it. Once the tribunal has considered the appeal, the individual will be notified of the outcome which will explain the decision, the reasons and if a further appeal right exists to appeal to the Upper Tribunal.

## Alternative approaches

221. There are alternatives to tribunals but the social security tribunals system is independent and trusted, and the majority of those that responded to the consultation were supportive. The Scottish Government therefore believes this to be an appropriate approach for appeals that reflects its guiding principles.

## Obtaining information to make determination

### Policy objectives

222. The policy objective is to put in place a process, in instances where the individual has not provided all of the evidence required at the first attempt, by which further information may be requested. In such instances, the guiding assumption is that the agency will contact the individual and request such further information as may be required.

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## Current process

223. There is currently no common process by which further information is requested which applies, even at a high level, to all of the benefits that will be devolved to Scotland.

## Consultation

224. The consultation did not directly seek respondents' views on the process by which further information should be requested. However, some of the responses to the consultation were relevant and have been taken into account in developing policy in this area - particularly, where respondents discussed the use of digital technology and felt that it should be used where possible, but not imposed, as many people do not have access to digital technology and where respondents felt that the new social security agency should make some provision for face to face contact.

## What the Bill does

225. The Bill sets out how the Scottish Ministers may request further information to enable them to determine an individual's entitlement. If that information is not provided within the period specified, the Bill allows the Scottish Ministers to proceed to a determination.

## Proposal

226. The Scottish Government does not propose to fix time limits, for requesting and receiving further information, in the Bill. This is to allow for the necessary administrative flexibility. Some information - for example a date of birth or national insurance number will be easy to obtain and may be provided quickly. Other information - for example, medical information may require more time. In each case, it will be made clear to the individual what they need to provide and when they are expected to provide it.

227. If the further information requested is not provided by the end of the period allowed, the Scottish Government proposes that the agency should have the option to either extend the period or to proceed to make a determination. The practical operation of this part of the process will be

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dependent, to an extent, on effective communication between the agency and the individual. The additional flexibility (e.g. the discretion to extend the period allowed or to proceed to a determination without further information) is provided in order to support, so far as possible, good communication and relationship building between agency staff and people applying for assistance.

228. The development of detailed operational procedures and systems that will support the application, determination and notification processes are on-going. The Scottish Government also expects to involve stakeholders - such as those who have enlisted to take part in Experience Panels, the members of its Disability and Carer's Benefits Expert Working Group and the members of other advisory groups - in its on-going and future operational policy development and service design. The Scottish Government would be pleased to say more about this work, at such stages during the Bill process as may be appropriate.

## Alternative approaches

229. In developing this Bill, the Scottish Government has also considered the UK Government's approach (where known) to obtaining further information and has decided that the UK approach does not reflect the Scottish Government's principles or the need to ensure that the high-level process is consistent, easy to understand and accessible across the board.

## Notifying a change of circumstance

### Policy objectives

230. In order to ensure the right amount of benefit is paid to the right people at the right time, it is important that, when there is a relevant change to circumstances during a period of a continuing payment, there is a responsibility to bring those changes to the attention of the agency, in order that the required action can be taken.

231. Broadly speaking, "relevant changes" will be changes which, had they been in effect at the time of the first determination, might have changed the outcome of that determination. Examples of relevant changes might be that the person is no longer caring for someone else or that there has been a material change in the person's medical condition (for example, the person

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may have recovered from illness or a new course of treatment may have restored their health).

232. In terms of lifting the duty to notify a change in circumstances, it is envisaged this will be required when whole life benefit entitlements are considered, for example where a person has a terminal illness or is severely disabled. This would fit with the rights-based approach taken in terms of social security entitlement, and is also consistent with the commitment to the dignity and respect of individuals.

233. The responsibility to tell the agency about a change in circumstances is an important one. A failure to do so, if it is not identified until a later date, may result in an overpayment and the individual incurring a liability to re-pay. This provision also makes a link to the offence that may be committed if there is a failure to notify a change in circumstances, which is detailed in Chapter 5, section 40 and 41 of the Bill.

## Current process

234. Issues of propriety and good practice in the handling of Scottish public funds are outlined in the Scottish Public Finance Manual (SPFM). The SPFM is issued by the Scottish Ministers to provide guidance to the Scottish Government and other relevant bodies on the proper handling and reporting of public funds, setting out the relevant statutory, Parliamentary and administrative requirements. The guidance further emphasises the need for economy, efficiency and effectiveness, and promotes good practice and high standards of propriety.

## Consultation

235. The consultation did not directly seek respondents' views on the process by which a duty would be placed on people to notify a change in circumstance, and how that may be lifted. However, some of the responses to the consultation were relevant and have been taken into account in developing policy in this area - particularly, where respondents discussed matters relating to fraud and managing overpayments.

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236. The majority of respondents agreed that the existing Scottish Government approach to fraud should be adopted for use by the social security agency, with overall support from the main respondent organisations.

## What the Bill does

237. The Bill sets out a duty on a person to notify of a change in circumstance that could affect their entitlement to assistance. The nature of the change in circumstance that must be notified, and how they should be notified, will be made clear to those persons receiving continuing entitlement, as part of the benefit they are receiving. Further to this, an offence will be committed if a person fails to notify a change in circumstance that led to their determination of entitlement.

## Alternative approaches

238. In developing this Bill, the Scottish Government has also considered the UK Government's approach (where known) to being notified of a change of circumstance and has decided that the UK approach does not reflect the Scottish Government's principles or the need to ensure that the high-level process is consistent, easy to understand and accessible across the board.

## Further provision about determining entitlement

### Policy objectives

239. The policy objective is to make the process of determination as simple and straightforward as possible, and to allow a decision about entitlement for future periods to be made at the same time as the first determination e.g. where a person is entitled for a type of assistance that may be paid on a continuing basis.

240. A further policy objective is to put in place a system that may allow a determination to be made, in some cases, without the individual necessarily having to always make an application. This is because some types of assistance may be available without the need for an application - for example, Winter heating assistance may be paid automatically, if the individual is in receipt of a qualifying benefit such as a state pension.

## Current process

241. There is currently no common process for the on-going determination of entitlement to different types of assistance or for an application for a determination that applies, even at a high level, to all of the benefits that will be devolved to Scotland.

## Consultation

242. The consultation did not directly seek respondents' views on the process by which determination of entitlement to different types of assistance might be made. However, some of the responses to the consultation section, "Delivering social security in Scotland", are relevant and have been taken into account in developing policy in this area.

## What the Bill does

243. The Bill makes provision for separate, lower-level decisions to be considered together, when making a determination. These decisions are:

- a decision about whether or not a person satisfies the eligibility rules (which will be set out in regulations for each type of assistance);
- if the person does satisfy the eligibility rules, a decision about what assistance the individual is entitled to (for example, some types of assistance (e.g. Disability assistance) may be provided in the form of benefits with different payment levels (e.g. PIP). An individual may satisfy the eligibility rules - i.e. they are eligible for Disability assistance in the form of PIP but a further decision will be needed, to decide what level of PIP payment they are entitled to; and
- if a person satisfies the eligibility rules and it has been agreed that they are entitled to a certain level of payment and that their entitlement will continue for a period of time, then the final decision will be the length of time that they will continue to receive payments.

## Proposal

244. Making a determination in this way will enable the system to deal with the fact that information on the individual's circumstances, provided at the

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time of the original application will only be known to be correct at that time - but some determinations will be for payments to be made over a (possibly indefinite) future period, during which the individual's circumstances may change.

245. The Scottish Government believes that the best way to deal with applications for entitlement to continuing payments is for the first determination to be made on the basis of certain, key assumptions - for example, for an application for Carer's assistance, the determination may be made based on an assumption that the person will be caring for someone else, for a certain period. Alternatively, the determination may be made that the person will be caring for someone else for an indefinite period.

246. These assumptions will be made and/or tested based on the application and any evidence that is provided in support of the application. The Scottish Government proposes to set out the detail of the assumptions (for example, assumptions that certain illnesses or medical conditions will continue to have effect over a longer period) that may be made when determining applications for entitlement to continuing payments in the regulations for the individual benefits. This is because these assumptions will be dependent on the detailed design of the benefits to be provided under different types of assistance. In practice, the types of assistance that may be paid on a continuing basis will mostly be those covered by section 22 of the 2016 Act i.e. disability and carers assistance.

247. The development of detailed operational procedures and systems that will support the application, determination and notification processes are on-going. The Scottish Government also expects to involve stakeholders - such as those who have enlisted to take part in its Experience Panels, the members of its Disability and Carer's Benefits Expert Working Group and the members of its other advisory groups - in its on-going and future operational policy development and service design. The Scottish Government would be pleased to say more about this work, at such stages during the Bill process as may be appropriate.

## Alternative approaches

248. In developing this Bill, the Scottish Government has also considered the UK Government's approach (where known) to making determinations and has decided that the UK approach does not reflect the Scottish Government's

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principles or the need to ensure that the high-level process is consistent, easy to understand and accessible across the board.

## Chapter 4: Recovery of assistance given in error

### Policy objectives

249. Once payments of devolved assistance have fully commenced, around £2.9 billion (in 2017/18) of social security spend will come within the responsibility of the Scottish Ministers. In practical terms, this means regular benefit payments will be made to around 1.4 million people in Scotland. This new undertaking is on an unprecedented scale in the Scottish context and will involve processing the same number of payments every week that the Scottish Government currently makes every year.

250. It is an overarching policy aim that the right payments are made to the right people at the right time. However, given the volume of payments, it is reasonable to anticipate that errors will be made. It is also likely, given the amounts expected to be paid, that there will be some attempts to de-fraud the public purse, either via fraudulent applications for assistance or by other means. The practical implication of the likelihood of error in the system or fraud is that, at times, incorrect payments will be made.

251. Therefore, the key policy objective is to support the appropriate correction of these errors and develop the appropriate processes to recover payments, where appropriate. In keeping with legislation in other areas, the Scottish Government's policy here is that there should be a fixed period after which an overpayment may not be recovered. It is also proposed that where overpayments are made as a result of agency error, they will not be pursued, unless under exceptional circumstances such as a very large and obvious overpayment. In developing policy in this area, the Scottish Government is mindful that it should:

- reflect the Scottish Government's social security principles;
- accord (in due course) with any part of Scotland's social security charter which may be relevant; and
- take the financial circumstances of the debtor into account (where these are known).

## Current process

252. In Scotland, the Scottish Public Finance Manual (SPFM) is issued by the Scottish Ministers to provide guidance to the Scottish Government and other relevant bodies on the proper handling and reporting of public funds. It sets out the relevant statutory, Parliamentary and administrative requirements, emphasises the need for economy, efficiency and effectiveness, and promotes good practice and high standards of propriety.

253. The SPFM provides guidance on the prevention, detection, reporting and handling of fraud and also how public sector organisations should deal with payments made in error. This guidance is equally applicable to all public sector organisations to which the SPFM directly applies, including constituent parts of the Scottish Administration and bodies sponsored by the Scottish Government.

254. There is a significant amount of legislation giving DWP the power to investigate and prosecute fraud, as well as dealing administratively with overpayments, debt, criminal offences and the imposition of penalties. Although these measures are carried in a wide number of acts and regulations, the main primary legislation is the Social Security Administration Act 1992. This Act also sets out the measures that can be laid down in regulations - for example, key regulations in relation to overpayments and debt are the Social Security (Overpayments and Recovery) Regulations 2013<sup>20</sup>.

255. Statistics for 2015/16 from DWP gives an indication of the level of overpayments currently made at a Great Britain level. It is estimated that 1.9% of total benefit expenditure (£172.3 billion) was overpaid, in that year, due to fraud and error (up from 1.8% in 2014/15) and that the estimated value of overpayments was £3.3 billion, with fraud accounting for £1.9 billion. The net government loss, after recoveries, was £2.2 billion, or 1.3% of benefit expenditure.

## Consultation

256. Key findings from the social security consultation were:

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<sup>20</sup> S.I. 2013/284.

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- most respondents felt that existing arrangements for recovering overpayments could be improved, with the main themes being importance of the rate and level of deductions and what type of overpayments should be repaid;
- on level of deductions, consideration of individual circumstances was felt to be important, the main issues being around flexibility, impact, multiple deductions being made, appeals on-going, etc. The issue of impact was around effect on people's lives, such as stress, increasing poverty, food banks and high rates of lending;
- on type of overpayments to repay, there were mixed comments. Many respondents felt certain types should not be recovered – for example, discretion should be used and official error should not be recovered, whereas some organisations felt all overpayments should be recovered to ensure fairness. Other suggestions included clarity and simplicity of application process to reduce errors, importance of information sharing to act quickly, advice and support, and the culture and behaviour of agency staff; and
- a large number of respondents felt financial advice could help, although some also felt a focus on early intervention and prevention were important.

## What the Bill does

257. The Bill makes provision to establish a liability on an individual who has been given assistance to which they were not entitled, and once a liability has been established, to enable the Scottish Ministers to recover the overpayment. Where the Scottish Ministers are aware of a person's financial circumstances, it provides that they must consider those circumstances in deciding whether to pursue recovery of a liability and also in considering how that money is to be recovered, for example in considering whether to make deductions from other assistance that is to be provided to the individual.

## Proposal

258. Establishing a liability is important because the Scottish Government's focus, in making provision for the recovery of assistance given in error, is primarily on recovery where it is clear that the liability has been incurred as a result of an error on the part of the individual. It is also important to establish

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a liability in law, which is required in order for the Scottish Government to access the range of recovery mechanisms currently available via civil litigation.

259. Any decision that establishes a liability will amount to a new determination of the individual's entitlement and will, therefore, be subject to the same rights of re-determination and appeal as any other determination.

260. The Scottish Government expects that the process will differ for assistance paid on a continuing basis and one-off payments.

261. For assistance paid on a continuing basis, where liability has been established for overpayment, the Scottish Government proposes that the agency would:

- work towards to a mutually acceptable agreement with the individual to repay monies at an affordable rate from future payments of assistance; and
- where agreement cannot be reached, the agency may implement a schedule of repayment from future payments of assistance.

262. For a one-off payment of assistance, where liability has been established for overpayment, the agency would:

- work towards to a mutually acceptable agreement with the individual to repay monies at an affordable rate from future payments (if the individual is in receipt of payments of another type of devolved assistance); and
- if the individual receives no other devolved assistance, the agency will work towards to a mutually acceptable agreement with the individual to repay monies at an affordable rate (from sources other than recurring benefits).

263. Where the individual is not in receipt of any other type of devolved assistance and a mutually acceptable agreement cannot be reached, the Scottish Government proposes that, where it is possible and appropriate to do so, recovery may be attempted through the range of recovery mechanisms currently available via civil litigation. These have the advantage of being common practice (so they are familiar and easily understood) and wholly defensible and appealable, as the individual would be able to challenge any attempt to recover via the courts during proceedings.

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264. For the avoidance of doubt, the Scottish Government does not propose to replicate the DWP's existing civil penalty regime in relation to overpayments. Civil penalties are currently applied where DWP decides, on the balance of probabilities that an overpayment has arisen as a result of negligence on the part of the individual but that the individual has not knowingly attempted to commit fraud. The Scottish Government does not consider civil penalties to be consistent with its social security principles or with the need to have regard for the financial circumstances of the individual.

265. In all cases, the Scottish Government accepts that there will be limited circumstances in which it will be both possible and appropriate to recover liabilities from individuals who are in receipt of payments of devolved assistance. That is why the Bill is explicit about the need to have regard for the financial circumstances of the individual.

266. Once a liability has been established, the Scottish Government proposes that the short negative prescription period of 5 years to apply to this obligation. It is proposed this would be deliverable by amending para 1 of schedule 1 of the Prescription and Limitation (S) Act 1973, which would automatically add the protection for court decrees at para 2 of that schedule.

267. This approach seems to fit better than any longer period, given that people should be treated with dignity and respect, which also supports prompt action to establish whether or not to recover.

## Alternative approaches

268. The Scottish Government intends, at all times, to ensure the proper stewardship of public funds by making certain that the right payments are made at the right time to the right people. However, in light of the scale of devolved social security spending (roughly 15% as a proportion of the total of all social security spending in Scotland annually), the relative population size and the need to reflect its social security principles, the Scottish Government believes a more proportionate response is required. As such, the aim is not to put in place a devolved Scottish equivalent of the very extensive regulation, systems, processes and manpower that DWP expends significant resource annually operating, in order to recover overpayments.

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269. The Scottish Government believes that a simpler, more proportionate approach - which looks, where necessary, to civil litigation to recover liabilities incurred - would be a better solution for Scottish needs and purposes.

## Chapter 5: Offences and investigation

### Offences

#### **Policy objectives**

270. The Scottish Government's social security system is based on the principle that social security is an investment in the people of Scotland and that the right people should be paid in the right amount at the right time. Therefore, any attempts to obtain social security benefit to which a person is not entitled results in less funding overall for those who need it most. While the main focus will be on prevention of fraud, error and overpayments through the deployment of robust systems and procedures, enforcement action will be required where fraudulent activities take place.

271. As such, the overall policy objective is to safeguard the public investment in benefit expenditure. In order to do that, it must be clear what activity will be considered a criminal offence during the process of applying for social security benefits.

#### **Current process**

272. The Scottish Public Finance Manual (SPFM) is issued by the Scottish Ministers to provide guidance to the Scottish Government and other relevant bodies on the proper handling and reporting of public funds. It sets out the relevant statutory, Parliamentary and administrative requirements, emphasises the need for economy, efficiency and effectiveness, and promotes good practice and high standards of propriety.

273. The SPFM gives guidance on the prevention, detection, reporting and handling of fraud and is equally applicable to all public sector organisations to which the SPFM is directly applicable, including constituent parts of the Scottish Administration and bodies sponsored by the Scottish Government.

## Consultation

274. The majority of respondents to the social security consultation agreed that the existing Scottish Government approach to fraud should be adopted for use by the social security agency. Importantly, comments made by some respondents who thought the current UK approach should not be followed were still suggestive of the need for an approach to fraud.

275. Suggestions for improved approaches included:

- a stronger focus on early prevention;
- a focus on entitlement, presumed innocence and dignity and respect;
- other comments included: the need for empathy and understanding; welcoming the distinction between fraud and overpayments; noting there should be no automatic assumption of guilt; and proportionate responses to fraud; and
- a number of suggestions were made in terms of designing out errors to reduce fraud at the application stage, such as verification of identities and more cross checking of data. Designing a simpler system, which is clear, understandable and consistent is important.

276. On penalties, the majority of respondents felt the current list of offences people could be found guilty of should be retained; with others feeling it should be kept under review. Again, much of what respondents suggested was around how people were treated and the need for differentiation between fraud and error. There was some discussion of new offences that should be added and also around penalties and punishments – with varying views around issues like alternatives to jail (e.g. community service, paying back the fraud), but also the importance of reserving severe punishment for those deliberately defrauding.

277. The question of whether the Scottish Government should impose the same level of penalties for fraud as is currently employed elicited a number of responses. Most felt it should, to ensure consistency across the UK. Concern was expressed about the use of administrative and civil penalties, particularly at the point when fraud is not proven. A few respondents felt that penalties should be harsher.

## **What the Bill does**

278. The Bill describes the offences that can be committed by an individual. The first offence relates to the provision of false or misleading information and the Bill sets out that a person will commit an offence if they provide false or misleading information that results in an error in the determination of their entitlement to assistance. Further to this, the consequences of those actions, if proven, are set out in terms of guidance on the level of fine that can be imposed and the maximum custodial sentences available.

279. The Bill also sets out further offences and penalties where a person fails, or causes another person to fail to notify the agency of a change in circumstance that results in a change to benefit entitlement. It further sets out the penalties for those convicted of committing such offences. This means if there are any relevant changes to circumstances during a period of a continuing payment, then there is a responsibility to bring those changes to the attention of the agency, in order that the required action can be taken. Should such activities occur, the Bill provides that this would constitute an offence being committed, with culpability for such offences being placed on responsible individuals within the organisation.

280. The Bill also provides that individuals within an organisation can be held responsible for an offence committed by the organisation.

## **Proposal**

281. The proposed approach will draw a clear distinction between fraud which (if proved) is a criminal offence, and an unintentional error by the individual, which should be addressed in ways which reflect the person's continued right to access social security support and to be treated with dignity and respect. For example, in terms of providing false or misleading information, there has to be an intention to have done so. Those people who may have provided false or misleading information, but had not intended to do so, will not be criminalised. This could be where an individual has misunderstood an element of an application form, or has made a genuine error.

282. The policy intention is not to criminalise genuine errors made by individuals. Therefore, the provision has been carefully framed to provide that it is sufficient that the person knew, or ought to have known, that the change

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could impact adversely on their entitlement. This means the offence is focused only on expectations of adverse impact, so there would be no question of a crime being committed where, for example, a carer fails to indicate that their hours have changed if the change is that they are now carrying out more duties and could get a higher level of assistance.

283. Where fraud is detected, the approach to dealing with individuals will be important and, while not set out in the Bill, will be explicit in terms of the behaviours exhibited by the agency. This means there will be a presumption of innocence.

284. It is also important to note that the agency will fully consider the facts of any case and any mitigating factors before deciding if it should be passed to the Procurator Fiscal for prosecution. There may be instances where there has been a failure to notify a change in circumstances that could be criminalised, but there are genuine mitigating factors. An example could be a carer where the family member they are caring for becomes deceased and the carer is too upset to notify the agency immediately. Clearly, situations like this would have to be considered respectfully to ensure the dignity of the affected person.

285. It is recognised that fraudulent activity may also be enabled by organisations, which may include businesses. This could theoretically occur if an organisation provides false account of the number of hours an individual works or provides artificially inflated costs for services. Again, it is expected this would very much be the exception, rather than the rule.

## **Alternative approaches**

286. In developing this policy, offences and how they are enforced by DWP were considered, as it provides a template for how social security fraud is currently administered. However, a proportionate response to fraud, in line with the benefits being devolved, was deemed more appropriate in the Scottish context. The ability to prosecute under existing common law fraud provisions, which is used in other areas of the Scottish public administration, could have provided an alternative approach. However, given the relatively larger scale of payments, the distinct type of fraud offences that could be committed and the need to accurately estimate benefit fraud against the social security system, the Scottish Government believes legislation for specific offences and enforcement is more appropriate.

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287. The approach taken is in line with what is proposed in the SPFM and the Scottish Government Counter Fraud Strategy – fraud against the public purse will not be tolerated and must be punished effectively.

## Investigations

### Policy objectives

288. Where fraudulent activity is detected, it will be important that the agency effectively and robustly investigates such matters. This requires that the Scottish Ministers have the powers to set out regulations to put in a place a system of investigation. Where fraud does happen, it must be investigated fairly, objectively and with a presumption of innocence until proven otherwise.

### Current process

289. The Scottish Government launched its counter fraud strategy, 'Protecting Public Resources', in June 2015. This is the first strategic approach to fighting fraud, bribery and corruption and is applied across the whole of the public sector in Scotland. The strategy was produced by the Counter Fraud Forum, a cross-public sector group with the aim of improving counter fraud across the public sector.

290. One of the key elements outlined is the need for investigation of fraud, which is also covered in the SPFM. This is in order to detect fraud by being proactive in analysing data to identify areas at risk and by being effective and professional in investigations of specific cases and by maintaining robust whistle-blowing procedures.

291. In terms of analysing data, the National Fraud Initiative is one of the key actions taken by the Scottish public sector in fighting fraud. Co-ordinated by Audit Scotland every two years, it is a complex data matching process to help public sector bodies prevent and detect fraud and error. The 2014/2015 National Fraud Initiative (NFI) report was published in June 2016.

292. Setting out a Code of Practice will be important in terms of outlining how the powers conferred through the Bill relating to investigations will be used. This is current practice for DWP, where section 3 of the Fraud Act 2001 (Code

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of Practice about use of information powers) requires the Secretary of State to issue a Code of Practice detailing the provision and use of the powers.

## Consultation

293. Key findings from the social security consultation were:

- majority of respondents suggested the Scottish Government should adopt DWP's current system for investigations, whereas a significant minority said that it should not;
- for those who said that it should not, a suggestion of a Scottish specific code was made, and that dignity and respect were important elements;
- training would also be important and some respondents suggested the powers of investigators should be limited; and
- regarding the powers currently granted to investigators, there were mixed views with some feeling they were too wide (mostly individuals), some feeling they were fine, others felt they required development (mostly local authorities). Where powers were too wide, the evidence suggested a need to consider circumstances carefully and work with dignity and respect, not heavy-handedly.

## What the Bill does

294. The Bill sets out a power to allow the Scottish Ministers to make regulations to investigate offences, which are defined in the Bill. In particular, the regulations confer powers to enter and search premises and to seize anything relevant to the investigation, which will be necessary to undertake an effective investigation into fraudulent activity.

295. The Bill does not take powers to enter dwelling houses, keeping in mind the dignity and respect of individuals. It is difficult to justify the requirement for such an invasive power, given that this should only ever be required for the most pernicious of fraud cases and it is difficult to see how such a fraud could be perpetrated against the devolved benefits coming to Scotland. However, should that ever be the case, further recourse could be to involve the police, who would have further powers of investigation. This seems more proportionate in terms of the Scottish social security system.

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296. The Bill places a duty on Scottish Ministers to consult on, and publish and maintain a Code of Practice on investigations. This will set out clearly how investigations will be conducted and the standards that will be employed.

## Proposal

297. This approach is deemed to be the most appropriate way forward to ensure the dignity and respect of individuals, but also to allow the agency to develop the necessary specialist expertise to investigate fraud cases effectively and to make key decisions about cases to be prosecuted.

298. The approach to regulations will be developed in conjunction with fraud practitioners and other experts in Scotland, including established social security stakeholder groups and, where appropriate, the Experience Panels. However, it is also a sensible approach, which allows sufficient flexibility for the development of the regulations in tandem with further policy development on the individual benefits.

299. The investigation regime will be underpinned by the publication of a Code of Practice, which will be developed initially with fraud experts and other relevant stakeholder groups, and then subject to wider consultation.

## Alternative approaches

300. In developing this policy, the methodology used by DWP to investigate fraud was considered, as it provides a template for how social security fraud is currently administered. However, a proportionate response to fraud, in line with the benefits being devolved, was deemed more appropriate in the Scottish context. As noted above, the ability to prosecute offences under existing common law fraud provisions would be possible, and investigations could theoretically be handled by the police service. However, this would be likely to create a significant pressure on their resources and, given the specialist nature of benefit fraud, it would be more appropriate for the agency to build the expertise and capacity to effectively investigate benefit fraud. This would also mean that decisions on referring cases to the Procurator Fiscal would be part of the decision making process by the agency.

## Part 3: Supplementing assistance under other enactments

### Top up of reserved benefits

#### **Policy objectives**

301. The policy objective is to transpose into Scottish legislation, from section 24 of the 2016 Act, the power to top up reserved benefits provided for (subject to certain restrictions) by that section, so that the power might be available to the Scottish Ministers in the future.

#### **Current process**

302. Section 24 of the 2016 Act creates a new exception 5 to the reservation of social security schemes in the Scotland Act 1998. This section, which is fully in force, gives the Scottish Parliament competence to provide for financial assistance to persons who are entitled to any reserved benefit (defined as a benefit which is to any extent a reserved matter, and that itself is linked to the definition in schedule 5, art 2, paragraph 1 of the Scotland Act 1998).

303. There are then various limitations. Discretionary financial assistance remains reserved within UK Government benefits. There are also limitations to prevent provision of top-up assistance for housing costs or where the requirement arises from the DWP sanctions regime.

#### **Consultation**

304. The consultation did not seek respondents views on the transposition of the power at section 24 of the 2016 Act.

#### **What the Bill does**

305. The Bill enables regulations to provide for top up payments to a person who is entitled to any reserved benefit, which means a benefit provided by the UK Government for which the Scottish Parliament does not have competence to legislate. The person must appear to need the additional assistance for a purpose for which the reserved benefit is provided.

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306. The detail on how entitlement is to be determined, the amount of assistance, the process by which assistance is sought and determined, and what happens if assistance is given incorrectly will be set out in regulations.

## **Alternative approaches**

307. The approach taken in this Bill is required in order to have legislation in place which could be used, assuming the necessary funding is available, to protect the most vulnerable and those on low incomes by mitigating the worst impacts of the UK Government's welfare cuts - so far as is possible in worsening financial circumstances. Around £1 billion will be cut from welfare spending in Scotland each and every year by 2021 – with a £0.2 billion cut due to changes this year alone.

## **Carer's allowance supplement**

### **Policy objectives**

308. The Scottish Ministers acknowledge the immense contribution carers make in Scotland and it is essential they are supported and sustained in this role. The Scottish Ministers have therefore committed to using the new social security powers to increase the rate of Carer's Allowance to the same level as Jobseekers Allowance.

309. The aim of the Carer's allowance supplement is to improve outcomes for carers by providing some additional financial support. Although Carers Allowance is not means tested, it cannot be received by carers whose individual earnings exceed £116 a week (post tax and certain deductions). While, some recipients will have significant capital and non-earnings income, most recipients are expected to have lower than average incomes.

### **Current process**

310. This is a new provision.

### **Consultation**

311. The consultation responses to the Scottish Government's plans for the Scottish Carer's Benefit were wide and varied. Many supported the proposal

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to increase the level of Carer's Allowance to the same level as Jobseeker's Allowance.

## **What the Bill does**

312. The Bill places a statutory duty on the Scottish Ministers to pay a supplement on a twice-yearly basis to persons who are in receipt of Carer's Allowance in Scotland. It provides for calculation of the supplement, which is designed to reflect the difference between the rate at which Carer's Allowance is paid and the rate of Jobseeker's Allowance. Each payment will be the equivalent of 26 times the difference between the two allowances on the qualifying date. The intention is to provide that carers will receive a supplement so that the amount of carer's allowance that a person receives on an annual basis will effectively be the same as the person would receive had they been in receipt of Jobseeker's Allowance.

313. The supplement is being provided because the Scottish Ministers cannot immediately increase the rate at which Carer's Allowance is paid to match the rate at which Jobseeker's Allowance is paid. It is envisaged that the supplement will cease to be needed once regulations to provide a scheme for carer's assistance have been made, as that can provide for payments at the increased rate. As such, the Bill allows the Scottish Ministers to repeal the duty to pay the supplement and revoke any regulations made under it.

## **Proposal**

314. Providing this supplementary payment to Scottish carers will have the effect of increasing Carer's Allowance payments to the level of Jobseeker's Allowance and thus deliver on an existing Scottish Government commitment.

315. This supplementary payment mechanism is designed to deliver additional payments to carers as quickly as possible. It will be a temporary measure, although the increase in Carer's Allowance will continue. The Scottish Government will only make these additional, supplementary payments to carers in Scotland until it takes on full responsibility for the delivery of Carer's Allowance overall. Once the Scottish Government is fully responsible for delivery, carers in Scotland will receive a single Scottish Carer's assistance payment which will be paid at the higher amount, to include the increase.

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## **Alternative approaches**

316. In developing this Bill, the Scottish Government has considered the UK Government's approach to providing assistance to carers and has decided that the UK approach does not reflect the Scottish Government's principles or the need to recognise the important role that carers have in society.

## Part 4: Discretionary Housing Payments

### Policy objective

317. Discretionary Housing Payments (DHPs) are administered by local authorities and there are currently no plans to make significant changes to the way the DHP scheme operates.

318. The Bill presents an opportunity to simplify the relevant legislation and recast it in a Scottish context but there will be little, if any, impact on the current operation of the scheme. The main advantage of replacement lies in removal of some procedural requirements that DWP legislation imposes around transfer of funding to local authorities, which can be dealt with more naturally under the existing funding arrangements in place for the Scottish local government financial settlement.

### Current process

319. Section 25 of the 2016 Act, was commenced on 1 April 2017 and gives the Scottish Parliament competence for provision of financial assistance to persons entitled to housing benefit, or other reserved benefits that are payable in respect of rent liabilities, who appear to need additional financial assistance to help meet housing costs. The effect is to devolve responsibility for DHPs, which local authorities operate with funding from the Scottish Government and with the ability to add their own extra funding. (Prior to 1 April 2017, local authorities received funding for DHPs from both DWP and the Scottish Government).

320. DHPs are currently operated under the existing Discretionary Financial Assistance Regulations 2001, made under the Child Support, Pensions and Social Security Act 2000. The experience of DWP's delivery of Discretionary Housing Payments, and the Scottish Government's experience of using DHPs to fully mitigate the bedroom tax has been that guidance (either DWP's formal guidance, or in terms of the statements of Ministerial expectations delivered alongside Scottish Government funding) is sufficient to ensure local authorities are acting in line with Ministerial expectations. This has also been the experience of the delivery of the Scottish Welfare Fund. The strength of discretionary, as opposed to entitlement based, elements of the social security system is that they can respond to individual needs and changing

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circumstances in a dynamic fashion. As such, it is more appropriate that decision makers be empowered to make awards on the basis of guidance rather than regulations which might fetter discretion and prevent them acting appropriately in unusual or unforeseen cases. Guidance allows final decisions and responsibility to rest with local authorities, who are themselves responsible to elected members and ultimately to local communities, both for the delivery of DHPs themselves, and also for the relationship with and impact of other areas of local authority responsibility, such as the prevention of homelessness.

## Consultation

321. There has been no consultation so far on the detail of the proposed changes.

322. The social security consultation identified some concerns about the administration of DHPs i.e. delays in receiving payments and variation in DHP administration across different local authority areas. There was also concern that the use of DHPs to mitigate the impact of the bedroom tax is reducing the resources going towards supporting people in housing crisis situations. These are issues that can be addressed through guidance or in practice at a local authority level and do not require legislation.

## What the Bill does

323. The Bill empowers local authorities to assist individuals who appear to them to need help towards their with housing costs. It is for local authorities to determine what assistance to give, though persons assisted must be entitled to housing benefit, or universal credit that includes an housing element amount of assistance with rent. The Bill prevents assistance being provided as a loan, reflecting a restriction in how current schemes are operated.

324. The Bill provides for the Scottish Ministers to issue guidance, including about the form and processing of applications for DHPs, and about any rules they feel would be appropriate in making decisions about the provision of a DHP. Information about any rules that a local authority applies must be made publicly available under the local authority's duty to provide information.

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325. The Bill places a duty on local authorities to publicise their schemes of assistance. Local authorities are also required to have regard to any guidance issued by the Scottish Ministers about their exercise of this power. The Scottish Ministers must consult local authorities, through a representative body, before issuing any guidance.

326. The Bill also includes a power to allow the Scottish Ministers to make regulations to amend the DHP scheme so that it keeps up with any technical changes that the UK Government makes to UK social security legislation.

## Proposal

327. The proposed approach will allow local authorities to manage their existing DHP schemes and with the existing arrangements that are in place for funding of DHPs. It also allows the Scottish Ministers to provide for future changes in the operation of DHP schemes through guidance rather than by regulation.

328. The approach will allow local authorities the choice of whether or not to have a DHP scheme and therefore the choice of whether to take advantage of any Scottish Government funding for DHPs. Although all local authorities are administering DHP at present and making full use of all the available Scottish Government funding for this purpose, allowing local authorities a choice builds in some flexibility for how discretionary schemes or support for housing costs may be delivered in the future.

## Alternative approaches

329. In developing this Bill, the Scottish Government has decided that the UK approach does not deal with the transfer of funding to local authorities as naturally as it could be dealt with under the funding arrangements that attach to the Scottish local government financial settlement. For this reason, no alternative approach was considered.

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effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

## Equal opportunities

330. A draft partial Equalities Impact Assessment was included in the consultation document, *A New Future for Social Security, Consultation on Social Security in Scotland*, in July 2016. Following the consultation a full Equalities Impact Assessment, of the provisions in the Bill, was carried out. It concluded that the Bill does not have an adverse impact on any of the protected characteristics, such as, age, sex, race, gender reassignment, pregnancy and maternity, disability, marital or civil partnership status, religion or belief or sexual orientation. The findings of the full Equalities Impact Assessment will be published on the Scottish Government website.

331. The Scottish Government is also working closely with the Equality and Human Right Commission (EHRC) to explore whether there is sufficiently detailed data to allow the Scottish Government to conduct a Cumulative Impact Assessment (CIA) on its policy choices on social security. Rather than narrowly evaluating the effect of individual policy decisions in isolation, CIA techniques support Governments to accurately measure the overall impact of a set of changes to government policies on the population, analysed according to one or more characteristics (e.g. income, gender, ethnicity and disability). In other words, so long as the necessary data is available, the CIA can help the Scottish Government to understand whether the new system is supporting people in the way that it wants it to, as well as to identify, and where possible take action to avoid, any unintended impacts on specific groups.

## Human rights

332. The UN Convention on the Rights of Persons with Disabilities (UNCRPD) is the framework used by the Scottish Government to bring together action and change across Departments to support disabled people. In December 2016, the Scottish Government published *A Fairer Scotland for Disabled People*, a delivery plan to 2021 setting out how UNCRPD will be implemented. Several of the ambitions that underpin the delivery plan – including ensuring places are accessible for all; protecting rights; decent incomes and fairer working lives; support services that promote independent

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living – will provide a valuable framework as the Scottish Government gives effect to new devolved social security powers.

333. The interface with obligations under UNCRPD remains of topical significance. The UN's examination of UK compliance was published in November 2016, citing "grave or systematic violations" of disabled people's rights as a result of UK Government welfare reforms, including criteria for PIP which is currently being introduced and is among the benefits being devolved. The Scottish Government will continue to work with representative groups, as well as people in receipt of the benefits, to ensure it designs a system that supports and empowers disabled people and meets the Government's obligations.

334. Delivering a rights based approach to social security is at the heart of the Scottish Government's ambitions for the new system. To help it to achieve this, the Scottish Government has engaged the support of both EHRC and the Scottish Human Rights Commission (SHRC) to act as a sounding board and critical friend, ensuring that a clear and rigorous understanding of human rights is being applied in both policy and service development.

## Island communities

335. The Bill is expected to have no disproportionate effect on island communities. The Scottish Government is keen to ensure that as much information as possible will be online, as well as allowing for the electronic submission of applications. However, the Scottish Government is aware that some remote and island communities may not have access to digital services nor is it everyone's preferred choice of communication. Some island councils have also highlighted the challenges that face those who have to travel a great distance to attend assessments. The Scottish Government is aware that people want tailored solutions to suit their different preferences and need, and will therefore work to ensure the availability of digital, telephone and face to face communication channels where possible. The Scottish Government will also ensure that help is available to people to explain how to complete applications and that there is also support for completing an application on behalf of someone else if that is needed.

## Local Government

336. The Bill has no disproportionate effect on local government in Scotland as there are no plans to make significant changes to DHPs, which are administered by local authorities. There are no additional responsibilities or duties for local authorities as a result of the Bill which would result in additional costs to local government. However, the Scottish Government has announced that the preferred option for the social security agency incorporates face to face pre-claims advice and support services co-located, where possible, in places people already visit. This may include local government premises. Under this scenario, the Scottish Government expects local government would recharge the agency for this sharing of its premises and would therefore incur no additional costs. Further information can be found in the Financial Memorandum that accompanies this Bill.

## Sustainable development

337. The Bill has no negative effect on sustainable development. A pre-screening report confirmed that the Bill would have no impact on the environment. It is, therefore, exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005 and consequently there is no need for a full Strategic Environmental Assessment to be undertaken.

338. Further details on the Bill's impact, on matters such as sustainable business, economic growth, inequalities and gender equality are explored in the EQIA and BRIA accompanying the Bill, which have been published on the Scottish Government website<sup>21</sup>.

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<sup>21</sup> <http://www.gov.scot/socialsecurity>

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# Social Security (Scotland) bill

## Policy Memorandum

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