

South of Scotland Enterprise Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the South of Scotland Enterprise Bill, introduced in the Scottish Parliament on 24 October 2018.

2. The following other accompanying documents are published separately:

- a Financial Memorandum (SP Bill 41–FM);
- a Policy Memorandum (SP Bill 41–PM);
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 41–LC).

3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

4. These notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

The Bill

Overview

5. The Bill establishes South of Scotland Enterprise, an enterprise agency for the south of Scotland. Scotland has two existing enterprise agencies: Scottish Enterprise and Highlands and Islands Enterprise (both established by the Enterprise and New Towns (Scotland) Act 1990¹).

6. As a Bill for an Act of the Scottish Parliament, the Bill's provisions fall to be read in accordance with the interpretation rules in Part 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.²

Establishment

Section 1 (South of Scotland Enterprise)

7. Section 1 brings South of Scotland Enterprise into existence as a legal person.

8. Subsection (2) states that it is a body corporate. This means that it has a legal personality separate from that of the people who comprise it (see section 2) so that, ordinarily, those people will not be personally liable for things done, or not done, by South of Scotland Enterprise.

Section 2 (People constituting body and staff)

9. Subsection (1) of section 2 provides that South of Scotland Enterprise is to be comprised by its appointed members and its chief executive. This means, in effect, that they collectively constitute its governing board.

¹ <http://www.legislation.gov.uk/ukpga/1990/35/contents>

² <http://www.legislation.gov.uk/asp/2010/10/part/1>.

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10. South of Scotland Enterprise is to have between 6 and 11 appointed members; that is a chairing member and between 5 and 10 ordinary members.

11. Subsection (2) makes schedule 1 part of the Bill. For an explanation of the schedule's provisions see paragraphs 51 to 59 of these Notes. Amongst other things, schedule 1 deals with the appointment of South of Scotland Enterprise's members and its chief executive.

Section 3 (Exclusion of Crown status)

12. Section 3 confirms that South of Scotland Enterprise is not an emanation of the Crown. The Crown, which for this purpose broadly means the executive branch of government, enjoys certain privileges and immunities in law. South of Scotland Enterprise is not to be regarded as a government body and therefore none of the particular legal rules that apply to government bodies apply to South of Scotland Enterprise.

13. Subsection (2) of section 3 confirms that South of Scotland Enterprise's members and staff are not civil servants. This means that none of the statutes that make provision about the civil service (see, for example, Part 1 of the Constitutional Reform and Governance Act 2010³) apply to the people who comprise, and work for, South of Scotland Enterprise.

Section 4 (Application of public bodies legislation)

14. Section 4 makes schedule 2 part of the Bill. For an explanation of the schedule's provisions see paragraphs 60 to 70 of these Notes.

³ <http://www.legislation.gov.uk/ukpga/2010/25/part/1>.

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Aims and Powers

Section 5 (Aims)

15. Section 5 sets out the aims of South of Scotland Enterprise.

16. Subsection (3) allows the Scottish Ministers to change, or clarify, its aims by regulations. Regulations doing so will be subject to scrutiny by the Scottish Parliament under the affirmative procedure (see section 20).

Section 6 (Action plan)

17. Section 6 requires South of Scotland Enterprise to have, and keep up to date, an action plan setting out what it proposes to do to achieve its aims (which are set out in section 5). Its general power to act under section 7 can only be exercised in ways that are consistent with the action plan (see subsection (1)(b) of section 7).

18. Subsection (2) requires that before making or modifying its action plan, South of Scotland Enterprise get the Scottish Ministers' agreement to the plan or modification in draft.

Section 7 (General powers)

19. Subsection (1) of section 7 gives South of Scotland Enterprise powers to act in order to achieve its aims (which are set out in section 5) and to do other things connected to performing any of its other functions (for example, it may hire an accountancy firm to help it fulfil its function of preparing annual accounts under section 13).

20. Subsection (1)(b) limits South of Scotland Enterprise to acting in ways that are consistent with its action plan (see section 6).

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21. Subsection (2) gives some specific examples of the things that South of Scotland Enterprise is empowered to do by subsection (1). The list is not exhaustive.

22. Subsection (3) restricts the ability of South of Scotland Enterprise to borrow money. It is permitted to do so from only two sources. The first is the Scottish Ministers. The second is its own subsidiaries. The word “subsidiary” is defined for this purpose by section 1159 of the Companies Act 2006.⁴ Loosely, in this context, it means a corporation that is to a certain degree under the control of South of Scotland Enterprise and so would include, for example, a limited company set up by South of Scotland Enterprise provided that the majority of voting rights in the company were held by South of Scotland Enterprise.

23. Subsection (4) gives South of Scotland Enterprise the power to charge for providing services.

Operational Matters

Section 8 (Headquarters)

24. Section 8 places the Scottish Ministers under a legal duty to direct South of Scotland Enterprise to have its headquarters somewhere in the South of Scotland (as defined in section 18). It is for the Scottish Ministers to specify in the direction where in the South of Scotland the headquarters must be.

25. As the direction about the location of South of Scotland Enterprise’s headquarters will be issued under section 15, South of Scotland Enterprise will be legally required to comply with it and the direction will be published.

⁴ <http://www.legislation.gov.uk/ukpga/2006/46/section/1159>.

Section 9 (Committees)

26. Section 9 allows South of Scotland Enterprise to set up committees, which can have sub-committees. The members of committees and sub-committees need not be members of South of Scotland Enterprise, which means that setting up committees and sub-committees can be a way for South of Scotland Enterprise to bring in people with expertise, or perspectives, its members may not have. Section 11 allows South of Scotland Enterprise to delegate functions to its committees and sub-committees, meaning those bodies can have more than an advisory role.

27. Subsection (3) allows arrangements to be made for committee and sub-committee members to be paid and receive other financial rewards and have their expenses met. Payments under such arrangements are to be made by South of Scotland Enterprise, but can only be made on a basis determined by the Scottish Ministers. Subsections (4) and (5) elaborate on subsection (3).

Section 11 (Authority to perform functions)

28. Section 11 allows South of Scotland Enterprise to delegate its functions or aspects of them to its members, committees, sub-committees, or staff. This means that not everything that may, or must, be done by South of Scotland Enterprise need be done by collective act of the people who constitute it (i.e. the ministerially-appointed members and its chief executive, see section 2).

29. Subsection (2) emphasises that South of Scotland Enterprise cannot absolve itself from its legal responsibilities to do certain things by entrusting others to do them on its behalf. It further makes clear that delegating a function does not divest South of Scotland Enterprise of its own powers to carry out the function.

Section 12 (Validity of things done)

30. South of Scotland Enterprise consists of its members and chief executive (see section 2). If, for any length of time, there were to be a problem with its membership (for example if it were to have fewer properly appointed members than section 2 requires), there may be doubts about the legal validity of anything done by South of Scotland Enterprise during that time when it was not properly constituted. Similar concerns may arise in relation to the acts of South of Scotland Enterprise's committees or sub-committees; the rules about the membership of those bodies will be set by South of Scotland Enterprise itself by virtue of section 10.

31. Section 12 forecloses any doubt there may otherwise have been about the legal validity of things done by South of Scotland Enterprise or any of its committees or sub-committees as a result of:

- there being too few members or no chief executive,
- a problem with the way a member or the chief executive was appointed, or
- someone appointed as a member coming to be disqualified from membership (as to which see paragraph 4 of schedule 1).

Accountability

Section 13 (Accounts and audit)

32. Section 13 requires South of Scotland Enterprise to prepare accounting records for each financial year and submit them to the Auditor General for Scotland for audit. The phrase "financial year" is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.⁵

⁵ <http://www.legislation.gov.uk/asp/2010/10/schedule/1>.

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33. Because South of Scotland Enterprise is required, by statute, to send its accounts to the Auditor General for Scotland, sections 21 and 22 of the Public Finance and Accountability (Scotland) Act 2000⁶ (“the 2000 Act”) apply. Amongst other things, those sections provide for the accounts, and the auditor’s report on them, to be laid before the Scottish Parliament and published (see section 22(5) of the 2000 Act⁷).

34. In addition, because sections 21 and 22 of the 2000 Act apply to the accounts of South of Scotland Enterprise:

- the principal accountable officer for the Scottish Administration can designate someone to be its accountable officer (see section 15 of the 2000 Act⁸), and
- the Auditor General for Scotland can look into whether it has been using its resources appropriately (see section 23 of the 2000 Act⁹).

35. The Scottish Public Finance Manual, which is guidance issued by the Scottish Ministers as to the proper handling and reporting of public funds, states that “sponsored bodies” (of which South of Scotland Enterprise will be one) should be required to keep their accounts in such form as the Scottish Ministers direct. The power for the Ministers to give directions to South of Scotland Enterprise is to be found in section 15.

Section 14 (Annual report)

36. Section 14 requires South of Scotland Enterprise to report to the Scottish Ministers after each financial year on what it has done in that year. The phrase “financial year” is defined in

⁶ <http://www.legislation.gov.uk/asp/2000/1/section/21>.

⁷ <http://www.legislation.gov.uk/asp/2000/1/section/22#section-22-5>.

⁸ <http://www.legislation.gov.uk/asp/2000/1/section/15>.

⁹ <http://www.legislation.gov.uk/asp/2000/1/section/23>.

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schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.¹⁰

37. This reporting obligation is in addition to South of Scotland Enterprise's duty under section 32 of the Public Services Reform (Scotland) Act 2010¹¹ to publish a statement after each financial year about (amongst other things) what it has done in that financial year to promote and increase sustainable economic growth. South of Scotland Enterprise is subject to that duty by reason of the amendment made to the Public Services Reform Act by paragraph 5(3) of schedule 2 of the Bill.

Ministerial Powers

Section 15 (Direction)

38. Section 15 places South of Scotland Enterprise under a legal duty to comply with ministerial directions in carrying out its functions. It also requires that the Scottish Ministers publish any directions it issues to South of Scotland Enterprise.

Section 16 (Financial assistance)

39. Section 16 provides a statutory basis for the Scottish Ministers to give financial support, of various kinds, to South of Scotland Enterprise.

Transfers from Scottish Enterprise

Section 17 (Transfer of property and liabilities)

40. South of Scotland Enterprise will, to an extent, take over some of the activities of Scottish Enterprise in the South of Scotland area. To facilitate that, section 17 allows for some of Scottish Enterprise's property, and its liabilities, to be transferred to South of Scotland Enterprise.

¹⁰ <http://www.legislation.gov.uk/asp/2010/10/schedule/1>.

¹¹ <http://www.legislation.gov.uk/asp/2010/8/section/32>.

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41. The transfer effected by section 17 will take place on the day the section comes into force, which is to be appointed by the Scottish Ministers by regulations (see section 21).

42. Precisely what property and liabilities will transfer to South of Scotland Enterprise will be set out by the Scottish Ministers in regulations. Those regulations will be laid before the Scottish Parliament in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.¹²

Interpretation

Section 18 (Meaning of South of Scotland)

43. Section 18 defines “the South of Scotland” for the purposes of the Bill. It defines the South of Scotland by reference to the local government areas of the Scottish Borders Council and Dumfries and Galloway Council. Scotland’s local government areas are identified in schedule 1 of the Local Government etc. (Scotland) Act 1994.¹³

Final Provisions

Section 19 (Ancillary provision)

44. Section 19 enables the Scottish Ministers to make ancillary provision, by regulations, to give full effect to the Bill or any provision made under it. This includes the power to modify other enactments (including the Bill itself).

45. Regulations made under section 19 that amend the text of primary legislation (including the Bill as enacted) are subject to the affirmative procedure. Otherwise, regulations under section 19 are subject to the negative procedure (see section 20).

¹² <http://www.legislation.gov.uk/asp/2010/10/section/30>.

¹³ <http://www.legislation.gov.uk/ukpga/1994/39/schedule/1>.

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Section 20 (Regulation-making powers)

46. Section 20 makes provision in relation to the regulation-making powers that the Bill confers on the Scottish Ministers.

47. The negative procedure is defined in section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010.¹⁴ The affirmative procedure is defined in section 29 of that Act.¹⁵

Section 21 (Commencement)

48. Section 21 deals with when the Bill's provisions come into effect as a matter of law.

49. The Bill's final provisions take effect the day after Royal Assent, which is to say the day after the Bill becomes an Act.¹⁶

50. The rest of the Bill's provisions take effect on the day, or days, appointed by the Scottish Ministers in regulations. Section 20(1) allows the regulations to appoint different days for different purposes. Regulations appointing the day that some or all of the Bill's provisions take effect will be laid before the Scottish Parliament in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.¹⁷

Schedule 1

Part 1: Members

51. As section 2 provides, South of Scotland Enterprise consists of its members and its chief executive (as to whom see paragraphs 57 and 58 of these Notes). All of the members of South of Scotland Enterprise (the numbers of which are regulated

¹⁴ <http://www.legislation.gov.uk/asp/2010/10/section/28>.

¹⁵ <http://www.legislation.gov.uk/asp/2010/10/section/29>.

¹⁶ The process for a Bill becoming an Act is set out in section 28 of the Scotland Act 1998 <http://www.legislation.gov.uk/ukpga/1998/46/section/28>.

¹⁷ <http://www.legislation.gov.uk/asp/2010/10/section/30>.

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by section 2) are to be appointed by the Scottish Ministers, and it is for the Ministers to appoint the chairing member to that office (see paragraph 1 of schedule 1). Certain people are disqualified from appointment by paragraph 4 of schedule 1.

52. Amendments made by schedule 2 mean that the appointment of members will need to be carried out in accordance with the code of practice on public appointments produced by the Commissioner for Ethical Standards in Public Life in Scotland, and the Gender Representation on Public Boards (Scotland) Act 2018. Section 159 (positive action: recruitment and promotion) of the Equality Act 2010¹⁸ will also apply in relation to the appointment of members.

53. On appointing someone as a member, the Scottish Ministers are to specify how long the person is to remain a member as a result of that appointment (see paragraph 2 of schedule 1). The person may continue as a member beyond that period by being re-appointed by the Scottish Ministers for another period.

54. Paragraph 3 of schedule 1 sets out the circumstances in which someone can cease to be a member of South of Scotland Enterprise before the person's period of appointment is up, namely:

- a member can resign,
- a person will automatically cease to be a member if the person becomes someone who is disqualified from being a member (see paragraph 4 of schedule 1),
- a person may be removed as a member by the Scottish Ministers in the circumstances described in subparagraph (2) of paragraph 3.

¹⁸ <http://www.legislation.gov.uk/ukpga/2010/15/section/159>

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55. If someone ceases to be a member before the person's period of appointment has ended, the Scottish Ministers can direct South of Scotland Enterprise to pay that person a sum of money as compensation for the premature loss of office (see paragraph 5(2) and (3) of schedule 1).

Part 2: Staff

56. Part 2 of schedule 1 deals with South of Scotland Enterprise's staff.

57. Paragraph 7 requires South of Scotland Enterprise to have at least one member of staff: a chief executive. The chief executive is one of the people who constitutes South of Scotland Enterprise (see section 2).

58. Paragraph 7 of schedule 1 provides for the first chief executive to be appointed by the Scottish Ministers. Thereafter, chief executives are to be appointed by South of Scotland Enterprise itself (subject to obtaining the Scottish Ministers' approval for the appointment). The first chief executive's terms and conditions of appointment are to be set by the Scottish Ministers. The terms and conditions of subsequent chief executives are to be set by South of Scotland Enterprise, subject to obtaining the Scottish Ministers' approval (see paragraph 9 of schedule 1).

59. Paragraph 8 of schedule 1 allows South of Scotland Enterprise to appoint other staff (i.e. staff other than the chief executive). South of Scotland Enterprise are to set the terms and conditions of employment for those staff, subject to obtaining the Scottish Ministers' approval (see paragraph 9 of schedule 1).

Schedule 2

Ethical Standards in Public Life etc. (Scotland) Act 2000

60. Paragraph 1 of schedule 2 adds South of Scotland Enterprise to the list of devolved public bodies in schedule 3 of the Ethical Standards in Public Life etc. (Scotland) Act 2000.¹⁹

This means that South of Scotland Enterprise will need to:

- have a code of conduct for its members, whose compliance with the code will be policed by the Standards Commission for Scotland, and
- maintain a public register of its members' interests.

Scottish Public Services Ombudsman Act 2002

61. Paragraph 2 of schedule 2 adds South of Scotland Enterprise to the list of authorities in schedule 2 of the Scottish Public Services Ombudsman Act 2002²⁰ ("the 2002 Act"). The effect is to:

- make South of Scotland Enterprise amenable to investigation by the ombudsman (see section 5 of the 2002 Act²¹),
- oblige South of Scotland Enterprise to have its own complaints handling procedure that complies with the statement of principles published by the ombudsman under section 16A of the 2002 Act,²²
- pave the way for South of Scotland Enterprise being subject to the further requirement to have a complaints handling procedure that complies with a model complaints

¹⁹ <http://www.legislation.gov.uk/asp/2000/7/schedule/3>.

²⁰ <http://www.legislation.gov.uk/asp/2002/11/schedule/2>.

²¹ <http://www.legislation.gov.uk/asp/2002/11/section/5>.

²² <http://www.legislation.gov.uk/asp/2002/11/section/16A>.

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handling procedure prepared by the ombudsman (see sections 16B²³ and 16C of the 2002 Act²⁴).

Freedom of Information (Scotland) Act 2002

Paragraph 3 of schedule 2 adds South of Scotland Enterprise to the list of Scottish public authorities in schedule 1 of the Freedom of Information (Scotland) Act 2002.²⁵ This means that South of Scotland Enterprise will be subject to the requirements that Act places on public bodies, including requirements to provide information to the public on request and to have in place a scheme for the pro-active publication of information it holds.

62. Being a public authority within the meaning of the Freedom of Information Act also makes South of Scotland Enterprise a “Scottish public authority” to which the Environmental Information (Scotland) Regulations 2004²⁶ apply.

63. In addition, as a public authority within the meaning of the Freedom of Information Act, South of Scotland Enterprise is a “public authority” or “public body” for the purposes of the General Data Protection Regulation by virtue of section 7 of the Data Protection Act 2018²⁷ (subject to the Secretary of State not making regulations under that section to remove its “public authority” status). The General Data Protection Regulation (also commonly referred to by the acronym “GDPR”) is Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.²⁸ There are particular rules applied to bodies classified as “public authorities” (over and above those applied to all data

²³ <http://www.legislation.gov.uk/asp/2002/11/section/16B>.

²⁴ <http://www.legislation.gov.uk/asp/2002/11/section/16C>.

²⁵ <http://www.legislation.gov.uk/asp/2002/13/schedule/1>.

²⁶ <http://www.legislation.gov.uk/ssi/2004/520/contents/made>.

²⁷ <http://www.legislation.gov.uk/ukpga/2018/12/section/7>.

²⁸ <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.

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processors) in the GDPR and the Data Protection Act 2018. An analysis of those rules is beyond the scope of these Notes.

Public Appointments and Public Bodies etc. (Scotland) Act 2003

64. Paragraph 4 of schedule 2 adds South of Scotland Enterprise to the list of specified authorities in schedule 2 of the Public Appointments and Public Bodies etc. (Scotland) Act 2003.²⁹ This means that the Scottish Ministers, when appointing South of Scotland Enterprise's members and first chief executive, will need to comply with the code of practice on public appointments produced by the Commissioner for Ethical Standards in Public Life in Scotland.

Public Services Reform (Scotland) Act 2010

65. Paragraph 5(2) of schedule 2 adds South of Scotland Enterprise to the list of bodies in schedule 5 of the Public Services Reform (Scotland) Act 2010.³⁰ This means that it is a body in relation to which an order can be made under section 14 of that Act.³¹ An order under section 14 of the Public Services Reform Act can (subject to restrictions, and only after the Scottish Parliament has approved a draft of the order):

- modify, confer, abolish, transfer or provide for the delegation of any function of a public body,
- amend the constitution of a public body.

66. Paragraph 5(3) of schedule 2 adds South of Scotland Enterprise to the list of bodies in schedule 8 of the Public Services Reform Act. This means that South of Scotland

²⁹ <http://www.legislation.gov.uk/asp/2003/4/schedule/2>.

³⁰ <http://www.legislation.gov.uk/asp/2010/8/schedule/5>

³¹ <http://www.legislation.gov.uk/asp/2010/8/part/2>.

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Enterprise will be subject to the duties to report after each financial year on:

- expenditure (see section 31 of the Public Services Reform Act), and
- the steps it has taken to promote and increase sustainable growth and improve its efficiency, effectiveness and economy (see section 32 of the Public Services Reform Act).

Public Records (Scotland) Act 2011

67. Paragraph 6 of schedule 2 makes South of Scotland Enterprise subject to the duties created by the Public Records (Scotland) Act 2011³² to produce, implement and keep under review a records management plan.

Community Empowerment (Scotland) Act 2015

68. Paragraph 7 of schedule 2 adds South of Scotland Enterprise to the list of persons in schedule 1 of the Community Empowerment (Scotland) Act 2015.³³ This makes South of Scotland Enterprise a community planning partner for the purposes of Part 2 of that Act.³⁴ As South of Scotland Enterprise's area of operation is coextensive with the areas of the Scottish Borders Council and Dumfries and Galloway Council (see section 18 of the Bill) it will be a community planning partner to both of those local authorities.

Gender Representation on Public Boards (Scotland) Act 2018

69. Paragraph 8 of schedule 2 adds South of Scotland Enterprise to the list of bodies in schedule 1 of the Gender

³² <http://www.legislation.gov.uk/asp/2011/12/contents>.

³³ <http://www.legislation.gov.uk/asp/2015/6/schedule/1>.

³⁴ <http://www.legislation.gov.uk/asp/2015/6/part/2>.

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Representation on Public Boards (Scotland) Act 2018.³⁵ This means that in appointing members to South of Scotland Enterprise, the Scottish Ministers must give preference to a woman if there are equally qualified candidates of either gender and appointing a woman would result in, or be a step towards, 50% of the membership being women (see section 4 of the Gender Representation Act³⁶). In addition, the Gender Representation Act requires that steps be taken to encourage women to apply to be members of South of Scotland Enterprise (see section 5³⁷), and further steps to be taken to promote gender balance in the membership if the 50% target has not been reached by particular dates (see section 6³⁸).

³⁵ [http://www.legislation.gov.uk/asp/2018/4/schedule/1.](http://www.legislation.gov.uk/asp/2018/4/schedule/1)

³⁶ [http://www.legislation.gov.uk/asp/2018/4/section/4.](http://www.legislation.gov.uk/asp/2018/4/section/4)

³⁷ [http://www.legislation.gov.uk/asp/2018/4/section/5.](http://www.legislation.gov.uk/asp/2018/4/section/5)

³⁸ [http://www.legislation.gov.uk/asp/2018/4/section/6.](http://www.legislation.gov.uk/asp/2018/4/section/6)

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