

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

Social Security Administration and Tribunal Membership (Scotland) Bill

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 Administration and Tribunal Membership (Scotland) Bill introduced in the Scottish Parliament on 27 April 2020.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 68-EN);
 - a Financial Memorandum (SP Bill 68-FM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 68-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.
4. The requirement for this Bill has arisen from the identification by the Scottish Government of a need to create statutory offences in primary legislation in relation to forms of assistance provided for under section 79 of the Social Security (Scotland) Act 2018 ("the 2018 Act").
5. The Bill also addresses a small number of other matters relating to social security administration and Tribunal membership, which are

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discussed in more detail below and which need to be made in order to ensure the continued effective implementation of the 2018 Act.

6. Rather than bringing forward separate and overlapping bills on these issues, the Scottish Government's view – given that the Bill is not about substantive policy development but rather a small series of fixes to the legislative framework for social security in Scotland and also that many of the issues in the Bill have been raised in one form or another previously – is that it is best to progress these provisions together to allow for their scrutiny by the Scottish Parliament as a single package of measures.

Policy objectives of the Bill

7. The overarching policy objectives of the Bill are:

- To allow for the appointment of a person to act on behalf of a child where there is no person with legal authority who is willing and able to so act;
- To allow for the appointment of a person to act on behalf of an adult who does not lack capacity but due to difficult circumstances wishes for an appointee to act on their behalf.
- To ensure Scottish Ministers do not disclose information about an individual's health where that would be likely to cause serious harm to the recipient's physical or mental health;
- To create statutory fraud offences in relation to the types of top up assistance created under section 79 of the 2018 Act;
- To enable the Scottish Ministers, by regulations, to transfer to the First-tier Tribunal for Scotland (the FTT for Scotland) some or all of the competence and jurisdiction of the sheriff courts in relation to the recovery of top up assistance created under section 79 of the 2018 Act;
- To introduce powers for the Scottish Ministers to make provision in regulations about the investigation of offences in relation to top up assistance created under section 79 of the 2018 Act;
- To modify the power to make regulations under schedule 5 of the 2018 Act, to widen the category of qualified persons whose clinical judgment, based on the appropriate guidance, will be accepted in

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relation to a diagnosis of terminal illness for the purpose of entitlement to Disability Assistance; and

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

Policy background

Appointees for children

8. As part of the devolution of disability benefits to Scotland under the Scotland Act 2016 and as delivered by the 2018 Act, Disability Assistance is a new form of social security assistance intended to provide financial support to individuals who have a disability arising from a physical or mental impairment or are terminally ill.

9. The Scottish Ministers have given a public commitment to deliver Child Disability Payment. This will replace the current benefit, Disability Living Allowance (“DLA”) for children.

10. As part of that commitment, the Scottish Government has said that the application process for Disability Assistance will be inclusive, accessible, simple and transparent. The Government has also committed to ensuring a safe and secure transfer from the reserved to the devolved system of social security.

11. Under the current rules applicable to the reserved social security system administered by the Department for Work and Pensions (“the DWP”) on behalf of the UK Government, there is legal provision allowing persons to be appointed to act, and to receive assistance, on behalf of adults who are unable to act and separate provision for persons to be appointed to act, and receive assistance, on behalf of children. The DWP will typically appoint a child’s parents to manage a claim on the child’s behalf, and in order to receive payments of benefit, until the child reaches age 16.

12. The 2018 Act provides that Scottish Ministers may appoint a person to act on behalf of an individual in connection with the determination of the individual’s entitlement to assistance under section 24 of the Act, and to receive such assistance on the individual’s behalf. However, Scottish

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Ministers may only appoint someone in a narrow set of circumstances – none of which allow for an individual to be appointed on behalf of a child. Most parents and some other persons will already have the parental right to act as a child’s legal representative and so do not need to be formally appointed. However other persons who may be responsible for the child’s care, but who do not have parental rights and responsibilities or other legal authority, will not be able to act on the child’s behalf in relation to the determination of their entitlement to social security assistance without a mechanism for being formally appointed to do so.

13. It is reasonable to expect that in many cases a parent or guardian of a child will be in a position to make the application for assistance for their child, where the child is the entitled individual (e.g. in the context of Disability Assistance).

14. However, in some circumstances children who will be entitled to assistance under the Act will not have a person with the relevant legal authority who resides with them and has the care of the child and is willing and able to act on their behalf. This could apply, for example, to children who are being cared for by family members who do not have parental rights and responsibilities (“PRRs”), such as grandparents, step-parents, older siblings and unmarried fathers who have not acquired PRRs.

15. As the 2018 Act presently does not permit the authorisation of an appointee for a child, it is necessary to make provision for the Scottish Ministers to authorise an individual to be appointed to act on behalf of a child in connection with a determination of the individual’s entitlement to assistance.

16. The Scottish Government’s approach in relation to this matter is to propose only such minimal provision as it believes is needed to achieve its policy objective.

17. The Scottish Government’s position is that these measures represent a legitimate and proportionate approach to securing the social security rights of the child by ensuring that an appropriate person can act on behalf of the child in connection with the child’s entitlement to assistance. The Scottish Government is clear that the scope of such an appointment will allow the appointed person to act on behalf of a child in connection with the

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determination of the individual's entitlement to assistance under section 24 of the 2018 Act, and to receive such assistance on the child's behalf.

18. The views of the child and their parents will be taken into account insofar as practicable by the Scottish Ministers when they are considering whether to appoint an appointee or terminate an appointment.

Consultation

19. The Scottish Government has consulted extensively on the delivery of social security in Scotland, with the 2016 Consultation on Social Security assisting in the formulation of high level principles, and the 2019 Consultation on Disability Assistance assisting in the formulation of more detailed policy requirements¹. The Scottish Government has not formally consulted on proposals in relation to appointees for children, however, in written submission to the Scottish Commission On Social Security (SCoSS) in relation to the draft Disability Assistance for Children and Young People Regulations a number of stakeholder organisations including the Child Poverty Action Group and Scottish Rights on Social Security raised the absence of provisions for such appointees.

20. Recommendation 28 of the scrutiny report relating to those draft regulations that SCoSS laid before the Parliament as required by section 97 of the Social Security (Scotland) Act 2018 welcomed the intention to include the provisions in the Social Security Administration and Tribunals Bill concluding that it addressed a gap in the existing law.

Alternative approaches

21. There is the option of not amending the law. This would preclude Scottish Ministers from lawfully accepting applications from a third party on behalf of a child who is subject to informal caring arrangements, or is otherwise living away from the child's parents; without that third party acquiring legal authority to act on the child's behalf.

¹ <https://www.gov.scot/publications/social-security-consultation-disability-assistance-scotland/>
<https://consult.gov.scot/social-security/social-security-in-scotland/>

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22. This would be an unsatisfactory arrangement; children likely to be entitled to social security assistance are significantly more likely to be vulnerable as a result of a health condition or disability, and refusing to accept any such applications would have a disproportionate impact upon such vulnerable clients.

23. An alternative approach would be to accept an application on behalf of a child from anyone with an interest in a child's affairs, but thereafter to correspond only with the child's parent or legal guardian. This may subvert the need to ensure that the most appropriate person to manage a child's Disability Assistance is able to do so, and would potentially prevent the effective administration of a case.

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

24. The Social Security (Scotland) Act 2018 currently provides for appointeeship where a client lacks capacity to act on their own behalf. However, there may be clients who do not lack capacity but could benefit from an appointee in certain circumstances. For example, clients who have been diagnosed as terminally ill for the purpose of determining entitlement to Disability Assistance may in some circumstances not be aware of their diagnosis, where this is withheld by medical professionals due to the likelihood of the information causing serious harm to the individual's physical or mental health.

25. Providing a supportive process for clients who wish to have another person to be appointed to act on their behalf, e.g. where they are terminally ill or for other personal reasons unable to act on their own behalf (without lacking capacity to do so) will ensure that they get the support they need to access the social security system. It will avoid causing clients unnecessary stress and trauma where, due to their circumstances, they wish to have another person act on their behalf.

26. The Scottish Government included provision in the 2018 Act to introduce a definition of terminal illness for the purpose of entitlement to Disability Assistance which differed from the UK Government's definition of terminal illness for reserved social security purposes. Therefore when making Disability Assistance Regulations under the Act the definition is:

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‘An individual is to be regarded as having a terminal illness for the purpose of determining entitlement to disability assistance if, having had regard to the (Chief Medical Officer’s (CMO) guidance), it is the clinical judgement of a registered medical practitioner that the individual has a progressive disease that can reasonably be expected to cause the individual’s death’.

27. This differs from the current UK Social Security legislation where a person is deemed terminally ill if: ‘they suffer from a progressive disease and their death as a consequence of that disease can be reasonably expected within 6 months’.

28. Support for people who are terminally ill is a complex, sensitive and difficult issue. The Scottish Government is aware that behind the decisions that it makes are thousands of people who it must put front and centre of those decisions and its actions. It has become clear that, in order to make the application process accessible and to avoid harmful information being disclosed to clients, provision should be made to allow appointeeship for adults where they agree. This will include those who are terminally ill. It is also possible that harmful information could be provided to Social Security Scotland in respect of supporting other applications for payment. Towards this end, the Scottish Government proposes that the Bill should ensure it is lawful for the Scottish Ministers to not disclose information which would be likely to cause serious harm to the physical or mental health of the recipient.

29. In the majority of circumstances it will be possible for clients to rely on common law agency arrangements to appoint another person to act on their behalf. However, this will not be suitable in some cases, for example where Scottish Ministers find it necessary to withhold information that is considered harmful to a client, since it does not remove the requirement for Scottish Ministers to communicate directly with the client, including meeting their obligations under sections 38, 40, 41, 42, 44 or 53 of the 2018 Act.

30. Harmful information is anything that would be considered detrimental to an individual’s health and wellbeing if they were to become aware of it (e.g. a diagnosis of malignancy). This information may be withheld from a patient where that is thought to be in the patient’s best interests because disclosure would be likely to cause serious harm to the patient’s physical or mental health. Therefore it is possible that an appropriate healthcare

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professional could make a clinical judgement that an individual is terminally ill for social security purposes but then withhold that information from the individual to prevent serious harm being caused. It is also possible that health and social care practitioners could share information that is deemed harmful in the course of providing supporting information for general Disability Assistance applications. It is expected that this would happen rarely but it is nonetheless possible. In such cases it may be appropriate to appoint another person to act on the client's behalf. In these circumstances the appointee will be subject to statutory obligations around provision of information in their own right, and the Scottish Ministers will be obliged to provide information to the appointee instead of providing it to the individual.

31. The Scottish Ministers will require confirmation that the client's agreement has been given for an appointment to be made, and will be required to terminate an appointment if the individual withdraws their agreement. While this may seem to be a wide provision it is considered appropriate to ensure that its availability is not limited to applications for Disability Assistance on account of terminal illness to provide for other circumstances where it may be helpful for the client. It may be appropriate for adults to agree to an appointment in other circumstances, for example where their personal circumstances are such that the individual would not wish, and it would not be reasonable to expect the individual, to act on their own behalf or instruct an agent to do so.

Consultation

32. The requirement to withhold information where it is considered harmful stems from the Chief Medical Officer's Guidance which advises that information may be withheld where it is in the best interest of the patient, and that disclosing the clinical information to the patient, would be harmful. The Chief Medical Officer's Guidance was subject to extensive consultation with clinicians and wider stakeholders. This included a managed (non-public) consultation, between February and April 2019, with those who will use the guidance to support their decision making and organisations who will support clients. The purpose of the managed consultation was to gather views of relevant professionals on the content, structure, and implementation of the Guidance. Letters were issued to relevant stakeholders (identified by the stakeholder groups supporting the development of the guidance) by the CMO inviting them to respond to ensure that the Guidance would meet the needs of medical practitioners

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and others, enabling them to support the delivery of fair and person-centred outcomes.

33. The provisions within the Bill, to allow for appointees for persons with capacity and to allow for the non-disclosure of harmful information, have not been consulted on separately. However, without these provisions there is an increased risk that clients may not be able to effectively access assistance to which they are entitled where information e.g. about a terminal diagnosis has been withheld from them due to risk of serious harm.

Alternative approaches

34. There is the option of not amending the law. However, this would not allow Scottish Ministers to appoint a person to act on a client's behalf where the client does not lack capacity nor would there be clear legal basis for Scottish Ministers to withhold harmful information, where that is necessary.

Top-up assistance: offences

35. Social Security Scotland has a responsibility to ensure that its resources are used economically, efficiently and effectively. Social security benefits are an investment in the people of Scotland and should be paid out only where they have been legally obtained, consistent with government policy. The Scottish Public Finance Manual ("the SPFM") also sets out that Scottish Government business areas undertaking expenditure must satisfy themselves that there is statutory authority for the activity giving rise to the expenditure, and that the expenditure is wholly in line with the relevant enabling statute.

36. While the vast majority of applications for benefits made to Social Security Scotland will be genuine, the evidence is clear that when payments of public money are being made, there will be attempts to obtain such payments by fraudulent means. Where there is a suspicion that this has occurred, it is incumbent upon Social Security Scotland to investigate, and to take appropriate action where necessary to recover the funds and take enforcement action if it believes an offence has been committed.

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37. Sections 71 to 73 of the 2018 Act provides for three specific types of offences that may be committed in relation to fraud. These are:

- Trying to obtain assistance by deceit (through providing false or misleading information);
- Failing to notify a relevant change of circumstances without a reasonable excuse; and
- Causing another person to fail to notify a change of circumstances.

38. Section 79 of the 2018 Act allows the Scottish Ministers to provide by regulations for financial assistance to be given to an individual who is entitled to a reserved benefit and appears to the Scottish Ministers to require financial assistance in addition to any amount that individual receives by way of reserved benefit.

39. However, the fraud offences outlined in sections 71-73 of the 2018 Act are not applicable to any assistance provided for under section 79, because under the Act as passed by the Parliament the offences apply only in the context of assistance given under Part 2. The power under section 79, in Part 3 of the Act, allows a range of matters about such 'top-up' assistance to be provided for in regulations, but does not include an express power to create offences for any 'top-up' assistance. Therefore, no statutory offences are in place in relation to the forms of assistance that may be provided for under section 79.

40. As noted above, the fraud offences outlined in sections 71-73 of the 2018 Act are not applicable to any of assistance provided under section 79. The power under section 79 in the Act allows a range of matters about top up assistance to be provided for in regulations but does not include an express power to create offences for any 'top-up' assistance.

41. This Bill amends section 79 of the 2018 Act to allow the Scottish Ministers, by regulations to make provision about offences in relation to assistance provided under this section and amends section 80 of the 2018 Act to lay out the maximum penalties that can be provided for under these regulations. It also creates a new default position which is that, in the absence of contrary provision made in regulations under section 79, the offences in sections 71 to 73 will apply in the context of top-up assistance.

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Consultation

42. The Scottish Government consulted on its approach to social security fraud as part of a wide-ranging consultation, held between 29 July and 30 October 2016, on the policy and content of its Scottish Social Security Bill. Respondents to that consultation were invited to express their views on the general principles and approach to fraud². A public consultation also ran for 12 weeks between 6 August and 29 October 2018 in relation to the draft Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020 and Code of Practice for Investigations³. The Scottish Government also published a full response to the consultation⁴.

43. The 2018 Act received Royal Assent on 1 June 2018 and the Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020 came into force on 24 January 2020.

Alternative approaches

44. This Bill creates a default position for offences in relation to top up assistance, and allows for different provision to be made in regulations where appropriate. This reflects that future forms of top up assistance developed may be structured differently i.e. they may have different eligibility criteria or rely on different qualifying benefits. While it would have been possible to create a default position in relation to offences and make no allowance for provision in regulations, or indeed leave it all to regulations, it was considered that the approach taken is most appropriate to ensure that appropriate offences can be applied to all future forms of section 79 assistance.

² <https://consult.gov.scot/social-security/social-security-in-scotland/results/00514346.pdf>

³ <https://www.gov.scot/publications/consultation-investigation-offences-regulations-code-practice-investigation/>

⁴ <https://www.gov.scot/publications/scottish-government-response-consultation-draft-investigation-offences-regulations-code-practice-investigations/pages/2/>

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Transfer of jurisdiction from the Sheriff Court to the First-tier Tribunal (FTT) for Scotland

45. Chapter 5 of Part 2 of the 2018 Act, 'Recovery of Value of Assistance' sets out the powers of Scottish Ministers to recover overpaid assistance under Chapter 2 Part 2 as a result of an error. This overpayment may arise due to an error by Social Security Scotland (official error), client error, or indeed assistance which may have been received fraudulently. The overpayment is the difference between the assistance that was given, and the assistance (if any) that should have been given had the error not been made.

46. Section 68 of the 2018 Act contains the following provision 'The Scottish Ministers may by regulations transfer to the First-tier Tribunal for Scotland some or all of the competence and jurisdiction that a sheriff has in relation to the recovery of money owed under section 63'. However, this and the recovery provisions in Chapter 5 relate only to the forms of assistance paid under Part 2 of the 2018 Act and does not apply to new types of top up assistance created under section 79.

47. It is important that overpayments are avoided in the first place and Social Security Scotland's key objectives in line with the obligations under the Public Finance and Accountability (Scotland) Act 2000, is to minimise errors through thorough staff training and IT deployment; early detection and correction of any errors that do occur and to develop effective processes to recover overpayments. Over time, Social Security Scotland will have its own overpayment data which will be able to inform these activities.

48. Where an overpayment exists and the individual has no continuing entitlement to assistance, and a mutually acceptable agreement cannot be reached with the individual, or where the individual fails to repay, then the only recourse for Social Security Scotland is recovery through the ordinary civil court process. Section 68 of the 2018 Act allows for any or all of the jurisdiction and competence of the sheriff in such cases to be transferred by regulations to the First-tier Tribunal for Scotland.

49. The provisions in this Bill will create a corresponding power in the context of top-up assistance, so that this would apply to overpayments relating to types of top up assistance created under section 79 of the 2018

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Act in the same way that it does for the forms of assistance contained within Chapter 2 of Part 2 of the 2018 Act.

Consultation

50. The initial consultation process on the approach to overpayments was carried out as part of a wide ranging consultation on the content of Scottish Social Security Bill between 29 July and 30 October 2016⁵.

51. During the passage of the Social Security (Scotland) Bill 2018 through the Parliament, concerns were raised by some stakeholders that the liability for a debt would, in some instances, only be determined when challenged through the Sheriff Court. This was considered as more daunting for vulnerable individuals than attending a First-Tier Tribunal. Therefore at Stage 3 an amendment was made to the Bill to allow some or all of the powers in relation to social security debt recovery to be transferred from the sheriff courts to the First-Tier Tribunal.

Alternative approaches

52. While the option of not including this provision within the Bill exists, as underlined during the passage of the 2018 Act, the Scottish Ministers wish to have an approach to the recovery of overpayments with fairness, dignity and respect of the individual at the heart of the process. If it is considered appropriate to transfer responsibility for recovery proceedings to the First-tier Tribunal in respect of Part 2 assistance, it is appropriate that Ministers also have the power to transfer this responsibility in respect of top-up assistance provided for under section 79.

Top up assistance: investigations

53. Section 75 of the 2018 Act confers power upon the Scottish Ministers to make provision in regulations about the investigation of the offences created by sections 71-73, as well as new offences relating to obstruction and delay of investigations. These are the Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020, which were laid in

⁵ <https://consult.gov.scot/social-security/social-security-in-scotland/results/00514346.pdf>

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the Scottish Parliament on 26 November 2019 and came into force on 24 January 2020.

54. However, in accordance with section 75, these regulations relate to assistance provided for under Chapter 2 of Part 2 of the 2018 Act and are not applicable to top up assistance provided for under section 79.

55. As noted above in relation to offences, alongside the Scottish Government's wider responsibilities under the SPFM, Social Security Scotland has a responsibility to ensure that its resources are used economically, efficiently and effectively. Social security benefits are an investment in the people of Scotland and should be paid out only where they have been legally obtained, consistent with government policy.

56. To ensure this is the case, it will be crucial that Social Security Scotland has the ability to gather relevant evidence from individuals and organisations to satisfy the evidential requirements of the criminal law in relation to all forms of assistance provided by the Scottish Ministers, including those provided for under section 79 of the 2018 Act.

Consultation

57. As noted above in relation to offences, the Scottish Government consulted on its approach to social security fraud as part of a wide ranging consultation, held between 29 July and 30 October 2016, on the policy and content of its Scottish Social Security Bill. Respondents to that consultation were invited to express their views on the general principles and approach to fraud. A full public consultation⁶ also ran for 12 weeks between 6 August and 29 October 2018 in relation to the draft Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020 and Code of Practice for Investigations. An independent analysis of the consultation was also carried out⁷.

⁶ <https://www.gov.scot/publications/consultation-investigation-offences-regulations-code-practice-investigation/pages/5/>

⁷

<https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-analysis/2019/08/independent-analysts-report-consultation-investigation-offences-regulations-code-practice->

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58. The 2018 Act received Royal Assent on 1 June 2018 and the Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020 came into force on 24 January 2020.

Alternative approaches

59. While the option of not including this provision within the Bill exists, this would prevent investigations by officers, who have been authorised by the Scottish Ministers and have undertaken such training as the Scottish Ministers consider appropriate, into possible instances of fraud in relation to top up assistance provided under section 79 of the 2018 Act. This would be inconsistent with the Scottish Government's zero tolerance approach to fraud and responsibilities under the SPFM.

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

60. The 2018 Act, schedule 5, Part 1, Chapters 1 and 3 currently state that an individual will be eligible for Disability Assistance under special rules when a registered medical practitioner, using their clinical judgement and having had regard to the CMO guidance, consider that an individual is terminally ill.

61. The term "registered medical practitioner" means doctor and does not include nurses. This constitutes a divergence from the existing DWP approach where doctors and some nurses can determine terminal illness for the purposes of establishing entitlement to Disability Assistance.

62. Following the coming into force of the 2018 Act, the CMO - in consultation with a range of medical professionals and wider stakeholders - developed draft guidance to support registered medical practitioners in using their clinical judgement to certify a person as terminally ill. During the development of the CMO guidance it became clear that some registered

[investigations/documents/analysis-responses-consultation-investigation-offences-regulations-code-practice-investigations/analysis-responses-consultation-investigation-offences-regulations-code-practice-investigations/govscot%3Adocument/analysis-responses-consultation-investigation-offences-regulations-code-practice-investigations.pdf](#)

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nurses have the required skills and interactions with a patient to take on responsibility for certifying a patient as terminally ill for the purpose of entitlement to Disability Assistance. This was also reflected in feedback received during the managed consultation on the guidance which suggested that the majority of DS1500s (the form used by the DWP to certify a person as terminally ill) are completed by nurses and that failing to maintain this approach is likely to lead to delays and additional burdens on doctors who are often not involved with the patients day to day care. Feedback in the managed consultation from all medical professions demonstrated overwhelming support for extending responsibility to certify a person as terminally ill to registered nurses. The CMO and Chief Nursing Officer are supportive of such an extension.

63. The provisions in the Bill replace registered medical practitioner with 'appropriate healthcare professional' and that regulations will further define 'appropriate healthcare professional'. The policy intent is to extend responsibility to registered nurses at this time but the provisions allow responsibility to be extended further in future, if appropriate. The provisions of the Bill will further allow regulations to make provision about other matters in relation to which healthcare professionals will be permitted to make the clinical judgement that a person is terminally ill for the purposes of determining entitlement to Disability Assistance.

64. The approach will enable the flexibility for regulations to set out that only appropriate healthcare professionals who meet certain criteria for example in relation to skills, training, or professional relationship to the patient, can certify that an individual is terminally ill for the purposes of disability assistance.

65. The 2018 Act already requires registered medical practitioners to have regard to the CMO guidance when deploying their clinical judgement. The guidance will provide detailed clinical direction as well as clinical indicators which a registered medical practitioner will have regard to, to assist them in making a clinical judgement. All appropriate healthcare professionals will now also be required to have regard to the guidance.

66. Registered nurses were invited to take part in the managed consultation of the guidance and were represented on the stakeholder groups established by the CMO to assist with the development of the

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guidance. The guidance is a live document therefore future development will be conducted by the CMO but supported by the CNO.

Consultation

67. Following the preparation of draft guidance on Benefits Assistance Under Special Rules in Scotland (BASRiS), a managed consultation was sent to a limited list of consultees on 12 February 2019. The consultation closed on 19 April 2019. Consultees were suggested by the stakeholder groups established by the CMO to assist with the development of the guidance⁸.

68. Fifty four of fifty five consultation responses challenged the decision to limit responsibility for completion of the BASRiS form to registered medical practitioners. The strength of feeling on this point was clear and shared by registered medical practitioners, registered nurses, and third sector organisations.

Alternative approaches

69. The Scottish Government considered adding specialist nurses rather than registered nurses. However, it was agreed with the CMO and CNO that this term has no clear parameters.

70. There is an option of defining in primary legislation which registered nurses are able to make the clinical judgement by grade or job title. In discussion, it became clear that job title may not be consistent between Scottish Health Boards, and also that both are subject to change over time. It would therefore be hard to ensure consistency in how the policy was implemented.

Tribunals issues: other judicial officers to hear matters

71. The Tribunals (Scotland) Act 2014 (“the 2014 Act”)⁹ created a new structure for devolved tribunals in Scotland and established the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland. Part 2 of the Act provides for organisational arrangements of the new structures generally,

⁸ The CMO guidance document and associated consultation analysis report have not yet been published.

⁹ <http://www.legislation.gov.uk/asp/2014/10/enacted>

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and Part 2, Chapter 1 makes provision for membership of the tribunals. Appointment and eligibility are dealt with in schedule 3 (First-tier Tribunal) and schedule 5 (Upper Tribunal) of the 2014 Act.

72. The current model for the Scottish Tribunals is based on a fee paid cadre of members, with terms and conditions in line with those set out in the Scottish Public Sector Pay Policy Framework for public appointments and tribunals¹⁰. In contrast, the reserved tribunals system engages a mix of full and part time salaried members and fee paid members. Within the reserved Social Entitlement Chamber, salaried judges provide the strategic judicial leadership required to maintain consistency and efficiency of decision-making across a high volume of membership and cases, which is thought to be critical to the effective and efficient running of the reserved social security jurisdiction.

73. The devolution of elements of the social security system will result in a significant growth in the numbers of cases that are dealt with by First-tier Tribunal Social Security Chamber and the Upper Tribunal. The current capacity of the Scottish Tribunals is insufficient to deal with the projected increase in business and needs to be significantly increased.

74. In particular, there is a large number of experienced judges currently working in the reserved UK tribunals in Scotland within the reserved Social Entitlement Chamber. Once Scottish Ministers start to deliver Disability Assistance for Working Age People (DAWAP), it is anticipated that 60% of social security appeals dealt within the reserved jurisdiction will fall within the remit of Scottish Tribunals. Judicial resources will, accordingly, need to be significantly increased and the President of the Scottish Tribunals is of the view that the right place to look for that resource will be within the ranks of those members in the reserved system who currently handle these appeals, whose work load will start to diminish as more benefits are devolved. The President considers that resource and experience of this group would be a significant asset to the Scottish Tribunals. It is anticipated that the temporary authorisation of members would be a short term measure to ensure that the Social Security Chamber can cope with the arrival of significant numbers of new cases. The longer term challenge is to

¹⁰ <https://www.gov.scot/publications/public-sector-pay-policy-senior-appointments-2019-20-technical-guide/pages/5/>

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find the right structure to provide effective delivery and leadership within the overall tribunals' structure for years to come.

75. There is already provision in the 2014 Act which enables the temporary authorisation of current and former judges. Section 18 of the 2014 Act provides the legal basis for the temporary authorisation of certain individuals to sit in the Upper Tribunal¹¹. Those individuals are certain retired court judges and judges “of a court or tribunal in a country or territory out with Scotland (whether or not another part of the United Kingdom).” This provision is useful in enabling the President of the Scottish Tribunals to access existing and former judiciary, however a wider provision would be helpful to enable the President to request authorisation of those currently within the reserved system with the expertise required to manage appeals efficiently and effectively from the outset. Considering the scale of change that will be experienced by the Social Security Chamber there will, from the start, be a pressing need for judicial efficiency.

76. There is not currently provision to temporarily authorise members of the reserved UK tribunals working in Scotland (not being persons sitting in “a court or tribunal in a country or territory out with Scotland”). Additionally, section 18 of the 2014 Act was specifically created for the Upper Tribunal whereas the increase in the volume of business will be most felt before the First-tier Tribunal.

77. The policy intention is to broaden out the list of those eligible to sit within the devolved system to enable them, via the route of temporary authorisation, to sit in either the First-Tier and Upper Tribunal.

78. Temporary authorisation would allow direct access to those with the greatest expertise in this area already. This is considered the best short term option to help ensure the Chamber can effectively dispose of business.

79. The policy is limited to temporary authorisation. In the longer term it is still the intention that, in line with the Smith Commission proposals, there will be a further devolution of administrative responsibility for tribunals. The

¹¹ <http://www.legislation.gov.uk/asp/2014/10/section/18>

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Scottish Government is committed to the ‘no detriment’ transfer of members at the time of devolution.

80. At the time of transfer the Scottish Government will invite the current cohort of salaried and fee paid members in the reserved tribunals system to transfer. It is anticipated that the Scottish Government will review the judicial structure, more widely, at the point of devolution.

81. Widening the list of judicial offices eligible for authorisation is akin to an administrative matter ensuring that those who already hear these types of cases continue to be able to do so. It would allow the straightforward assignment of a very-well qualified cadre of judiciary to meet a need in the devolved system.

Consultation

82. Consultation has been limited to the judicial stakeholders charged with the operation of the Scottish Tribunals System, the Ministry of Justice and Her Majesty’s Court and Tribunals Service (HMCTS). The President of the Scottish Tribunals has been strongly of the view that amending the 2014 Act is the only practical solution to the current challenges facing the Social Security Chamber to secure the efficient disposal of its business and ensuring that justice is administered without undue delay.

83. This view has also been supported by the Senior President of Tribunals in the reserved tribunal system. Discussions have been held with stakeholders such as the Judicial Appointments Board for Scotland (JABS) and Judicial Office.

Alternative approaches

84. Failure to amend the 2014 Act at this time could undermine the delivery of high-profile commitments in relation to social security policy. There are many vulnerable individuals dependent on a functioning social security tribunal system. The Scottish Government has made a prominent policy commitment that Social Security Scotland will deliver the newly devolved benefits in a more positive and supportive way for the users of its system. Efficient delivery lies at the heart of this commitment.

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85. JABS is responsible for recommending legal members and ordinary members to the Scottish Tribunals (appointments are made by the Scottish Ministers).

86. JABS intends to undertake a “fast-track” recruitment, open only to current fee-paid members of the reserved tribunals. It is not anticipated, however, that this JABS fast-track process (or any similar exercise it may run in future) will attract the numbers of fee-paid judges needed, nor will it attract the salaried members of the reserved tribunal. Therefore, this is not considered a suitable alternative.

87. Within the reserved tribunal system the salaried members provide additional functions (such as strategic oversight) which are thought to be critical to the effective and efficient running of the reserved social security jurisdiction. The clear view of the Senior President of the Tribunals and the President of Scottish Tribunals is that an essential part of that solution must be amendment to the 2014 Act to enable more direct access to current members in the Social Entitlement Chamber of the reserved First-tier Tribunal, particularly the salaried members.

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

Equal opportunities

88. A full Equality Impact Assessment has been published alongside the Bill. No direct negative impacts have been identified in relation to protected characteristics as a result of this Bill. The Scottish Government considers that the provision in relation to appointees for children will have a positive impact on children and young people.

89. No negative impacts have been identified in relation to the provisions regarding disclosing harmful information.

90. No direct negative impacts were identified in relation to the provisions around creation of statutory offences, transfer of jurisdiction but some indirect impacts were identified, primarily in reference to ensuring communications are accessible and user friendly.

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91. No impacts were identified in relation to widening the category of those who can make a clinical judgement of terminal illness. With regard to the provisions within the Bill in relation to enabling other types of judges to be temporarily authorised to sit in the First-tier Tribunal (FTT) and the Upper Tribunal, no impacts related to protected characteristics have been identified.

Human rights

92. The Scottish social security principles set out in section 1 of the 2018 Act recognise that social security is a human right. This is recognised in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR):

93. “Article 9 : The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”

94. The Bill makes a number of changes to the statutory arrangements for administration of the Scottish social security system, which are intended to have a positive impact on individuals’ access to social security assistance. For example, by allowing a wider range of healthcare professionals to provide evidence of a diagnosis of terminal illness for disability assistance purposes; by allowing capable adults to choose to have an appointee to act on their behalf where that is appropriate in their personal circumstances; and by ensuring a suitable adult can be appointed to act on behalf of a child where that is appropriate.

95. The provisions of the Bill will also contribute to the advancement of other human rights.

96. Section 1 is intended to make sure that children who might otherwise have difficulty in accessing social security assistance are able to access social security assistance whatever their living or care arrangements. The Bill does so by providing a mechanism allowing an appropriate adult to be appointed to act on behalf of the child in connection with the determination of the child’s entitlement to assistance and to receive assistance on the child’s behalf. This improvement will promote the realisation of article 26 of the United Nations Convention on the Rights of the Child:

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97. “Article 26 - 1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.”

98. The exercise of the power, which section 1 proposes to confer on the Scottish Ministers, to make and terminate an appointment, determines who can manage the child’s entitlement to social security assistance. The appointment process as set out in the Bill therefore includes requirements which ensure that the rights of the child and family members in relation to their private and family life, protected by Article 8 of the European Convention of Human Rights (ECHR) are respected. The Scottish Ministers will have regard to the views of the child and relevant family members when considering whether to make or terminate an appointment. This duty on the Scottish Ministers to have regard to the child’s views also promotes the child’s right under 12(1) of the UNCRC to be listened to in all matters relating them:

99. “Article 12 - 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

100. Sections 8 and 9 of the Bill amend section 18 of the Tribunals (Scotland) Act 2014. This relates to the Scottish Tribunals, which exercise functions that fall within the civil limb of Article 6(1) ECHR. Article 6 requires the determination of civil rights and obligations to be carried out by an independent and impartial tribunal established by law. The provisions will benefit the tribunals system, and result in a more effective and efficient Social Security Chamber, delivering a positive impact on access to justice, especially to the most vulnerable in society.

101. The 2014 Act secures the independence and impartiality of the Scottish Tribunals in a number of ways. Specifically in relation to section 18 of that Act, which is amended by the Bill, whilst it is the Scottish Ministers who ultimately authorise persons to act as judicial members, such an authorisation cannot be made without a request from the President of the Scottish Tribunals who may not make such a request without the Lord President’s approval. The period for which an authorisation is issued is also

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subject to the Lord President's approval. The leadership of the Scottish Tribunals, which is independent from the executive, plays a fundamental role in the authorisation process.

102. The amendments to section 18 retain these safeguards, thereby ensuring that the requirements of Article 6(1) continue to be upheld.

Island communities

103. An islands impact assessment has been conducted and will be published on the Scottish Government website in due course¹². The Scottish Government does not consider that the provisions within the Social Security Administration and Tribunal Membership (Scotland) Bill will negatively impact upon those in island and rural communities.

104. It is considered that the provisions related to third party applications on behalf of children and the widening of who can make the clinical judgement of terminal illness will have positive impacts on island and rural communities. It is possible that expedient access to registered medical professionals may be more limited in island and rural communities, therefore extending responsibility for diagnosing terminal illness will provide improved access to Disability Assistance for those clients.

105. The Scottish Government is not aware of any specific impacts of the provision relating to third party applications for terminal illness on those living in island or rural communities. Similarly, the provisions in relation to creation of statutory offences and transferring jurisdiction to the FTT for Scotland do not have any specific impacts.

106. The assessment of the provision in relation to investigations identified a number of indirect impacts related to operational matters such as locations for conducting interviews under caution and visibility of investigative staff within small communities. These are operational issues and Social Security Scotland will always treat individuals with fairness, dignity and respect it will be for the agency to ensure that operational processes take these into account when undertaking investigations to ensure that those in island and rural communities are not disproportionately affected in relation to investigations. The Scottish Government does not

¹² This document has not yet been published.

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consider that the provisions contained within this Bill in relation to tribunal membership make a material change to any policy, strategy or service which, in the Scottish Ministers' opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities.

Local government

107. The Scottish Government is satisfied that the Bill has minimal direct impact on local authorities. Any impact on the business of local authorities has been captured in the Financial Memorandum and also the Business and Regulatory Impact Assessment which will be published on the Scottish Government website in due course¹³.

Sustainable development

108. The Scottish Government undertook a Strategic Environment Assessment pre-screening report and this will be published on the Scottish Government website in due course¹⁴. This identified that provisions in the Bill will have very limited environmental consequences based on the criteria set out in schedule 2 of the Environmental Assessment (Scotland) Act 2005.

109. There is no impact – positive or negative – on environmental protection as the Bill does not cover that type of area.

110. On social equity, as the provisions within the Social Security Administration and Tribunal Membership (Scotland) Bill relate to a number of matters which need to be made in order to ensure the continued effective implementation of the Social Security (Scotland) Act 2018, the Scottish Government did not consider that a Fairer Scotland Duty Assessment was required.

¹³ This document has not yet been published

¹⁴ This document has not yet been published

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Social Security Administration and Tribunal Membership (Scotland) Bill

Policy Memorandum

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