

Social Security (Amendment) (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 Amendment (Scotland) Bill introduced in the Scottish Parliament on 31 October 2023.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 35-EN);
 - a Financial Memorandum (SP Bill 35-FM);
 - a Delegated Powers Memorandum (SP Bill 35-DPM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 35-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

4. The Scottish Government believes that social security is a human right and a shared investment to help tackle poverty and build a fairer, more equal society. The Social Security Principles – supported by the entire Scottish Parliament – are the foundation of the system of social security in Scotland which the Social Security (Scotland) Act 2018 (“the 2018 Act”) introduced.
5. The overarching policy objective of the Bill is to enhance the Scottish system of social security in line with those principles, laid out at section 1 of the 2018 Act, particularly the principles which require that ‘opportunities are to be sought to continuously improve the Scottish social security system in ways which put the needs of those who require assistance first, and advance equality and non-discrimination,’ and that ‘the Scottish system of social security is to be efficient and deliver value for money’.
6. In addition to setting out these high-level principles and setting up the broad framework for devolved social security, the 2018 Act also created the powers under

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

which regulations for specific forms of assistance are made. It also brought into being the Scottish Commission on Social Security (SCoSS), an independent scrutiny body which reviews some types of regulations made under powers in the 2018 Act. The payments created using the regulation-making powers in the 2018 Act are administered on behalf of Scottish Ministers by Social Security Scotland, an Executive Agency of the Scottish Government, which commenced activity on 1 September 2018. Some provisions of the Bill amend or repeal sections of the 2018 Act, and others create new provisions in that Act.

7. This Bill includes a number of provisions intended to improve the experience of people using the services provided by Social Security Scotland and a number of provisions intended to deliver increased efficiency and value for money. The Bill also seeks to implement the findings of an independent review into the remit and operation of the Scottish Commission on Social Security, and to revoke emergency provision inserted into the 2018 Act in 2020 at the height of the coronavirus (COVID-19) pandemic.

8. Most of the provisions were consulted on as part of a public consultation titled Scotland's Social Security system: Enhanced Administration and Compensation Recovery¹, which ran for a total of 12 weeks from 4 August to 27 October 2022.

9. Responses to the consultation were principally submitted through the Scottish Government's 'Citizen Space' platform. The consultation document was also made available in an easy-read format², and responses were accepted by whatever method respondents preferred. Those responses have been published where the appropriate permissions were provided³.

10. The consultation paper was divided into four sections:

- 'Improving Client Experience' – which included questions on the introduction of a right to withdraw a re-determination request, the legislative basis for Scottish Child Payment (SCP), making a determination after an appeal has been lodged, the limited use of Department for Work and Pensions (DWP) appointees and the introduction of a specific right of challenge against a finding of liability for an overpayment;
- 'Delivering Value for Money' – which included questions on alternatives to prosecution for low-value fraud, widening the scope of statutory liability for overpayments to include third parties acting on behalf of someone in certain

¹ <https://www.gov.scot/publications/scotlands-social-security-system-enhanced-administration-compensation-recovery-consultation/>

² <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2022/09/scotlands-social-security-easy-read-consultation/documents/consultation-scotlands-social-security-easy-read/consultation-scotlands-social-security-easy-read/govscot%3Adocument/consultation-scotlands-social-security-easy-read.pdf>

³ https://consult.gov.scot/social-security/scotlands-social-security-system/consultation/published_select_respondent

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

circumstances and the introduction of a power to make recoveries of benefits from compensation awards in line with established UK practice;

- ‘Independent Advice and Scrutiny of Social Security’ – which included questions on the respective roles and remits of, and interactions between, the Scottish Commission on Social Security, the Disability and Carers Expert Advisory Group and a potential Scottish replacement for the UK Industrial Injuries Advisory Council; and
- ‘Coronavirus (COVID-19) Measures’ – which included questions on extensions to deadlines for applications, re-determinations and appeals where the reason for the delay was related to COVID-19, introduced in 2020 at the height of the pandemic.

11. The Scottish Government ran a series of events whilst the consultation was open aimed at driving engagement and increasing the number of responses received. Two online events were hosted for stakeholder organisations interested in responding, on 27 September and 11 October 2022. Another online event, specifically aimed at and promoted to people from island communities, took place on 25 October 2022. Two in-person events aimed at members of the public took place; at Lochgelly Centre on 4 October 2022 and at Banchory Town Hall on 6 October 2022. Finally, an online event co-facilitated with Disability Equality Scotland, aimed at gathering the views of users of the existing system of disability benefits, took place on 15 November 2022.

12. The consultation received a total of 34 responses, most of which were submitted on behalf of organisations. Those responses were the subject of an independent report carried out on behalf of the Scottish Government, which was published on 31 March 2023⁴. An easy-read version of the report was published at the same time⁵. The responses to each part of the consultation are considered in detail alongside the relevant Bill provisions below.

13. The findings from the consultation and the surrounding engagement events were supplemented by subsequent research carried out by Scottish Government analysts with the Social Security Experience Panels and Social Security Scotland’s Client Panels.

14. The Scottish Government set up the Social Security Experience Panels in 2017 to help design Social Security Scotland’s benefits and processes. Panel members are people from across Scotland who have recent experience of at least one of the DWP benefits that are now devolved to Scotland. Over 2,400 people registered as Experience Panels members. The Client Panels are made up of Social Security Scotland clients from across Scotland. The Client Panels, launched in 2020, currently have more than 5,000 members with experience across the range of benefits Social Security Scotland delivers. The Client Panels continue the Experience Panels approach of bringing lived experience to decision making, with an emphasis more on continuous

⁴ <https://www.gov.scot/publications/consultation-analysis-scotlands-social-security-system-enhanced-administration-compensation-recovery/>

⁵ <https://www.gov.scot/publications/scotlands-social-security-consultation-results-easy-read/>

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

improvement than design. Client Panels research gives members the chance to share feedback about their experience and their ideas for improvements.

15. Research with Social Security Experience Panel members involved five focus groups and 35 individual interviews with 61 research participants. The second stage of the research included a survey with 340 members of Social Security Scotland's Client Panels. The research was carried out between October 2022 and January 2023. It was designed to provide data on the topics of re-determination and appeals processes, alternatives to prosecution for low-value fraud, and special measures for late re-determinations, appeals and applications. The findings from that research⁶, including a visual summary of the findings⁷, were published on 24 March 2023, and were considered alongside the formal consultation responses whilst developing relevant policies.

16. The Bill is drafted in nine parts, containing a total of 26 sections:

- Part 1 is titled 'Types of Social Security Assistance' and contains the provisions which take new regulation-making powers for Childhood Assistance and Care Experience Assistance;
- Part 2 is titled 'Applications for Assistance' and contains the provisions which repeal section 52B of the 2018 Act, which contains emergency Coronavirus provision introduced in 2020;
- Part 3 is titled 'Determinations and Re-determinations of Entitlement to Assistance' and contains the provisions which further set out timescales for re-determination or appeal requests, the provisions which introduce the right to withdraw a re-determination request, provisions which clarify the duties on Scottish Ministers where they have not completed a re-determination within the period allowed, the provisions introducing a power for Scottish Ministers to make a new determination which stops an appeal following an error whilst an appeal is ongoing, and provisions which set out the powers of the Tribunal in a process appeal, along with the effect of that Tribunal's decision.
- Part 4 is titled 'Assistance Given in Error' and contains provisions which modify the 2018 Act provisions on liability for overpayments and introduce a right to a review, followed by a right to appeal to the First-tier Tribunal for Scotland, against finding of liability for an overpayment;
- Part 5 is titled 'Appointees' and contains provisions which would allow Scottish Ministers to treat a person appointed by the Department for Work and Pensions (DWP) for a limited time, as though they are an appointee under the 2018 Act. Provision is also made to make appointees liable to the person they act for where they act in breach of their responsibilities;

⁶ <https://www.gov.scot/publications/social-security-experience-panels-enhanced-administration-powers-re-determinations-appeals-fraud-special-measures-covid-19-main-report/>

⁷ <https://www.gov.scot/publications/visual-summary-social-security-experience-panels-enhanced-administration-powers-re-determinations-appeals-fraud-special-measures-covid-19/>

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

- Part 6 is titled 'Information for Audit' and contains provisions which confer powers on Scottish Ministers allowing them to effectively audit the monetary value of error and fraud in the Scottish social security system;
- Part 7 is titled 'Recovery from Compensation Payments' and contains the provisions and powers which will allow the Scottish Ministers to make recoveries of assistance from awards of compensation, where they have both been awarded in relation to the same accident, injury or disease;
- Part 8 is titled 'Scottish Commission on Social Security' and contains provisions which implement some recommendations of a recent independent review into the remit and operation of the Commission;
- Part 9 is titled 'Final Provisions' and contains the final provisions applying across the Bill.

Part 1: Types of Social Security assistance

17. The 2018 Act sets out an over-arching framework for the administration of social security in Scotland, making provision for operational functions such as overpayments, fraud, error, re-determinations and appeals. The Act underpins a significant body of secondary legislation which provides detail on each type of assistance and the operation of the social security system.

18. Putting the detailed rules for each particular form of assistance in subordinate legislation was a deliberate choice. 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 the Scottish Government's responsiveness to circumstances.

19. Instead of scrutinising the benefit rules once, when they are made in primary legislation, Parliament instead scrutinises the enabling framework in the Bill, 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 has determined.

20. The powers being taken in Part 1 of this Bill follow the existing framework, conferring on Scottish Ministers the power to prescribe detailed benefit rules by regulations.

Childhood assistance

21. Scottish Child Payment (SCP) helps to support low-income families in Scotland. It is payable to families in receipt of certain UK Government benefits, such as Universal Credit. There is no limit to the number of children per family who can receive the payment. SCP launched in February 2021 for children under six. It was doubled from

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

£10 to £20 in April 2022. In November 2022, it was extended to children under 16 and the payment was increased again to £25 per child per week. SCP is delivered under section 79 of the 2018 Act, which allows the top-up of a reserved UK qualifying benefit. Introducing it under the 'top-up' power in section 79 was considered the fastest and most efficient way to deliver the payment.

22. The current approach has various advantages; in particular, it has allowed for a streamlined application and assessment process. It does however place constraints on the Scottish Government because the relevant qualifying benefits are reserved to the UK Government and the Scottish Government cannot control the eligibility criteria for them.

23. The Scottish Government considers that it would be desirable to have additional flexibility over the rules governing SCP to be able to make changes in future. The provisions at section one of the Bill take a regulation-making power for Scottish Ministers in relation to childhood assistance. The purpose of this assistance is to help towards meeting some of the costs associated with having a child in the family.

24. Scottish Ministers intend to use this power in due course to modify the legislative footing on which SCP is based. This will allow the Scottish Government to make regulations for SCP as a standalone payment, in line with other forms of assistance delivered by Scottish Ministers. Whilst Scottish Ministers envisage SCP eligibility maintaining a close link to reserved benefits, this new approach will allow Scottish Ministers additional flexibility. This additional flexibility would offer scope to better align the payment more closely with other forms of assistance delivered by Scottish Ministers, such as the Best Start Grants and Best Start Foods.

Alternative approaches

25. SCP is currently delivered using section 79 of the 2018 Act. As part of the policy development the Scottish Government considered the benefits and disadvantages in continuing to deliver the payment through this legislative route. It was recognised that its use was a significant contributor in delivering the payment quickly and that it provided a simple application process which appealed to clients and stakeholders.

26. The Scottish Government considered the continued use of the section 79 powers and whether these provided flexibility in delivering future changes to the payment. The Scottish Government established that the use of the section 79 powers was in this respect restrictive and prevents the alignment of SCP with other low income Scottish benefits. The Scottish Government therefore considers that it is appropriate to begin to move away from the delivery via section 79.

27. In order to deliver the desired flexibility the Scottish Government considered whether modifying section 32 (which enables Scottish Ministers to make regulations to deliver Early Years Assistance) and schedule 6 (which outlines the scope of these regulation making powers) of the 2018 Act would be appropriate, to deliver a regulation-making power for childhood assistance, which could be used to amend the legislative

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

footing on which SCP is based. This was considered within both the spirit and the letter of the existing legislative framework, given there are already number of provisions within section 32 and schedule 6 which could enable delivery of SCP with minimal changes. Further consideration however identified that an amendment would be required to paragraph 1 of schedule 6 to include further primary eligibility criteria. This would broaden the purposes of section 32 and schedule 6 beyond what was intended when they were created.

28. Sub-paragraph 1(2)(c) of schedule 6 of the 2018 Act states that the individual 'is to, or has, become responsible for the child within a specified period of the child's birth'. However, it is considered that to interpret this period to extend up to the age of 16 would be an extension of this provision beyond the intentions behind that provision, focusing on assistance in the earliest years of childhood.

29. Additionally, sub-paragraph 1(2)(d) of schedule 6 of the 2018 Act provides for the criterion that the individual 'is responsible for a child when a specified event in the child's life occurs or has become responsible for the child within a specified period of the event'. There is no clear 'event' to which eligibility for SCP could attach. It was therefore considered more appropriate to adopt a new enabling power and schedule which would more appropriately suit SCP and any potential future forms of childhood assistance beyond the early years.

Consultation

30. The consultation considered whether there should be changes to SCP, which is currently delivered under the 2018 Act using powers to 'top up' reserved forms of assistance. There was strong support for the proposal that it would be useful for the Scottish Government to be able to make changes to SCP that were not limited by the current approach that relies on 'top-up' powers. Almost all respondents who answered this section agreed (93%) with the proposal while the remainder didn't know (7%).

31. The main advantages noted by respondents were that the proposal would:

- build on the early success of the SCP, in particular as an intervention to help reduce child poverty and in the context of the cost-of living crisis
- overcome limitations of Universal Credit, a UK Government qualifying reserved benefit for receipt of the SCP
- protect the SCP from the impact of any changes made by the UK Government to reserved UK benefits
- align the SCP with other forms of Social Security Scotland assistance
- enable the Scottish Government to be more agile and responsive to changing circumstances, for example future external events or factors.

32. The main disadvantages of the proposal identified by respondents were:

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

- that implementation of any changes that arose from creating greater flexibility might require additional resources (such as finance and staffing resource), and that this might be challenging in the current climate
- that the application and assessment process for the SCP might become more complex.

33. A few respondents noted that additional flexibility could be used to restrict entitlement therefore the way in which additional flexibility was created would be important.

34. In order to provide additional flexibility, it was agreed that the appropriate route would be to create a regulation-making power for a new form of childhood assistance, which could be used to bring SCP under this provision as a stand-alone benefit rather than a top-up payment.

Care experience assistance

35. The Scottish Government recognise the challenges for people who have had experience of being in care and then move into more independent living. At any age and for any young person, moving on from home is a challenging time but when there are limited support networks in place, the challenge can be exacerbated. In addition to difficult early life experiences, and often multiple placements during childhood, care experienced people continue to leave care with less preparation, less support and often before they are ready.

36. Financial stress and strain for young people leaving care can quickly escalate to create a multitude of challenges and can lead to financial hardship. Published in 2020⁸, 5500 people with lived experience of the care system shared their experiences with the Independent Care Review, over half of whom have experience of care themselves. Many spoke about the anxiety they felt about leaving care and living alone for the first time. The Independent Care Review highlighted and recognised the links between those with care experience and the increased risk of poor mental health, addiction, homelessness and exploitation. Care experienced people are more than one and a half times more likely to experience financial difficulties and have more than double the chance of experiencing homelessness, mainly before the age of 30. Multiple reports have also found money management to be a top concern for people leaving care.

37. The Scottish Government is committed to 'Keeping the Promise' to all children and young people. In order to do so, in March 2022, the Scottish Government published the Promise Implementation Plan⁹, which sets out the actions and commitments that will be taken across the Scottish Government to Keep the Promise by 2030. This includes ensuring that care leavers are provided with person-centred support to enable positive transitions from care to more independent living.

⁸ <https://www.carereview.scot/wp-content/uploads/2020/02/The-Promise.pdf>

⁹ <https://www.gov.scot/publications/keeping-promise-implementation-plan/pages/1/>

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

38. Following the SNP Manifesto 2021 and subsequent Programmes for Government 2021/22 and 2022/23, the Scottish Government committed to developing a payment to provide young people leaving care with additional financial security. To fulfil this commitment, the Scottish Government intends to establish the Care Leaver Payment. This assistance has been referred to as the ‘Care Experience Grant’ in previous Manifesto and Programme for Government commitments.

39. The Care Leaver Payment will form part of a broader package of support which includes access to Continuing Care and Aftercare support for care leavers, the Care Experience Bursary and Council Tax Exemption for care leavers. The assistance will provide a one-off payment for young people leaving care, with the intention of helping to reduce some of the financial barriers that young people face in transition to adulthood and more independent living. This payment aims to provide care leavers with additional financial support.

40. The provision at section 2 of the Bill gives a regulation-making power to the Scottish Ministers to establish one or more schemes to provide care experience assistance to those who have experience of the care system. The regulation-making power will enable the Scottish Ministers to establish a scheme to deliver the Care Leaver Payment. The intention of the assistance is to provide financial support to young people as they move on from care to adulthood and more independent living. Details of the assistance will be set out in regulations following consultation and engagement with those impacted by the policy.

Alternative approaches

41. The Care Leaver Payment is the immediate motivation for the inclusion of section 2 in the Bill, which provides the Scottish Ministers with a regulation-making power to establish one or more schemes to provide care experience assistance to those with experience of the care system.

42. An alternative approach would have seen “care experience assistance” inserted as a benefit delivered under Chapter 2 Part 2 of the 2018 Act to enable the Scottish Ministers to deliver the assistance through Social Security Scotland.

43. The approach taken in the Bill means that full details, including the delivery vehicle, of the scheme(s) established under the regulation-making power to provide care experience assistance will be detailed in regulations without necessarily utilising all of the existing rules and frameworks for delivering assistance provided for in the 2018 Act.

44. Whilst the alternative approach would provide a number of benefits, including utilising existing rules and frameworks for delivering assistance and therefore aligning with other devolved benefits in Scotland, it was determined that the approach taken in the Bill would be preferable because the delivery vehicle for the payment has yet to be determined. The power within the Bill is similar in the approach taken to deliver Best Start Foods. The decision on the preferred delivery vehicle will be informed by evidence

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

and the views and experiences of those with experience of care and of delivering support to care experienced people.

45. By taking the approach set out in the Bill, the Care Leaver Payment can still be delivered in a timely manner without tying the delivery mechanism to Social Security Scotland. This approach will ensure the service is designed and delivered to best meet the needs of those with care experience alongside careful consideration being given to value for money.

Consultation

46. There has not yet been a formal consultation on the policy or provisions contained in the Bill regarding care experience assistance. The Scottish Government will shortly launch a full public consultation seeking views on the proposed assistance, which will include reference to the powers taken in the Bill in regards to care experience assistance. In addition, further consultation on the detailed rules for the assistance itself will be undertaken before the regulation-making power being taken in the Bill is exercised.

Part 2: Applications for assistance

Repeal of section 52B of the 2018 Act

47. In 2020, at the height of the global coronavirus (COVID-19) pandemic, some temporary changes were made to the way that essential public services, such as social security, operated. In addition, the Scottish Government considered that further support and flexibility for those using public services was necessary to reflect restrictions at that time, in both guidance and legislation, on the way people can live and work.

48. Section 52B of the 2018 Act was inserted into the 2018 Act by the Coronavirus (Scotland) Act 2020 ('the 2020 Act'). The 2020 Act made a range of provisions designed to ensure that business and public services could continue to operate effectively during a period where controls on movements had been imposed, and when pressures on public services were acute due to increased absence rates.

49. Section 52B makes provision in relation to applications for assistance. Where eligibility for assistance depends on an application being made by a particular time, section 52B has the effect that a late application can be treated as made within that time, where the reason for the delay is related to COVID-19. For example, the legislation for Adult Disability Payment prescribes an initial 8 weeks for an application to be completed¹⁰. The effect of section 52B is that an application for Adult Disability Payment (ADP) made after the 8 week period could be treated as made within the initial 8 weeks, where the delay was due to a reason related to COVID-19.

¹⁰ Disability Assistance for Working Age People (S) Regulations 2022/54, regulation 35

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

50. Section 52B was in practice relied upon by people making applications for assistance very rarely. Social Security Scotland internal management information suggests that fewer than 0.1 per cent of applications for Best Start Grant, Funeral Support Payment, Young Carers Grant and Job Start Payment between 7 April 2020 and 31 December 2022 relied on section 52B. Reliance on the provision at section 52B has trended downwards over time, after the most restrictive elements of the COVID-19 pandemic response had stopped.

51. In addition, a number of forms of assistance delivered by Scottish Ministers have existing flexibilities built in. For example, where a person has a good reason for not completing their ADP application within the 8-week window, Scottish Ministers can accept an application submitted more than 8 weeks after it was started. COVID-19 could be an example of a good reason.

52. The Scottish Government cannot remove all of the uncertainty about the future caused by the virus, but there have been extraordinary advances in science and technology that are enabling a more sustainable response to the virus; and therefore a return to greater normality. Against this background, the Scottish Government considers that the existing flexibilities in application deadlines, when considered against the low utilisation of section 52B, are sufficient in practice. As a result, the Bill makes provision for the repeal of section 52B.

Alternative approaches

53. The Scottish Government considered two alternative options in developing the policy around late applications due to COVID-19. It considered leaving the exceptions to application deadlines in place, meaning people could continue to have applications accepted late where the reason for the delay was COVID-19. It also considered taking a similar approach to the changes being made in the Bill to re-determination and appeal deadlines, accepting late applications where someone could demonstrate 'exceptional circumstances'.

54. The first alternative, leaving the COVID-19 exceptions in place, was considered undesirable for a number of reasons. In light of the changing circumstances around COVID-19, the Scottish Government does not consider that COVID-19 should be treated differently from any other health condition which may affect the timing of a person's application for assistance. In addition, internal management information showed that the exceptions were very rarely relied upon during the time that they were in place, suggesting little practical need for the exceptions.

55. In terms of the second option, the Scottish Government considers that a general rule for late applications to be accepted where a person could demonstrate exceptional circumstances is not necessary. There are already a range of flexibilities specific to the forms of assistance where they apply, and which offer scope for the circumstances of the individual case to be taken into account. For example, an application can already be accepted after the initial 8-week deadline for completing an application for ADP has passed, provided the applicant has a 'good reason' for being late. The Scottish

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

Government considers that the required flexibility in relation to application deadlines is more suitably provided for on the face of the secondary legislation in relation to particular forms of assistance.

Consultation

56. Respondents were asked whether they agreed or disagreed that applications for assistance to Social Security Scotland should no longer be able to be treated as made on time where they were made late and the reason for that delay was related to COVID-19. Consultation respondent feedback was mixed, albeit more disagreed with the proposal (56%). 38% of consultation respondents who answered this question agreed with the proposal and the remainder didn't know (6%). Most consultation respondents emphasised the need for flexibility and discretion to allow cases to be considered on an individual basis.

57. Respondents were also asked whether they agreed or disagreed that the ability to apply late, where deadlines for making applications for assistance apply, should be extended to reasons other than COVID-19. There was widespread support among consultation respondents for the proposal. Almost all respondents who answered this question agreed (94%) with the proposal and the remainder didn't know (6%). Most consultation respondents restated their support for flexibility and discretion.

Part 3: Determinations and re-determinations of entitlement to assistance

58. Scottish Ministers are under a duty to make a determination of a person's entitlement to assistance upon receiving an application, or when required to do so, by regulations, without receiving an application. A determination is the point at which it is determined that the individual is or is not entitled to assistance. Social Security Scotland makes other administrative decisions on behalf of Scottish Ministers which are not determinations, for example a decision to request further information. There may be multiple administrative decisions in the course of a determination. Specified parties other than the Scottish Ministers, such as the First-tier Tribunal for Scotland, may also make determinations.

59. Where a person disagrees with the determination by the Scottish Ministers, they have a right to re-determination. It is called a 're-determination' as during this stage, Scottish Ministers set aside the original determination and go through the entire process of making a new determination, rather than just examining whether the original determination was correct.

60. Once a re-determination has been made, the individual will be notified of the outcome, the reasons for it and advised of their further right to appeal to the First-tier Tribunal for Scotland, should they still disagree with the outcome. Statutory deadlines for completing re-determinations are provided for in regulations, and where Scottish Ministers do not meet those deadlines, people can appeal to the Tribunal without waiting for the re-determination to be made.

Re-determination and appeal deadlines in exceptional circumstances

61. The 2018 Act sets out that requests for re-determination must be made within statutory deadlines set out within regulations, or within up to one year where the person has a 'good reason' for not applying sooner. The 2018 Act also sets out the deadlines for appealing. An appeal should be made within 31 days. Beyond the 31 days and within a year, an appeal can only be made with the Tribunal's permission, and only if the Tribunal is satisfied that there is a 'good reason' for the appeal not having been made sooner. Provision was also made, by the Coronavirus (Scotland) Act 2020, at section 52A of the 2018 Act, so that a re-determination or an appeal could be made more than a year late where the reason is related to COVID-19.

62. Section 4 of the Bill repeals section 52A, and provides that where a person can demonstrate that 'exceptional circumstances' prevented them from making a request for re-determination within a year, Scottish Ministers will be able to accept the re-determination request. It also makes provision so that where the Tribunal consider that there are 'exceptional circumstances' why an appeal was not raised within a year, they can give permission for the appeal.

63. This means that a wider range of exceptional circumstances than COVID-19 alone will be considered when a re-determination request or appeal has been made beyond a year. The proposed flexibility to enable clients to request a re-determination beyond a year would be underpinned by guidance detailing when circumstances should be considered exceptional. When determining whether a client's circumstances are exceptional, Scottish Ministers will consider whether the circumstances could reasonably be expected to have blocked a client from requesting a re-determination within a year. Examples will be provided in guidance, e.g. severe physical or mental illness, unstable housing, abuse or detainment, but guidance will not prescribe a limited number of scenarios. This will ensure that each client's circumstances can be considered on a case-by-case basis. Exceptional circumstances for appeals beyond a year will be a matter for the Tribunal to determine.

Alternative approaches

64. An alternative would be to remove provisions allowing re-determinations beyond a year if a client had a reason for the delay related to COVID-19, and re-introduce a limit of a year for re-determinations. This alternative approach is however less flexible for clients and does not offer future-proofing for any future pandemics or significant disruption. Consequently, the Scottish Government considers that giving Social Security Scotland the discretion to consider re-determinations beyond a year in exceptional circumstances will ensure access to the challenge rights process when a client has faced significant barriers to bringing a challenge timeously.

65. An alternative for appeals would be to remove the provisions that allow an appeal be brought beyond a year where the Tribunal gives permission, on the basis that they

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

are satisfied that the reason for the application not having been made sooner is related to COVID-19. This would revert to pre-pandemic timescales for bringing an appeal.

66. However, the Scottish Government considers that giving the Tribunal a discretion to allow late appeals after a year in exceptional circumstances will offer more flexibility for people who are justifiably unable to appeal within one year.

Consultation

67. The questions relating to re-determination and appeal deadlines in the consultation were asked in the context of the existing exceptions to deadlines for COVID-19.

68. Respondents were asked whether they agreed or disagreed that requests for a re-determination should no longer be able to be treated as valid where they were made more than a year late and the reason for that delay was COVID-19. Consultation respondent feedback was mixed, albeit more disagreed with the proposal (53%). 40% of respondents who answered this question agreed with the proposal and the remainder didn't know (7%).

69. Similarly, consultation respondent feedback was mixed in relation to the question which asked respondents whether they agreed or disagreed that applications for an appeal should no longer be able to be treated as valid where they were made more than a year late and the reason for that delay was related to COVID-19.

70. Over half of all consultation respondents who answered this question disagreed (53%) with the proposal, just over two-fifths agreed (41%) and the remainder didn't know (6%).

71. The main feedback from respondents who agreed with these proposals was that the temporary measure has served its purpose. There was the suggestion, from some respondents who agreed with the proposal as well as from some of those who disagreed, that flexibility could be applied in exceptional circumstances. This would recognise the ongoing impact of the pandemic, including on particular groups of people and enable the Scottish Government to respond quickly to any future external factors and events.

72. Most respondents who disagreed with the proposals also said that the negative impacts of the pandemic were still being felt in society, and that the temporary measure might still be required.

Withdrawal of request for re-determination

73. Section 5 of the Bill will allow clients to withdraw a re-determination up until the point where a re-determination decision has been made by Scottish Ministers. Currently, section 39 of the 2018 Act allows withdrawal of an application for assistance.

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

There is no provision within existing legislation that enables clients to withdraw a request for a re-determination if they no longer wish to challenge the decision. Social Security Scotland client teams have highlighted that sometimes people do wish to withdraw their re-determination requests but currently Scottish Ministers have no ability to do so.

74. The approach in the Bill serves to empower clients and give them choice and flexibility, in line with Social Security Scotland's person-centred service. This approach also promotes resource optimisation within Social Security Scotland as staff time and resource can be utilised for re-determinations where clients do indeed want to challenge previous decisions. The rate of, and reasons for, withdrawing requests for re-determination will be monitored.

Alternative approaches

75. The Scottish Government considered whether or not to retain the status quo and insist that a re-determination must be carried out where a valid request has been made. It considers that the person-centred approach of the Scottish system of social security would be better served in practice if this decision was in the hands of people using the service.

76. One respondent to the consultation suggested that the re-determination should always go ahead once a request has been made, citing concerns that withdrawals could serve as a barrier to justice, and instead proposing that the re-determination should always be completed, perhaps through an anonymous internal review if the client no longer wishes to proceed.

77. This option would however be operationally difficult to implement, and it does not meet the objective of embedding client choice and flexibility in the challenge rights process.

Consultation

78. Respondents were asked whether they agreed or disagreed that a person should be able to withdraw a re-determination request before Social Security Scotland has made a re-determination decision. Almost all consultation respondents who answered the question agreed (96%) while the remainder of respondents disagreed (4%).

79. Views expressed by respondents who agreed with this proposal included that:

- it was considered a fair and reasonable approach and in keeping with the Social Security Principles around adopting a rights-based and person-centred approach
- the proposal had several advantages such as additional flexibility for people and reduced administrative burden

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

- access to independent advice would help ensure people have considered their options before deciding whether or not their re-determination should go ahead
- people should not feel pressured in any way to withdraw a re-determination request.

Re-determinations after the period allowed

80. Scottish Ministers have a duty to complete re-determinations within prescribed periods in regulations. If these deadlines are missed, clients are informed of their right to appeal to the First-tier Tribunal without waiting for the re-determination to be made. Scottish Ministers may continue to work on the re-determination after it goes out-of-time, and indeed do, but there is currently no legal duty to.

81. As a result, there is some client and stakeholder uncertainty around what happens to out-of-time re-determinations. Section 6 of the Bill will clarify that there is to be a legal duty for the Scottish Ministers to continue to work on out-of-time re-determinations. This duty will come to an end if the individual initiates an appeal, or if the re-determination request is withdrawn. This approach will formalise and clarify the process for out-of-time re-determinations. The provisions at section 6 will also ensure that Scottish Ministers' duty to continue to work on a re-determination resumes where a person withdraws an appeal.

Alternative approaches

82. An alternative would be to retain the current provision, noting that Scottish Ministers can still make the re-determination. However, this approach does not enshrine clients' rights in legislation, ensuring that a re-determination will be completed if a client does not bring an appeal after a re-determination goes out-of-time.

83. This approach also does not resolve stakeholders' concerns in terms of perceived ambiguity around out-of-time re-determinations. In practice, whilst they are no longer under the duty to do so, the Scottish Ministers still go on to make the re-determination beyond the period allowed. To put this on the face of the Bill is consistent with the values of the Social Security Charter in terms of delivering a people's service with clear procedures, timescales and redress.

Consultation

84. This provision is largely technical and uncontroversial as it clarifies existing practice within primary legislation. The need for legal clarity was highlighted to officials in early-2023 by advice and advocacy services who raised concerns that challenges could drop off once re-determinations go out-of-time.

85. No views were sought on this proposal in the public consultation. To seek input from stakeholders on this proposal, the Scottish Government requested written

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

feedback and offered an engagement session with public and third sector organisations in August 2023.

86. The Scottish Government received written feedback from four stakeholders and two stakeholders attended the engagement session. All respondents were in favour of the proposal as they felt it would provide increased clarity for advice and advocacy services and would inform clients of their rights. It was also suggested that this provision would be particularly beneficial for clients who may not wish to go straight to appeal due to stress or anxiety.

87. While support was expressed for the proposal, stakeholders also emphasised that Social Security Scotland should make all possible efforts to complete re-determinations on time, and that clients should not be discouraged from bringing an appeal.

New determination of entitlement after error

88. Under the terms of the 2018 Act, it is not possible for Scottish Ministers to make a new determination of a person's entitlement to assistance once that person has lodged an appeal against the Scottish Ministers' determination in the First-tier Tribunal. The appeal must go ahead in the Tribunal, unless the person withdraws their appeal, even in situations where Scottish Ministers have come to the view that the determination subject to appeal was incorrect.

89. As a result, Scottish Ministers might wish to make a determination which is more advantageous to the individual, but the appeal still has to take place. The Scottish Government considers that this is not a good use of the Tribunal's resources, and wishes to avoid the stress of unnecessary Tribunal hearings for people where there is essentially no dispute.

90. Disputes which are resolved by way of Tribunal hearings can sometimes take a long time to reach a resolution. The Scottish Government has always been clear that it will pay people the right amount of assistance at the right time, and considers that avoiding any delays which may result from the appeals process best advances this intention.

91. The provisions at section 7 of the Bill will allow Scottish Ministers to make a new determination after an appeal has been lodged in certain circumstances, and to stop the appeal. A new determination will only be made where it is more advantageous to the client and where the client consents to the new determination being made. Robust guidance will be put in place so that Social Security Scotland staff can support clients and their representatives to understand their options and the implications of accepting a new determination, and to understand their challenge rights on the new determination. Where a new determination is made, this will carry a right to a re-determination, and thereafter an appeal.

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

Alternative approaches

92. An alternative to the approach set out at section 7 of the Bill would be to only make a new determination, and stop the appeal, if the new determination gave the client the maximum they could be awarded by the Tribunal.

93. The Scottish Government considers that this approach risks pre-empting what the Tribunal might define as the 'maximum' award, and that it would be difficult to define what the maximum award might be across the range of benefits, particularly for disability benefits, where awards are based on how a disability affects a person. It is considered that this is not necessary, and that it is sufficient if the new determination will provide the individual with a more advantageous award as well as seeking their consent to the new determination.

Consultation

94. The consultation asked whether a new determination should only be made where the new determination has the same effect as the Tribunal making the maximum award available to it. Consultation respondent feedback was mixed. 40% of all consultation respondents who answered this question agreed that a new determination should only be made if it gave the person everything they could get from the Tribunal. A similar proportion disagreed with the proposal (44%) and 16% didn't know.

95. Respondents who agreed with this proposal noted that:

- people should not have to attend any unnecessary Tribunal hearings, and this proposal could reduce stress for people
- it could reduce time and resources involved on appeals
- it could increase transparency and errors could be rectified early.

96. Respondents who disagreed with this proposal suggested that:

- it could pre-empt the outcome of Tribunal hearings and restrict options for Social Security Scotland to respond to an appeal
- some people might wish to consent to the new determination and accept a higher award that is less than the maximum they could get from a Tribunal
- the process involved in applying for a re-determination could be stressful for people, and that some people might rather avoid applying for a re-determination as a result.

97. Respondents were also asked whether they agreed or disagreed that a person should be asked for their consent before a new determination is made. A majority of all consultation respondents who answered this question agreed (72%). Similar proportions either disagreed with the proposal (16%) or didn't know (12%).

98. Respondents who agreed with this proposal reported that:

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

- people should be asked for consent at all stages of the challenge process, and that this could empower people
- it fits with a person-centred approach and aligns strongly with the Social Security Principles and Charter
- it would reduce stress for people, including those with protected characteristics
- it would provide an additional opportunity for people to be signposted to independent advice.

99. On the other hand, those who disagreed with this proposal held the view that asking a person for consent before a new determination was made might not be necessary at this stage, and that Social Security Scotland has the right to make a new determination. It was suggested asking for consent could lead to added pressure being placed on people.

100. Most consultation respondents expressed support for challenge rights on a new determination, and there were broadly three main views on how those rights should look. Some people thought there should be a consistent approach across the social security system and therefore give people both re-determination and appeal rights on the new determination, others said that the new decision should only come with appeal rights (meaning that the re-determination step should be skipped), while others suggested that instead of stopping the appeal, the appeal should just continue against the new determination.

Appeal against Scottish Ministers' process decisions

101. Section 61 of the 2018 Act provides that individuals can appeal to the First-tier Tribunal against process decisions made by the Scottish Ministers in relation to applications for assistance, and requests for a re-determination. These can be referred to as 'process appeals' and are distinct from appeals against a determination of entitlement.

102. However, unlike section 49 of the 2018 Act, which sets out the powers of the Tribunal in an appeal against entitlement, section 61 does not explicitly set out the powers of the Tribunal in a process appeal to uphold a decision by Scottish Ministers, or to set aside a decision by Scottish Ministers and make its own decision.

103. In addition, the 2018 Act does not provide for what Scottish Ministers should do after the Tribunal sets aside a decision by Scottish Ministers and makes its own decision. In the scenario where the Tribunal sets aside a decision by Scottish Ministers and makes its own decision, it is implied that Scottish Ministers should process the client's application or re-determination request, but there is a lack of clarity in the legislation.

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

104. Section 8 of the Bill therefore clarifies the powers of the Tribunal in a process appeal, along with the duties of the Scottish Ministers where the Tribunal sets aside the Scottish Ministers' previous decision. The provisions reflect both the existing policy intent and what happens in practice.

Alternative approaches

105. The alternative would be to retain the current provisions, and therefore retain the ambiguity around the powers of the Tribunal in a process appeal, and the effect of the Tribunal's decision in a process appeal. Providing clarity is consistent with the values of the Social Security Charter in terms of delivering a people's service with clear procedures and routes of redress.

Consultation

106. No views were sought on this proposal in the public consultation. However, these provisions do not introduce any new policy or process. They are technical, and aim to clarify existing practice and policy intent within primary legislation.

Part 4: Assistance given in error

107. Part 4 of the Bill makes modifications to the 2018 Act for the Scottish Ministers to make decisions in relation to an individual's liability for overpayments. It clarifies the circumstances in which an individual will be held liable, as well as setting out the circumstances in which an individual's representative will be held liable. It also introduces a right to a review of these decisions, followed by a right to appeal.

Liability of individual for assistance given in error

108. In some circumstances a client will need someone else to act for them in connection with their award of assistance. Whether they are judicially or administratively appointed, a representative will usually take decisions that will benefit the person they are acting for.

109. However, they may make honest mistakes or bad judgements when carrying out their duties. For example, a failure to report a change of circumstances (such as hospitalisation) quickly might result in an overpayment. In the vast majority of cases, by the time it is discovered the overpaid funds will have made their way to the entitled individual, either directly, or in the form of goods and services from which they have benefited.

110. The 2018 Act currently specifies that a person who is entitled to assistance is liable to repay any overpayment made in error, except where they did not cause or contribute to that error, or if it was the sort of error an individual could not reasonably be expected to have noticed. Where the individual's representative applies for, manages and receives payments on a person's behalf, it will usually be them who has either been at fault, or who would have been in a position to notice the error. However the

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

individual's representative may still have operated within their duties and responsibilities as a representative, and used the overpaid funds for the benefit of the individual they represent.

111. The Scottish Government does not consider it fair to seek recovery from vulnerable clients where the overpaid sums were used outwith the duties and responsibilities of their representative. However, nor does the Scottish Government consider that people should be deterred from volunteering to act on behalf of a friend or family member by a risk to their personal finances, so some flexibility is required.

112. The provisions at section 9 of the Bill will make provision that an individual is liable where their representative has been the one who was at fault for the error. However, an individual will not be liable so far as the assistance given in error was used for a purpose which was a breach of the duties or responsibilities of their representative, for example, where the representative has not used the money in the interests of the client.

Liability of individual's representative for assistance given in error

113. Section 10 of the Bill deals with situations where the person acting on behalf of the client has used the overpaid money for a purpose which was a breach of their duties or responsibilities as a representative. Where a representative has acted deceitfully, for example misrepresenting a client's circumstances to obtain an overpayment which they then kept for themselves, that representative will be liable to repay the overpayment. The Scottish Government anticipates this will only occur in a minority of complex cases where financial abuse is identified.

114. The same exclusions from liability which currently exist for individuals will also apply to representatives. The representative will not be liable where they did not cause or contribute to that error, or if it was the sort of error that a person could not reasonably be expected to have noticed. Additionally, where a payment is to be recovered, every effort will be made to agree a mutually acceptable repayment plan with the representative in question. The Bill includes provision so that repayment could in some instances be by way of deduction from assistance which the representative receives in their personal capacity.

Alternative approaches

115. The Scottish Government considered making both the individual with the entitlement to assistance and their representative jointly and severally liable to repay any overpayments. It also considered the feasibility of making representatives liable for any errors that arose as a result of their action. This would apply in cases both where they acted in the client's best interests and within the scope of their duties, and when they did not.

116. Neither of these alternatives achieves the Scottish Government's policy intent in the way that the provision in the Bill will. Joint and several liability would not help

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

distinguish and attribute liability between the person with the entitlement and the person who acts on their behalf, dependent on the circumstances in which an overpayment arose whether any dishonesty was involved. This approach, while increasing the likelihood of Social Security Scotland recovering overpayments where someone acts on behalf of someone else, could result in unfairness, with a party lacking capacity being held liable for an overpayment they did not in fact ultimately benefit from.

117. Implementing a process where representatives are liable for all overpayments arising whilst they are involved regardless of whether any overpaid money was used in the interests of the client or not, would not fully achieve the policy intent either. The Scottish Government's view is that people acting on behalf of someone lacking capacity should not be discouraged from helping, particularly when the person acting in bad faith is anticipated in a small minority of cases.

118. The Scottish Government does not think it is fair to seek recovery from vulnerable clients where due to the bad faith of another person they saw no benefit from those payments. However, nor does the Scottish Government consider that people should be deterred from volunteering to act on behalf of a friend or family member by a risk to their personal finances. The Scottish Government considers the provisions in the Bill successfully strike this balance by ensuring that the person who benefited from the overpaid sums will, ultimately, be liable to repay them.

Consultation

119. Respondents were asked whether they agreed or disagreed that third parties, such as appointees, should be included within the scope of statutory liability for overpayments. The majority of all consultation respondents who answered this question agreed (75%) with the proposal, while 10% disagreed and 15% didn't know.

120. Those respondents who agreed with this proposal felt that:

- the proposal would create additional flexibility by balancing the need to protect vulnerable people and avoiding deterring people from volunteering to act on someone else's behalf
- there might be mitigating circumstances whereby friends or family could be involved in helping someone and could inadvertently make an honest mistake
- third parties who act on someone else's behalf should not be held liable where they did not cause or contribute to that error, or if it was the sort of error that a person could not reasonably be expected to have noticed.

121. Some respondents believed that third parties, such as appointees, should only be liable in cases of their own financial gain. These respondents suggested that, regardless of whether or not a person had acted deceitfully, it would be unfair to hold that person financially liable where they had not received financial benefit.

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

122. Respondents who disagreed with this proposal felt that a third party, such as an appointee, might be deterred from volunteering to act on someone else's behalf if they were included within the scope of statutory liability for overpayments.

Consequential modification of the Prescription and Limitation (Scotland) Act 1973

123. Section 11 of the Bill amends schedule 1 of the Prescription and Limitation (Scotland) Act 1973 so that the liability of a representative in the situations covered by section 10 will prescribe¹¹ after five years without a court action being served, in the same way that liability of an individual would prescribe. This is in keeping with most common debts, which cannot be recovered after five years have passed.

Liability of individual's estate

124. Section 12 of the Bill amends section 69 of the 2018 Act to ensure that the estates of both individuals who are liable under section 63 (as modified by the Bill) and representatives who are liable under section 64A (as provided by the Bill) will be liable for any assistance that they would have been required to pay under those respective sections had the decision been made before their death.

125. This is consistent with the current intentions of section 69, to ensure that an individual's estate will be liable for any outstanding assistance or liability that persists after death. It brings representatives found liable for an overpayment into line with individuals who represent themselves, making their estates similarly liable.

Assistance given in error: reviews and appeals

126. Currently, where Social Security Scotland comes to the view that an overpayment has occurred, it will make a new determination of a client's entitlement to the benefit in question.

127. Although this new determination will bring re-determination (and appeal) rights if the client disagrees and wants to challenge the decision, those rights of challenge do not currently include the right to challenge the separate decision on whether or not the client is liable for the overpayment.

128. For example, the person held liable for the overpayment might accept that an overpayment has in fact occurred, but may believe the overpayment was neither their fault nor an error that a person could have reasonably been expected to notice. People would be able to defend any court proceedings which may be raised by Scottish Ministers to recover any outstanding sums, but currently they cannot seek a review by the Scottish Ministers, or raise an appeal in the Tribunal, to challenge the decision.

¹¹ That is, cease to exist by operation of law

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

129. The Scottish Government considers that its person-centred approach to social security is best served by creating a right of challenge against a finding of liability for an overpayment which avoids the delay and expense of potentially lengthy and stressful court proceedings for clients.

130. Section 13 of the Bill therefore introduces new rights of challenge against a decision that an individual or their representative is liable for an overpayment. These provisions will apply in the same way whether or not the person being held liable by Scottish Ministers is the individual entitled to assistance or their representative.

131. Section 13 takes a power to make provision by regulations which Scottish Ministers will use to prescribe the process for requesting a review of a liability decision. This process will offer an individual the opportunity to request a review of the decision, and, if still dissatisfied, appeal the decision. It is expected that the process implemented will be analogous to the existing and established process within the devolved social security system where individuals dissatisfied with a determination, have the ability to seek a re-determination if still not satisfied following this re-determination, appeal to the First-tier Tribunal.

132. The timescales for this process will mirror existing timescales for re-determinations and appeals. There will also be provision for process appeals where a request for a review has been rejected as purporting to be a request, or where someone was considered to not have good reason or exceptional circumstances for not requesting a review sooner.

Alternative approaches

133. The status quo alternative – maintaining an informal and final challenge within Social Security Scotland followed by the opportunity to raise a defence to any subsequent Sheriff Court recovery action raised by Social Security Scotland – would not satisfy the policy intent.

134. The Scottish Government considers that its person-centred approach to social security is best served by creating a new right of challenge which both brings this type of dispute into line with other challenges against decisions made by Social Security Scotland and avoids the delay and expense of potentially lengthy and stressful court proceedings for clients.

135. Creating a right to challenge liability decisions in the First-tier Tribunal for Scotland (Social Security Chamber) allows people to proactively challenge Social Security Scotland's decision where they disagree, empowering clients to take charge of the situation in a way which is impossible when their only option is to wait to defend a possible court action.

136. The new process also brings these challenges into line with the existing approach to re-determinations and appeals on entitlement to assistance, which are heard in the same chamber of the First-tier Tribunal. The Scottish Government

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

considers that the Tribunal is the most appropriate venue to hear these disputes, given its specialist social security knowledge.

Consultation

137. Respondents were asked whether they agreed or disagreed that the Scottish Government should introduce rights of challenge against Social Security Scotland's decision that someone was liable to repay an overpayment. All consultation respondents who answered this question agreed (100%) with the proposal.

138. Much of the respondent feedback on this proposal was that rights of challenge were important for several reasons, including that:

- people should be able to challenge liability for an overpayment, as there could be a range of circumstances in which an overpayment could occur (for example administrative errors)
- each case should be assessed on its own merits as there might be mitigating factors
- the proposal could avoid court proceedings for people
- challenge rights were consistent with a person-centred, human rights-based approach
- the proposal could increase accountability, transparency, and openness of the Scottish social security system, and ensure greater alignment with the UK system.

139. Almost three quarters of respondents answering the question considered the most appropriate way to hear challenges was for Social Security Scotland to first look at its decision again when a challenge was raised with a possible re-determination and, if the person still disagreed, then for challenges to be heard at the First-tier Tribunal for Scotland (Social Security Chamber). Other approaches suggested by a few respondents included going straight to the First-tier Tribunal for Scotland (Social Security Chamber) in some cases, or an independent review.

Part 5: Appointees

140. The Scottish Government is committed to putting the needs of those who require assistance first, to pay clients on time and in the right amount, while recognising applications should be processed quickly.¹² However, the Scottish Government is also committed to respecting the rights of disabled people, and to supporting people who lack capacity to make informed decisions about their own lives as far as they are able to do so.¹³

¹² [Social Security Scotland - Our Charter](#)

¹³ [Adults with Incapacity \(Scotland\) Act 2000: principles - gov.scot \(www.gov.scot\)](#)

Power to make provision in relation to appointments made by a Minister of the Crown

141. Section 14 of the Bill will introduce powers for Scottish Ministers to make provision in regulations prescribing limited circumstances in which they may treat a person appointed by the Secretary of State to act on behalf of an individual as though they were appointed by the Scottish Ministers (under section 85A or section 85B of the 2018 Act) to act on behalf of that individual. This will allow the person appointed by the Secretary of State to act on another person's behalf in the UK benefits system to temporarily act on behalf of the individual within the devolved social security system until the appointment is fully assessed at a later date. In relation to specified forms of assistance, the intention is that Scottish Ministers must consider whether the conditions under the 2018 Act for making an appointment in respect of the individual are met as soon as reasonably practicable. Scottish Ministers will also be required to consider whether to terminate the appointment, and in that case, whether to appoint another person to act on the individual's behalf in terms of section 85A or 85B.

142. For a short period of time, the person appointed by the Secretary of State will be authorised to proceed with outstanding applications for specified forms of assistance and receive those payments on the individual's behalf, allowing individuals to be put into payment quickly, whilst thereafter ensuring that the appointment is appropriate.

Alternative approaches

143. An alternative would be to mirror UK Government provisions that enable DWP to accept a Social Security Scotland appointee. In practice this would apply a blanket approach to all DWP appointees, allowing them to be recognised in the devolved system for a prolonged period with no appointee assessment taking place.

144. This would remove the opportunity for Social Security Scotland to directly engage with the individual to assess their capacity; obtain their views where possible; assess if the appointee is suitable, and seek the views of others who have an interest in the individual's welfare or finances. Consequently, this approach is not in line with the safeguarding principles of the 2018 Act appointee provisions, the principles behind the Adults with Incapacity (Scotland) Act 2000¹⁴ or the United Nations Convention on the Rights of Person with Disabilities¹⁵, and is therefore not an appropriate option. Furthermore, there was overall agreement in responses to the consultation that where an existing DWP appointee is accepted, the duration of the arrangement should be short term, and the appointee should undergo the full Social Security Scotland process as soon as is practically possible.

Consultation

145. Respondents were asked whether they agreed or disagreed that Social Security Scotland should be able to make payments to a Department for Work and Pensions

¹⁴ [Adults with Incapacity \(Scotland\) Act 2000 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2000/42/section/1)

¹⁵ [Convention on the Rights of Persons with Disabilities – Articles | United Nations Enable](https://www.un.org/en/conventions/treaties/09)

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

(DWP) appointee for a time-limited period until Social Security Scotland completes its appointee process. Almost all consultation respondents who answered this question agreed with the proposal (96%) and the remainder disagreed (4%). The one reason given for disagreement was that Social Security Scotland should complete all its usual checks before paying a DWP appointee.

146. Respondents who agreed with this proposal reported that:

- the proposal would avoid delays to payment
- the benefits of the proposal outweighed the risks.

Liability of appointees under sections 85A and 85B

147. Currently, there is no provision within the 2018 Act with the effect that an appointee will be liable to account to the individual for any mismanagement of the individual's property (either in relation to children or adults). There are provisions respectively, in terms of the Children (Scotland) Act 1995 (c.36) and the Adults with Incapacity (Scotland) Act 2000 (asp 4), which make other types of representatives liable to the individual for mismanagement of their property.

148. As a result, the Bill inserts provision into the 2018 Act such that where an appointee uses any funds of the child or individual in breach of their responsibilities as an appointee under the 2018 Act, outwith their authority or power to act in terms of that appointment, in breach of any duty or responsibility arising from their appointment, or after their appointment is terminated, they are liable to repay those funds to the person they represent. An appointee will not be liable, however, where they have acted (or, as the case may be, failed to act) reasonably and in good faith.

Alternative approaches

149. The alternative would be to leave appointees made under the 2018 Act free from the liability that people in comparable positions, such as people with power of attorney, or parents, have. The Scottish Government does not consider there are any reasons why appointees made under the 2018 Act should be treated any differently in this regard.

Consultation

150. This change was not consulted upon as part of the public consultation because it emerged in the course of policy development and drafting around the policy proposals on appointees at section 14.

Part 6: Information for audit

151. The 2018 Act is underpinned by the principle that the Scottish social security system is to be efficient and deliver value for money. Section 15 of the Public Finance and Accountability (Scotland) Act 2000 ("the 2000 Act") makes provision for

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

accountable officers (“Aos”), with the relevant functions of Aos set out at section 15(7) of the 2000 Act. Under section 14 of the 2000 Act the AO is personally answerable to Parliament for the exercise of the functions; see also the Scottish Public Finance Manual at paragraph 2.1.4 in Annex 1¹⁶.

152. To those ends, robust and reliable audit and reporting mechanisms are required to provide assurance that payments are correct, and where they are not, to accurately quantify rates of overpayment, underpayment and fraud. This informs official statistics, identifies areas for improvement and helps to ensure that Social Security Scotland’s expenditure is in line with its statutory powers and parliamentary authority.

Information for audit of social security system

153. Section 16 of the Bill inserts new section 87B into the 2018 Act, which gives Scottish Ministers the power to require that individuals receiving assistance, cooperate with requests for information in relation to the individual’s award, payment, or entitlement for the purposes of auditing the monetary value of fraud and error and associated or connected purposes. Where they fail to do so, their entitlement may be suspended. Individuals will have the right to seek a review of any decision to suspend. Where following a suspension they still fail to provide the requested information, an unscheduled review may be triggered to review their entitlement, which could be brought to an end if appropriate in the circumstances. The unscheduled review process provides individuals with re-determination and appeal rights if they disagree with any determination arising.

154. New section 87B(5) provides that Ministers can prescribe in regulations categories of individuals who are not to be requested to provide information – in other words, categories of people who will be exempted entirely (e.g. people with terminal illnesses).

155. New sections 87C and 87D provide that individuals will be able to request that they are exempted from this requirement where they have good reason, and will be given the right to have support to respond to any request for information for audit purposes.

Alternative approaches

156. Provisions of this nature are necessary to meet the requirements of the 2000 Act. An alternative to the right to seek exemption would be to allow individuals to opt-out of providing information to support audit processes within the devolved social security system, even where they do not have a good reason.

157. The Scottish Government considers that this would prevent reliable estimates of overpayments, underpayments, and fraud being obtained and would create a self-

¹⁶ <https://www.gov.scot/publications/scottish-public-finance-manual/accountability/annex-1-memorandum-to-accountable-officers-scottish-administration/>

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

selecting rather than random statistical sample. In addition, it is unlikely that individuals engaged in fraudulent activity would willingly participate in any process that is likely to scrutinise of their entitlement, defeating the purpose of the audit.

158. Without reliable estimates of fraud and error within the devolved social security system, there is a risk that Social Security Scotland's AO would be unable to fully meet the requirements outlined in Part 2 section 15 of the 2000 Act ensuring the propriety and regularity of the finances of Social Security Scotland and that its resources are used economically, efficiently and effectively.

Consultation

159. The Scottish Government is clear that this provision is high priority, fundamental to the functioning of the Scottish social security system and aligns with the practice of other government departments. No public consultation was therefore conducted on the provisions at section 16. Stakeholder engagement will inform the processes used to capture information for audit to ensure that they are clear, user-friendly and accessible.

Part 7: Recovery from compensation payments

160. Scottish Ministers do not currently have powers to recover social security assistance from compensation paid to individuals by liable third parties as a result of accidents, injuries or diseases. While provisions were not made within the 2018 Act, it has always been the intention of the Scottish Government that, if possible, a process should be put in place within a reasonable timeframe that allows the recovery of social security assistance as appropriate.

161. Recovery provisions are a longstanding feature of the UK social security system, beginning with the Law Reform (Personal Injuries) Act 1948, followed by the recovery scheme introduced in Social Security Act 1989, then the Social Security Administration Act 1992 and finally in the current legislation, the Social Security (Recovery of Benefits) Act 1997.

162. Prior to the introduction of the 2018 Act, all social security benefits were administered and when appropriate, recovered by the Department for Work and Pensions (DWP). Devolved forms of assistance such as Industrial Injuries Disablement Benefit (IIDB), Personal Independence Payment (PIP), Attendance Allowance (AA) and Disability Living Allowance (DLA) are currently delivered by the DWP on behalf of Scottish Ministers via agency agreements. The recovery of these forms of assistance is also facilitated through those same arrangements.

163. With the creation of new forms of assistance in Scotland such as Adult Disability Payment (ADP) and Child Disability Payment (CDP), individuals in receipt of these as a result of an accident, injury or disease caused by a liable third party, are being doubly compensated in comparison to others in receipt of similar benefits delivered by DWP.

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

164. The intention is to create a Scottish compensation recovery scheme which takes an approach to the recovery of social security assistance consistent with the rest of the UK. This consistency is intended to reduce complexity for the personal injury and insurance industries while also limiting the impact on the injured persons involved.

165. The policy objective is to enable Scottish Ministers to recover amounts of social security assistance from compensation payments paid by liable third parties to individuals in relation to an accident, injury or disease.

166. The Scottish Government believes that liable third parties should not be subsidised from public funds in their obligation to fully compensate a person for an accident, injury or disease. Furthermore, assistance paid to the injured person should not serve as double compensation for the same loss but should meet their needs while a settlement is being reached.

167. One of the key principles established in the 2018 Act states that 'the Scottish social security system is to be efficient and deliver value for money'. To achieve efficiency and value for money, it is required that the Scottish Government ensures that every avenue is explored to attain maximum value for funds spent. Implementing recovery of social security assistance from compensation payments is a way in which this can be realised.

Recovery of value of assistance from compensation payments

168. The Bill sets out the main parameters of a Scottish compensation recovery scheme, including those forms of assistance that have been deemed recoverable. The Bill also makes provision for further details of how the scheme will operate to be established in regulations.

169. Section 17 of the Bill inserts sections 94A to 94W and schedule 12 into the 2018 Act.

170. Section 94A sets out the framework of the scheme. It first defines the scope of the scheme's application. This legislation would apply in cases where a compensation payment is made by a person, known as the compensator, to the injured person as a consequence of any accident, injury or disease.

171. The compensator will be liable to pay Scottish Ministers an amount equal to the total amount of recoverable assistance prior to paying the compensation to the injured person. This approach prevents Scottish social security assistance being used to subsidise liable third parties in their obligation to meet their duty to fully compensate injured persons and avoids injured persons being doubly compensated. The provisions made within the Bill in relation to compensation recovery will apply to compensation payments where the accident, injury or disease to which they relate occurs on or after the date that the provisions come into force.

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

172. As well as specifying the forms of assistance which will be recoverable, schedule 12 specifies payments which are to be exempt from recoveries. There are certain payments that are deemed exempt from recovery, because they are paid from a source or for a purpose which would make recoupment illogical or unreasonable. Redundancy payments are an example of this as it is deemed that they are not designed to compensate an ex-employee for the effects of an accident, injury or disease.

173. Another reason for exemption is that a payment is designed to supplement forms of assistance rather than replace them. Examples of this are awards made in respect of personal injury sustained as a result of a criminal act. These are subject to a separate offsetting arrangement operated by the Criminal Injuries Compensation Authority, and are therefore exempted from the compensation recovery provisions.

174. Payments are also exempted if it is expedient for operational reasons not to have to regard to a particular form of compensation. An example of this is payments for noise induced hearing loss where loss of hearing is less than 50 decibels. In such cases, it is very rare for social security assistance to be awarded as a direct result of the deafness. The exemption therefore prevents compensators requiring to notify Scottish Ministers that a compensation claim has been lodged and apply for a certificate of recoverable assistance.

175. Both the list of recoverable forms of assistance, and the list of exemptions, are to be able to be amended by regulations.

176. Section 94C sets out that before reaching a settlement with the injured person, compensators are required to apply for a certificate of recoverable assistance. Where no assistance has been received, a 'nil certificate', showing that there is no assistance to be recovered, will be issued. It is important that a compensator understands the financial obligation to Scottish Ministers before agreeing a settlement with an injured person, and the certificate provides this.

177. Once an accurate and complete application has been received by the Scottish Ministers, they must provide the compensator an acknowledgement of the application. It will then be the duty of Scottish Ministers to provide a certificate to the compensator within the 4 week period following the receipt of the application (or another period specified in regulations). This written acknowledgement becomes important if the certificate is not issued within the period of 4 weeks of the application being received. Failure to issue the certificate within this time period may result in the compensation payment being disregarded. This time limit helps to restrict the impact on the injured person by further elongation of the compensation claim process.

178. This certificate will detail the amounts and types of recoverable assistance received by the injured person since the beginning of the relevant period. Here, the "relevant period" refers to the limited timeframe where any recoverable assistance received within this period of time will be subject to recovery. The relevant period for an accident or injury is defined as five years immediately following the day of the incident. However, in relation to disease, a different relevant period will be required due to the

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

potential of delayed symptom onset after negligent exposure. Considering this, the relevant period is defined as five years beginning from the date that the injured party first claimed any agreed recoverable assistance as a consequence of the disease. Only assistance received as a result of the accident, injury or disease throughout the relevant period will be included on the certificate.

179. A certificate will specify the date until which it remains in force. Compensators may request further certificates. A new certificate will not be generated until the one currently in issue expires. Section 94E makes provision that compensators are liable to pay to Scottish Ministers an amount equal to the total amount of recoverable assistance received by the injured person within the relevant period. This liability will arise immediately before a compensation payment is made to the injured person or if there are multiple compensation payments, immediately before the first payment.

180. Compensators must pay what is owed to Scottish Ministers within 14 days of the compensation payment being made. If the compensator has already made a payment to the injured person without applying for a certificate, then a certificate will be issued and compensator must then pay Scottish Ministers within 14 days of the certificate's issue. If the payment is not made within this period, the Scottish Ministers may issue the compensator with a copy of the certificate of recoverable assistance, and a demand that payment of the sum due is to be made immediately.

181. In situations where a compensator has made a payment to the injured person but has not applied for a certificate of recoverable assistance from Scottish Ministers, the Scottish Ministers may issue both a certificate of recoverable assistance and a demand that payment of the sums due is made immediately.

182. If a payment is not forthcoming then the Bill makes provision for the recovery of sums due. The amount recoverable specified in a demand for payment is treated as if it were a decree bearing a warrant for execution. This means that Scottish Ministers can proceed directly to debt recovery without the need to go to court, ensuring that sums due to the Scottish Ministers by compensators are recovered in the most efficient manner possible.

183. Section 94G makes provision about amounts overpaid under the scheme. Circumstances may arise where the compensator has paid a sum to Scottish Ministers which they were not liable to pay. An example of this is when a compensator settles a claim earlier than expected, but pays the full amount on the certificate of recoverable assistance, as opposed to the sum up to and including the day of payment of the compensation to the injured person. As the relevant period will end on the day the compensation payment is made, the compensator would not be liable for any sums after that date.

184. The Bill makes provision for the repayment to the compensator of any difference between the amount that has been paid and what was due to be paid. When a refund is required, a statement specifying what should have been paid as well as the refund amount should be provided to both the compensator and the injured person.

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

185. In this situation, when it becomes clear that an overpayment has occurred, a new certificate must be generated, and the compensator will have an obligation to recalculate how much should have been deducted from the injured person's compensation payment and pay any amount that the injured person is due. This action will ensure that the injured person is fully compensated for the accident, injury or disease.

186. Section 94H makes provision about the liability of insurers. There are many instances where individuals and organisations engage insurance policies to protect against the financial impact of claims of negligence or liability. Within these policies, the insurer accepts liability in specific circumstances to pay compensation in relation to the negligence or liability of the policy holder. The Bill makes provision for policies of insurance to cover the liability to repay amounts of social security assistance to Scottish Ministers.

187. This would apply in circumstances where a compensator has engaged an insurance policy to protect against the financial impacts of any liabilities. Here, the insurer may be the one who pays the compensation owed by the policy holder in relation to an accident, injury or disease, and so the insurance policy should be treated as covering the compensator's liability to Scottish Ministers. This would apply to insurance policies engaged before and after the coming into force of the Bill provisions.

188. As set out in section 94J, it is the responsibility of the compensator to make the reduction of compensation calculation before the compensation payment is made to the injured person. This calculation is done by deducting the total of each recoverable assistance payment attributed to the specific head of compensation against the amount of compensation awarded against each head of compensation. The amount deducted from the compensation payment equals the amount that the injured person received in recoverable assistance in relation to an accident, injury or disease – it is this sum that should be paid to Scottish Ministers. For example, an award of compensation totalling £100,000 is agreed between compensator and injured person. £40,000 of this payment is in respect of general damages (pain and suffering), £30,000 in respect of loss of earnings and a further £30,000 in relation to a loss of mobility. The certificate of recoverable assistance lists Adult Disability Payment (ADP) (mobility component) totalling £10,000. As a result, the £30,000 in relation to loss of mobility will require to be reduced by £10,000. This will take the total sum of compensation to £90,000, with £10,000 to be paid to Scottish Ministers.

189. Section 94K contains provisions on the Diffuse Mesothelioma Payments Scheme (DMPS). The Scottish Government proposes that social security assistance is recovered against payments from the DMPS. The DMPS detailed in the Mesothelioma Act 2014 is entirely funded by an annual levy paid by the employers' liability insurance industry. The Diffuse Mesothelioma Payment Scheme (Levy) Regulations 2014/2904 place an obligation on active insurers in the employers' liability insurance market to pay towards the cost of the levy based on their relative market share.

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

190. Unlike other compensation payments, the payment from the DMPS is based on a tariff type approach where the amount awarded is linked to the age of the injured person at diagnosis. There are no quantified amounts awarded for different heads of damage. Because of this, the reduction calculation of this payment is different to other compensation payments, as the amount of recoverable assistance is deducted from the total amount of compensation. If the amount of recoverable assistance is greater than the amount of the payment, then the payment could be reduced to nil.

191. Section 94M of the Bill makes provision for reviews of a certificate of recoverable assistance. When a certificate of recoverable assistance has been generated, the compensator or injured person will have the right to request a review of the certificate. This review must have valid grounds and be requested in writing before the compensation payment has been made or any amounts owed are paid to Scottish Ministers. The grounds for requesting a review will be detailed in regulations and if these grounds do not apply, then Scottish Ministers are not required to carry out the review. If a compensator has already made a compensation payment without applying for a certificate, then they cannot apply for a review. This review is an optional stage and does not affect the right to reconsideration or appeal.

192. Once the review has been carried out, Scottish Ministers are to confirm that the details on the certificate are correct, issue a fresh certificate if required or revoke the certificate entirely. Once a certificate has been issued, it cannot be varied on review to increase the amount of recoverable assistance unless the compensator caused the error.

193. The Bill also makes provision for Scottish Ministers to review a certificate on their own initiative. Circumstances in which a review can be carried out on their own initiative will be detailed in regulations however Scottish Ministers will not be compelled to undertake a review when one of these circumstances arise.

194. Following a compensation payment being made to the injured person, and amounts of recoverable assistance paid to Scottish Ministers, there is an opportunity to seek reconsideration of the certificate of recoverable assistance. This process will allow Scottish Ministers to assess the certificate to ensure that the information detailed is correct as well as consider any further evidence provided. Having this opportunity will also help to prevent unnecessary cases progressing to the appeal stage at Tribunal.

195. A request for a reconsideration is to be submitted in writing within thirty days of either the compensation payment being made or within thirty days of the compensator paying the full amount as listed on the certificate. This request can be made by the compensator, or the injured person if they have had their compensation payment reduced due to offsetting of assistance.

196. A reconsideration can only occur on the basis that any amount, rate or period specified on the certificate is incorrect, if the certificate includes assistance that is not recoverable, or if the compensation payment is not a payment in consequence of an accident, injury or disease.

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

197. After carrying out the reconsideration of the certificate, the Scottish Ministers are to confirm the certificate as correct, change the certificate or revoke the certificate.

198. Following the reconsideration, Scottish Ministers must inform all parties who have the right to request a reconsideration of the decision by issuing a notice of reconsideration. This notice will detail the reasoning behind the decision and the right to appeal to the First-tier Tribunal.

199. An appeal is only possible once a reconsideration has occurred. If either the compensator or injured person are dissatisfied with the decision made at the reconsideration, they can request to progress to the appeal stage.

200. Regulations are to set out the circumstances in which an appeal is to be treated as a request for a reconsideration. The purpose of this is to limit unnecessary appeals progressing through the Tribunal without first providing Scottish Ministers with the opportunity to reconsider the certificate.

201. Similar to reconsiderations, it will be required that appeals at the First-tier Tribunal are sought on specific grounds. These grounds for appeals will be the same as those for reconsiderations.

202. Following the consideration of an appeal, the First-tier Tribunal may confirm the information on the certificate as correct, specify any changes to be made on the issue of a fresh certificate or declare the certificate to be revoked. After receiving the decision of the First-tier Tribunal, Scottish Ministers must, in accordance with that decision, confirm the certificate, issue a fresh certificate with any changes as required from the decision, or revoke the certificate.

203. Once an appeal has been made to the First-tier Tribunal, an appeal may also be made to the Upper Tribunal, then the Court of Session and thereafter the UK Supreme Court, in terms of the Tribunals (Scotland) Act 2014.

204. In circumstances where the compensator has paid more than they should have after a reconsideration or appeal, the Bill makes provision to allow Scottish Ministers to refund the compensator. On making a refund, a statement should be sent to the compensator and injured person detailing the amount that was owed and the amount that will be repaid. A fresh certificate of recoverable assistance should be generated, with the compensation reduction calculation carried out by the compensator to take this into consideration. The compensator should then pay any amount that is due to the injured person.

205. Following on from a reconsideration or appeal, if it is found that the compensator has paid less than they should have, the Bill makes provision for the compensator to pay the correct amount. A statement should be sent to the compensator and injured person detailing the amount that is due to be repaid to Scottish Ministers. Again, a fresh

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

certificate of recoverable assistance should be generated, and the compensation reduction calculation should be carried out to take this into consideration.

206. If after the reconsideration or appeal, it becomes apparent that the injured person supplied incorrect or insufficient information to the compensator in a deliberate attempt to enhance the compensation payment, provision is made for some of the compensation payment to be repaid to the compensator by the injured person.

207. Section 94Q of the Bill also makes provision about the treatment of multiple compensation payments. In cases where the same compensator (or different compensators) make more than one lump sum payment, Scottish Ministers should not recover assistance that was recovered when the earlier payment was made as this would result in double recovery.

208. These circumstances arise when a compensation payment in the form of a lump sum is made (known as the earlier payment) and then subsequently another later payment is made to the injured person in relation to the same accident, injury or disease. Any amount paid to Scottish Ministers in relation to the earlier payment must be taken into consideration when calculating how much the compensator is liable to pay Scottish Ministers in relation to the later payment. When calculating the overall amount owed to Scottish Ministers due to the additional lump sum payment, the previous amount paid to Scottish Ministers should be subtracted from the overall amount owed.

209. If the amount previously paid by the compensator in relation to the earlier payment is not subtracted from the overall amount owed on the fresh certificate of recoverable assistance, this may result in the compensator paying more than what is owed. In this circumstance Scottish Ministers must refund the difference between what was paid and what ought to have been paid. When the Scottish Ministers are making a refund to the compensator in this situation, they are to send a statement to both the compensator and the injured person or person to whom the compensation payment was made. This statement is to include information detailing the amount already paid by the compensator, the amount that should have been paid and the amount to be refunded.

210. If the compensator receives a refund in this circumstance, and has reduced the compensation paid to the injured person, before paying that amount to Scottish Ministers, then the compensator should do the compensation reduction calculation again. Following this, if the recalculation results in an increase in the compensation payment, the compensator should pay the amount of the increase to the person to whom the compensation payment was made.

211. A power is taken to make further provision in regulations for any case in which two or more compensation payments are to be made in respect of the same accident, injury or disease.

212. Section 94R also makes provision about periodical payments. In situations of serious injury where it has been decided that a lump sum payment is not appropriate, courts can decide that all or part of the damages will be paid in the form of a continuing

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

series of regular payments. These payments are known as periodical payments and involve the injured person receiving a regular payment, usually for the rest of their life.

213. Where a final settlement is reached in the form of an agreement that involves the making of periodical payments (whether of a capital or income and whether or not they are combined with lumps sums), provision is made in the Bill so that the compensator is treated as having made the compensation payment on the day the agreement is reached. This is when the relevant period ends and the compensator becomes liable to make a payment to Scottish Ministers.

214. Any other payments that are not included in the final settlement agreement will count as additional compensation payments and will require a recalculation of the amounts owed taking into consideration the new relevant period if applicable.

215. Section 94S also makes provision about court orders. In situations where a compensation claim in relation to an accident, injury or disease is heard in court, an award of compensation may be made. This award of compensation can consist of a number of different heads of damage, such as cost of care, loss of earnings, loss of mobility or general damages which can be awarded for physical suffering and mental distress. The Bill makes provision that if a court makes an award of compensation, the specific amounts which are awarded to each head of compensation must be quantified, and specified within the order for compensation. This action will facilitate the reduction of compensation calculation as each form of recoverable assistance should be recovered from the appropriate head of compensation.

216. In cases where the order of compensation is made with the consent of both the compensator and the injured person, there is no requirement for the court to quantify any amounts awarded for specific heads of damage. This is to prevent any interference with the agreed breakdown of compensation between both parties.

217. Section 94T makes provision about the provision of information. To ensure that Scottish Ministers have been supplied with sufficient information to be able to recover assistance from compensation payments, a regulation-making power is taken to require prescribed information to be given to the Scottish Ministers, about the injured person. The regulations will be able to require that this information is to be provided by the liable or allegedly liable party or someone acting on their behalf. Where recoverable assistance is claimed or received, the injured person will also be required to provide information on the accident, injury or disease. In circumstances where the injured person has died, this duty is to be imposed on their personal representative.

218. Another party that may be responsible for providing information to Scottish Ministers is the scheme administrator for the DMPS or any person who is providing services to the scheme administrator. This is because the administrator of DMPS provides a compensation payment to those injured persons with mesothelioma who were negligently exposed to asbestos at work, but are unable to pursue a civil claim because their former employer no longer exists and their former employer's insurer cannot be traced. Within this process, the administrator acts like a compensator and

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

should similarly be responsible for providing information to Scottish Ministers. Details of the information required, together with how and when it should be provided, will be set out within regulations.

219. The regulations may also make provision requiring information about the amount and composition of the payment to be provided to the Scottish Ministers in consequence of any expenses incurred due to the accident, injury or disease.

220. Section 94U allows the Scottish Ministers to make regulations about the investigation of any matter relating to how this Part applies to payments in consequence of accident, injury or disease. This is to support the enforcement of section 94E, and is intended ultimately to create powers corresponding to those in sections 109A to 109C of the Social Security Administration Act 1992 so far as those relate to the UK provisions on compensation recovery.

221. Sections 94V and 94W provide regulation-making powers to make provision for reciprocal arrangements in relation to compensation recovery between Scotland and the rest of the UK and Northern Ireland, as well as jurisdictions of the courts.

222. Section 14 also inserts a new schedule 12 into the 2018 Act. Part 1 of that schedule specifies the payments exempted from the scheme, and Part 2 provides a table which makes clear the forms of Scottish assistance which the Scottish Government intends will be recovered.

Alternative approaches

223. Consideration was given to the approach of Scottish assistance remaining unrecoverable from compensation payments. This would not require any legislative changes, however, it could be considered that individuals in Scotland have been compensated twice for their accident injury or disease, whereas those in the rest of the UK would only be compensated once. Even without recovering amounts of assistance, there would still be a requirement on the Scottish Government to supply information to the UK Government so that it can fulfil its legislative duties. Lastly, to not recover the value of social security assistance in this context would be poor management of public finance – in essence, recovery from compensation allows for social security spending to be better targeted at those who need it most.

Consultation

224. Respondents were asked whether they agreed or disagreed in principle that the Scottish Government should undertake recovery of Scottish social security assistance from compensation paid as a result of injury or disease for which a third party was liable.

225. Consultation respondent feedback on the proposal was mixed. 43% of respondents who answered the question agreed in principle, the same proportion didn't know (43%), and the remainder disagreed (14%). Qualitative feedback from

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

respondents who agreed with this proposal was that they considered it important that public money was not used to compensate people twice for the same injury or disease.

226. Among respondents who disagreed with this proposal, the main point raised was that the proposal would place undue hardship or stress on people. A large proportion of respondents were unsure about this proposal as the subject matter was outside their expertise.

Part 8: Scottish Commission on Social Security

227. The Scottish Commission on Social Security (SCoSS) is an independent body set up to provide scrutiny of the Scottish social security system (including benefit regulations). SCoSS has the functions set out in section 22 of the 2018 Act. This includes scrutinising legislative proposals in terms of section 97 of the 2018 Act.

228. SCoSS is separate from the Scottish Government, and carries out its work independently of both Scottish Ministers and the Scottish Parliament.

229. The provisions at Part 8 of the Bill will extend SCoSS's scrutiny function to a broader number of regulation-making powers within the 2018 Act, to ensure that it is able to scrutinise administrative regulations in addition to regulations about each form of assistance.

230. The Bill will also remove the Commission's accounting and auditing duties, replacing them with a duty to prepare an annual report, and remove its status as a Body Corporate, ensuring proportionate governance.

Consultation

231. Respondents were asked to what extent they thought the current arrangements for the provision of independent scrutiny and advice worked effectively.

232. Consultation respondent feedback was mixed. 42% of respondents who answered this question thought current arrangements were either partially or fully effective, 25% thought current arrangements were not effective, and the remainder didn't know (33%).

233. The main feedback from respondents who thought current arrangements for the provision of independent scrutiny and advice work were partially or not effective included that membership of the SCoSS and the Disability and Carers Benefit Expert Advisory Group (DACBEAG) could be widened to increase diversity and to ensure a wider representation of viewpoints and perspectives; and to ensure the groups have the right mix of skills, expertise, and capabilities.

234. Respondents were asked if the current arrangements for the provision of independent scrutiny and advice were changed, which of three pre-defined options did

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

they consider most appropriate. Consultation respondent feedback was mixed. Half of respondents who answered this question (50%) thought it would be right to maintain separation between independent scrutiny and advice as a way to remove potential for conflict of interests.

235. Over one-quarter (27%) thought it would be right to combine these functions to maximise the use of independent expertise and secretariat resources, and as a way to ensure the more efficient and effective use of resources.

236. The remainder of respondents thought there is a need for a different approach (23%). These respondents felt that a new independent body is required to oversee the Scottish benefit called Employment Injury Assistance, which will in future replace Industrial Injuries Disablement Benefit. The main point raised was that the current membership of SCoSS and DACBEAG might lack the necessary skills and expertise to oversee Employment Injury Assistance.

237. The consultation document stated that there could be different options for organising independent advice and scrutiny in the future. This could be a formal arrangement, for example, a statutory body such as a non-departmental public body and paid board members, or an informal arrangement at Ministerial invitation with members participating on a voluntary basis.

238. The main point raised by consultation respondents was that if current arrangements were retained then consideration should be given to funding for back-office functions and remuneration for members.

Scrutiny of regulations by the Commission

239. Section 97 of the 2018 Act defines the types of regulations which Scottish Ministers must share with SCoSS, before they can lay any such regulations before the Scottish Parliament. This currently extends to any regulations made under Chapter 2 of Part 2 of the 2018 Act, or any regulations made using section 79. In practice, SCoSS comments on administrative regulations where there may be a material impact upon applicants.

240. The provision at section 18 of the Bill will formalise this role, extending the scope of regulations which SCoSS scrutinises to include those:

- setting out advocacy service standards;
- specifying who is to be regarded as a suitably qualified person for the purpose of assessments;
- related to all types of assistance included in Chapter 2;
- on the right to request a re-determination;
- on the duty to re-determine an individual's entitlement;
- on determinations made on the basis of ongoing entitlement;

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

- on determinations without application;
- providing for top up assistance to be given;
- modifying who is a qualifying individual for Carer's Allowance Supplement;
- repealing and/or revoking temporary provisions related to Carer's Allowance Supplement;
- making provisions about investigation; and,
- setting out ancillary provisions used to make regulations which have a material impact on claimants.

241. This will put beyond doubt the range of regulations for which SCoSS scrutiny is required. A regulation-making power is also being provided, to allow for the list to be further amended in due course.

Alternative approaches

242. The alternative would be to retain the existing scope for SCoSS as set out under the 2018 Act. However, this has given rise to questions about how broadly this provision can be interpreted, which risks inconsistency in the approach adopted by SCoSS at any point in time.

243. The Scottish Government considers it more sensible to regularise the situation and improve transparency through a clear and complete approach, listing all the provisions which are intended to be subject to SCoSS scrutiny.

Removal of Commission's status as body corporate

244. Section 1(3) of the 2018 Act provides SCoSS with Body Corporate status as would routinely be conferred to an Executive Non-Departmental Public Body (NDPB). SCoSS was intended to be set up as an advisory NDPB and to all intents and purposes works in this manner, as it does not employ its own staff or manage its budget separately to the Scottish Government. For this reason, it does not require Body Corporate status.

245. Section 19 of the Bill removes SCoSS' Body Corporate status, and will ensure that the level of governance is proportionate and enables SCoSS to focus on its advisory, scrutiny role.

Alternative approaches

246. The alternative, to retain body corporate status as conferred on SCoSS by the 2018 Act, would mean that the body operates differently to a typical organisation with such status. To all intents and purposes, SCoSS was set up and works as an advisory non-departmental body and utilises Scottish Government resource to manage its budgets and support operations.

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

247. The Scottish Government considers it to be necessary that SCoSS's status reflects how it operates in practice, with recognition that its independence is emphasised through its scrutiny work and reinforced in the Framework Agreement and operating arrangements.

Removal of Commission's accounting and auditing duties

248. Paragraph 12 of schedule 1 of the 2018 Act requires SCoSS to prepare accounts and submit these for external audit. A recent review into SCoSS's governance identified that the external accounting and audit requirement places a disproportionate burden on the body, does not contribute to meaningful scrutiny and should be resolved within primary legislation.

249. An advisory non-departmental public body which is funded by way of a Scottish Government sponsorship team does not require to meet any separate auditing requirements. In terms of section 19(1) of the 2000 Act, there is a duty for the Scottish Ministers, Lord Advocate and every other person to whom sums are paid out of the Scottish Consolidated Fund in a financial year, to prepare accounts of their expenditure and receipts for that year. Section 19(7) of the 2000 Act then requires that these accounts are sent to the Auditor General for Scotland for auditing.

250. By warrant of receiving their funding by way of a sponsorship team, the Commission's funds are covered within the Scottish Ministers' duty under section 19 of the 2000 Act. They do not, as a result, have any separate duty to discharge under the 2000 Act. Section 21 of the Bill therefore repeals the duty on SCoSS to submit accounts for external audit. This will result in resource and time savings, freeing up the Commission to focus more fully on its primary role carrying out legislative scrutiny.

Alternative approaches

251. The alternative would be to retain the requirement for external audit as set out in the 2018 Act. A recent independent governance review undertaken into SCoSS makes clear that it would be disproportionate to maintain the arrangements set out in the 2018 Act and that this should be resolved within primary legislation at the first opportunity.

252. This is because SCoSS is a small non-departmental public body that does not employ its own staff or manage its budget separately from the Scottish Government. The requirement for external audit currently places undue pressure on SCoSS's resources and removing it will enable SCoSS to focus more fully on its primary scrutiny role.

Duty on Commission to publish annual report

253. Section 21 of the Bill makes provision requiring SCoSS to send Scottish Ministers an annual report, including information on the carrying out of its functions during that year, and a statement of its accounts, as soon as is practicable following the end of each financial year. The Scottish Ministers must then lay before Parliament a copy of

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

this report each year. The Scottish Government considers that this reporting obligation is more proportionate than the existing requirement to submit its accounts for external audit.

Alternative approaches

254. The duty to publish an annual report is identified as the most suitable means for SCoSS to outline its performance in relation to its functions, including a statement of accounts. It is considered that the accounting and external auditing duties of SCoSS should be replaced with a suitable reporting process. This will ensure that transparency of accounts and governance is achieved in a proportionate and therefore more appropriate way than the status quo.

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

Equal opportunities

255. Following the consultation a full Equalities Impact Assessment (EQIA) 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: 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 assessment will be published in full on the Scottish Government website.

256. That assessment has found that the Bill will have a positive impact on people who use the services provided by Social Security Scotland, regardless of protected characteristics. The Bill has been considered in the context of the public sector equality duty and it has been assessed that the Bill will not discriminate against people because of any protected characteristics they have.

257. Provisions in the Bill intend to empower people to challenge decisions, create efficiencies and streamline processes all of which should result in an improved experience of interacting with Social Security Scotland. Evidence has shown that the proportion of Social Security Scotland clients who identify as women is much higher than the general Scottish population. In that respect women may particularly benefit from the Bill.

258. There will be operational considerations when measures included in the Bill are implemented to ensure that the benefits are realised and there are no unintended negative consequences in terms of discrimination. Social Security Scotland must ensure that processes introduced as a result of the Bill are person-centred and any related communications are accessible and inclusive. Overall, the EQIA identified no significant negative impacts associated with the policy content of the Bill and the Scottish

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

Government has concluded that no changes to the policies included in the Bill are necessary as a result.

Human rights

259. The Scottish Government considers that the Bill, and the wider legislation for, and the delivery of, social security in Scotland is in compliance with the European Convention on Human Rights (ECHR). In particular, the provisions in the Bill in relation to Information for Audit have been prepared with consideration of Article 8 of the ECHR (the right to private and family life) and Article 1 of Protocol 1 (being the right to property). The provisions in relation to re-determination and appeal deadlines in exceptional circumstances, and a new determination of entitlement after error have been prepared with consideration of Article 6 (being the right to a fair trial). In relation to the provisions recognising appointments by a Minister of the Crown, Articles 6 and 8 have also been considered. Finally, the provisions for compensation recovery have been prepared with consideration of Article 1 of Protocol 1. In all instances, the Scottish Government are satisfied that the Bill provisions operate with the terms of the ECHR.

260. The Scottish Government recognises that the right to social security assistance is itself a human right, in turn essential to the enjoyment of the full range of human rights. This is set out explicitly in the 2018 Act, at section 1(b). This is also recognised in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states that its signatories “recognize the right of everyone to social security, including social insurance.” There is additionally a right to social security set out in Article 22 of the Universal Declaration of Human Rights, and Article 12 of the European Social Charter.

261. As such, the ongoing enhancement and continuous improvement of the rights-based system that delivers devolved social security in Scotland will protect that right by ensuring its effective realisation. 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’ (including children’s) access to social security assistance. This includes, for example, the ability to withdraw a re-determination request, as well as the duty for Scottish Ministers to consider re-determination requests beyond the period allowed. The provisions to recognise appointments by a Minister of the Crown (for both children and adults) will also assist individuals to access assistance without undue delays. The provisions creating liability of appointees to the individuals whom they represent also add to the protections of individuals where they are supported by an appointee.

262. These changes to the system will additionally further support the realisation of Article 26 of the United Nations Convention on the Rights of the Child (UNCRC), which is that states “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.” This will be supported in particular by the provisions in relation to childhood assistance, care experience assistance, and other improvements to the delivery of social security such as the ability

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

to make a new determination after an error is realised whilst an appeal is ongoing.). Specific impacts on the rights of children and young people have been considered in a Child Rights and Wellbeing Impact Assessment (CRWIA), which will be published on the Scottish Government website.

Island communities

263. The Bill is expected to have no disproportionate effect on island communities. The Scottish Government arranged an online event with members of the Scottish Islands Federation on 25 October 2022 aimed at encouraging responses to the public consultation from people living and working on the islands. The public consultation asked respondents to provide any comments they wished to share on the impact of the proposals on island communities, including details, making reference to the specific proposal or proposals to which the comments related.

264. Fewer than five respondents to the consultation provided those comments. The main theme was around ensuring equal service levels for people living in the islands by ensuring a range of communication options. The full range of contact options for Social Security Scotland are available across Scotland. People can contact Social Security Scotland by telephone on a freephone number, by post, and by webchat. The Scottish Government does not foresee any disproportionate impact on the islands based on the available communications channels. A subsequent Island Communities Impact Assessment which identified no differential impacts will be published on the Scottish Government website.

Local government

265. The Bill will not affect local government in Scotland. There are no additional responsibilities or duties being created which would result in additional costs to local government.

Sustainable development

266. The United Nations' 2030 Agenda for Sustainable Development¹⁷ provides a shared blueprint for peace and prosperity for people and the planet, now and into the future. As part of this, the Sustainable Development Goals (SDGs) are intended to be a universal call to action.

267. Scotland's National Performance Framework (NPF)¹⁸ is the main mechanism through which the Scottish Government is localising and implementing the SDGs in Scotland. The NPF is Scotland's wellbeing framework and the SDGs share the same aims as the NPF: to encourage transformational social, economic and environmental change to achieve increased wellbeing and a more peaceful and prosperous future, recognising our assets and their relevance to future generations as well as our use and

¹⁷ <https://www.undp.org/sustainable-development-goals>

¹⁸ <https://nationalperformance.gov.scot/>

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

distribution of resources. Scotland's NPF was launched in 2007, put into law in 2015, and was last refreshed in 2018. A recent Scottish Government consultation which sought views on the NPF outcomes ran from March to June 2023¹⁹.

268. The provisions in the Bill will have a positive impact on two of the SDGs in the 2030 Agenda for Sustainable Development. The SDGs which the Bill will impact positively are Goal 1 (No Poverty) and Goal 10 (Reduced Inequalities). By improving the Scottish system of social security in ways which put its users first, the Scottish Government will be able to more effectively tackle the poverty and inequality disproportionately experienced by those users. Users of the Scottish system of social security are more likely to be on low incomes, or disabled, as a result of the types of assistance which are devolved.

269. For the same reason, the provisions in the Bill will contribute towards the following NPF outcomes by improving the Scottish system of social security:

- Communities: We live in communities that are inclusive, empowered, resilient and safe;
- Human Rights: We respect, protect and fulfil human rights and live free from discrimination; and
- Poverty: We tackle poverty by sharing opportunities, wealth and power more equally

270. The Bill will have no negative effects on sustainable development.

Crown consent

271. It is the Scottish Government's view that the Bill as introduced does not require Crown consent. Crown consent is required, and must be signified during a Bill's passage, where the Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or interests of the Sovereign, the Prince and Steward of Scotland or the Duke of Cornwall. The Scottish Government's view is that this Bill does none of those things.

¹⁹ <https://consult.gov.scot/national-performance-framework-unit/review-of-the-npf/>

This document relates to the Social Security (Amendment) (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 31 October 2023

Social Security (Amendment) (Scotland) Bill

Policy Memorandum

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