

SOCIAL SECURITY (SCOTLAND) BILL

EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Social Security (Scotland) Bill, introduced in the Scottish Parliament on 20 June 2017.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill X–FM);
 - a Policy Memorandum (SP Bill X–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill X–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND

5. The Social Security (Scotland) Bill is brought forward following changes to the devolution settlement effected by the Scotland Act 2016 (“the 2016 Act”).¹ The changes give the Scottish Parliament legislative competence over various aspects of social security (which was previously reserved almost entirely to the UK Parliament).² The Scottish Parliament has also been empowered to top up benefits which remain reserved to the UK Parliament, and can create new benefits in any area except old age pensions or where there is a connection to a matter which remains reserved (such as child support maintenance or reserved aspects of employment support).
6. As a result of the changes in the devolution settlement, eleven existing social security benefits will become a devolved responsibility. The Bill transposes them onto a Scottish legislative platform. The benefits in question are:

¹ [See the Scotland Act 2016, Part 3.](#)

² [See the Scotland Act 1998, Schedule 5, Part 2, Section F1.](#)

- Disability Living Allowance;
- Personal Independence Payment;
- Attendance Allowance;
- Severe Disablement Allowance;
- the Industrial Injuries Scheme;
- Carer's Allowance;
- Sure Start Maternity Grants;
- Funeral Payments;
- Cold Weather Payments;
- Winter Fuel Payments; and
- Discretionary Housing Payments.

7. The Bill also gives powers to create new benefits for early years and to provide for top up of reserved benefits. It also provides for a supplementary payment to persons receiving Carer's Allowance, pending the transposition of that benefit onto a Scottish legislative platform.

8. The principal purpose of the Bill is to put in place a legislative framework that will underpin a process by which people will be given assistance, once a determination is made that they are entitled to that assistance. People will either apply for the types of assistance for which they are eligible or, in some circumstances, a determination will be made without an application being required. The criteria and the rules for each type of assistance will vary.

9. The Bill sets out an over-arching legislative framework for the administration of social security in Scotland, making provision for operational functions such as determination of entitlement, re-determinations, appeals, overpayments, fraud and error. Secondary legislation will be required once the Bill enters into law to provide details on each type of assistance and on the operation of the social security system.

OVERVIEW

10. The Bill is arranged in five Parts as follows:

- Part 1 sets out the Scottish social security principles, provides for a Scottish social security charter and requires annual reporting on the performance of the Scottish social security system.
- Part 2 places a duty on the Scottish Ministers to give assistance to persons who are entitled to it, sets out eight types of assistance that are to be created, and provides for applications, determination of entitlement and appeals. It also provides for recovery of assistance given in error and offences.
- Part 3 provides the Scottish Ministers with the ability to provide for top up of benefits that are reserved to the UK Parliament. It also makes provision for a supplement to be paid to persons in receipt of Carer's Allowance.

- Part 4 empowers local authorities to make payments to persons to assist with their housing costs, provides some restrictions on how that power is to be used and requires local authorities to publicise their rules for assistance.
- Part 5 deals with the technical matters normally dealt with at the end of Bills: it allows ancillary provision to be made by regulations, sets out the parliamentary procedures that are to apply to the regulation-making powers in the Bill, makes provision about when the Act resulting from the Bill will come into force and establishes its short title (i.e. the Act's official legal name).

PART 1 (PRINCIPLES, CHARTER & ACCOUNTABILITY)

11. Section 1 sets out the Scottish social security principles. These seven principles are to inform the Scottish social security charter (which is provided for by sections 2 to 5).

12. Section 2 defines what the Scottish social security charter is to be. The charter is to set out what can be expected from the Scottish Ministers in designing and delivering social security, and from persons who apply for, and receive, assistance from the Scottish social security system (see section 2(2) and, for the meaning of “Scottish social security system”, see section 7). The charter is to do so in a way which reflects the principles articulated in section 1 (see section 2(3)). For example, the charter will provide for how respect for the dignity of individuals will be placed at the heart of the system (the principle articulated in section 1(c)) when Ministers are exercising functions such as determining a person's entitlement to assistance.

13. Section 3 requires the charter to be published for the first time within 6 months of that section coming into force (section 3 is to come into force on a date appointed by regulations under section 56). Section 3 also provides for consultation in development of the charter, which must include consultation with the persons listed in subsection (3). These are persons who are receiving from the UK Government the types of assistance that correspond to those which will in future be provided to people in Scotland by the Scottish Government under Part 2 of the Bill.

14. Section 4 requires the Scottish Ministers to make the charter available to the public. This is an ongoing duty placed on Ministers, and therefore goes beyond their duty to first publish the charter under section 3(1). As the charter may change from time to time in accordance with section 5, Ministers will have to ensure that the version of the charter made available to the public as required by section 4 is the current version.

15. Section 5 requires the charter to be reviewed every five years. It requires the Scottish Ministers to include as part of the review process consultation with persons who have received assistance through the Scottish social security system (as defined by section 7). After each review the Scottish Ministers must provide a report to Parliament explaining the consultation undertaken and what changes to the charter (if any) have been made, with reasons why changes have been made, or not made.

16. Section 6 places a statutory duty on the Scottish Ministers to report annually to the Scottish Parliament on the performance of the Scottish social security system (as defined by section 7) during the previous financial year. As well as information about the system's

performance, the report is to describe what the Scottish Ministers have done in that year to meet the expectations on them set out in the charter.

PART 2 (GIVING OF ASSISTANCE BY SCOTTISH MINISTERS)

Chapter 1 (Assistance to be given according to determination of entitlement)

The duty to give assistance

17. A duty is placed on the Scottish Ministers, by section 8, to give a person whatever assistance of a kind described in Chapter 2 of Part 2 the person is entitled to.

18. Entitlement to assistance under section 8 flows from a determination of entitlement. The ways in which a determination of entitlement may be made are set out in section 9.

Who determines entitlement?

19. In summary, a determination of entitlement will be made in the first instance by the Scottish Ministers under section 19. If the individual whose entitlement has been determined is dissatisfied with that determination, he or she may request the Scottish Ministers to reconsider it under section 23. If the individual remains dissatisfied with the Scottish Ministers' determination, or if the Scottish Ministers fail to make the determination within the period permitted, the individual can appeal to the First-tier Tribunal for Scotland under section 27. At the end of such an appeal, the First-tier Tribunal may make a determination of the individual's entitlement. These parts of the process are set out in Chapter 3 of Part 2, and as such are discussed in more detail below.

20. By conferring jurisdiction on the First-tier Tribunal to deal with entitlement to assistance under Part 2, the Bill attracts the review and appeal provisions contained in Part 6 of the Tribunals (Scotland) Act 2014 ("the Tribunals Act") (section 9 of the Bill draws the reader's attention to the significance of that). Part 6 of the Tribunals Act empowers the First-tier Tribunal to review its own decisions and provides for onward appeals from the First-tier Tribunal to the Upper Tribunal for Scotland and from the Upper Tribunal to the Court of Session. It provides that at each appeal stage, the appellate body (be it the Upper Tribunal or the Court of Session) has the same powers to dispose of the appeal as the body whose decision is under appeal. Which, in this context, means that on appeal a determination of entitlement may be made by the Upper Tribunal or, ultimately, by the Court of Session.

How is entitlement determined?

21. Whoever makes a determination of entitlement, the component parts of it are set out in section 33. In all cases, determining an individual's entitlement to a given type of assistance will entail a decision about whether or not the individual has met the relevant eligibility criteria for that type of assistance (see subsection (1)(a)). The relevant eligibility criteria for each type of assistance will be set out in regulations (see the discussion of Chapter 2 of Part 2 below).

22. If the individual meets the eligibility criteria for the type of assistance in question, the next step in determining the individual's entitlement is a decision about what assistance the individual is entitled to be given (see subsection (1)(b)). Again, this decision is to be taken in accordance with the regulations relevant to the type of assistance in question.

23. The decision to be taken under section 33(1)(b) described in the preceding paragraph is a decision about what assistance of the type in question the individual is entitled to be given at the time the decision is made. Section 33(1)(c) requires that, in certain circumstances, the person determining entitlement is to make a decision about the individual's future, as well as present, entitlement to assistance. Those circumstances are to be set out in regulations under section 34. Where a determination of entitlement includes a decision about the individual's future entitlement to assistance it is referred to in the Bill as having been made on the basis that the individual has an ongoing entitlement to assistance.

Ongoing entitlement

24. The purpose of allowing regulations under section 34 to provide for entitlement to be determined on an ongoing basis in certain circumstances is to remove the need for someone to apply repeatedly for the same type of assistance in arrears every few weeks or months. If, for example, it is clear that there is going to be no short to medium-term improvement in the physical condition of someone who is entitled to disability assistance in respect of the previous month, it is sensible to decide that that person will continue to be entitled to disability assistance for at least a certain number of months into the future.

25. Regulations under section 34 will set out the types of assistance in relation to which entitlement will be determined on an ongoing basis; while ongoing entitlement makes sense for disability assistance, it would not make sense for funeral expense assistance, for example, as that will be provided one funeral at a time. The regulations may also set out exceptions to the circumstances in which a determination of entitlement to a particular type of assistance will be made on an ongoing basis; for example, if someone applies for disability assistance for a past period and indicates in the application form that their mental condition has since improved so that they no longer have a disability, it would make no sense to nevertheless determine their entitlement to disability assistance on an ongoing basis.

26. Subsection (2)(a) of section 34 provides for regulations under that section to make provision about when someone is to become entitled to be given assistance under section 8 in respect of what is a future period at the time the determination of entitlement is made. The point is that if it is decided that a person is likely to continue to be entitled to a given type of assistance for the next 6 months, the person will not necessarily be given the value of 6 months' worth of assistance immediately as a lump sum. If the type of assistance in question is normally payable on a monthly basis, for example, the regulations under section 34 may provide for the individual to be given one month's worth of assistance at the end of each month over the 6 month period. Of course the frequency with which different types of assistance will be given may vary from one type of assistance to another and may also vary over time and in relation to different circumstances. Accordingly, these are matters left to regulations.

27. Subsection (2)(b) of section 34 allows regulations under that section to specify assumptions on the basis of which future eligibility is to be decided. One can of course only

speculate about whether someone will remain eligible for a given type of assistance into the future. Therefore, a decision about ongoing entitlement will necessarily be made on the basis of certain assumptions (for example, in the case of carer's assistance, that the person will continue to provide care to someone else and that someone else will continue to be entitled to a disability benefit). In relation to what happens if those assumptions prove wrong, see below the discussion of Chapter 5 of Part 2.

Later determination supersedes earlier

28. Section 10 states that the assistance an individual is to receive in respect of any period, or as a result of any event, is established by the latest determination of entitlement. Therefore if a determination is made under section 19 by the Scottish Ministers, and the person exercises his or her right under section 23 to request a re-determination, the re-determination will supersede the original one.

29. A further example of where a later determination may supersede an earlier one is where a determination has been made that an individual is entitled to a particular type of assistance on an ongoing basis for, say, the next 6 months (see discussion of ongoing entitlement above). Three months after that determination is made, the individual's circumstances change prompting a new determination of the individual's entitlement to be made. That new determination will replace the original one, with the result that the original determination will not entitle the individual to any assistance for the three months it would otherwise have had left to run. The individual may, however, be entitled to assistance for those 3 months under the new determination depending on how the change in circumstances has affected the individual's eligibility for the type of assistance in question.

30. Section 10 only causes a later determination to supersede an earlier one to the extent that they overlap. A later determination of entitlement to funeral expense assistance will therefore not affect an earlier determination of entitlement to funeral expense assistance in relation to a different funeral. The two determinations concern different events. Similarly, a later determination of entitlement to disability assistance for September to December will not affect entitlement to disability assistance under an earlier determination for June to August of the same year. The two determinations relate to different periods.

Chapter 2 (Types of assistance to be given)

31. Chapter 2 sets out the eight types of assistance that are to be given by the Scottish Ministers under section 8. Each assistance type is described at a high level by a section of Chapter 2, setting out the characteristics of the assistance, for example an activity that qualifies for assistance (such as caring for a disabled person), a purpose of assistance (such as to help with heating costs) or an event that qualifies for assistance (such as an employment-related injury). Regulations will set out the eligibility rules that will determine entitlement to assistance and what assistance is to be provided. For all sections, apart from section 18 (short term assistance), there is a link to a schedule which makes further provision about the content of regulations.

32. The assistance types are provided for are as follows:
- Section 11 provides for Carer's assistance, to be provided to an individual who cares for another individual with a disability. Schedule 1 requires that eligibility for this type of assistance is to depend on a person providing, or having provided, regular and substantial care to a person with a disability that normally entitles a person to a disability benefit. The schedule provides for these terms to be further defined, and defines "disability benefit". It describes other sorts of criteria that may be included in regulations, such as provision for situations where more than one person provides care to a disabled person.
 - Section 12 provides for Cold-spell heating assistance, to be provided to an individual to help meet heating costs in periods of cold weather. Schedule 2 requires that eligibility for this type of assistance is to depend on a person's home being situated in an area that experiences a spell of cold weather, or is expected to experience such a spell. Amongst other criteria, eligibility may be made to depend on a person's means or on the individual being in receipt of other types of social security assistance. That could include benefits such as income support or universal credit, and is not limited to the types of assistance provided for by the Bill.
 - Section 13 provides for Winter heating assistance, to be provided to an individual to help meet heating costs in winter. Schedule 3 says that eligibility for this type of assistance may contain eligibility criteria related, amongst other things, to a person's age and their receipt of other types of social security assistance. There are no mandatory criteria that regulations must, or must not, provide for a person to qualify for this type of assistance.
 - Section 14 provides for Disability assistance, to be provided to a disabled individual on account of their disability (which can be physical or mental). It also provides for assistance to persons who are terminally ill. Schedule 4 requires that eligibility for this type of assistance is to depend on the disability having a significant adverse effect on the person's daily activities, that is not a short-term effect. This section will enable the Scottish Government to provide for disability assistance such as is currently provided for through Disability Living Allowance, Personal Independence Payment, Attendance Allowance and Severe Disablement Allowance. Paragraph 12 of the schedule describes types of assistance that cannot be given as lump-sum payments, because such assistance remains a reserved matter. This includes assistance as a result of pneumoconiosis and Byssinosis.
 - Section 15 provides for Early years assistance, which is assistance to an individual who has costs related to having a child in their family. This includes persons who are expecting to have a child, such as due to pregnancy or an adoption arrangement. Schedule 5 requires that eligibility for this type of assistance be restricted to four broad situations (described as "primary eligibility criteria"). These are: pregnancy; a relationship to a pregnant person (such as a partner); responsibility for a child after that child's birth; and responsibility for a child at or after a specified event in the child's life. The sorts of events likely to be so specified, in practice, are a child starting nursery education and primary education, though the Bill leaves open what these may be. Regulations must define what being responsible for a child is to mean.

- Section 16 provides for Employment-injury assistance, to be provided to an individual who has had an injury or contracted a disease through employment. Schedule 6 makes further provision, and requires regulations to define “employment” for these purposes, as well as what are relevant personal injuries and diseases. Any definition of “employment” cannot include within it the matters described in paragraph 3(2), due to the limits of devolved competence set out in the legislation there described. In practice this type of assistance would be used to create Scottish industrial injuries benefits, within the limits of devolved competence. Paragraph 13 of the schedule describes types of assistance that cannot be given as lump-sum payments, because such assistance remains a reserved matter.
- Section 17 provides for Funeral expense assistance, which is assistance to an individual to help meet funeral costs that the individual has met or is responsible for meeting. Schedule 7 requires that regulations for this type of assistance define “funeral” for this purpose, and that eligibility criteria can be based, amongst other things, on where the funeral takes place, the relationship of the individual to the deceased person, and the means of either person.
- Section 18 provides for Short-term assistance to individuals. The Scottish Ministers must make regulations providing for such assistance to be given to persons who have a change in their entitlement to assistance as described in sections 11 to 17, and who have asked for a review or appeal of that determination. In this way, short-term assistance will be used to continue giving assistance, for a while, to persons who have been entitled to assistance on an ongoing basis (see particularly paragraphs 23 and 24 above), but whose entitlement has reduced or ceased by a later determination of their entitlement that is being revisited. An example would be where a person has been entitled to regular payments of disability assistance, but it is decided that their entitlement should be less. Regulations can provide for such a person to be eligible for short-term assistance while the determination is being re-determined or appealed so that during that period the person suffers no loss of income. Section 18 also provides scope for the Scottish Ministers to prescribe other eligibility rules for short-term assistance. No schedule relates to this section, as it sets out fully what is to be prescribed in the regulations that are to be made under it.

Chapter 3 (Determining entitlement)

Determination by the Scottish Ministers

33. Section 19 places a duty on the Scottish Ministers to decide whether or not a person is entitled to assistance as provided for in Chapter 2. This may be as the result of an application or, where regulations under section 35 so provide, without application.

34. One example of when Ministers may determine entitlement without an application is in circumstances where they already hold sufficient information to determine an individual’s entitlement). An example could be where a person was entitled to winter heating assistance in the previous year and Ministers have no reason to believe the person’s circumstances have changed since. Regulations under section 35 could, in that case, provide for Ministers to

determine such a person's entitlement and make a payment without any application for winter heating assistance having been made.

35. Another example of when Ministers may make a determination of entitlement unprompted by an application is where it has been determined that an individual is entitled to assistance on an ongoing basis (see particularly paragraphs 23 and 24 above) and before the end of the period covered by that forward-looking determination of entitlement Ministers learn that there has been a change in the individual's circumstances. In that event, Ministers would determine again the individual's entitlement to the type of assistance in question in light of the change in circumstances. As explained in paragraph 29 above, the resulting determination may (to some extent) supersede the earlier one.

36. As all the information required to make a determination of entitlement may not be available where there has been no application, section 35(2) allows for regulations to specify the information, and assumptions, that are to be used in making a determination in such circumstances. For instance, in the winter heating example given in paragraph 34 above, a determination of entitlement to that type of assistance in succeeding years would necessarily rest on an assumption that the individual's circumstances have not materially changed between times.

37. Section 20(1) allows Ministers to specify how applications for assistance are to be made and to require evidence to be provided along with applications. For example, an application for early years assistance might require to be accompanied by evidence of pregnancy. A purported application for assistance will not trigger Ministers duty to make a determination under section 19 if it is not made in the form, or not accompanied by the evidence, required by Ministers. Section 20(2) places Ministers under a duty to make the public aware of the requirements for applications set under subsection (1).

38. Section 20(3) provides that once a person has applied for assistance in respect of a particular period or event and a determination of entitlement has been made as a result, the person cannot apply again for the same type of assistance in respect of the same period or event. This means that if someone applies for early years assistance in relation to the birth of a child, and Ministers make a determination of whether or not the individual is entitled to early years assistance as a result of the child's birth, the individual cannot apply again for early years assistance in respect of the birth of the same child. If the individual is aggrieved by the Scottish Ministers' determination, he or she can request a re-determination under section 23 and, if still dissatisfied, can appeal under section 27 (see paragraphs 19 to 20 for a fuller summary of the various ways in which a determination of entitlement can be made). To be clear, section 20(3) would not prevent a different individual applying for early years assistance in respect of the birth of the same child. Nor would it prevent the same individual applying for early years assistance in respect of a different event in the life of the same child.

39. Section 21 allows an applicant to withdraw an application prior to its determination. Where this is requested, the duty imposed on the Scottish Ministers by section 19 to determine the application ceases and no determination must be made. Ministers may require that such requests are made in a particular form, for example a written and signed request might be required (though in practice most applications are likely to be capable of being made electronically). As section 20(3) only prevents a further application being made in respect of a

period or event if the preceding application results in the Scottish Ministers making a determination under section 19, it follows that if an individual withdraws an application before a determination is made, the individual can apply again for the same type of assistance in respect of the same period or event.

40. Section 22 requires that all persons who have applied for assistance, or whose entitlement to assistance has been determined without an application, must be notified of the Scottish Ministers' determination under section 19 and the reasons for it. The person must also be told that they have the right to have their entitlement considered again by the Scottish Ministers (see section 23), and that they will have the right to appeal to the First-tier Tribunal if the Scottish Ministers do not complete their reconsideration within a certain period (see section 26).

Re-determination by the Scottish Ministers

41. Section 23 enables an individual to ask that their entitlement be looked at again by the Scottish Ministers if they are not content with a determination by the Ministers under section 19. Subsection (2)(a) enables the Scottish Ministers to set requirements for how requests for a re-determination are to be made. For example a written and signed request might be required (though in practice most applications are likely to be capable of being made electronically). A purported request that does not comply with any requirements set will not trigger Ministers duty to make a re-determination. Subsection (3) requires Ministers to publicise requirements as to the form in which requests for a re-determination should be made. Subsection (2)(b) empowers the Scottish Ministers to make regulations setting a deadline by which a request for a re-determination must be made (section 55 provides for such regulations to be subject to the negative procedure).

42. Section 24 places a duty on the Scottish Ministers to re-determine of new the person's entitlement to assistance, where a request is made under section 23. Subsections (2) and (5) provide that Ministers must aim to make the re-determination within a timescale to be set by regulations. If Ministers fail to do this, subsection (3) and section 26 provide that the person who made the request has the immediate right of appeal to the First-tier Tribunal for Scotland. Subsection (3)(a) also makes clear, however, that the Scottish Ministers may still make the re-determination out of time. An individual may wish to wait for the Scottish Ministers to do so before deciding whether or not to take a case to the Tribunal.

43. Section 25 sets out what the Scottish Ministers must do when they have re-determined a person's entitlement to assistance. The person must be informed of the determination, the reasons for that determination, and that they have the right to appeal the determination if they so wish.

44. Where a decision following a request for re-determination is not made within the period allowed by regulations, section 26 provides that the Scottish Ministers must inform the individual of their right immediately to appeal to the First-tier Tribunal for Scotland. As mentioned above, the individual could choose to wait for the Scottish Ministers' re-determination before deciding whether or not to go to the Tribunal.

Appeal against the Scottish Ministers' determination

45. Sections 27 to 29 provide rights of appeal to the First-tier Tribunal for Scotland against a determination by the Scottish Ministers of an individual's entitlement to assistance under section 8.

46. Section 27(1) provides that an appeal can only be taken to the Tribunal if either the initial determination required by section 19 has been re-determined as provided for by section 24 or if the duty to make such a re-determination has not been completed within the timescale set by regulations.

47. Section 28 provides the timescales within which appeals to the Tribunal can be made. An appeal can be made within 31 days of the relevant event without having to get the Tribunal's permission to bring it. Beyond 31 days from the relevant event, an appeal can only be brought with the Tribunal's permission (subsection (3) sets the test by which the Tribunal will decide whether to give permission). And in no event can an appeal be taken more than a year after the relevant event. What constitutes the relevant period depends on what type of determination by the Scottish Ministers the appeal is brought against. If it is brought against a re-determination by the Scottish Ministers under section 24, the relevant event is Ministers notifying the individual of the re-determination. If it is brought against a determination under section 19 (i.e. it is brought following a failure by Ministers to make a re-determination within the period allowed by regulations under section 24(5)), the relevant event is Ministers notifying the individual that they have failed to make a re-determination within the period allowed.

48. The period of 31 days is allowed for an appeal without the Tribunal's permission on the basis that it represents a month, but specifying the period in days rather than as one calendar month ensures nobody is disadvantaged by the fact of a relevant event occurring in a short calendar month (such as February).

49. The powers of the First-tier Tribunal in appeals are set out in section 29. It can uphold the determination (in effect, refuse the appeal), or it can make a different determination of its own as to the person's entitlement to assistance.

50. As mentioned in paragraph 20 above, it follows from giving the First-tier Tribunal jurisdiction that the further rights of appeal and review set out in Part 6 of the Tribunals Act apply.

Obtaining information to make determination

51. Section 30 provides that where Ministers are determining an individual's entitlement, they can request that the individual provide further information that they need to reach a decision. This might include results from an assessment, an example might be a medical examination to ascertain the extent of a person's injury where an application has been made for employment-injury assistance. Subsection (2) states that if information Ministers request is not provided, they may determine that the person is not entitled to assistance. Subsection (2) does not, however, preclude Ministers from making a determination of entitlement based on the information they do hold.

52. Section 31 enables the Scottish Ministers to place a duty on an individual to notify them if their circumstances change, or if the circumstances of a person being assisted change (for example, where a parent is receiving disability assistance on behalf of a child). This is intended to be used where a determination is made that a person is entitled to assistance on an ongoing basis (see particularly paragraphs 23 and 24 above). As subsections (3) and (4) set out, a duty to notify a change of circumstances can be imposed on the individual entitled to assistance or another person to whom payments are made for the entitled individual's benefit. As discussed above (see paragraph 27) a decision that an individual will be entitled to a given type of assistance in the future can only be speculative at the time the decision is taken. It is therefore important for Ministers to find out as soon as possible if any of the assumptions on which the decision is premised prove false so that the person's ongoing entitlement to the type of assistance in question can be looked at again (the original decision may have been an under-estimate or an over-estimate of the true position). An example might be where an award of carer's assistance was made to a person on the basis that they would continue to care for a disabled person and therefore would receive future payments of carer's assistance. The carer might be placed under a duty to notify the fact that they have ceased to provide care, since that would cause their entitlement to assistance to come to an end. As explained in paragraph 35 above, being notified of a change in that circumstance will cause Ministers to make another determination of the individual's entitlement to carer's assistance.

53. The significance of being placed under a duty to notify a change of circumstances is that section 40 makes it a criminal offence to fail to do so if, as a result, an individual obtains more assistance than they are entitled to (see discussion of Chapter 5 of Part 2 below). Whether or not a failure to notify a change of circumstances amounts to an offence, if an individual receives more assistance than he or she is entitled to, the excess may be recoverable by the Scottish Ministers under Chapter 4 of Part 2 (see discussion of that Chapter below).

54. Section 32 enables the Scottish Ministers to remove a duty to notify that they have placed on an individual, in whole or in part. An example might be if Ministers had determined that a person was entitled to disability assistance, had imposed a duty to notify them of a change in the person's medical condition, but in consequence of a change in the person's condition Ministers considered that the requirement was no longer necessary.

Further provision about determining entitlement

55. For discussion of section 33 (decisions comprising determination) see paragraphs 21 to 23 above.

56. For discussion of section 34 (determination on basis of ongoing entitlement) see paragraphs 24 to 27 above.

57. For discussion of section 35 (determination without application) see paragraphs 33 to 36 above.

Chapter 4 (Recovery of assistance given in error)

58. Sections 36 to 38 state that an individual who is advantaged by any assistance paid in error is liable to repay the cost of that assistance. Section 36(1) makes an individual liable to repay. Subsection (4) describes what is a mistaken decision. An example might be where the Scottish Ministers were unaware that a person's circumstances had changed such as to make them no longer entitled to ongoing assistance which it had been assumed the person would be entitled to (see paragraph 52 above).

59. Section 36(2) clarifies that the liability is limited to the difference between the assistance given and the assistance that should have been given. So if, in error, Ministers have given someone £200 instead of £150, the person will only be liable for the £50 difference not the full £200.

60. Subsection (3) provides for how the value of assistance is to be calculated if it is not provided in money. For example, if Ministers were to provide a disabled person with a mobility aid, its value for the purposes of calculating any liability for overpayment would be what it cost Ministers to provide the aid, not what it might have cost the individual to buy it.

61. Where the Scottish Ministers are aware of a person's financial circumstances, section 37 provides that they must consider those circumstances in deciding whether to pursue recovery of a liability and also in considering how that money is to be recovered, for example in considering whether to make deductions from other assistance that is to be provided to the individual.

62. Section 38 provides that a prescriptive period of 5 years is to apply to any liability to repay money to the Scottish Ministers. The basic effect is that if Ministers are aware that a liability to repay exists, but take no steps to recover the debt, after 5 years Ministers may lose the ability then to pursue the debt. This basic rule is subject to the other provisions of the Prescription and Limitation (Scotland) Act 1973.

Chapter 5 (Offences and investigations)

63. Section 39 creates an offence of, and penalties for, providing false or misleading information to the Scottish Ministers, with the intention of causing an individual to be given assistance that they would not otherwise be given. Subsection (2) clarifies that making a statement is a form of providing information. Subsection (3) provides penalties, which vary according to whether the offence is prosecuted under summary procedure or solemn procedure. Solemn procedure involves a jury and is used for more serious offences. The maximum penalties for trial by solemn procedure are therefore set at a higher level, by subsection (3)(b), than those for summary procedure, set by subsection (3)(a).

64. Sections 40 and 41 create offences of, and penalties for, failing to notify a change in circumstances. Again, the maximum penalties vary according to the manner in which any offence is prosecuted.

65. Section 40 covers a situation where an individual has been notified, under section 31, that they have a duty to tell the Scottish Ministers if their circumstances, or the circumstances of another person, change in a way that will reduce, or remove, that person's entitlement to assistance. If the person fails to tell Ministers of such a change, and knew or ought to have known that the change would affect that entitlement, then an offence is committed.

66. Section 41 creates a similar offence where a person causes another person to fail to tell the Scottish Ministers about a change in circumstances. This reflects existing social security offences, where it can be that a person is under a duty to tell Ministers that another person's circumstances have changed, but is prevented from doing so in some way, for example by concealment of the change.

67. Section 42 provides that individuals within an organisation can be held responsible for an offence committed by the organisation, where there is active involvement or neglect by a "responsible official" of the organisation. Subsection (3) describes the types of organisations this applies to, and subsection (4) describes what "responsible official" means in each case.

68. Section 43 empowers the Scottish Ministers to make regulations about investigation of the offences resulting from the Bill. These can give power for persons to enter and search premises, such as workplaces, but any use of this power cannot enable entry and search of places where people live. They can also give powers to seize documents, for example. Offences can be created, to address the possibilities that persons will fail to provide information or obstruct an investigation.

69. In relation to such investigations, section 44 places a duty on the Scottish Ministers to publish and maintain a Code of Practice on investigations. This is intended to provide transparency on how investigations will be conducted, and must be publicly consulted upon before it is published. It must also be kept under review, to ensure it remains up to date. Courts and tribunals are required, by subsection (5), to take the code into account where they are considering any question to which the terms of the code will be relevant.

70. References in Chapter 5 to the "statutory maximum" and the "standard scale" in relation to levels of fines are to be construed in accordance with schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010. The 2010 Act defines the statutory maximum as the figure specified in section 225(8) of the Criminal Procedure (Scotland) Act 1995. It is presently £10,000. The standard scale of fines is set out in section 225(2) of the 1995 Criminal Procedure Act. Section 43(3) of the Bill sets a level 3 fine as the maximum penalty that can be imposed for an offence created by regulations under that section. A level 3 fine is presently £1,000.

PART 3 (SUPPLEMENTING ASSISTANCE UNDER OTHER ENACTMENTS)

Top up of reserved benefits

71. Sections 45 and 46 enable regulations to provide for top up payments to a person who is entitled to any reserved benefit, which means a benefit provided by the UK Government for which the Scottish Parliament does not have competence to legislate. The person must appear to need the additional assistance for a purpose for which the reserved benefit is provided.

72. The detail of any top-up payments would be set out in regulations and section 45 sets out that provision can be made for how entitlement is to be determined, the amount of assistance, the process by which assistance is sought and determined, and what happens if assistance is given incorrectly.

73. These sections reflect the devolved competence given to the Scottish Parliament by section 24 of the 2016 Act to legislate for such payments. Section 46 states restrictions on what regulations can do, which repeat restrictions on devolved competence in that Act. These include that top-up assistance cannot be given to help meet housing costs, nor can a top-up payment be provided where, for example, the need arises solely as a result of a sanction because of non-compliance with a work-related requirement in a reserved benefit.

Carer's allowance: temporary provision

74. Section 47 places a statutory duty on the Scottish Ministers to pay a supplement on a twice-yearly basis to persons who receive Carer's Allowance in Scotland. Ministers are to determine a "qualifying date" in each half of the financial year, and persons who are receiving a Carer's Allowance on that date, and who are resident in Scotland, will receive the supplement. Ministers are given the power to modify these two criteria. The section provides for calculation of the supplement, which is designed to reflect the difference between the rate at which Carer's Allowance is paid and the rate of Jobseeker's Allowance. Each payment will be the equivalent of 26 times the difference between the two allowances on the qualifying date. The intention is to provide that carers will receive a supplement so that the amount of carer's allowance that a person receives on an annual basis will effectively be the same as the person would receive had they been in receipt of Jobseeker's Allowance.

75. The supplement is being provided because the Scottish Ministers cannot immediately increase the rate at which Carer's Allowance is paid to match the rate at which Jobseeker's Allowance is paid. It is envisaged that the supplement will cease to be needed once regulations under section 11 have been made to provide a scheme for carer's assistance, as that can provide for payments at the increased rate. Section 48 allows the Scottish Ministers to repeal the duty to pay the supplement and revoke any regulations made under it.

PART 4 (DISCRETIONARY HOUSING PAYMENTS)

76. Local authorities are empowered by sections 49 to 53 to assist individuals who appear to them to need help towards their housing costs. It is for local authorities to determine what assistance to give, though persons assisted must be entitled to housing benefit, or universal credit that includes an amount of assistance with rent. These are limits contained in the devolved competence given to the Scottish Parliament by section 25 of the 2016 Act and the pre-existing Discretionary Housing Payments scheme which devolved as a result of it. Section 49(3) defines terms that are part of the limits contained in section 25 of the 2016 Act.

77. Section 50 imposes further restrictions on the use of the power. Subsection (1) prevents assistance being provided as a loan, reflecting a restriction in how current schemes are operated. Subsections (2) to (4) reflect limits on competence contained in section 25 of the 2016 Act.

78. Local authorities must publicise their schemes of assistance. Such publicity must include the details listed in section 51. Section 52 requires local authorities to have regard to any guidance issued by the Scottish Ministers about their exercise of this power. The Scottish Ministers must consult local authorities, through a representative body, before issuing any guidance. Subsection (2) describes some of the matters that guidance may deal with. Different guidance can be addressed to different local authorities, which might (for example) be used to issue different guidance to local authorities that are housing authorities and to those that are not. Subsections (5) and (6) require the Scottish Ministers to lay a copy of any guidance before the Scottish Parliament and to make it publicly available. Subsection (7) enables guidance to be updated and revoked.

79. Section 53 empowers the Scottish Ministers to amend section 49, to allow for changes to the legislation relating to housing benefit or universal credit, or should other reserved benefits be created to assist persons with their housing costs.

PART 5 (FINAL PROVISIONS)

80. Section 54 allows the Scottish Ministers to make incidental, supplementary, consequential, transitional, transitory or saving provision that they consider it appropriate to make. Any use of this power has to be for the purposes of the Act or any provision made within it, or in connection with, or for giving full effect to, the Act or any provision made within it.

81. Section 55 sets out the parliamentary scrutiny procedures which are to apply to regulations made under the powers set out in the Bill. For example, regulations to create types of assistance are to be subject to the affirmative procedure. Whereas the negative procedure will apply to regulations setting the period within which a request for re-determination must be made, and the period within which the Scottish Ministers must aim to make that determination. The negative and affirmative procedures are defined by sections 28 and 29 (respectively) of the Interpretation and Legislative Reform (Scotland) Act 2010. Put briefly, regulations subject to the negative procedure can be made by Ministers without prior parliamentary approval but Parliament can vote to annul them after they are made. Regulations subject to the affirmative procedure cannot be made by Ministers unless and until Parliament approves them in draft.

82. Section 56 provides that, apart from Part 5, provisions of the Bill will come into force as provided for in commencement regulations, and that such regulations may include transitional, transitory or saving provision. Part 5 comes into force on the day after the Bill receives Royal Assent.

83. The short title of the Act the Bill will become (if passed) is provided by section 57.

This document relates to the Social Security (Scotland) Bill (SP Bill 18) as introduced in the Scottish Parliament on 20 June 2017

SOCIAL SECURITY (SCOTLAND) BILL

EXPLANATORY NOTES

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.scottish.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at: www.scottish.parliament.scot/documents