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Social Security (Scotland) Bill

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This Scottish Government bill sets out the framework of a new Scottish social security system, and the principles that will underpin it. This will be used to deliver the social security benefits devolved by the Scotland Act 2016, once a new social security agency has been set up. The bill also provides a legislative platform for discretionary housing payments, which are already devolved and will continue to be delivered by local authorities.



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Executive Summary

The Social Security (Scotland) Bill ("the bill") sets out principles and a general framework for Scottish social security following the devolution of 11 social security benefits in the Scotland Act 2016.

Principles

The bill sets out seven principles for Scottish social security, including the principle that social security is a human right. The Scottish Ministers will have a duty to prepare a social security charter, in consultation with others, reflecting these principles. The charter will set out the responsibilities of those receiving assistance as well as the responsibilities of Ministers. Scottish Ministers will also have to report annually to the Parliament on how the charter has been met and how the social security system is performing. While it would be a legal requirement to publish and review the charter, the bill does not include a duty on Ministers to abide by the charter or the principles.

Devolved assistance

The bill sets out eight 'types of assistance', for example, disability assistance. Most of these types of assistance will be administered by a new executive agency. An executive agency does not need to be established by legislation, because it is part of the government, so this is not included in the bill.

The bill includes broad eligibility criteria for each type of assistance, and Scottish Ministers are given wide regulation-making powers to define these.

Putting the substantive rules in regulations is a deliberate policy choice. The government argues that this will make the law easier to understand. This means that many of the policy commitments and much of the administrative detail are not set out in the bill. Secondary legislation attracts less parliamentary scrutiny than primary legislation. For example, regulations cannot be amended - only accepted or rejected as a whole. However, illustrative drafts of regulations should be available during stage 1. The bill documents specifically ask for the Parliament's views on the appropriate level of scrutiny required for regulations.

Carer's allowance supplement

One exception to the general approach of leaving the detail to regulations is the temporary supplement to carer's allowance. This will increase this benefit to the level of jobseeker's allowance. The bill also provides for "carer's assistance", which will, in time, form the permanent arrangement for payments to carers in Scotland. In the meantime, the Scottish Government will have an agency agreement with the DWP for delivery of carer's allowance.

Discretionary housing payments

Another exception to the general approach is the provision for discretionary housing payments in part 4 of the bill. These will continue to be delivered by local authorities and are not included as part of 'Scottish social security' for the purposes of the principles or charter.

Framework of the Scottish social security system

Part 2 of the bill sets out the general framework for determining entitlement, making applications and challenging decisions. Much is left to regulations. For example, Ministers have a power to decide what "assistance" is to be given. This would include, for example, stating what the value of an award would be. This could be used for annual uprating, but there is no requirement to do so.

Although a person has a right to be given the assistance they are entitled to, certain administrative procedures must still be followed. For example, where applications are required they must be made in the required form. Any evidence required must also be provided. Government amendments introducing new data-sharing powers are expected at stage 2, although it is unclear how they will be used.

The bill also provides for re-determining entitlement, and appeals to tribunals. Like the reserved system, a person will only be able to appeal to an independent tribunal if they have first requested a re-determination by the social security agency. Unlike the current reserved system, the bill does not restrict which determinations can be appealed, and a right of appeal arises if a re-determination request is not decided within a time limit (to be set by regulations).

The bill allows for recovery of overpayments. All overpayments made due to a mistaken decision will be legally recoverable. This contrasts with the current system, where the benefits to be devolved can only be recovered if the claimant has failed to disclose or misrepresented a material fact.

Amongst the new criminal offences created by the bill is that of a failure to report a change of circumstances. This appears to be wider in scope than a similar reserved benefit offence, in that no intent to deceive is required.

Background

The Scotland Act 2016 gives Scotland powers over 11 social security benefits (see Table 1).

Table 1: Benefits devolved by the Scotland Act 2016

Group of Benefits	Benefits
For carers, disabled people and those that are ill	carer's allowance, disability living allowance, attendance allowance, personal independence payment, industrial injuries benefits, severe disablement allowance
Currently part of the regulated social fund	cold weather payment, funeral payment, sure start maternity grant, winter fuel payment
Other	discretionary housing payments

The act also devolves a range of other **powers**:

- an expanded power to provide **discretionary payments and assistance**
- the **power to top-up reserved benefits**
- the power to **create other new social security benefits (other than pensions) in areas not otherwise connected with reserved matters**
- Scottish Ministers have powers to **vary the housing cost element of universal credit** for rented accommodation and to **change payment arrangements for universal credit**.

For further background on the Smith Commission and passage of the Scotland Act 2016 see SPICe Briefing *New Social Security Powers*. ¹

Commencement of the new social security powers

The [Joint Ministerial Working Group on Welfare](#) oversees the transfer and implementation of the new welfare powers. The group agreed to a phased approach for the commencement of the social security powers devolved by the Scotland Act 2016. These have been commenced as follows:

- Top-ups to reserved benefits, discretionary payments and devolved powers over universal credit commenced on 5 September 2016, and discretionary housing payments commenced on 1 April 2017. ²
- Split competence applies to disability, industrial injuries, carer's benefits, benefits for heating, maternity and funeral expenses from 17 May 2017 up to 1 April 2020 at the latest (see [below](#)). ^{3 4}
- Provision for welfare foods (s.27) has not been commenced.

Split competence

The Joint Ministerial Working Group on Welfare agreed to commence s.22 (disability industrial injuries and carers benefits) and s.23 (benefits for maternity, funeral and heating

expenses) of the Scotland Act 2016 by splitting legislative and executive competence.^{3 5}
The Scottish Government describes legislative and executive competence as follows:

“ Legislative competence means the ability to make primary legislation in Parliament. On devolving legislative competence [...] the UK Government would not [...] be able to change or bring in new primary legislation in the relevant areas for Scotland without a Legislative Consent Motion.”

“ Executive competence means the power to make regulations and payments and underpins delivery responsibilities. For so long as executive competence remains reserved, the UK Government has the ability to administer the existing benefits and to adjust the detail of their delivery.”

Constance, 2016⁶

This will allow the Scottish Government time to develop the necessary mechanisms to deliver the benefits.⁶ A key priority is the safe and secure transfer of benefits. Until the transfer of executive competence, the DWP will continue to set the rules for these benefits in Scotland, despite the introduction of the bill.

Executive competence for disability, industrial injuries and carers benefits will transfer before 1 April 2020 if the relevant provisions in the bill are commenced at an earlier date.⁴ This means, for example, that executive competence for carer's allowance will automatically transfer to the Scottish Ministers when the carer's allowance supplement (s.47 of the bill) is commenced. Further information on the approach taken to this supplement is provided [later in this briefing](#).

The situation is different for maternity, funeral and heating expenses, as executive competence transfers on 1 April 2020.⁴ If the Scottish Government wishes to completely replace the current reserved benefits before April 2020 (which it plans to do in the case of funeral payments and maternity grants - see [below](#)) then further action from the UK Government will be needed to stop the current schemes from operating in Scotland.⁷

Bill and policy development

The Social Security (Scotland) Bill was introduced in the Parliament on 20 June 2017.

In addition to the formal consultation,⁸ the Scottish Government held a range of consultation events, which are detailed at para 38 of the policy memorandum.⁹ The independent analysis of the consultation responses, along with the Scottish Government response, were published on 22 February 2017.¹⁰

Experience panels and advisory groups

The Scottish Government has made various arrangements for involving experts and users in the development of the new Scottish social security system. These arrangements include the following groups:

- [Advisory and reference groups](#) have been established to provide a forum for discussion and decision-making. The groups include a disability and carer's benefit

expert advisory group and a funeral expense assistance group. Further information about the stakeholder groups is available on the Scottish Government [website](#).

- **Experience panels** made up of people with direct experience of the social security system have been recruited to help the Scottish Government design the processes, procedures and systems of the new Scottish social security system. Over 2,400 people have been recruited to these experience panels.

Social security agency

The delivery of most Scottish social security will be undertaken by a new executive agency. As the agency is part of the Scottish Government it does not require any legislation to establish it or set out its functions.

On 27 April 2017, Jeane Freeman MSP, the Social Security Minister, announced ⁸ further details about the Scottish Government's preferred model of delivery, following the publication of an outline business case. ¹¹ It has two strands.

- The Scottish versions of 10 of the 11 devolved benefits will be delivered directly by the new social security agency itself through a centralised function. The agency will also provide locally accessible face-to-face pre-claims advice and support, co-located, where possible, in places people already visit.
- Discretionary housing payments (and the Scottish welfare fund) will continue to be delivered by local authorities.

The agency will employ at least 1,500 staff, with an estimated annual running cost of around £150m. An announcement on the location of the agency and the next steps on the assessment model for determining eligibility for benefits, is expected in the autumn.

Legislative approach to devolved social security

The structure of the bill is as follows.

- Part 1 sets out the principles of the Scottish social security system, and the charter and scrutiny mechanisms.
- Part 2 and the schedules establish a framework for decision-making in the new system, and establish the different types of devolved assistance.
- Part 3 creates a power to top-up reserved benefits by regulations, and provides for a carer's allowance supplement.
- Part 4 provides for discretionary housing payments.
- Part 5 contains ancillary and transitional powers and general provisions.

The detailed rules for the types of devolved assistance created by part 2 will be set out in regulations. Regulations receive less parliamentary scrutiny than primary legislation and cannot be amended in part – only accepted or rejected as a whole.

The breadth of regulation-making powers is a deliberate policy choice which the Scottish Government considers:

“ should improve Parliament’s ability to scrutinise executive action. Instead of scrutinising the benefit rules once, when they are made in primary legislation, Parliament will scrutinise the enabling framework in the bill [...] then the detailed benefit rules in each set of regulations, then any changes to these rules.”

para 12 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

The Scottish Government considers that the existing legislative framework is too complex. It is of the view that the approach taken in the bill will make the social security system easier to understand, and provide flexibility to respond to changing circumstances.

“ ...the Scottish Government is of the view that it would make the law more accessible to tell the whole story of how a person qualifies for assistance, and what they qualify for, in one place. As some elements of that story will necessarily have to change from time to time, telling it in primary legislation is not a realistic option. The Scottish Government is therefore of the view that the optimal solution is to have the whole story of entitlement to different types of assistance told in regulations.”

para 11 Social Security (Scotland) Bill [as introduced] Delegated Powers Memorandum, SP Bill 18-DPM, 2017¹²

However, there are some areas of policy in which the bill does not include explicit regulation-making powers. This is particularly the case in relation to the provisions relating to the form of applications and notifications, as well as liability to repay overpayments and fraud offences. If provision in these areas is set out in operational guidance rather than regulations, then the "whole story of entitlement" would not be in one place (see quotation above). These areas are discussed further [later in this briefing](#).

In the delegated powers memorandum (para 12), the Scottish Government points out that the Parliament can amend the detail of the schedules, and thus what the regulations may, must or must not do. The Scottish Government also argues that its approach should help the Parliament to scrutinise future Scottish Government policy as:

“ The fragmented nature of existing UK social security legislation not only makes it difficult to follow for those applying it, it also makes it difficult for parliamentarians to understand proposed changes to it.”

para 14 Social Security (Scotland) Bill [as introduced] Delegated Powers Memorandum, SP Bill 18-DPM, 2017¹²

The Scottish Government has committed to produce illustrative drafts of regulations, including some drafts in relation to types of assistance, prior to stage 2. ¹² Until draft regulations are published, the policy intention remains unclear in some areas. These regulation-making powers are discussed further below.

The regulation-making powers allowing provision to be made for devolved benefits, are all subject to the affirmative procedure (s.55(2)). There are currently no requirements for the Scottish Government to consult with particular bodies before making the regulations.

The bill also provides for parliamentary scrutiny of Scottish social security through consideration of the Scottish Government's annual report on the Scottish social security system, and consideration of the review of the charter every five years (see [below](#)).

Principles and accountability

Part 1 of the bill sets out seven principles for Scottish social security. A charter, based on these principles, must be published within six months of the bill coming into force, and reviewed every five years. Scottish Ministers must make an annual report to the Parliament. This will cover how the charter has been met and how the Scottish social security system has performed. Those in receipt of Scottish social security are to be involved in developing the charter.

The principles

The principles of Scottish social security are that (s.1):

- social security is an investment in the people of Scotland
- social security is a human right, and essential to the realisation of other human rights
- the social security system has respect for the dignity of individuals at its heart
- Ministers have a role in ensuring that people are given what they are eligible for under the Scottish social security system
- the system is designed with the people of Scotland on the basis of evidence
- opportunities are sought to continuously improve the Scottish social security system, putting the needs of those needing assistance first
- the system is efficient and delivers value for money.

The policy memorandum⁹ focuses its discussion on three of the seven principles: human rights, dignity and ensuring that individuals are given what they are eligible to be given.

The Scottish Government decided on these seven principles in 2016 following the broad-ranging Fairer Scotland consultations.¹³ Five principles were included in the consultation and two were added as a result. The additional two were: that Scottish Ministers have a role in ensuring that individuals are given what they are eligible to be given, and that [social security is a human right](#).

Social security as a human right

One area that has received particular comment is the recognition that ‘social security is itself a human right and essential to the realisation of other human rights’. The Scottish Government states that the aim is to embed human rights into the legislation. This is in line with a wider commitment to consider how international human rights obligations can be given “further and better effect” in Scotland.¹⁴

Social security is defined as a human right under international law. For example, it is included in Article 22 of the Universal Declaration of Human Rights,¹⁵ Article 9 of the International Covenant on Economic, Social and Cultural Rights¹⁶ (ICESCR) and Article 26 of the UN Convention on the Rights of the Child (UNCRC).¹⁷

International human rights treaties are enforced principally by the obligation to report to the relevant UN Committee. For example, in 2016, the UN Committee on Economic, Social and Cultural Rights published its concluding observations for the UK Government. It expressed concerns about the impacts of welfare reform and that it was 'deeply concerned' about a number of UK policies, for example, the reduction in the benefit cap and the bedroom tax, amongst others.¹⁸ These UN reports can be used as a way to influence policy and parliamentary scrutiny of government action.

The United Nations international human rights instruments cannot be enforced directly through the courts. However, they can be used as an aid to interpreting domestic law. In addition, under the Scotland Act 1998, observing and implementing international obligations is not reserved (para.7(2)(a) of schedule 5). The Parliament has already legislated in this area. The Scottish Government is required to report to the Parliament every three years on how it is 'giving further effect to' the UNCRC under part 1, Children and Young People (Scotland) Act 2014.¹⁹ This would include reporting on article 26 UNCRC - the right to social security as it affects children.

The Scottish Government states that its proposal to adopt and embed social security principles in the bill can be summarised as:

“ That no future Scottish Government is criticised by the UN, or an equivalent organisation, for failing to guarantee a right to social security, as laid out in General Comment 19 of the UN Committee on Economic, Social and Cultural Rights.”

para 48 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

The UN provides guidance, 'general comments', on how states can fulfil their obligations to social security. General comment 19 states that:

“ The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.”

para 2 United Nations Economic and Social Council, 2007²⁰

It also states that social security should be:

“ ...established under national law and ensure the right of individuals and organizations to seek, receive and impart information on all social security entitlements in a clear and transparent manner.”

para 11 United Nations Economic and Social Council, 2007²⁰

In contrast with the UN system, rights protected under the European Convention on Human Rights (ECHR) can be directly enforced through the courts.²¹ Although the ECHR does not contain an explicit 'right to social security', it does offer some protection in this area, principally through: protection of property (article 1 of protocol 1), protection of private and family life (article 8), protection against discrimination (article 14) and right to a fair trial (article 6).²² Under the Scotland Act 1998, an Act of the Scottish Parliament is not law to the extent that it is incompatible with the ECHR. In addition, Ministers (and so the

new social security agency) must comply with the ECHR (s.57, Scotland Act 1998), as must all public authorities under s.6 of the Human Rights Act 1998.²³

Therefore, even even if the bill did not include the principle that social security is a human right, any devolved social security must be compatible with the right to social security to the extent that it exists under the ECHR. Two recent cases where the UK Government has been found to breach the ECHR concern the bedroom tax and the benefit cap. In *R (on the application of Rutherford and another) v Secretary of State for Work and Pensions*,²⁴ the bedroom tax regulations were held to unlawfully and unjustifiably discriminate against households with disabled members. In *R (on the application of DA and others) v Secretary of State for Work and Pensions*,²⁵ the application of the benefit cap to lone parents with children aged under two was found to be discriminatory. The UK Government intends to appeal in the latter case.²⁶

There is a range of other instruments, guidance and standards which contribute to the human rights framework for social security. For further background on these see the written submissions from the Scottish Human Rights Commission²⁷ and Equality and Human Rights Commission²⁸ to the Scottish Government's consultation.

The charter

The charter is intended to turn the principles “into more focussed aims” so that they are “open to monitoring, reporting and scrutiny.”⁹ While the requirement to publish a charter is statutory, the charter itself will not be set out in legislation.

The detail will be developed in consultation with those claiming Scottish social security benefits and others. The equality impact assessment suggests this “co-production” approach will benefit recipients even if the amount paid is not increased nor eligibility widened for specific benefits.

“ even where there are no current plans to adapt levels of payment or eligibility, recipients of devolved benefits will still benefit substantially by having assistance administered through a system that has tailored its approach and processes to their specific needs. ”

para 7 Scottish Government, 2017²⁹

Recent research from the Equality and Human Right Commission notes that:

“ The co-production model can help develop positive working relationships between claimants and front line staff”

p.67 Simpson, 2017³⁰

The charter and principles will apply to the new agency because it is an executive agency, essentially a function of Scottish Ministers. The charter therefore can set out what is expected of the new agency.

The charter will also set out what is to be expected of people receiving Scottish social security benefits. The inclusion of these expectations is not discussed in the consultation

nor the policy memorandum, but will be discussed by the experience panels during the drafting of the charter.

Coverage of the principles and charter

The charter and principles only apply to Scottish social security as defined in the bill. That is, they apply to:

- assistance under part 2 – carer’s assistance, cold-spell heating assistance, winter heating assistance, disability assistance, early years assistance, employment-injury assistance, funeral expense assistance, short term assistance
- regulations under part 3 – top ups to reserved benefits and the temporary carer’s allowance supplement.

This does not include other payments such as discretionary housing payments (see [below](#)) and the Scottish welfare fund. Nor does it cover council tax reductionⁱ or universal credit flexibilities. Therefore, the legal requirements to consult with those receiving assistance, to develop a charter and report annually do not extend to these provisions.

That said, the policy intention is wider than what is provided for in the bill. The annual report will report more widely “on the performance of the entire system.”⁹

Accountability and monitoring

The Scottish Government has said that the charter could:

“ be used to hold the Scottish Government to account for the successful delivery of its stated aim of creating a fairer, more inclusive system.”

p.7 Scottish Government, 2017³¹

However, the bill only requires that a charter is published. It does not place a duty on anyone to uphold the principles, or implement or ‘have regard’ to the charter.

In the bill, the function of the charter is to "set out what is expected" of Ministers when developing policy and exercising their functions under the bill (s.2(2), and to reflect the social security principles (s.2(3)). The charter will therefore set out what individuals can expect from the system. The accompanying documents suggest that it is also intended to be used as a mechanism for assessing the system as a whole.

“ It is envisaged that the charter will be a link between the principles and the way in which the social security system in Scotland performs. [...] the Scottish Government intends that the charter will be used as an instrument to facilitate a 'two way dialogue' between users and the Scottish Government, embedding accountability and enabling it to drive improvement.”

para 65 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

ⁱ Council tax reduction is a replacement for council tax benefit. The Scottish Government view it as a tax relief rather than as part of the social security system.

The Scottish Government considers that the process for reviewing the charter would be “more open to collaboration than the process to amend the primary legislation” and “introduces a further important layer of accountability and participation.”⁹ The review process must include consultation with recipients of Scottish social security assistance.

The charter and the annual reports will also be laid in the Parliament. Unlike consideration of legislation, there is no formal parliamentary procedure for consideration of documents laid before the Parliament. The degree of scrutiny afforded the annual reports and charter will therefore be a matter for members to decide.

The specific content of the charter will be developed in consultation with stakeholders. It could potentially include things such as:

- "system level" standards, in the manner of "key performance indicators"
- a summary of individuals' rights
- a clear statement of service standards.

Independent scrutiny body

Almost all (91% of 211) of those responding to the consultation said there should be an independent body set up to scrutinise Scottish social security arrangements, and a ‘vast majority’ of these said that this should be established by law.¹⁰ Some referred to the existing UK Committees, (Social Security Advisory Council and Industrial Injuries Advisory Council (IIAC)), which provide expert, technical scrutiny of social security legislation to the UK government. The role of the IIAC is discussed in the SPICe briefing [Scotland Act 2016: industrial injuries benefits and severe disablement allowance](#).³²

There is no provision for an independent statutory scrutiny body in the bill as introduced. The Scottish Government has explicitly invited parliamentary committees’ views on this issue, in relation to regulations. On the issue of the level of scrutiny of regulations, the delegated powers memorandum states:

“ One option might be to set up an expert advisory committee along the lines of the system that the UK Parliament operates. [...] Amongst other issues though, thought would need to be given to the relationship between any expert advisory committee and the relevant parliamentary committees [...] the Scottish Government has already established some specific expert advisory groups [and is] recruiting panels of people with direct experience of social security. [...] the Scottish Government is keen to hear the committees' views. At this stage, so as not to pre-empt discussions with members of the Parliament, the Scottish Government has not provided for anything more than the affirmative procedure on the face of the bill.”

para 5 Social Security (Scotland) Bill [as introduced] Delegated Powers Memorandum, SP Bill 18-DPM, 2017¹²

The Scottish Government has also said that:

“ we will enlist the support of objective experts to advise us on the most effective arrangements for robust, independent scrutiny of the new system’s performance. ”

p.9 Scottish Government, 2017³¹

For a list of the advisory groups established to assist with policy development, see [above](#).

The Minister for Social Security has written to the Parliament's Social Security Committee setting out the different options and issues to be considered for the scrutiny of Scottish social security regulations.

“ The Scottish Government believes the best approach to this issue would be for the appropriate bodies (including, subject to agreement, Parliamentary bodies) to consider alternatives to the establishment of a statutory committee before proceeding.”

Freeman, 2017³³

The framework of the Scottish social security system

Part 2 of the bill sets out the different types of devolved assistance (explained [below](#)), and certain provisions which will be common to the devolved benefits. Broadly, these include:

- a legal framework for determining entitlement, applications and evidence requirements
- provisions for applicants to be able to challenge determinations of their entitlement to assistance
- provisions relating to recovery of overpayments and new criminal offences in relation to the Scottish social security system.

The detail of some aspects of this process will be set out in the regulations governing each type of devolved assistance.⁹ For further information about the Scottish Government's approach to social security legislation, see [above](#).

Applications and determinations

Scottish Ministers must provide an individual with any social security assistance that they are entitled to, under a determination of entitlement to assistance ("a determination") (s.8). The policy memorandum describes this as reflecting a rights-based approach to social security. The Scottish Government draws a contrast with the current reserved system, which it describes as operating:

“ on the basis that not everyone is entitled but those who are will be able to demonstrate their entitlement.”

para 47 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

However, the Government acknowledges that "the practical effect may be similar [to the reserved system] in most cases".⁹

A determination is made up of a series of "decisions". A determination must be made (s.19):

- if an application for assistance is made in the correct form; *or*
- without an application if Scottish Ministers are required to do so by regulations (made under s.35).

Applications do not have to be determined, and assistance can be refused, if any required evidence is not provided.

Some aspects that are not entirely clear include under what circumstances someone else will be able to apply on behalf of a child or disabled person, and how someone can request a further determination if they are already receiving a devolved benefit. If an applicant disagrees with a determination they can request a re-determination (see [below](#)).

Once an application has been determined for a type of assistance, no further application can be made for the same type of assistance for the same event or period (s.20(3)). This provision has no equivalent in the reserved system. It may be problematic if an individual applies for assistance that they do not qualify for, but for which they later become eligible. An example of when this can happen in the current reserved system is that a common reason for refusal of a sure start maternity grant is that the claimant is not receiving a "qualifying benefit". If such a benefit is later awarded, a further application can be made.

Determinations without an application

Regulations setting out circumstances in which no application is required could potentially be made for any type of devolved assistance, and in any circumstances. The delegated powers memorandum gives the example of:

“ cold-spell heating assistance, which Ministers might be able to determine people’s entitlement to based on information already held about where they live and their entitlement to other forms of social security.”

para 35 Social Security (Scotland) Bill [as introduced] Delegated Powers Memorandum, SP Bill 18-DPM, 2017¹²

The explanatory notes give further possible examples:

- winter heating assistance, if a person qualified for it the previous year
- a determination of ongoing entitlement to disability assistance which needs to be amended due to a change of circumstances.³⁴

Regulations may provide for assumptions that can be made and information that can be used in determining entitlement to devolved assistance without an application (s.35(2)). For discussion of the potential importance of regulations made under this power during an ongoing award, see [below](#).

Form of applications

An application for assistance must be made in the manner required, although the way in which applications must be made is not specified in the bill. The Scottish Ministers must publicise the way(s) in which applications need to be made.

The Scottish Government says it:

“ will develop and design all of those application processes and forms with the people who receive the benefits, to make sure they are clear, easy to understand and as simple as possible to complete. ”

p.1 Scottish Government, 2017³¹

The Scottish Government acknowledges the need for a number of different channels through which people can apply, giving the examples of applying online, by phone or using a paper claim form.³¹ It appears that the way in which applications must be made will not be set out in the regulations. This is because there are no explicit regulation-making powers under s.20 of the bill.

Who should apply for assistance

Applications must be received "from the individual" (s.19). Similarly, it is "the individual" who has the right to request a redetermination or who would be liable to repay an overpayment.

An exception to this is that a duty to notify a change of circumstances can be placed on someone receiving assistance on behalf of another person (s.31(4)). The explanatory notes give the example of parents receiving disability assistance on behalf of a child. It is not clear from the bill or accompanying documents whether the intention is for regulations to set out circumstances in which one person may apply for assistance on behalf of another, or if this will only be possible where it is provided for elsewhere in law.

At present, reserved social security legislation provides for: ³⁵

- someone to be automatically appointed to act on behalf of a child under 16 for whom an application is made for disability living allowance
- someone to be appointed to act on behalf of an adult in relation to social security benefits if they are unable to act for themselves.

Information and evidence required

Applications must be accompanied by such evidence as is required (s.20(1)(b)), which is to be provided within a time limit set out in requests for information (s.30(1)). This can include the results of an assessment that has not been carried out at the time the request is made (s.30(3)). The time limit to respond to a request is not restricted in any way, and may depend on a decision as to how easy the information is likely to be to obtain. ⁹ It does not appear that either the time limit to provide information or the types of information that may be requested will be set out in the regulations. This is because there are no explicit regulation-making powers under s.30 of the bill.

There is currently no provision in the bill setting out when the Scottish Ministers may request further evidence from third parties. ⁱⁱ However, the Scottish Government's privacy impact assessment (PIA) for the bill states that:

“ the intention is to bring forward amendments during the Parliamentary process to include appropriate provisions on data sharing. Work is on-going to determine the data sharing requirements however it is likely to require data sharing between Scottish Ministers and a number of public sector organisations including HMRC; Scottish local authorities; National Records of Scotland (NRS); all local Scottish Health Boards; NHS National Services Scotland; Skills Development Scotland (SDS). ”

para 7.5 Scottish Government, 2017³⁷

The Annex to the PIA gives the example of accessing GP records (with consent). However, the bill documents do not set out what role Scottish Ministers may have in seeking evidence or information from third parties relating to an application.

ii s.34 of the Scotland Act 2016 ³⁶ already allows data sharing between the Scottish Ministers and the DWP for social security purposes. ³⁷

Consequences if required evidence not provided

If an individual does not provide information within the time requested, the Scottish Ministers can refuse the application “without further consideration” (s.30(2)). The explanatory notes highlight that this power does not rule out the possibility of a determination being made on the basis of whatever information has already been provided.³⁴ However, the duty to make a determination does not arise until all evidence required is provided by the applicant.

Determinations and decisions

“Decisions” are effectively the building blocks that constitute a “determination” of entitlement to assistance (s.33). Determination is the “crucial point” where it is determined that an individual is or is not entitled to assistance.⁹ The reserved benefits system currently uses the same two terms, but with the meanings reversed.ⁱⁱⁱ Applicants are likely to be claiming benefits in both the devolved and reserved systems, so they (and those advising them) will need to be aware of the different uses of these terms.

The bill appears to give an exhaustive list, setting out three different types of decision which comprise a determination (s.33(1)):

- whether the eligibility rules for the assistance are satisfied
- if so, what assistance the individual is entitled to
- if applicable, what ongoing assistance the individual is to be entitled to in the future.

It appears that a new decision in relation to any one of these matters would require a further determination of entitlement to be made. It seems clear that a relevant change in an individual's circumstances would require a new determination. It is less clear whether other changes to devolved assistance are intended to require a new determination. For example, annual uprating of the amounts of devolved benefits would appear to be a change to “what assistance of the type in question the individual is entitled to be given”³⁸ (and so a new decision under s.33(1)(b)). For discussion of this in relation to the right to challenge a determination, see [below](#).

Regulations can provide for entitlement to assistance to be determined on an ongoing basis, for either a fixed or indefinite period (s.34). Such regulations could be made for any type of devolved assistance, but the policy memorandum states that:

“ In practice, the types of assistance that may be paid on a continuing basis will mostly be those covered by section 22 of the 2016 Act i.e. disability and carers assistance. ”

para 246 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

A determination of entitlement must be notified to the individual (s.22). The reasons for the determination must be given, along with a notification of the right to request a re-determination. However, the form of notifications is not set out in the bill, and it does not appear to be something that will be set out in the regulations either, as s.22 contains no

iii An example would be that if someone claimed employment and support allowance (ESA), a **determination** that they did not have “limited capability for work” would result in an appealable **decision** that they were not entitled to ESA.

explicit regulation-making power. Whilst the policy memorandum emphasises the flexibility that this provision gives to meet peoples' needs, individuals may struggle to effectively exercise their rights without some form of written notification to refer to in all cases.

Further determinations during a period of entitlement

A person who has been given assistance on an on-going basis (eg. disability assistance) may need the assistance to be changed if, for example, their circumstances change. The bill provides that any later determination will supersede an earlier one and alter the amount of assistance which an individual is entitled to (s.10). However, it is not clear from the bill documents when an individual will have the right to insist on a further determination being made during an ongoing award.^{iv}

A person only has a right to a determination of their entitlement in the following three situations:

- They apply in the required form and provide the required evidence (s.19(a)).
- They request a re-determination (under s.23) in the required form and within the required time (s.24).
- Regulations (under s.35) require a determination to be made without an application (s.19(b)).

There are a number of situations where a person already receiving assistance may want to request a further determination, but not be able to put in a further application (as their award continues for a future period - s.20(3)). For example:

- there may have been a change of circumstances
- a new interpretation of the entitlement conditions that may increase an award may be given by the courts.

Ministers may also wish to make further determinations in similar circumstances, including if changes to eligibility criteria are made. This means that the regulations made under s.35 will be important for ensuring that the system works coherently.

The Scottish Government's proposal is to set out the detail about how entitlement can change, and the date from which an award would be altered, in regulations and operational guidance.³⁹ This contrasts with the approach in the reserved system (where the rules are split between primary and secondary legislation),^{40 41} which sets out how entitlement can change (and from what date) if, amongst other situations:

- an advantageous change of circumstances is reported late by a claimant
- the Secretary of State disagrees with a tribunal's decision
- the courts give a new interpretation of the criteria to be awarded a benefit

^{iv} If there is no mechanism by which someone can place a duty on the Scottish Ministers to make a further determination, it is unclear whether it would be possible to challenge a refusal to change entitlement. This is because there would not seem to be a new determination unless a material change was accepted.

- the law is changed to alter the entitlement conditions of a benefit
- a decision was made in ignorance of a claimant's true circumstances, but they could not reasonably be expected to have known that the decision was incorrect. ⁴²

Challenging determinations

If an individual wishes to challenge a determination, they must first request a re-determination. If still unhappy with the outcome of this (or if the time limit for Ministers to carry out a re-determination is missed) they will be able to appeal to an independent tribunal. The wording of the bill appears to provide that all determinations can be challenged.

The Scottish Government intends that this process will improve on the system of mandatory reconsideration which applies to reserved benefits. It is slightly different to the process for reserved benefits, and to mechanisms to challenge decisions in other devolved areas, such as the Scottish welfare fund and council tax reduction reviews.

A significant change is that if a determination reduces or removes an ongoing award, and the applicant challenges it, they may be eligible for "short-term assistance", pending the outcome of the challenge. Short-term assistance is discussed further [below](#).

Re-determinations

A re-determination request must be made:

- in the required form, *and*
- within the required time.

No further detail of either of these requirements are set out on the face of the bill, save that Scottish Ministers must publicise the manner in which re-determination requests must be made.

The policy memorandum suggests that this process:

“ is called a 're-determination' as during this stage, the agency would put aside the original determination and go through the entire process of making a new determination rather than just examining whether the original decision was right or not. ”

para 206 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

The policy memorandum also points out that this may result in an outcome less favourable than the initial determination. It does not appear that it will be possible for an individual to request that only some aspects of a determination are re-visited in a re-determination request. For example, if disability assistance is divided into different components (as disability living allowance currently is), it seems that it will not be possible to ask for only one component to be looked at again, even if the individual agrees with the determination of the other component.

Time limit to request a re-determination

The time limit to request a re-determination will be set out in regulations, which are subject to the negative parliamentary procedure. It is not clear whether the time limit will be flexible, and allow requests to be made late if there is a good reason for lateness. This is common to reserved social security law, other areas of devolved responsibility,^v and the time limits to appeal a decision in the bill (see [below](#)).

It is also unclear whether, in some circumstances, a person could have an indefinite period to request a re-determination. In the reserved system, a decision on entitlement can be "revised" at any time if it results from an official error to which the claimant did not contribute. This allows the DWP to remedy its own errors, no matter when they were made. The power to supersede a previous determination appears to be broad enough to allow Scottish Ministers to take such action (assuming that regulations include this situation in the circumstances in which entitlement can be determined without an application). However, there is no obvious provision in the bill which gives an individual the ability to request a re-determination at any time.

Right of appeal without a re-determination

It appears that the Scottish Government's intention is that there will be no right of appeal if a re-determination request is made in an incorrect way, or outside the time limit. This contrasts with the reserved "mandatory reconsideration" (MR) system, where a request does not need to be made in a particular form, and can be made by telephone, in writing or by email. In this different statutory context, a recent Upper Tribunal decision has also held that a refusal to consider an MR request made outside the normal time limit gives rise to a right of appeal, if made within a year of the decision.⁴⁴

Time limit to carry out a re-determination

A re-determination is a completely new determination of entitlement, without reference to the previous decision-making process. A timescale to carry out a re-determination is to be set by regulations, and may vary for different types of assistance.

If a re-determination has not been carried out within the time allowed by the regulations, an immediate right of appeal against the original determination will arise. However, this still requires the applicant to make an appeal. There is no provision in the bill to treat an undecided re-determination request as an appeal. So, even if the agency fails to act on a re-determination request, further action will be required from the individual before their case can be heard by an independent tribunal.

Appeals to the First-tier Tribunal

If an individual is unhappy with the outcome of their request for a redetermination (or their request has not been determined within the prescribed time limit - see [above](#)) they can appeal to the First-tier Tribunal (s.27). The Scottish Government intends to set up a new

^v For example, see regulation 3 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999⁴¹ and regulation 14(3) of The Welfare Funds (Scotland) Regulations 2016.⁴³

chamber of the First-tier Tribunal for Scotland to hear appeals in relation to devolved social security assistance.^{vi 9}

An appeal must normally be made within 31 days of the notification of the outcome of a re-determination request (or a notification that a request has not been decided within the time limit). The First-tier Tribunal can accept an appeal made up to one year later, if it accepts that there is a good reason for lateness (s.28).

The detail of how the First-tier Tribunal will deal with social security cases will be set out in procedural rules. If an appeal is successful, the tribunal's determination replaces that of the Scottish Ministers (subject to any further appeal) (s.9).

Onward appeals to the Upper Tribunal and the Court of Session

Appeals against a First-tier Tribunal decision to the Upper Tribunal, and then potentially to the Court of Session, will be possible on points of law. Decisions of the Court of Session in civil cases can be appealed to the UK Supreme Court. Any of these bodies will thus also be able to make determinations of entitlement to devolved assistance.

Detailed provision has not been made for onward appeals in the bill. The explanatory notes³⁴ state that the establishment of a First-tier Tribunal means that onward appeals to the Upper Tribunal and the Court of Session are already provided for by the Tribunals (Scotland) Act 2014.⁴⁵

Which determinations can be challenged

The bill does not contain any provisions (other than time limits and the form of requests) which restrict the circumstances in which a determination can be challenged. As such, it is not clear whether regulations could set out that some types of determination cannot be appealed either. In the current reserved legislation,^{40 41} a number of types of administrative decisions which do not have a right of appeal are listed, including decisions about:

- the frequency of payment of benefits
- who is entitled to carer's allowance if more than one person meets the eligibility criteria
- the annual uprating of amounts of benefits
- recovery of overpaid benefit by deductions from payment of other benefits.

In its discussion of re-determinations under part 2 of the bill, the policy memorandum can be read as implying that the Scottish Government's intention is that not all determinations will be appealable, as it states that:

vi The intention is that once the administration of reserved social security tribunals is devolved, they will be heard in the same chamber. Provision for the devolution of tribunal administration is **not** made by the bill.

“ For those benefits, and decisions within benefits, that will have a right of appeal, the process for challenging a decision will first require a re-determination.”

para 206 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

Elsewhere in the same section, the policy memorandum can be read as suggesting that a decision increasing the amount of assistance annually might be intended to generate a right of appeal, because it refers to this as a "determination":

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

“ 196. When the individual is notified, they are also to be notified of their right to request a redetermination and appeal, should they disagree with the determination, and how to exercise it. ”

paras 193, 196 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

Overpayments and criminal offences

Chapter 4 of part 2 of the bill sets out when assistance given in error can be recovered by the Scottish Ministers. Chapter 5 creates new criminal offences and powers of investigation.

In both cases there are both similarities to and important differences from the operation of the reserved social security system. All overpayments due to a mistaken decision will be legally recoverable. This contrasts with the current system where the benefits to be devolved can only be recovered if the claimant is at fault, or the payment made does not match an award of benefit. Amongst the new offences created is that of a failure to report a change of circumstances. This appears to be wider in scope than reserved benefit offences, which require an intention to deceive to be shown.

Overpayments of devolved assistance

The value of any devolved assistance can be recovered if it was given as a result of "a mistaken decision". Scottish Ministers must take into account the financial circumstances of the debtor, and action to recover an overpayment must be taken within 5 years.

Incorrect payments not resulting from mistaken decisions

Paragraph 257 of the policy memorandum describes these provisions as establishing a liability "on an individual who has been given assistance to which they were not entitled." ⁹ However, the wording of the bill appears to be narrower, as it only creates a specific liability where there is a "mistaken decision under section 33(1)" (s.36). For example, a determination of entitlement might be correct in all aspects. However, due to a processing fault, a duplicate payment might be made to an individual. In this situation, it is not clear that any mistaken decision has been made, so the bill does not appear to create a specific liability to repay the value of that assistance.

It is perhaps surprising that explicit provision is not made in the bill to recover payments made which are in excess of the amount of benefit awarded. The equivalent reserved provisions are section 71(4) of the Social Security Administration Act 1992,⁴⁶ and regulations made under it. The Scottish Government may instead intend that overpayments not resulting from a mistaken decision will be recoverable using alternative powers available to pursue debts.

Liability where an individual is not at fault

All assistance given due to a mistaken decision creates a liability, and so is legally recoverable. S.36(1) provides that:

“ an individual is liable to pay the Scottish Ministers the value of any assistance that was given to the individual as a result of a mistaken decision under section 33(1).”

Social Security (Scotland) Bill [as introduced] SP Bill 18, 2017³⁸

The policy memorandum states that the requirement to establish a liability is important, as:

“ the Scottish Government’s focus, in making provision for the recovery of assistance given in error, is primarily on recovery where it is clear that the liability has been incurred as a result of an error on the part of the individual.”

para 258 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

The bill as drafted allows for overpayments due to mistaken decisions to be recovered, even if only the social security agency has made a mistake.

If the Scottish Ministers determine that a mistaken decision has been made and so someone is liable to repay an overpayment, the person will have the right to request a re-determination.⁹ This would allow an individual to show that they were not actually overpaid. If it is established that they were overpaid, whether recovery of the overpayment can be challenged by requesting a re-determination will depend on the method of recovery chosen (see [below](#)).

In contrast, reserved legislation provides statutory protection where the claimant is not at fault, as overpayments are only recoverable in specified circumstances.⁴⁶ vii The DWP also exercises administrative discretion in deciding whether to actually recover those overpayments that are legally recoverable.⁴⁷ The requirement to consider a debtor's financial circumstances (when known) when deciding whether to seek recovery (s.37) indicates that the discretion not to recover overpayments will also exist in the Scottish social security system.

Recovery of overpayments

Before deciding to recover an overpayment and how to recover it, the Scottish Ministers must consider the debtor's financial position, if they are aware of it (s.37). One option for Scottish Ministers to recover overpaid assistance due to a mistaken decision is to reduce

vii Some reserved benefits, such as universal credit, are always legally recoverable, but all of the benefits to be devolved currently have such statutory provisions.

the amount of an ongoing entitlement to devolved assistance. If used, this method would require a new determination, and so be possible to challenge by requesting a re-determination (see [above](#)). Using court action to recover money paid incorrectly but not due to a mistaken decision (for example, due to a computer error) would allow debtors to challenge the existence or amount of the debt in the courts.

The policy memorandum suggests that the first option, when seeking recovery of an overpayment, will normally be to try to agree amounts to be deducted from devolved assistance that the individual receives.^{viii} If this is not possible, either deductions may be made without the debtor's agreement, or recovery pursued through civil litigation. It is not clear whether the rate of deductions to recover overpayments will be limited by the regulations, but it appears not, as:

“ the aim is not to put in place a devolved Scottish equivalent of the very extensive regulation, systems, processes and manpower that DWP expends significant resource annually operating, in order to recover overpayments.”

para 268 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

Time limit to begin recovery action

The bill amends the Prescription and Limitation (Scotland) Act 1973,⁴⁸ to add a liability to repay social security assistance under s.36 to the list of debts which are "prescribed" after 5 years (s.38). The explanatory notes describe the effect of s.38 as 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.”

para 62 Social Security (Scotland) Bill [as introduced] Explanatory Notes, SP Bill 18-EN, 2017³⁴

If court action to recover a debt is taken within the 5 year period, the liability to repay it will continue to exist for 20 years. However, it is not clear whether the liability would be extinguished if action other than court action was taken - eg. deductions were made from other types of devolved assistance - during the 5 year period.

At present, overpayments of reserved benefits are subject to a 20 year limitation period in Scotland.

New criminal offences created by the bill

The bill creates new criminal offences in the areas of:

- giving false or misleading information to try to get a devolved benefit
- failing to notify, or causing someone else to fail to notify, a change of circumstances.

A "responsible individual" may also be prosecuted for an offence committed by an organisation (s.42). Paragraph 285 of the policy memorandum gives the examples of an organisation providing false information about hours worked by an employee, or artificially inflating charges for its services.⁹

viii This can be provided for in the regulations for the types of devolved assistance that will be paid on an ongoing basis - see Schedule 1 paragraph 10(b) for carer's assistance, for example.

Regulations may make provision about the conduct of investigations, including creating new offences in relation to obstructing investigations (s.43). The delegated powers memorandum acknowledges that "a power to create offences in subordinate legislation is comparatively unusual,"¹² but highlights that there is a precedent in reserved social security legislation. These regulations will be subject to the affirmative parliamentary procedure.

A code of practice must be produced to govern fraud investigations, and consulted on publicly before its introduction (s.44). Fraud will be investigated by staff of the social security agency.⁹

Offence of failing to report a change of circumstances

A person receiving assistance must report changes of circumstances (s.31) if the person has been informed:

- what changes must be notified
- how those changes must be notified
- that a failure to report such changes may be an offence.

This duty only applies to assistance which is given to an individual on an ongoing basis.

The bill (s.40(1)(b)) creates a new offence which is committed if:

“ the person knew, or ought reasonably to have known that [a change of circumstances] might result in an individual ceasing to be entitled to assistance or becoming entitled to a reduced level of assistance.”

Social Security (Scotland) Bill [as introduced] SP Bill 18, 2017³⁸

A similar offence is also created in relation to an individual causing someone else to fail to notify a change (s.41). This does not appear to require any dishonest intent on the part of the person who commits the offence. In contrast, the offence of trying to obtain assistance by deceit (s.39) is only committed if:

“ the person does so with the intention of causing an individual to be given assistance under section 8 which would not otherwise be given.”

Social Security (Scotland) Bill [as introduced] SP Bill 18, 2017³⁸

The policy memorandum highlights, at paragraph 276, that the majority of respondents to the consultation felt that the current offences in the reserved system should be retained.⁹ However, the equivalent reserved offence relating to changes of circumstances (set out in section 112 of the Social Security Administration Act 1992) is worded differently. It provides that:⁴⁶

(1A) A person shall be guilty of an offence if –

(a) there has been a change of circumstances affecting any entitlement of his to any benefit or other payment or advantage under any provision of the relevant social security legislation;

(b) the change is not a change that is excluded by regulations from the changes that are required to be notified;

(c) he knows that the change affects an entitlement of his to such a benefit or other payment or advantage; and

(d) he fails to give a prompt notification of that change in the prescribed manner to the prescribed person.

One common factor between the reserved and devolved offences is that someone may still commit an offence if they attempt to report a change in their circumstances, but do not notify the change in the required way.

The analysis of responses to the consultation on a social security system for Scotland contains the following summary of views on failure to notify changes of circumstances:

“ Respondents pointed to the need for a high level of proof for “intent” in this instance, and a clear differentiation between fraud and error. Some felt it was important to recognise emotionally charged situations and other mitigating circumstances, and be clear that offences only exist where there is a clear intent to gain benefit to which individuals would not otherwise be entitled...”

para 18.42 Scottish Government, 2017¹⁰

The policy memorandum suggests, at paragraph 282, that the intention is not to criminalise "genuine errors." ⁹ The policy memorandum also highlights that the majority of respondents to the Scottish Government's consultation on social security in Scotland agreed that the approach taken to fraud should mirror the Scottish Government's existing counter-fraud strategy, summarised in the consultation document as having:

“ a zero tolerance attitude to individuals who knowingly commit fraud and [believing] that there is no acceptable level of intentional or organised fraud. ”

p.105 Scottish Government, 2016⁴⁹

Neither the consultation document, nor the counter-fraud strategy linked to within it mention the possibility of creating a new offence of this kind.

Devolved social security assistance

Chapter 2 makes broad provision for the “types” of assistance that are to be given by Scottish Ministers. Ten of the eleven benefits devolved by the Scotland Act 2016 are categorised in the bill into seven types of assistance:

1. carer’s assistance (s.11)
2. cold-spell heating assistance (s.12)
3. winter heating assistance (s.13)
4. disability assistance (s.14)
5. early years assistance (s.15)
6. employment-injury assistance (s.16)
7. funeral expense assistance (s.17).

The Scottish Government argues that this approach follows the structure of the 2016 Act and:

“ has an additional advantage in that it means that - if required, in the future - any new benefits that may be created can be slotted in under the relevant assistance type without disrupting the Bill’s overall structure and narrative.”

para 92 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

There is also provision for a new type of short-term assistance. This is considered separately [below](#). [Discretionary housing payments](#) are covered in part 4 of the bill.

In some areas, the Scottish Government's policy intention will not be clear until the draft regulations are published.

Provisions relating to all types of devolved assistance

For each of the seven types of devolved assistance, the bill sets out:

- the purpose of the assistance
- that the assistance may or may not take the form of money
- that Scottish Ministers are to make regulations prescribing the eligibility rules and what assistance an individual is to be given
- further details about how the regulation making powers conferred by the relevant sections may or must be exercised in the associated schedules.

The following sections look briefly at some common questions that apply to all types of devolved assistance created by the bill. The major difference between the regulation-

making powers for the different types of assistance is the purpose for which assistance is provided. This is discussed further [below](#).

Up-rating of amounts of assistance

The bill does not place a duty on the Scottish Ministers to review the rates of devolved social security assistance. The policy memorandum states that:

“ The Bill provides the Scottish Ministers with the power to vary the rates of assistance, which can be used to deliver the Government's commitment to uprate disability and employment-injury assistance in line with inflation. ”

para 94 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

No mention is made of when and how the amounts of the other types of assistance will be reviewed. Whilst the current one-off payments to be devolved are not regularly reviewed, carer's allowance is amongst the social security benefits that must be uprated, if it appears to the Secretary of State that prices have increased during a year.⁴⁶ There is nothing in the bill that prevents the rates of devolved assistance from being increased, but equally no duty to consider whether to increase them at any point.

The bill provides for regulations that could be used to vary the rates of assistance. The policy memorandum refers to using these to:

“ uprate disability and employment-injury assistance in line with inflation ”

para 95 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

During a Scottish Government debate on Disability, Fairness, and Respect in Disability Benefits (S5M-00374), Jeane Freeman MSP, the Minister for Social Security, welcomed a Labour Party amendment to ensure that disability benefits:

“ are increased at least in line with inflation to ensure that they cover the cost of living ”

col 50 Scottish Parliament, 2016⁵⁰

This amendment was supported by 88 MSPs, with 29 against and 0 abstentions.

In response to a question about how rates of devolved benefits will be decided, Jeane Freeman told the Social Security Committee that:

“ we will uprate benefits in line with inflation, using the consumer prices index, if I recall correctly. ”

col 9 Social Security Committee 02 March 2017, Jeane Freeman, contrib. 18⁵¹

It is not clear whether this means that the Scottish Government also intends to uprate benefits for maternity and heating expenses, given that one-off benefit payments such as cold weather payments and winter fuel payments are not regularly uprated in the reserved system.

For discussion of uprating the carer's allowance supplement and carer's assistance [see below](#).

Residence and presence

A number of the benefits that will become devolved assistance:

- are currently exportable in certain circumstances to other EU states
- are classified as "public funds " and so cannot normally be claimed by "persons subject to immigration control".

Neither these issues, nor the possibility of an individual moving within the UK, or living and working close to the border with England, are addressed at all in the bill or accompanying documents.

The Scottish Government response to the Consultation on Social Security in Scotland did not make any mention of "cross-border issues".³¹ At the time the consultation was launched, the Scottish Government suggested that it was likely to use a test of "habitual residence", but that:

“ A final definition of a 'Scottish Claimant', i.e. a person who qualifies for Scottish benefits will also need to be discussed and agreed with the UK Government. ”

p.98 Scottish Government, 2016⁴⁹

Until draft regulations for the types of devolved assistance are produced, it remains unclear what definition of residency will be used in the devolved social security system.

Assistance in cash or 'in kind'

Chapter 2 of part 2 of the bill provides that each type of devolved assistance:

“ is assistance (which may or may not take the form of money) given by the Scottish Ministers under section 8 to an individual...”

Social Security (Scotland) Bill [as introduced] SP Bill 18, 2017³⁸

The policy memorandum suggests that decisions about whether and how to use this power are yet to be made. In relation to the following types of assistance, it states that a choice would be offered as to whether it is paid in cash or 'in kind':

- disability assistance
- early years assistance
- employment injury assistance
- funeral expenses assistance.⁹

However, for other types of assistance (carer's assistance, cold spell heating assistance and winter heating assistance) an identical power exists, and no indication is given in the bill documents about when payment in kind might be offered, and whether an individual will have a choice.

None of the regulation-making powers restrict the circumstances in which the Scottish Ministers may make payments of devolved assistance in kind. It is also unclear at present

whether a decision on the type of assistance provided could be challenged, if this power is used without offering a choice (see [above](#)).

Eligibility for other types of assistance

Regulations made under the schedules can make eligibility for assistance dependent on whether someone receives, or is eligible for, another form of "State assistance". This would appear to enable devolved equivalents of both "qualifying benefit" and "overlapping benefit" rules to be made.

"Qualifying benefit" rules mean that entitlement to one benefit depends on receiving another benefit. For example, for someone to get carer's allowance (CA), the person that they care for must normally receive a disability benefit at a certain level. Similarly, cold weather payments are only made to people who are entitled to one of a list of qualifying benefits.

The "overlapping benefit" rules broadly work the other way. They prevent the same person from being paid some combinations of benefits, even if they meet the entitlement conditions for all of them. For example, a person cannot be paid CA if they receive a full state pension. The (reserved) armed forces independent payment overlaps with certain types of industrial injuries benefits and disability benefits (to be devolved).

The scope of the regulation-making powers in the bill^{ix} would seem to allow both of the above types of rules to be made for the Scottish system. What is less clear is exactly how someone not "eligible for assistance" might retain the equivalent of an "underlying entitlement" in the current reserved system.

"Underlying entitlement" currently allows someone who is not actually paid a benefit to qualify for other things based on their entitlement. For example, someone entitled to CA qualifies for additional amounts of reserved means-tested benefits such as pension credit, even if CA is not paid. At present it is not clear whether a carer getting the (reserved) state pension would be eligible for payment of carer's assistance or not. If not, it is unclear whether they would still be able to get these extra amounts in the reserved benefit system.

The individual types of devolved assistance

Some of the essential characteristics of the different types of devolved assistance are set out in the bill, with provisions stating how regulations must be framed (see [below](#)). The schedules set out what the regulations **may** prescribe, but generally without limiting what they **could** prescribe. This means that regulations could cover other matters and that they do not have to cover everything set out in the schedule.

The only restrictions to what the regulations can do beyond how the types of assistance are framed are the following:

^{ix} For example, schedule 4 para 6 is the regulation-making power for disability assistance. The other schedules contain identically worded provisions.

- In relation to disability assistance and employment-injury assistance, lump sum payments cannot be made where the individual's entitlement arises from them having, or had a specified condition.
- In relation to employment-injury assistance, the definition of "employment" must be within that set out in schedule 5 of the Scotland Act 1998.

Both of these provisions exactly re-create limits to devolved competence that are already set out in the Scotland Act 1998

Thus, although the Scottish Government has made a number of policy commitments about the new types of assistance it will provide (see [below](#)), these are not provided for in the bill. Rather, the detail will be contained in regulations. For discussion of how this may affect Parliamentary scrutiny, see [above](#).

The basic eligibility criteria for types of devolved assistance

Table 2 sets out the types of assistance the bill provides for and the basic eligibility criteria that the schedules state **must** be provided for in regulations. A slightly different approach is taken for winter heating assistance, in that there is no requirement for the regulations to set particular eligibility criteria.

Table 2: Basic eligibility criteria for devolved assistance

Type of assistance	Section and schedule	Basic eligibility criteria
carer's assistance	section 11, schedule 1	Dependent on having provided regular and substantial care during that period to another individual to whom a disability benefit is normally payable.
cold spell heating assistance	section 12, schedule 2	Dependent on someone's home being in an area experiencing a cold spell
winter heating assistance	section 13, schedule 3	Does not specify any provisions that must be included in the regulations.
disability assistance	section 14, schedule 4	Dependent on the individual having a physical or mental impairment that has a significant and not short-term adverse effect on the individual's ability to carry out normal day to day activities or otherwise gives rise to a significant and not short-term need, or a terminal illness.
early years assistance	section 15, schedule 5	Dependent on having, or expecting to have, responsibility for having a child.
employment-injury assistance	section 16, schedule 6	Dependent on being injured, or contracting a disease at work.
funeral expenses assistance	section 17, Schedule 7	Dependent on having met or being responsible for meeting the costs of a funeral.

The schedules set out a range of other matters which the regulations **may** provide for. Some of these are the same for each type of assistance. For all types of assistance, regulations may provide that: eligibility can depend on receiving other State assistance; applications must be made within a specified period; and Ministers may prescribe anything else in the regulations. Other criteria that are specified for most, but not all, types of assistance are: taking financial circumstances into account; age; residence; and providing some flexibility around meeting eligibility criteria.

Scottish Government commitments on social security

Table 3 summarises the commitments the Scottish Government has made to date on how it will use its new social security powers. The table also outlines how the commitment is being taken forward and the timescale, where known. As the bill provides an enabling legislative framework, many of the commitments will be implemented through regulations which are yet to be made.

Unless otherwise stated, these commitments are cited in the policy memorandum.⁹ The timescales on delivery were set out in a Ministerial statement on social security.⁸

Table 3: Scottish Government Social Security Commitments

Devolved Benefit / Power	Commitments made	How the commitment is being taken forward
disability assistance	<p>The Scottish Government's immediate priority is to ensure a safe and secure transition of the disability benefits so that those in receipt of DLA, PIP and AA at the point of transition continue to receive it at the right time and in the right amount.</p> <p>Reduce face to face assessments and to use communication channels which suit the individuals' needs.</p> <p>Introduce longer term or lifetime awards for people whose condition is unlikely to improve.</p> <p>Give children in receipt of DLA, when the benefits are transferred, an automatic entitlement to continue to receive it until they are 18.</p> <p>For severe disablement allowance no changes are proposed.</p> <p>Uprate in line with inflation.</p>	<p>The bill provides the framework for regulations to be made.</p> <p>There is no explicit provision for SDA in the bill, as the Scottish Government intends to "use existing powers to run and administer [SDA] once devolved".⁹ The Scottish Government is yet to decide whether to make regulations replicating the existing SDA rules, or to leave the current regulations in force.⁵² If the current regulations are left in force, they will be within the competence of Scottish Ministers once executive competence is transferred (see above).</p>
carer's assistance	<p>Increase to jobseeker's allowance level (from £62.70 to £73.10 a week).</p> <p>Consider introducing a young carer's allowance.</p> <p>Increasing carer's allowance for carers looking after more than one disabled child.</p> <p>Improving the carer's experience so that people can easily access help and advice and feel that the application process is quick and user friendly.</p> <p>In the longer term a carer's benefit will be established.</p>	<p>As an interim arrangement, the bill provides Scottish Ministers with the power to make a carer's allowance supplement every 6 months to Scottish carers who are in receipt of carer's allowance from DWP.</p> <p>First payments will be made in the summer of 2018 but will cover the period from April 2018.</p> <p>The bill also provides an enabling framework for a carer's benefit.</p>
employment injury assistance	<p>The Scottish Government is not actively considering changes to eligibility for industrial injuries benefits, as it currently stands, at the point of transition. In the longer term, options for improvement are being considered.</p>	<p>The bill provides an enabling framework for regulations to be made.</p>
early years assistance	<p>Replace the sure start grant with new, expanded best start grant - £600 grant when the first child is born and £300 for each other child, plus £250 when a child starts nursery and again when they start school.</p>	<p>The bill provides an enabling framework for Scottish Ministers to make regulations. Delivery is planned to start by summer 2019.</p>

Devolved Benefit / Power	Commitments made	How the commitment is being taken forward
funeral expenses assistance	Process more quickly, within 10 days, and wrap in a more coherent package of support.	The bill provides an enabling framework for Scottish Ministers to make regulations. Delivery is planned to start by summer 2019.
cold-spell heating assistance	Examine how best assistance can be provided in order to help contribute reducing fuel poverty in Scotland more efficiently.	The bill provides an enabling framework for Scottish Ministers to make regulations.
winter heating assistance	Extend winter fuel payments to families with disabled children on DLA higher rate. Make early payments to those living off the gas grid.	The bill provides an enabling framework for Scottish Ministers to make regulations.
discretionary housing payments (DHPs)	Continue to operate in the same way, delivered by local authorities.	Legislative competence has been transferred. DHPs are still delivered by local authorities. The bill provides a broad framework for DHPs. The Scottish Government intends to issue guidance on DHPs.
universal credit (UC) payment flexibilities	Option to have support for rent paid direct to the landlord. Option to be paid twice a month instead of once a month .	The Universal Credit (Claims and Payments) (Scotland) Regulations 2017 ⁵³ come into force on 4 October 2017. Choice applies to new claimants in UC full service areas.
universal credit housing costs element	Abolish bedroom tax for those on universal credit.	The Scottish Government is in discussion with the UK Government as to how this can be implemented.
universal credit housing element for 18-21 year olds	Retain the universal credit housing costs element for 18-21 year olds. ⁵⁴	The bill contains no specific provisions regarding this. Discussions are on-going with the UK Government as to how this can be achieved. As an interim measure the Scottish Welfare Fund can be used to make payments to young people affected by the UK Government restrictions.

Short-term assistance

The duty to provide short-term assistance has not been consulted on previously. It aims to ensure that, if an individual's entitlement to ongoing assistance is reduced by the Scottish Ministers and they challenge the decision, they can keep their previous level of assistance until the outcome of any appeal to the First-tier Tribunal is known. The intention is:

“ to ensure that an individual's rights to challenge a decision and/or to access administrative justice are not impeded - as might otherwise be the case if the individual had to manage for a period with a reduced income due to lowered payments or their payment being stopped.”

para 178 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

It is not clear whether such assistance will be recovered from the individual if they eventually lose their appeal, as there is no limit placed on the further eligibility conditions that may be set out in regulations. For example, a provision could be included to require agreement to repay assistance in the event of an unsuccessful appeal, as a condition of receiving short-term assistance. If such a provision is not included, the introduction of short-term assistance may act as a financial incentive for individuals to challenge a decision reducing their entitlement, even if they in fact agree that they no longer qualify for assistance.

On the other hand, if assistance is to be recoverable in the event of an unsuccessful appeal, some people may be put off challenging decisions due to the fear of being left in debt if they do not succeed and have to repay the money.

Short term assistance does not have to be made available to those challenging a determination refusing an initial application for assistance (as opposed to challenging a reduction in assistance they have been entitled to).

Short-term assistance of other kinds may also be introduced by regulations, without limits other than that the assistance is given on a “short-term basis” (which is undefined). The policy memorandum confirms that the regulation-making power:

“ will allow the Scottish Ministers to give assistance on a short-term basis to meet ad-hoc needs.”

para 177 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

Regulations providing for short-term assistance are subject to the affirmative parliamentary procedure (s.55(2)).

Top-ups to reserved benefits

Section 45 of the bill provides for Scottish Ministers to create regulations to top-up reserved benefits. The section re-states the wording of s.24 of the Scotland Act 2016. Top-up payments could be paid on an individual case by case basis or provide on-going support to a specific group of benefit recipients. They can only be paid to someone who is entitled to a reserved benefit who appears to need additional assistance for the purpose of that benefit. The top-ups cannot be used for housing costs or, unless there are exceptional circumstances, offset the impact of a benefit sanction.

The bill's provisions on determining entitlement, re-determination, appeals and overpayments do not apply to top-ups. Similarly, the right to be provided with assistance in s.8 of the bill does not apply to top-ups. Instead, s.45 enables Ministers to make regulations to cover these and other matters.

The Scottish Government's consultation did not seek views on top-ups. This was noted by respondents. The consultation analysis notes that a group of organisations working with children, young people and families called for a top-up to child benefit (of £5 a week), to reduce inequality and child poverty. Children in Scotland said:

“ We echo the recommendations put forward by the Children and Young People's Commissioner, CPAG, Parenting Across Scotland, Common Weal and others and call on the Scottish Government to be bold in its approach by using the top up powers it has available to it in order to reduce socio-economic inequality and child poverty. ”

Children in Scotland, 2016⁵⁵

The call to top-up child benefit was debated during the stage 1 consideration of the Child Poverty (Scotland) Bill on 1 June 2017.⁵⁶ That bill was amended at stage 2 to require that any proposals for use of the top up power to address child poverty are included in the delivery plans which ministers must prepare under the Child Poverty (Scotland) Bill. (Section 7(2B) and (2E) of the bill at stage 2). The bill has not yet reached stage 3, and so may be further amended.⁵⁷

The potential use of top-up powers, in relation to tax credits, has been debated in the chamber on at least two occasions.^{58 59}

Carer's allowance supplement

The Scottish Government is creating a temporary supplement to carer's allowance (CA). It is doing so to fulfil the policy commitment, which has achieved cross-party support, to increase CA to the same rate as jobseeker's allowance (JSA).

CA is currently worth £62.70 a week, compared with £73.10 a week for JSA for people aged 25 and over. This is a difference of £10.40 a week. The supplement will be paid twice a year, with each payment in effect covering a six month period, to people in receipt of CA and resident in Scotland. People must be in receipt of CA on a specific reference date, which is to be set by Scottish Ministers without legislation (s.47(3)). The supplement will only be paid to people who are receiving a payment of CA on that date.

Unlike other types of assistance provided for in the bill, there is no right to challenge decisions about the carer's supplement. This is because the bill's provisions on determining entitlement, re-determination, appeals and overpayments do not apply to part 3 of the bill. There is no provision in s.47 for regulations to be made that could create this framework for the CA supplement. Similarly, the right to be provided with assistance (s.8) does not apply to carer's allowance supplement. While the CA supplement is intended as a temporary measure, there is the possibility that people may wish to challenge being refused it during that temporary period. Other than by discussion with the social security agency, such a challenge would require to be pursued by judicial review.

The Scottish Government's aim is to improve outcomes for carers by increasing their financial support. The policy memorandum states that:

“ The Scottish Ministers acknowledge the immense contribution carers make in Scotland and it is essential they are supported and sustained in this role.”

para 308 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

Many of the respondents to the Scottish Government's consultation on the bill supported the increase, but some had concerns that the increase is too low. A few felt that JSA does not reflect the amount of work involved as a carer. At just over £2 an hour, it is significantly lower than the minimum wage and living wage. The consultation analysis stated that:

“ A few wished to see the Scottish Government choosing to use tax raising powers to increase the resources available, and to help lift many carers out of poverty. ”

para 7.6 Scottish Government, 2017¹⁰

For further background on CA, including the proposal to increase the award, see the SPICe briefing [Scotland Act 2016: Carer's Allowance](#).⁶⁰

Uprating carer's allowance supplement and carer's assistance

There is a statutory requirement in current UK legislation to uprate carer's allowance (CA) in line with inflation. This is set out, along with uprating powers and duties for many other benefits, in s.150 of the Social Security Administration Act 1992. Since 2011, the UK Government has used the Consumer Price Index to increase CA. Jobseeker's allowance (JSA) is subject to a rate freeze for the period 2016/17 to 2019/20, under the Welfare

Reform and Work Act 2016.⁶¹ This means that the rate for CA will increase, while the rate for JSA remains the same, until at least 2020/21. Therefore, if the number of people in receipt of CA remains the same up to 2020/21, the amount of money the Scottish Government would need to spend on the supplement will reduce over that period. There has been no suggestion from the Scottish Government that the temporary CA supplement should increase in line with inflation. While the Scottish Government has made a commitment to uprate disability benefits in line with inflation, its view on uprating carer's assistance in the future is less clear.

In response to a question (PQ S5W-02672) about whether the increased CA would maintain or deviate from the system of uprating JSA, the Minister for Social Security, Jeane Freeman MSP, said that:

“ In line with our response on uprating benefits set out in the answer to S5O-00060 on 16 June 2016, we are taking the Consumer Price Index (CPI) as a starting point for our considerations on uprating and taking views on this, along with other aspects of our social security policy, through the consultation on social security. The consultation ends on 28 October 2016. ”

Scottish Parliament, 2016⁶²

For further discussion of uprating generally, in relation to other types of assistance, [see above](#).

How the supplement will be delivered

The supplement to carer's allowance (CA) is being delivered under amendments to devolved competence made by s.22 of the Scotland Act 2016 (which devolves "carer's benefits") rather than as a 'top-up' to a reserved benefit. As described [above](#), the Scottish and UK Government have agreed to an approach of split competence. The Scottish Parliament currently has legislative competence for the benefits listed in sections 22 and 23 of the Scotland Act 2016³ (see discussion [above](#)).

When s.47 of the bill is commenced, Scottish Ministers will have executive competence for carer's allowance, due to the effect of the Scotland Act 2016 (Transitional) Regulations 2017.⁴ It is proposed that the DWP will continue to administer CA as the Scottish Ministers' agent, and on their behalf. This will need an Order in Council under s.93 of the Scotland Act 1998, to create an agency arrangement.⁶³

The delegated powers memorandum, paragraph 54, explains the approach to temporarily supplement CA further. It states that Scottish Ministers do not have the power to increase the rate of CA, "other than to uprate it for inflation".¹² This is a reference to the uprating provisions in s.150 of the Social Security Administration Act 1992. The Scottish Government's view is that this power does not enable Ministers to provide the supplement, because the amount of the increase is not connected to the rate of inflation.⁶³

The aim is for the CA supplement to continue to be paid until regulations provide for a new carer's assistance. This means that the Scottish Government can meet its commitment to increase CA on an interim basis. S.48 of the bill allows for Scottish Ministers to repeal the

CA supplement by regulations. The new carer's assistance would then pay an award at the increased rate:

“ Once the Scottish Government is fully responsible for delivery, carers in Scotland will receive a single Scottish carer's assistance payment which will be paid at the higher amount, to include the increase. ”

para 315 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

There is little further detail on this approach to deliver the CA supplement. The Scottish Government had previously asked the DWP to conduct a feasibility study to see if the DWP could deliver an increased carer's payment on a temporary basis.⁶⁴ The options were assessed by the Scottish Government,⁶⁵ but the results have not been published:

“ We are in active discussions with the Department for Work and Pensions to assess options for delivery, and we are in the process of reviewing the administrative costs in respect of these options.”

Scottish Parliament, 2017⁶⁶

Who will receive the carer's allowance supplement

The carer's allowance (CA) supplement will be paid to all people resident in Scotland who are receiving a payment of CA on the "qualifying date" (see [above](#)). However, some people who are entitled to CA are not paid it due to reserved social security rules. This group of people will not receive the CA supplement either.

The financial memorandum estimates that there will be 76,300 recipients of CA in 2017/18. The most recent caseload data from February 2017 shows there were 71,175 people in receipt of CA in Scotland. There were an additional 44,377 people who were entitled to CA, but did not receive any payment. Of this group, 35,589 were aged 65 and over.⁶⁷ These people do not receive CA, despite being assessed as entitled to it, because of the overlapping benefit rule. The overlapping benefit rule means that a person cannot be paid more than one non-means-tested "earnings replacement" benefit in full at the same time. An important example is that a person getting a full state pension is not paid CA. Some respondents to the Scottish Government consultation on social security in Scotland said that the overlapping benefit rule is unfair.¹⁰ The Scottish Government cannot amend the rules as they are reserved, but the UK Government has previously said that further consideration would be given to the overlapping benefit rule with regard to the devolution of social security benefits.⁶⁸

Some respondents to the consultation were concerned that some recipients of CA may not be better off after the increase. This is because CA is counted as income for means-tested benefits.^x However, the fiscal framework suggests that the CA supplement should not count as income:

x Someone who is entitled to CA and also receives a means-tested benefit is slightly better off, due to qualifying for an additional amount of the means-tested benefit, currently worth around £35 a week.⁴²

“ The Governments have agreed that any new benefits or discretionary payments introduced by the Scottish Government must provide additional income for a recipient and not result in an automatic offsetting reduction by the UK government in their entitlement elsewhere in the UK benefits system.”

para 89 HM Treasury, Scottish Government and the Rt Hon Greg Hands MP, 2016⁶⁹

For further discussion of the impact of increasing CA on other entitlements, see the SPICE briefing Scotland Act 2016: Carer's Allowance.⁶⁰

Discretionary housing payments

Discretionary housing payments (DHPs) provide additional financial support to tenants in private or social rented housing, to help meet their housing costs. They are administered by local authorities. For further background information see the SPICe briefing [Scotland Act 2016: Discretionary Powers and New Benefits](#).⁷⁰

The Scotland Act 2016 (s.25) amended the Scotland Act 1998 to devolve legislative competence for DHPs to the Scottish Parliament (this is in addition to the limited executive competence that Scottish Ministers already had). This provision was commenced on 1 April 2017. Prior to 1 April 2017, the DWP provided local authorities in Scotland with funding for DHPs. Since 2013, the Scottish Government has also provided local authorities with additional resources for DHPs to mitigate the impact of the 'bedroom tax' in Scotland.

Following the devolution of powers to Scotland, the DWP transferred £18.5m to the Scottish Government. This, combined with Scottish Government resources, gives a budget for DHPs of £57.9m in 2017-18. Of this, £47m is expected to be used for bedroom tax mitigation.^{71 72}

Bill provisions on discretionary housing payments

Chapter 4 of the bill makes provision for discretionary housing payments (DHPs). The Scottish Government has no plans to make any significant changes to the way the DHP scheme operates. The policy memorandum (paras 317 and 318) states that the provisions in the bill are intended to simplify the relevant legislation and recast it in a Scottish context.⁹

S.49 of the bill proposes to ensure that local authorities continue to have a power to give financial assistance to a qualifying individual to meet, or help meet, their housing costs. A person must be in receipt of housing benefit or universal credit, which includes a housing element for rent, to be entitled to receive a DHP.

Giving local authorities a power, rather than a duty, reflects the existing legislative position. The Scottish Government states that allowing a local authority a choice whether to provide DHPs or not:

“ builds in some flexibility for how discretionary schemes or support for housing costs may be delivered in the future”

para 328 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

This contrasts to the approach taken with the other discretionary fund administered by local authorities, the Scottish welfare fund (SWF). The Welfare Funds (Scotland) Act 2015⁷³ places a duty on local authorities to deliver the welfare funds, in line with regulations and guidance issued by Scottish Ministers.

The bill provides for limitations on the use of DHPs (s.50). Payments cannot be made where the need for financial assistance arises solely from a reduction, non-payability or suspension of a reserved benefit as a result of an individual's conduct (e.g. a sanction decision). However, this does not prevent assistance from being given where the need for the assistance also arises from some exceptional event or circumstance and the need is

immediate. This limitation replicates the extent of devolved competence for DHPs. Assistance cannot be made by way of a loan (s.50(1)).

Local authority duty to provide information

S.51 of the bill gives local authorities a duty to provide information about DHPs in their area. The bill sets out the information that local authorities must provide, including how to apply for financial assistance and how to apply for a review challenging a decision by the local authority.

This duty does not appear in the existing UK legislation, although the UK Government [guidance](#)⁷² on DHPs sets out the expectation that local authorities will publicise their DHP schemes.

Guidance on discretionary housing payments

Section 52 would require local authorities to have regard to any guidance issued by the Scottish Ministers on DHPs. The bill sets out the types of issues that Scottish Ministers may include in guidance, for example, the rules which authorities are to apply in deciding how much assistance to give and the process for determining applications for assistance and review. The Scottish Ministers must consult local authorities, through a representative body, before issuing any guidance and lay a copy of the guidance in the parliament. The policy memorandum states that, given the discretionary nature of the scheme:

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

para 320 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

Consultation on discretionary housing payments

The Scottish Government did not specifically consult on the approach that the bill would take towards DHPs. The social security consultation identified support for the Scottish Government continuing to mitigate the impact of the bedroom tax. However, there were concerns that this was becoming the only use of the DHP budget, to the detriment of those unaffected by the bedroom tax. Other concerns were raised about the administration of DHPs, for example, delays in receiving payments.¹⁰ The Scottish Government's view is that these:

“are issues that can be addressed through guidance or in practice at a local authority level and do not require legislation.”

para 322 Social Security (Scotland) Bill [as introduced] Policy Memorandum, SP Bill 18-PM, 2017⁹

Financial memorandum

The devolution of social security powers will result in direct costs for the Scottish Government, as well as new budgetary risks. Direct costs will arise from the administration of the devolved benefits and (potentially) costs associated with future policy choices of the Scottish Government. New budgetary risks arise in part from the devolved benefits being largely demand led.

Budgetary impacts and risks

In 2017-18, expenditure on the benefits to be devolved is forecast to be an estimated £2.9bn. Funding will remain with the UK Government until executive competence is transferred.⁷⁴ (Transfer of competence is discussed [above](#).) In the first year of devolution of a benefit, the Scottish Government's budget will be increased by the amount that was spent on delivering that benefit in Scotland in the year prior to devolution.^{xi} In subsequent years, the budgetary adjustment will reflect changes in per capita benefit spending by the UK Government. For further details, see the SPICe briefing [The Fiscal Framework](#).⁷⁵

Over time, the budgetary adjustment may not reflect the actual cost of providing the benefits in Scotland, depending on the Scottish Government's policy choices and on how demand for benefits in Scotland changes, relative to demand for the equivalent benefits in England and Wales. In addition, differences in demographic growth or uptake of benefits between Scotland and England and Wales will affect the extent to which the block grant adjustment matches the cost of providing the relevant benefits in Scotland.

Policy costs

The Scottish Government will face additional demands on its budget if it chooses to increase benefit rates, top-up reserved benefits or introduce new benefits. Future changes to devolved benefits will be the subject of secondary legislation and so the costs will be considered at that point. The only policy costs set out in the financial memorandum relate to:⁷⁶

- proposals to increase carer's allowance to match jobseeker's allowance
- costs of the proposed best start grant (BSG), which will replace the sure start maternity grant.

However, as the bill does not set out the detailed provisions for the BSG, these costs do not directly arise from the bill.

Increasing carer's allowance

The Scottish Government plans to increase carer's allowance to the same rate as jobseeker's allowance by paying a twice-yearly supplement to those in receipt of carer's

^{xi} The exception to this is Cold Weather Payments where, reflecting the volatile nature of expenditure, an average for the period since 2008-09 will be used for the initial adjustment.

allowance (see [above](#)). This is expected to cost the Scottish Government £37m in 2018-19, falling to £32m per year in 2019-20.

Table 4: Estimated additional costs of proposed increase in carer's allowance, £m

	2018-19	2019-20	2020-21	2021-22
Carer's allowance increase	37	32	33	34

Jobseeker's allowance (JSA) is currently frozen in cash terms until April 2020, while carer's allowance will continue to rise in line with inflation. This means that the gap between the two benefits will narrow in 2019-20, reducing the cost of meeting the Scottish Government's commitment. An anticipated increase in numbers of claimants for carer's allowance will partially offset this. In subsequent years, the end of the freeze in JSA and a forecast increase in numbers of claimants will result in increased costs. These costs are additional to the current costs of providing carer's allowance in Scotland (estimated at £256m in 2017-18).

Social security system costs

The financial memorandum (FM) sets out the estimated costs associated with the establishment and running of the new social security system. This will be done through an executive agency,⁸ so does not require primary legislation. The implementation costs are estimated at £308m over the four years to 2020-21, broken down as shown in Table 5.

Table 5: Scottish Social Security system: implementation costs

	Total costs for four year period to 2020-21, £m
IT systems	190
Estates	14
Staffing	104
Total	308

The FM notes that:

“ the estimates of implementation costs...will change materially as further discussions are taken and the programme of work to specify and procure the infrastructure required for Scotland's new social security system evolves”

para 54 Social Security (Scotland) Bill [as introduced] Financial Memorandum, SP Bill 18-FM, 2017⁷⁶

Annual running costs for the social security system, once established, are estimated in the FM at between £144m and £156m per year, depending on the model of delivery for assessments that is adopted. These costs are broken down as shown in Table 6.

Table 6: Social security system: annual running costs

	Steady state annual cost range, £m
Operating costs	83 - 84
Pre-claim support services	21
Assessment services	25 - 34
Estates services	15 - 17
Total	144 - 156

These costs are based on the preferred option presented in the Outline Business Case:

“...a central agency with enhanced phone and online support, which incorporates face-to-face pre-claims and support services locally in existing public sector locations and with assessments undertaken in a manner that is appropriate for policy choices that will be made as the final business case is progressed.”

p.13 Scottish Government, 2017¹¹

As with the implementation costs, the FM notes that:

“the final [running] costs are dependent on decisions on policy, delivery and operations that have yet to be made”. ”

para 59 Social Security (Scotland) Bill [as introduced] Financial Memorandum, SP Bill 18-FM, 2017⁷⁶

In particular, the running costs will be influenced by the model of delivery for assessments that is adopted.

The estimated running costs are in line with Scottish Government estimates of the current costs to the DWP of administering the devolved benefits in Scotland (£159m per year). The Scottish Government's estimated running costs represent 5% of the value of benefits being administered, which compares with 6.3% for the DWP for non-pensioner benefits across the UK, according to the Scottish Government. It is unclear how comparable these figures are, given that the DWP costs will include administration of passported benefits, which will be more complex to administer.

Funds transferred under the fiscal framework,⁶⁹ will cover part of the costs of the newly devolved powers (including powers other than those relating to social security). As set out in the FM, £66m will be made available for administration costs and £200m for implementation costs. The administration costs will be phased according to the timescale for introduction of the new social security powers, and will be transferred to the baseline block grant and then indexed in subsequent years. The implementation costs will be a one-off transfer.

Other unquantified costs

The financial memorandum (FM) refers to unquantified costs relating to:

- the production of forecasts of social security costs by the Scottish Fiscal Commission
- the provision of advice services in relation to the newly devolved benefits
- the appeals process, including the impact on the Scottish Courts Tribunal Services.

The FM makes no reference to the potential costs associated with:

- annual reporting on the performance of the Scottish social security system
- development and review of the social security charter, including consultation.

These are both requirements set out in the legislation, and will have associated costs, but are not covered by the FM.

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