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Social Security Administration and Tribunal Membership (Scotland) Bill: Stage 3

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This briefing reviews the progress of the Social Security Administration and Tribunal Membership (Scotland) Bill. The briefing looks at the scrutiny of this short, technical Bill in the Social Security Committee at Stage 1, the issues raised in the committee report, and subsequently the 18 amendments lodged at Stage 2. The Stage 3 debate is scheduled for Tuesday 29 September.

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Executive summary

The [Social Security Administration and Tribunal Membership \(Scotland\) Bill](#) ¹ is a short, technical Bill making changes to the administration of Scottish social security on appointees, terminal illness and topping up reserved benefits. It will also extend existing provisions to allow judges from other jurisdictions to sit on Scottish Tribunals.

While the Social Security Committee was generally supportive of the Bill at Stage 1, the [Committee report stated](#) ² there were issues around the appointment of individuals to receive benefit payments on behalf of another person, and that required further discussion. The report also made recommendations on other areas of the Bill including: [non-disclosure of health information](#); [top-up of reserved benefits](#); [who can diagnose terminal illness](#); and [tribunal membership](#). The [Committee report also highlighted the lack of public consultation](#) on the Bill, stating that the proposals on appointees in particular would have benefited from more public input. The [Scottish Government response](#) to the report took many of these recommendations on board.

[At Stage 2](#), 18 amendments were lodged; 16 of these were Scottish Government amendments and two were lodged by Jeremy Balfour MSP. The Scottish Government amendments all passed while one of Jeremy Balfour's amendments was withdrawn and the other was not moved.

Amendments passed included those setting out terms around appointees on behalf of a child or adult with capacity. During Stage 2, the [Cabinet Secretary stated](#):

“ Of all the areas on which the bill touches, the subject of appointees raises the most complex issues and has understandably attracted the most interest from the committee and from stakeholders. As members will know, I wrote to the committee to set out in detail how I have responded to the many issues that were raised.”

Amendments on the recovery of overpayments, the duty of Ministers to inform people of eligibility for assistance, diagnosing terminal illness and provisions for temporary suspension of assistance in certain cases [were also agreed to at Stage 2](#).

The [Scottish Government has lodged amendments at Stage 3](#) to allow for the uprating of the Scottish Child Payment. The intention is to uprate this annually, in line with inflation.

The Stage 3 debate on the Bill is expected to be held on 29 September 2020.

Background and intention of the Bill

The [Social Security Administration and Tribunal Membership \(Scotland\) Bill](#)¹ (the Bill) was introduced to Parliament on 27 April 2020. The Bill makes minor changes to the [Social Security \(Scotland\) Act 2018](#)³.

As the [initial Scottish Parliament Information Centre \(SPICe\) briefing sets out](#)⁴, the Bill will allow:

- appointed individuals to receive benefit payments on behalf of a child under 16 or an adult who gives permission;
- health information to be withheld from a claimant if judged its revelation would be harmful;
- provisions on offences and investigations to be included in regulations on 'top-up' benefits;
- medical professionals other than doctors to confirm terminal illness;
- and the temporary appointment of judges from other jurisdictions to sit on Scottish tribunals.

The Bill was considered at Stage 2 on 10 September 2020. It is due to be debated at Stage 3 on 29 September 2020.

Key purposes of the Bill

The Bill will introduce⁴:

Appointees: This will enable appointment of a person to receive benefit payments on behalf of a claimant who is a child under 16 or an adult that has agreed to the appointment. This is covered in Section 1 of the Bill.

Non-disclosure of health information: This will allow the withholding of health information from a claimant where it is judged that revealing the information would be harmful. This is covered in Section 2 of the Bill.

Top-up Benefits: Sections 3 to 6 of the Bill will enable offences and powers to investigate possible offences to be created for 'top-up' benefits. This will apply to the Scottish Child Payment - the [first top-up benefit to be created under the Social Security \(Scotland\) Act 2018](#)⁴.

Terminal illness: Medical professionals other than doctors to confirm a person's terminal illness in order to fast-track their benefit claim. Section 7 covers this.

Tribunals: The temporary appointment of judges from other jurisdictions to sit on Scottish tribunals in order to create a greater pool of expertise.

More information about the changes the Bill will introduce can be found in the [Scottish Parliament Information Centre \(SPICe\) briefing](#), the Scottish Government [Policy Memorandum](#) ⁵ and the [Explanatory Notes](#) ⁶.

Costs of the Bill

The accompanying [Financial Memorandum](#) ⁷ sets out the costs associated with the measures introduced by the Bill as follows:

- The Scottish Child Payment will account for approximately £405,000 of the £10 million total cost of developing a fraud prevention function within Social Security Scotland.
- The cost per annum of the appointment of additional judges is estimated to be: "between £0 and approximately £455,000 p.a., depending on how many salaried members are required up to the stated potential requirement of five such appointments. measures introduced by the Bill." ⁷

The Financial Memorandum also acknowledges that, due to the differences in appointment terms for devolved legal tribunal members and reserved tribunal members, the temporary authorisation of a reserved member to sit in the Scottish Tribunals:

“...presents risks associated with costs and the possibility of creating full-time comparators for the purposes of a part-time worker’s less favourable treatment claim or an equal pay claim, both in Scottish Tribunals and across the wider tribunal and judicial system in Scotland. In particular, the higher pro rata rate of daily fee and the continuance of pension arrangements for reserved legal members creates risk of successful legal challenge as regards other devolved tribunal members, including legal members and Chamber Presidents in Scottish Tribunals, members of devolved tribunals which are yet to transfer to Scottish Tribunals and other part-time judicial office holders appointed by the Scottish Ministers.”

Paragraph 33 Scottish Parliament. (2020, April 28). Financial memorandum: Social Security Administration and Tribunal Membership (Scotland) Bill. ⁷

The Scottish Government states it:

“...has considered that any difference in terms of appointment as between transferring reserved and part-time members is capable of being objectively justified in the event of legal challenge.”

Paragraph 34 Scottish Parliament. (2020, April 28). Financial memorandum: Social Security Administration and Tribunal Membership (Scotland) Bill. ⁷

However, a successful legal challenge might mean pension provisions may need to be extended to legal members of Scottish Tribunals, including current Chamber Presidents. Doing this would lead to a cost of approximately £500,000 per year.

Progress through Parliament

- The Bill was introduced in April 2020. [The Bill and its accompanying documents are available on the Scottish Parliament website](#) ¹.
- A [SPICe briefing on the Bill, as introduced](#) ⁴, was published on 1 May 2020.

Committee scrutiny

- The Social Security Committee led on examining the Bill.
- A call for written views was launched and by 17 May 2020, the Committee had received [14 submissions](#) ⁸.
- A [single evidence session was held in on 21 May](#), with evidence heard from the Scottish Association for Mental Health (SAMH); the Child Poverty Action Group (CPAG), the Cabinet Secretary for Social Security and Older People and officials; and Social Security Scotland.
- The Committee [published its report on the Bill at Stage 1](#) ² on 9 June 2020.
- The Delegated Powers and Law Reform Committee considered the Bill in private on 12 May and was content with the delegated powers provisions. The Committee [published a short report on 18 May 2020](#) ⁹.

Stage 1 debate

- The [Stage 1 debate took place on 24 June 2020](#), and MSPs agreed the general principles of the Bill.

Stage 2 consideration

- The Social Security Committee completed [consideration of the Bill at Stage 2](#) on 10 September 2020.
- The [Bill as amended at Stage 2](#) can be viewed on the Parliament website. ¹⁰

Social Security Committee report

The Social Security Committee [published its report on the Bill at Stage 1](#) ² on 9 June 2020. The report stated that while the Committee supports the general principles of the Bill, there were issues around appointees requiring further discussion.

The Committee's conclusions and recommendations to the Parliament were:

“ 63. The Committee draws the Scottish Government's attention to the approach taken in this Bill to safeguards for appointees (not creating any legislative provision) and compares that to the approach taken to who can diagnose terminal illness (primary legislation accompanied by regulations). 64. The Committee supports the general principles of the Bill and in doing so looks forward to engaging positively with the Scottish Government on the issues raised around appointees and ensuring appropriate safeguards for claimants and those acting on their behalf. - *Paragraph 63 and 64, Conclusion and recommendation to the Parliament, Scottish Parliament. (2020, June 9). Stage 1 Report on the Social Security Administration and Tribunal Membership (Scotland) Bill* ² . ”

The Delegated Powers and Law Reform Committee considered the Bill in private on 12 May, and [published a short report concluding](#) ⁹ :

“ The Committee therefore reports that it is content with the delegated powers provisions contained in the Bill. - *Delegated powers, Scottish Parliament. (2020, May 12). Social Security Administration and Tribunal Membership (Scotland) Bill - Stage 1 Report* ⁹ . ”

Appointees for adults with capacity

The [Committee report states](#) ² that a number of respondents including the Child Poverty Action Group (CPAG), Citizens Advice Scotland (CAS), the Equality and Human Rights Commission (EHRC), the Scottish Association for Mental Health (SAMH); Epilepsy Scotland and the Law Society of Scotland called for safeguards to protect the appointee system from abuse. On this, the [Cabinet Secretary told the Committee](#):

“ As for other appointee arrangements, we will ensure that appropriate safeguards are in place, and we are developing guidance to make sure that there is a robust and flexible process to ensure that the right to social security is protected.”

The Committee recommended that the Bill should therefore:

“ ...outline the general safeguarding principles that will underpin the guidance. These may include providing for mechanisms to challenge appointee decisions, undertaking periodic reviews and resolving disputes. We look forward to sight of the discussion paper and the guidance as it is being developed and recommend that the guidance should be statutory. - *Paragraph 23, Scottish Parliament. (2020, June 9). Stage 1 Report on the Social Security Administration and Tribunal Membership (Scotland) Bill* ² . ”

Non-disclosure of health information

The Committee report highlights concerns around the Bill provisions on non-disclosure of health information to a claimant. This related to cases where a registered medical practitioner or registered nurse informs Scottish Ministers that disclosure of health information "would be likely to cause serious harm to the physical or mental health of the recipient" ⁵ .

SAMH called for more clarity and a definition of 'serious harm to physical or mental health' while the Law Society stated this requirement may not be human rights-compliant. CPAG also raised concerns.

The Cabinet Secretary anticipated that withholding this information would "happen very rarely, but it is possible." ¹¹

The Committee report requested further examples of information that might be withheld on the basis it could cause serious harm.

Top-up of reserved benefits

The Committee stated it is content with proposals to introduce offences and powers to investigate offences in cases of fraud involving the Scottish Child Payment and any other top-up benefit.

The report recommends Stage 2 amendments ensuring existing duties to inform people about benefits they are entitled to also applies to top-up benefits.

Diagnosing terminal illness for disability assistance purposes

In its report, the Committee supports extending the range of people who can verify terminal illness for the purposes of fast-tracking a claim for disability benefit. The proposed approach is to introduce this through primary legislation that is supported by regulations, and the committee also supports this.

Tribunal membership

The Committee report recognises that power to temporarily authorise existing judges to sit on tribunals is not new, and is necessary in order to address capacity issues in Scottish tribunals. The report recommends:

“...we do ask the Scottish Government to reflect on the opportunity created by the establishment of a new distinct Scottish social security system and how, longer term, the devolved tribunal system for this will be supported by an appropriate pool of judges. - *Paragraph 53, Scottish Parliament. (2020, June 9). Stage 1 Report on the Social Security Administration and Tribunal Membership (Scotland) Bill.* ²”

Other issues

In evidence to the Committee, CAS, CPAG and the Alliance called for the ability to enable suspension of carer and disability benefits, ensuring claimants can have benefits suspended temporarily rather than stopped if they go into hospital, a care home, or legal detention etc.

The Cabinet Secretary indicated to the Committee that the necessary amendments for this would be brought forward at Stage 2, and the Committee has stated its approval for this.

The Committee also highlighted the Scottish Government's failure to hold a public consultation on the Bill, stating that proposals on appointees in particular would have benefited from more stakeholder input.

[Paragraph 62](#) of the report acknowledges that the Cabinet Secretary has agreed to consult organisations including the Social Security Experience Panels and the Disability and Carer Benefits Expert Advisory Group.

The Scottish Government's response

The Cabinet Secretary [wrote to Social Security Committee Convener Bob Doris on 19 June 2020 in response to the Committee report](#) ¹².

The response to each area can be summarised as follows:

- **Appointees:** The Cabinet Secretary cited Epilepsy Scotland's evidence to the Committee stating that some of their clients with capacity may find it helpful to have an appointee. On the Committee's call for the Bill to outline the general safeguarding principles underpinning guidance on appointees, the Cabinet Secretary stated plans for further consultations and consideration will be given to including general safeguarding principles in the Bill.
- **Non-disclosure of health information:** The Cabinet Secretary provided assurance that Social Security Scotland will only withhold information on the direction of a patient's medical practitioner and it is anticipated this will happen rarely. In instances where a client with capacity does not know they are terminally ill and does not choose to have an appointee, their application can still be fast-tracked.
- **Top-up of reserved benefits:** The Cabinet Secretary states the requirements and means of notification for change of circumstances will be laid out clearly to applicants. On the transfer of jurisdiction from the sheriff court to the First-tier Tribunal, the letter states public consultation will be held later this year. The Scottish Government also confirmed an amendment would be brought at Stage 2 to ensure the duty to inform people about eligibility for other benefits also applies to top-up benefits.
- **Diagnosing terminal illness for disability assistance purposes:** The Cabinet Secretary confirmed clear criteria will be set out which a registered medical practitioner or registered nurse must meet to ensure only appropriate medical professionals can perform this function.
- **Tribunal membership:** The Cabinet Secretary stated belief that the provisions in the Bill alongside longer term plans will result in an appropriate pool of judges in the devolved system.
- **Other issues:** The intention to bring forward an amendment to make provision for carer and disability benefits to be suspended was reiterated. On consultation, the Scottish Government is undertaking work with the Ill Health and Disability Benefits Stakeholder Reference Group on proposals for appointees, with a view to these

proposals being examined by the Disability and Carers Benefits Expert Advisory Group.

- **Committee Conclusion and Recommendation to Parliament:** On the different approach to safeguards for appointees and the diagnosis of terminal illness, the Cabinet Secretary stated that the professionals involved in diagnosis operate independently of Ministers and clear legislation is essential. However, for appointees, a balance was sought between prescriptive statutory safeguards and safeguards set out in decision making processes and guidance.

Stage 1 debate

The [Stage 1 debate took place on 24 June 2020](#), and MSPs agreed the general principles of the Bill.

During the debate, the Cabinet Secretary stated that the Scottish Government intended to lodge a Stage 2 amendment to ensure that the duty under section 53 of the Social Security (Scotland) Act 2018 to notify clients of eligibility for other benefits will be extended to include top-up benefits.

Stage 2

At Stage 2 of the Bill there were [18 amendments lodged](#) ¹³. Two of these were lodged by Jeremy Balfour MSP and the remaining 16 were lodged by the Cabinet Secretary.

Moving amendments setting out terms around appointees on behalf of a child or person with capacity, the [Cabinet Secretary said](#):

“ Of all the areas on which the bill touches, the subject of appointees raises the most complex issues and has understandably attracted the most interest from the committee and from stakeholders. As members will know, I wrote to the committee to set out in detail how I have responded to the many issues that were raised.”

The amendments on this were agreed to.

Jeremy Balfour MSP's amendment on the determination of entitlement to assistance was withdrawn, and his amendment on who can diagnose terminal illness was not moved.

All 16 of the Cabinet Secretary's amendments were passed, making changes in a number of areas including:

- **The recovery of overpayments of assistance:** Following further consultation, the [Cabinet Secretary stated](#) the government intends to transfer *"some or all of the competence and jurisdiction in relation to the recovery of overpayment from the sheriff courts to the First-tier Tribunal"*.
- **Identifying possible eligibility:** These amendments will extend the duty in the 2018 act to ensure that Scottish Ministers must inform people of their eligibility for Scottish Child Payment and other 'top-up' benefits.

- **Persons who can diagnose terminal illness:** The [Cabinet Secretary](#) stated these amendments: "...allow for an overseas healthcare professional to confirm that their patient meets the terminal illness definition".
- **Suspension of assistance:** [Following calls from stakeholders](#), these amendments will enable the suspension and non-payment of assistance in certain circumstances, allowing for the value of certain types of on-going assistance to be set to zero.
 - Circumstances include: where a client does not provide the necessary information; concerns raised about financial abuse by an appointee; and where a client requests suspension because they do not have access to their bank account.
 - The amendments also allow payment to be restarted when an individual is no longer resident of a care home, hospital or legal detention.

The [Official Report of the meeting](#) and the [Bill as amended at Stage 2](#)¹⁰ can be viewed on the Parliament website.

Stage 3

The Stage 3 debate on the Bill is expected to take place on Tuesday 29 September. The deadline for amendments was Tuesday 22 September.

The Scottish Government has lodged an amendment at Stage 3 to ensure the Scottish Child Payment can be uprated.

When the Scottish Government introduced the Scottish Child Payment in June 2019, it made a commitment to uprate the payment annually, in line with inflation. Draft regulations shared with the Scottish Commission on Social Security (SCoSS) at that time were intended to place a duty to do this on Ministers. However, in a [letter to the Committee](#)¹⁴ the Cabinet Secretary for Social Security and Older people states it later "became clear that the ability to make provision for uprating is not in the enabling powers relating to the draft Regulations"

In order to remedy this, the [Cabinet Secretary](#) states in the letter:

"...we do however, remain strongly committed to uprating the [Scottish Child Payment]. As such, I intend to bring forward an amendment at Stage 3 of the Social Security Administration and Tribunal Membership (Scotland) Bill to include benefits introduced under section 79 of the Social Security (Scotland) Act in the duty to review under section 77 of the 2018 Act, and to provide a duty to uprate SCP under section 78 of the Act. As first payments of the SCP will start from the end of February 2021, the duty to uprate would be effective from April 2022."

The daily list of amendments [can be found on the Bill information page on the Parliament website](#).

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