

# **Social Security Administration and Tribunals (Scotland) Bill 2020**

**Business and Regulatory Impact Assessment**

**May 2020**

## **Business and Regulatory Impact Assessment**

### **Title of Proposal**

Social Security Administration and Tribunal Membership (Scotland) Bill

### **Purpose and Intended Effects**

The Social Security Administration and Tribunal Membership (Scotland) Bill contains a number of provisions which will support the continued effective implementation of the Social Security (Scotland) Act 2018 ('the 2018 Act'). The provisions within this Bill will allow the Scottish Ministers:

- To appoint persons to act on behalf of a child in relation to their application for assistance under the 2018 Act, ensuring that an appropriate person in the child's life is the person that Social Security Scotland will deal with when the child's parent or guardian is unable to act;
- To allow for the appointment of a person to act on behalf of an adult who does not lack capacity but due to difficult circumstances wishes for an appointee to act on their behalf;
- To ensure Scottish Ministers do not disclose information about an individual's health where that would be likely to cause serious harm to the recipient's physical or mental health;
- To introduce powers for the Scottish Ministers to make provision in regulations about the investigation of offences in relation to top up assistance created under section 79 of the 2018 Act;
- To create statutory fraud offences in relation to the types of top up assistance created under section 79 of the Social Security (Scotland) Act 2018 ('the 2018 Act');
- To enable the Scottish Ministers, by regulations, to transfer to the First-tier Tribunal (FTT) for Scotland some or all of the competence and jurisdiction of the sheriff courts in relation to the recovery of top up assistance created under section 79 of the 2018 Act;
- To modify the power to make regulations under schedule 5 of the 2018 Act, to widen the category of qualified persons whose clinical judgement, based on the appropriate guidance, will be accepted in relation to a diagnosis of terminal illness for the purpose of entitlement to Disability Assistance; and
- To enable other types of judges to be temporarily authorised to sit in the FTT and the Upper Tribunal

## **Background**

The provisions within this Bill build on the 2018 Act framework for a Scottish social security system that is underpinned by dignity, respect and a human rights based approach. The business and regulatory impact assessment undertaken for the 2018 Act is therefore relevant and this Bill is making relatively minor changes to that framework. In general, any additional business and regulatory impact identified is minor.

The benefits to which these particular provisions apply will be delivered on an entitlement basis to eligible people. Decision-making will be person-centred but operational guidance for Case Managers within Social Security Scotland will be created, in line with the rules within the regulations, to provide a framework for consistent decision making across all applications. There will be provision in place to challenge the decision of Social Security Scotland through a redetermination and all applicants will have the right of appeal to an FTT.

The Social Security Charter sets out, in plain and clear English, what people are entitled to expect from the Scottish social security system, including how they should be treated and how their application will be processed. Adherence to the Charter will ensure that applicants understand their right to have their decision re-determined by Social Security Scotland and to request an appeal to the FTT if they remain unhappy with their decision. Where provision has been made for an appointee to act on behalf of a client all decisions relating to the application, all information used, and rationale for the decision will be communicated solely to the appointee. Complaints regarding Social Security Scotland can be directed to the Scottish Public Services Ombudsman.

We will develop and publish a communications strategy as appropriate for the relevant benefits which will aim to ensure that stakeholders know how to apply and understand the eligibility criteria.

The 2018 Act provides a right to independent advocacy support for people with a disability who require this support to help them apply for their Scottish social security entitlements.

Scottish Ministers are also required to set service standards which will apply to services receiving funding for social security advocacy. Service standards must be set in regulations. Funding and service will be in place for the delivery of the first disability benefits.

The Tribunals (Scotland) Act 2014 (the 2014 Act) created a new, two-tier structure for devolved tribunals in Scotland; the FTT for Scotland and the Upper Tribunal for Scotland, known collectively as the Scottish Tribunals. The 2014 Act was not thought to have any impact on Scottish business or the third sector, nor did it transfer costs, so no BRIA was undertaken.

There is already provision in the 2014 Act which enables the temporary authorisation of current and former judges.

## **Explanatory Note**

Section 1 is intended to make sure that children are not prevented, in a practical sense, from claiming their entitlement to social security assistance by reason of the fact that the child does not live with anyone who has the parental right to act as the child's legal representative: mothers automatically acquire this legal right as do fathers who are married to the child's mother and / or are named as the child's father on the child's birth-certificate.

Section 1 provides a mechanism allowing an appropriate adult, who lacks this parental right, to be appointed to act on behalf of the child in connection with the determination of the child's entitlement to assistance and to receive assistance on the child's behalf.

Section 1 is also allows for an individual to appointed to act on behalf of an adult with legal capacity and to receive assistance on the adult with legal capacity's behalf if the adult with legal capacity consents to the appointment. In only some cases, it will be appropriate for an appointment to be made on behalf of an adult with legal capacity, for example where circumstances are such that the adult could not reasonably be expected to act on their own behalf, or could not do so effectively due to harmful health information being withheld by a nurse or doctor in accordance with new section 62A, inserted by section 2 of the Bill.

Section 2 of the Bill relates to circumstances where a registered nurse or doctor has informed the Scottish Ministers that an individual is likely to be seriously harmed from receiving information about their entitlement to assistance. For example, if the individual were to find out that the reason they were receiving assistance is because they have been diagnosed as terminally ill for social security purposes. In such circumstances, section 2 removes the legal obligations placed on the Scottish Ministers under the 2018 Act that involve informing individuals about their entitlement to assistance at various stages of their claim.

Section 3 of the Bill puts in place as a default position that the statutory offences which currently exist in the 2018 Act and which apply to social security assistance given under Part 2 of the Act now apply to social security assistance that is given under regulations made under section 79 of the 2018 Act (power to provide top up of reserved benefits)("top-up assistance"). These are:

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

The legislative approach to establishing these new offences is to modify sections 71 – 73 of the 2018 Act. A consequential effect of this modification is that the investigative powers exercisable under Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020, which apply to the investigation of offences under section 71 – 73 of the 2018 Act, will also be exercisable in relation to the

investigation of these new offences, allowing individuals authorised by these regulations to investigate suspected instances of top-up assistance fraud.

Section 3 of the Bill also gives the Scottish Ministers the option of creating different offences in regulations which may replace the new offences which stand as the default position. Under the Act as it stands, the power to make provision to investigate offences only applies to offences established by the Act itself rather than offences set out in regulations. Therefore section 5 of the Bill modifies this power so that if the Scottish Ministers do decide to create offences in regulations, the Scottish Ministers can also make provision for the investigation of these offences.

Chapter 4 of the 2018 Act relates to the recovery of the value of assistance, including assistance given in error. Section 68 allows the Scottish Ministers, by regulations, to transfer some or all of the competence and jurisdiction that a sheriff has in relation to the recovery of money owed under section 63 to the First-tier Tribunal for Scotland. The provisions within section 68 relate to the forms of assistance provided for under Part 2 of the Act. Section 4 of the Bill makes provisions in the Social Security Administration and Tribunal Membership (Scotland) Bill in relation to transfer of jurisdiction in order to ensure consistency between forms of assistance provided for under Part 2 of the 2018 Act and those provided under section 79.

Section 5 makes provision to extend the power for Ministers to make provision in regulations for the investigation of offences under the 2018 Act. These currently exist in the 2018 Act but apply to social security assistance given under Part 2 of the Act only, and will now also apply to social security assistance that is given under regulations made under section 79 of the 2018 Act (power to provide top up of reserved benefits) i.e. to “top-up assistance”.

Section 7 of the Bill confers powers on the Scottish Ministers to make provision in regulations about the appropriate health professionals whose diagnosis of terminal illness will be taken to evidence an individual’s entitlement to disability assistance in accordance with regulations made under section 31 of the 2018 Act. Regulations must provide that the person making the diagnosis is either a registered medical practitioner, a registered nurse or part of another healthcare profession as may be prescribed in regulations. Scottish Ministers also have the power to set additional criteria with reference to, for example, the health professional’s skills, qualifications, training and experience. Under the 2018 Act as it stands, the regulations must permit the diagnosis to be given by a registered medical practitioner.

The provisions in the Social Security Administration and Tribunal Membership (Scotland) Bill broaden out the list of those eligible to sit within the devolved system to enable them, via the route of temporary authorisation, to sit in either the First-Tier and Upper Tribunal. In other words, they facilitate access to a wider group of existing judges in order to increase the capacity of the Scottish Tribunals in dealing with social security appeals

Section 8 of the Bill modifies section 18 of the Tribunals (Scotland) Act 2014 (“the 2014 Act”). Section 18 of the 2014 Act relates to the temporary authorisation of current and former judges to hear appeals in the Upper Tribunal. The roll-out of new

and newly devolved social security benefits will significantly increase the business of the Social Security Chamber of the FTT and, in turn, the Upper Tribunal (to which there is a further right of appeal). The amendments to section 18 (Authorisation of others) of the 2014 Act enable, for the first time, temporary authorisation to sit in the FTT and widen the group of existing judicial office holders, sitting in other courts or tribunals which can be temporarily authorised to sit in the Upper Tribunal. This allows the resource and expertise of a wider group of judicial office holders to be quickly accessed in order to increase the capacity of both the Scottish Tribunals. This will assist in ensuring the efficient and effective disposal of this increased business.

## Consultation

The Scottish Government has consulted widely in relation to social security matters – firstly in 2016 to support the development of a framework that would become the Social Security (Scotland) Bill, and more recently in 2019 on disability assistance in Scotland. The first consultation received more than 200 responses to questions relating to disability benefits with an even split between organisational and individual responses<sup>1</sup> and the second received 263 responses, of which 74 were from stakeholder organisations<sup>2</sup>.

In addition to engaging with over 2,400 people across Scotland who have lived experience of the benefits, through the work of the Experience Panels, the Scottish Government has also undertaken ongoing consultation with stakeholders through our independent Disability and Carers Benefits Expert Advisory Group (DACBEAG) as well as the Ill Health and Disability Benefits Stakeholder Reference Group.

The views of people with lived experience have also been captured through a range of user research and stakeholder engagement activities held throughout Scotland.

As part of the wide ranging consultation on Social Security in Scotland<sup>3</sup> which informed the contents of the 2018 Act, few comments were received specifically in relation to offences. Most respondents were content with the Scottish Government's proposed approach to fraud.

Alongside the wider consultation on Social Security in Scotland, the Scottish Government's full public consultation in relation to the Investigation of Offences Regulations and Code of Practice for Investigations was undertaken and independent analysis was undertaken by KSO Research<sup>4</sup>.

In relation to the authorisation of judiciary to sit in Scottish Tribunals, consultation has been limited to the judicial stakeholders charged with the operation of Scottish Tribunals System, the Ministry of Justice and Her Majesty's Court and Tribunals Service (HMCTS). The President of the Scottish Tribunals has been strongly of the

---

<sup>1</sup> Scottish Government (2017) [Analysis of Written Responses to the Consultation on Social Security in Scotland](#)

<sup>2</sup> Scottish Government (2019) [Disability assistance in Scotland: analysis of consultation responses](#)

<sup>3</sup> [https://consult.gov.scot/social-security/social-security-in-scotland/user\\_uploads/consultation-on-social-security-in-scotland---full-version.pdf](https://consult.gov.scot/social-security/social-security-in-scotland/user_uploads/consultation-on-social-security-in-scotland---full-version.pdf)

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

view that amending the 2014 Act is the only practical solution to the current challenges facing the Social Security Chamber to secure the efficient disposal of its business and ensuring that justice is administered without undue delay. This view has also been supported by the Senior President of Tribunals in the reserved tribunal system.

Discussions have also been held with stakeholders such as the Judicial Appointments Board for Scotland, Scottish Courts and Tribunals Service (SCTS) and Judicial Office. Officials have also been clear that, due to challenging timescales in introducing the Bill, a formal public consultation will not take place in relation to this issue.

In relation to the provisions which modify which healthcare professionals can diagnose an illness as terminal for social security purposes, the Scottish Government's Chief Medical Officer consulted on the statutory guidance which, as the Act currently stands, registered medical practitioners (doctors) must follow when making the diagnosis. Both clinicians who will use the guidance, and organisations who will support terminally ill clients, took part in the managed (non-public) consultation. The views gathered by the consultation informed the Scottish Ministers' policy decision to amend which healthcare professionals can diagnose an individual as terminally ill for social security purposes.

### **Rationale for Government Intervention**

The regulatory sphere which the Government is seeking to intervene in goes no wider than the framework set up by the Social Security (Scotland) Act 2018. The rationales for making further, relatively minor interventions, are explained fully in the policy memorandum to the Bill

### **Appointees on behalf of children**

The 2018 Act provides that Scottish Ministers may appoint a person to act on behalf of an individual in connection with the determination of the individual's entitlement to assistance under section 24 of the Act, and to receive such assistance on the individual's behalf. However, Scottish Ministers may only appoint someone in a narrow set of circumstances – none of which allow for an individual to be appointed on behalf of a child. Most parents and some other persons will already have the parental right to act as a child's legal representative and so do not need to be appointed as an appointee in order to act on their child's behalf

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

As of August 2019, 41,600 children in Scotland under age 18 were in receipt of Disability Living Allowance (DLA), which accounts for approximately 4% of children under age 18 in Scotland<sup>5</sup>. Our forecasts currently estimate that we could receive around 11,000 new applications for CDP in 2021/22

At 31 July 2019, there were an estimated 14,015 looked after children (under 18 years old) in Scotland<sup>6</sup>, accounting for around 1% of all children in Scotland<sup>7</sup>. The most common setting was 'kinship care' - with 29% those children being looked after by relatives or friends<sup>8</sup>. Of the total CDP caseload, it is likely that a minority will be living in a complex family situation which requires an appropriate adult to be appointed by the Scottish Ministers to act and receive social security assistance on the child's behalf.

### **Appointees on behalf of adults with legal capacity and non-disclosure of harmful information**

The Social Security (Scotland) Act 2018 currently provides for appointments on behalf of adults where a client lacks capacity to act on their own behalf. In only some cases, it will be appropriate for an appointment to be made on behalf of an adult with legal capacity. Providing a supportive process for clients who wish to have another person to be appointed to act on their behalf will ensure that they get the support they need to access the social security system.

Another benefit of having an appointee act on behalf of some people with legal capacity, is that the individual would not see any information relating to their entitlement to assistance. The people who would benefit from this are those who would be likely to be severely harmed by receiving information about the nature of their entitlement. For example, it is expected that some individuals will be entitled to disability assistance on account of terminal illness, but will not fully appreciate they are terminally ill because a healthcare professional will have deemed in the patient's best interests to withhold such information.

The fact that some people's health may be harmed by receipt of information about their entitlement to social security assistance is also the rationale for section 2 of the Bill. As noted above, section 2 removes various legal obligations placed on the Scottish Ministers under the 2018 Act to inform individuals about their entitlement to assistance if a registered nurse or medical practitioner has advised the Scottish Ministers that an individual is likely to be seriously harmed from receipt of this information.

---

<sup>5</sup> Stat Xplore, accessed 16<sup>th</sup> March 2020, [Stat Xplore](#) and NRS (2019) [Mid-2018 population estimates Scotland](#): Child DLA May-18 caseload estimate, Scotland, under 18s: 38542. 30 June 2018 under 18 population estimate: 1,028,798

<sup>6</sup> This includes children in several types of care setting, including at home (where a child is subject to a Compulsory Supervision Order and continues to live in their normal place of residence), foster care, residential unit or school, a secure unit, with prospective adopters, or in kinship care (where they are placed with friends or relatives).

<sup>7</sup> Scottish Government (2020) [Children's social work statistics 2018-2019](#)

<sup>8</sup> Scottish Government (2020) [Children's social work statistics 2018-2019](#)

## **Offences**

The Scottish Government has a zero tolerance approach to fraud and the statutory offences outlined in sections 71-73 of the 2018 Act relate to forms of assistance provided for under Part 2 of the act and do not apply to forms of top up assistance provided under section 79. A lack of statutory offences to tackle fraud in relation to top up assistance is inconsistent with the other forms of assistance provided under the Act and may encourage fraud or misuse of the benefit. Having these offences in place is considered essential before the Scottish Ministers can invest in the roll-out of the SCP.

While the vast majority of applications for assistance made to Social Security Scotland will be genuine, we know that where public money is being paid out there will be attempts to defraud. Where there is a suspicion that this has occurred, it is incumbent upon Social Security Scotland to investigate, take appropriate action where necessary to recover the funds and take enforcement action, if it believes an offence has been committed. It will be crucial that Social Security Scotland has the ability to gather relevant evidence from businesses and organisations to meet the burden of proof required by evidential requirements of the criminal law.

## **Assistance given in error: FTT's jurisdiction**

The provisions in relation to the recovery of the value of assistance within the 2018 Act do not apply to any form of top up assistance provided under section 79. Not recovering assistance where appropriate would be inconsistent with the Scottish Government's duties for responsible stewardship of public funds as outlined within the SPFM and The provisions in the Social Security Administration and Tribunal Membership (Scotland) Bill in relation to transferring jurisdiction to the First-tier Tribunal (FTT) will ensure that assistance provided under section 79 can be recovered where appropriate.

## **Persons who can give diagnosis**

The term "Registered Medical Practitioner" means doctor and does not include nurses. This constitutes a divergence from the existing Department for Work and Pensions (DWP) approach where doctors and some nurses can determine terminal illness for the purposes of accessing UK Government benefits. Following the coming into force of the 2018 Act, the Chief Medical Officer consulted with a range of medical professionals and wider stakeholders when developing draft guidance to support Registered Medical Practitioners in using their clinical judgement to certify a person as terminally ill.

The consultation evidence suggested that the majority of DS1500s (the form used by the DWP to certify a person as terminally ill) are completed by nurses and that failing to maintain this approach is likely to lead to delays and additional burdens on doctors who are often not involved with the patient's day to day care. Feedback in the managed consultation from all medical professions demonstrated overwhelming support for extending responsibility to certify a person as terminally ill to registered nurses.

As of August 2019, 20 children and young people receiving DLA Child in Scotland were classified as terminally ill. As of October 2019, 3,200 of the adults claiming PIP were claiming under terminal illness rules and 3,300 adults claiming Attendance Allowance under terminal illness rules.

When extending responsibility for diagnosis of terminal illness, the Scottish Government considers it essential that responsibility is only extended to those able to undertake this task. That is why the Bill will include powers to set additional criteria in regulations for persons to meet before they can diagnose a person as terminally ill for social security purposes. As noted above, this additional criteria will apply to doctors, nurses, and other healthcare professions as may be prescribed

### **Authorisation of judiciary to sit in Scottish Tribunals**

The roll-out of new and newly devolved benefits will result in a significant growth in the numbers of cases that are dealt with by FTT Social Security Chamber and the Upper Tribunal. The current capacity of the Chamber is insufficient to deal with the projected increase in business and needs to be significantly increased

Once Scottish Ministers start to deliver Disability Assistance for Working Age People (DAWAP), it is anticipated that 60% of social security appeals dealt with in the reserved jurisdiction will fall within the remit of Scottish Tribunals. Judicial resources will, accordingly, need to be significantly increased. Widening the list of judicial offices eligible for temporary authorisation is as akin to an administrative matter to allow for the straightforward assignment of a very-well qualified cadre of judiciary to meet a need in the devolved system. This is considered the best short term option to help ensure the Chamber can effectively dispose of business.

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

### **Options**

When developing the provisions within Social Security Administration and Tribunal Membership (Scotland) Bill, the Scottish Government gave consideration to the following options:

- **Option 1** – Do not bring forward legislation on these issues;
- **Option 2** - Bring forward primary legislation to address these issues to ensure the continued effective implementation of the 2018 Act.

The Scottish Government considered that option 2 should be selected.

## **Costs**

The Scottish Government will continue to look to identify and minimise any indirect impacts, for example administrative burdens, on local government, private businesses or third sector organisations as a result of the provisions. A financial memorandum has been published to accompany the Bill and can be found on the Scottish Government website<sup>9</sup>.

## **Appointees on behalf of children and adults with legal capacity**

The equivalent UK benefit to the Child Disability Payment (CDP), DLA Child already makes provision for third party applications to DLA on behalf of a child. It is expected that the number of appointee applications for children under the age of 16 will remain similar to this because CDP is the main form of devolved assistance that children will be directly entitled to apply for in their own right. Other forms of assistance, such as the Scottish Child Payment, are based on the parent applying in their own right.

The CDP diverges from DLA policy in that the upper age limit of CDP is 18 years compared to 16 years for DLA. As estimates assumed alignment with DWP this group was already incorporated in costings produced by the Scottish Fiscal Commission (SFC) that accompanied the February budget. It is not possible to split this group out as there is not sufficient information on the numbers of 16-18 year olds who will require an appropriate adult to be appointed on their behalf.

The costs for developing the processes to manage appointees has been built into the total Social Security implementation programme forecast costs as set out in the Social Security Business Case. It is not anticipated that appointees for children or adults with capacity will result in additional ongoing administration costs to Social Security Scotland beyond the resource already identified for the processing of applications.

Furthermore, allowing appointees for children and adults with capacity will not impact on total benefit spend forecasts. The change aligns with the current DWP rules and therefore the impact is built into the funding which the Scottish Government will receive from the UK Government through the Block Grant Adjustment for the relevant benefits.

It is not considered that the proposals in relation to appointees will have any impact on Scottish business.

## **Persons who can give diagnosis**

Widening the category of qualified persons whose clinical judgement will be accepted in relation to a diagnosis of terminal illness for the purpose of entitlement to Disability Assistance will not impact on total benefit spend forecasts. The change aligns with the current DWP rules and therefore the impact is built into the funding

---

<sup>9</sup> <https://beta.parliament.scot/bills/social-security-administration-and-tribunal-membership-scotland-bill#target1>

which the Scottish Government will receive from the UK Government through the Block Grant Adjustment for the relevant benefits.

The implementation costs for extending the responsibility for diagnosis of terminal illness to registered nurses are built into the total Social Security Implementation Programme forecast cost as set out in the Social Security Business case.

Although it is not possible to identify the exact proportion of this which specifically relates to the changes required to accept terminal illness diagnosis from registered nurses, it may be reasonable to assume it is a relatively low proportion. Similarly, it is not anticipated that there will be an additional ongoing administration cost to Social Security Scotland beyond the resource already identified for the processing of applications. In the short term, there may be additional work for some third sector organisations as they make arrangements for their staff to incorporate knowledge of the new provision (as well as the new benefits, more broadly) into their current systems.

As above, it is not considered that the proposal will have any impact on Scottish business.

### **Offences**

No significant costs to business have been identified in relation to modifying the existing statutory offences under the 2018 Act so that they apply to assistance provided for in regulations made under section 79 of the 2018 Act (top-up of a reserved benefit). These statutory offences already apply to forms of assistance provided for under Part 2 of the Act and these provisions provide consistency.

### **Investigations**

When undertaking a BRIA for the Code of Practice for Investigations and Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020, the Scottish Government identified that, as this is a rolling programme of benefit implementation, the detailed eligibility criteria of some of the benefits have yet to be defined. As a result, it is not possible to fully anticipate all of the organisations who may in future be required to provide information relevant to an investigation. However, where devolved benefits are similar to those delivered by the DWP, it is likely that the organisations from whom Social Security Scotland will request information from, are also likely to be similar to those from whom it is currently requested. Therefore no significant new costs were identified.

### **Assistance given in error: First-tier Tribunal's jurisdiction**

No significant costs to business are associated with the transfer to the FTT of some or all of the competence and jurisdiction of the sheriff courts in relation to the recovery of assistance given in error related to top up assistance created under section 79 of the 2018 Act.

## **Authorisation of judiciary to sit in Scottish Tribunals**

The provisions in relation to broadening out the list of those eligible to sit within in either the First-Tier and Upper Tribunal in themselves have no costs implications, but the use of the mechanism which they provide for will i.e. on appointment of members.

All tribunals administered by SCTS are funded by the relevant policy areas within the Scottish Government. The costs associated for temporarily authorising salaried members within the reserved system, to sit within the Social Security Chamber has been built into the total Social Security implementation programme forecast costs.

It is not considered that the proposal in relation to the authorisation of judiciary to sit in Scottish Tribunals will have any impact on Scottish business.

## **Benefits**

The provisions in the Bill in relation to appointees contribute to the following National Outcomes:

- We respect, protect and fulfil human rights and live free from discrimination;
- We tackle poverty by sharing opportunities, wealth and power more equally;
- We live in communities that are inclusive, empowered, resilient and safe;
- We grow up loved, safe and respected so that we realise our full potential.

Specifically, the provision in the Bill which relates to third party applications on behalf of children will help deliver the social security outcomes that young people:

- are supported to look after their own health and wellbeing, improve their quality of life;
- participate fully in society and, if they choose, engage in training, education and employment opportunities, as well as social and leisure activities;
- have an increased sense of control and empowerment over their lives.

Making provision for third party applications on behalf of children will provide a clear, consistent process for children, Social Security Scotland, third-sector advisors and local authorities to follow. For children who are looked after within the meaning of s. 17(6) of the Children (Scotland) Act 1995, local authorities will have scope to make an application where previously only the child's parents would have legal authority – therefore securing children's rights to social security assistance.

While the SCP will provide support to those who need it most, as noted above the setting up of offences is essential before the SCP can be rolled out. The creation of statutory offences is consistent with the Scottish Government's requirements under the Scottish Public Finance Manual and is in line with the wider Scottish public sector. The offences also have a deterrent effect to prevent misuse of the benefits system. It will also ensure that only those entitled to assistance receive it and assures consistency between forms of assistance provided under section 79 with those forms of assistance provided under Part 2. This provides certainty for individuals.

As noted above, the modification of the offences in section 71 – 73 of the Act, which currently apply in relation to assistance given under Part 2 of the Act only, to apply to assistance given under top-up assistance regulations has the consequential effect that the investigative powers exercisable under Social Security Assistance (Investigation of Offences) (Scotland) Regulations 2020 will also be exercisable in relation to the investigation of suspected top-up assistance fraud. The benefit of this is that the expertise of, and the resources being channelled to, individuals authorised by the 2020 Regulations can be fully utilised in response to all instances of suspected devolved benefit fraud.

With regard to the provision in the Social Security Administration and Tribunal Membership (Scotland) Bill in relation to transferring jurisdiction to the FTT, this meets the requirements of the Scottish Public Finance Manual and is in line with the wider Scottish public sector. In relation to overpayments, it will contribute to ensuring that only those entitled to assistance receive it. It will ensure consistency between forms of assistance provided under section 79 with those forms of assistance provided under Part 2.

With regard to the extension of responsibility for diagnosis of terminal illness, the inclusion of registered nurses will significantly impact the smooth implementation of the new terminal illness definition which will apply to Scotland's new disability benefits. Without this change only registered medical practitioners would be able to make this diagnosis and this could cause delays in accessing disability assistance through the special rules route. It would also impact on frontline healthcare professionals. Currently only a minority of these terminal illness diagnoses (for disability assistance) are undertaken by registered medical practitioners; without the extension of responsibility to registered nurses there would be an increased demand on the need for registered medical practitioners to undertake this role.

Broadening out the list of those eligible to sit within the devolved system to enable them, via the route of temporary authorisation, to sit in either the First-Tier and Upper Tribunal will allow for the efficient disposal of business in the Social Security Chamber.

### **Scottish Firms Impact Test**

As set out above, it is not considered that the proposal will have any impact on Scottish business.

### **Competition Assessment**

The Scottish Government does not believe that the provisions in the Bill will have an adverse impact on the competitiveness of Scottish companies or the third sector within Scotland, the UK, or elsewhere in Europe or the rest of the world. Additionally, the Scottish Government does not expect there to be any significant impact on the operational business of local authorities or health boards as a result of introducing these provisions. The provisions within the Bill in relation to benefits will largely replicate the processes in place for benefits provided by the DWP and, as per below, the right to appeal to the FTT is already provided for in the 2018 Act.

## **Legal Aid Impact Test**

Impact on legal aid budgets must be assessed in a BRIA for each new assistance provided for under the 2018 Act. This Bill is not providing for a new type of assistance and The Scottish Government does not anticipate significant impacts on the legal aid budget as a result of the introduction of the Social Security Administration and Tribunal Membership (Scotland) Bill.

The right to appeal to the FTT is provided for in the 2018 Act.

With regard to the provision in relation to investigations, where there is a fraud investigation by DWP, 'Legal Advice and Assistance' is already available to individuals through the statutory scheme of Advice and Assistance. This will similarly be available to Social Security Scotland clients. Where an offence is reported to the Crown Office and Procurator Fiscal Service, criminal legal aid would also be available.

In order to mitigate the effects of multiple agencies investigating similar, linked or related offences, the Scottish Government has committed to investigating with other government departments where there is a common interest and to joint reporting to the Crown Office and Procurator Fiscal.

Demand for legal services in relation to investigations is not anticipated to be significantly higher as a result of devolved social security. Disability benefits are not means tested and legal advice and assistance would remain subject to eligibility testing dependent on the type of assistance sought. Further reengagement with the Ministry of Justice, HMCTS and SCTS will be needed to work out the practicalities of appointments.

## **Enforcement, sanctions and monitoring**

There are anticipated to be no additional burdens for businesses, local government or the third sector generated by these provisions.

The 2018 Act places a duty on the Scottish Ministers to publish an annual report on the performance of the Scottish social security system. On-going engagement with key stakeholders will also provide the Scottish Government with an opportunity to monitor the impact of the policy.

Audit Scotland will monitor and report on the delivery of the social security system, including Social Security Scotland.

## **Summary and Recommendation**

Of the 2 identified options, the Scottish Government proposes to implement option 2 (Bring forward primary legislation). The Scottish Government does not anticipate significant business or regulatory impacts arising from the introduction of the Social Security Administration and Tribunal Membership (Scotland) Bill.

<b>Option</b>	<b>Total benefit per annum: Economic, environmental, social, policy and administrative</b>	<b>Total cost per annum: Economic, environmental, social, policy and administrative</b>
<b>1</b>	Selection of this option would bring no significant benefit.	Selection of this option would bring no significant direct costs. However, there are indirect costs in relation to not investigating possible instances of fraud and recovering assistance where appropriate.
<b>2</b>	<p>This option will contribute towards the delivery of a number of national outcomes. It will also protect public funds through the creation of statutory offences and investigations of possible instances of fraud in relation to assistance provided for under section 79 of the 2018 Act. Transfer of jurisdiction to the FTT will also allow the Scottish Government to retrieve overpayments of assistance provided for under section 79 as appropriate.</p> <p>Broadening out the list of those eligible to sit within the devolved system to enable them, via the route of temporary authorisation, to sit in either the First-Tier and Upper Tribunal will allow for the efficient disposal of business in the Social Security Chamber.</p>	While it is not possible to estimate the exact cost per annum of the provisions within the Social Security Administration and Tribunal Membership (Scotland) Bill, the Scottish Government has identified a number of costs. Previous costings assumed alignment with DWP on the appointments of people to act on behalf of children so whilst there is a cost associated with this, this is already incorporated in previous estimates. The salary of tribunal members is another related cost required to handle the increased volume of cases. However, neither of these is expected to be significant and the Scottish Government considers that these are outweighed by the benefits of this Bill.

## **Declaration and publication**

The Cabinet Secretary or Minister responsible for the policy (or the Chief Executive of non- departmental public bodies and other agencies if appropriate) is required to sign off all BRIAs prior to publication.

- Sign-off for Partial BRIAs:

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:** Shirley-Anne Somerville

**Date:** 5 May 2020

**Minister's name:** Shirley-Anne Somerville

**Minister's title:** Cabinet Secretary for Social Security and Older People

**Scottish Government Contact point:** Paul Curtis  
**Social Security Directorate** paul.curtis@gov.scot



Scottish Government  
Riaghaltas na h-Alba  
gov.scot

© Crown copyright 2020

**OGL**

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit [nationalarchives.gov.uk/doc/open-government-licence/version/3](https://nationalarchives.gov.uk/doc/open-government-licence/version/3) or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk)

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at [www.gov.scot](http://www.gov.scot)

Any enquiries regarding this publication should be sent to us at  
The Scottish Government  
St Andrew's House  
Edinburgh  
EH1 3DG

ISBN: 978-1-83960-740-0 (web only)

Published by The Scottish Government, May 2020

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS734147 (05/20)

W W W . G O V . S C O T