

This document relates to the Social Security Administration and Tribunal Membership (Scotland) Bill (SP Bill 68) as introduced in the Scottish Parliament on 27 April 2020

Social Security Administration and Tribunal Membership (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Social Security Administration and Tribunal Membership (Scotland) Bill, introduced in the Scottish Parliament on 27 April 2020.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 68–FM);
 - a Policy Memorandum (SP Bill 68–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 68–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

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The Bill

Overview

5. The overarching policy objectives of the Bill are:
 - To allow for the appointment of persons to act on behalf of a child where there is no person with legal authority who is willing and able to so act;
 - To allow for the appointment of a person to act on behalf of an adult who does not lack capacity and has agreed to the appointment of an appointee to act on their behalf.
 - To enable the Scottish Ministers to withhold health information where its disclosure would cause serious harm to an individual.
 - To create statutory fraud offences in relation to 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 assistance given in error for top up assistance created under section 79 of the 2018 Act;
 - To confer powers on the Scottish Ministers to make provision by regulations about investigation of offences in relation to top up assistance created under section 79 of the 2018 Act;
 - To modify schedule 5 of the 2018 Act which makes further provision about regulations that may be made under section 31 of that Act, to widen the category of qualified persons whose clinical judgment will be accepted in relation to a diagnosis of terminal illness for the purposes of disability assistance; and
 - To enable other types of judges to be temporarily authorised to sit in the First-tier Tribunal (FTT) and the Upper Tribunal.

6. The Bill contains 12 sections in relation to the policy objectives identified above. Explanatory Notes on the various sections of the Bill are provided below. A detailed explanation of the policy intentions underpinning the Bill can be found in the Policy Memorandum.

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Detailed provisions

Appointment of person to act on behalf of individual

7. Section 1 modifies the 2018 Act in relation to the appointment of persons to act on behalf of individuals. Subsection (2) modifies section 58 (which provides for the appointment of person to act on behalf of individual) of that Act, to add to the circumstances in which Scottish Ministers may appoint a person under section 58(1) of the Act. Subsection (3) inserts new sections 58A and 58B into the Act, to make further provision about appointments.

8. Section 58 allows the Scottish Ministers to appoint a person (who must be over 16 years of age if an individual) to act on behalf of an individual in connection with that individual's entitlement to assistance under section 24 of the 2018 Act. The appointee effectively stands in the shoes of the individual that the appointee has been appointed to represent (see subsection (6) of section 58).

9. The new circumstances in which the power to appoint an appointee may be used are where it appears to the Scottish Ministers that:

- the individual is aged 16 years or over and agrees to the appointment (new section 58(2)(a) of the 2018 Act, inserted by section 1(2)(a)), and
- where new subsection (4A) (inserted by section 1(2)(b)) applies (new section 58(2)(b) of the 2018 Act, inserted by section 1(2)(a)).

10. New subsection (4A) provides that a person may be appointed on behalf of a child where it appears to the Scottish Ministers that there is no person with legal authority to act on the child's behalf who resides with, and has the care of, the child and is willing and practicably able to do so.

11. New section 58A provides that a person may be appointed on behalf of an adult with capacity. It limits the circumstances to adults with capacity who are aged 16 or over and provides that they must agree to the appointment. It also references the new subsection (4A).

12. New section 58B references the other provisions in the 2018 Act that provide for a person to be appointed to act on behalf of a person (58(3))

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where that person is deceased and there is no executor appointed on the individual's estate, and 58(4) where the individual is incapable within the meaning of the Adults with Incapacity (Scotland) Act 2000, there is no guardian acting or appointed under that Act, the individual's estate is not being administered by a judicial factor, and there is no other person who has authority to act on behalf of the individual and is willing to do so.

Determination of entitlement to assistance: non-disclosure of information

13. Section 2 modifies the 2018 Act, to insert a new section 62A in relation to non-disclosure of harmful health information about individual's health.

14. New section 62A(1) provides that the section applies in relation to certain duties of the Scottish Ministers under the 2018 Act, to inform an individual of certain things in relation to the determination of the individual's entitlement to assistance. The duties are those under the following sections of the 2018 Act:

- Section 38(5) (duty to inform an individual of matters relating to a decision to reject something purporting to be an application for assistance);
- Sections 40(1) (duty to inform an individual of matters relating to a determination of the individual's entitlement to assistance) and 41(6) (duty to inform an individual of matters relating to a decision to reject something purporting to be a request for a re-determination);
- Section 42(2) (duty to inform an individual of matters relating to a decision as to whether an individual has good reason for not requesting a re-determination sooner); and
- Sections 44(1) (duty to inform an individual of matters relating to a re-determination of the individual's entitlement to assistance) and 53(2) (duty to inform about possible eligibility for other assistance).

15. New sections 62A(2) and (3) provide that nothing in these duties requires the Scottish Ministers to disclose information relating to an individual's physical or mental health where a registered medical practitioner or registered nurse has informed the Scottish Ministers that

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disclosure of the information would be likely to cause serious harm to the physical or mental health of the recipient.

Offences - Top up assistance

16. Sections 71 to 73 of the 2018 Act contain statutory offences in relation to social security assistance given under Part 2 of that Act. These are:

- Offence of trying to obtain assistance by deceit;
- Offence of failing to notify Social Security Scotland of a change of circumstances relevant to their own receipt of benefit; and
- Offence of causing a failure to notify Social Security Scotland of a change of circumstances relevant to another individual's receipt of benefit;

17. Section 75 of the 2018 Act allows the Scottish Ministers, by regulations, to make provision about the investigation of these offences. Section 76 places a duty upon the Scottish Ministers to publish a code of practice on investigations carried out by virtue of section 75.

18. The offences outlined in sections 71 to 73 of the 2018 Act are not applicable to top-up assistance given in accordance with regulations made under section 79 of that Act. Similarly, the power to make provision about investigations in regulations under section 75 of the 2018 Act does not apply to investigation of offences in connection with top-up assistance.

19. Section 3 of the Bill modifies the 2018 Act to make provision about offences in connection with top-up assistance.

20. Section 3(2) modifies section 79(2) of the 2018 Act to insert a new paragraph (g) which expressly provides that the Scottish Ministers' power under section 79(1), to make provision by regulations for top-up assistance, includes the power to make provision about offences.

21. Section 3(3) inserts a new subsection (4) into section 80 of the 2018 Act, which sets out restrictions on the powers in section 79. This new subsection specifies the maximum penalties that can be provided for in regulations under section 79 in respect of an offence under those

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regulations. These are: on summary conviction, imprisonment for a term not exceeding 12 months, a fine not exceeding the statutory maximum or both; and, on conviction on indictment, imprisonment for a term not exceeding five years, a fine or both.

22. Section 3(4) inserts a new section 80A into the 2018 Act which provides a new default position in respect of offences in connection with top-up assistance. That is, that the offences set out in sections 71 to 73 of that Act apply in connection with any form of ‘top-up’ assistance created under section 79, just as they also apply in connection with the various forms of assistance under Part 2 of that Act (section 80A(1)). This is subject to any contrary provision in regulations for specific forms of ‘top-up’ assistance that may be made under new section 79(2)(g) (section 80A(2)).

23. New section 80A(3) makes various modifications to sections 71 to 73 of the 2018 Act where they apply by virtue of section 80A(1), so that they operate effectively in the context of top-up assistance. In particular, the modifications make clear that:

- a) “Assistance” refers to financial assistance provided under ‘top-up’ benefits for by top up regulations,
- b) a reference to giving notice in accordance with section 56 of the 2018 Act is referring to giving notice in accordance with regulations about top-up assistance, and
- c) subsections 72(3) and 73(3) (which relate to how individuals inform Scottish Ministers of any relevant changes of circumstances) do not apply unless, in accordance with top-up assistance regulations, the Scottish Ministers have informed the person about the way in which notification of a change of circumstances is to be given.

24. New section 80A(4) makes provision to put beyond doubt the application of section 74 of the 2018 Act to both the commission of offences under sections 71 to 73 of that Act as applied by new section 80A(1), and the commission of offences created under the new power in section 79(2)(g). Section 74 makes provision about individual culpability where an offence under the 2018 Act or any regulations made under it is committed by an organisation. New section 80A(4) therefore provides, for the avoidance of any doubt, that the reference in section 74 to an offence under the Act or any regulations made under it includes any offence under

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any of sections 71 to 73 of the 2018 Act as applied by section 80A, and to any offence under the top-up assistance regulations.

25. New section 80A(5) specifies that ‘top-up assistance regulations’ refers to regulations made under section 79 of the 2018 Act.

Assistance given in error: First-tier tribunal’s jurisdiction

26. Section 4 of the Bill modifies section 79(2)(f) of the 2018 Act in order to allow regulations made under that section to transfer to the First-tier Tribunal for Scotland some or all of the competence and jurisdiction that a sheriff has in relation to the recovery of assistance given in error. This replicates, for recovery of top-up assistance given in error, the power that exists in section 68 of the 2018 Act in connection with recovery of assistance given in error under Part 2 of that Act.

Investigations - Top up assistance

27. Section 5 makes provision, in subsection (6), to extend the power for Ministers to make provision in regulations, under what was previously section 75 of the 2018 Act about investigation of offences under that Act, so that provision may also be made about the investigation of offences under any regulations made under the Act. This ensures that investigations regulations can cover the investigation of any new offences created under section 79(2)(g) (inserted by section 3). Since section 75 of the 2018 Act was located in Part 2 of that Act, and the powers to make provision about top-up assistance are located in Part 3, the substantive provision described above necessitated some re-structuring of the 2018 Act.

28. Subsections (2) to (5) of section 5 therefore moves the investigations provision previously found in section 75 of the 2018 Act to Part 4 of that Act, which contains provisions relevant to both Parts 2 and 3. Section 76, which makes provision for a code of practice on investigations under section 75 is similarly moved to Part 4. The title of Part 2, Chapter 6 of the 2018 Act is therefore modified to remove the wording ‘and investigations’, and the italic heading of ‘Offences’ which immediately precedes section 71 is also removed. Sections 75 and 76 are re-numbered as sections 84A and 84B.

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29. Subsections (7) and (8) of section 5 of the Bill make changes to sections 84B and 96(2) of the 2018 Act that are required in consequence of the amendments made by subsections (2) to (6). References to sections 75 and 76 are removed and replaced with references to those sections as re-numbered.

Transitional provision in consequence of section 5

30. Section 6 of the Bill makes transitional provision which is required as a consequence of the changes made by section 5. Subsection (1) sets out that anything done under section 75 or 76 of the 2018 Act is now to be treated as having been done under section 84A or 84B respectively (as those sections have been re-numbered by section 5). Subsection (2) provides that references to section 75 or 76 of the 2018 Act in any enactment or other document are to be read as referring instead to section 84A or 84B respectively.

31. Section 6(3) allows Scottish Ministers to publish a new code of practice (formerly done under section 76 of the 2018 Act but now done under section 84B) without the need to meet the consultation requirements set out at section 84B(3), as long as the only amendments to the new code of practice are to reflect the renumbering changes made by section 5 of the Act. This will allow any code of practice already published when these changes come into force to be revised, if considered appropriate, to refer to the provisions as re-numbered by section 5 without there being a requirement for the Scottish Ministers to carry out a public consultation on those changes.

Persons who can give diagnosis - Diagnosing terminal illness for disability assistance purposes

32. Section 7 of the Bill modifies schedule 5 of the 2018 Act which makes provision about regulations under section 31 of that Act in relation to disability assistance to enable diagnosis of terminal illness given by appropriate healthcare professionals (including but not limited to registered medical practitioners) to be accepted as evidence of terminal illness for the purposes of disability assistance.

33. Paragraph 1(2) of schedule 5 sets out that regulations under section 31 of the 2018 Act must provide that an individual is to be regarded as

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terminally ill for the purposes of entitlement to disability assistance if that is the clinical judgement of a registered medical practitioner, having had regard to guidance issued by the Chief Medical Officer of the Scottish Administration. Subsection (2)(a)(i) allows the classes of healthcare professionals whose diagnosis will be accepted as evidence of terminal illness to be extended, by amending paragraph 1(2) to replace the reference to a ‘registered medical practitioner’ with a reference to an ‘appropriate healthcare professional’.

34. Subsection (2)(a)(ii) inserts new sub-paragraphs (2A) and (2B) into paragraph 1 of schedule 5 to the 2018 Act. New sub-paragraph (2A) provides that regulations are to define what ‘appropriate healthcare professional’ means for the purpose of determining entitlement to disability assistance on the basis of an individual having a terminal illness, and new sub-paragraph (2B) makes provision about the exercise of that power.

35. New sub-paragraph (2B)(a) provides that the regulations defining ‘appropriate healthcare professional’ must include both registered medical practitioners and registered nurses as appropriate healthcare professionals.

36. New sub-paragraph (2B)(b) provides that registered members of other healthcare professions may be included in the definition, and new sub-paragraph (2B)(c) allows the introduction of additional requirements that an individual must satisfy in order to be an appropriate healthcare professional.

37. In particular, the regulations may: specify any requirements relating to qualifications, skills, experience and training that the appropriate healthcare professional must have in order to exercise the function; include requirements about the person’s professional relationship with the individual; specify that the appropriate healthcare professional is authorised to act as such by a Health Board, Special Health Board or the Scottish Ministers.

38. Subsections (2)(a)(iii) and (2)(b) make consequential amendments to schedule 5 of the 2018 Act, to replace references to a “registered medical practitioner” with references to an “appropriate healthcare professional”.

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Part 2

Tribunal membership

Authorisation of judiciary to sit in Scottish Tribunals

39. Part 2 of the Bill modifies the Tribunals (Scotland) Act 2014 (“the 2014 Act”).

40. The 2014 Act created a new structure for devolved tribunals in Scotland and established the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland, known collectively as the Scottish Tribunals. The Scottish Tribunals are responsible for hearing appeals against determinations made by Social Security Scotland.

41. The roll-out of new and newly devolved social security benefits will significantly increase the business of the Social Security Chamber of the First-tier Tribunal 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 the resource and expertise of a wider group of existing judicial office holders, sitting in other courts or tribunals, to be quickly accessed in order to increase the capacity of both of the Scottish Tribunals. This will assist in ensuring the efficient and effective disposal of this increased business.

42. Section 8 of the Bill modifies section 18 of the 2014 Act. Section 18 enables the Scottish Ministers, on receiving a request from the President of Tribunals, to authorise certain current and former judges of other courts and tribunals to assist in the disposal of the business of the Upper Tribunal. The judicial offices eligible for temporary authorisation include: a former judge of the Court of Session, a former Chairman of the Land Court, a former sheriff (excluding a part-time sheriff) or a current judge of a court or tribunal in a country or territory out with Scotland.

43. Section 8(2) substitutes section 18(1) of the 2014 Act so as to enable persons to be temporarily authorised to act as a member of the First-tier Tribunal, as well as the Upper Tribunal. The mechanism mirrors that in place for the Upper Tribunal.

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44. Section 8(3) inserts a new section 18(1A) which provides that the judicial offices eligible to sit in the First-tier Tribunal are a former or current judge of a court or tribunal in another part or parts of the UK, a current judge of an overseas court or tribunal and a current judge of an international court or tribunal.

45. Section 8(4) modifies section 18 by broadening out the list of those judicial offices eligible for temporary authorisation to sit in the Upper Tribunal so that it includes a former or current judge of a court or tribunal in another part or parts of the UK, a current judge of an overseas court or tribunal and a current judge of an international court or tribunal.

46. Section 8(6) replaces section 18(8) to enable the Scottish Ministers to make further arrangements as necessary when authorising certain judges. It also inserts a new subsection (8A) which ensures that there is a duty upon judges to take the judicial oath if they have not already done so.

47. Section 8(7) updates section 18(10) to provide relevant definitions.

Consequential modifications

48. Section 9 of the Bill sets out further consequential amendments to the 2014 Act.

49. These are minor amendments, consequential on changes made to section 18 of the 2014 Act. They revise references throughout the 2014 Act to an “extra judge”, which currently indicate that this position exists in the Upper Tribunal only. The amendments reflect that, under the new and amended provisions, the position of “extra judge” will now exist in both the First-tier Tribunal and Upper Tribunal. These changes are required to allow for the improved flexibility to use judiciary from outside Scotland provided for in section 8.

Final provisions

50. Section 10 (Ancillary Provision) allows the Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory or saving provision appropriate for the purposes of, or in connection with, or for giving full effect to this Act. Section 11 (Commencement) confirms that the provisions within sections 3,5,6,10 and 12 within the Act will come into

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force on the day after Royal Assent. Section 12 relates to the short title of the Act 'The Social Security Administration and Tribunal Membership (Scotland) Act 2020.

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