

Legislative Consent Memorandum

Social Security (Special Rules for End of Life) Bill

Background

1. This memorandum has been lodged by Shona Robison, Cabinet Secretary for Social Justice, Housing and Local Government, under Rule 9.B.3.1(a) of the Parliament's standing orders, and is supported by Ben Macpherson, Minister for Social Security and Local Government. The Social Security (Special Rules for End of Life) Bill 2022 was introduced in the House of Lords on 11 May 2022. The Bill can be found at [Social Security \(Special Rules for End of Life\) Bill \[HL\] - Parliamentary Bills - UK Parliament](#).

Content of the Social Security (Special Rules for End of Life) Bill 2022

2. The Department for Work and Pensions ("DWP") provides fast-tracked access to disability benefits for people with a terminal illness. The provisions which enable this are known as the 'Special Rules for Terminal Illness' ("Special Rules"). Applications for disability benefits under Special Rules are fast-tracked and a face-to-face assessment is not required for benefits administered by the UK Government. No waiting period is applied, and, where applicable, individuals are able to receive the highest level of Attendance Allowance ("AA"), the care component of Disability Living Allowance ("DLA"), or the daily living element of Personal Independence Payment ("PIP"). Since terminal illness provision was introduced in 1990, eligibility for the Special Rules has been limited to those who have been diagnosed with a progressive disease where their death in consequence is likely to occur within six-months (the "six-month rule").

3. The Social Security (Special Rules for End of Life) Bill is a single topic Bill which changes the definition of terminal illness that is used for the provision of fast-tracked access to DLA, PIP and AA to clients who are terminally ill. The Bill consists of two clauses. Clause 1 of the Bill will amend the definition of terminal illness in existing primary legislation, which is based on someone having six-months or less to live, by replacing it with a new 12-month definition. This Clause will also amend the definition of terminal illness, within the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013, which is currently based on someone having six-months or less to live, to align with the new 12-month definition. Clause 2 of the Bill states that the full Bill extends to Scotland. Clause 2 will come into force on the day on which the Bill is passed and clause 1 comes into force on such day as the Secretary of State may be regulations appoint. Clause 2 also provides that such commencement regulations for clause 1 may contain such transitional, transitory or saving provision as the Secretary of State considers appropriate.

4. The proposed Bill has arisen from the DWP's Green Paper published in July 2021: 'Shaping Future Support: The Health and Disability Green Paper'. As a result of consultation with stakeholders, including clinicians, DWP have concluded that a 12-month definition of terminal illness is fairer than the current six-month definition and aligns with the definition of terminal illness used by the NHS.

Provisions which relate to Scotland

5. Clause 1 of the Bill amends section 66 of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act") for AA and DLA, and section 82 of the Welfare Reform Act 2012 ("the 2012 Act") for PIP, to change the definition of terminal illness to be when a person suffers from a progressive disease and their death in consequence of that disease is reasonably expected to be within 12 months, rather than 6 months. AA, DLA and PIP are all benefits that fall within devolved competence by virtue of section 22 of the Scotland Act 2016, which amended schedule 5 to the Scotland Act 1998.

6. Clause 1 will also amend the definition of terminal illness within the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013, which is currently based on someone having six-months or less to live, to align it with the new 12-month definition. This, so far as it relates to PIP, would fall within devolved competence.

7. Clause 2 of the Bill states that the full Bill extends to Scotland, and gives details of commencement. Clause 2(2) states that clause 1 will be commenced by way of regulations, and clause 2(3) gives a power to the Secretary of State to make provision, when commencing clause 1 of the Bill, to make such transitional, transitory or saving provision as the Secretary of State considers appropriate.

Reasons for seeking a legislative consent motion

8. Since April 2020, the Scottish Government has had legislative competence for DLA, PIP and AA. Responsibility for these disability benefits as regards Scotland is devolved by virtue of section 22 of the Scotland Act 2016, which amended schedule 5 to the Scotland Act 1998. Agency agreements between the Scottish Government and the DWP set out that the DWP will continue to administer these benefits in Scotland in line with England and Wales. The agency agreements set out the expectation that legislation in Scotland is in alignment with any changes which take effect in the rest of the UK. As the competence to make legislation in relation to disability benefits, as they apply in Scotland, sits with the Scottish Parliament, a legislative consent motion is required in order for the UK Government to make the changes to the definition of terminal illness for the devolved benefits within the proposed Bill.

9. Co-operation is necessary to maintain the agency agreements and the delivery of our existing benefits programme. The only alternative to consenting to the UK Government making provision for Scotland in its Bill is to bring forward equivalent Scottish primary legislation. The Scottish Government considers that seeking to

progress primary legislation on an expedited basis in the Scottish Parliament generates risk and would not be appropriate in these circumstances. Such primary legislation would be required to come into force at the same time as the UK Bill, in order for clients in receipt of the affected benefits in Scotland to be treated in the same way as clients in the rest of the UK. This would entail truncated development time, truncated parliamentary scrutiny and the need to request truncated Royal Assent, all of which would generate significant risk.

Consultation

10. There has not been sufficient time to consult stakeholders on this LCM. However, since the publication of the Scottish Government's Consultation on Disability Assistance in 2019, extensive engagement has been undertaken on the Scottish Government's definition of terminal illness, including through a specific consultation on Adult Disability Payment undertaken between December 2020 and March 2021. The departure from the six-month rule and towards a person-centred approach was developed with stakeholders and experts, including the Disability and Carer Benefits Expert Advisory Group.

11. Furthermore, the DWP have undertaken consultation on the Bill with a wide range of stakeholders, including clinicians. The Bill is not seen as controversial as it widens access to disability benefits for some terminally ill clients and brings the UK Government's definition of terminal illness further in line with the definition already used by the NHS and by the Scottish Government.

Financial implications

12. DWP estimate that the annual cost of widening their definition of terminal illness will result in DWP needing to fund an additional £112.4 million in benefit expenditure per year by 2026/27 across the UK. This comprises of an additional £68.9 million for Attendance Allowance, £40.5 million for Personal Independence Payment and Disability Living Allowance (Working Age), £2.5 million for Disability Living Allowance (State Pension Age) and £0.5 million for Disability Living Allowance (Child).

13. The LCM will not result in a material increase to the cost of the Agency Agreement under which the benefit is delivered. This is because the additional benefit expenditure resulting from the Bill will be funded via Block Grant Adjustment.

Conclusion

14. For the reasons set out above, the Scottish Government believes that the LCM is necessary and appropriate.

15. The draft motion, which will be lodged by the Cabinet Secretary for Social Justice, Housing and Local Government, is:

“That the Parliament agrees that the provisions of the Social Security (Special Rules for End of Life) Bill 2022, introduced in the House of Lords on 11 May 2022, relating to Special Rules for Terminal Illness for accessing disability benefits, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Scottish Government
May 2022

This Legislative Consent Memorandum relates to the Social Security (Special Rules for End of Life) Bill (UK legislation) and was lodged with the Scottish Parliament on 25 May 2022

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