

Social Security (Scotland) Bill Policy Paper

Funeral Expense Assistance (FEA) Illustrative Regulations and Policy Narrative

November 2017

**SOCIAL SECURITY (SCOTLAND) BILL
POLICY PAPER**

**FUNERAL EXPENSE ASSISTANCE (FEA)
ILLUSTRATIVE REGULATIONS AND POLICY NARRATIVE**

NOVEMBER 2017

INTRODUCTION

The Scotland Act 2016 devolved new social security powers to Scotland. Our paper *Creating a Fairer Scotland: A New Future for Social Security in Scotland*, which was published in March 2016, set out the Scottish Government's vision, key principles for the future of social security using these devolved powers, and intention to establish an agency within the Scottish Government family to deliver the devolved benefits. The enabling legislation for this, the Social Security (Scotland) Bill, was laid before the Scottish Parliament on 20 June 2017 and is currently undergoing Stage 1 of the Parliamentary scrutiny process.

A series of position papers have been provided to the Social Security Committee setting out current policy thinking on key matters to be examined during Stage 1 of the Bill. Alongside these, illustrative regulations are being provided to the Committee to give an idea of how we intend to use the powers in the Social Security Bill to take forward Funeral Expense Assistance (FEA). Illustrative regulations for Best Start Grant have already been shared with the Committee.

The FEA illustrative policy and regulations reflect the product of analytical evidence, and discussions to date with stakeholders. These illustrative regulations do not have any status beyond offering an example to inform the debate. The Scottish Government will continue to develop FEA policy working with the people who will apply for and receive support to understand their needs, in order to deliver this benefit by summer 2019.

The position papers and illustrative regulations already provided can be found at: <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/105188.aspx>

CONSULTATION

The Social Security in Scotland Consultation ran from July to October 2016. This included ten questions on the current DWP Funeral Payment. The most responses to a question was 156, the lowest 66. We have established a Funeral Payment and Funeral Poverty Reference Group that brings together a range of stakeholders from the public, private, and third sector, to support the development of the FEA. FEA and operational policy will be informed by consultation responses, and by the views of our reference group, previous applicants and potential users. Going forward, we will be taking in to account views from the Experience Panels.

The illustrative regulations reflect the product of analytical evidence and discussions to date, but are not necessarily the final position on FEA policy. The regulations set

out key policy decisions that have been made, for example on eligibility and the format of the payment. We are still developing policy on the detail of the payment and how this will be implemented, although major changes that have an impact on financial planning would need careful consideration.

Parliament will be asked to consider the FEA regulations in 2019, there will be a public consultation on these regulations before they are laid. These regulations will be updated to reflect any changes to the Bill; stakeholder views and developments in service design. The Scottish Government has already indicated that, with the exception of a small number of areas that mostly deal with administrative matters, regulations that are made under the Social Security Bill will be subject to the affirmative procedure, which will allow for full scrutiny.

POLICY OBJECTIVES

Following the devolution of Parliamentary competence for the Funeral Expenses Payment (more commonly known as the Funeral Payment) in the Scotland Act 2016, Scottish Ministers will use powers in the Social Security Bill to create a new benefit, Funeral Expense Assistance (FEA).

The Scottish Government recognises the impact of rising funeral costs on families on low incomes and the long term effect this can have on their finances and on how they experience grief. The Scottish Government has already set out a range of actions that we will take to tackle funeral poverty during this parliamentary term in the [Funeral Costs Plan](#)¹ which was published in August 2017. As well as improving the availability of affordable funeral options, the Scottish Government wants to provide support directly to those who need it most at the point of bereavement. A key way we will do this is by delivering FEA by summer 2019.

The policy objective of FEA is to provide a one off payment to support people on low income benefits by providing a contribution towards the cost of a funeral. FEA is intended to help improve the outcomes for families or friends of the deceased by alleviating the burden of debt they may face when paying for a funeral.

The Scottish Government wants to ensure that the process to determine eligibility and provide support is handled as sensitively as possible. We also want to reach more people with the benefit, improve the application process and make eligibility clearer to people in advance of application. We have already committed to processing completed FEA applications within 10 working days, responding to feedback that the current DWP process takes too long to reach a decision.

Prior to launch, a communication strategy will be developed to ensure that applicants and the services that they come in to contact with and might seek support from, are aware of the new benefit; their entitlement; and how they can access it.

¹ <http://www.gov.scot/Publications/2017/08/6243/0>

THE POTENTIAL ROLE OF THE CHARTER

The Bill places a statutory duty on Scottish Ministers to develop a Social Security Charter that reflects the key principles set out in section 1 of the Bill. These principles are derived from key aspects of the human right to social security. This idea of a publicly accessible charter, communicating in clear terms what people are entitled to expect from the new system, received strong support both in response to the Consultation on Social Security in Scotland, and in wider public and stakeholder engagement. The Scottish Government has since committed to developing the charter in partnership with the people of Scotland and has made express provision for this on the face of the Bill.

The specific nature and content of the charter will be a product of this co-design process. Subject to the outcome of this co-design, it is also possible that the commitments made in the charter might include specific matters such as timeframes relating to processing claims or similar indicators.

FORMAT OF THE ILLUSTRATIVE REGULATIONS

The intention is that regulations will contain all relevant provisions for that type of assistance, including cross cutting provisions such as those for residence and re-determinations.

INTRODUCTORY AND INTERPRETATION

These sections specify the date of commencement and definitions used in the regulations, such as the definition of a partner and of a funeral. The full text is at Annex A.

ELIGIBILITY

Eligibility for FEA will be determined using a series of tests carried out when a completed application is received by the Social Security Agency:

- **Applications** – whether the application is made in the format required and during the permitted application window.
- **Relationship to the person who has died and financial responsibility for the funeral** - the event triggering the payment. In the case of FEA this is the applicant paying for a funeral where they are the nearest relative or friend of the person who has died.
- **Residence** – applicant requirement to be habitually resident in Scotland, and for the deceased to have been ordinarily resident within the UK.
- **Qualifying benefit** – an award of a qualifying benefit having been made to the applicant or their partner.

APPLICATIONS

Illustrative regulations:

Applications

- 3.—(1) A person who applies for funeral expense assistance (the “applicant”) is entitled to receive it if that person—
- (a) applies within the period described in regulation 4, and
 - (b) meets the conditions prescribed in these Regulations.
- (2) Regulations 5 and 6 describe eligibility conditions relating to the applicant’s relationship to the deceased person and multiple applications.
- (3) Regulation 7 describes eligibility conditions relating to the applicant’s residence, the last residence of the deceased person and the place where the funeral takes place.
- (4) Regulations 8 and 9 describe eligibility conditions relating to the financial means of the applicant, based on receipt of income related benefits, and of the estate of the deceased person.
- (5) An application is to be treated as made on the day it is received by the Scottish Ministers.
- (6) For the avoidance of doubt, a thing that purports to be an application is not an application unless it is—
- (a) made in the form, and
 - (b) accompanied by the evidence, required under section 20(1) of the Social Security (Scotland) Act 2018.

The aim is to make it as easy as possible for eligible people to take up their entitlement for an FEA payment. The Scottish Government will work with people with experience of the system throughout the process of service design to achieve this, including during development of application channels. Information on how to apply for devolved benefits will be fully and widely accessible in whatever form users need. The detail of these is still to be determined in conjunction with users. One of the key differences between our social security delivery and the existing system will be the strong local presence across Scotland. Local agency staff will provide pre-claims advice and support to people on the benefits it delivers and related support they may be entitled to.

Valid Application – There will be certain conditions that need to be met to determine that a valid claim has been made, for example the form in which it is made and evidence required to support the claim. Relevant processes for this and for situations where the form does not meet the requirements will be set out once service design is further progressed. We do not envisage that they will be included in regulations, to allow for a flexible and responsive system.

Evidence - Evidence requirements and processes to underpin collection to establish whether applicants meet eligibility conditions are under development. This includes opportunities for using existing data sources, including data sharing with the Department for Work and Pensions (DWP) and Her Majesty's Revenue and Customs (HMRC). Processes for requesting and collecting any additional evidence required to make a decision will also be required. Evidence requirements will be clearly communicated to applicants but we do not expect that they will be set out in regulations. This enables the Agency to more easily keep step with changes in technology, culture and practice, and to amend the application process to take account of users’ needs and preferences. It is expected that the evidence required

will be set out in guidance which will be available for decision makers, applicants, and the public to clearly explain what is required.

Second Application - Section 20 of the Bill precludes two applications being made by the same person in respect of the same event. However, we anticipate that there may be situations where two applications might legitimately be made for the same FEA payment (event). For example, where the applicant has applied at the beginning of an application window and does not meet the eligibility requirements but applies again later in the window, outside the allowed time to request a re-determination, and meets the criteria at that point. We are considering options for providing for this sort of situation.

Date of Application – This is the date on which a completed application is received by the Agency. Once service design is further progressed, there may be some further regulations in this area that smooth the application process for applicants and increase the efficiency of the social security system by reducing the need to handle applications repeatedly. For example, it may be possible to make provision for situations where an applicant is not on a qualifying benefit during the FEA application window but are awaiting the result of an awarded of a qualifying benefit, if that award is backdated to within the period within the FEA application window.

Illustrative regulations:

Period for applications

- 4.—(1) A person is not entitled to funeral expense assistance unless an application for that assistance is made within the period described in this regulation.
- (2) No application for funeral expense assistance may be made prior to the date on which the person whose funeral is being arranged becomes deceased.
- (3) No application for funeral expense assistance may be made after the day falling six months after the day on which the funeral takes place.
- (4) In calculating the end of the period for an application where the day of the month on which the funeral takes place is the 29th, 30th or 31st, and the month falling six months after that month does not have such a date, the period ends on the last day of the later month

Application Window - The application window for FEA opens on the date of death of the person whose funeral is being arranged and closes six months after the date of the funeral. An FEA application can be made at any point during this window.

The current DWP Funeral Payment application window is three months but this will be extended to six months, matching the Scottish FEA. This change is expected to take place as of April 2018. At present, DWP allows decision makers to accept applications in exceptional circumstances for up to one year after the date of the funeral. However, it has been suggested that this discretion can lead to inconsistent decision making. Given that the length of the FEA application window will be three months longer than the Funeral Payment application window has been historically, the Scottish Government is considering whether having this longer window but no discretion to accept late applications would be more in keeping with the Scottish Government's rights based approach to entitlement. We will explore the suitability of taking this approach further with stakeholders and previous applicants as we continue to refine policy for FEA.

In the event of an individual applying because they are expecting to have responsibility for a funeral but the person has not yet died, the applicant would be informed of the application process and evidence required. Applications submitted for a funeral where the person has not yet died would not be valid, as circumstances and eligibility may change prior to the application window commencing.

Timescale to make a determination – The Scottish Government has made a commitment that FEA applications will be processed within ten working days of receipt of a completed application, and payment made as soon as practicable thereafter. This responds to concerns that have been raised by organisations and individuals that the current DWP assessment process takes too long. This commitment will provide additional certainty for applicants and funeral directors about when a payment will be made.

The Scottish Government will collect management information for FEA in a number of areas, including on performance against the ten day processing commitment and is considering the most appropriate means of reporting this information. This will allow FEA policy to be reviewed in the future using a robust evidence base.

Notification of a Determination - Section 22 of the Social Security Bill sets out required content of a notice of determination:

- the determination;
- reasons for it;
- the right to a re-determination; and
- the right to appeal to a tribunal.

The Scottish Government does not propose to set out further detail on this matter in regulations. The policy intent is for applicants to have a lasting record of the determination on their application or re-determination that they can use. For example, to discuss with an adviser or to check their rights to re-determination. The Scottish Government will consider options for meeting this need further and will engage with users and welfare rights organisations to devise a solution.

RELATIONSHIP TO THE PERSON WHO HAS DIED

Illustrative regulations:

Relationship to deceased person

5.—(1) To qualify for funeral expense assistance the applicant, or the partner of the applicant, must have accepted responsibility for the expenses of the funeral, and the Scottish Ministers must consider it to be reasonable for that responsibility to have been accepted.

(2) In determining whether it was reasonable to accept responsibility, the Scottish Ministers must consider—

- (a) whether someone other than the applicant, or the partner of the applicant, would be the nearest relative of the deceased person in terms of section 65(3) to (6) (arrangements on death of adult) of the Burial and Cremation (Scotland) Act 2016; and
- (b) any other relevant circumstances that the applicant brings to their attention.

(3) Where the deceased person was under 16 years of age on the day of his or her death, or was a still-born child, for the purposes of paragraph (2)(a) regard is to be had to section 66(3) to (5) (arrangements on death of child) of the Burial and Cremation (Scotland) Act 2016 instead of section 65(3) to (6).

The Scottish Government's policy intention is that eligibility will in part depend on the familial relationship or friendship that the applicant had with the person who has died.

Currently, the DWP makes the decision about who is the appropriate person to take responsibility for arranging the funeral by asking the applicant a series of questions about their relationship with the person who has died. We have heard from people with experience of the system that the questions asked to determine whether someone is estranged from the deceased are intrusive and distressing. The questions also extend the length of the Funeral Payment application form and ask questions where applicants may not have access to the information required. For example, the financial status of other family members. If there is another immediate family member not on a qualifying benefit then the DWP would seek further information from the applicant about that family member and it is likely the applicant would not be eligible to receive the Funeral Payment as the DWP would conclude that there is another person who could take financial responsibility for the funeral.

The Scottish Government has been looking at ways to make this process less intrusive, to avoid having to make judgements about family relationships, and to make it clearer in advance who is eligible for FEA. Some stakeholders have proposed that eligibility for FEA should be based on the lists included in the [Burial and Cremation \(Scotland\) Act 2016 s65 'Arrangements on the death of adult'](#), and [s66 'Arrangements on death of child'](#). These set out who is the nearest relative of the person who has died, so it is clearer who would make the arrangements for the burial or cremation.

Following policy development, the Scottish Government has decided to use the lists from the Burial and Cremation (Scotland) Act 2016 as part of the process to determine eligibility for FEA. In addition to using the family relationship lists in this Act, a key difference from the current DWP Funeral Payment process is that if there was another family member in the same level of the list as the applicant we would

not ask the applicant questions about the other person's circumstances in order to consider whether the other family member should take financial responsibility for the funeral. Instead we would accept that the applicant is an appropriate person to take financial responsibility for the funeral.

Our forecast suggests that making these changes will significantly widen eligibility for FEA with an estimated additional 2,000 FEA payments being made each year, extending FEA support to more people on low incomes. This will take the total number of payments to approximately 5,600 per annum, once a steady state is reached.

Illustrative regulations:

Multiple applications

6.—(1) Where two or more persons accept responsibility for the expenses of the funeral, and apply for funeral expense assistance, the Scottish Ministers must consider which of the persons is the nearer (or nearest) relative of the deceased person, applying the approach described in regulation 5(2)(a).

(2) The Scottish Ministers must determine the application by the nearer relative before they determine any other application for assistance.

(3) Where, in applying paragraph (1), two or more applicants for assistance rank equally as the nearer relative and are not in agreement as to which application is to be progressed, the Scottish Ministers must decide which application is to be progressed first.

(4) Where a determination is made to give a person funeral expense assistance in respect of a funeral, only that person is eligible for such assistance in respect of the expenses of a funeral of the deceased person.

(5) Where the Secretary of State decides to make a funeral payment within the meaning of the Social Fund Maternity and Funeral Expenses (General) Regulations 2005(a) or the Social Fund Maternity and Funeral Expenses (General) Regulations (Northern Ireland) 2005(b), no person is eligible for funeral expense assistance to meet, or help meet, expenses of a funeral in respect of the deceased person.

A maximum of one FEA payment will be made per funeral. Where two or more people apply for a payment, the Scottish Government will consider the application by the nearer relative first, if one is a nearer relative than the other (using the tests already described above).

The Scottish Government recognises that there are some sensitive, practical, and complex issues that DWP face in relation to family estrangement; and in relation to multiple applications being submitted when family members cannot agree who should arrange the funeral. The illustrative regulations provide that the Scottish Government will take the decision about who is appropriate to be responsible for the funeral in difficult cases such as these.

We will undertake further work, including engagement with stakeholders, to determine how to handle these difficult cases sensitively and appropriately during the application process. The Scottish Government welcomes views on alternative ways to resolve difficult cases sensitively.

Where a payment has already been made by DWP or NISSA for a funeral, no FEA payment will be made by the Scottish Government for that funeral.

RESIDENCE

Illustrative regulations:

Residence conditions and place of funeral

- 7.—(1) To qualify for funeral expense assistance, the applicant must be habitually resident in Scotland at the date of their application for that assistance.
- (2) The applicant is not entitled to that assistance unless—
- (a) the deceased person was ordinarily resident in the United Kingdom at the date of his or her death; and
 - (b) the place of the funeral is in the United Kingdom, or in a case where paragraph (3) applies, in a member state of the EU, Iceland, Liechtenstein, Norway or Switzerland.
- (3) This paragraph applies where the applicant is, or has a partner who is—
- (a) a worker or a self-employed person for the purposes of Council Directive No. 2004/38/EC;
 - (b) a person who retains the status of a worker or a self-employed person pursuant to Article 7(3) of that Directive;
 - (c) a person who is a family member of a person referred to in sub-paragraph (a) or (b) within the meaning of Article 2 of that Directive; or
 - (d) a person who has the right to reside permanently in the United Kingdom by virtue of Article 17 of that Directive.

The policy intention is that eligibility will depend on an applicant being habitually resident in Scotland. This is in line with common practice in jurisdictions across the Common Travel Area (CTA) and in the European Union. In addition, the policy intention is that the deceased will have been ordinarily resident within the UK. This achieves consistency with the DWP approach and reduces the possibility of gaps in eligibility or double claiming.

In practice, residence conditions attached to each of the qualifying benefits may be sufficient to establish Scottish residence and we do not anticipate a significant evidence burden on applicants, especially where they are coming to Scotland from other CTA jurisdictions, in line with the reciprocal approach that is currently taken.

QUALIFYING BENEFITS

Illustrative regulations:

Qualifying benefits

8. To qualify for funeral expense assistance the applicant, or the partner of the applicant, must, at the time of application, have been properly awarded—

- (a) income support under section 124 of the Social Security Contributions and Benefits Act 1992;
- (b) state pension credit within the meaning given by section 1(1) of the State Pension Credit Act 2002;
- (c) income-based jobseeker's allowance within the meaning of the Jobseekers Act 1995;
- (d) working tax credit where the disability element or the severe disability element of working tax credit as specified in regulation 20(1)(b) and (f) of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 is included in the award;
- (e) child tax credit which includes an individual element or a disability element referred to in section 9(3) of the Tax Credits Act 2002;
- (f) housing benefit within the meaning of section 123 of the Social Security Contributions and Benefits Act 1992;
- (g) income-related employment and support allowance under Part 1 of the Welfare Reform Act 2007, or
- (h) universal credit under Part 1 of the Welfare Reform Act 2012.

Qualifying benefits - As a proxy for being on a low income, FEA payments will be made to applicants where either they or their partner have been awarded a qualifying DWP or HMRC payment of:

- Income Support (IS)
- Income based Job Seekers Allowance (JSA)
- Income related Employment and Support Allowance (ESA)
- Pension Credit (PC)
- Child Tax Credit (CTC)
- Disability or severe disability element of Working Tax Credit
- Universal Credit (UC)
- Housing Benefit (HB)

The Scottish Government is considering how to deal with the practicalities of varying UC entitlement month on month. This will require some further work to understand the implications for service design before a decision is made on a solution.

Council Tax Reduction - Some consultation responses suggested that eligibility for FEA should be extended to include receipt of Council Tax Reduction as a qualifying criterion. The Scottish Government has considered making this change to eligibility as part of the policy development process that has taken place for FEA to prepare these illustrative regulations. Widening eligibility to include CTR is not considered to improve the targeting of FEA to assist those on low incomes and would add a number of additional complexities, risks, and costs. The Scottish Government has therefore decided not to widen eligibility for FEA to include CTR.

Younger applicants - We are aware there could be issues around the eligibility of younger applicants, partly around their ability to be in receipt of a qualifying benefit,

and partly around their ability to enter into a contract for services with funeral directors. We expect to develop policy on this matter further through engagement with appropriate stakeholders as part of the service design process.

Linking eligibility to the financial circumstances of the person who has died -

The Scottish Government did also consider making a significant change to the operation of FEA compared to the DWP Funeral Payment by basing eligibility for the payment on the person who has died having been in receipt of a qualifying benefit at the point of their death, rather than the financial circumstances of the applicant. It was suggested that this would improve certainty around eligibility and be easier to communicate to applicants.

There are considered to be a number of risks associated with making this change. The policy intent of FEA is to provide support to those on low incomes with the costs of a funeral. Changing eligibility to base this on the financial circumstances of the deceased person is not considered to be consistent with this policy intent. Some people who are not in need of support would have become eligible for the payment while other people on low income benefits who were arranging a funeral would not be eligible if the person who had died was not in receipt of a qualifying benefit. Making this change was also considered to be problematic in terms of alignment with the Funeral Payment administered by NISSA and DWP so that some people who would receive a payment at present would not be eligible under any of the systems. The Scottish Government has therefore decided to maintain eligibility based on the applicant being in receipt of a qualifying benefit.

Illustrative regulations:

Estate of deceased person

9.— (1) A person is not entitled to funeral expense assistance if assets of the deceased are available and sufficient to meet the costs of a funeral.

(2) For the purpose of paragraph (1) any lump sums due to the applicant or others by virtue of any insurance policy, occupational pension scheme, burial club, or similar scheme may be considered an asset of the deceased.

This section of the illustrative regulations makes clear that where it is possible to access assets of the deceased to meet the cost of the funeral then these should be used rather than an FEA payment being made. There are likely to be situations where after an FEA payment has been made it becomes apparent that the estate of the deceased person could have been used to pay for the funeral arrangements. In this instance, the Scottish Government would expect to recover the payment from the estate and we are looking at how this can be achieved in practice.

ASSISTANCE TO BE GIVEN

Illustrative regulations:

Calculation and form of funeral expense assistance

10.—(1) The funeral expense assistance to be given is an amount calculated in accordance with regulation 11, less any applicable deductions provided for by regulation 12.

(2) Funeral expense assistance is to be given as money (subject to paragraph (3)).

(3) If—

(a) the Scottish Ministers offer to give an individual some or all of the value of funeral assistance in a form other than money; and

(b) the individual accepts the offer, the assistance is to be given in the form offered.

How assistance will be paid – We anticipate that the majority of awards will be made in the form of a payment into a bank or credit union account. The intention is that no other form of payment will be imposed on an applicant without their consent but the applicant cannot choose an alternative to cash unless it is offered by the Agency.

We understand that currently DWP makes the Funeral Payment directly to the funeral director on behalf of the applicant in many cases. However, the applicant can specifically request the payment to be made to them if they wish. This process provides the funeral director with a reassurance of payment for their services if the applicant is successful in their Funeral Payment application; and reduces the administrative burden on the applicant to forward on their award to help reduce, or clear, any outstanding debt for the funeral service. The Scottish Government will engage with the funeral industry and with individuals as we continue to develop FEA to devise an appropriate payment process.

Appointees - There are likely to be situations where the Agency will want to make an appointee to act on behalf of the applicant, for example where the applicant does not have the capacity to act on their own behalf. We are looking at how this can be achieved.

Illustrative regulations:

Amount of funeral expense assistance

- 11.—(1) The amount of funeral expense assistance is—
- (a) an amount calculated by reference to the costs which the person assisted incurs in arranging the funeral, so far as reasonable and of the types described in paragraph (2); and
 - (b) a payment of £700, except where paragraph (7) applies.
- (2) The types of funeral costs for which assistance is given are the costs of—
- (a) burial (see paragraph (4)) or cremation (see paragraph (5));
 - (b) obtaining any documents to release assets of the deceased person for the purposes of regulation 12 (deductions from an award);
 - (c) transport within the United Kingdom from the place where the body is situated to a funeral parlour, to the deceased person's last residence, or to another place where it is appropriate for the body to lie prior to the funeral, plus a return journey, but not including the first 80 kilometres of travel;
 - (d) subject to paragraph (3), vehicular transport for the coffin and bearers, and one additional vehicle, from the funeral director's premises or place where the body is lying to the funeral, plus a return journey, but not including the first 80 kilometres of travel;
 - (e) one return journey by the person assisted either for the purpose of making arrangements for the funeral or for attendance at the funeral, but not exceeding the cost of a return journey from the person's home to the place of burial or cremation.
- (3) Where assistance is given for burial or cremation costs under paragraph (2)(a), no assistance is to be given for transport costs under paragraph (2)(d) unless—
- (a) the distance travelled necessarily exceeds 80 kilometres, or
 - (b) in the case of a burial, where no costs have been incurred for purchase of a burial plot under paragraph (4)(a), the distance travelled exceeds 80 kilometres.
- (4) For a burial, the costs are—
- (a) the cost of a new burial plot with a right of burial in it;
 - (b) fees levied by the local authority or person responsible for the operation of burials in the area where the burial takes place;
 - (c) the cost of grave-digging;
 - (d) if required, the cost of any medical references and of certificates from a registered medical practitioner.
- (5) For a cremation, the costs are—
- (a) fees levied by the local authority or person responsible for the operation of crematoriums in the area where the cremation takes place;
 - (b) the cost of any medical references and of certificates from a registered medical practitioner;
 - (c) the fee for removal of any active implantable medical device, within the meaning of the Medical Devices Regulations 2002(), subject to a limit of £20 where the removal is not carried out by a registered medical practitioner.
- (6) Where a deceased person is not buried or cremated in the area in which they lived, and the costs of their burial or cremation exceed those that would have applied had the burial or, as the case may be, cremation taken place in that area, no assistance is to be given for those additional costs.
- (7) Where the deceased person has left provision of the type described in regulation 9(2), the payment in paragraph (1)(b) is £120.

The FEA payment is made up of two elements:

1) Burial or Cremation costs. This will be available to all eligible applicants, and may include costs of burial or cremation. It may also include the cost of any documents that are required to allow the burial and cremation (such as a doctor's certificate) to take place. Some other costs may also be included in this element of the payment, for example certain travel costs.

AND

2) A contribution for other expenses. This may include any other funeral expenses such as funeral director fees, a coffin, and flowers. The amount of other expenses will either be -

- £700 for the majority of eligible applicants where the deceased had no funeral provision in place; **or**
- £120 will be provided to eligible applicants where the deceased had made incomplete provision for their funeral such as a funeral plan or funeral insurance.

The element of the DWP Funeral Payment that currently pays for burial or cremation costs also includes some other costs, including travel in certain circumstances. Travel costs outwith these specified circumstances fall under the other expenses element of the payment. The Scottish Government is considering whether to make any changes to the process for travel costs as this appears quite complex and difficult for applicants to understand at present. As with other changes we are considering making to the benefit, we will seek the views of stakeholder organisations and individuals with experience of the present system as we decide what to do about this issue.

A number of stakeholders and consultation responses suggested that the element of the FEA payment for other expenses should be increased above the £700 maximum currently paid by the DWP which has been in place since 2003.

The Scottish Government has considered increasing the amount payable for other expenses as part of the policy development process that has taken place for FEA to prepare these illustrative regulations. In doing so, we are balancing widening eligibility for FEA to assist more of those in need with the overall amount of the payment. This change is expected to result in approximately 2,000 additional payments per year. This is a 56% increase compared to the current DWP Funeral Payment and is the best way of assisting more of those in need who would otherwise receive no support at all.

Illustrative regulations:

Deductions from an award of funeral expense assistance

12.—(1) There is to be deducted from the amount of funeral expense assistance any funds or contribution which is available towards meeting the expense of the funeral from—

- (a) any assets of the deceased person which are available without confirmation having been granted, or (elsewhere in the United Kingdom) without probate or letters of administration, but ignoring any assets described in paragraph (2);
- (b) any pre-paid funeral plan, insurance policy, occupational pension scheme, burial club, or similar scheme or arrangement;
- (c) a funeral grant, made out of public funds, in respect of the deceased person having been entitled to a war disablement pension within the meaning of section 17 of the State Pension Credit Act 2002(b).

(2) For the purposes of paragraph (1)(a), the following sums payable to the estate of the deceased are to be ignored—

- (a) arrears of any benefit under any enactment relating to social security in any part of the United Kingdom;
- (b) any payment made by a body described in regulation 10(2) of the Social Fund Maternity and Funeral Expenses (General) Regulations 2005; [i.e. the DWP scheme; to be set out at length in regs when made, based on the DWP scheme at that time]
- (c) arrears of any assistance provided for by regulations under Parts 2 or 3 of the Social Security (Scotland) Act 2018, or under section 47 (carer's allowance supplement) of that Act.

Where funds are available from the estate of the person who has died to pay for the funeral these should be used and will be deducted from a payment. Similarly, if the deceased had made provision through a funeral plan, insurance or similar for their funeral, then this provision should be used for the funeral and deducted from the payment. This will help to ensure that an applicant does not receive double funding for the funeral.

If the applicant is also in receipt of a DWP Bereavement Support Payment (lump sum and ongoing monthly payments) this would not be deducted from the FEA payment amount.

RE-DETERMINATIONS AND APPEALS

The policy intent for re-determinations is to provide a right for individuals to challenge a determination, should they disagree with it. The re-determination process will see the agency put aside the original determination and a different independent officer will go through the entire process of making a new determination rather than just examining whether the original decision was right. The individual will be able to ask for a re-determination without having to supply further evidence, but the agency will take into consideration any new evidence provided. If the individual is still dissatisfied with the re-determination outcome, following this new consideration of their full case, or if it has not been done within the prescribed timescales, they are able to take their claim to the First-tier Tribunal in the Scottish Tribunals.

The re-determinations approach is to focus on getting the decision right, have clearly published procedures and timescales for challenging decisions with meaningful redress as well as having processes in place for the agency to put things right

quickly where there has been an error. The detailed service design and modelling work to co-design the new processes for challenging decisions; working with Experience Panels, users and stakeholders has now started. Once this has been done, we will be in a position to share relevant timescales for requesting and processing re-determinations as set out in Sections 23 and 24 of the Bill which, unlike the DWP system, will allow a person to make an appeal without further delay if the timescale isn't met.

OVERPAYMENTS AND FRAUD

Policy on overpayments and fraud for FEA will follow wider policy for the Social Security Agency. We are considering whether there are any specific requirements for FEA.

The Scottish Government is taking a considered approach to overpayment recovery. This approach will ensure the individual's rights are respected throughout the process, while also ensuring the proper stewardship of public funds by making certain that the right payments are made at the right time to the right people. This will be done by minimising errors and detecting and correcting any errors that do occur quickly. However, it is reasonable to anticipate some errors will be made by both the Social Security Agency and individuals in receipt of assistance.

Where overpayments are made as a result of agency error, they will not be pursued unless under exceptional circumstances, such as a very large and obvious overpayment. Also, before overpayment recovery is pursued, officials must have regard to the individual's financial circumstances, but they will also take account of other circumstances they consider relevant. The key principles guiding recovery decisions will be that no-one is placed into undue hardship and that people should at all times be treated with dignity and respect. We are currently considering safeguards, such as the concept of a 'minimum income floor', which would determine whether Ministers would seek recovery of an overpayment.

The Scottish Government has been clear that a zero-tolerance approach to social security fraud will be taken. Equally important, however, is that individuals will be treated with dignity and respect. Therefore, while suspicions of fraud will be treated sensitively under a presumption of innocence, action should be taken when fraud has actually occurred.

IMPACT ASSESSMENT

Relevant impact assessments are being developed and will be consulted on alongside draft regulations.

The Scottish Government expects to make an estimated additional 2,000 FEA payments annually due to widened eligibility of FEA compared to the current Funeral Payment. Therefore we expect to reach more low income families and individuals with this support, helping to reduce the debt burden that they face and, in turn, helping to reduce funeral poverty.

The Scottish Government has already begun engagement to understand the impact of FEA on particular groups, for example due to gender or faith. The Scottish

Government is also committed to encouraging increased take up of FEA compared to the Funeral Payment and is continuing to look at how we can improve the reach of the FEA. Good communication, building on third sector networks will be particularly important to reach groups who are not always in touch with mainstream services.

The Scottish Government will also consider any financial effects of FEA on either local government or on business from the proposed instrument as FEA continues to be developed.

FINANCIAL EFFECTS

Once a steady state is reached, estimated expenditure on FEA is forecast to be approximately £8.3 million per annum based on around 5,600 FEA payments. Due to the widening of eligibility in Scotland compared to England and Wales, expenditure is forecast to be approximately £3 million higher than if the DWP Funeral Payment had remained in place. This is around a 60% increase on top of the budget that is likely to be transferred from DWP in order to fund this widening of eligibility.

The Scottish Government's decision to widen eligibility for FEA is expected to reduce the number of families facing unsustainable debt as a result of arranging a funeral that they cannot afford.

The transfer of the social security powers will require the implementation of new infrastructure and systems to support their delivery. Administration costs for FEA form part of wider financial planning for the new agency.

Scottish Government
Directorate for Social Security
Social Security Policy Division
November 2017

These illustrative regulations have been prepared to assist the Parliament in considering SP Bill 18 Social Security (Scotland) Bill [as introduced] Session 5 (2017). The terms of this draft do not reflect settled Scottish Government policy. A further draft will be prepared for consultation purposes.

ILLUSTRATIVE SCOTTISH STATUTORY
INSTRUMENTS

2019 No.***

SOCIAL SECURITY

The Funeral Expense Assistance (Scotland) Regulations 2019

Made - - - - - *** 2019
Coming into force - - - - - *** 2019/20

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These illustrative regulations have been prepared to assist the Parliament in considering SP Bill 18 Social Security (Scotland) Bill [as introduced] Session 5 (2017). The terms of this draft do not reflect settled Scottish Government policy. A further draft will be prepared for consultation purposes.

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 17 of the Social Security (Scotland) Act 2018(a) and all other powers enabling them to do so.

PART 1

Introductory

Citation and commencement

1. These Regulations may be cited as the Funeral Expense Assistance (Scotland) Regulations 2019 and come into force on *** 2019.

PART 2

Interpretation

2. In these Regulations—

“applicant” means a person who has applied for funeral expense assistance;

“burial” does not include burial of ashes, where a person’s remains have been cremated;

“determination” means a determination of an individual’s entitlement under section 19 of the Social Security (Scotland) Act 2018;

“funeral” means a burial or a cremation of a deceased person, or of a still-born child within the meaning given by section 56(1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965(b);

“partner” means—

(i) where a person is living together with a spouse or civil partner, that other person;

(ii) where a person is living together with a person as a married couple, that other person.

PART 3

Eligibility

Applications

3.—(1) A person who applies for funeral expense assistance (the “applicant”) is entitled to receive it if that person—

(a) applies within the period described in regulation 4, and

(b) meets the conditions prescribed in these Regulations.

(2) Regulations 5 and 6 describe eligibility conditions relating to the applicant’s relationship to the deceased person and multiple applications.

(3) Regulation 7 describes eligibility conditions relating to the applicant’s residence, the last residence of the deceased person and the place where the funeral takes place.

(4) Regulations 8 and 9 describe eligibility conditions relating to the financial means of the applicant, based on receipt of income related benefits, and of the estate of the deceased person.

(a) 2018 asp xx. [Footnoting has mostly not been completed for other statutory references in this illustrative draft.]

(b) 1965 c.49, which is amended by section 1(2) of the Still-Birth (Definition) Act 1992 (c.29).

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(5) An application is to be treated as made on the day it is received by the Scottish Ministers.

(6) For the avoidance of doubt, a thing that purports to be an application is not an application unless it is—

- (a) made in the form, and
- (b) accompanied by the evidence,

required under section 20(1) of the Social Security (Scotland) Act 2018.

Period for applications

4.—(1) A person is not entitled to funeral expense assistance unless an application for that assistance is made within the period described in this regulation.

(2) No application for funeral expense assistance may be made prior to the date on which the person whose funeral is being arranged becomes deceased.

(3) No application for funeral expense assistance may be made after the day falling six months after the day on which the funeral takes place.

(4) In calculating the end of the period for an application where the day of the month on which the funeral takes place is the 29th, 30th or 31st, and the month falling six months after that month does not have such a date, the period ends on the last day of the later month.

Relationship to deceased person

5.—(1) To qualify for funeral expense assistance the applicant, or the partner of the applicant, must have accepted responsibility for the expenses of the funeral, and the Scottish Ministers must consider it to be reasonable for that responsibility to have been accepted.

(2) In determining whether it was reasonable to accept responsibility, the Scottish Ministers must consider—

- (a) whether someone other than the applicant, or the partner of the applicant, would be the nearest relative of the deceased person in terms of section 65(3) to (6) (arrangements on death of adult) of the Burial and Cremation (Scotland) Act 2016; and
- (b) any other relevant circumstances that the applicant brings to their attention.

(3) Where the deceased person was under 16 years of age on the day of his or her death, or was a still-born child, for the purposes of paragraph (2)(a) regard is to be had to section 66(3) to (5) (arrangements on death of child) of the Burial and Cremation (Scotland) Act 2016 instead of section 65(3) to (6).

Multiple applications

6.—(1) Where two or more persons accept responsibility for the expenses of the funeral, and apply for funeral expense assistance, the Scottish Ministers must consider which of the persons is the nearer (or nearest) relative of the deceased person, applying the approach described in regulation 5(2)(a).

(2) The Scottish Ministers must determine the application by the nearer relative before they determine any other application for assistance.

(3) Where, in applying paragraph (1), two or more applicants for assistance rank equally as the nearer relative and are not in agreement as to which application is to be progressed, the Scottish Ministers must decide which application is to be progressed first.

(4) Where a determination is made to give a person funeral expense assistance in respect of a funeral, only that person is eligible for such assistance in respect of the expenses of a funeral of the deceased person.

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(5) Where the Secretary of State decides to make a funeral payment within the meaning of the Social Fund Maternity and Funeral Expenses (General) Regulations 2005^(a) or the Social Fund Maternity and Funeral Expenses (General) Regulations (Northern Ireland) 2005^(b), no person is eligible for funeral expense assistance to meet, or help meet, expenses of a funeral in respect of the deceased person.

Residence conditions and place of funeral

7.—(1) To qualify for funeral expense assistance, the applicant must be habitually resident in Scotland at the date of their application for that assistance.

(2) The applicant is not entitled to that assistance unless—

- (a) the deceased person was ordinarily resident in the United Kingdom at the date of his or her death; and
- (b) the place of the funeral is in the United Kingdom, or in a case where paragraph (3) applies, in a member state of the EU, Iceland, Liechtenstein, Norway or Switzerland.

(3) This paragraph applies where the applicant is, or has a partner who is—

- (a) a worker or a self-employed person for the purposes of Council Directive No. 2004/38/EC;
- (b) a person who retains the status of a worker or a self-employed person pursuant to Article 7(3) of that Directive;
- (c) a person who is a family member of a person referred to in sub-paragraph (a) or (b) within the meaning of Article 2 of that Directive; or
- (d) a person who has the right to reside permanently in the United Kingdom by virtue of Article 17 of that Directive.

Qualifying benefits

8. To qualify for funeral expense assistance the applicant, or the partner of the applicant, must, at the time of application, have been properly awarded—

- (a) income support under section 124 of the Social Security Contributions and Benefits Act 1992;
- (b) state pension credit within the meaning given by section 1(1) of the State Pension Credit Act 2002;
- (c) income-based jobseeker's allowance within the meaning of the Jobseekers Act 1995;
- (d) working tax credit where the disability element or the severe disability element of working tax credit as specified in regulation 20(1)(b) and (f) of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 is included in the award;
- (e) child tax credit which includes an individual element or a disability element referred to in section 9(3) of the Tax Credits Act 2002;
- (f) housing benefit within the meaning of section 123 of the Social Security Contributions and Benefits Act 1992;
- (g) income-related employment and support allowance under Part 1 of the Welfare Reform Act 2007, or
- (h) universal credit under Part 1 of the Welfare Reform Act 2012.

(a) S.I. 2005/3061. There are amendments that are not relevant to this regulation.

(b) S.I. 2005/506. There are amendments that are not relevant to this regulation.

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Estate of deceased person

9.—(1) A person is not entitled to funeral expense assistance if assets of the deceased are available and sufficient to meet the costs of a funeral.

(2) For the purpose of paragraph (1) any lump sums due to the applicant or others by virtue of any insurance policy, occupational pension scheme, burial club, or similar scheme may be considered an asset of the deceased.

PART 4

Assistance to be given

Calculation and form of funeral expense assistance

10.—(1) The funeral expense assistance to be given is an amount calculated in accordance with regulation 11, less any applicable deductions provided for by regulation 12.

(2) Funeral expense assistance is to be given as money (subject to paragraph (3)).

(3) If—

- (a) the Scottish Ministers offer to give an individual some or all of the value of funeral assistance in a form other than money; and
- (b) the individual accepts the offer,

the assistance is to be given in the form offered.

Amount of funeral expense assistance

11.—(1) The amount of funeral expense assistance is—

- (a) an amount calculated by reference to the costs which the person assisted incurs in arranging the funeral, so far as reasonable and of the types described in paragraph (2); and
- (b) a payment of £700, except where paragraph (7) applies.

(2) The types of funeral costs for which assistance is given are the costs of—

- (a) burial (see paragraph (4)) or cremation (see paragraph (5));
- (b) obtaining any documents to release assets of the deceased person for the purposes of regulation 12 (deductions from an award);
- (c) transport within the United Kingdom from the place where the body is situated to a funeral parlour, to the deceased person's last residence, or to another place where it is appropriate for the body to lie prior to the funeral, plus a return journey, but not including the first 80 kilometres of travel;
- (d) subject to paragraph (3), vehicular transport for the coffin and bearers, and one additional vehicle, from the funeral director's premises or place where the body is lying to the funeral, plus a return journey, but not including the first 80 kilometres of travel;
- (e) one return journey by the person assisted either for the purpose of making arrangements for the funeral or for attendance at the funeral, but not exceeding the cost of a return journey from the person's home to the place of burial or cremation.

(3) Where assistance is given for burial or cremation costs under paragraph (2)(a), no assistance is to be given for transport costs under paragraph (2)(d) unless—

- (a) the distance travelled necessarily exceeds 80 kilometres, or
- (b) in the case of a burial, where no costs have been incurred for purchase of a burial plot under paragraph (4)(a), the distance travelled exceeds 80 kilometres.

(4) For a burial, the costs are—

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- (a) the cost of a new burial plot with a right of burial in it;
 - (b) fees levied by the local authority or person responsible for the operation of burials in the area where the burial takes place;
 - (c) the cost of grave-digging;
 - (d) if required, the cost of any medical references and of certificates from a registered medical practitioner.
- (5) For a cremation, the costs are—
- (a) fees levied by the local authority or person responsible for the operation of crematoriums in the area where the cremation takes place;
 - (b) the cost of any medical references and of certificates from a registered medical practitioner;
 - (c) the fee for removal of any active implantable medical device, within the meaning of the Medical Devices Regulations 2002(a), subject to a limit of £20 where the removal is not carried out by a registered medical practitioner.
- (6) Where a deceased person is not buried or cremated in the area in which they lived, and the costs of their burial or cremation exceed those that would have applied had the burial or, as the case may be, cremation taken place in that area, no assistance is to be given for those additional costs.
- (7) Where the deceased person has left provision of the type described in regulation 9(2), the payment in paragraph (1)(b) is £120.

Deductions from an award of funeral expense assistance

12.—(1) There is to be deducted from the amount of funeral expense assistance any funds or contribution which is available towards meeting the expense of the funeral from—

- (a) any assets of the deceased person which are available without confirmation having been granted, or (elsewhere in the United Kingdom) without probate or letters of administration, but ignoring any assets described in paragraph (2);
- (b) any pre-paid funeral plan, insurance policy, occupational pension scheme, burial club, or similar scheme or arrangement;
- (c) a funeral grant, made out of public funds, in respect of the deceased person having been entitled to a war disablement pension within the meaning of section 17 of the State Pension Credit Act 2002(b).

(2) For the purposes of paragraph (1)(a), the following sums payable to the estate of the deceased are to be ignored—

- (a) arrears of any benefit under any enactment relating to social security in any part of the United Kingdom;
- (b) any payment made by a body described in regulation 10(2) of the Social Fund Maternity and Funeral Expenses (General) Regulations 2005; [*i.e. the DWP scheme; to be set out at length in regs when made, based on the DWP scheme at that time*]
- (c) arrears of any assistance provided for by regulations under Parts 2 or 3 of the Social Security (Scotland) Act 2018, or under section 47 (carer's allowance supplement) of that Act.

[***]

(a) S.I. 2002/618.
(b) c.16.

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St Andrew's House,
Edinburgh
*** 2019

ILLUSTRATIVE REGULATIONS



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