

EXPLANATORY MEMORANDUM TO

THE SCOTLAND ACT 2016 (TRANSITIONAL) REGULATIONS 2017

2017 No. 444

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions on behalf of the Scotland Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument makes transitional provision in connection with the coming into force of sections 22 and 23 of [the Scotland Act 2016](#) as set out in the Scotland Act 2016 (Commencement No. 5) Regulations 2017.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative resolution procedure consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The Scotland Act 2016 (Commencement No. 5) Regulations 2017 commence sections 22 and 23 in Part 3, welfare and employment support, of [the Scotland Act 2016](#).
- 4.2 Sections 22 and 23 insert exceptions 1, 2 and 4 in Section F1 of Part 2 of [Schedule 5 to the Scotland Act 1998](#).
- 4.3 The transitional provisions contained in this instrument modify the operation of section 53 of the Scotland Act 1998 to enable a Ministerial function under a pre-commencement enactment that is within legislative competence of the Scottish Parliament by virtue of exceptions 1 or 2 to remain with a Minister of the Crown until 31 March 2020. Those functions would otherwise transfer to the Scottish Ministers by virtue of that section. The transitional provisions also modify section 23 of the Scotland Act 1998 to provide that the power of the Scottish Parliament to require a Minister of the Crown to attend does not apply to a function under a pre-commencement enactment that is within legislative competence of the Scottish Parliament by virtue of exceptions 1, 2 or 4.
- 4.4 Following the end of the transitional period, all Ministerial functions under a pre-commencement enactment that are within legislative competence of the Scottish Parliament by virtue of exceptions 1 and 2 will transfer to Scottish Ministers.
- 4.5 If prior to 31 March 2020, Scottish Ministers wish to take on these functions, the transitional regulations enable an ending of the transitional period, in respect of an

exception in section FI in Part 2 of Schedule 5 to the Scotland Act 1998, from the date of commencement of a provision in an Act of the Scottish Parliament which is within legislative competence by virtue of that exception.

- 4.6 No transitional provision is made to retain functions in respect of exception 4 because the matters dealt with by this exception are payable out of the Social Fund, in respect of which no functions are being devolved.
- 4.7 The transitional regulations modify the operation of [Article 5 of the Transfer of Property etc. \(Scottish Ministers\) Order 1999](#), to ensure that property, rights and liabilities which currently sit with UK Government Ministers in respect of the relevant functions are passed to Scottish Ministers even if the provision providing for the function is repealed in relation to Scotland prior to the transfer. The normal operation of that Article is to transfer property, rights and liabilities on the transfer of a function under section 53 of the Scotland Act 1998 (which, but for the transitional provision, would transfer the relevant functions on commencement of a provision conferring legislative competence on the Scottish Parliament).

5. Extent and Territorial Application

- 5.1 The extent of this instrument is to the United Kingdom.
- 5.2 The territorial application of this instrument is to the United Kingdom.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 These regulations, along with the Scotland Act 2016 (Commencement No. 5) Regulations 2017, apply to sections 22 and 23 of the Scotland Act 2016. The 2016 Act amends the Scotland Act 1998 by inserting exceptions to reserved matters under section F1 Social Security.
- 7.2 Section 22 deals with disability and industrial injury under exception 1 and carer's benefits under exception 2. This currently covers Personal Independence Payment, Attendance Allowance, Industrial Injuries Disability Benefits, Disability Living Allowance, Severe Disablement Allowance and Carer's Allowance.
- 7.3 Section 23 deals with payments currently paid from the Social Fund for maternity, funeral and heating expenses under exception 4 and covers Funeral Expenses payments, Sure Start Maternity Grants, Cold Weather Payments and Winter Fuel Payments.
- 7.4 The [Joint Ministerial Working Group on Welfare](#) (JMWGW) was set up prior to the introduction of the Scotland Bill and oversees the transfer and implementation of the new welfare powers under the Scotland Act 2016. The Secretary of State for Scotland, and the Cabinet Secretary for Communities, Social Security and Equalities, are the co-Chairs of the group. Chairing of individual meetings alternates between the two governments.

- 7.5 The JMWGW agreed at the request of Scottish Ministers to commence sections 22 and 23 of the Scotland Act 2016 by splitting legislative and executive competence. This enables the Scottish Government to introduce a Scottish Social Security Bill to the Scottish Parliament by June 2017. At the same time, DWP can continue administering benefits in respect of customers in Scotland until 1st April 2020 when executive competence will, as per the JMWGW agreement, transfer to the Scottish Ministers.
- 7.6 Prior to 1st April 2020, if executive competence is needed by Scottish Ministers the transitional regulations make provision for it to transfer earlier, on the date on which a provision of the Scottish Social Security Bill relating to a particular exception or, in the case of exception 1, a paragraph of that exception, commences.
- 7.7 Under section 23 there is technically no transfer of Ministerial functions because the social fund from which payments for maternity, funeral and heating expenses are made remains reserved. An amendment under section 23(5) will give the Scottish Ministers a power to make like payment under existing legislation, but there is nothing to prevent the Scottish Ministers from introducing their own benefits under Scottish legislation dealing with these matters before that power commences on 1st April 2020. When Scottish Ministers introduce their payments to cover maternity, funeral and heating expenses under the exceptions covered by section 23, payments from the social fund will only be applicable to people in England and Wales.
- 7.8 If following the transfer of executive competence in April 2020, or earlier, the Scottish Government are not able to put in place their own delivery processes, agency arrangements will need to be considered for DWP to deliver existing, but then devolved, benefits on behalf of the Scottish Government.
- 7.9 The transitional regulations also make provision that ensures that property, rights and liabilities currently held by UK Government Ministers is transferred to Scottish Ministers along with executive competence. In particular, this refers to outstanding overpayments of the benefits covered by sections 22 which are assets and should transfer as executive competence transfers.
- 7.10 In addition, the transitional regulations also ensure that during the transitional period, UK Ministers are accountable to the UK Parliament.
- 7.11 The Scottish Government intend to introduce a Social Security Bill by June 2017. However before this the Presiding Officer of the Scottish Parliament must be able to certify the Bill as being within competence. Therefore the commencement and transitional regulations must come into force before 17 May 2017. For this to happen, the transitional regulations will come into force on 1 May 2017 a few days in advance of the commencement regulations.

8. Consultation outcome

- 8.1 The provisions in the Scotland Act 2016 were set out in the Command Paper; [Scotland in the United Kingdom: An enduring settlement](#). This followed the agreement contained in [the Smith Commission Report](#) on devolving further powers to Scotland.

9. Guidance

- 9.1 As the Scottish Government put forward details of their policy choices and legislative programme as a result of the transfer of welfare powers under the Scotland Act 2016, DWP guidance and information products for customers and staff will be revised.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 An Impact Assessment was carried for the [Scotland Bill 2014-15](#) (which became the Scotland Act 2016) and this stated that the Scotland Bill would not trigger any immediate impacts but it will be for the Scottish Parliament to determine how the devolved powers are used and to assess the impact of their policy choices. These transitional regulations do not change that assessment.

11. Regulating small business

- 11.1 The regulations do not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 These transitional regulations may need to be reviewed as the Scottish Social Security Bill is scrutinised in the Scottish Parliament, to ensure they continue to deliver a secure basis for the transitional period.

13. Contact

- 13.1 Dave Annison at the Department for Work and Pensions. Telephone: 02074495377 or email: DAVE.ANNISON@DWP.GSI.GOV.UK can answer any queries regarding the instrument.