

EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY (SCOTLAND) ACT 2018 (FUNERAL EXPENSE ASSISTANCE AND EARLY YEARS ASSISTANCE) (CONSEQUENTIAL MODIFICATIONS AND SAVINGS) ORDER 2019

2019 No. 1060

1. Introduction

- 1.1 This explanatory memorandum has been jointly prepared by the Department for Work and Pensions (DWP) and Department for Communities on behalf of the Office of the Secretary of State for Scotland and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument amends social security legislation for Great Britain and Northern Ireland as a consequence of Funeral Expense Assistance, which is being introduced by the Social Security (Scotland) Act 2018¹ (“the 2018 Act”). The changes in this instrument will ensure that:
 - only claimants who live in England, Wales or Northern Ireland are eligible for the Funeral Expenses Payment (“FEP”);
 - recipients of Funeral Expense Assistance who subsequently move from Scotland to England, Wales or Northern Ireland are not eligible for the FEP.
- 2.2 The instrument makes amendments to ensure Funeral Expense Assistance is disregarded in reserved income-related benefits for Great Britain and Northern Ireland.
- 2.3 The instrument also makes amendments to ensure that Early Years Assistance (Best Start Grants) under section 32 of the 2018 Act is disregarded in Universal Credit in Northern Ireland.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The coming into force of the provisions in this instrument relating to Funeral Expense Assistance is contingent upon the coming into force of Regulations made by the Scottish Ministers to introduce Funeral Expense Assistance, which will be the first Regulations made under section 34 of the 2018 Act. This approach to commencement ensures that access to FEP for Scottish residents will end immediately after Funeral Expense Assistance is created, so that there is no gap in provision of funeral expenses for Scottish residents and no period of overlap during which provision is duplicated.

¹ 2018 asp 9. <http://www.legislation.gov.uk/asp/2018/9/contents/enacted>.

The Scottish Ministers laid draft Regulations before the Scottish Parliament on 18 January 2019².

Matters relevant to Standing Orders Nos.83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos.83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales, Scotland, and Northern Ireland, except where otherwise specified.
- 4.2 The territorial application of this instrument is England and Wales, Scotland, and Northern Ireland, except where otherwise specified.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 Section 104 of the Scotland Act 1998³ (“the 1998 Act”) allows consequential modifications to be made to UK law where necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament. This Order modifies laws in Great Britain and Northern Ireland in consequence of provisions introduced in section 34 of the 2018 Act.
- 6.2 The Scotland Act 2016⁴ (“the 2016 Act”) devolved responsibility for certain welfare benefits to the Scottish Parliament. Under exception 4(b) of Section F1 in Part II of Schedule 5 of the 1998 Act, as amended by section 23 of the 2016 Act, the Scottish Parliament may legislate to provide financial assistance for funeral expenses. This devolves the payment of funeral expenses for people in Scotland, currently covered by FEP.
- 6.3 In accordance with section 34 of the 2018 Act, the Scottish Government are introducing Funeral Expense Assistance for applicants ordinarily resident in Scotland.
- 6.4 FEP will continue to be payable under the Social Fund Maternity and Funeral Expenses (General) Regulations 2005 (S.I. 2005/3061)⁵ to people in England and Wales. The provisions in this instrument amend these Regulations to restrict eligibility to claimants living in England and Wales and to prevent duplicate payment by ensuring that recipients of Funeral Expense Assistance are not also eligible for a FEP for the same funeral.

² The draft Funeral Expense Assistance (Scotland) Regulations 2019.

<http://www.legislation.gov.uk/sdsi/2019/9780111040461/contents>.

³ 1998 c. 46. <http://www.legislation.gov.uk/ukpga/1998/46/contents>.

⁴ 2016 c. 11. <http://www.legislation.gov.uk/ukpga/2016/11/contents/enacted>.

⁵ S.I. 2005/3061. <http://www.legislation.gov.uk/uksi/2005/3061/contents>.

- 6.5 Funeral Expense Assistance is to be disregarded as income and capital in the same way as the current FEP is in a range of income-related benefits. This instrument therefore amends the following social security legislation:
- the Income Support (General) Regulations 1987 (S.I. 1987/1967)⁶;
 - the Jobseeker's Allowance Regulations 1996 (S.I. 1996/207)⁷;
 - the State Pension Credit Regulations 2002 (S.I. 2002/1792)⁸;
 - the Housing Benefit Regulations 2006 (S.I. 2006/213)⁹;
 - the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 (S.I. 2006/214)¹⁰;
 - the Employment and Support Allowance Regulations 2008 (S.I. 2008/794)¹¹; and
 - the Universal Credit Regulations 2013 (S.I. 2013/376)¹².

Northern Ireland

- 6.6 Section 87 of the Northern Ireland Act 1998¹³ places a statutory duty on the Minister for Communities and the Secretary of State for Work and Pensions to consult with one another with a view to securing a single social security system for the United Kingdom. Section 88 of that Act makes provision for financial adjustments to support the maintenance of these parity arrangements.
- 6.7 Underpinning the parity principle is the argument that, as people in Northern Ireland pay the same rates of income tax and National Insurance contributions as people in Great Britain, they are entitled to the same rights and benefits paid at the same rate.
- 6.8 In accordance with the parity principle, this instrument makes, for Northern Ireland, corresponding changes to those being made for Great Britain in consequence of the introduction of Funeral Expense Assistance. Accordingly, the instrument amends the Social Fund Maternity and Funeral Expenses (General) Regulations (Northern Ireland) 2005 (S.R. 2005 No. 506)¹⁴ to restrict eligibility to claimants living in Northern Ireland and to prevent duplicate payment by ensuring that recipients of Funeral Expense Assistance are not also eligible for a FEP for the same funeral.
- 6.9 The instrument also makes corresponding changes to provide that Funeral Expense Assistance is disregarded as income and capital in the same way as the current FEP is in a range of income-related benefits.
- 6.10 Early Years Assistance is also to be disregarded as income and capital in Universal Credit in the same way as it is disregarded under the Universal Credit Regulations 2013, as amended by the Social Security (Scotland) Act 2018 (Best Start Grants) (Consequential Modifications and Saving) Order 2018 (S.I. 2018/1138)¹⁵.

⁶ S.I. 1987/1967. <http://www.legislation.gov.uk/uksi/1987/1967>.

⁷ S.I. 1996/207. <http://www.legislation.gov.uk/uksi/1996/207/contents>.

⁸ S.I. 2002/1792. <http://www.legislation.gov.uk/uksi/2002/1792>.

⁹ S.I. 2006/213. <http://www.legislation.gov.uk/uksi/2006/213/contents>.

¹⁰ S.I. 2006/214. <http://www.legislation.gov.uk/uksi/2006/214/contents>.

¹¹ S.I. 2008/794. <http://www.legislation.gov.uk/uksi/2008/794>.

¹² S.I. 2013/376. <http://www.legislation.gov.uk/uksi/2013/376/contents>.

¹³ 1998 c. 47. <http://www.legislation.gov.uk/ukpga/1998/47/contents>.

¹⁴ S.R. 2005 No. 506. <https://www.legislation.gov.uk/nisr/2005/506/contents/made>.

¹⁵ S.I. 2018/1138 <http://www.legislation.gov.uk/uksi/2018/1138/contents/made>

- 6.11 This instrument therefore amends the following Northern Ireland social security legislation:
- the Income Support (General) Regulations (Northern Ireland) 1987 (S.R. 1987 No. 459)¹⁶;
 - the Jobseeker’s Allowance Regulations (Northern Ireland) 1996 (S.R. 1996 No. 198)¹⁷;
 - the State Pension Credit Regulations (Northern Ireland) 2003 (S.R. 2003 No. 28)¹⁸;
 - the Housing Benefit Regulations (Northern Ireland) 2006 (S.R. 2006 No. 405)¹⁹;
 - the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations (Northern Ireland) 2006 (S.R. 2006 No. 406)²⁰;
 - the Employment and Support Allowance Regulations (Northern Ireland) 2008 (S.R. 2008 No. 280)²¹; and
 - the Universal Credit Regulations (Northern Ireland) 2016 (S.R. 2016 No. 216).

7. Policy background

What is being done and why

- 7.1 Section 104 of the 1998 Act allows for modifications to be made to UK law where necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament. This power ensures that reserved law and law relating to England, Wales and Northern Ireland-only is up-to-date, to help make devolution work.
- 7.2 Responsibility for payments for funeral expenses to people in Scotland was devolved to the Scottish Parliament under the 2016 Act. This Order updates legislation in Great Britain and Northern Ireland to reflect that Scottish Ministers will now provide a replacement Scottish scheme for funeral expenses, and Scottish residents or recipients of this new Funeral Expense Assistance will no longer be eligible for FEP in England, Wales and Northern Ireland.
- 7.3 The FEP is a payment to help meet the necessary costs of a burial or cremation. How much a person gets will depend on their circumstances. FEP meets costs which include:
- burial fees for a particular plot;

¹⁶ S.R. 1987 No. 459. The latest version of this instrument can be accessed by selecting “1987” in the Document Year drop down box: <http://iaccess.communities-ni.gov.uk/sspldbbluevolumesinternet/users/internetsearchpage.aspx>.

¹⁷ S.R. 1996 No. 198. This instrument can be accessed by selecting “1996” in the Document Year drop down box: <http://iaccess.communities-ni.gov.uk/sspldbbluevolumesinternet/users/internetsearchpage.aspx>.

¹⁸ S.R. 2003 No. 28. This instrument can be accessed by selecting “2003” in the Document Year drop down box: <http://iaccess.communities-ni.gov.uk/sspldbbluevolumesinternet/users/internetsearchpage.aspx>.

¹⁹ S.R. 2006 No. 405. This instrument can be accessed by selecting “2006” in the Document Year drop down box: <http://iaccess.communities-ni.gov.uk/sspldbbluevolumesinternet/users/internetsearchpage.aspx>.

²⁰ S.R. 2006 No. 406. This instrument can be accessed by selecting “2006” in the Document Year drop down box: <http://iaccess.communities-ni.gov.uk/sspldbbluevolumesinternet/users/internetsearchpage.aspx>.

²¹ S.R. 2008 No. 280. This instrument can be accessed by selecting “2008” in the Document Year drop down box: <http://iaccess.communities-ni.gov.uk/sspldbbluevolumesinternet/users/internetsearchpage.aspx>.

- cremation fees, including the cost of the doctor's certificate;
- travel to arrange or go to the funeral;
- the cost of moving the body within the UK, if it's being moved more than 50 miles;
- death certificates or other documents; and
- payments toward other funeral expenses.

7.4 Under section 34 of the 2018 Act the Scottish Government are introducing their replacement for FEP in the form of Funeral Expense Assistance to cover funeral expenses for people ordinarily resident Scotland. This is being done through the Funeral Expense Assistance (Scotland) Regulations 2019, which were laid in draft in the Scottish Parliament on 18 January 2019. The Scottish Government has set out further detail on its policy in Funeral Expense Assistance regulations: our response to consultation.²²

FEP – England and Wales

7.5 FEP will continue to be paid to people living in England or Wales and to people living temporarily in Scotland who will be able to claim FEP from their permanent address in England or Wales. The condition will be satisfied if the claimant lives at an address in England or Wales. This will be ascertained by DWP checking the claimant's address and postcode at the time they make their claim for a FEP. FEP will not be payable to a person living permanently in Scotland, or to a person who has moved to England or Wales and has already been awarded Funeral Expense Assistance for the same funeral.

7.6 Entitlement to FEP depends, in part, on the claimant having been awarded a qualifying benefit (being one of the benefits listed in regulation 7(4) of the Social Fund Maternity and Funeral Expenses (General) Regulations 2005). Each qualifying benefit has its own residence test and for this reason, a separate residence test has not previously applied to the FEP scheme. The purpose of the residence condition introduced by this instrument is only to ensure that the FEP scheme is not available to persons for whom the Scottish Government is competent to make provision. It is intended to be as "light touch" as possible so as not to introduce a "double test" for residence into the FEP scheme and is not intended to mirror the approach taken by the Funeral Expense Assistance scheme, which has different entitlement criteria and makes different provision.

FEP - Northern Ireland

7.7 FEP will continue to be paid to people living in Northern Ireland and to people living temporarily in Scotland who will be able to claim FEP from their permanent address in Northern Ireland. The condition will be satisfied if the claimant lives at an address in Northern Ireland. This will be ascertained by the Department for Communities checking the claimant's address and postcode at the time they make their claim for a FEP. FEP will not be payable to a person living permanently in Scotland, or to a person who has moved to Northern Ireland and who has already been awarded Funeral Expense Assistance for the same funeral.

²² <https://www.gov.scot/publications/scottish-government-response-consultation-funeral-expense-assistance-scotland-regulations-2019/>

- 7.8 As with the corresponding changes made for Great Britain, the purpose of the residence condition inserted into the Social Fund Maternity and Funeral Expenses (General) Regulations (Northern Ireland) 2005 by this instrument, is only to ensure that the FEP scheme is not available to persons for whom the Scottish Government is competent to make provision. It is not intended to mirror the approach taken by the Funeral Expense Assistance scheme.

Consequential changes to income-related benefits

- 7.9 Paragraph 55 of the Smith Commission agreement²³ states that “Any new benefits or discretionary payments introduced by the Scottish Parliament must provide additional income for a recipient and not result in an automatic offsetting reduction in their entitlement to other benefits or post-tax earnings if in employment.”
- 7.10 The provisions in Part 3 of this instrument are included to ensure that Funeral Expense Assistance is disregarded for income and capital purposes in the same way as the current FEP is in the following reserved income-related benefits in Great Britain and Northern Ireland: Income Support, Jobseeker’s Allowance (income-based), State Pension Credit, Employment and Support Allowance (income-related), Housing Benefit and Universal Credit.
- 7.11 Amendments to disregard Early Years Assistance (Best Start Grants) in Universal Credit in Northern Ireland in the same way as they are disregarded in Great Britain are also included in this instrument.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 Not applicable.

10. Consultation outcome

- 10.1 The Scottish Government consulted on draft Funeral Expense Assistance regulations for 14 weeks between 17 May and 23 August 2018. Where permission was given, consultation responses were published on 11 September 2018.²⁴ .

11. Guidance

- 11.1 Guidance to DWP staff will cover procedures to deal with customer enquiries to DWP on the Scottish Government’s Funeral Expense Assistance and also ensuring that it is disregarded in the calculation of reserved benefits.
- 11.2 Guidance to Department for Communities staff will cover procedures to deal with customer enquiries to the Department on the Scottish Government’s Funeral Expense

²³ http://webarchive.nationalarchives.gov.uk/20151202171017/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf.

²⁴ [Published responses to the FEA consultation - https://consult.gov.scot/social-security/funeral-expense-assistance/consultation/published_select_respondent](https://consult.gov.scot/social-security/funeral-expense-assistance/consultation/published_select_respondent).

Assistance and also ensuring that it is disregarded in the calculation of Northern Ireland benefits.

12. Impact

- 12.1 There is no impact on business, charities or voluntary bodies.
- 12.2 There is no impact on the public sector.
- 12.3 An Impact Assessment for the amendments in this instrument has not been carried out.

13. Regulating small business

- 13.1 The amendments in this instrument do not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 As the Scottish Government take on responsibility for further welfare benefits and payments, as set out in the 2016 Act, further consequential amendments will be made to ensure that reserved law and law relating to England, Wales and Northern Ireland only is up-to-date, to help make devolution work.
- 14.2 The UK Government and the Scottish Government will continue to work together to ensure the safe and secure transfer of devolved welfare benefits.

15. Contact

- 15.1 Gail Turton at the Department for Work and Pensions. Telephone: 0114 2041870 or email: GAIL.TURTON@DWP.GOV.UK can be contacted with any queries regarding the instrument.
- 15.2 Dave Annison at the Department for Work and Pensions. Telephone: 0207 449 6377 or email: dave.annison@dwp.gov.uk can be contacted with any queries regarding the instrument.
- 15.3 Anne McCleary at the Department for Communities. Telephone 0289082332 or email: anne.mccleary@communities-ni.gov.uk can be contacted with any queries regarding the instrument relating to Northern Ireland.