

# **WELFARE REFORM (FURTHER PROVISION) (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **PURPOSE**

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Welfare Reform (Further Provision) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

### **OUTLINE OF BILL PROVISIONS**

2. The Welfare Reform (Further Provision) (Scotland) Bill is an enabling Bill comprising six sections. It confers on the Scottish Ministers power to make such provision for devolved purposes as they consider appropriate in consequence of changes to the welfare system made by or under Parts 1 and 4 of the UK Welfare Reform Act 2012 ("the UK Act").

3. The Bill broadly mirrors the relevant clauses of the Bill for the UK Act which were removed during the Bill's Third Reading in the House of Lords as a consequence of full legislative consent for that Bill having been withheld by the Scottish Parliament. Unlike the relevant clauses of the Bill for the UK Act, however, the provisions in the Bill do not explicitly refer to the enabling powers being exercisable only to make provision which would be within the legislative competence of the Scottish Parliament if contained in an Act of the Parliament. This would have been a necessary express qualification in the UK Act, because the UK legislation could have conferred a wider power on the Scottish Ministers to enable them to make provision for any purpose whether devolved or reserved. The Scottish Government considers that a similar express qualification in the Bill is unnecessary to limit the scope of the powers because in its view all of the powers conferred in the Bill are implicitly limited to being exercisable within the limits of devolved competence in the following way. The legislative objective of the Bill is to enable the Scottish Ministers to make provision by regulations only for devolved purposes. To the extent that the text of the Bill's provisions, which bear a relationship to provision made by or under Parts 1 and 4 of the UK Act relating to the reserved matter of social security provision, could be read as being outwith competence, the Scottish Government considers that the operation of section 101 of the Scotland Act 1998 would ensure that the provisions could be read as narrowly as required for them to be within competence and for them to have effect accordingly.

## **GENERAL COMMENTARY ON POWERS IN THE BILL**

4. The provisions delegating powers to the Scottish Ministers are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of parliamentary procedure has been considered appropriate. In most instances, the Scottish Government acknowledges that it is not able to specify precisely the uses to which the Scottish Ministers will put the powers in this Bill. Many of the practical details as to how the UK Government's welfare reforms will operate (e.g. conditions for entitlement to universal credit) remain to be set out in subordinate legislation by the Secretary of State. The Scottish Government does not expect the UK Government to be in a position to convey the essential detail of universal credit to it before June of this year. As a result, its work on passported benefits will not be completed until later in the year.

5. Despite the fact that it is not possible to specify all of the devolved uses to which the Scottish Ministers will put the powers in this Bill, the Scottish Government believes that this approach carries less risk than the alternative, which would be to wait to bring forward legislation when the design of these successor arrangements has been completed and the full details of the operation of the new UK benefit system are known. It is unlikely that this would be practical, given the lead time required to put successor systems and processes in place.

6. In introducing this Bill, the Scottish Government is seeking to avoid a situation where provision of some passported benefits is put at risk if the necessary legislation is not commenced in time or the operational systems and processes are not in place. The Scottish Government undertakes that, where changes to the existing provision are to be proposed in subordinate legislation, it will, at that stage, have regard to the Scottish Parliament's need to scrutinise and consider the detail of these changes.

## **DETAILED COMMENTARY ON POWERS IN THE BILL**

### **Universal Credit**

**Section 1 – Power to make such provision as the Scottish Ministers consider appropriate in consequence of any provision of Part 1 (universal credit) of the UK Act, regulations made by the Secretary of State under that Part or an order made under section 41(5)(a) of that Act**

|                                 |  |
|---------------------------------|--|
| <b>Power conferred on:</b>      | <b>Scottish Ministers</b>  |
| <b>Power exercisable by:</b>    | <b>regulations made by Scottish statutory instrument</b>   |
| <b>Parliamentary procedure:</b> | <b>affirmative procedure if regulations made under this section add to, replace or omit any part of the text of an Act, otherwise negative procedure</b> |

### *Provisions*

7. Section 1 sets out a power for the Scottish Ministers to make changes to primary and subordinate legislation, or freestanding provision, for devolved purposes. Under this section, as read with section 3(3)(b), the Scottish Ministers are empowered to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider appropriate

in consequence of the introduction in 2013 of universal credit and the abolition of some existing social security benefits by the UK Act. This enabling power is exercisable only for devolved purposes.

*Reasons for taking powers*

8. Section 1 is necessary because the introduction of universal credit and the abolition of existing benefits have consequences for matters devolved to the Scottish Parliament and their associated legislation. One of the main ways in which existing benefits impact on devolved areas is that they are used as an eligibility hook for a variety of Scottish “passport benefits”. These include benefits in kind such as free school lunches and cash benefits such as the education maintenance allowance. When the existing benefits are abolished, so too will the current, associated eligibility hooks. Existing benefits also impact on other devolved areas such as pre-action requirements where a landlord’s grounds for possession include rent arrears (discussed further below at paragraph 13).

9. The primary purpose for taking these powers is to make such changes as the Scottish Ministers consider appropriate in order to maintain the legislative basis for devolved matters, including passport benefits, currently linked to those social security benefits which are being abolished and replaced by universal credit.

10. The power may be used, for example, to amend the legislation making provision for free school lunches. Section 53(3AA) of the Education (Scotland) Act 1980 (“the 1980 Act”) provides that where an education authority provides school lunches, it must do so free of charge to a pupil to whom section 53(3) of the 1980 Act applies. Section 53(3) of the 1980 Act sets out the eligibility criteria for receipt of free school lunches based on a pupil who is in receipt of, or whose parents are in receipt of, certain benefits, allowances and tax credits. That section currently refers to income support, income-based jobseeker’s allowance and employment and support allowance, all of which will be abolished by section 33 of the UK Act.

11. Furthermore, the Education (School Lunches) (Scotland) Regulations (SSI 2009/178), made under the powers set out at section 53(3)(a)(iv) and (b)(iii) of the 1980 Act, provide that parents of pupils or pupils who are in receipt of an award of child tax credit which meets specified criteria are entitled to free school lunches. Child tax credit and working tax credit are also being abolished by section 33 of the UK Act.

12. Depending on the ultimate policy intention, the power in section 1 of the Bill may be used to make changes to section 53(3) of the 1980 Act to refer consequentially to some aspect of the new universal credit or to supplement this section by creating a new eligibility criteria and to revoke the Education (School Lunches) (Scotland) Regulations 2009.

13. An example of how this power may be used in respect of a devolved matter other than a passport benefit is that it may be used to modify section 14A of the Housing (Scotland) Act 2001. That section provides for pre-action requirements where the landlord’s grounds for possession include rent arrears. Section 14A(3) requires the landlord to make reasonable efforts to provide the tenant with advice and assistance on the tenant’s eligibility to receive (a) housing benefit and (b) other types of financial assistance (for example, other benefits or grants).

14. Depending on the ultimate policy, this power may be used consequentially to remove the reference in section 14A(3)(a) to “housing benefit” which is also being abolished by section 33 of the UK Act. The power could also be used to replace that reference with a reference to the housing component of universal credit.

*Choice of procedure*

15. Regulations made under this provision will be subject to the affirmative procedure where they add to, replace or omit any part of the text of an Act. This level of procedure is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail of any changes to primary legislation.

16. Otherwise the regulations will be subject to the negative procedure. This procedure is appropriate given the anticipated nature of these regulations. It is considered that the negative procedure provides an appropriate balance between expedition and practicality on the one hand and the need for scrutiny of a provision of this nature.

**Personal Independence Payment**

**Section 2 – Power to make such provision as the Scottish Ministers consider appropriate in consequence of any provision of Part 4 (personal independence payment) of the UK Act or regulations made by the Secretary of State under that Part**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative procedure if regulations made under this section add to, replace or omit any part of the text of an Act, otherwise negative procedure

*Provisions*

17. Section 2 sets out a power for the Scottish Ministers to make provision in consequence of the introduction in 2013 of personal independence payments, a new UK-wide, disabled persons benefit and the accompanying abolition of the existing disability living allowance. Under this section, as read with section 3(3)(b), the Scottish Ministers are empowered to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider appropriate. Changes will be required to both primary and subordinate legislation for devolved purposes. The power also includes power to make freestanding provision. This enabling power is only exercisable for devolved purposes.

*Reasons for taking powers*

18. As with the introduction of universal credit, these powers are needed to ensure that the necessary changes may be made for devolved purposes to account for the introduction of the personal independence payment. One of the main ways in which existing benefits impact on devolved areas is that they are used as an eligibility hook for a variety of Scottish “passported benefits”, such as blue badge parking. When the existing benefits are abolished, so too will the current, associated eligibility hooks and regulations made under these powers will need to preserve or renew eligibility to certain services.

19. An example where the powers may be used relates to eligibility for the “blue badge” for disabled persons’ parking. The Disabled Persons (Badges for Motor Vehicles) (Scotland) Regulations 2000 refer to the disability living allowance as one of the eligibility criteria for receiving a “blue badge”. The power could be used either to simply consequentially refer to eligibility to the new personal independence payment or some form of supplemental provision may be necessary to create a new eligibility criteria. The exact details of such changes cannot, however, be finalised at this stage due to the lack of clarity about the personal independence payment.

#### *Choice of procedure*

20. Regulations made under this provision will be subject to the affirmative procedure where they add to, replace or omit any part of the text of an Act. This procedure is appropriate to allow the high level of scrutiny for the Scottish Parliament to consider the detail of any changes to primary legislation.

21. Otherwise, the regulations will be subject to the negative procedure. This procedure is appropriate given the nature and detail of these regulations. It is considered that the negative procedure provides an appropriate balance between expedition and practicality on the one hand and the need for scrutiny of a provision of this nature.

### **GENERAL SUBORDINATE LEGISLATION PROVISION**

22. Section 3 contains general subordinate legislation provisions which apply to any regulations made under section 1 or 2. Subsection (2)(a) allows for provisions to be in direct or indirect consequence of a relevant portion of the UK Act or instrument made under it.

23. Subsection (2)(b) allows for provision to be made in regulations which is not itself in direct or indirect consequence of a relevant portion of the UK Act or instrument made under it, where the provision concerns a matter which is or was in consequence of a relevant portion of the UK Act or instrument made under it. The flexibility provided by this subsection is needed because there is a high likelihood that future changes to devolved legislation amended (or created) using the powers enabled by this Bill may be required for reasons which are not in direct or indirect consequence of the UK Act. For example, if the power contained in section 1 of this Bill were used to establish an income threshold for entitlement to certain passported benefits then, in future, the Scottish Ministers may wish to vary that income threshold. Such variation may not be in direct or indirect consequence of the UK Act but in consequence of something else, such as a rise in the rate of inflation. This part of the ancillary power is intended to facilitate such variation and avoids the need for the Scottish Ministers to bring further primary legislation in these circumstances where the passported benefit is governed by primary legislation or where the existing enabling power for regulations setting out the passported benefit is not wide enough to accommodate this. It does this by enabling the Scottish Ministers to make provision to amend such an income threshold that is a step removed from the UK Act but still links to the original regulations made under section 1 which themselves are a direct or indirect consequence of that Act.

24. Subsection (3)(a) provides that the regulations may make different provision for different cases or purposes. Subsection (3)(b) provides for the regulations to include supplemental,

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incidental, consequential, transitional, transitory or saving provisions. The UK Government has confirmed that it plans to implement the new welfare system on a phased basis over a period of time. The precise details of implementation are not yet known but, given that implementation will be phased, it is considered necessary that the Scottish Ministers have the power to make transitional, transitory and savings provisions for devolved legislation.



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