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Dear Collette

Social Security (Amendment) (Scotland) Bill

I write further to the Delegated Powers and Law Reform Committee (DPLRC)'s publication of its report on the Social Security (Amendment) (Scotland) Bill on 26 March, to provide further information on the points raised by the DPLRC.

The DPLRC has highlighted the power to make regulations for Care Experience Assistance at section 2, noting that it is a broad power with limited detail on the face of the Bill as to its intended use. The DPLRC suggests that the lead committee may consider taking further evidence from the Scottish Government regarding its intended use of this power. The DPLRC also recommends that this power's exercise should be subject to the super affirmative procedure.

The Scottish Government intends to use this power to create regulations to establish the Care Leaver Payment in the first instance. The responses to a public consultation which closed on 26 January are currently being analysed to further develop the policy, and an independent analysis of those responses will be published shortly.

As required by the Bill, further consultation will be carried out prior to regulations being laid, ensuring the details of the scheme have been informed by people with care experience and those delivering support to those people. Any regulations laid under the regulation-making power will be subject to further parliamentary scrutiny by way of the affirmative procedure.

With thanks to stakeholders who have raised the point in their evidence, we also intend to introduce a Government amendment at Stage 2 so that the Scottish Commission on Social Security (SCoSS) will scrutinise regulations made under section 93A prior to their being laid. As such, given the scrutiny to which future regulations under the relevant power in the Bill will be subject, we do not consider it appropriate that the power should be subject to the super affirmative procedure.

The DPLRC has also asked you to seek further evidence from the Scottish Government in relation to the inclusion of the power to create 'neglect' offences in connection with the provisions on compensation recovery, and consider whether an amendment to remove the reference to 'neglect' in section 94U(2)(i) is necessary.

It is our intention to clearly lay out these details in regulations following in-depth engagement with all relevant stakeholders, including representatives of the insurance industry, during the development of any associated offences created using the powers in the Bill. Section 94U will only apply to cases related to the recovery of compensation from those liable to make these payments, such as insurance providers. A similar broad power to make provisions about offences is already contained in the 2018 Act, at sections 79(2)(g) and 84A(2)(b).

The principal legislation which provides for UK compensation recovery scheme – the Social Security (Recovery of Benefits) Act 1997 – does not contain provisions in relation to investigations and offences. Instead, the provisions which can address non-compliance with the 1997 Act are located in the Social Security Administration Act 1992. Section 111(1) of the 1992 Act provides for offences of refusal or neglecting to comply with requirements to provide information, similar to those which may be created under section 94U(2)(d)(ii).

Any offences provided for under regulations would apply at the point of investigation where a request has been made to provide information or provide electronic access to information. A refusal to comply with this request is a deliberate and obvious act. However, neglecting to comply may be defined as the person initially agreeing to comply and then not doing so within a defined time period. Compensators will be aware of their obligations following a request for information or access to electronic information and will not therefore be committing an offence in ignorance. Refusal to comply and neglecting to comply may both arise in practice and must be provided for. Failure to enforce compliance could create an unfair situation where some compensators comply and others don't, with no consequences for those who don't.

Separately, you will recall that my officials gave an informal presentation to the Committee about the Social Security (Amendment) (Scotland) Bill on 8 February, in advance of the Stage One evidence sessions. I understand that Jeremy Balfour MSP asked at that session for more information on the Scottish Government's plans for provisions in primary social security legislation which have yet to be commenced.

The Social Security (Scotland) Act 2018 (the '2018 Act') is the framework legislation governing the administration of devolved social security powers. The 2018 Act has been amended a number of times since its passage by subsequent primary legislation, principally by the Social Security Administration and Tribunal Membership (Scotland) Act 2020.

There are a total of 11 sections of the 2018 Act which are uncommenced at March 2024; namely sections 29, 33, 35, 85D, 86, 88-90, 92, 93 and 94. Section 85B and section 91 remain uncommenced for certain purposes. The remainder of this letter sets out the Scottish Government's position with respect to each of those sections.

Cold-spell Heating Assistance (s29)

Section 29 of the 2018 Act gave the Scottish Government power to deliver a new winter heating benefit in the form of cold-spell heating assistance. This is assistance to meet, or help towards meeting, an individual's heating costs during a period of cold weather. The

drafting of section 29 reflected the initial intention to deliver a 'like-for-like' replacement for the UK Government's Cold Weather Payments in Scotland.

Following a period of review and a new manifesto commitment, the Scottish Government moved away from a like-for-like delivery approach and instead introduced the Winter Heating Payment, using separate powers for winter heating assistance, under section 30 of the 2018 Act. This approach did not rely on the requirement for a cold-spell of weather to trigger a payment and instead provides a reliable annual payment to eligible clients each winter.

Given this change in approach and the move away from entitlement being tied to cold-spells, section 29 was no longer required as an enabling power for Winter Heating Payment. Whilst there is no immediate intention to deliver further benefits using section 29, the feedback both during and following the consultation on Winter Heating Payment reflected interest in continuing to have a weather-related element to Winter Heating Payment¹.

Section 29 therefore provides the option for Scottish Ministers to consider this approach to winter heating benefits in the future. If the decision is taken in the future to utilise this section, it will be commenced.

Employment-injury Assistance (s33)

Section 33 of the 2018 Act empowers Scottish Ministers to make regulations for Employment-injury Assistance, which is assistance to an individual on account of the individual, or another individual, having suffered an injury, or contracted a disease, in the course of employment.

This would provide the legal basis for a Scottish replacement for the UK's Industrial Injuries Disablement Benefit (IIDB). The IIDB scheme was established in 1948 and has undergone limited reform since its introduction.

The Scottish Government continues to consider options for the replacement of the UK industrial injuries scheme in Scotland, while protecting current payments, which is the priority. A full public consultation will take place shortly. The Scottish Government recognises the range of views on IIDB and its relevance to the modern world of work, and agrees that reform of the benefit is indeed important.

We are working with the Department of Work and Pensions (DWP) and delivery partners to work through the many specific complexities associated with the largely clerical nature of Industrial Injuries Disablement Benefit and the age of the IT that currently supports elements of the benefit. While the scheme has a relatively low caseload in Scotland, it is one of the most complex to transition, as detailed information about current and previous scheme recipients is almost entirely held in paper files. In addition to files relating to live awards, there are significantly more associated with awards no longer in payment but required to be kept on file.

Housing Assistance (ss35 & 86)

Housing Assistance is assistance under section 35 of the 2018 Act to meet or help towards meeting housing costs. Section 86 provides a regulation-making power to make provision for

¹ [Low Income Winter Heating Assistance \(LIWHA\): Analysis of Consultation Responses: Final Report \(www.gov.scot\)](http://www.gov.scot)

functions in relation to housing assistance under section 35 (and associated payments of short term assistance under section 36) to be exercised on behalf of the Scottish Ministers by local authorities.

The Scottish Government only intends to use the powers for housing assistance in certain situations. One such anticipated situation was if Scottish Ministers made regulations to prevent a reduction in a universal credit award due to the bedroom tax (removal of the spare room subsidy/social sector size criteria).

The Scotland Act 2016 gives Scottish Ministers power to make regulations in relation to universal credit in a number of ways, including to vary the housing calculation. It is the housing element of universal credit to which the bedroom tax is applied.

Abolishing the bedroom tax was more onerous than initially thought, in part due to a dispute around the interaction with the benefit cap. Because the benefit cap is applied after the housing element is calculated it might prevent individuals benefitting from an increase in the housing element.

In 2017 the Scottish and UK Governments agreed a solution to abolish the bedroom tax in Scotland. This would require housing assistance to be used as a “top-up” payment where someone had had their universal credit capped due to the increased housing element.

Until the bedroom tax fix for Scotland is applied in universal credit, something DWP have yet to commit to a date for, or include in their programme for work, there is no requirement for the Scottish Ministers to make provision for housing assistance using either section 35 or section 86.

The Scottish Government is pressing DWP to agree a timetable for the implementation of this fix; in the meantime, we mitigate the bedroom tax through the use of discretionary housing payments (DHPs).

Discretionary Housing Payments (ss 88-90, 92 and 93)

Discretionary Housing Payments (DHPs) are the means by which the Scottish Government mitigates the UK Government’s bedroom tax, benefit cap, the freeze to local housing allowance rates, and other welfare reforms.

DHPs are delivered by way of local authorities, with funding provided by the Scottish Government. In 2024/25 we will make £90.5m available to local authorities to spend on DHPs. Part 5 of the 2018 Act (sections 88-93) includes provision for local authorities to provide DHPs, Section 91 makes provision for local authorities to have regard to guidance issued by Scottish Ministers in connection with providing DHPs.

Section 91 was partially commenced in April 2020, for the purpose of allowing consultation on a Scottish statutory DHP guidance manual. Due to staff redeployments in the coronavirus pandemic, this work was put on hold.

In the last 12 months Scottish Government officials have been working with the Convention of Scottish Local Authorities (COSLA) on development of the new scheme and guidance. In accordance with the 2018 Act section 91, the Scottish Government conducted a consultation on the Scottish DHP guidance manual with COSLA between December 2023 and January 2024. The guidance was subsequently updated with COSLA’s approval.

Sections 88-93 will be commenced by the Social Security (Scotland) Act 2018 (Commencement No. 10 and Transitional Provision) Regulations 2024/57 on 1 April 2024. This means that from 1st April 2024 the Discretionary Housing Payment scheme in Scotland will be regulated by the Social Security (Scotland) Act 2018. From that date local authorities will stop using the DWP-issued DHP guidance and should only follow the guidance issued by Scottish Ministers.

Appointees (s85B & s85D)

As part of the Social Security Administration and Tribunal Membership (Scotland) Act 2020, new provisions (at sections 85A to 85E) were inserted into the 2018 Act in relation to appointees to act on behalf of both children and in other circumstances. Most of these provisions have since been commenced and implemented.

Section 85B makes provision for appointments for individuals other than children, and is commenced for all purposes except for appointments in terms of section 85B(3)(a) and (4) (adults who are not incapable in terms of the Adults with Incapacity (Scotland) Act 2000). Section 85D makes provision to seek a review in the First-tier Tribunal for of certain decisions by the Scottish Ministers in relation to appointments.

These two remaining uncommenced provisions are innovations of the devolved system, and are being implemented as part of a wider programme of change.

They necessarily follow implementation of the key provisions requiring the consultation on, and production of, statutory guidance, which allowed the fundamental functions for a system for appointees to be implemented. We are currently developing proposals for these remaining provisions to come into force.

Section 85B introduces a completely new type of appointment to cover the very rare circumstances where adults who are capable of acting are still considered to require an appointee to act on their behalf. The provisions were created to cover a narrow set of circumstances where harmful information, such as a terminal diagnosis, may need to be withheld from a client who has capacity.

In addition to our expectation that this type of appointment will be used very rarely, and there already exist less formal ways that clients can access support to help them navigate our social security system, such as nominating a third-party representative, or through the local delivery service. Safeguards were added to these provisions that require this type of appointment to be certified by an 'appropriate person'. Further consultation and secondary legislation is required to define that person. My officials are consulting with stakeholders in regards to the definition, and are exploring wider circumstances where this type of appointment may be useful. Regulations will be made in due course to commence the remaining aspects of section 85B.

Whilst section 85D is not yet commenced, procedures are already in place in line with section 85A and 85B, allowing clients and others to ask Social Security Scotland to review an appointment at any time. Routes of recourse do therefore currently exist for people to dispute an appointee decision. The decision is reviewed by a different decision maker, with the aim being to resolve disagreements at the earliest stage.

My officials continue to engage with stakeholders to understand the complexities that arise around a new process to be taken through the Tribunal, including questions over how multiple parties would be allowed to challenge, and how sensitive information is handled. This additional role for the First-tier Tribunal is one of several changes planned for the Scottish Courts and Tribunal Service, including introducing challenge rights in relation to decisions on liability for an overpayment and transfer of jurisdiction to the First-tier Tribunal of the competence that a sheriff has in relation to the recovery of money owed. As such, the Scottish Government is managing these changes collectively in consultation with the Scottish Courts and Tribunal Service.

Universal Credit: split payments (s94)

The Committee will be aware that I wrote on 3 April setting out the Scottish Government's position on split payments of Universal Credit.

Section 94 of the 2018 Act makes provision requiring Scottish Ministers to bring forward regulations to give effect to the proposal for universal credit payable in respect of joint claimants in Scotland to be split between the couple in such proportion as the Scottish Ministers consider appropriate (unless the Scottish joint claimants elect to nominate a single bank or other account).

The Scottish Government acknowledges that introducing split payments of Universal Credit will not solve all the issues around domestic abuse and financial coercion, however improving accessibility of independent incomes will help people in these difficult situations. We remain committed to delivering split payments of Universal Credit. We have engaged with a wide range of stakeholders, including Engender, Scottish Women's Aid, COSLA, the Scottish Federation of Housing Associations (SFHA) and the Child Poverty Action Group (CPAG) to inform the policy.

Universal Credit is reserved to the UK Government and as a result delivery of split payments will be dependent on the Department for Work and Pensions (DWP) agreeing to deliver this. As such the Scottish Government is dependent on what is technically feasible within the DWP's IT systems and its operational capacity. On 27 October 2023 my officials issued a formal proposal to the DWP to allow for an impact assessment to consider how feasible it would be to make the changes to the Universal Credit system. DWP has not yet set out its official timeline.

I hope that this information will be of use to the Committee in its scrutiny of the Bill, and I look forward to answering members' questions in person.

Yours sincerely

SHIRLEY-ANNE SOMERVILLE