

Social Security (Scotland) Bill

Delegated Powers Memorandum

Introduction

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 Social Security (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.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Social Security (Scotland) Bill is arranged in five Parts as follows:
 - Part 1 sets out the Scottish social security principles, provides for a Scottish social security charter and requires annual reporting on the performance of the Scottish social security system.
 - Part 2 places a duty on the Scottish Ministers to give assistance to persons who are entitled to it, sets out eight types of assistance that are to be created, and provides for applications, determination of entitlement and appeals. It also provides for recovery of assistance given in error and offences.
 - Part 3 provides the Scottish Ministers with the ability to provide for top up of benefits that are reserved to the UK Parliament. It also makes provision for a supplement to be paid to persons in receipt of Carer's Allowance.

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- Part 4 empowers local authorities to make payments to persons to assist with their housing costs, provides some restrictions on how that power is to be used and requires local authorities to publicise their rules for assistance.
- Part 5 deals with the technical matters normally dealt with at the end of Bills: it allows ancillary provision to be made by regulations, sets out the parliamentary procedures that are to apply to the regulation-making powers in the Bill, makes provision about when the Act resulting from the Bill will come into force and establishes its short title (i.e. the Act's official legal name).

Rationale for subordinate legislation

3. The Scottish Government has had regard, when deciding what subordinate legislation powers and respective parliamentary procedures are appropriate for the Bill and whether provisions should be in primary or in subordinate legislation, to the need:

- to set out provision in a coherent way for users of social security legislation, while providing flexibility to respond to changing circumstances (for example changing priorities or in light of operational experience of the delivery of devolved social security assistance);
- to allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation;
- to make proper use of valuable parliamentary time; and
- to deal with the unexpected, which might otherwise frustrate the purpose of provision made by the Parliament.

General comment on choice of procedure

4. For reasons set out below, in the Scottish Government's view it is appropriate for many of the powers the Bill will confer to be subject to the affirmative procedure. In particular, the Scottish Government considers the affirmative procedure to be most appropriate for the powers to set out in regulations who is eligible for different types of assistance and what assistance those who are entitled to it are to be given (see discussion of sections 11 to 17 below). There is, however, the question of whether social

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security regulations should be subject to some other form of oversight over and above that which the affirmative procedure entails.

5. One option might be to set up an expert advisory committee along the lines of the system that the UK Parliament operates. Amongst other issues though, thought would need to be given to the relationship between any expert advisory committee and the relevant parliamentary committees (principally the Social Security Committee and the Delegated Powers and Law Reform Committee). The very different nature of the committee system at Holyrood may make it inappropriate to simply adopt a UK Parliament model. Furthermore, the Scottish Government has already established some specific expert advisory groups (such as the Disability and Carers Benefits Expert Advisory Group) and, pursuant to its commitment to designing the social security system in Scotland in partnership with the people of Scotland (a commitment reflected in section 1(e) of the Bill), the Scottish Government is recruiting panels of people with direct experience of receiving social security. The role of these existing groups and panels relative to that of the parliamentary committees and any other scrutiny body which may be established would need to be thought through.

6. As these are issues which fundamentally concern the proper place of parliamentary committees in the scrutiny of legislation, the Scottish Government is keen to hear the committees' views. At this stage, so as not to pre-empt discussions with members of the Parliament, the Scottish Government has not provided for anything more than the affirmative procedure on the face of the Bill.

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Part 2 - Giving of assistance by Scottish Ministers

Sections 11 to 17 – Carer’s assistance, Cold-spell heating assistance, Winter heating assistance, Disability assistance, Early years assistance, Employment-injury assistance, Funeral expense assistance

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

7. Sections 11 to 17 follow broadly the same approach and are therefore best explained together.

8. Each of the sections describes a type of assistance which the Scottish Ministers are duty bound to give under section 8. In each case, the section provides that the Scottish Ministers are to make regulations setting out who is eligible for the type of assistance in question and what those who are entitled to it are to be given by way of assistance.

9. Each section is linked to a schedule which makes further provision about the regulation-making power the section confers. The schedules set out the core eligibility criteria that the Scottish Ministers must use the power to set. For example, in relation to funeral expense assistance, the regulations must provide that a person’s eligibility for that type of assistance depends on the person being responsible for meeting the costs of a funeral (see schedule 7, paragraph 1). The schedules also give a non-exhaustive list of other eligibility criteria that may be set in the regulations. Some of these are common to more than one assistance type, such as the proposition that eligibility may be made to depend on applying for assistance within a specified period. Others are particular to the type of assistance in question, for example a further eligibility criteria for funeral expense assistance may be that it depends on where the funeral takes place (see schedule 7, paragraph 2). Similarly, the schedules provide a non-exhaustive list of the provision that may be made in regulations concerning what people are to be entitled to by way of assistance.

Reason for taking power

10. The Bill is the first devolved provision for social security. In looking at existing UK social security legislation, the Scottish Government was struck

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by how complex and fragmented it had become over time. Users of the legislation have complained that in order to understand how a benefit operates it is often necessary to simultaneously refer to primary and secondary legislation, which interacts in complex ways.

11. Having reflected on these complaints, the Scottish Government is of the view that it would make the law more accessible to tell the whole story of how a person qualifies for assistance, and what they qualify for, in one place. As some elements of that story will necessarily have to change from time to time, telling it in primary legislation is not a realistic option. The Scottish Government is therefore of the view that the optimal solution is to have the whole story of entitlement to different types of assistance told in regulations.

12. Naturally, the Scottish Government is live to concerns about the effect of this approach on the opportunity for the Parliament to control the detail around the different types of assistance during the Bill's passage. The schedules attached to each of sections 11 to 17 are a way of ensuring that parliamentary control is not sacrificed in the interests of more accessible law and, equally, that the ambition of having accessible social security law is not sacrificed in the interests of parliamentary control. By amending the relevant schedule during the Bill's passage, members will be able to control what may, must, or must not, be done using the power to make provision about a particular type of assistance. In this way, members will be able to exert just as much control over the detail of the different types of assistance during the passage of the Bill as they would if some of the eligibility rules were set directly on the face of the Bill. The approach the Scottish Government is proposing for this Bill simply affects how members influence the detail, not the extent to which they can do so.

13. Ahead of Stage 2, the Scottish Government will produce illustrative drafts of regulations, including some drafts in relation to types of assistance. This will give members an opportunity to see how the primary and secondary legislation will fit together and, if they wish, inform the development of the regulations..

14. Looking beyond the Bill process, the Scottish Government's proposed approach of having the whole story in relation to the different assistance types told in regulations should help the Parliament's ability to scrutinise future Scottish Government policy. The fragmented nature of existing UK social security legislation not only makes it difficult to follow for those applying it, it also makes it difficult for parliamentarians to understand proposed changes to it.

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Choice of procedure

15. The Scottish Government's proposal is that regulations under sections 11 to 17 should be subject to the affirmative procedure (see section 55(2)).

16. The regulations will contain the provision that determines what eligibility rules will be applied to determine whether a person is entitled to assistance and what qualifying persons are entitled to be given. In the Scottish Government's view, the significance of these matters makes it appropriate that the Parliament should consider them in detail and that it is therefore appropriate for such regulations to be subject to the affirmative procedure.

17. As discussed in paragraphs 4 to 6 above, the Scottish Government is keen to hear from the Social Security Committee and the Delegated Powers and Law Reform Committee in particular about what further mechanisms for scrutinising regulations (if any) would be appropriate.

18. As set out in paragraph 11 above, the Scottish Government has adopted this approach to set out provision in a coherent way for users of social security legislation, while providing flexibility to respond to changing circumstances. Putting the full detail of provision in subordinate legislation avoids the need for users to read both an Act and secondary material to understand provision, while retaining parliamentary control over what must be provided, and what can be provided.

Part 2 - Giving of assistance by Scottish Ministers

Section 18 – Short-term assistance

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

19. Section 18 provides for a type of assistance called short-term assistance. Like the other sections in Chapter 2 of Part 2 of the Bill (i.e. sections 11 to 17), it gives the Scottish Ministers the power to set out in regulations who is eligible for short-term assistance and what someone who is entitled to it is to be given by way of assistance.

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20. Unlike the other sections of Chapter 2 of Part 2, section 18 has no schedule attached to it which makes further provision about the exercise of the power it confers. This leaves what can be provided for by way of short-term assistance open-ended. This is consistent with the purpose of having a power to provide for short-term assistance, because the object is to allow the Scottish Ministers to give assistance on a short-term basis to meet somewhat ad hoc needs.

21. Subsection (3) of section 18 does impose one rule about the exercise of the power to provide short-term assistance. It directs the Scottish Ministers to make provision for it to be available to persons who have been entitled to assistance of an on-going nature (as opposed to a one-off payment) in the event that the person's entitlement to that on-going assistance has been stopped, or reduced, and the decision to stop or reduce the person's entitlement is under review. 'For these purposes, "under review" means that the person has requested a re-determination (see section 23) or has appealed to the First-tier Tribunal (see section 27). In effect, short-term assistance will plug the gap so that the person is left no worse off as a result of a contested decision to stop or reduce his or her entitlement to the other type of assistance until that decision has been looked at again.

Reason for taking power

22. The purpose of establishing short-term assistance is to enable the Scottish Ministers to give someone assistance, for a limited period, in circumstances not covered by one of the 'main' assistance types described in sections 11 to 17. As the object is, in part, to make provision for the unforeseen it follows that taking a power to make provision is the only option.

23. The one circumstance in which the Scottish Government is clear that short-term assistance ought to be available is the circumstance covered by section 18(3) (which is described in paragraph 21 above). Nevertheless, there may be a need to make further provision about precisely to whom short-term assistance should be made available in that circumstance and what form it should take. Amongst other things, the nature of that further provision may depend on what type of on-going assistance the short-term assistance is being used to plug a gap in. And as the detail of the on-going assistance types are to be set out in regulations, it follows that flexibility will be needed to mesh short-term assistance with the regulations on the on-going assistance types.

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Choice of procedure

24. For the reasons set out above (see paragraphs 15 to 18), the Scottish Government is of the view that affirmative procedure is appropriate for powers dealing with who is eligible for assistance and what those who are entitled to assistance are to be given.

Part 2 - Giving of assistance by Scottish Ministers

Section 23 – Right to request re-determination

Subsection (2)(b) – Power to prescribe period for requests

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

25. Section 23 provides that after the Scottish Ministers have determined a person's entitlement to a particular type of social security, the person can ask for a re-determination. Subsection (2)(b) provides for Ministers to make regulations setting an end date by which any such request has to be made.

Reason for taking power

26. The length of time someone should have to ask for a re-determination may not be the same in all circumstances. Fairness to the individual and administrative certainty have to be balanced against one another. Allowing the period within which someone can seek a re-determination to be set by regulations means that the rules can be refined in light of practical experience.

Choice of procedure

27. In the Scottish Government's view negative procedure is appropriate for regulations under section 23(2)(b). This type of deadline is essentially administrative. While the Parliament should be made aware of what the period or periods are to be and be able to comment on them it is not anticipated that such provision is likely to be controversial. Consequently it

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should not be necessary to require parliamentary time to be spent debating each use of the power. Making the power subject to the negative procedure means that members can choose to have a debate on an instrument if they have particular concerns about it.

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Part 2 - Giving of assistance by Scottish Ministers

Section 24 – Duty to re-determine entitlement

Subsection (5) – Power to prescribe period for redetermination

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

28. Section 23 provides that a person whose entitlement to a particular type of social security assistance has been determined by the Scottish Ministers may request that the Scottish Ministers re-determine the person's entitlement. The person cannot appeal to the First-tier Tribunal against the Scottish Ministers' determination of entitlement until either the Scottish Ministers have made the re-determination or the time allowed for them to do so has run out. Section 24(5) confers on the Scottish Ministers the power to prescribe by regulations when the time for making a re-determination runs out.

Reason for taking power

29. The length of time the Scottish Ministers should be allowed for making a re-determination may depend on the circumstances. To re-determine entitlement for an assistance type that has fairly easily assessed eligibility criteria, only a short re-determination window may be needed. But longer may be needed to look again at someone's eligibility for a type of assistance that has more complex eligibility criteria (for example, disability assistance).

30. The possibility that different provision may be needed for different purposes, and that the periods allowed may need to be refined in light of practical experience, favour setting the period allowed for re-determination by regulations.

Choice of procedure

31. In the Scottish Government's view negative procedure is appropriate for regulations under section 24(5). This type of deadline is essentially

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administrative. While the Parliament should be made aware of what the period or periods are to be and be able to comment on them it is not anticipated that such provision is likely to be controversial. Consequently it should not be necessary to require a debate on each occasion that it is used, though there would be opportunity for that through the requirement for negative procedure. It would not seem to the Scottish Government to be an efficient use of parliamentary time for such regulations to require a higher level of scrutiny.

Part 2 - Giving of assistance by Scottish Ministers

Section 34 – Determination on basis of on-going entitlement

Subsection (1) – Power to provide for entitlement to be indefinite or for a period

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

32. Where a person is entitled to social security assistance, it may be provided as a one-off award (for example, a payment to assist with funeral expenses) or it may be provided on the basis that the person will continue to qualify for further payments in future unless circumstances change. An example of the latter would be an award of disability assistance where it is obvious that the person is going to continue to be disabled at least in the medium term. Section 34 provides that a determination of a person's entitlement to a specified type of social security assistance may be made on the basis that the person's entitlement will be on-going. The circumstances in which someone's entitlement is to be determined to be of an on-going nature, and the details of how on-going assistance is to be given, are to be set out in regulations under section 34.

Reason for taking power

33. While there will be a need to provide for continuing assistance and how decisions relating to it are to be determined, this cannot be done in the Bill as it will link closely to the design of relevant schemes of assistance. As

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those schemes will be established by regulations, it is necessary, and appropriate, to set out such provision in regulations.

Choice of procedure

34. The Scottish Government's view is that regulations under section 34(1) should be subject to the affirmative procedure. In practice, to assist users of the legislation, the Scottish Government is likely to exercise this power as part of regulations making provision for a scheme of assistance under sections 11 to 17, rather than in a free-standing manner. For the reasons set out in paragraphs 15 to 18 above, the Scottish Government's view is that regulations under those sections should be subject to the affirmative procedure.

Part 2 - Giving of assistance by Scottish Ministers

Section 35 – Determination without application

Subsection (1) – Power to determine a person's entitlement to assistance without receiving an application

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

35. For some types of social security assistance, it may be appropriate for the Scottish Ministers to make a determination that a person is entitled to it without the need for an application. An example might be cold-spell heating assistance, which Ministers might be able to determine people's entitlement to based on information already held about where they live and their entitlement to other forms of social security. Ministers also require to be able to provide for replacement of existing determinations if they become aware that a person's circumstances have changed, or that assumptions made in making the determination have ceased to be appropriate. Section 35(1) gives Ministers the power to specify in regulations the circumstances in which they will determine someone's entitlement to a type of assistance without having received an application.

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Reason for taking power

36. The circumstances in which a determination of entitlement is to be made without the need for an application is intrinsically linked to the design of the various types of assistance. As the detail around the different types of assistance is to be set out in regulations under sections 11 to 17, it is necessary, and appropriate, for this inextricably connected type of provision to be made by regulations.

Choice of procedure

37. In the Scottish Government's view regulations under section 34(1) should be subject to the affirmative procedure. In practice, to assist users of the legislation, the Scottish Government is likely to exercise this power as part of regulations making provision for a scheme of assistance (i.e. regulations under Chapter 2 of Part 2), rather than in a free-standing manner. For the reasons set out in paragraphs 15 to 18 above, the Scottish Government's view is that regulations under those sections should be subject to the affirmative procedure.

Part 2 - Giving of assistance by Scottish Ministers

Section 35 – Determination without application

Subsection (2) – Power to make provision about the information that is to be used and assumptions to be made when determining a person's entitlement to assistance without receiving an application

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

38. For the reasons set out in paragraph 35, there will be circumstances in which a determination of someone's entitlement to a type of assistance will be made without the person having made an application for assistance. In the absence of an application, Ministers will need to use information available to them from other sources, and perhaps make certain assumptions, in order to make a determination of entitlement. Section 35(2) provides for regulations to set out the sources of information that are to be

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used, and the assumptions that are to be made, by Ministers when making a determination of entitlement unprompted by an application.

Reason for taking power

39. The sources of information that will be relevant, and the assumptions that will need to be made, will necessarily depend on the rules governing the different types of assistance. As those rules are to be set out in regulations under sections 11 to 17, it is necessary, and appropriate, for this inextricably connected type of provision to be made in regulations.

Choice of procedure

40. In the Scottish Government's view, regulations under section 35(2) should be subject to the affirmative procedure. In practice, to assist users of the legislation, the Scottish Government is likely to exercise this power as part of regulations under sections 11 to 17, rather than in a free-standing manner. For the reasons set out in paragraphs 15 to 18 above, the Scottish Government's view is that regulations under those sections should be subject to the affirmative procedure. Relatedly, it is very likely that any regulations made under section 35(2) will form part of the same instrument as regulations under section 35(1). As stated in paragraph 37, the Scottish Government's view is that regulations under section 35(1) should be subject to the affirmative procedure.

Part 2 - Giving of assistance by Scottish Ministers

Section 43 – Power to make provision about investigations

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

41. This provides the Scottish Ministers with the power to make provision about the investigation of offences. Regulations may confer powers to enter and search premises (other than dwelling-houses) and seize relevant material. They may also create offences, with a maximum penalty not exceeding level 3 on the standard scale (currently £1,000).

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Reason for taking power

42. Investigatory powers and offences will need to be tailored to the schemes of assistance created using the powers conferred by the Bill. The approach to developing regulations will be undertaken in conjunction with fraud practitioners and other experts in Scotland, including established social security stakeholder groups and, where appropriate, the Experience Panels. This approach will also allow sufficient flexibility to be developed in tandem with the rules governing the different types of assistance. The Code of Practice provided for by section 44 will be significant here, and is to be developed after public consultation. Although a power to create offences in subordinate legislation is comparatively unusual, it is preceded in a social security context; see, for example, section 113 of the Social Security Administration Act. Taking a power will enable investigatory powers to be determined relevantly, with offences created where appropriate. The level of penalty has been selected taking into account that this is related to offences that will be of a lesser seriousness than those provided for on the face of the Bill, in the immediately preceding sections.

Choice of procedure

43. Affirmative procedure is considered appropriate for creation of offences. Creating offences by subordinate legislation is not very common. When it is done, it is almost always on the basis that the affirmative procedure will apply to any offence-creating regulations. Adopting that procedure will mean that the more detailed level of parliamentary scrutiny is given both to offences that are created and to the powers that will be conferred on investigators.

Part 2 - Giving of assistance by Scottish Ministers

Section 44 – Code of practice on investigations

Power conferred on: the Scottish Ministers
Parliamentary procedure: laid, no procedure

Provision

44. Section 44 provides for the Scottish Ministers to publish a Code of Practice on investigations and to keep it under review. They must consult publicly before publishing the code, and when revising it, and must lay a copy of the published code before the Scottish Parliament. A court or tribunal

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must take the code into account in determining any question to which it is relevant, though breach of the code does not of itself give grounds for any legal claim.

Reason for taking power

45. In addition to the provision made by regulations under section 43, it is important that there is publicly available information about how social security investigations will be conducted. That will ensure proper conduct of inquiries and further the implementation of the Scottish social security principles provided by the Bill, in particular that respect for the dignity of individuals is to be at the heart of the system.

Choice of procedure

46. The code will supplement provision made by regulations under section 43, and it is considered sufficient by the Scottish Government that it is brought to the Scottish Parliament's attention by laying it after publication. The public consultation requirement will ensure that stakeholder views can inform the code's development and review. As the code will be relatively technical, and informed by the views of persons who take a close interest in these matters, the Scottish Government does not consider that it would be an appropriate use of the Parliament's time to require parliamentary approval of the code.

Part 3 – Supplementing assistance under other enactments

Section 45 – Power to provide for top up of reserved benefits

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

47. Section 45(1) provides that the Scottish Ministers may, by regulations, provide financial assistance to persons entitled to a reserved benefit who appear to them to require additional assistance for a purpose for which that benefit is provided. A definition of "reserved benefit" is provided and section 46 provides restrictions on the use of the power (such as that the power may

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not be used to assist with housing costs). These reflect the limits on devolved competence provided by Exception 5 in Section F1 (social security schemes) in Part 2 of schedule 5 of the Scotland Act 1998, as inserted by section 24 of the Scotland Act 2016.

Reason for taking power

48. It would be prudent to provide the Scottish Ministers with the power to be able to exercise the devolved competence to top up reserved benefits. Unlike other types of assistance, this provision will require to be responsive to circumstances, particularly the benefits that the UK Government provides and their conditions. This section will allow the Scottish Ministers to respond to concerns where reserved benefits are perceived to provide insufficient assistance.

Choice of procedure

49. Affirmative procedure is considered appropriate given the nature of the provision and the fact that its use may involve modification of primary legislation, including provision in the Bill. It is appropriate that the Scottish Parliament should consider in detail any provision that the Scottish Ministers propose to make.

Part 3 – Supplementing assistance under other enactments

Section 47(5) – Power to amend eligibility criteria for a Carer’s Allowance supplement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

50. Section 47 imposes a duty on the Scottish Ministers to provide supplementary payments to persons in receipt of Carer’s Allowance on two dates to be set each year. Those persons are to be resident in Scotland. Subsection (5) allows modification of these eligibility criteria. Section 47 is intended as a temporary measure, being provided because the Scottish Ministers cannot immediately increase the rate at which Carer’s Allowance

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is paid to match the rate at which Jobseeker's Allowance is paid. It is envisaged that the supplement will cease to be needed once regulations under section 11 have been made to provide a scheme for carer's assistance, as that can provide for payments at the increased rate.

Reason for taking power

51. Until experience is gained of paying the Carer's Allowance supplement it is impossible to be certain that the eligibility criteria will operate effectively. Also, as experience is gained it may become possible to refine the eligibility criteria, for example to extend provision of the supplement to carers who receive Carer's Allowance on other dates, but not on one of the two set dates. It would be prudent for the Scottish Ministers to have the power to be able to adjust the criteria to be responsive to difficulties and opportunities.

Choice of procedure

52. Affirmative procedure is considered appropriate as use of the provision involves amendment of primary legislation, i.e. section 47 of the Bill. It is appropriate that the Scottish Parliament should consider in detail any modification of the eligibility criteria that the Scottish Ministers propose to make.

Part 3 – Supplementing assistance under other enactments

Section 48 – Power to repeal section 47 (carer's allowance supplement) and revoke regulations made under it

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

53. The power allows the Scottish Ministers to repeal section 47 and revoke any instruments made under it. That section imposes a duty on the Scottish Ministers to provide supplementary payments to persons resident

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in Scotland who are in receipt of Carer's Allowance on two dates to be set each year.

Reason for taking power

54. Section 47 is intended to be a temporary provision, to increase payments to carers until the Scottish Ministers are able to commence provision using the powers at section 11 of the Bill. Ministers wish the rate at which Carer's Allowance is paid to match the rate of Jobseeker's Allowance, but do not have powers to increase its rate, other than to uprate it for inflation. Regulations under section 11 can provide a scheme for carer's assistance that makes payments at a rate equivalent to Jobseeker's Allowance, which would make the supplement unnecessary. Section 48 therefore allows the Scottish Ministers to repeal the duty to pay the supplement and revoke any regulations made under it.

Choice of procedure

55. Affirmative procedure is considered appropriate as use of the provision involves amendment of primary legislation, i.e. removal of section 47 of the Bill. It is appropriate that the Scottish Parliament should approve that. In practice this is likely to happen along with provision that the Scottish Ministers propose to make using the power provided by section 11 of the Bill, so an identical procedure is desirable.

Part 4 – Discretionary Housing Payments

Section 52 – Guidance to local authorities

Power conferred on: the Scottish Ministers

Parliamentary procedure: laid, no procedure

Provision

56. Part 4 provides for local authorities to give financial assistance to help qualifying individuals with housing costs. This is intended to replace current provision for Discretionary Housing Payments by local authorities under the Child Support, Pensions and Social Security Act 2000. Local authorities must have regard to any guidance issued by the Scottish Ministers, who must consult a local authority body before issuing it. The Scottish Ministers must lay a copy of any guidance before the Scottish Parliament.

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Reason for taking power

57. Current delivery of Discretionary Housing Payments includes provision for guidance and Ministers consider that should continue. For example, guidance may be used to further the implementation of the Scottish social security principles provided by the Bill and to encourage consistency of approach where desirable.

Choice of procedure

58. The Scottish Government considers it sufficient that guidance is brought to the Scottish Parliament's attention by laying it after publication. The requirement for consultation with a local authority representative body will ensure that views from local authorities must be considered ahead of any guidance being issued, and in practice it is likely that there will be considerable local authority input into the guidance. As the guidance will be informed by the views of the bodies that currently deliver assistance, and will continue to do so, the Scottish Government does not consider that it would be an appropriate use of the Parliament's time to require parliamentary approval of the guidance.

Part 4 – Discretionary Housing Payments

Section 53 – Power to modify section 49 (local authorities' power to make discretionary housing payments)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

59. Section 53 confers power on the Scottish Ministers to make regulations modifying section 49 in consequence of changes to UK social security legislation.

60. Section 49 empowers local authorities to make Discretionary Housing Payments to people who are in receipt of certain other types of assistance intended to help them pay rent. Section 49 specifies what those other types of assistance are by reference to legislation made by the UK Parliament. If the UK Parliament were to change the legislation mentioned in section 49,

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individuals who should be eligible for Discretionary Housing Payments may not be. Section 53 therefore allows the Scottish Ministers to make regulations to amend section 49 in order to keep it up to date with changes in parts of the law which remain reserved to the UK Parliament.

Reason for taking power

61. The alternatives to taking a power to update section 49 by regulations are either:

- requiring primary legislation to effect any update, or
- using a form of words in section 49 which is expansive enough to cover any changes that may be made to the relevant parts of UK social security legislation in the future.

62. Requiring further primary legislation to effect any updates would not be a good use of parliamentary time. The likelihood is the power will be used simply to replace a cross-reference to one enactment with another.

63. Using a form of words that is broad enough to cover any future changes to UK social security legislation is the approach taken to the drafting of exception 6 to the social security reservation in schedule 5 of the Scotland Act 1998 (i.e. the exception which gives the Scottish Parliament competence to enact section 49). Following that approach in the Bill itself would not provide readers with clarity and certainty. They would have to parse for themselves what a “reserved benefit payable in respect of a liability to make rent payments” means, applying the statutory definitions of the terms “reserved benefit” and “rent payments”.

64. The Scottish Government is therefore of the view that taking a regulation-making power is the most appropriate and transparent way to ensure that section 49 keeps pace with technical changes in UK social security legislation.

Choice of procedure

65. While the nature of the amendments that can be made to section 49 by regulations under section 53 will be very limited, convention favours applying the affirmative procedure to regulations that amend primary legislation. Furthermore, any amendment made will directly affect who can and cannot be given Discretionary Housing Payments. For these reasons, the Scottish Government considers affirmative procedure appropriate.

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Part 5 – Final provisions

Section 54 – Power to make ancillary provision as is considered appropriate for the purposes of, or in connection with, or for giving full effect to any provision of the Bill

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure if making textual changes to an Act, but otherwise negative

Provision

66. Section 55 of the Bill confers on the Scottish Ministers a power to make, by regulations, any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, or in connection with, or for giving full effect to the Bill or any provision made under it.

Reason for taking power

67. As with any new body of law, this Bill may give rise to a need for a range of ancillary provision. For example, consequential provision may be required in order to make necessary changes to related legislation. The Scottish Ministers consider the power to be necessary to provide this flexibility and that it should extend to the modification of primary legislation. Otherwise it might be necessary to return to Parliament for further primary legislation to make a small technical adjustment to another statute where it is obvious that the adjustment has to be made if the intentions of Parliament in passing this Bill are to be given effect. That would not be an efficient use of resources by the Parliament or the Scottish Government. The power, whilst potentially wide, is limited in that it can only be used if the Scottish Ministers consider it appropriate to do so, for the purposes of, or in connection with, or for giving full effect to any provision made by or under the Bill. As discussed below, the Parliament will have an opportunity to scrutinise any use of the power by the Scottish Government.

Choice of procedure

68. Section 55(4) of the Bill provides that any regulations made under section 54 will be subject to affirmative procedure if they contain provisions

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which make textual changes to an Act. Otherwise, they will be subject to negative procedure. This provides the appropriate level of parliamentary scrutiny for the textual amendment of primary legislation, while allowing efficient use of parliamentary time for regulations that do not require that level of scrutiny.

Part 5 – Final provisions

Section 56 – Power to commence provisions of the Bill, including power to make transitional, transitory or saving provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

Provision

69. Section 56 provides that the Scottish Ministers may, by regulations, appoint days on which the provisions in the Bill come into force. Regulations under section 56 may include transitional, transitory or saving provision.

Reason for taking power

70. The power will enable the Scottish Ministers to bring the provisions of the Bill into force and to manage the effects of their commencement. This is especially significant for this Bill, as the approach to devolution of social security requires to manage transition of existing assistance schemes.

71. For example, the Scotland Act 2016 (Transitional) Regulations 2017 (S.I. 2017/444) delay transfer of executive competence for existing Secretary of State benefits for disability, industrial injuries and carers until 1 April 2020, unless a relevant provision of the Bill (or any other devolved enactment) comes into force earlier than that date. Commencement of section 47 of the Bill (Carer's Allowance supplement) earlier than 1 April 2020 will mean that the Scottish Ministers assume responsibility for delivery of Carer's Allowance under section 70 of the Social Security Contributions and Benefits Act 1992. The Scottish Ministers therefore need the power to manage such effects, both in setting dates of commencement and in making any transitional, transitory and saving provision that commencement gives rise to.

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Choice of procedure

72. Section 56 has the effect that such commencement regulations will not be subject to parliamentary procedure. This is typical of commencement powers.

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Social Security (Scotland) Bill

Delegated Powers Memorandum

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