

Social Security (Scotland) Bill

[As amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

This supplementary memorandum has been prepared by the Scottish Government in accordance with rule 9.7 of the Parliament's Standing Orders. It describes provisions in the Bill which confer power to make subordinate legislation and which were either amended or introduced at stage 2.

1. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament. This supplementary memorandum should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

Provisions conferring power to make subordinate legislation introduced or amended at Stage 2

2. The amended or new delegated powers in the Bill 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.

Powers in connection with the Scottish Commission on Social Security

3. Section 6A establishes the Scottish Commission on Social Security and schedule A1 makes further provision about that Commission.

Schedule A1, paragraph 4(2)(c) – Access to information

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new: new

Parliamentary procedure: negative

Provision

4. Paragraph 4 of schedule A1 confers on the Commission a right of access to information in the possession or under the control of a member of the Scottish Government or a local authority, that the Commission reasonably requires for the purpose of performing its functions. The Commission is also able, as part of that right, to require persons who hold or are accountable for such information to provide assistance or explanation to it in the performance of its functions or in exercising its right of access. The right is expressly made subject to any restriction in other legislation, such as data protection legislation, that prohibits or restricts disclosure.

5. The power conferred by paragraph 4(2)(c) of the schedule would allow the Scottish Ministers to specify other persons, or types of persons, in relation to whom this power to require information and explanations can be used.

Reason for taking power

6. This power will allow Ministers to give the Commission access to information held by other persons that may be relevant to the Commission's role. Taking a power to specify whom the Commission can require information from provides flexibility should it emerge, from experience, that the Commission is routinely encountering difficulty accessing certain types of information. The Government does not favour the alternative approach, which would be to set no limits at all on whom the Commission can require information from.

Choice of procedure

This document relates to the Social Security (Scotland) as amended at Stage 2 (SP Bill 18A)

7. Given the relatively limited nature of the power, and the restriction at paragraph 4(3) that prevents the Commission accessing information where other prohibitions or restrictions prohibit its disclosure, the Scottish Government considers that the negative procedure provides the appropriate level of Parliamentary scrutiny. This is consistent with provision in other legislation, such as that applicable to the Poverty and Inequality Commission, where identical provision exists.

Schedule A1, paragraph 13 – Membership of Commission

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new: new

Parliamentary procedure: negative

Provision

8. Paragraph 13 of schedule A1 provides for the Commission to have a chair plus at least 2 and not more than 4 other members. Paragraph 13(2) of the schedule would allow the Scottish Ministers to specify other minimum and maximum numbers of members.

Reason for taking power

9. It is prudent to allow for some flexibility to alter the size of the Commission in future, for example should there be any significant change to the Commission's role or remit.

Choice of procedure

10. This is a limited power which will allow the Scottish Ministers to make very specific amendments. There is a similar power in the Scottish Fiscal Commission Act 2016 (in section 15(4)), and also in relation to the Poverty and Inequality Commission (in paragraph 1 of the schedule of the Child Poverty (Scotland) Act 2017). Both of these powers are subject to the negative procedure. The Scottish Government therefore considers that negative procedure is appropriate.

Section 6B(1)(e) – Power to confer further functions on Commission

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new: new

Parliamentary procedure: affirmative

Provision

11. Section 6B(1)(e) allows the Scottish Ministers to confer additional functions on the Commission. The power is solely to add functions, not to alter the functions already set out in the Bill.

12. Once the Commission has been established, Ministers will require to consult the Commission before laying draft regulations under this power (see section 55(5)).

Reason for taking power

13. It is prudent to allow for flexibility to add to the functions of the Commission in future, should there be a wish that the Commission have a role or remit in relation to something not currently foreseen. Although Ministers and the Parliament may make requests for reports on specific matters, it may be desirable to give the Commission additional functions on a more permanent basis. Until the Commission is established and begins its work, it is impossible to predict where its expertise might additionally prove useful.

Choice of procedure

14. The Scottish Government considers that affirmative procedure, with a consultation requirement, is appropriate. The addition of functions extends a scheme set out in primary legislation in which the Scottish Parliament will have a significant interest, since it can ask the Commission to report on specific matters. It is appropriate that Parliament should approve any proposals, and that both the Scottish Ministers and the Parliament, in its consideration of proposals, should have the advantage of the Commission's views on what is being proposed.

Regulations establishing assistance types under Part 2 and topping-up reserved benefits under Part 3

Section 17A – Housing assistance

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new: new

Parliamentary procedure: affirmative

Provision

15. Section 17A introduces a new type of assistance (housing assistance), with a power to make regulations setting out who is eligible for it and what those who are entitled to it are to be given by way of assistance. It links to a schedule which makes further provision about the regulation-making power the section confers, following the same structure as schedules for other types or assistance.

Reason for taking power

16. The reason for taking the power is the same as with other assistance types. The Scottish Government considers that it makes 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 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 told in regulations, with schedules that control use of the power to make regulations. That structure ensures that parliamentary control is not sacrificed.

Choice of procedure

17. The Scottish Government considers that affirmative procedure, with the additional steps outlined in paragraphs 22 to 25, is appropriate. The addition of the new housing assistance type has no features that make inappropriate the procedure proposed for other assistance types.

Section 18 – Short-term assistance (revised)

18. The effect of section 18, which allows regulations to make provision about short-term assistance, did not change significantly at Stage 2 but the provision was re-structured.

19. Two additional rules governing the way that the regulation-making power can be exercised were added:

- First, it is now provided that short-term assistance must be given to an individual while an application to the First-tier Tribunal for a late appeal under section 27 is pending.
- Second, provision is now made governing the value of short-term assistance that must be given when that type of assistance is being

given during a challenge to a person's entitlement to another type of assistance.

20. To accommodate the addition of those rules, schedule 9 was added to the Bill. The rules which formed subsections (3) to (5) of section 18 in the Bill as introduced, were also moved into the schedule.

Sections 55A and 55B – Scrutiny of certain regulations

21. The Delegated Powers Memorandum prepared in relation to the Bill as introduced raised the question of whether regulations setting up the new, Scottish forms of social security (i.e. regulations under sections 11 to 18 and section 45) should be subject to some other form of oversight, over and above that which the affirmative procedure entails. In its Stage 1 report, the Social Security Committee recommended adding to the scrutiny procedure a role for a body equivalent to the Social Security Advisory Committee which operates at Westminster.

22. The procedure for making regulations under the sections referred to above is supplemented by provision at new section 55A of the Bill. This provides that where the Scottish Ministers propose to make such regulations, they must inform the Scottish Commission on Social Security of their proposals, notify the Parliament that they have done so, and make their proposals publicly available. The primary purpose is to allow the Commission, and the Parliament if it chooses to do so, to undertake the scrutiny of regulations. Only after that may the Scottish Ministers lay a draft instrument containing regulations, along with either a response to the Commission's report or an explanation of why Ministers consider it appropriate not to await that report. The latter is likely to be used if there is either some urgency to make the regulations, or a reason why the Commission is not able to report. It would be for the Parliament to determine what to make of any explanation in deciding whether to approve the making of the instrument.

23. There is an exception to this requirement where regulations either consolidate earlier regulations or fall within a description that the Commission has advised that it does not consider it need be informed about. Section 55B creates a further exception, for early-years assistance regulations and funeral expense assistance regulations that are brought forward before a date that the Commission has notified Ministers and the

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Parliament. This is a date from which the Commission is ready to perform its function of scrutinising legislation.

24. The exceptions to the consultation requirement are designed to address three situations:

- From time to time the Scottish Government will seek to consolidate regulations, to assist both scrutiny and the use of legislation. Where that is a technical drafting process, involving no change to the way the regulations work, there is no need for the Commission to consider the regulations.
- The Commission may itself identify types of regulations that it sees no need to consider. It is difficult to predict what that might be, but an example might be if the section 45 power to top up benefits were used in a way that included relatively minor procedural detail that needed to be updated periodically to reflect changes in the benefit being topped up. The Commission might consider that there were types of such changes that were simply mechanical adjustments and did not require it to expend resource in preparing a report. This would be for the Commission to determine.
- The Scottish Government wishes to proceed to deliver devolved assistance promptly. Setting up the Commission will inevitably take some time, and awaiting its views would delay consideration of some regulations that are likely to be brought forward before the Commission is ready to consider them. Drafts of these regulations have already been prepared and published. The policies that underlie those drafts have been consulted upon during the Bill's Parliamentary passage. The Government therefore sees no need to delay progressing those regulations if the Commission is not ready to consider and report on them. Section 55B lets the Commission decide when it is ready, but allows those two types of regulations to be progressed ahead of that readiness.

Section 55B(4) – Power to repeal section 55B (temporary disapplication of section 55A)

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new: new

Parliamentary procedure: laid, no procedure

Provision

25. The power allows the Scottish Ministers to repeal section 55B. The section disapplies for a temporary period section 55A, which provides for consultation with the Scottish Commission on Social Security as described in paragraphs 22 to 25 above.

Reason for taking power

26. Section 55B is a temporary provision to allow the Scottish Ministers to progress regulations for early years assistance and for funeral expense assistance ahead of the time that the Commission is ready to perform its function of scrutinising proposals for legislation. The Commission will advise Ministers and the Parliament once it is ready to commence that role, and at that point the consultation requirements in section 55A apply and section 55B ceases to operate. Section 55B(4) therefore allows the Scottish Ministers to repeal the section, to tidy up the statute book as the section is spent and there is no reason for it to remain there.

Choice of procedure

27. No procedure is provided, though the instrument would be laid before the Parliament as required by section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. This is considered appropriate as the regulations will simply be removing from the statute book a provision that has ceased to have any legal effect.

28. The position here can be contrasted with that in relation to the power in section 48 of the Bill, which allows for the repeal of section 47 and the revocation of regulations under it. Regulations under section 48 are subject to the affirmative procedure. That level of scrutiny is appropriate for those regulations because there will be a significant element of policy discretion involved in the exercise of the power, which will end the temporary scheme for the topping up of UK Government's carer's allowance. There is an exercise of Ministerial discretion around the timing of the power's exercise and, although the power is likely to be used only to tidy the statute book,

other uses are at least theoretically possible. For the section 48 power, therefore, the affirmative procedure is appropriate because the Parliament should closely scrutinise the choices Ministers have made about how to exercise the power and the timing of its exercise.

29. By contrast, there are no policy choices for the Parliament to scrutinise in relation to the exercise of the power under section 55B(4). The power can only be used to remove text from the statute book that will, at the point the power becomes exercisable, have ceased to have any legal effect. Removal in no way alters the law of Scotland, it is simply a tidying-up exercise so that readers of the legislation are not left to wonder about whether the section is still in effect or not.

Other regulation-making powers

Section 20(1) – Applications for assistance

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new: new

Parliamentary procedure: negative

Provision

30. Section 20(1) provides that an application for assistance must be made to the Scottish Ministers in such form as may be prescribed in regulations.

Reason for taking power

31. In moving the amendment to introduce this power, Mark Griffin MSP said that it is intended to provide for how applications are to be made, which would provide clarity to applicants and those who advise them, of what is required to make a valid application.

Choice of procedure

32. This is a limited power which will allow the Scottish Ministers to make provision for the form of applications. The Bill as introduced proposed that this be managed administratively, without any requirement for a prescribed form. The negative procedure is considered to provide adequate Parliamentary scrutiny for what is to be prescribed.

Section 23(2C)(a) – Re-determination periods

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new: revised (structure only)

Parliamentary procedure: negative

33. Section 23(2C)(a) confers on the Scottish Ministers the power to specify the period within which a request for a re-determination under section 23 may be requested. The power is mentioned in this memorandum for completeness only. The power is identical to that provided by section 23(2)(b) in the Bill as introduced, and has been moved into a new subsection as part of a wider re-structuring of section 23 that has no implications for the nature of the power. Accordingly what is said about section 23(2)(b) in the Delegated Powers Memorandum published to accompany the Bill on introduction holds good for section 23(2C)(a).

Section 48C(2)(g) and (5) – Information-sharing

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new: new

Parliamentary procedure: negative

Provisions

34. Section 48C(2) lists bodies that the Scottish Ministers can require to provide them with information that the bodies hold, where Ministers require that information for a social security purpose. Paragraph (g) of that subsection enables Ministers to specify in regulations further persons who are to be subject to that requirement.

35. Section 48C(5) provides that Ministers can supply information Ministers hold for social security purposes to the bodies mentioned in section 48C(2). However, regulations must specify the function of the person for which the information can be supplied for use.

Reason for taking powers

36. These two powers are inter-related. The section 48C(5) power is intended to ensure that where Ministers have a reason to supply information to an external person (in practice these are bodies, rather than individuals), it is clear why that information is being provided. The list of purposes cannot be anticipated with certainty until Ministers commence operating a social security system and is likely to need to respond to changes in the functions persons have, the manner in which they carry them out, and the types of information that Ministers hold.

37. The list of persons from whom Ministers may require information may also need to respond to changes in the names of the persons themselves, and to add new persons who hold information that would assist in operating the social security system. Additions may create a need to specify purposes for which information can be supplied by Ministers to the person being added.

38. The power provides flexibility to add to the persons covered by section 48C(2) and to specify purposes for which information can be provided by Ministers to the persons already set out in that section or added in future.

This document relates to the Bill as amended at Stage 2 (SP Bill A)

Choice of procedure

39. Both powers are relatively limited in what they provide for. It is appropriate that the persons and purposes be prescribed, so that the Parliament can see what is intended and annul it if it is not content with the proposals. A higher level of scrutiny is not warranted, for what is the administrative detail of data-sharing between what are likely, in practice, to be public sector bodies which already share data for other purposes.

Section 48D(1) – Housing assistance

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Revised or new: new

Parliamentary procedure: affirmative

Provision

40. Section 48D enables the Scottish Ministers, by regulations, to provide for their functions in relation to housing assistance to be exercised by local authorities. Ministers would remain responsible for how those functions are exercised; regulations can provide for the detail of which functions are to be exercised by local authorities, the persons affected, and for enactments (including the Bill as enacted) to apply with modifications when functions are being exercised in this manner.

Reason for taking power

41. It is anticipated that elements of housing assistance might be delivered by local authorities. Local authorities already provide assistance through operation of schemes for discretionary housing payments. Also, they assist some persons with costs of accommodation through Scottish Welfare Funds (usually where persons have housing costs, but are ineligible for a discretionary housing payment, for example because they are not in receipt of housing benefit).

42. Until provision is made by regulations for housing assistance it is not possible to anticipate, or indeed describe, what local authority delivery might entail. The regulation-making power therefore provides flexibility to make provision, when regulations for housing assistance are being drafted. The power to modify the operation of enactments would allow provision around, for example, appeals to be adapted so that local authorities could play an appropriate role in that process.

Choice of procedure

43. It is appropriate to provide for the higher level of Parliamentary scrutiny. Where the Parliament has provided that functions are to be exercised by to the Scottish Ministers, rather than by another Scottish public authority, the Parliament should consider fully any proposal by Ministers that another Scottish public authority exercise those functions on Ministers' behalf, despite responsibility for their exercise remaining with Ministers. Also, the

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2 (SP Bill 18A)

power to provide for modification of the operation of enactments justifies
the higher level of scrutiny for any use of this power.

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