

This document relates to the Social Security Administration and Tribunal Membership (Scotland) Bill (SP Bill 68) as introduced in the Scottish Parliament on 27 April 2020

# Social Security Administration and Tribunal Membership (Scotland) Bill

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## 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 Administration and Tribunal Membership (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.

### Interpretation

2. In this memorandum:

- “the Social Security Act” means the Social Security (Scotland) Act 2018
- “the Tribunals Act” means the Tribunals (Scotland) Act 2014.

### Outline of Bill provisions

3. The following provisions of the Bill confer, or modify, powers to make subordinate legislation:

- Section 3 extends the regulation-making power under section 79 of the Social Security Act so that it may be exercised to create criminal offences.
- Section 4 further extends the power under section 79 of the Social Security Act so that it may be exercised to transfer competence

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and jurisdiction in relation to certain matters from the sheriff courts to the First-tier Tribunal for Scotland.

- Section 5 broadens the regulation-making power under section 75 of the Social Security Act so that it can be exercised to make provision about the investigation of offences created by regulations under section 79, as well as the offences in Chapter 6 of Part 2 of the Act.
- Section 7 modifies schedule 5 of the Social Security Act to allow the Scottish Ministers to specify in regulations which healthcare professionals can diagnose a person as having a terminal illness in order for the person to then be entitled to disability assistance on that basis.
- Section 9(4) extends the regulation-making power in section 38 of the Tribunals Act so that the power can be exercised to make provision about the role that may be played in the decision-making process of the First-tier Tribunal for Scotland by an extra judge who has been temporarily authorised to assist in the disposal of the Tribunal's business by the new subsection (1)(b) of section 18 of the Tribunals Act (which is inserted by section 8 of the Bill).
- Section 10 confers a power on the Scottish Ministers to make ancillary provision by regulations.
- Section 11 confers a power on the Scottish Ministers to bring those provisions of the Bill that are not to come into force automatically following Royal Assent into force on a day specified by the Ministers in regulations.

## Rationale for subordinate legislation

4. In deciding whether a matter should be left to subordinate legislation, the Government has carefully considered the need to:

- strike the appropriate balance between the importance of the issue and providing sufficient flexibility to respond to changing and unforeseen circumstances,
- make proper use of valuable parliamentary time,
- take account of the likely frequency of amendment, and

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- anticipate the unexpected, which might otherwise frustrate the purpose of the provision approved by the Parliament.

## Delegated Powers

### Section 3 – Offences

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

### Provision

5. Section 79 of the Social Security Act allows the Scottish Ministers to establish schemes through which they can supplement, or top up, so-called reserved benefits (which is to say forms of social security assistance that remain reserved to the UK Parliament). Section 3 of the Bill amends section 79 so that regulations under that section can establish offences in connection with the top-up schemes. Section 3 of the Bill also amends section 80 of the Social Security Act in order to constrain the power to create offences so that regulations cannot assign a more severe maximum penalty for any new offence than applies in relation to the fraud offences set out in Chapter 6 of Part 2 of the Social Security Act, which apply in relation to the devolved forms of assistance given under that Part.

### Reason for taking power

6. There needs to be a mechanism for effectively dealing with fraud against top-up schemes established by regulations under section 79. Section 3 of the Bill inserts a new section 80A into the Social Security Act which will provide that, as a default position, the fraud offences set out in Chapter 6 of Part 2 of the Social Security Act will apply in relation to any top-up scheme as they apply in relation to devolved forms of assistance given under that Part. However, those fraud offences were designed to operate in the context of the processes for giving assistance under Part 2 of the Social Security Act. The processes surrounding the giving of some

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forms of top-up assistance, which will be set out in regulations under section 79, may be quite different from the processes set out in Part 2. Therefore, the fraud offences that were designed with the Part 2 processes in mind may not catch all of the fraudulent behaviour that they should in relation to a given top-up scheme. As the processes surrounding each top-up scheme will be a matter for regulations, it makes sense for the fine-tuning of the offences that relate to each scheme to also be a matter for regulations in order to ensure a proper fit is achieved.

### **Choice of procedure**

7. Regulations under section 79 of the Social Security Act are subject to the form of super-affirmative procedure provided for by section 97 of the Act. This means that in addition to requiring the Parliament to approve any regulations in draft, a draft of any regulations must be sent to the Scottish Commission on Social Security whose expert report will then inform the Parliament's consideration of the draft regulations. The Government does not consider the modification of section 79 to allow it to be used to create offences precipitates any need to revisit this highly robust scrutiny mechanism.

### **Section 4 – Assistance given in error: First-tier Tribunal's jurisdiction**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

### **Provision**

8. As explained in paragraph 5, section 79 of the Social Security Act allows the Scottish Ministers to establish top-up schemes by regulations. Amongst other things, regulations under section 79 can make provision about what happens in the event that someone receives an overpayment of financial assistance through a top-up scheme. One possibility is that a legal process will follow through which the Scottish Ministers will seek to recover

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the overpayment. Ordinarily, such an action would be raised in the sheriff court.

9. Section 68 of the Social Security Act allows the Scottish Ministers to make regulations transferring the competence and jurisdiction that a sheriff would have in relation to the recovery of overpayments to the First-tier Tribunal for Scotland so that proceedings could be taken in that forum instead of the sheriff courts. But section 68 only applies in relation to overpayments of assistance under Part 2 of the Social Security Act, not under top-up schemes. Section 4 of the Bill amends section 79 of the Social Security Act to make clear that amongst the things regulations under that section may do in relation to overpayments under top-up schemes is transfer shrieval competence and jurisdiction to the First-tier Tribunal, just as can be done in relation to Part 2 overpayments by regulations under section 68.

### **Reason for taking power**

10. Section 79 of the Social Security Act already confers a broadly expressed power on the Scottish Ministers to make provision about assistance given in error through top-up schemes. The details of top-up schemes will vary from case to case and so it is sensible to have the power to make bespoke provision in regulations. For some schemes it may make sense to have the First-tier Tribunal rather than sheriff courts involved in actions to recover overpayments, particularly if that produces parity with the position in relation to overpayments of assistance under Part 2 of the Social Security Act. For other schemes, which are less akin to the system of Part 2, a different approach to dealing with overpayments may be more appropriate.

### **Choice of procedure**

11. As set out in paragraph 7, regulations under section 79 of the Social Security Act are subject to a form of super-affirmative procedure. The effect of section 4 of the Bill is to elaborate on the already broad power that section 79 confers to make provision about assistance given in error through top-up schemes. The Government does not consider the addition of that elaboration to warrant revisiting the highly robust scrutiny mechanism that already applies to section 79 regulations.

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## Section 5 – Investigations

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

### Provision

12. Section 75 of the Social Security Act allows the Scottish Ministers to make regulations about the investigation of offences under the Act, which means the fraud offences in Chapter 6 of Part 2. As discussed above, section 3 of the Bill expands the power under section 79 of the Social Security Act so that regulations under that section can provide for fraud offences in relation to top-up schemes. Section 5 of the Bill modifies section 75 of the Social Security Act in consequence of section 3 of the Bill, so that regulations under section 75 (or in its new guise section 84A) can also make provision about the investigation of offences created by section 79 regulations.

13. As alluded to in the preceding paragraph, section 5 of the Bill renumbers section 75 of the Social Security Act as section 84A, having moved it from Part 2 to Part 4 of the Act. This is a cosmetic adjustment to ensure that the structure of the Act continues to make sense in light of the former section 75 ceasing to be a provision that is relevant only in relation to assistance given under Part 2 of the Act and becoming a provision relevant to the giving of assistance under Parts 2 and 3 (Part 3 being the Part which provides for top-up schemes).

### Reason for taking power

14. It follows that if the Scottish Ministers are to be able to create fraud offences in relation to top-up schemes by regulations that they should also be able to make provision by regulations about the investigation of those offences. The Scottish Ministers already have the power to make regulations about the investigation of the offences set out in Chapter 6 of Part 2 of the Social Security Act and their having the power to make provision by regulations about offences in respect of top-up schemes too

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will allow a consistent regulatory framework for the investigation of social security offences to be produced.

### **Choice of procedure**

15. Regulations under section 75 of the Social Security Act are presently subject to the affirmative procedure. Enabling regulations under that section to make provision about the investigation of offences created by regulations under section 79, as well as the offences provided for in Chapter 6 of Part 2, does not materially change the nature of the power. The Government therefore sees no reason to disturb the judgement that the Parliament made when it passed the Bill for the Social Security Act that the affirmative procedure is appropriate for regulations under section 75.

### **Section 7 – Persons who can give diagnosis**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

### **Provision**

16. Section 31 of the Social Security Act empowers the Scottish Ministers to make regulations setting out the eligibility criteria for disability assistance. Paragraph 1 of schedule 5 requires the Scottish Ministers to provide in the regulations that anyone with a terminal illness is eligible for disability assistance and that the Scottish Ministers must accept a diagnosis of terminal illness from a registered medical practitioner as sufficient evidence that a person has a terminal illness.

17. Section 7 of the Bill amends paragraph 1 of schedule 5 of the Social Security Act so that regulations under section 31 must require the Scottish Ministers to accept a diagnosis of terminal illness not just from a registered medical practitioner but from anyone who falls within the definition of “appropriate healthcare professional” instead. Section 7 goes on to amend schedule 5 to provide that regulations under section 31 must define

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appropriate healthcare professional and must, as a minimum, define it so as to cover registered medical practitioners and registered nurses. The amendments then allow the definition to embrace members of allied health professions and to stipulate other conditions that must be fulfilled for someone to be regarded as an appropriate healthcare professional within the definition.

### **Reason for taking power**

18. In the course of consulting on the Chief Medical Officer's guidance referred to in paragraph 1 of schedule 5 of the Social Security Act, it became apparent to the Government that in many cases registered nurses would be well placed to provide diagnoses of terminal illness for the purposes of determining entitlement to disability assistance. The Bill might have amended paragraph 1 of schedule 5 to insert a reference to registered nurse to sit alongside the existing reference to registered medical practitioner. However, this would be inflexible. It may emerge from experience once disability assistance is operating that members of some allied health professions would also be well placed to provide diagnoses of terminal illness. Experience may also highlight a need to require those providing such diagnoses to have undergone specialist training or in some other way be identified as suitable to perform the role. It would make for a poor use of parliamentary time if every refinement of the system required primary legislation. Moreover, as is being vividly demonstrated at the time of writing, events can arise that require a more rapid reallocation of resources within the health service than would be possible if a Bill were required to adjust who can provide a terminal illness diagnosis for social security purposes.

### **Choice of procedure**

19. Regulations under section 31 of the Social Security Act are subject to the form of super-affirmative procedure described in paragraph 7. The Government considers it appropriate that regulations dealing with who can diagnose a terminal illness for the purpose of establishing someone's eligibility for disability assistance should be subject to that same highly robust form of scrutiny as applies to regulations under section 31 making any other sort of provision about eligibility for disability assistance.



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## Section 9 – Consequential modifications in relation to Tribunal membership

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

### **Provision**

20. Through regulations under section 38(1) of the Tribunals Act, the Scottish Ministers can make provision about the composition of the First-tier Tribunal for Scotland when convened to make a decision in a case. Section 8 of the Bill amends section 18 of the Tribunals Act to allow certain people to be authorised to sit temporarily as judicial members of the First-tier Tribunal. Section 9(4) of the Bill extends the power under section 38(1) of the Tribunals Act to make provision about the composition of the First-tier Tribunal in deciding a case so that regulations under that section can include provision about the role that can be played in making decisions by any extra judge who is sitting by virtue of the amendments made by section 8 of the Bill.

### **Reason for taking power**

21. The First-tier Tribunal is divided thematically into chambers. The role of ordinary, legal and judicial members in decision making differs between the chambers. There is therefore a need to have the flexibility of subordinate legislation to describe the role in decision making that is to be played by the extra judges allowed for by section 8 of the Bill.

### **Choice of procedure**

22. Regulations under section 38(1) of the Tribunals Act are subject to the affirmative procedure. The adjustment of that power by section 9 of the Bill, in consequence of the changes made by section 8, does not materially alter the nature of the enabling power. The Government therefore considers it appropriate to leave the scrutiny procedure applicable to those regulations unchanged.

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## Section 10 – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if modifying primary legislation, otherwise negative

### **Provision**

23. Section 10 provides that the Scottish Ministers may by regulations make supplementary, incidental, consequential, transitional, transitory or saving provision in connection with the Bill's provisions.

### **Reason for taking power**

24. Section 10 follows the now standard model for the power to make ancillary provision. Any new law may give rise to the need for a range of ancillary provisions. Without the power to make that provision by regulations it would be necessary to return to the Parliament with another Bill to deal with minor matters to properly give effect to a Bill that Parliament has already passed. That would not be an effective use of either the Parliament's or the Government's resources. The power is restricted in that it can only be used to make provision ancillary to the Bill's provisions.

### **Choice of procedure**

25. Regulations under section 10 will be subject to the affirmative procedure if they add to, replace or omit any part of the text of primary legislation. Otherwise, they will be subject to negative procedure. This is the standard approach in relation to the scrutiny of regulations made under ancillary powers and the Government sees no special reason to depart from it in this case.

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## Section 11 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

### **Provision**

26. Section 11 provides for itself, the other provisions normally found at the end of a Bill (i.e. the ancillary provision section and the short title section) and sections 3, 5 and 6, to come into force on the day after Royal Assent. It then confers a power for the Scottish Ministers to bring the other sections of the Bill into force on a date they appoint by regulations.

### **Reason for taking power**

27. It is typical for the coming into force date of a Bill's substantive provisions to be appointed by regulations. This Bill follows that standard model, save in relation to sections 3, 5 and 6 which are substantive provisions that policy considerations require be brought into force earlier than would otherwise be the case. For the rest, having them come into force on a date appointed by regulations means that the Government can appoint a date having ensured that everyone who needs to prepare for the law changing has made the necessary preparations.

### **Choice of procedure**

28. As is now usual for commencement regulations, the default laying requirement will apply, as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. The Government considers this appropriate because the policy behind the provisions will already have been considered by the Parliament during the passage of the Bill.

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