

# Scottish Employment Injuries Advisory Council Bill

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## Delegated Powers Memorandum

### Introduction

1. This Delegated Powers Memorandum has been prepared by the Non-Government Bills Unit on behalf of Mark Griffin MSP in accordance with Rule 9.6.2 of the Parliament's Standing Orders in relation to the Scottish Employment Injuries Advisory Council Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 30–EN);
  - a Financial Memorandum (SP Bill 30–FM);
  - a Policy Memorandum (SP Bill 30–PM);
  - statements on legislative competence made by the Presiding Officer and the member who introduced the Bill (SP Bill 30–LC).

### Outline of Bill provisions

3. The Bill creates a Scottish Employment Injuries Advisory Council ("the Council"), and provides for the Council's functions in relation to employment-injury assistance. The Bill is in 11 sections and has 3 schedules. The Bill provisions:
  - Establish a statutory Council as an independent advisory non-departmental public body.
  - Give the Council functions to:
    - scrutinise legislative proposals relating to employment injuries assistance ("EIA");
    - report to Scottish Ministers and the Scottish Parliament on any matter relevant to EIA, at the request of the Scottish Ministers or Scottish Parliament, in respect of research carried out, commissioned or supported by the Council, or that the Council considers appropriate; and

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- carry out, commission or support research into any matter, relevant to EIA, the Council considers appropriate, which may include (but not be limited to) research into existing or emerging employment hazards which may result in disease or personal injury, or the scope and extent of EIA.
- Sets out the detail of the procedure for the Council's scrutiny function.
- Makes detailed provision for the Council's status, powers, procedure, finances and membership.
- Amends the Social Security (Scotland) Act 2018 to remove the EIA scrutiny function from the Scottish Commission on Social Security and place it with the Council to reflect the expertise of the Council in relation to EIA and avoid duplication of work.
- Applies legislation relating to public bodies to the Council.

## Rationale for subordinate legislation

4. The Bill contains four powers to make subordinate legislation, which are delegated to the Scottish Ministers. The powers are explained in detail in the following paragraphs, but in considering if, and how provision should be set out in subordinate legislation, rather than on the face of the Bill the Member has had regard to:

- the need to strike a balance between the importance of ensuring full Parliamentary scrutiny of the core provisions of the Bill and making proper use of Parliamentary time;
- the need to provide flexibility to make further provision over time, as the Council is established, to ensure that where a need is identified to address practical matters of detail, or to make other refinements so as to assist the effective operation of the Act, or where other changing or unexpected circumstances arise which require a legislative solution, then these can be readily taken forward without the need for primary legislation.

5. More generally it is also worth noting for information that the Bill makes provision in relation to the level of scrutiny required for existing regulations under the Social Security (Scotland) Act 2018. This is to enable the Council, when established, to have formal statutory powers to scrutinise regulations under the 2018 Act. However, as the power to make those regulations is provided for by a separate and existing Act (the 2018 Act), they are not covered in this Memorandum.

6. The delegated powers provisions 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.

## Delegated Powers

### Section 2(5): Council functions

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

#### Provision

7. Section 2(1)(a) – (e) sets out the core functions of the Council. These include in sections 2(1)(a) – (d), scrutiny of proposals for EIA legislation; reporting to the Scottish Ministers and the Scottish Government on any matter relevant to EIA that the Council is asked to report on by the Scottish Ministers or the Scottish Parliament, in respect of any research or any other matter the Council consider appropriate; and carrying out, commissioning, or supporting research into any matter relevant to EIA. Under section 2(1)(e), the Council’s functions include any functions conferred on the Council by regulations made under subsection (5). Section 2(5) enables Scottish Ministers to confer additional functions on the Council by regulations.

#### Reason for taking power

8. In conferring functions on the Council, the Member wishes for there to be sufficient flexibility for Scottish Ministers to confer additional functions on the Council at a future point.

#### Choice of procedure

9. The ability to confer additional functions on the Council is a significant one and, in essence, amounts to amendment of section 2. To ensure that additional functions are only conferred with the involvement of the Council itself the exercise of the power is subject to the requirement under section 4(3) that once the Council is established these regulations may not be made unless the Scottish Ministers have consulted the Council about the modification. Given this could amend section 2 and result in a significant addition to the powers of the Council with potential resource implications, it is considered essential that the Parliament should have the opportunity to consider the addition of those functions fully. For that reason, therefore, and as set out at section 4(2)(a), it is considered that the affirmative procedure would provide the appropriate level of scrutiny.

## Section 7(1): Ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if modifying primary legislation, otherwise negative procedure

### Provision

10. Section 7(1) provides for the Scottish Ministers to use regulations to make any incidental, supplementary, consequential, transitional, transitory or saving provision which Ministers consider appropriate for the purposes of, in connection with, or for giving full effect to the Bill when enacted or any provision made under it. Section 7(2) makes clear that, while regulations under section 7(1) may modify any enactment, they may not remove functions conferred on the Council by the Bill.

### Reason for taking power

11. The Member considers that this power is necessary to ensure flexibility when it comes to implementation of the Bill and the effective operation of the legislation once it comes into force. Some of the Bill's provisions are inserted into or interact with other legislation, such as the Social Security (Scotland) Act 2018. While the Member has given careful consideration to such interactions, the Bill may give rise to a need for ancillary provision to ensure these changes operate as intended. The power to make such provision is common in Bills to provide flexibility to make any adjustments in light of experience in relation to the operation of the Act as timeously as possible.

12. The Member considers that it is important to take a power to deal with any ancillary matters that might emerge in the course of implementing the Bill, so that any unexpected issues which require ancillary provisions can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

### Choice of procedure

13. Regulations made under this section which modify any primary legislation would be subject to the affirmative procedure. Otherwise, the regulations would be subject to the negative procedure. This approach is typical for ancillary powers of this type and ensures that the Scottish Parliament is able to closely scrutinise and determine whether to approve any draft regulations that change the text of primary legislation before they can be made. It is considered that these procedures provide for an appropriate level of Parliamentary scrutiny and control in such cases.

## Schedule 1, paragraph 4(2): Access to information

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

### Provision

14. Paragraph 4 of Schedule 1 of the Bill provides the Council with the right to access “relevant information” that it may reasonably require for the purpose of performing its functions and the right to require a person who is accountable for relevant information to provide assistance or explanation that the Council may reasonably require for the purpose of performing its functions or when exercising that right of access. Sub-paragraph 2 provides that “relevant information” is information in the possession or under the control of a list of bodies which it then sets out in sub-sub paragraphs (a) to (h). Sub-paragraph 2(i) provides that the Scottish Ministers can specify in regulations additional persons to those listed in sub-sub-paragraphs (a) to (h).

### Reason for taking power

15. The list of persons provided in paragraph 4(2)(a) to (h) contains a list of specified bodies and further Scottish public authorities under the Freedom of Information (Scotland) Act 2002. In order to future proof the list and to allow Ministers flexibility in a situation where a body not currently covered by this list has information of the type that the Council might reasonably require for the purpose of performing its functions, the Member wishes to confer a regulation making power on Ministers to add any person to this list. This would still be subject to sub-paragraph (2) which provides that these provisions are subject to any other enactment or rule of law that prohibits or restricts the disclosure of any information or the giving of any assistance or explanation.

### Choice of procedure

16. The power being conferred is to ensure that the list is future proofed by allowing Ministers flexibility to add to the list of bodies the Council is able to access “relevant information” from. On the basis this would add new bodies to this section, the Member considers it appropriate that regulations under this sub-paragraph are subject to the affirmative procedure. This is considered to provide an appropriate level of scrutiny.

## Schedule 1, paragraph 13(2): Number of members of the Council

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

### Provision

17. Paragraph 13 of Schedule 1 of the Bill sets out the number of members that the Council is to have. Paragraph 13(1)(a) provides that the Council is to consist of one member to chair it, and 13(1)(b) provides that the Council is to consist of at least six but no more than 12 members other than the chair.

18. Paragraph 13(2) enables the Scottish Ministers to amend Paragraph 13(1)(b) by substituting a different number of members for a specified time, subject to the minimum number of members being no less than six.

### Reason for taking power

19. The Member wishes for the Scottish Ministers to have the power to increase the number of members on the Council. Paragraph 14 provides that the Scottish Ministers are to appoint Council members. In doing so sub-paragraph (5) of paragraph 14 requires Ministers to have regard to the desirability of ensuring that the Council has experience or knowledge of a range of matters, and having a member with personal experience of having a disability from, or as a result of, injuries suffered or disease contracted in the course of employment, as well as having members who are representative of employers and employed earners, and members who have not previously served.

20. In order to achieve this breadth of representation, it is reasonable to assume that there may be situations where the Scottish Ministers are required to increase the number of members on the Council. Furthermore, there may be other scenarios where it is appropriate to increase the number of members on the Council for a period of time.

### Choice of procedure

21. The ability to add members to the Council amends primary legislation, has resource implications and the Member considers it should only be exercised where there is clear justification. To ensure that the reasoning behind the exercising of this power by the Scottish Ministers is appropriately scrutinised by the Parliament, the Member considers it essential that exercise of this power is made subject to the affirmative procedure, that being considered to afford this more rigorous / appropriate level of scrutiny.



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