

Social Security (Amendment) (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Social Security (Amendment) (Scotland) 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. This memorandum should be read in conjunction with the Explanatory Notes and the Policy Memorandum for the Bill.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 35–EN);
 - a Financial Memorandum (SP Bill 35–FM);
 - a Policy Memorandum (SP Bill 35–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 35–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Interpretation

4. In this memorandum:
 - "the Bill" means the Social Security (Amendment) (Scotland) Bill
 - "the 2018 Act" means the Social Security (Scotland) Act 2018.

Outline of Bill provisions

5. The overarching policy objective of the Bill is to enhance the Scottish system of social security in line with the Scottish social security principles which the 2018 Act introduced at section 1. In particular, the purpose of the Bill is to enhance social security in line with the principle which requires that 'opportunities are to be sought to continuously improve the Scottish social security system in ways which put the needs of

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those who require assistance first, and advance equality and non-discrimination' and that 'the Scottish system of social security is to be efficient and deliver value for money'.

6. The Bill is drafted in nine parts, containing a total of 26 sections.

7. Part 1 is titled 'Types of Social Security Assistance' and contains the provisions which take new regulation-making powers for childhood assistance and care experience assistance.

8. Part 2 is titled 'Applications for Assistance' and contains the provisions which repeal section 52B of the 2018 Act, which contains emergency Coronavirus provision introduced in 2020.

9. Part 3 is titled 'Determinations and Re-determinations of Entitlement to Assistance' and contains the provisions which further set out timescales for re-determination or appeal requests, the provisions which introduce the right to withdraw a re-determination request, provisions which clarify the duties on the Scottish Ministers where they have not completed a re-determination within the period allowed, the provisions introducing a power for Scottish Ministers to make a new determination which stops an appeal following an error whilst an appeal is ongoing, and provisions which set out the powers of the Tribunal in a process appeal, along with the effect of that Tribunal's decision.

10. Part 4 is titled 'Assistance Given in Error' and contains provisions which modify the 2018 Act provisions on liability for overpayments and introduce a right to a review, followed by a right to appeal to the First-tier Tribunal for Scotland, against a finding of liability for an overpayment.

11. Part 5 is titled 'Appointees' and contains provisions which would allow the Scottish Ministers to treat a person appointed by the Department for Work and Pensions for a limited time as though they are an appointee under the 2018 Act. Provision is also made to make appointees liable to the person they act for where they act in breach of their responsibilities.

12. Part 6 is titled 'Information for Audit' and contains provisions which confer powers on the Scottish Ministers allowing them to effectively audit the monetary value of error and fraud in the Scottish social security system.

13. Part 7 is titled 'Recovery from Compensation Payments' and contains the provisions and powers which will allow the Scottish Ministers to recover assistance from awards of compensation, where they have both been awarded in relation to the same accident, injury or disease.

14. Part 8 is titled 'Scottish Commission on Social Security' and contains provisions which implement some recommendations of a recent independent review into the remit and operation of the Scottish Commission on Social Security ("SCoSS").

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15. Part 9 is titled 'Final Provisions' and contains the final provisions applying across the Bill.

Rationale for subordinate legislation

16. 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 the provisions 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);
- make proper use of valuable Parliamentary time;
- allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation; and
- deal with the unexpected, which might otherwise frustrate the purpose of provision made by the Parliament.

17. The delegated powers provisions are listed below. For each provision, the Memorandum sets out:

- the person upon whom, or the body upon which the power is conferred and
- the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power; and
- the Parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, and why it was considered appropriate to make it subject to that procedure.

Delegated Powers

Section 1(3): Childhood assistance

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

18. Within Part 1 (Types of Social Security Assistance) of the Bill, section 1 of the Bill inserts a new section 32A into Chapter 2 of Part 2 of the 2018 Act. Section 32A(1) sets out that childhood assistance is assistance to help towards meeting the costs associated with having a child in the family. Section 32A(2) gives the Scottish Ministers power to make regulations to provide for childhood assistance. The Scottish Ministers are to make regulations under section 32A(2) setting out who is eligible for childhood

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assistance, and what assistance those who are entitled are to be given. Along with section 32A, section 1 of the Bill inserts a new schedule 6A (Childhood assistance regulations), which makes further provision about the regulation-making power conferred by section 32A(2).

19. Schedule 6A sets out a non-exhaustive list of eligibility criteria for childhood assistance that the Scottish Ministers must make provision for within regulations. For example, under paragraph 1 of schedule 6A, any regulations for childhood assistance must provide that an individual's eligibility depends on the individual being responsible for a child, and must also define what being responsible for a child means for the purposes of determining entitlement to childhood assistance. The schedule also sets out other eligibility criteria that may be set out in the regulations for childhood assistance, for example that the regulations may provide that an individual is not eligible, despite satisfying the primary eligibility criterion, on account of that criterion being satisfied in respect of the same child by someone else. Some of the other eligibility criteria included within schedule 6A are common to more than one type of assistance under Chapter 2 of Part 2 of the 2018 Act, such as paragraph 6 of schedule 6A which provides that eligibility may be made to depend on applying for assistance within a specified period. By way of comparison, this can also be seen in schedule 2 at paragraph 9, in relation to carer's assistance.

Reason for taking power

20. There is already an established process of taking regulation-making powers in the 2018 Act to specify in regulations the eligibility rules to be applied to determine if a person will be entitled to a given form of assistance, and what they will be entitled to receive. This approach means that provision can be made one place, so that users of legislation do not have to refer to both primary and secondary legislation in order to understand how each form of assistance operates. The established approach under the 2018 Act is to pair each regulation-making power with a corresponding schedule setting out how the regulation-making power may be exercised to set eligibility criteria for the assistance.

21. As with other forms of assistance, some elements of the eligibility criteria for childhood assistance will necessarily have to change from time to time, and so setting them out in primary legislation is not an appropriate option. Taking a regulation-making power such as that proposed at section 1 of the Bill, and setting out provision in regulations, provides flexibility for the Scottish Ministers to modify the regulations to respond to changing circumstances. It is also a coherent approach for users of social security legislation because setting out eligibility criteria for childhood assistance in regulations avoids the need for members of the public to simultaneously refer to both primary and secondary legislation to understand the eligibility rules for childhood assistance. Additionally, this approach will ensure that SCoSS are able to scrutinise any proposals for childhood assistance, in the form of draft regulations, in terms of section 97 of the 2018 Act. It will also allow for more detailed parliamentary control and safeguard Parliament's ability to influence the detail of the eligibility criteria for childhood assistance. As a result, the Scottish Government takes the view that the optimal approach is to set out entitlement criteria for childhood assistance in regulations.

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22. The Scottish Government understands that taking a regulation-making power to set out entitlement criteria for childhood assistance in regulations may impact on the extent to which Parliament may control the detail in the entitlement criteria for childhood assistance. Schedule 6A, which makes further provision about the regulation-making power that section 32A(2) confers, is a way of ensuring that sufficient parliamentary control is present while at the same time ensuring accessible law. Members will be able to control what may, must, or must not, be done using the power to make provision for childhood assistance. In this way, members will be able to exert control over the detail of childhood assistance during the passage of the Bill just as they would if some of the eligibility rules were set directly on the face of the Bill.

Choice of procedure

23. The proposal is that regulations made under section 32A(2) should be subject to the affirmative procedure. Any regulations made under section 32A(2) will contain provisions which determine what eligibility rules will be applied to determine whether a person is entitled to childhood assistance and what qualifying persons are entitled to be given. Therefore, 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.

24. As set out in paragraph 21 above, the Scottish Government has adopted this approach to set out provisions in a coherent way for users of social security legislation, while providing flexibility to respond to changing circumstances. Putting the detail of provision for childhood assistance 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.

Section 2(2): Care experience assistance

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

25. Within Part 1 (Types of Social Security Assistance) of the Bill, section 2 inserts a new Part 5A (Care Experience Assistance) into the 2018 Act. This new Part comprises new section 93A, which makes provision for the Scottish Ministers to establish, by way of regulations, one or more schemes to provide financial assistance to individuals who have had experience of being in the care system. Section 93A(3) sets out the matters which the power may be used to make provision about, for example determining entitlement to assistance and the amount of assistance. This may also include provision for offences, and section 93A(4) to (8) makes further provision in that regard, including setting limits on the maximum penalty that may be imposed. Section 93A(3) also allows for the regulations to make provision for who is to give the assistance. Section 93A(10)

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sets out a consultation requirement before laying a draft of any regulations to be made using the power.

Reason for taking power

26. The intention of care experience assistance is to provide financial support to young people as they move on from being in care to adulthood and more independent living. Details of care experience assistance will be set out in regulations following consultation and engagement with those impacted by the policy. The Scottish Government considers that the use of a regulation-making power is suitable in alignment with the approach to other forms of assistance delivered within the 2018 Act. Under the provisions for devolved forms of social security assistance and the 2018 Act, there is already an established process of taking regulation-making powers to specify in regulations how a person qualifies for assistance, and what they qualify for, in one place.

27. As with other forms of assistance, some elements of the eligibility criteria for care experience assistance will necessarily have to change from time to time. As a result, setting them out in primary legislation is not a realistic option. Setting out the provisions in regulations provides flexibility for the Scottish Ministers to modify the eligibility criteria to respond to changing circumstances. It is also a coherent approach for users of social security legislation because it avoids the need for members of the public to simultaneously refer to both primary and secondary legislation to understand the eligibility rules for care experience assistance. It will also allow for further detailed parliamentary control of particular forms of care experience assistance and safeguard Parliament's ability to influence the detail of the eligibility criteria.

28. Ahead of the powers being exercised, the final scheme for forms of care experience assistance to be delivered under this power will be informed by evidence of the views and experiences of those with experience of being in care and of delivering support to care experienced people. The power also will allow for flexibility in determining who is best suited to deliver different forms of care experience assistance.

29. As a result, the Scottish Government takes the view that the optimal approach is to set out entitlement criteria for care experience assistance in regulations.

Choice of procedure

30. The affirmative procedure is considered appropriate so that a care experience assistance scheme has the necessary level of parliamentary scrutiny. Any regulations made under this new power will contain provisions which determine what eligibility rules will be applied to determine whether an individual is entitled to care experience assistance or not and what qualifying persons are entitled to be given. Therefore, in the Scottish Government's view, the significance of these matters makes it appropriate that the Parliament should consider them in detail. It is as a result considered appropriate for such regulations to be subject to the affirmative procedure.

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Section 2(2): Care experience assistance

Power conferred on: the Scottish Ministers

Power exercisable by: Directions

Parliamentary procedure: No Procedure

Provision

31. As noted at paragraph 25, section 2 inserts a new Part 5A (Care Experience Assistance) into the 2018 Act. This new Part comprises new section 93A, which makes provision for the Scottish Ministers to establish, by way of regulations, one or more schemes to provide financial assistance to individuals who have had experience of being in the care system. Section 93A(3) also allows for the regulations to make provision for who is to give the assistance. Section 93A(9)(a) allows the Scottish Ministers to give directions in relation to the giving of care experience assistance under schemes established by virtue of section 93A(1) to the persons responsible for giving the assistance.

Reason for taking power

32. It is possible that care experience assistance will not be delivered by the Scottish Ministers. Section 93A(3) allows the regulations to set out who is to give the assistance provided for under any care experience assistance scheme to be established. Where such a scheme is not to be delivered by the Scottish Ministers, section 93A(9)(a) will allow the Scottish Ministers to set out requirements for delivery, within directions.

Choice of procedure

33. Directions do not usually follow any parliamentary procedure. However in terms of section 93A(9)(b), the Scottish Ministers must make publicly available any such directions given under section 93A(9)(a). This approach is considered to be appropriate in order that the directions may be easily obtained to be read alongside the regulations establishing the scheme to provide financial assistance for individuals with experience of being in the care system.

Section 7(7): Tribunal rules to end appeal after new determination for error

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

34. Chapter 3 of the 2018 Act makes provision for determinations and re-determinations of entitlement by the Scottish Ministers, as well as appeals to the First-tier Tribunal for Scotland. The provisions at section 7 of the Bill will add sections 49A-

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49C to the 2018 Act, to allow the Scottish Ministers to make a new determination after an appeal has been lodged in certain circumstances, and as a result to bring the ongoing appeal to an end by operation of law. Section 49C(1) gives the Scottish Ministers the power to make regulations to provide for proceedings in the First-tier Tribunal in relation to an appeal to end, by operation of law, where the Scottish Ministers make a new determination of entitlement in relation to any type of assistance under section 49A in the Bill, or under regulations made under section 79.

Reason for taking power

35. The power at section 49C(1) is required to ensure that the Tribunal Rules, which are found within secondary legislation, may be amended to align with the provisions at section 49A and 49B. The powers to otherwise create and amend the Tribunal Rules within secondary legislation can be seen at section 71 of the Tribunals (Scotland) Act 2014 (“the 2014 Act”). Section 49C(4) makes clear that the regulation-making power in section 49C does not affect the powers within section 71 of the 2014 Act. The 2014 Act is also amended at section 7(12) to sign-post section 49C. The power at section 49C was placed within the 2018 Act rather than the 2014 Act due to the power extending only to social security related appeals.

Choice of procedure

36. The Scottish Government is of the view that the negative procedure is appropriate where the power is limited to making provisions which are technical, and administrative in nature and where the circumstances involved are advantageous to the individual. This is aligned with the procedure applied to section 71 of the 2014 Act (see section 79(3) of the 2014 Act). The Scottish Government does not consider that it would be an appropriate use of the Parliament’s time to require more extensive parliamentary scrutiny and approval in this instance and so, in these circumstances, the heightened affirmative procedure appears unnecessary.

Section 9(4)(d): Liability of individual for assistance given in error

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

37. Section 63 of the 2018 Act makes provision for when an individual may be held liable for assistance which they have received in error. Section 64 of the 2018 Act limits the circumstances in which an individual can be held liable to repay an overpayment which has been made due to an error. Section 9 of Part 4 (Assistance given in error) of the Bill amends section 64 to clarify that an individual is liable where their representative has been the one who was at fault for the error. An individual will not however be liable so far as the assistance given in error was used for a purpose which was a breach of the duties or responsibilities of their representative. Section 10 of the Bill inserts new sections 64A and 64B into the 2018 Act, which provide for the individual’s

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representative to be liable for assistance given in error where the assistance was used for a purpose which constitutes a breach of any duty or responsibility owed to the individual by the individual's representative. Section 64B then makes provision to limit the circumstances in which the individual's representative will be held liable.

38. Section 9(4)(d) of the Bill inserts section 64(6) into the 2018 Act, which provides that the Scottish Ministers may by regulations specify the persons, or categories of persons, who are included within the meaning of "the individual's representative" for the purposes of sections 64, 64A and 64B.

Reason for taking power

39. A power to specify in regulations the persons, or categories of persons, who are included within the meaning of "the individual's representative" is considered to allow flexibility for any amendments needed to the list, to include future forms of representative, or to account for any alterations to the legal basis for different types of representative.

Choice of procedure

40. It is considered appropriate that these regulations are subject to the affirmative procedure and the enhanced level of parliamentary scrutiny because regulations made under this power will be substantive in nature, impacting on the liability, and exclusion from liability, of persons who act for entitled individuals. The significance of these matters makes it appropriate that the Parliament should consider them in detail and that they should be subjected to the enhanced level of scrutiny the affirmative procedure offers.

Section 13(2): Assistance given in error: reviews and appeals

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

41. Section 13 of the Bill makes provision for assistance given in error and reviews and appeals, inserting sections 69A to 69L into the 2018 Act. Where an individual is informed in accordance with section 63 of the 2018 Act (or, in terms of the amendments to the 2018 Act under section 12 of the Bill, where a representative is informed in accordance with section 64A of the 2018 Act) of their liability for assistance given in error, under section 69A they may request that the Scottish Ministers review their decision. A request for a review of such a decision is only valid where the request is made before the end of the period prescribed by the Scottish Ministers in regulations made under section 69A(5). On being requested to review a decision that a person is liable for assistance given in error, the Scottish Ministers are under a duty to review that

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decision. The period allowed for that review to take place is to be prescribed by the Scottish Ministers in regulations made under section 69C(6).

Reason for taking power

42. It is necessary to prescribe a period of time within which individuals may request reviews of determinations about their liability for assistance given in error and it is also necessary to prescribe periods of time within which the Scottish Ministers must carry out such a review. Allowing the period within which someone can seek a review (and within which Scottish Ministers may undertake a review) to be set by regulations means that the timescales can be refined in light of practical experience, to ensure that the correct balance between fairness to the individual and administrative certainty is struck.

Choice of procedure

43. The negative procedure is considered appropriate because these powers taken at section 69A(5) and section 69C(6) are administrative powers. It is standard for provisions setting timescales such as these to be subject to the negative Parliamentary procedure and the Scottish Government sees no reason to depart from that. Whilst the Parliament should be made aware of what periods are to be set out, and be able to comment on them, it is not anticipated that such provisions made are likely to be controversial. Consequently, it should not be necessary to require parliamentary time to be spent debating each use of these powers. Making these regulation-making powers subject to the negative procedure means that members can choose to have a debate on an instrument if they have particular concerns about it. 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.

Section 14(2): Power to make provision in relation to appointments made by a Minister of the Crown

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

44. Section 14 of the Bill inserts section 85F into the 2018 Act. Section 85F(1) will give Scottish Ministers a power to make provision in regulations prescribing circumstances in which they may treat specified persons appointed by a Minister of the Crown as though they were appointed by the Scottish Ministers under section 85A or 85B of the 2018 Act. Section 85F(3) provides that these regulations must specify the categories of individuals to whom the regulations must apply, as well as the appointed persons to whom they apply. The regulations must also provide that where an individual to whom the regulations apply is to receive a specified form of assistance, and as soon as reasonably practicable, the appointed person is subject to consideration in terms of section 85A (or as the case may be, section 85B).

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Reason for taking power

45. It is considered appropriate to make these provisions within regulations to enable different provisions to be made across different benefits, to ensure that the policy is implemented proportionately and in the best interests of recipients of the assistance. Additionally, making provision within regulations will allow for flexibility should any amendments be needed to account for future groups of persons appointed by a Minister of the Crown, or to account for alterations in the legal basis of different types of appointee.

Choice of procedure

46. It is considered appropriate that these regulations are subject to the affirmative procedure and the enhanced level of parliamentary scrutiny because regulations made under this power will be substantive in nature, impacting on whether or not certain appointees can act on behalf of individuals entitled to assistance under the 2018 Act. 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.

Section 16(2): Information for audit of social security system

Powers conferred on: the Scottish Ministers

Powers exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

47. Section 16 of the Bill inserts sections 87B to 87E into the 2018 Act, making provision for obtaining information for audit of the social security system. Section 87B provides the Scottish Ministers with the power to request information from an individual who is entitled to assistance under the 2018 Act, about their entitlement to or payment of assistance. Such a request must be made for the purposes of auditing the monetary value of error and fraud in the Scottish social security system, and carrying out corrections of apparent errors and investigations into potential fraud (and other activities connected to auditing).

48. Section 87B(5) provides the Scottish Ministers with power to prescribe by regulations categories of individuals who are not to be requested to provide information about their entitlement to or payment of assistance under subsection section 87B(1).

Reason for taking power

49. This power has been taken so that the Scottish Ministers can prescribe the categories of individuals that will be exempted from the Information for Audit process whilst remaining responsive to stakeholders' views and changing circumstances. It is considered these provisions are best created using a regulation-making power (subjective to parliamentary oversight) conferred by the Bill. This will allow for necessary

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flexibility and responsiveness to any changing circumstances without the need for amendments to primary legislation.

Choice of procedure

50. It is considered appropriate that the affirmative procedure is used to give Parliament suitable oversight of such provision in regulations. This provision will be substantive in nature because it will result in cohorts of entitled individuals not being subject to any requests for information under section 87B, where other cohorts will be. This has possible implications in terms of individuals' payments of, and entitlement to, assistance. The significance of these matters makes it appropriate that the Parliament should consider them in detail and so it is appropriate for regulations made under section 87B(5) to be subject to the affirmative procedure.

Section 16(2): Information for audit of social security system

Powers conferred on: the Scottish Ministers

Powers exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provisions

51. Section 16 inserts sections 87B to 87E on obtaining information for audit, within which there are a number of powers to make regulations, subject to the negative procedure.

52. Section 87B(4) provides that the Scottish Ministers may require the response to a request for information to take specific forms, including an interview in person, or telephone or video call. Section 87B(4)(c) also gives Scottish Ministers the power to prescribe in regulations circumstances where the Scottish Ministers may require the response to take the form of a written response, and section 87B(4)(d) provides that that the Scottish Ministers may make regulations to prescribe other forms of response too.

53. Section 87C(1) provides the Scottish Ministers with power to prescribe by way of regulations a period of time within which an individual may request that the Scottish Ministers withdraw the request for information.

54. Section 87C(4) (read with (5)) provides the Scottish Ministers with a power to prescribe within regulations a period of time within which the Scottish Ministers must make a decision about whether an individual has a good reason for the request to be withdrawn. It also provides a power to make provision in regulations in relation to cases where the Scottish Ministers fail to make a decision within the period prescribed in the regulations.

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Reason for taking powers

55. The details of the Information for Audit policy will benefit from a flexible approach that allows Scottish Ministers to be adaptive and responsive to the practical implementation of the policy and real-life experiences. This will be helpful when considering specific details like the form of response to be required, or timescales for seeking and deciding upon a request for withdrawal. Timescales such as these are commonly prescribed in secondary legislation to allow for flexibility and responsiveness to changing circumstances without the need for primary legislation.

Choice of procedure

56. It is considered that the negative procedure is appropriate for each of the powers detailed in paragraphs 51 to 54 because of their technical and administrative nature. The powers to set timescales are only administrative and while the Parliament should be made aware of what those periods are and be able to comment on them the Scottish Government does not consider that any of them are anticipated to be controversial matters. Consequently the Scottish Government considers that it should not be necessary to require parliamentary time to be spent debating each use of these powers (although if Members have any particular concerns they may choose to have a debate). 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.

Section 17(2): Recovery of value of assistance from compensation payments

Powers conferred on: the Scottish Ministers

Powers exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provisions

57. Part 7 of the Bill, at section 17, inserts after section 94 of the 2018 Act a new Part 6A, as well as schedule 12. Within Part 6A, sections 94A to 94W are to be inserted into the 2018 Act to make provision for recovery of specified forms of assistance (as set out in part 2 of the new schedule 12) from compensation payments, where the compensation payment and the assistance are paid in relation to the same accident, injury or disease.

58. Part 1 of schedule 12 specifies payments which are to be exempt from recoveries, because they are paid from a source or for a purpose which would make recoupment illogical or unreasonable (e.g. redundancy payments).

59. Section 94A(3) gives Scottish Ministers the power to make regulations to modify the list of forms of assistance set out in Part 1 (Exempted Payments) of schedule 12 (Compensation Payments), to add a payment, remove a payment, or vary the description of a payment.

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60. Section 94A(5) provides the Scottish Ministers with a power to make provision within regulations about the recovery of payments made under schemes providing for compensation in the form of a lump sum payment in consequence of any accident, injury or disease, where a compensation payment in respect of the same accident, injury or disease has been paid to or in respect of that person.

61. Section 94B(2) allows the Scottish Ministers to make provision in regulations to modify the definition of “relevant assistance” as set out in section 94B(1), and to modify the table in Part 2 of schedule 12 (the table which sets out the types of recoverable assistance and the heads of compensation they relate to).

62. Section 94H makes provision in relation to the liability of insurers where a compensation payment is made in a case where a person is liable in respect of the accident and the liability is covered by insurance. Section 94H(4) provides that the Scottish Ministers may by regulations make provision about the liability imposed on insurers.

63. Section 94M makes provision about reviews of certificates of recoverable assistance. A power is taken in section 94M(5) to prescribe in regulations the period in which a request for a review may be made, the cases and circumstances in which such a request may be made, and the cases and circumstances in which the Scottish Ministers may undertake a review on their own initiative.

64. Section 94N makes provision for the reconsideration by the Scottish Ministers of the certificate of recoverable assistance. Under section 94N(8)(b), specified persons will receive a notice of consideration. A person who has received a notice of reconsideration may then appeal to the First-tier Tribunal for Scotland against the reconsideration, as set out in section 94O. Section 94O(6) gives the Scottish Ministers the power to make provision in regulations about the manner in which and the period within which appeals may be brought and the circumstances and manner in which a purported appeal under this section may be treated instead as a request for a reconsideration under section 94N. Related to this process, the Scottish Ministers will have the power under section 94O(11) to make provision in regulations about the non-disclosure of medical advice or medical evidence given or submitted in connection with an appeal.

65. Section 94Q makes provision where multiple compensation payments are made in relation to the same accident, injury or disease. Subsection (9) includes a power to make provision in regulations about the timescales for payment of any amount due, and make further provision for any case in which two or more compensation payments in the form of lump sum payments are made by two or more compensators to or in respect of an injured person in consequence of the same accident, injury or disease.

66. Section 94T(1) gives a power to the Scottish Ministers to make provision in regulations about the information to be provided to them, where compensation is sought in respect of any accident, injury or disease suffered by any person. Subsection (2) further sets out what those regulations must require, from whom, and in what manner, place and time period.

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67. Section 94U(1) provides a power to make provisions in regulations about the investigation of any matter relating to the application of Part 6A to a payment to or in respect of any individual in consequence of any accident, injury or disease suffered by that individual. Section 94U(2) sets out that those regulations may include provision about who can carry out investigations on behalf of Scottish Ministers, and what powers may be exercised by any authorised persons in relation to obtaining or accessing prescribed information etc. This includes a power to make provision for offences including setting limits on the maximum penalty that may be imposed.

68. Section 94V(1) provides a power to make regulations to modify Part 6A of the 2018 Act to make provision about the relationship between Part 6A and the relevant UK provisions in circumstances where both Part 6A and the relevant UK provisions apply to a payment to or in respect of any individual in consequence of any accident, injury or disease suffered by that individual. This will allow the Scottish Ministers to ensure that the provisions within Part 6A of the 2018 Act work alongside the provisions within UK legislation, in any cross-border cases.

69. Section 94W(1) provides a power to modify Part 6A within regulations, to make provision about the recovery of payments due from a compensator, where the relevant UK provisions apply to the compensator, but they are resident in or have a place of business in Scotland. This will allow the Scottish Ministers to ensure that the provisions within Part 6A of the 2018 Act work alongside the provisions within UK legislation in any cross-border cases.

70. Section 17 also inserts schedule 12 into the 2018 Act. The proposed schedule 12 makes provision in Part 1 for the exempted payments (as noted at paragraph 58). Paragraph 3 of Part 1 of schedule 12 includes any payment made out of property held for the purposes of any prescribed trust (whether the payment also falls within paragraph 2 of schedule 12 or not). The trusts to fall under paragraph 3 of schedule 12 are to be prescribed in regulations.

Reason for taking powers

71. The powers at section 94A(3) and section 94B(2) are required so that if any alterations are required to the list of assistance to which the provisions apply, or to the exempted payments, these changes can be made by secondary rather than primary legislation.

72. The powers at sections 94A(5), 94H(4), 94M(5), 94O(6), 94O(11), 94Q(9), 94T(1) and 94U(1) are all powers to make provision in secondary legislation which relate to complex and technical matters and scenarios, for which flexibility within secondary legislation will be suitable. This will allow the provisions to be adapted to reflect real life experience and implement the policy in a flexible practical manner, with parliamentary oversight. The powers at section 94V(1) and section 94W(1) are to provide Scottish Ministers with flexibility to adapt should arrangements change, including if different arrangements in other parts of the United Kingdom are put in place which require changes to Scottish legislation.

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Choice of procedure

73. The Scottish Government considers that the affirmative procedure is appropriate for all of these powers. Section 94A(3), section 94B(2), section 94V(1) and section 94W(1) will all amend primary legislation, and convention favours applying the affirmative procedure to regulations that amend primary legislation. The affirmative procedure also allows for sufficient time for parliamentary scrutiny of how these powers are exercised.

74. The powers at sections 94A(5), 94H(4), 94M(5), 94O(6), 94O(11), 94Q(9), 94T(1), 94V(1) and 94W(1) of the Bill are all powers to make provision in secondary legislation which relate to complex and technical matters and scenarios. How these powers operate will directly impact compensators and the actions they require to take before making any compensation payments. They may also have impacts upon injured individuals, for example so far as they may be required to provide information to the Scottish Ministers under section 94T. 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. The Scottish Government considers that the affirmative procedure gives Parliament the appropriate level of oversight for the detailed design of this compensation recovery scheme using these regulation-making powers taken.

75. As far as the power at section 94U(1), this includes a power to make provision for offences. Creating offences in subordinate legislation is not very common and when it is done, it is almost always on the basis that the affirmative procedure will apply. 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 authorised persons.

Section 17(2): Recovery of value of assistance from compensation payments

Powers conferred on: the Scottish Ministers

Powers exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provisions

76. As noted in paragraph 57, Part 7 of the Bill, at section 17, inserts after section 94 of the 2018 Act a new Part 6A, as well as schedule 12. Within Part 6A, sections 94A to 94W are to be inserted into the 2018 Act to make provision for recovery of specified forms of assistance (as set out in part 2 of the new schedule 12) from compensation payments, where the compensation payment and the assistance are paid in relation to the same accident, injury or disease.

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77. Section 94C makes provision for certificates of recoverable assistance, for which a compensator must submit an application to Scottish Ministers for, before a compensator makes a compensation payment.

78. Section 94C(4) provides that Scottish Ministers may prescribe in regulations a period of time within which the Scottish Ministers must issue the certificate to the person specified in the application (or in the absence of a prescribed period of time under section 94C(4), then 4 weeks will be the period of time).

79. Section 94C(8) then provides that the Scottish Ministers may, when the compensator applies for a further certificate while an existing certificate remains in force, prescribe a period of time within which they must issue that further certificate (or in the absence of a prescribed period of time under section 94C(8), then 4 weeks will be the period of time).

80. Section 94C(9) provides that the Scottish Ministers may by regulations provide for the day on which an application for a certificate is to be treated as received.

81. As noted at paragraph 64, section 94N makes provision for the reconsideration by the Scottish Ministers of the certificate of recoverable assistance. Section 94N(7) gives the Scottish Ministers the power to make provision within regulations about the manner in which and the period within which a request for a reconsideration may be made.

82. Section 94P makes provision in relation to payments following reconsideration or appeal and under subsection (9), Scottish Ministers will have the power to make provision in regulations about the timescales for payment of any amount due following a reconsideration or an appeal.

Reason for taking powers

83. The practical application of the compensation recovery policy will benefit from a flexible approach that allows Scottish Ministers to be adaptive and responsive to the practical implementation of the policy and real-life experiences. This will be helpful when considering timescales required for certain processes. Timescales such as these are commonly prescribed in secondary legislation to allow for flexibility and responsiveness to changing circumstances without the need for primary legislation.

Choice of procedure

84. It is considered that the negative procedure is appropriate for each of the powers detailed in paragraphs 78 to 84, because the powers to set timescales are only administrative and while the Parliament should be made aware of what those periods are and be able to comment on them the Scottish Government does not consider that any of them are anticipated to be likely to be controversial matters. Consequently the Scottish Government considers that it should not be necessary to require parliamentary time to be spent debating each use of these powers (although if Members have any

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particular concerns they may choose to have a debate). 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.

Section 18: Scrutiny of regulations by the Commission

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

85. Section 18 in the Bill amends section 97 in the 2018 Act, to modify the list of regulation-making powers for which there must be scrutiny of any draft regulations by SCoSS. It also extends section 97 to regulations made under section 13(1) of the Social Security Act 1988 and section 175(4) of the Social Security Contributions and Benefits Act 1992. Section 18 of the Bill inserts subsection (12) into section 97 of the 2018 Act, to allow regulations to modify section 97(1) and (1A) of the 2018 Act so as to add, remove or vary the description of a power to make regulations conferred by this Act or by any other enactment.

Reason for taking power

86. Section 97(12) will allow the Scottish Ministers to add, remove or vary the description of a power to make regulations so as to further amend the reach of scrutiny under section 97. This will allow flexibility should further powers be determined to be suitable for scrutiny by SCoSS, or if powers were to be removed from the list.

Choice of procedure

87. The affirmative procedure is considered appropriate for this power because this power will allow amendment of primary legislation. Convention favours applying the affirmative procedure to regulations that amend primary legislation. This procedure will also offer Parliament the opportunity to scrutinise any modifications to the list of regulation-making powers caught within the terms of section 97 and consider the subject-matter of the types of legislation to be brought under the scrutiny of the Commission.

Section 23: Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure if making textual amendments to an Act, but otherwise negative

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Provision

88. Section 23 of the Bill confers on the Scottish Ministers a power to make, by regulations, any incidental, supplementary, consequential, transitory or saving provision they consider appropriate for the purposes of, or in connection with, or for giving full effect to the Bill.

Reason for taking power

89. 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 adjustments 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

90. Section 23(3) of the Bill provides that any regulations made under section 23 will be subject to the affirmative procedure if they contain provisions which add to, replace or omit any part of the text of an Act. Otherwise, they will be subject to the 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.

Section 25: Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

91. Section 25(2) provides that the Scottish Ministers may, by regulations, appoint days on which the provisions in the Bill come into force. This is with the exception of sections 22, 23, 25 and 26, which come into force on the day after Royal Assent. Regulations under section 25 may include transitional, transitory or saving provisions and may make different provision for different purposes.

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Reason for taking power

92. This 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 the Scottish Government to manage the transition of existing assistance schemes. Having the provisions come into force on a date appointed by regulations means that the Scottish 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

93. 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 Scottish 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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Social Security (Amendment) (Scotland) Bill

Delegated powers Memorandum

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