DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

2nd Meeting, 2018 (Session 5)

Tuesday 23 January 2018

The Committee will meet at 10.00 am in the Adam Smith Room (CR5).

1. **Decision on taking business in private:** The Committee will decide whether to take item 8 in private.

2. **Instruments subject to affirmative procedure:** The Committee will consider the following—
   
   - Human Trafficking and Exploitation (Scotland) Act 2015 (Support for Victims) Regulations 2018 [draft].

3. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—
   
   - Education (Recognised Bodies) (Scotland) Order 2018 (SSI 2018/6);
   - Contract (Third Party Rights) (Scotland) Act 2017 (Commencement) Regulations 2018 (SSI 2018/8 (C.1));
   - Human Trafficking and Exploitation (Scotland) Act 2015 (Commencement No. 4) Regulations 2018 (SSI 2018/9 (C.2));

4. **Social Security (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.

5. **Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.

6. **Forestry and Land Management (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

7. **Gender Representation on Public Boards (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.
8. **European Union (Withdrawal) Bill:** The Committee will consider a paper from the Clerk outlining recent developments of relevance to its ongoing consideration of the European Union (Withdrawal) Bill.

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The papers for this meeting are as follows—

**Agenda Items 2 and 3**

Briefing on Instruments (private) DPLR/S5/18/2/1(P)

**Agenda Item 4**

*Social Security (Scotland) Bill - As Introduced*

*Social Security (Scotland) Bill - Delegated Powers Memorandum*

*48th Report, 2017: Social Security (Scotland) Bill at Stage 1*

Briefing Paper DPLR/S5/18/2/2

**Agenda Item 5**

*Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill - As Introduced*

*Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill - Delegated Powers Memorandum*

*52nd Report, 2017: Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill at Stage 1*

Briefing Paper DPLR/S5/18/2/3

**Agenda Item 6**

*Forestry and Land Management (Scotland) Bill - As Amended at Stage 2*

*Forestry and Land Management (Scotland) Bill - Supplementary Delegated Powers Memorandum*
**Agenda Item 7**

Gender Representation on Public Boards (Scotland) Bill - As Amended at Stage 2

Gender Representation on Public Boards (Scotland) Bill - Supplementary Delegated Powers Memorandum

**Agenda Item 8**

European Union (Withdrawal) Bill - As Introduced in the House of Lords
DELEGATED POWERS AND LAW REFORM COMMITTEE

2nd Meeting, 2018 (Session 5)

Tuesday 23 January 2018

Social Security (Scotland) Bill: Stage 1

Response from the Scottish Government

BACKGROUND

1. The Committee reported at Stage 1 on the delegated powers in the Social Security (Scotland) Bill (the “Bill”) on 31 October 2017, in its 48th Report, 2017 Session 5.¹

2. The Social Security Committee considered the Bill as lead committee and reported on 11 December 2017.

3. The Scottish Government has now responded to this Committee’s report. The correspondence is reproduced as an Annex to this report.

4. This paper sets out the provisions in the Delegated Powers Memorandum on which the Committee raised recommendations in its Stage 1 report and the Government’s response to those recommendations. Additional detail can be found in the Committee’s Stage 1 report (see paragraph 1 above) and in the Scottish Government’s response (see the Annex to this paper).

DELEGATED POWERS PROVISIONS

Part 2 - Giving of assistance by Scottish Ministers
Sections 11 to 17: Carer’s assistance, Cold-spell heating assistance, Winter heating assistance, Disability assistance, Early years assistance, Employment-injury assistance, Funeral expense assistance

• Power conferred on: The Scottish Ministers
• Power exercisable by: Regulations made by Scottish statutory instrument
• Parliamentary procedure: Affirmative

Provision

5. The Bill provides a statutory framework for the types of assistance it creates. Sections 11 to 17 provide for carer’s assistance, cold-spell heating assistance, winter heating assistance, disability assistance, early years assistance, employment-injury assistance and funeral expense assistance.

¹ The Bill, as introduced, is available here.
6. The details of each type of assistance, on both eligibility criteria and what those who qualify are to be given by way of assistance, are to be set out in regulations made under the many powers in the Bill. Those regulations are subject to the affirmative procedure.

7. The scope of the regulation-making powers pertaining to eligibility and what assistance is to be given are set out in the schedules to the Bill. The schedules set out what the regulations “may”, “must” or “may not” provide for each of the types of assistance established in sections 11 to 17.

(a) Clarity of rules and parliamentary scrutiny

8. The Committee considered the Scottish Government’s overall approach of setting out the rules relating to eligibility for each type of assistance and what assistance will be provided in regulations rather than on the face of the Bill.

9. The Committee’s consideration of this issue is set out in paragraphs 17 to 29 of the Committee’s Stage 1 report.

Committee Recommendations from Stage 1 Report

10. The Committee considers that the balance could be better struck in the Bill between the accessibility of the rules and parliamentary scrutiny. In particular, the Committee agrees with Citizens Advice Scotland that not all of the detail must be made in regulations. It also agrees with a number of the respondents to the Social Security Committee that more certainty and clarity in relation to the policy choices to be made is necessary for the stakeholder community.

11. Accordingly, the Committee calls for a “reasonable level of detail” to be set out on the face of the Bill on eligibility criteria and the assistance to be given. This could allow the Parliament to properly debate the policy options on a line by line basis while ensuring that the rules are clear and that there is an appropriate level of flexibility.

Scottish Government Response

12. The Scottish Government considered that the more prescriptive the Bill becomes, the few opportunities there will be for stakeholders and others to influence the development of the final regulations. Its response stated:

13. The Scottish Government provided a detailed response to the Social Security Committee’s recommendations on this topic.² It was subsequently raised at the Stage 1 debate on 19 December. In her closing remarks, Jeane Freeman MSP, the Minister for Social Security, said:

"Our purpose here is to provide clarity on the foundation of social security in Scotland, with the details in regulations. That is our intent. In my view, putting eligibility criteria on the face of the bill will not best serve the interests

of the people who receive benefits. It will not give us enough time to consult, via experience panels, the expert group or any other means, as we have consistently committed to doing. I am not prepared to break that consistent commitment because I am convinced that our approach is the right way to build this new public service and the only way to meet the principles of the bill.\(^3\)

14. The Scottish Government’s position is that there is a need for long-term engagement, consultation and evidence-gathering before the eligibility criteria could be fully established. It also argues that there will be few simple eligibility criteria that can be easily translated into general provision on the face of the Bill. It cited residency criteria as a complex area that would need to keep pace with such criteria applying to the equivalent benefits elsewhere in the UK. It noted that the UK Government can change the residency criteria for the benefits it administers by subordinate legislation.

15. For further details, see the Government’s response in paragraphs 5 to 14 in the Annex to this paper.

16. The Scottish Government hopes that this explanation as to why it would not be helpful to be too prescriptive when providing for matters such as eligibility criteria on the face of the Bill is of interest. The DPLRC will also be aware of the clear commitments made by the Minister for Social Security prior to and during the Stage 1 debate to say that the Scottish Government will lodge amendments ahead of Stage 2 to put in place the independent and enhanced levels of scrutiny that the DPLRC, the Social Security Committee and the wider stakeholder community all wish to see.

(b) The schedules

17. Each schedule in the Bill corresponds to the regulation-making powers in sections 11 to 17. The schedules define the scope of the regulation-making powers on eligibility and the assistance to be given for each type of assistance.

18. In her evidence to the Committee on 3 October, the Minister for Social Security made it clear that the schedules are not intended to define each individual benefit. For example, disability assistance currently covers four benefits.\(^4\)

19. The Government’s position is that the schedules allow the Parliament to have “complete control” to decide what the regulations for each type of assistance “may”, “must” or “may not” include.\(^5\) The Committee notes that it is unusual for Parliament to be invited to insert appropriate controls on the scope of regulation-making powers.

20. The Committee’s consideration of this issue is set out in paragraphs 32 to 41 of the Committee’s Stage 1 report.

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Committee Recommendation from Stage 1 Report

21. The Committee draws the Social Security Committee’s attention generally to the importance of the schedules in ensuring that the scope of the regulation-making powers in sections 11 to 17 are framed appropriately.

Scottish Government Response

22. *The Scottish Government welcomes the Committee’s recognition of the schedules’ key importance to the structure of the Bill.*

Committee Recommendation from Stage 1 Report

23. The Committee recognises the Scottish Government’s position that it may in the future wish to extend eligibility for winter heating assistance to other categories of applicant. However, it considers that the failure to make any mandatory provision in schedule 3 in relation to the eligibility criteria for winter heating assistance regulations appears to confer an inappropriately wide level of discretion on the Scottish Ministers and provides insufficient certainty to the stakeholder community.

Scottish Government Response

24. *The Scottish Government has made it very clear that eligibility for the Winter Fuel Payment will not only be protected, it will also be extended to families with severely disabled children. It has noted evidence on this matter given during Stage 1 scrutiny of the Bill – for example, by Norman Kerr of the Scottish Fuel Poverty Forum who said that he did “not think that anybody is arguing that we should take away the universality”. The Scottish Government has always prioritised tackling fuel poverty and it has a clear aspiration to eradicate poor energy performance as a cause of it. Furthermore, along with the other assistance types, eligibility criteria for winter heating assistance will be set out in regulations that will be developed, consulted on, and made subject to independent scrutiny and a super-affirmative procedure. Further details addressing this point can be found in the response to the Social Security Committee’s Stage 1 report.*

Committee Recommendation from Stage 1 Report

25. The Committee also draws the lead Committee’s attention to schedule 5 (early years assistance regulations), which does not make any provision about what assistance is to be given.

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Scottish Government Response

26. As noted in its response to the Social Security Committee’s Stage 1 report,\(^7\) the Scottish Government does not consider there to be a requirement for assistance provision to be given for the Best Start Grant (Early Years Assistance in the Bill). The frequency and value of the payments will be set out in regulations, alongside eligibility (illustrative regulations depicting such were made available during the Stage 1 scrutiny process\(^8\)). In other schedules in the Bill, there is a need to allow for specific provision in relation to the assistance to be given (for example, to clarify that Funeral Expense Assistance regulations may specify items of expense that will, or will not, be covered by assistance).

(c) Bespoke parliamentary procedure

27. As noted at paragraph 6 above, the Bill provides that the affirmative procedure applies to regulations made in relation to each of the types of assistance under sections 11 to 17 (among others).

28. The Scottish Government has given consideration to whether social security regulations should be subject to some other form of oversight in addition to what is entailed in the affirmative procedure.

29. The Minister for Social Security appointed Dr Jim McCormick of the UK Social Security Advisory Committee to lead a “short-life” working group to consider how scrutiny of social security matters should work as part of the new Scottish system. This is considered in further detail in the section of the Committee’s Stage 1 report entitled “Proposal for Scottish independent expert advisory committee”.

30. The Scottish Government has also indicated that it is recruiting panels of people with direct experience of receiving social security. It has also established some specific expert advisory groups, such as the Disability and Carers Benefits Expert Advisory Group.

31. Another option available to the Parliament to increase the scrutiny of regulations made under the many wide powers in the Bill is to apply a form of bespoke parliamentary procedure. This could provide a more formal mechanism for consultation on social security regulations made under the Bill.

32. When asked at the Committee’s evidence session about the possibility of applying a “super-affirmative” type of procedure, the Minister indicated that her mind was open to considering what might be the best approach in the Bill. Her view was that this is not exclusively a matter for the Government and that the Parliament will need to consider its role. She was open to considering the options following responses from the Social Security Committee, the Minister’s “short-life working group” headed by Dr Jim McCormick and this Committee.\(^9\)

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33. There is no singular form of “super-affirmative” procedure. Instead, it is a form of enhanced scrutiny in addition to the affirmative procedure. “Super-affirmative” procedures have been used in the past in connection with delegated powers in bills for which the Parliament considered that a particularly high level of parliamentary scrutiny is appropriate.

34. The element common to most “super-affirmative” procedures is a requirement for a pre-scrutiny draft of the regulations to be laid before the Parliament. This would afford the Parliament an initial opportunity to comment on the proposed regulations. The period for comments could be 40 or 60 days and could be accompanied by a requirement for the Scottish Government to formally consult publicly. The Government could be required to consider any comments made. A final version would then be laid before the Parliament for approval under the affirmative procedure.

Committee Recommendations from Stage 1 Report

35. The Committee considers that it would be premature at this stage to make a full recommendation to the Parliament until it has seen if the Bill is amended at Stage 2. After Stage 2 the Committee would have a clearer picture of the level of detail on the face of the Bill, the content of the schedules and the conclusions stemming from the "short-life" working group led by Dr McCormick.

36. The Committee therefore limits itself to drawing the Social Security Committee's attention to the availability of a “super-affirmative” procedure.

37. However, if the Bill remains in its current form the Committee considers that enhanced parliamentary scrutiny would be appropriate.

Scottish Government Response: See paragraphs 45 to 47 below.

Part 2 – Giving of assistance by Scottish Ministers

Section 18 – Short-term assistance

- Power conferred on: The Scottish Ministers
- Power exercisable by: Regulations made by Scottish statutory instrument
- Parliamentary procedure: Affirmative

Provision

38. Section 18(1) provides for short-term assistance, which is described as assistance (whether in the form of money or otherwise) given by the Scottish Ministers to an individual on a short-term basis.

39. The Scottish Ministers are required by virtue of subsection (2) to make regulations prescribing the eligibility rules and what short-term assistance an individual who is entitled to it is to be given. Such regulations are subject to the affirmative procedure. Unlike sections 11 to 17, section 18 does not have a
corresponding schedule setting out the scope of the regulation-making powers in relation to eligibility criteria and what assistance is to be given.

40. Subsection (3) provides that the regulations under subsection (2) are to make provision for short-term assistance to be available to persons who have been entitled to assistance of an on-going nature (rather than a one-off payment). The assistance applies in the event that the person’s entitlement to that on-going assistance has been stopped or reduced, and the decision to stop or reduce the person’s entitlement is under review.

41. However, subsection (5) provides that subsection (3) is not exhaustive of the eligibility rules that may be prescribed to determine entitlement. A person could therefore be eligible for short-term assistance even if he or she is not contesting a decision to stop or reduce ongoing entitlement to another type of assistance.

42. The Committee’s consideration of this issue is set out in paragraphs 60 to 68 of the Committee’s Stage 1 report.

Committee Recommendations from Stage 1 Report

43. The Committee concludes that the particularly broad regulation-making powers in section 18 are acceptable in principle. Insofar as those powers may be exercised as envisaged by subsection (5), the Committee draws the Social Security Committee’s attention to the availability of forms of super-affirmative procedure. This could assist to ensure that such broad powers are subjected to an appropriate level of parliamentary scrutiny.

44. However, the Committee concludes that it would be premature to reach a firm conclusion on the necessity for a form of super-affirmative procedure at this stage. This will become clearer once the Parliament has seen the Bill as amended at Stage 2 and has the benefit of Dr Jim McCormick’s conclusions on how scrutiny of social security matters should work as part of the new Scottish system.

Scottish Government Response

45. The Scottish Government notes the Committee’s current position and is grateful for its summary of the current position (in particular for making it clear that there is no single or set form of super-affirmative procedure).

46. As it has made clear throughout the Bill process, the Scottish Government is keen that the Parliament should be closely involved in shaping the method through which the regulations are scrutinised, and agrees with the notion that there should be some form of super-affirmative procedure in place for the relevant regulations.

47. The Scottish Government can therefore confirm that it will bring forward amendments to the Bill at Stage 2 that will apply a form of super-affirmative procedure.
Part 3 – Supplementing assistance under other enactments
Section 45 – Power to provide for top up of reserved benefits

- Power conferred on: The Scottish Ministers
- Power exercisable by: Regulations made by Scottish statutory instrument
- Parliamentary procedure: Affirmative

Provision

48. Section 45(1) empowers the Scottish Ministers to make regulations providing for the top-up of reserved benefits. Such regulations are subject to the affirmative procedure.

49. Subsection (2) provides that the power to make regulations includes the power to make provision about determining entitlement (including specifying further eligibility rules), the amount of assistance, applications for assistance, obtaining information, appeals and assistance given in error.

50. The Committee’s consideration of this issue is set out in paragraphs 73 to 80 of the Committee’s Stage 1 report.

Committee Recommendation from Stage 1 Report

51. On balance, the Committee considers that any concerns the Scottish Government has about the parliamentary time that may be involved in updating references to existing UK legislation is outweighed by the benefits to parliamentary scrutiny of setting out the existing reserved benefits that are to be topped-up on the face of the Bill. Setting those benefits out on the face of the Bill would allow the Parliament to properly consider and debate the surrounding policy choices and to conduct full scrutiny on a line by line basis.

Scottish Government Response

52. Section 45 of the Bill is a power for the Scottish Government to make regulations to top up benefits which remain reserved to the UK government. The Scottish Government’s view is that it is appropriate for that power to exist in relation to all reserved benefits. Framing the power in such a way, rather than exhaustively listing them individually, is the most succinct way of expressing the policy that it intends the Bill to give effect to.

53. The framing approach chosen does not prevent Members from debating whether any reserved benefit should not be susceptible to being topped up as the Bill passes through Parliament. Any Member can, if they wish, bring forward an amendment at Stage 2 or 3 to exempt a particular benefit, or description of a benefit, from the general proposition that all reserved benefits may be topped up.

54. The Scottish Government also believes that this approach does not prevent the Parliament from scrutinising proposals to top up a particular reserved benefit if
and when a government decides it wishes to do so. All regulations made under section 45 will be subject to the super-affirmative procedure.

Committee Recommendation from Stage 1 Report

55. A power similar to that in section 53 could be taken in section 45 to update by regulations the references that would be made in section 45 to the existing UK reserved benefits being topped-up.

Scottish Government Response

56. The Scottish Government believes that, if the Bill is passed on the strength of the principle that all reserved benefits should be capable of being topped up by regulations under section 45, it would be superfluous to require the Parliament to reaffirm that principle each and every time the UK Government creates a new reserved benefit or changes the name of an existing one. To do so would only delay the top up being received by those who would benefit from it.

57. Conversely, should the Parliament wish to stop a top-up proposal from the Scottish Government being enacted (and if only one set of regulations were required to give effect to said top-up), it would need only decline to approve the draft top-up regulations. The Scottish Government, therefore, believes that this approach also maintains an appropriate level of Parliamentary scrutiny for top-up powers.

Committee Recommendation from Stage 1 Report

58. Alternatively, if the Scottish Government does not agree to the recommendations made at paragraphs 81 and 82 above, the Committee draws the Social Security Committee’s attention to the availability of forms of super-affirmative procedure. This could assist to ensure that such a broad power to make regulations topping up reserved benefits in section 45 is subjected to an appropriate level of parliamentary scrutiny. However, as observed previously, the Committee considers that the necessity for a form of super-affirmative procedure will become clearer once the Parliament has seen the Bill as amended at Stage 2 and has the benefit of Dr McCormick’s conclusions on how scrutiny of social security matters should work as part of the new Scottish system.

Scottish Government Response

59. The Scottish Government notes this position and, as mentioned in paragraph 13 above (see paragraph 15 in the Annex attached to this paper), will bring forward amendments to the Bill at Stage 2 that will apply a form of super-affirmative procedure.
Part 4 – Discretionary Housing Payments

Section 52 – Guidance

Subsection (1) – Guidance to local authorities

- Power conferred on: The Scottish Ministers
- Power exercisable by: Guidance
- Parliamentary procedure: Laid, no procedure

Provision

60. Section 52(1) provides that local authorities must have regard to any guidance issued by the Scottish Ministers in connection with the exercise by them of the power in section 49 to make discretionary housing payments.

61. As soon as reasonably practicable after issuing guidance under subsection (1), the Scottish Ministers must lay a copy of the guidance before the Parliament. However, no parliamentary procedure applies to that guidance.

62. In terms of section 52(2), the guidance may, in particular, deal with:

- the rules which local authorities are to apply in deciding whether to give someone financial assistance, the amount of assistance to give and what period to give assistance for;
- the form of applications both for assistance and for review of authorities’ decisions about the giving of assistance;
- the processes which authorities are to follow both in determining applications for assistance and review and deciding whether to stop giving someone assistance;
- the circumstances in which authorities should, and should not, seek to recover the value of assistance given in error or following a breach of any of the conditions under which it was given.

63. The Committee’s consideration of this issue is set out in paragraphs 87 to 93 of the Committee’s Stage 1 report.

64. In summary, the Committee noted that UK provision on matters such as those set out in section 52(2) of the Bill is made in regulations; namely the Discretionary Financial Assistance Regulations 2001, which are made under section 69 of the Child Support, Pensions and Social Security Act 2000. Such regulations are subject to annulment (i.e. the equivalent of the Scottish Parliament’s negative procedure).

65. Furthermore, the Committee noted that matters referred to in section 52(2) are ones that, in relation to the other forms of assistance in the Bill, are set out either on the face of the Bill or in regulation-making powers subject to either the affirmative or negative procedures.
Committee Recommendation from Stage 1 Report

66. The Committee calls on the Scottish Government to amend the Bill at Stage 2 so that the negative procedure applies to the guidance issued under section 52 to allow for a more appropriate level of parliamentary scrutiny.

Scottish Government Response

67. The Scottish Government does not share the Committee’s view that it would be appropriate to make guidance issued under section 52 subject to the negative procedure. […]

68. The Scottish Government noted that guidance is also currently issued on the matters covered by section 52, which is not subject to any Parliamentary scrutiny procedure at all.

69. Through the Bill, the Scottish Government has proposed effectively dispensing with the regulation-making power while retaining, and providing a statutory basis for, the practice of issuing guidance to Local Authorities about the exercise of their DHP functions. It believes that there is no reason such a proposal should mean the Parliamentary procedure that currently applies to the regulation-making power should transfer over to the guidance-issuing power. […]

70. The Scottish Government is also mindful that guidance, in this case, is not law. Section 52 states that Local Authorities must have regard to guidance issued by Scottish Ministers. In other words, they must consider the guidance, but are not legally obligated to follow it. […]

71. Given the significant difference in legal weight between guidance and regulations, the Scottish Government believes that the Committee’s use of the analogy between the guidance-issuing power under section 52 of the Bill and the regulation-making power under section 69 of the of the Child Support, Pensions and Social Security Act 2000 is not an appropriate one in this instance. A closer comparator to the Bill’s guidance-issuing power would be the guidance-issuing power under section 6 of the Welfare Funds (Scotland) Act 2015. Not only is it also a power to issue guidance, it is a power to issue guidance to which Local Authorities must have regard in exercising their discretion to help meet financial need amongst their respective populations. Guidance under section 6 of the 2015 Act is not subject to the negative procedure, and there is no requirement to lay it before the Parliament.

72. For further details, see the Scottish Government’s response in paragraphs 29 to 33 in the Annex to this paper.

Proposal for Scottish independent expert advisory committee

73. There are currently two independently statutory advisory bodies which scrutinise draft regulations and provide advice to the Secretary of State for Work and
Pensions on social security matters. These are the Social Security Advisory Committee (“SSAC”) and the Industrial Injuries Advisory Council.

74. Following the devolution of benefits provided for under the Scotland Act 2016, however, the UK government has decided that the existing bodies should only provide advice to the Secretary of State. Accordingly, the Scottish Ministers will not be able to refer draft regulations they intend to make under the powers in the Bill as enacted to these UK bodies.

75. At the Committee's evidence session on 3 October 2017 the Minister for Social Security stated that there is a need for independent expert scrutiny of social security matters in Scotland.

76. There is currently no proposal in the Bill for an equivalent independent Scottish expert statutory body. The Scottish Government has indicated that it has not provided for anything more than the affirmative procedure on the face of the Bill so as not to pre-empt discussions with members of the Parliament on enhanced oversight.

77. The Minister's position at the Committee's evidence session on 3 October 2017 was that it is not appropriate for ministers of any government to be able to bypass the expert advisory committee when they introduce measures. She also observed that the regulations come to the existing UK bodies only once they have been drafted.

78. In addition to establishing an independent Scottish expert advisory committee, the Scottish Government has indicated that it is recruiting panels of people with direct experience of receiving social security. It has also already established some specific expert advisory groups. The Scottish Government recognises that the relationship of the existing groups and panels it has set up with the parliamentary committees and any other scrutiny body which may be established would need to be considered in detail.

79. The Minister for Social Security asked Dr Jim McCormick (chair of the Scottish Government's expert advisory group on disability and carers benefits, to set up a “short-life” working group from among his members to consider how scrutiny of social security matters should work as part of the new Scottish system.

80. The Committee's consideration of this issue is set out in paragraphs 95 to 110 of the Committee’s Stage 1 report.

Committee Recommendation from Stage 1 Report

81. The Committee welcomes the proposed establishment of a Scottish independent expert advisory committee on social security matters. The Committee seeks to be engaged as part of the “short-life” working group led by Dr McCormick. In the meantime, the Committee highlights that the proposed independent expert advisory committee should not be seen as a substitute for parliamentary scrutiny.
Scottish Government Response

82. The Scottish Government welcomes the Committee’s willingness to engage with Dr McCormick’s short-life working group. It also agrees with the Committee that any expert advisory body on social security should be a complement to, rather than a substitute for, Parliamentary scrutiny of social security regulations.
STAGE 1 REPORT ON THE SOCIAL SECURITY (SCOTLAND) BILL:
Scottish Government’s Response to the Delegated Powers and Law Reform Committee

16 January 2018
INTRODUCTION

1. The Scottish Government welcomes the Delegated Powers and Law Reform Committee’s (DPLRC’s) report ‘Social Security (Scotland) Bill at Stage 1’\(^ {10}\), following its consideration of the delegated powers provisions in the Social Security (Scotland) Bill\(^ {11}\).

2. The Social Security Committee – as Lead Committee for the Bill – made reference to the DPLRC’s report in the preparation of its Stage 1 report\(^ {12}\) ahead of the debate on 19 December 2017. The Scottish Government responded\(^ {13}\) to that report on 15 December, and therefore covered some of the topics raised by the DPLRC in that document.

3. The Scottish Government trusts that this response, which sets out its position directly on the various matters raised by the DPLRC, will be helpful in further informing peoples’ views on the Bill in advance of Stage 2.

4. This document is structured to reflect the layout of the DPLRC’s report. Detailed responses to recommendations made by the Committee are set out beneath the text of each individual recommendation. Some of the headings and sub-headings from the Committee’s report are used, to aid readers in navigating the document, and they therefore may not match up with every heading used in the Bill itself (the Committee made no comments or recommendations on Part 1, for example).

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\(^{10}\) See: https://digitalpublications.parliament.scot/Committees/Report/DPLR/2017/10/31/Social-Security-Scotland--Bill-at-Stage-1#Introduction

\(^{11}\) See: http://www.parliament.scot/parliamentarybusiness/Bills/105267.aspx


\(^{13}\) http://www.gov.scot/Publications/2017/12/2026
DELEGATED POWERS PROVISIONS

Part 2 – Giving of assistance by Scottish Ministers

The Committee considers that the balance could be better struck in the Bill between the accessibility of the rules and parliamentary scrutiny. In particular, the Committee agrees with Citizens Advice Scotland that not all of the detail must be made in regulations. It also agrees with a number of the respondents to the Social Security Committee that more certainty and clarity in relation to the policy choices to be made is necessary for the stakeholder community.

Accordingly, the Committee calls for a “reasonable level of detail” to be set out on the face of the Bill on eligibility criteria and the assistance to be given. This could allow the Parliament to properly debate the policy options on a line by line basis while ensuring that the rules are clear and that there is an appropriate level of flexibility.

5. The Scottish Government agrees with the DPLRC that Parliament should have the opportunity to debate the policy options around eligibility criteria and the assistance to be given. It also recognises the issues raised in relation to the balance between what is contained in primary (the Bill) and secondary (regulations) legislation.

6. In the Scottish Government’s opinion, the more prescriptive the Bill becomes, the fewer opportunities there will be for stakeholders and others to influence the development of the final regulations. The Scottish Government believes this would be regrettable, not least because it would seem to be inconsistent with the Scottish social security principles set out in section 1 of the Bill, particularly:

- the principle at paragraph (e): the Scottish social security system is to be designed with the people of Scotland on the basis of evidence, and

- the principle at paragraph (f): opportunities are to be sought to continuously improve the Scottish social security system in ways which put the needs of those who require assistance first.

7. The Scottish Government provided a detailed response to the Social Security Committee’s recommendations on this topic. It was subsequently raised at the Stage 1 debate on 19 December. In her closing remarks, Jeane Freeman MSP, the Minister for Social Security, said:

“Our purpose here is to provide clarity on the foundation of social security in Scotland, with the details in regulations. That is our intent. In my view, putting eligibility criteria on the face of the bill will not best serve the interests of the people who receive benefits. It will not give us enough time to consult, via

experience panels, the expert group or any other means, as we have consistently committed to doing. I am not prepared to break that consistent commitment because I am convinced that our approach is the right way to build this new public service and the only way to meet the principles of the bill.”

8. The Scottish Government is happy to develop these points further, in this response.

9. The Scottish Government agrees with Bill Scott, of Inclusion Scotland, who gave evidence to the Social Security Committee, to say that there is a need for longterm engagement, consultation and evidence-gathering before it will be possible to settle on the right eligibility criteria for each future assistance type. In developing eligibility criteria, the Scottish Government intends to consult and engage with the wider public, including the membership of organisations such as Inclusion Scotland and also to draw upon the collective, lived experience of the more than 2,400 recipients of existing benefits that make up the [Government's] Experience Panels.

10. Furthermore, it is the Scottish Government's view that there will be few, simple eligibility criteria that can be easily translated into general provision on the face of the Bill. One example of the complex issues which must be addressed would be the issue of residency criteria for different types of assistance. Residency is an example of a criterion which some witnesses who appeared before the Social Security Committee suggested could be provided for at a ‘reasonable level of detail’ on the face of the Bill – at least in part, it was said, because a single residency criterion could apply uniformly across all assistance types.

11. In fact, the position is more complicated for some assistance types because there is the residency of two individuals to consider; for example, in the context of carer’s assistance the residency of either or both the carer and the cared-for person may be relevant.

12. There may need to be special rules (and different special rules for different assistance types) to say that in certain circumstances prolonged absences from home will not lead to a person being treated as having changed his or her place of residence (for example to accommodate members of the armed forces serving overseas or people who are receiving medical treatment outside Scotland).

13. And, crucially, it will be essential to ensure that whatever residency criterion is applied in relation to Scottish types of assistance mirrors and keeps pace with the residency criterion applying to the equivalent benefits elsewhere in the UK. If the residency criterion of a Scottish assistance type and its UK equivalent were to drift apart, some people may become entitled to receive essentially the same form of assistance from both the Scottish Government and the UK Government. Worse, some people may end up falling between the two stools and not being entitled to assistance from either government.

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14. As the UK Government can change the residency criteria for the benefits it administers by subordinate legislation, it could create serious problems if the residency criteria for Scottish forms of assistance could only be changed by another Bill. This is not to mention the complications around EU nationals and the fluid state of the UK Government’s negotiations on that subject with the EU.

15. The Scottish Government hopes that this explanation as to why it would not be helpful to be too prescriptive when providing for matters such as eligibility criteria on the face of the Bill is of interest. The DPLRC will also be aware of the clear commitments made by the Minister for Social Security prior to and during the Stage 1 debate to say that the Scottish Government will lodge amendments ahead of Stage 2 to put in place the independent and enhanced levels of scrutiny that the DPLRC, the Social Security Committee and the wider stakeholder community all wish to see.

The Committee draws the Social Security Committee’s attention generally to the importance of the schedules in ensuring that the scope of the regulationmaking powers in sections 11 to 17 are framed appropriately.

16. The Scottish Government welcomes the Committee’s recognition of the schedules’ key importance to the structure of the Bill.

The Committee recognises the Scottish Government’s position that it may in the future wish to extend eligibility for winter heating assistance to other categories of applicant. However, it considers that the failure to make any mandatory provision in schedule 3 in relation to the eligibility criteria for winter heating assistance regulations appears to confer an inappropriately wide level of discretion on the Scottish Ministers and provides insufficient certainty to the stakeholder community.

17. The Scottish Government has made it very clear that eligibility for the Winter Fuel Payment will not only be protected, it will also be extended to families with severely disabled children. It has noted evidence on this matter given during Stage 1 scrutiny of the Bill – for example, by Norman Kerr of the Scottish Fuel Poverty Forum who said that he did “not think that anybody is arguing that we should take away the universality”. The Scottish Government has always prioritised tackling fuel poverty and it has a clear aspiration to eradicate poor energy performance as a cause of it. Furthermore, along with the other assistance types, eligibility criteria for winter heating assistance will be set out in regulations that will be developed, consulted on, and made subject to independent scrutiny and a super-affirmative procedure. Further details addressing this point can be found in the response to the Social Security Committee’s Stage 1 report.\textsuperscript{16}

The Committee also draws the lead Committee’s attention to schedule 5 (early years assistance regulations), which does not make any provision about what assistance is to be given.

18. As noted in its response to the Social Security Committee’s Stage 1 report,\(^\text{17}\) the Scottish Government does not consider there to be a requirement for assistance provision to be given for the Best Start Grant (Early Years Assistance in the Bill). The frequency and value of the payments will be set out in regulations, alongside eligibility (illustrative regulations depicting such were made available during the Stage 1 scrutiny process\(^\text{18}\)). In other schedules in the Bill, there is a need to allow for specific provision in relation to the assistance to be given (for example, to clarify that Funeral Expense Assistance regulations may specify items of expense that will, or will not, be covered by assistance).

The Committee considers that it would be premature at this stage to make a full recommendation to the Parliament until it has seen if the Bill is amended at Stage 2. After Stage 2 the Committee would have a clearer picture of the level of detail on the face of the Bill, the content of the schedules and the conclusions stemming from the “short-life” working group led by Dr McCormick.

The Committee therefore limits itself to drawing the Social Security Committee’s attention to the availability of a “super-affirmative” procedure.

However, if the Bill remains in its current form the Committee considers that enhanced parliamentary scrutiny would be appropriate.

The Committee concludes that the particularly broad regulation-making powers in section 18 are acceptable in principle. Insofar as those powers may be exercised as envisaged by subsection (5), the Committee draws the Social Security Committee’s attention to the availability of forms of super-affirmative procedure. This could assist to ensure that such broad powers are subjected to an appropriate level of parliamentary scrutiny.

However, the Committee concludes that it would be premature to reach a firm conclusion on the necessity for a form of super-affirmative procedure at this stage. This will become clearer once the Parliament has seen the Bill as amended at Stage 2 and has the benefit of Dr Jim McCormick’s conclusions on how scrutiny of social security matters should work as part of the new Scottish system.

19. The Scottish Government notes the Committee’s current position and is grateful for its summary of the current position (in particular for making it clear that there is no single or set form of super-affirmative procedure).


20. As it has made clear throughout the Bill process, the Scottish Government is keen that the Parliament should be closely involved in shaping the method through which the regulations are scrutinised, and agrees with the notion that there should be some form of super-affirmative procedure in place for the relevant regulations.

21. The Scottish Government can therefore confirm that it will bring forward amendments to the Bill at Stage 2 that will apply a form of super-affirmative procedure.

**Part 3 – Supplementing assistance under other enactments**

On balance, the Committee considers that any concerns the Scottish Government has about the parliamentary time that may be involved in updating references to existing UK legislation is outweighed by the benefits to parliamentary scrutiny of setting out the existing reserved benefits that are to be topped-up on the face of the Bill. Setting those benefits out on the face of the Bill would allow the Parliament to properly consider and debate the surrounding policy choices and to conduct full scrutiny on a line by line basis.

22. Section 45 of the Bill is a power for the Scottish Government to make regulations to top up benefits which remain reserved to the UK government. The Scottish Government’s view is that it is appropriate for that power to exist in relation to all reserved benefits. Framing the power in such a way, rather than exhaustively listing them individually, is the most succinct way of expressing the policy that it intends the Bill to give effect to.

23. The framing approach chosen does not prevent Members from debating whether any reserved benefit should not be susceptible to being topped up as the Bill passes through Parliament. Any Member can, if they wish, bring forward an amendment at Stage 2 or 3 to exempt a particular benefit, or description of a benefit, from the general proposition that all reserved benefits may be topped up.

24. The Scottish Government also believes that this approach does not prevent the Parliament from scrutinising proposals to top up a particular reserved benefit if and when a government decides it wishes to do so. All regulations made under section 45 will be subject to the super-affirmative procedure.

A power similar to that in section 53 could be taken in section 45 to update by regulations the references that would be made in section 45 to the existing UK reserved benefits being topped-up.

25. The Scottish Government believes that, if the Bill is passed on the strength of the principle that all reserved benefits should be capable of being topped up by regulations under section 45, it would be superfluous to require the Parliament to reaffirm that principle each and every time the UK Government creates a new reserved benefit or changes the name of an existing one. To do so would only delay the topup being received by those who would benefit from it.
26. Conversely, should the Parliament wish to stop a top-up proposal from the Scottish Government being enacted (and if only one set of regulations were required to give effect to said top-up), it would need only decline to approve the draft top-up regulations. The Scottish Government, therefore, believes that this approach also maintains an appropriate level of Parliamentary scrutiny for top-up powers.

Alternatively, if the Scottish Government does not agree to the recommendations made [in the] paragraphs ... above, the Committee draws the Social Security Committee's attention to the availability of forms of superaffirmative procedure. This could assist to ensure that such a broad power to make regulations topping up reserved benefits in section 45 is subjected to an appropriate level of parliamentary scrutiny. However, as observed previously, the Committee considers that the necessity for a form of super-affirmative procedure will become clearer once the Parliament has seen the Bill as amended at Stage 2 and has the benefit of Dr McCormick’s conclusions on how scrutiny of social security matters should work as part of the new Scottish system.

27. The Scottish Government notes this position and, as mentioned in paragraph 15 above, will bring forward amendments to the Bill at Stage 2 that will apply a form of super-affirmative procedure.

Part 4 – Discretionary Housing Payments (DHPs)

The Committee calls on the Scottish Government to amend the Bill at Stage 2 so that the negative procedure applies to the guidance issued under section 52 to allow for a more appropriate level of parliamentary scrutiny.

28. The Scottish Government does not share the Committee’s view that it would be appropriate to make guidance issued under section 52 subject to the negative procedure.

29. The Committee highlights that the matters which will be capable of being addressed by guidance under section 52 are ones which can be covered by regulations under the existing law on DHPs (see section 69 of the Child Support, Pensions and Social Security Act 2000\textsuperscript{19}, which the Committee uses as an analogy). Any such regulations are subject to the negative procedure.

30. However, the Scottish Government believes that it is important to note that guidance is also currently issued on the matters covered by section 52, which is not subject to any Parliamentary scrutiny procedure at all (as such guidance is typically not). As the guidance that is presently issued around DHPs has no clear statutory basis, there is not even a requirement to lay it before Parliament (in contrast to the presently proposed position for guidance under section 52).

\textsuperscript{19} See: https://www.legislation.gov.uk/ukpga/2000/19/section/69
31. Through the Bill, the Scottish Government has proposed effectively dispensing with the regulation-making power while retaining, and providing a statutory basis for, the practice of issuing guidance to Local Authorities about the exercise of their DHP functions. It believes that there is no reason such a proposal should mean the Parliamentary procedure that currently applies to the regulation-making power should transfer over to the guidance-issuing power. In addition, it believes that where the Parliament has delegated law-making power to the Scottish Government, to be exercised by regulations (which are laws), the use of said power is scrutinised by the Parliament and that the Parliament should have a vote on the Scottish Government’s exercise of the power in question.

32. The Scottish Government is also mindful that guidance, in this case, is not law. Section 52 states that Local Authorities must have regard to guidance issued by Scottish Ministers. In other words, they must consider the guidance, but are not legally obligated to follow it. Indeed, they would be acting unlawfully if they disregarded the discretion that statute entrusts to them and mechanically applied guidance issued by the Scottish Government instead.

33. Given the significant difference in legal weight between guidance and regulations, the Scottish Government believes that the Committee’s use of the analogy between the guidance-issuing power under section 52 of the Bill and the regulation-making power under section 69 of the Child Support, Pensions and Social Security Act 2000 is not an appropriate one in this instance. A closer comparator to the Bill’s guidance-issuing power would be the guidance-issuing power under section 6 of the Welfare Funds (Scotland) Act 2015. Not only is it also a power to issue guidance, it is a power to issue guidance to which Local Authorities must have regard in exercising their discretion to help meet financial need amongst their respective populations. Guidance under section 6 of the 2015 Act is not subject to the negative procedure, and there is no requirement to lay it before the Parliament.

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\(^{20}\) See: https://www.legislation.gov.uk/asp/2015/5/section/6
PROPOSAL FOR SCOTTISH INDEPENDENT EXPERT ADVISORY COMMITTEE

The Committee welcomes the proposed establishment of a Scottish independent expert advisory committee on social security matters. The Committee seeks to be engaged as part of the “short-life” working group led by Dr McCormick. In the meantime, the Committee highlights that the proposed independent expert advisory committee should not be seen as a substitute for parliamentary scrutiny.

34. The Scottish Government welcomes the Committee’s willingness to engage with Dr McCormick’s short-life working group. It also agrees with the Committee that any expert advisory body on social security should be a complement to, rather than a substitute for, Parliamentary scrutiny of social security regulations.
CONCLUSION

35. The Scottish Government would like to thank the Committee for its thoughtful consideration of the delegated powers provisions in the Social Security (Scotland) Bill.

36. It trusts that this response will be welcomed by the Committee, and looks forward to their further consideration of the Bill once Stage 2 has concluded.

Scottish Government
Social Security Directorate

16 January 2018
DELEGATED POWERS AND LAW REFORM COMMITTEE

2nd Meeting, 2018 (Session 5)

Tuesday 23 January 2018

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: Stage 1

Response from the Scottish Government

Background

1. The Committee reported at Stage 1 on the delegated powers in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (the “Bill”) on 9 November 2017, in its 52nd Report, 2017 Session 5.

2. The Justice Committee considered the Bill as lead committee and reported on 21 December 2017.

3. The Scottish Government responded to the Committee’s report and has agreed to the Committee’s recommendation. The text of the correspondence from the Minister for Community Safety and Legal Affairs can be found in the annex to this paper.

Committee recommendation

Section 7(3) – Form, content etc. of success fee agreements

• Power conferred on: The Scottish Ministers
• Power exercisable by: Regulations made by Scottish Statutory Instrument
• Parliamentary procedure: Affirmative

Provisions

4. Section 7 of the Bill provides that a success fee agreement must be in writing (subsection (1)) and must specify the basis on which the amount of the success fee is to be determined (subsection 2).

5. The delegated power is contained in section 7(3), which provides that the “Scottish Ministers may by regulations make further provision about success fee agreements including in particular provision about – (a) their form and content (including their terms); (b) the manner in which they may be entered into; (c) their modification and termination; (d) the resolution of disputes in relation to such agreements; and (e) the consequences of failure to comply with the requirements of subsection (1) or (2) or the regulations.”

6. Subsection (4) provides that regulations under subsection (3) may modify Part 1 of the Bill regarding success fee agreements.

1 The Bill, as introduced, is available here.
7. In terms of section 19(2) of the Bill, regulations made under section 7(3) are subject to the affirmative procedure.

8. The Delegated Powers Memorandum (DPM) states that section 7 is intended to support the policy intention of enhancing the certainty, predictability and transparency of success fee agreements.

9. In particular, the Scottish Government’s position in the DPM is that details relating to the form and content of success fee agreements may require to be prescribed in more detail than is provided in the Bill. Furthermore, the content of success fee agreements may require regular amendment to deal with new eventualities or to adapt to changing circumstances. It states that key matters are set out in subsections (1) and (2) but that there should be flexibility to provide further for the content and form of success fee agreements in secondary legislation if that is considered necessary.

10. The DPM indicates that the affirmative procedure is appropriate given the importance of the use of success fee agreements in providing additional funding options for parties seeking to enforce their rights.

Committee consideration

11. As part of its Stage 1 consideration of the delegated powers in the Bill, the Committee asked the Scottish Government to explain why the power to amend Part 1 of the Bill in subsection (4) is necessary and proportionate. In particular, the Committee asked if the power could be expressed more narrowly and still obtain the policy objective of enhancing the certainty, predictability and transparency of success fee agreements. It also asked for examples of the sorts of modifications that the Scottish Government considers may need to be made to the provisions in Part 1 using the powers in section 7(3) and (4).

12. These questions were asked in circumstances where the DPM does not consider the extension made by subsection (4) to the scope of the power in subsection (3).

13. In its response, the Scottish Government stated that it did not consider that the powers in subsections (3) and (4) were unjustified or unduly wide. It argued that provision made in terms of subsection (4) would be limited to the matters permissible in terms of subsection (3).

14. The Scottish Government also argued that amendments to Part 1 of the Bill may become necessary in the future depending on the experience of the operation of success fee agreements in the years ahead. This would allow the Scottish Government to react to any anomalies or abuses concerning success fee agreements that may emerge and that could hinder the policy objective of certainty, predictability and transparency of success fee agreements.
15. In its Stage 1 report, the Committee indicated that it was content that, in principle, the power in section 7(3) is necessary to regulate the technical detail relating to success fee agreements.

16. However, it considered that subsection (4) is particularly broad. That provision is not confined to amending section 7 of the Bill. Instead, modification may be made to any section within Part 1 of the Bill relating to success fee agreements by regulations made under section 7(3).

17. Special justification is required for regulation-making powers that allow amendments to be made to primary legislation. Such powers may not be acceptable where they would have the effect of authorising a fundamental change to the basis of the legislation or to address issues of policy and principle. However, it can be acceptable to use such powers to address points of a minor, administrative or technical nature.

18. The Committee considered that the affirmative procedure would afford the Parliament the opportunity to undertake enhanced scrutiny in relation to any proposed amendment to Part 1 of the Bill.

19. However, on the prior question of whether subsection (4) is appropriate in principle, the Committee considered that the Scottish Government's argument, that provision made in terms of subsection (4) would be limited to the matters permissible in terms of subsection (3), offered limited reassurance. This is because the power is expressed broadly to allow the Scottish Ministers to “make further provision about success fee agreements”. Although paragraphs (a) to (e) provide details of the provision which such regulations may include in particular, the use of the word “including” in subsection (3) indicates that the regulations may include other matters which are not encompassed by paragraphs (a) to (e). It is not clear why the further provision cannot be made in regulations without the additional power to modify Part 1 of the Bill.

20. As noted above, the Scottish Government’s position is that the power to amend Part 1 of the Bill would allow it to react to any anomalies or abuses concerning success fee agreements that may emerge. The Committee recognised that those offering success fee agreements may seek to work around the constraints placed on such agreements in Part 1 of the Bill, and that these issues may in some circumstances be technical in nature.

21. However, the Committee asked for examples of the sorts of modifications to Part 1 of the Bill that the Scottish Government considers it may need to make. The response did not provide any specific examples. The Committee therefore remained unclear why the unusually wide power in subsection (4) is necessary and proportionate. This is particularly where that power would allow the Scottish Government to amend the policy choices relating to the operation of success fee agreements contained in the Bill as enacted.

22. The Committee recommended to the Parliament that although it is content that the affirmative procedure applies to regulations made under section 7(3), the unusually wide scope of section 7(4) to enable amendments to be made to Part
1 of the Bill has not been sufficiently justified by the Scottish Government. Unless specific examples could be provided by the Scottish Government to explain why the modification to Part 1 of the Bill is necessary and proportionate, the Committee could not see why the power in subsection (3) alone to make further provision about success fee agreements in regulations is insufficient.

23. The Committee’s position was supported by the Justice Committee:

“The Committee agrees with the concerns of the Delegated Powers and Law Reform Committee that the provision in section 7(4), which would enable amendments to be made to Part 1 of the Bill by regulations, is “unusually wide” in scope and has not been sufficiently justified by the Scottish Government. The Scottish Government has not yet provided any specific examples as to why this power is necessary and proportionate. If the Scottish Government cannot provide such specific examples, then the Committee calls on the Scottish Government to amend section 7(4).”

Scottish Government Response

24. The Scottish Government responded to the Committee’s Stage 1 report in the following terms:

“The Scottish Government believes that section 7(4) provides a useful power to augment the current provisions of the Bill in relation to success fee agreements in cases where it is considered to be desirable to have future provision about, say, mandatory terms or the unenforceability of success fee agreements. Such future provision would only be brought forward after careful consultation on the regulation of success fee agreements with interested stakeholders and for that reason cannot be included in the Bill at present. The Government’s view is that any such provision should be set out in the primary legislation as amended by regulations, rather than set out in entirely freestanding regulations. That would ensure that all of the mandatory terms relating to success fee agreements can be found in the primary legislation. This would deliver the legislative result that is most clear for the readers and users of the legislation. The Government therefore wishes to retain section 7(4).

However, the Government has taken note of the Committee’s concerns about the scope of section 7(4). Accordingly, the Government will bring forward amendments at Stage 2 which will limit the scope of section 7(4).”

11 January 2018

Dear Convener

I am writing to respond to the Delegated Powers and Law Reform Committee’s Stage 1 Report on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. I would like to thank the Committee for its careful consideration of the Bill.

I am pleased that the Committee was content with the delegated powers in the Bill, subject to its comments on the power in subsection (4) of section 7 (Form, content, etc of success fee agreements) which allows section 7(3) regulations to modify Part 1 of the Bill. I note that the Committee considers that the scope of section 7(4) has not been sufficiently justified and has asked the Government to explain why the modification of Part 1 of the Bill is necessary and proportionate.

The Scottish Government believes that section 7(4) provides a useful power to augment the current provisions of the Bill in relation to success fee agreements in cases where it is considered to be desirable to have future provision about, say, mandatory terms or the unenforceability of success fee agreements. Such future provision would only be brought forward after careful consultation on the regulation of success fee agreements with interested stakeholders and for that reason cannot be included in the Bill at present. The Government’s view is that any such provision should be set out in the primary legislation as amended by regulations, rather than set out in entirely freestanding regulations. That would ensure that all of the mandatory terms relating to success fee agreements can be found in the primary legislation. This would deliver the legislative result that is most clear for the readers and users of the legislation. The Government therefore wishes to retain section 7(4).

However, the Government has taken note of the Committee’s concerns about the scope of section 7(4). Accordingly, the Government will bring forward amendments at Stage 2 which will limit the scope of section 7(4).

I hope that this response to the issue raised by the Committee is helpful in explaining the reasons why the Government wishes to retain section 7(4) and satisfies the Committee that we will respond to the concerns about the need to limit the scope of the section.

Yours sincerely

Annabelle Ewing
Minister for Community Safety and Legal Affairs