



The Scottish Parliament  
Pàrlamaid na h-Alba

## Delegated Powers and Law Reform Committee

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Dear Clare,

Thank you for your letter and the opportunity to comment on the particular amendments to the Social Security (Scotland) Bill you refer to prior to their consideration at Stage 2.

As you will be aware the issues arising out of the amendments are ones that the Committee gave careful consideration to in its Stage 1 report on the Bill.

A link to the report can be found below:

<https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2017/10/31/Social-Security--Scotland--Bill-at-Stage-1/DPLRS52017R48.pdf>

The Committee notes that its view is being specifically sought on the amendments providing for an enhanced scrutiny procedure for regulations under part 2, chapter 2 ('Types of assistance to be given') and section 45 ('Power to provide for top up') of the Bill.

The Scottish Government's letter to the Social Security Committee explains how this super-affirmative procedure will operate—

“It would require Scottish Ministers to take a series of actions prior to being able to lay any regulations – to which this section applies – before Parliament. These are:

- Publish their proposals for draft regulations;
- Refer the proposals to the independent scrutiny body and notify the Parliament of that;
- The independent scrutiny body must then prepare a report on the proposals that sets out any observations and recommendations they would wish to make. The report must take into account the Scottish social security principles and any relevant international human rights instruments; and
- Scottish Ministers have a duty to respond to the report, which should be submitted to Parliament when the draft regulations are laid. The response must set out where the regulations differ from the report (and why), what Scottish Ministers have done to address any comments and/or recommendations made in the report, and/or detail if they disagree with any of the report’s conclusions.”

In its consideration of delegated powers in bills the Committee has encountered a variety of different forms of super-affirmative procedure.

The approach contained in these regulations is not one with which the Committee is familiar, albeit the Committee recognises that the role of an independent commission, the Scottish Commission on Social Security (the “Commission”), provides an additional element of complexity.

The Bill currently provides that the affirmative procedure applies to regulations made in relation to each of the types of assistance under sections 11 to 18 (among others). In its report on the Bill, the Committee did not definitively conclude whether the Bill should be amended to provide that a super-affirmative procedure should apply to such regulations, but took the view that if the Bill remained in its current form it would consider that enhanced parliamentary scrutiny would be appropriate. That is to say if the Bill was not amended to provide for more detail on the face of the Bill, primarily about eligibility for assistance and what those who qualify are to be given by way of assistance, then an enhanced procedure would be appropriate.

Given that such detail has not been forthcoming the Committee would support the inclusion of an enhanced scrutiny procedure. You may wish to note that the Committee has written to the Scottish Government asking it to consider again whether, among other things, it would be appropriate for more detail to be included on the face of the Bill. This letter can be found at the following address:

[http://www.parliament.scot/S5\\_Delegated\\_Powers/20180125SocSec.pdf](http://www.parliament.scot/S5_Delegated_Powers/20180125SocSec.pdf)

Paragraph 51 of the Committee’s Stage 1 report noted that there is not one singular form of super-affirmative procedure. However, at paragraph 52 the Committee suggested what its expectations would be for such an enhanced procedure—

“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.”

Further to this, the Committee’s Stage 1 report welcomed the establishment of the independent scrutiny body. However, at paragraph 111 of the report the Committee concluded that the proposed independent scrutiny body should not be seen as a substitute for parliamentary scrutiny.

Taking both of these recommendations into account it would appear that in a number of respects the Scottish Government’s recommendations do not meet this Committee’s recommendations.

### **Enhanced *parliamentary* scrutiny**

The establishment of the Commission as an independent scrutiny body is to be welcomed. However, in this Committee’s view its role in relation to the scrutiny of proposals to make draft regulations undermines the ability of the Parliament to hold the Government to account and shape the draft regulations.

Firstly, the Committee finds it unsatisfactory that the amendments only provide that Parliament should be notified when proposals to make regulations are referred to the Commission.

This is a unique approach to a super-affirmative procedure. Normally in this consultation phase proposed draft regulations would be laid before the Parliament for scrutiny. We note that in evidence to your Committee the Minister suggested that this does not preclude the Parliament from considering such proposals, but it would appear that any such consideration would only be as an adjunct to the work of the Commission.

### **Proposals to make regulations**

Secondly, the requirement in the amendment is for the Scottish Ministers to inform the Commission of their proposals to make regulations. The Minister’s evidence to the Social Security Committee indicated that the Scottish Government would “pass the draft regulations to the Commission”. However, as drafted, the amendment leaves open the possibility that the proposals may take a form other than draft regulations; for example, a document outlining the policy choices.

The wording in the amendment could be clarified to put beyond doubt that the reference in this context is to the proposed draft regulations.

### **Commission can disapply enhanced scrutiny**

The Committee is also concerned by subsection (9) of amendment 131. Paragraph (b) in particular allows the Commission to determine that there are types of instruments that it does not require to be notified about and accordingly to which this

enhanced scrutiny procedure would not apply. You could again take the view that such an approach undermines the Parliament's role.

An example of an alternative approach to a super-affirmative procedure can be found in sections 14 and 15 of the Alcohol etc. (Scotland) Act 2010 (the "2010 Act"). Section 14 contains a power for the Scottish Ministers to make regulations for the imposition on licence-holders of a social responsibility levy.

Section 15 provides that before laying the regulations for approval by the Parliament, the Scottish Ministers are required to consult health boards; bodies representing licensing boards, local authorities and relevant licence-holders; the chief constable; interested voluntary organisations; and others by laying a proposed draft before the Scottish Parliament and sending a copy of the proposed draft regulations to those consultees. The Scottish Ministers must then have regard to any representations received within 60 days. When subsequently laying the regulations before the Parliament for approval, the Scottish Ministers are also required to lay an explanatory document outlining the consultation carried out, any representations received and any changes made as a result of the representations.

The Social Security Committee may wish to consider whether a similar framework for consultation requirements could apply to the Scottish Ministers in relation to the Commission and others. An initial draft of the regulations could be laid in the first instance before the Parliament, with a requirement to send the initial draft regulations to the Commission and to publish them for consultation. As is currently provided in the amendments, an exception could be made to the requirement for enhanced scrutiny where regulations are made only for the purpose of the consolidation of earlier regulations. The Scottish Ministers could be required to lay an explanatory document outlining their views on the Commission's position (similar to what the amendments currently provide), but also any other representations received. The revised draft regulations could then be subject to the affirmative procedure in the usual way.

The Committee does not wish to detract from the role of the independent scrutiny body, but as noted before that role should not be a substitute for parliamentary scrutiny.

### **Amendment 132**

Similarly, the Committee also suggests that your Committee might wish to explore further the impact of amendment 132. It provides that the provisions of amendment 131 do not apply to regulations about early years assistance and funeral expense assistance brought forward before the date specified by the Commission. This means that such regulations would not be subject to the enhanced scrutiny procedure.

### **Timescales**

It should also be noted that the amendment provides no timescale in which consideration of proposed draft regulations should take place. Commonly super-affirmative procedures provide a timescale in which consultation on proposed draft regulations should take place; normally 40 to 60 days. In the example referred to

above, in relation to section 15 of the 2010 Act, the period chosen in that instance was 60 days.

Not only does amendment 131 provide no timescale for the consideration of the proposed draft regulations, but subsection (7)(b) of that amendment allows Ministers to lay draft regulations before the Parliament before the Commission has reported on the proposed draft regulations.

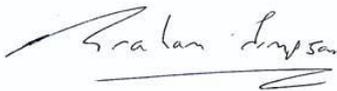
The Committee suggests that a timescale should be stipulated on the face of the Bill for scrutiny of proposed draft regulations.

### **Conclusion**

The Committee hopes that you find these comments helpful.

The Committee will return to consider the Bill after Stage 2, but would be happy to assist further in advance of that.

Yours,

A handwritten signature in black ink, appearing to read "Graham Lyson". The signature is written in a cursive style with a horizontal line underneath.

Convener of the Delegated Powers and Law Reform Committee