



The Scottish Parliament
Pàrlamaid na h-Alba

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Social Security (Scotland) Bill as amended at Stage 2

The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 27 March. The Committee agreed to seek an explanation of the following matters:

New schedule A1, paragraph 4(2)(c) – Access to information

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Revised or new:	New
Parliamentary procedure:	Negative

Paragraph 4(2)(c) of new schedule A1 provides that the Scottish Ministers may by regulations specify such other person (or person of a certain description) to which the Scottish Commission on Social Security (“the Commission”) has a right of access to information.

Similar powers are contained in section 10(2)(f) of the Scottish Fiscal Commission Act 2016 and paragraph 3 of the schedule to the Child Poverty Act 2017 in relation to the powers of the Scottish Fiscal Commission and the Poverty and Inequality Commission (respectively) to require information. These powers are subject to the affirmative procedure.

The Committee would therefore be grateful if you would reconsider whether it would be more appropriate that the power in paragraph 4(2)(c) of schedule A1 of the Bill is made subject to the affirmative procedure rather than the negative procedure.

New section 17A – Housing assistance

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Revised or new:	New
Parliamentary procedure:	Affirmative plus Commission scrutiny under new section 55A

Paragraph 1(2)(a) to (e) of schedule 8 set out the eligibility criteria that must be specified in the housing assistance regulations for assistance relating to the removal of the spare room subsidy. It appears that these criteria are to be cumulative. However, unlike the eligibility criteria contained in paragraph 1(3)(a) to (d) (for assistance relating to the removal of housing support costs for 18 to 21-year-olds), the word “and” does not appear in the penultimate sub-paragraph to clarify this beyond doubt.

Please can you explain if there is any reason for the omission of the word “and” at the end of paragraph 1(2)(d) of schedule 8, compared to the inclusion of that word at the end of paragraph 1(3)(c).

New sections 55A and 55B – Scrutiny of certain regulations

The Committee previously wrote to the Social Security Committee to provide its observations on the proposed form of “super-affirmative” procedure contained in the Government’s amendments to the Bill at Stage 2. These amendments were agreed and inserted into the Bill.

The Committee welcomed the establishment of the Commission as an independent scrutiny body. However, it considered that the Commission’s 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.

The Committee requests that the Scottish Government reconsiders sections 55A and 55B in respect of the following matters:

- During the consultation phase, proposed draft regulations are normally laid before the Parliament for scrutiny. However, the amendments only provide that Parliament should be notified when proposals to make regulations are referred to the Commission. **Please consider whether it would be more appropriate that the Bill is amended to provide that a draft of the regulations is laid before the Parliament at this initial consultation stage.**
- Section 55A requires the Scottish Ministers to inform the Commission of their proposals to make regulations. **Please consider clarifying section 55(2)(a) to put beyond doubt that it is the proposed draft regulations that are to be communicated to the Commission.**

- Section 55A(9)(b) 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.

The Committee considers that an alternative approach to a super-affirmative procedure, such as that found in sections 14 and 15 of the Alcohol etc. (Scotland) Act 2010, would be more appropriate. This could provide that an initial draft of the regulations would 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. As is currently provided in new section 55A(9)(a), 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 section 55A(7) and (8) currently provide), but also any other representations received. The revised draft regulations could then be subject to the affirmative procedure in the usual way.

Please consider whether it would be more appropriate that the Bill is amended to provide a procedure of the sort outlined above.

- The Committee remains concerned that section 55A 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. For example, the period chosen in section 15 of the 2010 Act was 60 days. However, not only does section 55A provide no timescale for the consideration of the proposed draft regulations, but subsection (7)(b) allows Ministers to lay draft regulations before the Parliament prior to the Commission having reported on the proposals. **The Committee would be grateful if the Scottish Ministers would give further consideration to this issue, including the possibility of stipulating a timescale on the face of the Bill for scrutiny of proposed draft regulations. Furthermore, with reference to paragraph 23 of the Supplementary Delegated Powers Memorandum, in what circumstances is it envisaged that regulations would need to be made urgently, or that the Commission would be unable to report?**
- In relation to section 55B, the Committee remains concerned about the lack of enhanced scrutiny in relation to regulations regarding early years assistance and funeral expense assistance given the broad nature of the regulation-making powers for those types of assistance. These regulation-making powers are broad and it is appropriate that an enhanced form of parliamentary procedure beyond that provided by the affirmative procedure applies, particularly in respect of the initial regulations made under the relevant powers. **The Committee would be grateful if the Scottish Ministers would give further consideration to this issue.**

Section 20(1) – Applications for assistance

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument

Revised or new: **New**
Parliamentary procedure: **Negative**

Section 20(1) provides that an application for assistance must be made to the Scottish Ministers in such form as may be prescribed in regulations.

By way of contrast, section 20(1) of the Bill as introduced provided that an application for assistance is to be in such form and accompanied by such evidence as the Scottish Ministers may require.

For consistency and clarity, please could you consider whether it would be more appropriate for the regulation-making power to be framed to require provision to be made both in relation to the form of the application *and the evidence that is to accompany it.*

New section 44B – Duty to update carer’s, disability and employment-injury assistance

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish statutory instrument**
Revised or new: **New**
Parliamentary procedure: **Affirmative**

New section 44B requires the Scottish Ministers to bring forward legislation before each financial year to replace the value of assistance to be given as prescribed in regulations for carer’s assistance (under the power in section 11), disability assistance (under the power in section 14) and employment-injury assistance (under the power in section 16). This duty applies where any such figure is, in the Scottish Ministers’ opinion materially below its inflation-adjusted level. In such circumstances, the figure must be replaced with at least the inflation-adjusted level (subject to any rounding the Scottish Ministers think appropriate).

It appears that the procedure set out in section 55A requiring consultation with the Commission does not apply to these apparent standalone updating regulations made under section 44B. Please explain why it is considered appropriate that the Commission is not consulted given that the Scottish Ministers are required to make a judgment as to whether the value of any of carer’s, disability and employment-injury assistance is materially below its inflation-adjusted level.

In addition, it appears that following Stage 2 there is a cross-referencing error in section 44B(4) insofar as the definition of “relevant figure” is to be construed in accordance with section 43A(3) (which does not exist) and which it appears should instead be section 44A(3).

New section 48C(2)(g) and (5) – Information-sharing

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish statutory instrument**

Revised or new: **New**
Parliamentary procedure: **Negative**

Section 48C(2)(g) of the Bill allows the Scottish Ministers to specify in regulations further persons who are to be subject to the requirement to provide information that those persons hold to the Scottish Ministers for the purpose of a social security function.

This power appears to be similar in nature to the power in paragraph 4(2)(c) of schedule A1 for regulations made by the Scottish Ministers to specify such other person (or person of a certain description) to which the Scottish Commission on Social Security has a right of access to information.

For the same reasons as set out in the Committee’s question in relation to whether the affirmative procedure should apply to the power in paragraph 4(2)(c) of schedule A1, please could you reconsider whether it would be more appropriate that regulations made under the power in section 48C(2)(g) be made subject to the affirmative procedure rather than the negative procedure.

Please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Friday 6 April.

Thank you.

Euan Donald
Clerk to the Delegated Powers and Law Reform Committee