



The Scottish Parliament
Pàrlamaid na h-Alba

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Social Security (Scotland) Bill at Stage 1

The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 12 September. The Committee agreed to invite oral evidence from the Minister for Social Security. In addition, the Committee agreed to seek an explanation of the following matters:

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

Each of sections 11 to 17 set out a type of assistance which the Scottish Ministers are required to provide under section 8. In each case, the section provides that the Scottish Ministers are to make regulations setting out who is eligible for the type of assistance and what those who qualify are to be given by way of assistance.

As the DPM notes, each section is connected to a schedule which makes provision about the exercise of the regulation-making power the related section confers. The schedules set out the core eligibility criteria that the Scottish Ministers *must* use the power to set. The schedules also provide a non-exhaustive list of other eligibility criteria that *may* be set in the regulations.

Schedules 1 to 7 each contain a provision providing that the generality of the power to make regulations is not limited. For example, schedules 3 and 5 state that

“nothing in this schedule is to be taken to limit what may be prescribed in the regulations.”

Paragraph 12 of the DPM states that schedules 1 to 7 allow the Parliament to exert control over the scope of the regulation-making powers relating to each of the types of assistance in sections 11 to 17. However, if each schedule as a whole, or certain provisions in it, is not to be taken to limit what the regulations may provide for, it is not clear that the Parliament retains sufficient control over the scrutiny of the regulations.

The Committee therefore asks the Scottish Government to provide examples to illustrate why this provision is necessary.

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

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.

The regulation-making power is set out in subsection (2). Like sections 11 to 17, the Scottish Ministers are under a duty to make regulations prescribing the eligibility rules and what short-term assistance an individual who is entitled to it is to be given. However, unlike the other types of assistance in sections 11 to 17, section 18 has no corresponding schedule making further provision about the exercise of the power it confers. Instead, the scope of the regulation-making power is set out in the section itself at subsection (3).

However, subsection (5) leaves open the possibility that the regulations may prescribe eligibility criteria other than those set out in subsection (3). Paragraph 22 of the DPM explains that, as part of the objective of making provision for unforeseen needs not covered by one of the “main” assistance types described in sections 11 to 17, taking a power to make provision is the only option.

However, section 18 does not impose any limits on the power to set alternative forms of eligibility rules to those specified in subsection (3). The power to set additional eligibility rules for short-term assistance is potentially very wide.

The Committee therefore asks the Scottish Government for further explanation as to why the circumstances when eligibility for short-term assistance other than that envisaged in subsection (3) will apply is not clarified in more detail on the face of the Bill.

Part 2 – Giving of assistance by Scottish Ministers

Section 34 – Determination on basis of on-going entitlement

Subsection (1) – Power to provide for entitlement to be indefinite or for a period

Power conferred on: the Scottish Ministers

**Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative**

Section 34(1) confers power on the Scottish Ministers to make regulations which provide that a determination of an individual's entitlement to a specified type of assistance is to be made on an ongoing basis (as opposed to a one-off payment). The ongoing entitlement can be either indefinite or for a duration specified in the regulations. The regulations may also provide for exceptions to any provision made.

Paragraph 33 of the DPM states that provision for ongoing assistance and how decisions relating to it are to be determined cannot be made on the face of the Bill.

The DPM indicates that disability assistance is an example of an assistance that may be provided on an ongoing basis where it is obvious that the person is going to continue to be disabled at least in the medium term. Paragraph 246 of the DPM also identifies carer's assistance as one which may be provided on an ongoing basis.

With reference to the delegated power in section 34(1), the Committee asks the Scottish Government to explain why the Bill does not stipulate which types of entitlement are capable of being paid on an ongoing basis and which are not. For example, why is it that funeral assistance is not specified as not being capable of being paid on an ongoing basis?

Part 2 – Giving of assistance by Scottish Ministers

Section 35 – Determination without application

Subsection (1) – Power to determine a person's entitlement to assistance without receiving an application

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Section 35(1) provides that the Scottish Ministers may by regulations provide that they may make a determination of an individual's entitlement to a particular type of assistance without receiving an application. This power can be exercised in such circumstances as the regulations specify.

The DPM provides the example of cold-spell heating assistance as a type of assistance which the Ministers may be able to determine entitlement to based on information already held about where the individual lives and their entitlement to other types of social security. Paragraph 240 of the Policy Memorandum also refers to winter heating assistance as a type of assistance that could be paid automatically without the need for an application to be made.

The Committee asks the Scottish Government to explain why the Bill does not stipulate which of the types of assistance a determination of entitlement can be made in respect of without receiving an application. For example, it is not clear whether funeral expense assistance would ever be provided other than following an application.

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

Section 45 empowers the Scottish Ministers to make regulations providing for the top-up of reserved benefits. Paragraph 48 of the Scottish Government's Delegated Powers Memorandum states that it would be prudent to take the power to top-up reserved benefits and that, unlike other types of assistance, provision will require to be responsive to circumstances.

The Committee asks the Scottish Government to explain why the Bill does not contain provision specifying the existing UK benefits which the Scottish Ministers seek to top up.

The power in section 45(1) includes, by virtue of section 45(2), making provision which addresses matters such as applications for assistance, obtaining information, appeals and assistance given in error.

The Committee also asks the Scottish Government to provide further explanation as to why it is appropriate for Ministers to have powers to make provision on the matters set out in section 45(2) when, in relation to the other types of assistance set out in the Bill, provision addressing those matters is set out on the face of the Bill.

Paragraph 49 of the DPM states that section 45 may be used to modify primary legislation, including provision in the Bill. However, it is not clear that either section 45 or the Bill does confer such a power beyond the power to make ancillary provision in section 54.

The Committee asks the Scottish Government to clarify its position on the scope of section 45 to modify primary legislation, including the Bill.

Part 4 – Discretionary Housing Payments

Section 52 – Guidance

Subsection (1) – Guidance to local authorities

Power conferred on: the Scottish Ministers

Parliamentary procedure: laid, no procedure

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.

The matters listed in section 52(2) that the guidance issued under section 52(1) can contain are ones that, in relation to the other forms of assistance set out 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.

The Committee asks the Scottish Government to explain why:

- a. the matters set out in section 52(2) are not dealt with in regulations, with a further power to issue guidance on those regulations if that is deemed necessary.
- b. an enhanced level of parliamentary procedure is not applied to the scrutiny of the detailed rules governing Discretionary Housing Payments.

Part 4 – Discretionary Housing Payments

Section 53 – Power to modify section 49 (local authorities’ power to make discretionary housing payments)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Section 53(1) provides that the Scottish Ministers may by regulations make “whatever amendment to section 49 they think appropriate in consequence of: (a) an enactment mentioned in that section being amended, repealed or revoked, or (b) the creation of a reserved benefit payable in respect of a liability to make rent payments.”

The Committee asks the Scottish Government to explain whether the effect of those particular words is to restrict the exercise of the power to amend section 49 for the purposes of changes that arise in paragraphs (a) and (b).

Part 2 - Giving of assistance by Scottish Ministers

Sections 20, 21 and 23 – Application for assistance, withdrawal of application and right to request re-determination

Subsections (1) and (2) of section 20; (3) and (4) of section 21; and (2) and (3) of section 23 – Form of, and evidence accompanying, applications for assistance, and form of both requests to withdraw such applications and re-determinations, to be as the Scottish Ministers require

Power conferred on: the Scottish Ministers

Power exercisable by: no form of instrument is set; the power is exercisable administratively

Parliamentary procedure: none, although the Scottish Ministers must publicise any requirements for the time being set

Section 20(1) provides that an application for assistance must be made to the Scottish Ministers in such form and be accompanied by such evidence as the Scottish Ministers require. Similarly, section 21(3) provides that a request to withdraw an application for assistance must be made to the Scottish Ministers in such form and be accompanied by such evidence as the Scottish Ministers require. Likewise, section 23(2) provides that a request for the Scottish Ministers re-determine an individual’s entitlement to a particular type of assistance is to be made in such form as the Scottish Ministers require.

In terms of sections 20(2), 21(4) and 23(3), the Scottish Ministers must publicise any requirements for the time being set under the relevant sections.

The Committee asks the Scottish Government to explain why it is considered appropriate that that these matters are not prescribed in regulations that would allow scrutiny by the Parliament.

Part 3 – Supplementing assistance under other enactments

Section 47 – Carer’s allowance supplement

Subsection (3) – Qualifying date for carer’s allowance supplement to be set by Scottish Ministers

Power conferred on: the Scottish Ministers

Power exercisable by: no form of instrument is set; the power is exercisable administratively

Parliamentary procedure: none

Section 47(1) imposes a duty on the Scottish Ministers to provide supplementary payments to “qualifying individuals” who are in receipt of Carer’s Allowance in respect of two specified six-monthly periods each financial year.

The Committee asks the Scottish Government to explain why it is appropriate that the power conferred on the Scottish Ministers in section 47(5), to determine the qualifying date for the purposes of assessing whether a person is a qualifying individual entitled to carer’s allowance supplement, is not prescribed in regulations that would allow scrutiny by the Parliament.

Please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Friday 22 September.

Thank you.

Euan Donald

Clerk to the Delegated Powers and Law Reform Committee