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## SOCIAL SECURITY (SCOTLAND) BILL AT STAGE 1

Dear Euan,

Thank you for your letter of 14 September to James Hynd, setting out specific points on which the Delegated Powers and Law Reform Committee is seeking further explanation of the powers contained in the Social Security (Scotland) Bill (“the Bill”). It has been passed to me to provide a reply, as my Division has policy responsibility for the Bill.

### 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**

The Committee notes that each of sections 11 to 17 set out a type of assistance which the Scottish Ministers are required to provide through regulations, which will set out who is eligible for the type of assistance and what assistance those who qualify are to be given. Each section is connected to a schedule which sets 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.

The Committee suggests that 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.” It suggests that it is not clear that the Parliament retains sufficient control over the scrutiny of the regulations, and asks the Scottish Government to provide examples to illustrate why this provision is necessary.

The Government has included the schedules because it considers them important to ensure proper parliamentary involvement in setting the core rules which will govern the giving of assistance under the Scottish social security system.

The schedules set out a mixture of rules about the things that must be included and the things that may be included in the regulations that will define the different types of assistance. As they stand, the schedules reflect the Government's view of those matters at the time the Bill was introduced. Through the Bill process, the Parliament has complete control over the final terms of the Bill (including the schedules). It is the Parliament that will decide whether further rules should be included in the 'may' or 'must' category, whether rules presently in the 'may' category should be moved to the 'must' (or vice-versa) and whether rules should be added about what regulations must not include.

The comment about the schedules each containing "*a provision providing that the generality of the power to make regulations is not limited*" has to be understood in this context. In all schedules apart from schedule 3 it refers to an absence of limits in parts of the schedules, because there are some limits in each case. Only schedule 3 refers to the power not being limited, because for winter heating assistance no mandatory provision is currently described.

## **Part 2 – Giving of assistance by Scottish Ministers**

### **Section 18 – Short-term assistance**

**Section 18(1) provides for short-term assistance, to be given by the Scottish Ministers to an individual on a short-term basis. 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).**

**The Committee 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.**

As explained in the Delegated Powers Memorandum, the power to provide for short-term assistance is being taken to deal with circumstances that at present cannot be fully anticipated. A power to deal with the unforeseen must necessarily be broad because, by definition, the Government does not know the situations it may need the power to deal with.

Subsection (1) places a constraint on the power by stipulating that short-term assistance can only be given on a short-term basis. The power therefore cannot be used to establish schemes for giving assistance to individuals over an extended period. If a future government wished to do that, it would need to return to Parliament for further primary legislation (perhaps taking the form of an amendment to the Act the Bill will become to add a suitable new assistance type).

## **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**

**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?**

The point of saying that a type of assistance will be given on an ongoing basis is so that the Government can provide it into the future, rather than requiring an individual to have to apply for it repeatedly in respect of different periods in arrears.

On the wider question of why the Bill cannot say which assistance types will be paid on an ongoing basis, as well as providing a power to say which benefits will be paid on an ongoing basis section 34(1) provides a power to create exceptions to the general rule. The provision that needs to be made is unlikely to be a bald statement that disability assistance, for example, is to be paid on an ongoing basis. In some cases it will be obvious that an individual's condition is very unlikely to improve, while in others the disability may reduce or cease. The flexibility of regulations is therefore required to address the different factual circumstances that may affect entitlement to each of the different types of assistance.

On funeral expense assistance, the Scottish Government did not feel it was necessary for the Bill to explain that funeral assistance would not be provided on an ongoing basis because the circumstances make this clear.

## **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**

**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.**

As the Committee's question implies, it would be possible to say definitively that some types of assistance could never be given without an application. But there seems little need to constrain the power in that way on the face of the Bill because, if it is impossible as a matter of practice for entitlement to a type of assistance to be determined without an application, there is no prospect of any Government making regulations to enable that to happen.

Therefore, at the least, leaving the door open to regulations providing for funeral expense assistance to be given without an application can do no harm. One never knows what developments in technology or the funeral services industry might make it possible, in some circumstances, for such assistance to be awarded seamlessly as part of another process without an application being made directly to the Government.

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

### **Section 45 – Power to provide for top up of reserved benefits**

**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.**

If the power identified the specific UK benefits that can be topped up by name, or by reference to their statutory basis, section 45 would need to be updated every time the UK benefits system changed. At present the power is provided to top up any reserved benefit, within the limits of devolved legislative competence.

**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.**

For assistance that is given simply as a top-up to a UK benefit, it may be possible to have a lighter-touch system than the one set out in Part 2 of the Bill. Much will depend on which benefit is being topped up and how the top-ups can most easily be administered. If the circumstances were such that the full machinery of Part 2 were considered appropriate to handling a particular type of top up, regulations under section 45(2) can provide for the Part 2 machinery to apply to the top-up benefit.

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

The thrust of the point being made in paragraph 49 of the Delegated Powers Memorandum is that the Government considers the affirmative procedure to be appropriate because of the significance of the things that can be done under section 45. One way of expressing provision that section 45 allows would be to say that certain provisions of primary legislation are to be treated as applying to a benefit top-up, subject to certain words and expressions being read in a different way. That is a sort of modification of how primary legislation operates. But the Government apologises for any confusion caused by using a word that is normally used in a legislative context to refer to textual modification.

#### **Part 4 – Discretionary Housing Payments Section 52 – Guidance to local authorities**

**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 to make discretionary housing payments. Section 52(2) lists matters that the guidance issued under section 52(1) can contain, which 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.**

**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.**

The design of Part 4 aims to give local authorities the power to continue to make discretionary housing payments, with a duty to provide information about such payments. Current arrangements operate well without detailed Ministerial direction through regulations and the Government considers that it is sufficient to use section 50 to set out the information that is to be published, leaving it to local authorities to decide what is appropriate for their local circumstances.

Although a power is included in the Bill allowing for Ministers to issue guidance, the obligation on local authorities is only to have regard to it. Guidance is not binding on them and would not allow Ministers to direct how schemes were to operate; if issued it is likely to

be used to disseminate and encourage good practice. Consultation with a local authority association is required before any guidance is issued.

As the Delegated Powers Memorandum indicates, it does not seem to the Government to be an appropriate use of the Parliament's time to require Parliamentary approval of any guidance of this type, though it would be laid under section 52(5) so that Parliament could take any steps it thinks appropriate.

#### **Part 4 – Discretionary Housing Payments**

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

**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).**

The words in question restrict the power conferred by section 53(1) to making changes in consequence of the events described in paragraphs (a) and (b), which are essentially different types of change to the legislative framework for reserved benefits. The purpose of the power is simply to allow the references to reserved benefits in section 49 to keep pace with changes to the legislative framework for reserved benefits so that people in Scotland can continue to receive discretionary housing payments whatever changes may be made to the legislative framework for reserved benefits at Westminster. Section 49(2) had to be framed to refer to the existing benefits that assist persons with a liability to make rent payments, but those might change in future.

It would not be right to describe regulations under section 53 as making changes to the list of reserved benefits in section 49 “for the purposes of changes” made to the legislative framework for reserved benefits. The Government's purpose in making regulations under section 53 would be to update section 49 in consequence of the changes made by Westminster (whatever Westminster's purposes for making those changes may have been).

#### **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**

**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.**

The Government is committed to developing its processes in conjunction with the people who will be using them. Developing processes with end users, in a way which they understand and are able to fully take part in is, in the Government's view, the best way to

ensure that the system delivers the optimum end-user experience based on the principles of dignity and respect.

On that basis, the Government is committed to ensuring that the process for applying for assistance (and indeed withdrawing an application) is as straightforward as possible for people whatever their circumstances. The formality of regulations, and the delay inherent in the regulation-making process, can stand in the way of achieving that aim. Furthermore, the practice of requiring application forms to be prescribed by regulations grew up in an era when processes were largely paper based. It is not obvious how an interactive online form can be attached as a schedule to regulations in a way that would make it understandable and meaningful to the reader.

The Parliament's role in scrutinising the Government's performance is not of course limited to looking in the abstract at the printed word in a set of regulations. If members hear from their constituents that the processes around the social security system are not working for them, members should certainly hold the Government to account for that. And if the Government is able to change those processes administratively, without having to prepare regulations and take them through the Parliament, it should be possible to address those complaints more quickly.

### **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**

**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.**

The qualifying date for the purposes of the carer's allowance supplement will be used to determine the persons to whom that supplement is paid. As the date to be used in each 6 month period will be dependent on agreement with the Department for Work and Pensions, no dates could be specified in the Bill. Section 47 is intended to be a temporary measure, until such time as the Government can pay Scottish carer's assistance at a higher rate than the current allowance. It will not be a long-term form of assistance.

The Government does not see what advantage prescribing the date would achieve, or what scrutiny might be applied to the date. Although the choice of date will affect some individuals, at a broader level nothing turns on the choice of any particular date, compared with any other date. Supplementary payments will be made to all persons who were in receipt of a carer's allowance at whichever date is chosen in each period.

I hope this reply is helpful.

Yours sincerely

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