

# **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*',<sup>1</sup> following its consideration of the delegated powers provisions in the Social Security (Scotland) Bill<sup>2</sup>.

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<sup>3</sup> ahead of the debate on 19 December 2017. The Scottish Government responded<sup>4</sup> 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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<sup>1</sup> See: <https://digitalpublications.parliament.scot/Committees/Report/DPLR/2017/10/31/Social-Security--Scotland--Bill-at-Stage-1#Introduction>

<sup>2</sup> See: <http://www.parliament.scot/parliamentarybusiness/Bills/105267.aspx>

<sup>3</sup> See: <https://digitalpublications.parliament.scot/Committees/Report/SC/2017/12/11/Stage-1-Report-on-the-Social-Security--Scotland--Bill>

<sup>4</sup> See: <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<sup>5</sup>. 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*

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<sup>5</sup> See: <http://www.gov.scot/Publications/2017/12/2026/downloads>, paragraphs 5 – 27 and 78.

*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.”<sup>6</sup>*

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 long-term 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.

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

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<sup>6</sup> See: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11275>

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 regulation-making 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<sup>7</sup>.

**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<sup>8</sup>, 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

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<sup>7</sup> See: <http://www.gov.scot/Publications/2017/12/2026/downloads>, paragraphs 150 – 152.

<sup>8</sup> See: <http://www.gov.scot/Publications/2017/12/2026/downloads>, paragraph 172.

eligibility (illustrative regulations depicting such were made available during the Stage 1 scrutiny process<sup>9</sup>). 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.

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<sup>9</sup> See: <http://www.gov.scot/Publications/2017/10/9898>

### **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 re-affirm 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.

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 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.**

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<sup>10</sup>, 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).

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

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<sup>10</sup> See: <https://www.legislation.gov.uk/ukpga/2000/19/section/69>



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 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<sup>11</sup>. 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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<sup>11</sup> 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

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