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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Social Security (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 12 September, 3 October, 24 October and 31 October 2017, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Social Security (Scotland) Bill at Stage 1 (“the Bill”).ⁱ
2. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of the Standing Orders.

ⁱ The Social Security (Scotland) Bill [as introduced] is available here:
[http://www.parliament.scot/Social%20Security%20\(Scotland\)%20Bill/SPBill18S052017.pdf](http://www.parliament.scot/Social%20Security%20(Scotland)%20Bill/SPBill18S052017.pdf)

Overview of the Bill

3. This Government Bill was introduced by the Cabinet Secretary for Communities, Social Security and Equalities, Angela Constance MSP, on 20 June 2017. The lead Committee is the Social Security Committee.
4. The Bill stems from the changes to the devolution settlement following the Smith Commission made by the Scotland Act 2016. The 2016 Act granted legislative competence to the Scottish Parliament in respect of various benefits. These include disability, industrial injuries and carer's benefits, benefits for maternity, funeral and heating expenses and discretionary housing payments. Among other things, it also enabled the Scottish Parliament to top-up benefits reserved to Westminster and allowed for the creation of new benefits in certain circumstances.
5. The Bill transposes the social security benefits devolved by the 2016 Act on to a Scottish legislative platform. It provides an over-arching statutory framework for the new types of assistance it creates. This framework makes provision to allow people to be given assistance once a determination has been made that they are entitled to that assistance. People will either apply for assistance or, in certain circumstances, a determination of entitlement will be made without an application being required.
6. The Bill is divided into five Parts. There are seven schedules to the Bill. A summary of each Part and the schedules is set out below:
 - **Part 1** establishes the “Scottish social security principles”. The principles are to be reflected in the “Scottish social security charter”. The Scottish Ministers are required to lay an annual report on the performance of the Scottish social security system at the end of each financial year.
 - **Part 2** requires the Scottish Ministers to provide assistance to individuals who are entitled to it. It sets out eight types of assistance that are to be created and provides regulation-making powers prescribing rules on eligibility and what assistance is to be given. The types of assistance relate to carers, cold-spell heating, winter heating, disability, early years, employment injury, funeral expenses and short-term assistance. Part 2 also makes provision in relation to applications for assistance, determinations of entitlement and appeals. In addition, it provides for the recovery of assistance given in error and various offences.
 - **Part 3** grants the Scottish Ministers powers to provide for the top-up of benefits reserved to the UK Parliament. It includes various restrictions on the power, such as that financial assistance cannot be given for housing costs. Part 3 also provides for a supplement to be paid to individuals in receipt of UK Carer's Allowance.
 - **Part 4** allows local authorities to make payments to individuals to assist with housing costs. Various restrictions on this power are provided for, such as that financial assistance may not be given by way of a loan. Local authorities are required to provide information on their rules for assistance and must have regard to any guidance issued by the Scottish Ministers.

- **Part 5** contains the technical matters that are usually set out at the end of a Bill.
- Each of **schedules 1 to 7** of the Bill is connected to one of the seven new types of assistance introduced in sections 11 to 17. Each schedule sets out further details as to what the regulations for each type of assistance “may”, “must” and “may not” provide for.

Delegated Powers Provisions

7. The Scottish Government has produced a Delegated Powers Memorandum ("DPM") on the delegated powers provisions in the Bill.ⁱⁱ
8. At its meeting on Tuesday 12 September 2017, the Committee agreed to write to the Scottish Government to raise questions in relation to a number of the delegated powers in the Bill. The Committee's questions, and the response received from the Scottish Government to them, are included in the **Annex**.
9. At that same meeting, the Committee also agreed to take oral evidence on the Bill from the Minister for Social Security, Jeane Freeman MSP, at its meeting on 3 October 2017.ⁱⁱⁱ

Recommendations

10. The Committee's comments and recommendations on the powers in the Bill are detailed below.

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**

Provision

11. The Bill provides a statutory framework for the types of assistance it creates. Sections 11 to 17 provide for carer's assistance, cold-spell heating assistance, winter heating assistance, disability assistance, early years assistance, employment-injury assistance and funeral expense assistance.
12. By way of example, section 13 provides that winter heating assistance is assistance (which may or may not take the form of money) given by the Scottish Ministers to an individual to meet, or help towards meeting, the individual's heating costs during the winter months.
13. The details of each type of assistance, on both eligibility criteria and what those who qualify are to be given by way of assistance, are to be set out in regulations made under the many powers in the Bill. Those regulations are subject to the affirmative procedure.

ii The Delegated Powers Memorandum is available here: [http://www.parliament.scot/Social%20Security%20\(Scotland\)%20Bill/SPBill18DPM052017.pdf](http://www.parliament.scot/Social%20Security%20(Scotland)%20Bill/SPBill18DPM052017.pdf)

iii The Official Report of that evidence session is available here: <http://www.parliament.scot/parliamentarybusiness/28862.aspx?r=11134&mode=pdf>

14. The scope of the regulation-making powers pertaining to eligibility and what assistance is to be given are set out in the schedules to the Bill. The schedules set out what the regulations “may”, “must” or “may not” provide for each of the types of assistance established in sections 11 to 17.

Comment

15. The Committee has identified three overarching and interrelated areas of focus in relation to the regulation-making powers in each of sections 11 to 17.

- Clarity of the rules and parliamentary scrutiny
- The schedules
- Bespoke parliamentary procedure

16. Each area is considered in turn below together with the Committee's recommendation.

(a) Clarity of rules and parliamentary scrutiny

17. The first matter the Committee considered is the Scottish Government's overall approach of setting out the rules relating to eligibility for each type of assistance and what assistance will be provided in regulations rather than on the face of the Bill.

18. The Scottish Government argues that placing the rules in regulations will make the legislation clearer and more accessible than the equivalent UK legislation, which is contained partly in primary legislation and partly in regulations. In this context, paragraph 8 of the Scottish Government's Policy Memorandum^{iv} refers to remarks made by Lord Justice Wall in an English Court of Appeal case that the UK social security statutory regime is—

” *“complex, obscure and, to many, simply incomprehensible”*.^v

19. The Scottish Government argues that the stakeholder community has acknowledged the logic in the Government's approach and the reasoning behind it. For example, at the Committee's evidence session on 3 October 2017 the Minister for Social Security quoted the following submission from Citizens Advice Scotland to the Social Security Committee:

” *“Citizens Advice Scotland accepts the Scottish Government's view that setting out some of the rules for the new benefits should be made in Regulations. Much of the important detail affecting the operation of the social security system is contained in regulations and guidance which are regularly issued and updated.”*^{vi}

iv The Scottish Government's Policy Memorandum is available here:
[http://www.parliament.scot/Social%20Security%20\(Scotland\)%20Bill/SPBill18PMS052017.pdf](http://www.parliament.scot/Social%20Security%20(Scotland)%20Bill/SPBill18PMS052017.pdf)

v *R (on the application of Gargett) v London Borough of Lambeth* [2008] EWCA Civ 1450.

vi The submission is available at: http://www.parliament.scot/S5_Social_Security/Inquiries/041._Citizens_Advice_Scotland.pdf

20. However, the paragraph immediately after that quoted above in the submission from Citizens Advice Scotland states:
- ” *“However, it is not necessarily the case that all the detail must be made in Regulations. Details of eligibility and operation of many of the reserved benefits are included in primary legislation – for instance, the Welfare Reform Act 2012 goes into a reasonable level of detail about the rules for Universal Credit and Personal Independence Payment. CAS is of the view that more detail around the eligibility and operation of the benefits should be included in the primary legislation.”*
21. A significant number of other responses to the Social Security Committee's call for evidence, including Age Scotland, Disability Agenda Scotland and Engender, have also suggested that more detail should be on the face of the Bill so as to provide more certainty and clarity.
22. The Scottish Government argues that one of the benefits of placing the rules on eligibility and the assistance to be provided in regulations is that the reader will not have to be concerned that the rules are displaced or altered by another piece of legislation somewhere else, which will improve accessibility.
23. On a related point of accessibility, when referring to the illustrative draft regulations on Best Start Grant provided to the Committee, the Minister recognised at the Committee's evidence session that—
- ” *“while [they] are drafted in a logical order and in fairly plain English” “[o]f course it will not be accessible to everyone. The need for legislation to be drafted in a way that delivers legal certainty makes that impossible.”^{vii}*
24. The Committee considers that those accessing the legislation are primarily likely to be lawyers and other experienced social security practitioners. Indeed, the Minister for Social Security indicated that the need for accessibility would be met by providing information in different formats to suit different audiences.
25. Another point to consider is that under the affirmative procedure the Parliament will only be able to accept the regulations or reject them in their entirety. Conversely, if detailed provision on eligibility and the assistance to be provided was set out on the face of the Bill, the Parliament could scrutinise and amend, if appropriate, the criteria applying to each type of assistance on a line by line basis.
26. The Minister stated at the Committee's evidence session that a “power of veto” under the affirmative procedure is more than “limited control”.^{viii} She also referred to the proactive engagement of the Parliament and the setting up of expert and stakeholder groups before the regulations come to the Parliament.
27. The Scottish Government has provided illustrative draft regulations on early years assistance, which is to be welcomed. However, it recognises that the final version of the regulations might be different according to any comments it receives. Similarly,

vii *Official Report*, 3 October 2017, col. 9.

viii *Official Report*, 3 October 2017, col. 8.

a future government might seek to exercise the powers in the Bill in a very different way to those set out in the illustrative regulations.

28. The Committee acknowledges the Scottish Government's suggestion that setting out the rules on eligibility and the assistance to be provided in regulations might allow social security legislation to be more easily understood and more accessible than setting those rules out partly in regulations and partly on the face of the Bill. The Committee also acknowledges that providing for the detailed rules to be made in regulations may provide an important element of flexibility that is necessary to ensure that social security provision is responsive to the needs of users of the system.
29. However, while more understandable and accessible rules are important, parliamentary scrutiny may be hampered by the approach taken to the regulation-making powers in sections 11 to 17 and such an approach may not provide the stakeholder community with the clarity it is seeking.

30. 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.

31. 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.

(b) The schedules

32. Each schedule in the Bill corresponds to the regulation-making powers in sections 11 to 17. The schedules define the scope of the regulation-making powers on eligibility and the assistance to be given for each type of assistance.
33. In her evidence to the Committee on 3 October, the Minister for Social Security made it clear that the schedules are not intended to define each individual benefit. For example, disability assistance currently covers four benefits.^{ix}
34. The Government's position is that the schedules allow the Parliament to have “complete control” to decide what the regulations for each type of assistance “may”, “must” or “may not” include.^x The Committee notes that it is unusual for Parliament to be invited to insert appropriate controls on the scope of regulation-making powers.

^{ix} *Official Report*, 3 October 2017, col. 5.

^x *Official Report*, 3 October 2017, col. 6 and paragraph 12 of the DPM.

35. One particular issue the Committee raised in written correspondence is that schedules 1 to 7 each provide that the generality of the power to make regulations is not limited.
36. For example, in schedule 3, which relates to winter heating assistance regulations, paragraph 7 states that “*nothing in this schedule is to be taken to limit what may be prescribed in the regulations*”. For the other schedules, a provision on the generality of the power to make regulations only applies to the particular parts of the schedules that set out what the regulations “may” provide both in relation to eligibility and the assistance to be given.
37. In this regard, the Committee's evidence session with the Scottish Government clarified that the wording for all the schedules other than schedule 3 expressly states that the generality does not override what Parliament agrees as mandatory provision. Again, the Scottish Government's position is that the Parliament can change the balance of what is mandatory and what is illustrative.
38. It is notable that none of the schedules make mandatory provision in Part 2 about what assistance is to be given. Indeed, schedule 5 also does not set out what the regulations “may” provide regarding the assistance to be given.
39. One particular issue in schedule 3 is that no mandatory provision is made regarding the scope of winter heating assistance regulations. At the Committee's evidence session on 3 October 2017 the Minister's view was that it would be going too far to suggest that there are no limits on what winter heating assistance regulations can be used to provide for. The Minister for Social Security referred to section 13, which defines “winter heating assistance” as assistance to help people “*meet [...] heating costs during the winter months*”.^{xi} She argued that any regulations would have to be consistent with that purpose.
40. However, it appears to the Committee that the effect of the words in schedule 3 quoted at paragraph 36 above is that there is a minimal restriction placed on what winter heating assistance regulations can provide for. The Committee considers that the definition of winter heating assistance in section 13 as assistance to help people meet heating costs during the winter months does not meaningfully limit the scope of the regulation-making powers.
41. The Minister also explained that winter heating assistance is currently mostly paid to people of state pension age. However, she saw no reason to rule out the possibility that it might be extended in the future. In order to maintain this flexibility the Bill does not set the same limits on the rules for who will receive winter heating assistance.

42. 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.

43. The Committee recognises the Scottish Government's position that it may in the future wish to extend eligibility for winter heating assistance to other

^{xi} *Official Report*, 3 October 2017, col. 7.

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.

44. **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.**

(c) Bespoke parliamentary procedure

45. As noted at paragraph 13 above, the Bill provides that the affirmative procedure applies to regulations made in relation to each of the types of assistance under sections 11 to 17 (among others).
46. The Scottish Government has given consideration to whether social security regulations should be subject to some other form of oversight in addition to what is entailed in the affirmative procedure.
47. The Minister for Social Security has appointed Dr Jim McCormick of the UK Social Security Advisory Committee to lead a “short-life” working group to consider how scrutiny of social security matters should work as part of the new Scottish system. This is considered in further detail in the section of this report entitled “Proposal for Scottish independent expert advisory committee” below.
48. The Scottish Government has also indicated that it is recruiting panels of people with direct experience of receiving social security. It has also established some specific expert advisory groups, such as the Disability and Carers Benefits Expert Advisory Group.
49. Another option available to the Parliament to increase the scrutiny of regulations made under the many wide powers in the Bill is to apply a form of bespoke parliamentary procedure. This could provide a more formal mechanism for consultation on social security regulations made under the Bill.
50. When asked at the Committee's evidence session about the possibility of applying a “super-affirmative” type of procedure, the Minister indicated that her mind was open to considering what might be the best approach in the Bill. Her view was that this is not exclusively a matter for the Government and that the Parliament will need to consider its role. She was open to considering the options following responses from the Social Security Committee, the Minister's “short-life working group” headed by Dr Jim McCormick and this Committee.^{xii}
51. There is no singular form of “super-affirmative” procedure. Instead, it is a form of enhanced scrutiny in addition to the affirmative procedure. “Super-affirmative” procedures have been used in the past in connection with delegated powers in bills for which the Parliament considered that a particularly high level of parliamentary scrutiny is appropriate.

^{xii} *Official Report*, 3 October 2017, col. 4.

52. 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.

53. **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.**

54. **The Committee therefore limits itself to drawing the Social Security Committee's attention to the availability of a “super-affirmative” procedure.**

55. **However, if the Bill remains in its current form the Committee considers that enhanced parliamentary scrutiny would be appropriate.**

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**

Provision

56. 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.
57. The Scottish Ministers are required by virtue of subsection (2) to make regulations prescribing the eligibility rules and what short-term assistance an individual who is entitled to it is to be given. Such regulations are subject to the affirmative procedure. Unlike sections 11 to 17, section 18 does not have a corresponding schedule setting out the scope of the regulation-making powers in relation to eligibility criteria and what assistance is to be given.
58. Subsection (3) provides that the regulations under subsection (2) are to make provision for short-term assistance to be available to persons who have been entitled to assistance of an on-going nature (rather than a one-off payment). The assistance applies in the event that the person's entitlement to that on-going assistance has been stopped or reduced, and the decision to stop or reduce the person's entitlement is under review.

59. However, subsection (5) provides that subsection (3) is not exhaustive of the eligibility rules that may be prescribed to determine entitlement. A person could therefore be eligible for short-term assistance even if he or she is not contesting a decision to stop or reduce ongoing entitlement to another type of assistance.

Comment

60. The Committee asked the Scottish Government both in written questions and at its evidence session 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.
61. The Scottish Government's position is that the power to provide for short-term assistance is being taken to deal with circumstances that, at present, cannot be fully anticipated. The power has to be broad because the Government does not know what situations it might need the power to deal with.
62. The Scottish Government also argues that there is a constraint on short-term assistance insofar as it has to be for a short-term need. It therefore cannot be used to confer assistance on a long term basis and so could not be used to replace an entire benefit that has been repealed from UK legislation.
63. However, when asked about the possibility of applying a form of enhanced parliamentary procedure, the Minister for Social Security stated at the Committee's evidence session that her mind was open to looking at the various models that are available under the "super-affirmative" procedure.
64. The Committee accepts the Scottish Government's position that the power to make regulations in the terms envisaged by subsection (5) to provide for short-term assistance other than that referred to in subsection (3) necessarily has to be broad in order to deal with unexpected situations.
65. The Committee also recognises that the exercise of the power in the circumstances referred to in subsection (5) is at least constrained insofar as regulations must be for assistance to an individual on a short-term basis. The regulation-making power therefore cannot be used to confer assistance on a long term basis.
66. While accepting these points, the Committee remains mindful that the effect of subsection (5) is to confer a particularly broad regulation-making power on the Scottish Ministers.
67. Accordingly, the Committee draws the Social Security Committee's attention to the availability of bespoke enhanced parliamentary procedures that could be applied to the regulation-making power in section 18. The use of a form of super-affirmative procedure in the exercise of the particularly broad powers to make regulations envisaged by subsection (5) could assist to ensure that the Parliament conducts an appropriate level of scrutiny.
68. However, as recognised at paragraph 53 above, the Committee considers that it would be premature at this stage to reach a firm conclusion on the necessity of a form of "super-affirmative" procedure. 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 from the "short-life" working group established by the Minister for Social Security.

69. **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.**
70. **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.**

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**

Provision

71. Section 45(1) empowers the Scottish Ministers to make regulations providing for the top-up of reserved benefits. Such regulations are subject to the affirmative procedure.
72. Subsection (2) provides that the power to make regulations includes the power to make provision about determining entitlement (including specifying further eligibility rules), the amount of assistance, applications for assistance, obtaining information, appeals and assistance given in error.

Comment

73. The regulation-making power in subsection (1) is particularly wide. While the assistance must be for the purpose, or one of the purposes, for which the benefit is being provided, no provision is made setting out what existing reserved benefits the Scottish Ministers may seek to top-up.
74. The Committee wrote to the Scottish Government to ask why the Bill does not contain provision specifying the existing reserved UK benefits which the Scottish Ministers seek to top up. This was explored further at the Committee's evidence session on 3 October 2017.
75. The Minister confirmed at the Committee's evidence session that there are currently no plans to top-up existing reserved benefits.
76. The Scottish Government argues that if the Bill were to specify benefits which could be topped up, section 45 would have to be updated every time the UK benefits system changed. Whether that was achieved in further primary legislation or using

an amending power, the Minister's position was that it would not be a particularly sensible use of parliamentary time. The power had therefore been deliberately framed to reflect the full extent of the limits of devolved competence.

77. The Committee considers that regulation-making powers should not be a substitute for policy development. The decision to top-up any particular reserved benefit is a matter of principle which is fundamental to the Bill. It is one that will have significant resource implications. It may also be one which could have a significant impact on individuals, including recipients of the benefits.
78. The Committee recognises that it would not be a good use of parliamentary time to have to update section 45 by primary legislation each time UK legislation amended a particular reserved benefit.
79. However, it appears that it would be possible to take an amending power to update by regulations references that could be made in section 45 to UK legislation in relation to existing reserved benefits. In this regard, the Committee notes that a power has been taken in section 53 to amend references to UK enactments mentioned in section 49 in relation to local authorities' powers to make discretionary housing payments.
80. A further power could also be taken for regulations to provide for the top-up of future reserved benefits made at Westminster. Like the Committee's comments at paragraphs 53 to 55 above, whether such regulations should be subject to a form of "super-affirmative" procedure will depend on the amendments made at Stage 2 of the Bill and the conclusions of the "short-life" working group led by Dr McCormick on the scrutiny of Scottish social security matters.

81. 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.

82. 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.

83. Alternatively, if the Scottish Government does not agree to the recommendations made at paragraphs 81 and 82 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.

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**

Provision

84. 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.
85. As soon as reasonably practicable after issuing guidance under subsection (1), the Scottish Ministers must lay a copy of the guidance before the Parliament. However, no parliamentary procedure applies to that guidance.
86. In terms of section 52(2), the guidance may, in particular, deal with:
- the rules which local authorities are to apply in deciding whether to give someone financial assistance, the amount of assistance to give and what period to give assistance for;
 - the form of applications both for assistance and for review of authorities' decisions about the giving of assistance;
 - the processes which authorities are to follow both in determining applications for assistance and review and deciding whether to stop giving someone assistance;
 - the circumstances in which authorities should, and should not, seek to recover the value of assistance given in error or following a breach of any of the conditions under which it was given.

Comment

87. The Scottish Government observes that the obligation in section 52(1) is to have regard to the guidance, which means that the guidance is not binding on local authorities. The Minister stated at the Committee's evidence session on 3 October 2017 that this reflects current arrangements, which work well without detailed ministerial direction. This allows local authorities to have flexibility in line with local needs.
88. The Committee recognises the benefits of flexibility provided by guidance. However, the Committee notes that UK provision on matters such as those set out in section 52(2) of the Bill is made in regulations; namely the Discretionary Financial

Assistance Regulations 2001, which are made under section 69 of the Child Support, Pensions and Social Security Act 2000. The 2001 Regulations set out the circumstances in which discretionary housing assistance may be made; limits on the amount that may be paid; the periods for which it can be paid; the form, manner and procedure for claims; provision of information; and reviews.

89. A “Guidance Manual”, which includes a “Local Authority Good Practice Guide”, is issued by the Department for Work and Pensions on discretionary housing assistance. It provides guidance and advice on good practices that should be taken into account when payment of discretionary housing assistance is being considered by local authorities.
90. Furthermore, the Committee notes that matters referred to in section 52(2) are ones that, in relation to the other forms of assistance 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.

91. The Minister considered that the best use of Parliament's time is—

” *“making law, not guidance”*^{xiii}

and that the laid-only procedure is proportionate as it means—

” *“Parliament will be free to take any steps it thinks appropriate at that stage”*.^{xiv}

92. While there is guidance at UK level on discretionary housing assistance, the matters covered by the guidance issued under section 52 of the Bill are also ones which, in relation to UK discretionary housing assistance, are set out in regulations subject to annulment (i.e. the equivalent of the Scottish Parliament's negative procedure).
93. Unlike the UK position, the Scottish Government intends to issue guidance without accompanying regulations. Given the nature of the guidance issued under section 52 of the Bill, the Committee considers that an appropriate middle-ground is that the guidance is subject to the negative procedure to enable sufficient parliamentary scrutiny.

- 94. 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.**

^{xiii} *Official Report*, 3 October 2017, col. 12.

^{xiv} *Official Report*, 3 October 2017, col. 12.

Proposal for Scottish independent expert advisory committee

UK Provision

95. There are currently two independent statutory UK advisory bodies which scrutinise draft regulations and provide advice to the Secretary of State for Work and Pensions on social security matters. These are the Social Security Advisory Committee (“SSAC”) and the Industrial Injuries Advisory Council.
96. These bodies are established under sections 170 to 174 of the Social Security Administration Act 1992. The Secretary of State has a duty to refer proposals for changes to secondary legislation to the committees unless the matter is urgent or the committees agree that a particular set of regulations does not need to be referred to them.
97. The UK SSAC regularly issues calls for evidence on areas covered by regulations to enable detailed analysis on various issues. It can also produce reports and recommendations on its own initiative. Although the UK Government is not bound by those recommendations, they play an important role in analysing the changes being made by regulations.
98. Following the devolution of benefits provided for under the Scotland Act 2016, however, the UK government has decided that the existing bodies should only provide advice to the Secretary of State. Accordingly, the Scottish Ministers will not be able to refer draft regulations they intend to make under the powers in the Bill as enacted to these UK bodies.

Scottish proposal

99. At the Committee's evidence session on 3 October 2017 the Minister for Social Security stated that there is a need for independent expert scrutiny of social security matters in Scotland.
100. There is currently no current proposal in the Bill for an equivalent independent Scottish expert statutory body. The Scottish Government has indicated that it has not provided for anything more than the affirmative procedure on the face of the Bill so as not to pre-empt discussions with members of the Parliament on enhanced oversight.
101. The Minister's position at the Committee's evidence session on 3 October 2017 was that it is not appropriate for ministers of any government to be able to bypass the expert advisory committee when they introduce measures. She also observed that the regulations come to the existing UK bodies only once they have been drafted.
102. In addition to establishing an independent Scottish expert advisory committee, the Scottish Government has indicated that it is recruiting panels of people with direct experience of receiving social security. It has also already established some specific expert advisory groups. The Scottish Government recognises that the relationship of the existing groups and panels it has set up with the parliamentary committees

and any other scrutiny body which may be established would need to be considered in detail.

103. At the Committee's evidence session on 3 October 2017 the Minister for Social Security indicated that she had met with the Convenor of the Social Security Committee in May 2017 to ask her and her committee's members to consider what role the Parliament should play in filling the space left by the existing UK advisory committees.
104. The Minister for Social Security has since written to Dr Jim McCormick, who is the chair of the Scottish Government's expert advisory group on disability and carers benefits. She has asked him to set up a "short-life" working group from among his members to consider how scrutiny of social security matters should work as part of the new Scottish system. An initial response has been requested in line with the timetable for the drafting of the Social Security Committee's Stage 1 report.
105. In evidence to the Social Security Committee on 21 September, Dr McCormick outlined that the expert group plans to engage with that committee and the Public Audit and Post-Legislative Scrutiny Committee. However, the Minister for Social Security indicated at the Committee's evidence session on 3 October that she would be interested to hear from members of this Committee if they felt that it could also make a contribution to that work.
106. The Minister expects to be able to say more about how expert scrutiny is to be built in to the system later in the Bill process.

Comment

107. The Committee welcomes the proposed establishment of a Scottish independent expert advisory committee on social security matters. Establishing such a committee appears to be necessary in circumstances where the Scottish Ministers will not be able to have recourse to the current UK bodies.
108. The Committee considers that it would be premature at this stage for it to reach concrete conclusions in this report on the exact shape of the independent expert committee and its relationship to the Parliament. However, the Committee does wish to be engaged as part of the "short-life" working group led by Dr McCormick.
109. In the meantime, the Committee highlights that while the output of any independent Scottish expert advisory committee will be relevant to this Committee's work, it will not alter the remit and role of this Committee to conduct its own scrutiny of the regulations made under the Social Security Bill as enacted.
110. The proposed independent expert advisory committee should not be seen as a substitute for parliamentary scrutiny. The exact shape of the expert advisory committee should also be considered in light of the wider considerations relating to the potential for a form of super-affirmative procedure to be applied to some of the wider regulation-making powers contained in the Bill.

111. **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.

Annex

Written correspondence with the Scottish Government

LETTER FROM THE SCOTTISH GOVERNMENT

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.

