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

Social Security (Scotland) Bill as amended at Stage 2



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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>



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Convener
Graham Simpson
Scottish Conservative
and Unionist Party



Deputy Convener
Stuart McMillan
Scottish National Party



Neil Findlay
Scottish Labour



Alison Harris
Scottish Conservative
and Unionist Party



David Torrance
Scottish National Party

Introduction

1. At its meetings on 27 March and 17 April 2018, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Social Security (Scotland) Bill as amended at Stage 2 ("the Bill").ⁱ The Committee submits this report to the Parliament under Rule 9.7.9 of the Standing Orders.
2. This Scottish 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.
3. This Committee previously reported on the delegated powers provisions in this Bill at Stage 1 in its [48th Report, 2017](#).
4. A substantial number of amendments were made to the Bill at Stage 2, which was completed on 1 March 2018. The Scottish Government subsequently provided the Parliament with a supplementary delegated powers memorandum (the "Supplementary DPM") covering the delegated powers in the Bill as amended at Stage 2.ⁱⁱ
5. At its meeting on 27 March 2018, the Committee agreed to write to the Scottish Government with a number of questions on the new and revised delegated powers in the Bill following the amendments made at Stage 2.ⁱⁱⁱ The Scottish government responded in writing on 9 April 2018.^{iv}

ⁱ The Bill as amended can be found [here](#).

ⁱⁱ The Supplementary Delegated Powers Memorandum is available [here](#).

ⁱⁱⁱ The Committee's letter dated 27 March 2018 is available [here](#).

^{iv} The Scottish Government's response is available [here](#).

Delegated Powers

6. The Committee considered each of the delegated powers provisions in the Bill as amended at Stage 2 in light of the Scottish Government's response at its meeting on 17 April 2018. The Committee reports to the Parliament as follows.

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

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

Provision

7. New section 6A establishes the Scottish Commission on Social Security (“the Commission”). Schedule A1 makes further provision about the Commission.
8. Paragraph 4 of new schedule A1 confers on the Commission a right of access at reasonable times to any information in the possession or under the control of any member of the Scottish Government or a local authority that the Commission may reasonably require for the purpose of performing its functions.
9. The Commission may also require any person who holds or is accountable for relevant information to provide at reasonable times any assistance or explanation that the Commission may reasonably require for the purpose of performing its functions or exercising its right of information.
10. The delegated power is contained in sub-paragraph (2)(c), which provides that the Scottish Ministers may by regulations specify such other person (or person of a certain description) in respect of which the Commission has a right of access to information.
11. By virtue of section 55(3), regulations made under paragraph 4(2)(c) of schedule A1 are subject to the negative procedure.
12. The Supplementary DPM states that the power will allow Ministers to give the Commission access to information held by other persons that may be relevant to the Commission's role. The justification given in the Supplementary DPM refers to the provision made in sub-paragraph (3) that the right of access to information is subject to any other legislation or rule of law that prohibits or restricts the disclosure of any information or the giving of any assistance or explanation (e.g., data protection legislation).
13. In terms of the choice of the negative procedure, the Supplementary DPM states that this procedure is appropriate given the relatively limited nature of the power and the restriction in paragraph 4(3) referred to above. It states that the choice of

procedure is consistent with the application of the negative procedure to equivalent regulations made in respect of the Poverty and Inequality Commission (under the Child Poverty (Scotland) Act 2017 (the “2017 Act”).

Consideration

14. Paragraph 3(4) of the schedule to the 2017 Act in fact provides for the affirmative procedure to apply to the equivalent power to make regulations contained in paragraph 3(2)(c) of that schedule.
15. The power in section 10 of the Scottish Fiscal Commission Act 2016 (the “2016 Act”) is similar. It provides for the Scottish Fiscal Commission to have a right of access to relevant information held by specified public bodies that may be required by the Commission in order for it to perform its functions. Like paragraph 4(2)(c) of schedule A1 of the Bill, section 10(2)(f) of the 2016 Act allows the Scottish Ministers to add to the list of specified bodies by regulations. However, unlike the Bill, section 10(4) of the 2016 Act provides that these regulations are subject to the affirmative procedure.
16. In its response to the Committee dated 9 April 2018, the Scottish Government indicated that it is content to lodge an amendment at Stage 3 that will make regulations relating to the power in paragraph 4(2)(c) of schedule A1 of the Bill subject to the affirmative procedure.
17. The Committee considers that the regulation-making power in paragraph 4 of schedule A1 to the Bill is equivalent in nature to the powers in section 10 of the 2016 Act and paragraph 3 of the 2017 Act, which are subject to the affirmative procedure.

Recommendation

18. **Accordingly, the Committee welcomes the Scottish Government’s commitment to amend the Bill at Stage 3 so that the affirmative procedure applies to the power in paragraph 4(2)(c) of new schedule A1 of the Bill rather than the negative procedure.**

New sections 55A and 55B – Enhanced scrutiny of certain regulations

Provision

19. Section 55(2) provides that the affirmative procedure applies to regulations making provision for types of assistance (among other things). These regulations are those made under the powers in any section within Chapter 2 of Part 2 (i.e. sections 11 to 18, including new section 17A) and section 45.
20. New section 55A supplements the procedure for making regulations under sections 11 to 18 and section 45. It requires the Scottish Ministers to take a series of actions prior to laying any such regulations before the Parliament. These are to publish their

proposals for draft regulations, refer the proposals to the Commission and notify the Parliament of that referral.

21. The Commission must then prepare a report on the proposals that sets out any observations and recommendations they would wish to make. The report must take into account the Scottish social security principles and any relevant international human rights instruments.
22. The Scottish Ministers have a duty to respond to the report, which should be submitted to the Parliament when the draft regulations are laid. The response must set out where the regulations differ from the report (and why), what the Scottish Ministers have done to address the observations and recommendations made in the report, and detail if they disagree with any of the report's conclusions.
23. The Scottish Ministers can lay a draft instrument containing regulations before the Commission has reported with a statement explaining why it considers this to be appropriate.
24. Section 55A does not apply where regulations either consolidate earlier regulations or fall within a description that the Commission has advised that it does not consider it needs to be informed about.
25. Section 55B provides that the provisions of section 55A do not apply to regulations about early years assistance and funeral expense assistance brought forward before a date specified by the Commission.

Consideration

26. In its Stage 1 report on the Bill, the Committee did not definitively conclude whether the Bill should be amended to provide that a super-affirmative procedure should apply to regulations under the powers in sections 11 to 18 and section 45. However, it took the view that if the Bill was not amended to provide for more detail on the face of the Bill, primarily about eligibility for assistance and what those who qualify are to be given by way of assistance, then an enhanced procedure would be appropriate.
27. The amendments to the schedules for each type of assistance in the Bill are limited in nature. In summary, they provide that assistance may be given in a form other than money. They also provide that for certain types of assistance, the regulations may not make an individual's eligibility depend on the financial circumstances of the individual or anyone who lives with the individual.
28. In principle, the Committee welcomes the establishment of the Commission as an independent scrutiny body. However, the Committee highlighted a number of issues to the Social Security Committee and the Scottish Government on whether the Commission's role in scrutinising proposals to make draft regulations could undermine the ability of the Parliament to hold the Government to account and shape the draft regulations.

Ministers to inform the Commission of their "proposals"

29. Section 55A(2)(a) is limited to requiring the Scottish Ministers to inform the Commission of their "proposals" to make regulations under sections 11 to 18 and 45. The Committee observed that it is possible that the proposals may take a form

other than draft regulations; for example, an explanatory document outlining the policy choices.

30. The Committee highlights that the wording could be clarified to put beyond doubt that the reference in this context includes the proposed draft regulations, while recognising the value of having an explanatory document setting out the policy choices.
31. The Scottish Government's position is that the reference to proposals is consistent with the approach taken in section 172 of the Social Security Administration Act 1992. It indicates that its intention is to provide a policy paper (referred to here as an explanatory document) accompanied by a set of draft regulations at the initial consultation phase. This is the approach the Scottish Government has taken to its recent consultations on Best Start Grant^v and funeral expenses assistance.^{vi}
32. The Scottish Government indicated in its Policy Position Paper to the Social Security Committee dated 28 February 2018 that it would nevertheless be content to amend the Bill at Stage 3 to create a requirement for draft regulations to be produced at the consultation phase if members feel strongly that the power is not one which the Commission should have.^{vii}

Recommendation

33. **The Committee welcomes the Scottish Government's position that it would be content to amend the Bill at Stage 3 to require draft regulations to be produced at the consultation stage. Additionally, the Committee recommends that the amendment includes a provision to the effect that an explanatory document (as mentioned in paragraph 31 above) is produced with the draft regulations to assist the Parliament in the scrutiny of the policy underlying the regulations.**

Ministers to "notify" the Parliament of proposals referred to Commission and timescales

34. The Committee raised section 55A(2)(b) in correspondence with the Social Security Committee and the Scottish Government. This provides that Parliament should be "notified" when proposals to make regulations are referred to the Commission. There are previous examples of super-affirmative procedures that have required that proposed draft regulations are laid before the Parliament for scrutiny in this consultation phase.^{viii}
35. As a related point, the Committee highlighted that section 55A provides no timescale in which consideration of proposed draft regulations should take place. Indeed, section 55A(7)(b) allows the Scottish Ministers to lay draft regulations before the Parliament before the Commission has reported on the proposed draft

^v See consultation [here](#).

^{vi} See consultation [here](#).

^{vii} See position paper [here](#).

^{viii} See e.g., section 15(4)(a) of the Alcohol etc. (Scotland) Act 2010 and section 26(2)(a) of the Public Services Reform (Scotland) Act 2010.

regulations. Commonly, super-affirmative procedures provide a timescale in which consultation on proposed draft regulations should take place; normally 40 to 60 days. For example, the period chosen in section 15 of the Alcohol etc. (Scotland) Act 2010 was 60 days.

36. The Committee therefore also asked the Scottish Government whether a timescale should be stipulated on the face of the Bill for scrutiny of proposed draft regulations.
37. On the first issue, the Scottish Government argued in its Policy Position Paper that section 55A creates an opportunity for Parliament to be involved from the very beginning of the process and that how a member or a Committee of the Parliament wishes to get involved is a matter for them.
38. In terms of the application of a minimum period for the initial consultation phase, the Scottish Government argues that the purpose of the initial consultation phase under the Bill is different to the purpose of the initial consultation phase under, for example, the Alcohol etc. (Scotland) Act 2010.
39. Firstly, the Scottish Government argued that there is no need to leave a prescribed period of time to wait and see whether the Commission will respond to proposals submitted to it because the Commission is legally required to do so. Secondly, the relevant powers in the Bill are likely to be exercised much more often than the powers in the Alcohol etc. (Scotland) Act 2010. Regulations made under the relevant provisions of the Bill could include the annual inflationary uprating regulations but also important revisions and refinements that will need to be made periodically as a result of being a complex statutory scheme that will interact with the UK social security system.
40. The Scottish Government therefore considers that it would be inflexible to apply a specific period for scrutiny. Indeed, it argues that this could have unintended consequences if a particular period is required to pass regulations that are uncontroversial and that could result in potential damage to the individuals affected.
41. The Scottish Government therefore argues in favour of a proportionate approach which can be flexible depending on whether the regulations in question are short and straightforward or long and complex. It notes that the duration of the initial consultation phase will therefore depend on how long the Commission reasonably needs to consider and report on a given set of proposals.
42. The Committee recognises that the enhanced scrutiny procedure needs to be flexible and that a prescribed period for the initial consultation phase in all cases may not be appropriate. It also accepts that alterations will need to be made periodically and that the Commission may not always be in a position to report in circumstances where such alterations need to be made quickly.
43. However, given the wide scope of the regulation-making powers in sections 11 to 18 and 45, the Committee remains concerned that the procedure provided in section 55A remains insufficient to allow the Parliament and the public to play an active role in the scrutiny of the regulations at the consultation stage. This is particularly the case in relation to the initial regulations establishing each type of assistance.
44. Subject to the Committee's observations on section 55B below, the Committee considers on balance that an appropriate middle ground would be to require the initial draft proposed regulations establishing each type of assistance (except early

years assistance regulations for Best Start Grant and funeral expenses assistance regulations) to be laid before the Parliament at the same time as being sent to the Commission and published for public consultation.

Recommendations

45. **The Committee therefore recommends that the Scottish Government consider amending the Bill at Stage 3 to specify a period for the Commission to report to the Parliament on the initial draft regulations establishing each of the types of assistance under sections 11 to 18 and 45 (except early years assistance regulations for Best Start Grant under section 15 and funeral expenses assistance regulations under section 17). Such an amendment could include a further period for the Scottish Ministers to lay an explanatory document outlining their views on the Commission's position. The combined period would allow the Parliament's committees to consider the initial draft regulations and take evidence on them.**
46. **The Committee considers that any such amendment should remove the ability conferred on the Scottish Ministers in section 55A(7)(b) to lay the initial draft regulations establishing each type of assistance (except early years assistance regulations for Best Start Grant under section 15 and funeral expenses assistance regulations under section 17) before the Commission has reported. In addition, the Committee recommends that the Scottish Government give consideration to amending section 55A(8)(b) to include a requirement for the Scottish Ministers to consider any other representations received. Subject to section 55B, any such amendment should also ensure that the Commission cannot decline to consider the draft regulations establishing each type of assistance under section 55A(9)(b).**
47. **In order to ensure sufficient flexibility, the Committee considers that subsequent regulations that amend the initial regulations made establishing each type of assistance should continue to be subject to the provisions of section 55A as currently drafted.**

Commission's power to disapply enhanced scrutiny

48. The Committee also specifically considered section 55A(9)(b), which allows the Commission to determine that there are types of instruments that it does not require to be notified about and accordingly to which this enhanced scrutiny procedure would not apply. The Committee questioned whether such an approach could undermine the Parliament's role.
49. The Scottish Government has stated in its Position Paper to the Social Security Committee dated 29 February that it would be content to remove this power by amendment at Stage 3 if members feel strongly that the power is not one which the Commission should have.
50. The Scottish Government nevertheless explains that the purpose of the provision is to allow the Commission to manage its workload. This was in recognition of the fact

that the Commission would be a relatively small body and that its workload will fluctuate.

51. The Scottish Government also observes that it has not included either the discretion that the Secretary of State has at a UK level to choose not to refer proposals to the UK Social Security Advisory Committee.
52. The Scottish Government also notes that it would be possible for the Parliament to require the Commission to report.^{ix} This is in addition to the lead Committee's inherent powers to call members of the Commission, or anyone else, to give evidence.

Recommendation

53. **The Committee considers that it is necessary to balance the importance of the Commission's input on social security matters against the Commission's ability to manage its workload. Accordingly, the Committee recommends that the Scottish Government consider amending the Bill at Stage 3 to insert a power to make regulations prescribing the types of proposal that the Commission does not need to be notified about. These regulations should be subject to the Parliament's approval under the affirmative procedure and to prior consultation with the Commission.^x**

Disapplication of enhanced scrutiny to early years and funeral expense assistance regulations

54. The Committee also specifically considered section 55B of the Bill as amended at Stage 2. It provides that the provisions of section 55A do not apply to regulations about early years assistance and funeral expense assistance brought forward before the date specified by the Commission. This means that such regulations would not be subject to the Commission's scrutiny, and that the Parliament would not be informed of the proposals to make draft regulations in advance.

^{ix} Section 6B(1)(c) of the Bill provides that one of the functions of the Commission is to prepare and submit to the Scottish Parliament a report on any matter, relevant to social security, that the Commission is requested to report on by the Parliament after the Parliament has resolved that the request should be made.

^x This recommendation was agreed to by division (For 2 (Bill Bowman and Graham Simpson), Against 2 (Stuart McMillan and David Torrance), Abstentions 0; wording agreed to on casting vote). Alternative wording was disagreed to by division (For 2 (Stuart McMillan and David Torrance), Against 2 (Bill Bowman and Graham Simpson), Abstentions 0; wording disagreed to on casting vote) - "In light of the explanation provided by the Scottish Government, the Committee recognises that it should be open to the Commission to manage its workload where there are types of instrument that the Commission considers that it does not need to be notified about. The Committee is satisfied that the Parliament could still require the Commission to report or otherwise give evidence on any particular proposal which the Commission decided that it did not need to be notified about".

55. The Supplementary DPM explains that the Scottish Government wishes to deliver devolved assistance promptly. It states that setting up the Commission will take some time and awaiting its views would delay consideration of some regulations that are likely to be brought forward before the Commission is ready to consider them.
56. The Scottish Government states that the regulations for early years assistance (Best Start Grant) and funeral expense assistance have already been prepared in draft and published for consultation with an accompanying policy narrative.^{xi} The Minister for Social Security has also provided a copy of these illustrative regulations and policy narratives to the Parliament. The Social Security Committee agreed with the suggestion from the Minister for Social Security that the Scottish Government draws on the expertise of Scottish members of the UK Social Security Advisory Committee. It also indicated that it would take evidence on the draft Best Start Grant regulations to feed in to the Scottish Government's consultation, which runs from 26 March to 15 June 2018.^{xii}
57. The Scottish Government also observes that it is the Commission rather than Scottish Government that decides when it is ready to start its scrutiny work and that the Scottish Government will not be able to begin providing any other types of assistance until the Commission is ready to start its scrutiny work.

Recommendation

58. **The Committee recognises that the Scottish Government has begun a process of consultation to deliver early years assistance for Best Start Grant and funeral expenses assistance and that the Commission may not be established in time to scrutinise the relevant regulations. The Committee encourages the Scottish Government to do all that it can to enable the Commission to conduct its scrutiny function at the earliest available opportunity.**

Section 20(1) – Applications for assistance

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

Provision

^{xi} See the letter from the Minister for Social Security to the Social Security Committee dated 15 March 2018, which is available [here](#).

^{xii} See the letters between the Social Security Committee and the Minister for Social Security dated 28 March and 3 April, which are available [here](#) and [here](#).

59. Section 20(1) of the Bill as amended at Stage 2 provides that an application for assistance must be made to the Scottish Ministers in such form as may be prescribed in regulations.
60. Section 55(3) provides that regulations made under the power in section 20(1) are subject to the negative procedure.
61. The Supplementary DPM explains that Mark Griffin MSP stated when moving the amendment that the intention is that the regulations should provide for how applications are to be made, which would provide clarity to applicants and those who advise them, of what is required to make a valid application.
62. The Supplementary DPM also notes that this is a limited power allowing the Scottish Ministers to make provision for the form of applications. The Bill as introduced proposed that this be managed administratively, without any requirement for a prescribed form.

Consideration

63. The Committee notes that section 20(1) of the Bill as introduced provided that an application for assistance is to be in such form *and accompanied by such evidence* as the Scottish Ministers may require.
64. The Committee asked the Scottish Government whether, for the avoidance of doubt and for consistency, the regulation-making power should also include the power to prescribe the evidence that is required to accompany an application in addition to the form of an application.
65. The Scottish Government's written response to the Committee dated 9 April 2018 explained that it did not support the Stage 2 amendments that made this change. It is currently considering section 20 as part of its on-going work in advance of Stage 3.

Recommendation

66. **It is not yet clear what position the Scottish Government will take in relation to section 20 at Stage 3. The Committee therefore draws the Parliament's attention to the absence in the regulation-making power of an explicit Ministerial power to prescribe the evidence that an application for assistance must be accompanied by.**

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

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

Provision

67. Section 48C(2)(a) to (f) lists public bodies that the Scottish Ministers can require by virtue of section 48C(1) to provide them with information that the bodies hold for the purpose of a social security function. Paragraph (g) of subsection (2) allows the Scottish Ministers to specify in regulations further persons who are to be subject to that requirement.
68. A further delegated power is contained in section 48C(5). This section provides that the Scottish Ministers can supply information that they hold for social security purposes to the bodies mentioned in section 48C(2) but that regulations are to specify the function of the person for which the information can be supplied for use.
69. By virtue of section 55(3), regulations made under the powers in section 48C(2)(g) and (5) are subject to the negative procedure.
70. The Supplementary DPM argues that a higher level of scrutiny than the negative procedure is not warranted for what is the administrative detail of data-sharing between what are likely, in practice, to be public sector bodies which already share data for other purposes.

Consideration

71. The power in section 48C(2)(g) is similar in nature to the power in paragraph 4(2)(c) of schedule A1 (considered above). This provides that the Scottish Ministers may by regulations specify such other person (or person of a certain description) to which the Commission has a right of access to information.
72. The Committee wrote to the Scottish Government asking whether it would be more appropriate that the power in section 48C(2)(g) is subject to the affirmative procedure rather than the negative procedure.
73. In its written response dated 9 April 2018, the Scottish Government indicated that it was content to lodge an amendment at Stage 3 that will make regulations relating to the power in section 48C(2)(g) of the Bill subject to the affirmative procedure.
74. The Committee considers that the application of the affirmative procedure to the regulations made under section 48C(2)(g) would align with the similar powers contained in section 10(2)(f) of the Scottish Fiscal Commission Act 2016 and paragraph 3(2)(c) of the schedule to the Child Poverty (Scotland) Act 2017. It would also align with the Committee's recommendation in this report in respect of paragraph 4(2)(c) of schedule A1 of the Bill.

Recommendation

75. **Accordingly, the Committee welcomes the Scottish Government's commitment to amend the Bill so that regulations made under the power in section 48C(2)(g) are subject to the affirmative procedure rather than the negative procedure.**

Section 52(1) – Guidance to local authorities on Discretionary Housing Payments

- **Power conferred on: The Scottish Ministers**
- **Power exercisable by: Guidance**
- **Revised or new: Existing and unamended**
- **Parliamentary procedure: Laid, no procedure**

Provision

76. 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.
77. 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.
78. In terms of section 52(2), the guidance may, in particular, deal with:
- (a) 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;
 - (b) the form of applications both for assistance and for review of authorities' decisions about the giving of assistance;
 - (c) the processes which authorities are to follow both in determining applications for assistance and review and deciding whether to stop giving someone assistance;
 - (d) 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.
79. This power is not considered in the Supplementary DPM on the basis that section 52 is unamended from introduction.

Consideration

80. In its Stage 1 report the Committee called 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.
81. The Committee noted that there is (non-statutory) guidance at UK level on discretionary housing assistance. However, 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 subject to annulment (i.e. the equivalent of the Scottish Parliament's negative procedure).^{xiii} 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.

82. The Committee also noted that the matters referred to in section 52(2) are ones that, in relation to the other types 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.
83. Unlike the UK position, the Scottish Government intends to issue guidance without accompanying regulations. Given the nature of the guidance that could be issued under section 52 of the Bill, the Committee considered that an appropriate middle-ground is that the guidance is subject to the negative procedure to enable sufficient parliamentary scrutiny.
84. In its response to the Committee's Stage 1 report,^{xiv} the Scottish Government argued that there is no reason that the parliamentary procedure that currently applies to the regulation-making power in UK regulations should transfer over to the guidance-issuing power in the Bill. The Scottish Government also considered that as the duty placed on local authorities is to have regard to the guidance, the guidance is not legally binding and therefore it would not be a good use of parliamentary resources to scrutinise it.
85. The Committee wrote to the Scottish Government further on this point on 25 January 2018.^{xv} The Scottish Government responded on 19 February 2018 reiterating its view.^{xvi} The Minister's evidence to the Social Security Committee during Stage 2 proceedings was that:

” *“It is fair to consider whether something can be done on proportionate scrutiny of guidance. The point was well made that a great deal of guidance can be produced, although we do not intend to replicate the DWP's approach, so there will be some guidance that does not require significant scrutiny and other guidance that does. I am happy to reflect on what was said on that.”^{xvii}*

86. The Committee also notes that the Scottish Government's Disability and Carers Benefits Expert Advisory Group recommended in December 2017 that there should be a proportionate role for independent scrutiny of official guidance.^{xviii}
87. There are examples of obligations to have regard to a document that have been made subject to parliamentary procedure. For example, the Scottish Ministers are under a duty to prepare, publish and revise a Code of Practice under section 274 of the Mental Health (Care & Treatment) (Scotland) Act 2003. Those with functions under mental health legislation must have regard to the Code. The Code must be

xiii The Discretionary Financial Assistance Regulations 2001 are made under section 69 of the Child Support, Pensions and Social Security Act 2000.

xiv The Scottish Government's response to the Committee's Stage 1 report on the delegated powers in the Bill is available [here](#).

xv The Committee's letter is available [here](#).

xvi The Scottish Government's response is available [here](#).

xvii Social Security Committee 25 January 2018, Jeane Freeman, contrib. 117 available [here](#).

xviii See page 9 of the Expert Advisory Group's report, which is available [here](#).

laid before the Parliament and brought into effect by Order subject to the negative procedure.

88. The Committee therefore remains of the view that it is appropriate that the guidance to be issued under the power in section 52 of the Bill is made subject to the negative procedure.
89. Although the guidance issued under this power will not be binding, it will cover substantial matters which in the UK are set out in regulations (albeit supplemented in non-statutory guidance). Furthermore, the 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.
90. The Committee continues to recognise the benefits of flexibility for local authorities provided by the use of guidance. However, if a regulation-making power, and the scrutiny afforded to regulations made under it, is not to apply in the Scottish context, the Committee considers that an appropriate middle-ground is that the guidance is made subject to the negative procedure to enable sufficient parliamentary scrutiny.

Recommendations

91. **Accordingly, the Committee recommends that the Scottish Government consider amending the Bill at Stage 3 to provide that the guidance issued under section 52 is subject to negative procedure to enable the Parliament to exercise sufficient oversight.**
92. **The Committee also recommends that the Scottish Government consider amending the Bill at Stage 3 to secure the involvement of the Commission in the scrutiny of guidance to be issued under section 52.**

