



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

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Dear Cabinet Secretary

Social Security (Amendment) (Scotland) Bill

The Delegated Powers and Law Reform Committee considered the above [Bill](#) at its meeting on Tuesday, 6 February, and agreed to write to you to ask the following questions in relation to delegated powers contained in the Bill.

Section 2(2) - Care experience assistance

The Scottish Government's [Delegated Powers Memorandum](#) ("the DPM") explains that the intention of care experience assistance is to provide financial support to young people as they move on from being in care to adulthood and more independent living. Details of the scheme or schemes will be set out in regulations following consultation and engagement with those impacted by the policy. However, the eligibility criteria, processes and delivery model of the assistance are still to be determined. There has not yet been a formal consultation on the policy, or the provisions contained in the Bill regarding care experience assistance.

The DPM further explains that ahead of the delegated power being exercised to introduce the final scheme for care experience assistance to be delivered, it will be informed by the views and experiences of those with experience of being in care and of delivering support to care experienced people. The Scottish Government states in its [Policy Memorandum](#) that it will shortly launch a full public consultation seeking views on the proposed assistance.

The Scottish Government highlights in its accompanying materials that consultation is still ongoing with stakeholders. To assist the Committee in considering whether the power should be delegated, the Committee asks:

- (i) Why the Scottish Government has opted to include provision in the Bill to introduce a scheme where the detail of the policy and its implementation have yet to be established and which has not yet been consulted upon, instead of waiting until such time as its policy position is more fully developed?**
- (ii) Given extensive regulation will be required to fill in the details which are not on the face of the Bill, can the Scottish Government provide an outline or timetable setting out its plans for laying these regulations?**
- (iii) When will the Scottish Government be in a position to provide outlines or drafts of any of the regulations which it plans to make under this provision?**

Section 16(2) inserts section 87B(5) - Information for audit of the social security system

This power enables the Scottish Ministers to exempt categories of individuals from the requirement to provide information about their benefits for audit purposes. The Policy Memorandum states that certain categories will be exempted entirely, such as people with terminal illnesses. Other individuals may also request that they be exempt from having to provide information for audit purposes.

However, the Committee noted that there is a lack of clarity about the criteria to be applied to exempt categories of individual from audit. The Committee also noted that there is no consultation requirement included within the provision.

In relation to this power, the Committee asks:

- (i) What consideration the Scottish Government has given to whether the criteria to be applied to determine exemption categories should be stated on the face of the Bill; and**
- (ii) What consideration the Scottish Government has given to whether a consultation requirement should be considered in relation to the exercise of the power to make regulations.**

Section 17(2) - Compensation Recovery

The Committee had questions on four of the newly created delegated powers contained in section 17(2) which give powers to Scottish Ministers to recover devolved social security assistance from compensation paid to persons by liable third parties.

Section 94H(4) - Power to make provision about the liability of insurers

The Explanatory Notes provide that section 94H is intended to cover the circumstances “where it is an insurer rather than the compensator themselves who is ultimately funding the compensation payment.”

The Policy Memorandum states that the “insurance policy should be treated as covering the compensator’s liability to Scottish Ministers”. The equivalent provision in Health and Social Care (Community Health and Standards) Act 2003, section 164 contains a more restricted power to limit the amount of the insurer’s liability. In contrast the delegated power contained in section 94H(4) grants the Scottish Ministers with wide discretion “to make provision about the liability imposed on the insurer under subsection (1).”

The Committee therefore asks:

- (i) What sort of provision do the Scottish Ministers anticipate making under this power?**
- (ii) The power contained in equivalent sections of UK legislation is limited to the amount of the insurer’s liability – why is it considered that wider discretion is required in this case?**
- (iii) Is the intention to use the power to limit or to exclude liability under subsection 1?**

Section 94M(5) - Power to make regulations prescribing review procedures

In relation to this section, the Committee wants to ask about the circumstances in which it is intended that Scottish Ministers will be able to undertake a review of their own decisions. The Policy Memorandum provides that:

“Circumstances in which a review can be carried out on their own initiative will be detailed in regulations however Scottish Ministers will not be compelled to undertake a review when one of these circumstances arise.”

However, the DPM does not specify the circumstances in which it is envisaged the Scottish Ministers will review decisions on their “own initiative”. It is therefore unclear whether this is a measure to audit the quality of initial compensation recovery decisions, combat fraud or whether there is another objective.

The Committee therefore asks **what sort of cases and circumstances is it intended that the Scottish Ministers will be able to undertake a review on their own initiative?**

Section 94O(11) - Power to make provision about medical evidence

This power confers a regulation making power on the Scottish Ministers to provide for the non-disclosure of medical advice or medical evidence given or submitted in connection with an appeal brought under this section.

The Committee noted that the publications associated with the Bill anticipate that the compensator will typically be an insurance provider. The DPM explains that:

“How these powers operate will directly impact compensators and the actions they require to take before making any compensation payments.”

While the DPM goes on to say that the power “may also have impacts upon injured individuals, for example so far as they may be required to provide information to the Scottish Ministers”, the power is broadly defined without any specific safeguards to the requests for, or use of, the medical evidence in appeal proceedings.

The Committee therefore asks:

(i) What further details the Scottish Ministers can give in relation to provisions they anticipate making in the exercise of this power relating to the non-disclosure of medical advice or medical evidence?

(ii) How will the rights of individuals to whom the medical advice or medical evidence relates be considered in exercise of this power?

Section 94U(1) - Power to make regulations about the investigation of compensation recovery matters (including provision for offences)

While it is customary for the details of civil penalty matters to be specified in delegated legislation, rather than on the face of the Bill, there is public interest in criminal offences being contained in primary legislation. This is to make it easier for people to find the relevant law and understand how it applies to them. The DPM states that:

“As far as the power at section 94U(1), this includes a power to make provision for offences. Creating offences in subordinate legislation is not very common and when it is done, it is almost always on the basis that the affirmative procedure will apply. Adopting that procedure will mean that the more detailed level of parliamentary scrutiny is given both to offences that are created and to the powers that will be conferred on authorised persons.” (paragraph 70)

In addition, the Explanatory Notes provide that:

“The maximum penalty for such offences is a fine not exceeding level 3 on the standard scale (£1,000 at September 2023). The statutory time bar in section 136 of the Criminal Proceedings (Scotland) Act 1995 will automatically apply to these offences because they are statutory offences triable only summarily.” (paragraph 128)

It may be considered that the creation of offences for the positive action of obstructing an authorised person in carrying out investigations may be necessary to achieve the policy intention of recovering compensation due to the Scottish Government. However, the Bill is less clear what kind of omission may constitute “neglecting to comply with any requirement relating to the provision of information...”.

Given this power, read together with 94U(2)(d), grants Scottish Ministers a power to create offences in delegated legislation, the Committee asks:

(i) Can the Scottish Government provide an outline of the behaviours this power is intended to capture?

(ii) In addition, is the offence provision intended to capture offences by omission as well as purposive acts?

(iii) Given the potential impact on individuals whose behaviour may be criminalised in regulations made under this power, can the Scottish Ministers explain why they have not chosen to specify the criminal conduct on the face of the bill?

I would be grateful if you could please email your response to dplr.committee@parliament.scot by **Monday, 26 February 2024**. The Committee will then consider your response at a future meeting and report on the delegated powers in the Bill to the lead committee.

Yours sincerely

Stuart McMillan MSP
Convener of the Delegated Powers and Law Reform Committee