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Scottish Parliament

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15 February 2024

Dear Stuart

## **Social Security (Amendment) (Scotland) Bill**

Thank you for your letter of 8 February in relation to six of the delegated powers in the Social Security (Amendment) (Scotland) Bill (“the Bill”). I am grateful to the Committee for its detailed and constructive consideration of the Bill, and trust members will recognise how its questions have identified a number of improvements we commit to taking forward at Stage 2. This letter responds to each of the Committee’s questions in turn.

### **Section 2(2) - Care experience assistance**

The Committee asks:

1. 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?
2. 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?
3. 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?

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The Scottish Government responds as follows:

1. The Bill includes an enabling power for care experience assistance. As noted by the Committee, the details of any scheme created under this power will be set out in regulations following the commencement of section 2 of the Bill.

This approach, which inserts enabling powers for care experience assistance in to the Social Security (Scotland) Act 2018 (“the 2018 Act”), is consistent with the approach taken for other forms of social security assistance that the Scottish Ministers may provide for within the Scottish social security system. Within the framework of the 2018 Act, enabling powers are provided for other forms of assistance. The detail of the payments that are to be introduced under the enabling powers is properly a matter for secondary legislation, as flexibility is required for Ministers to respond to changing circumstances (such as societal and economic changes) in defining the nature and amount of those payments, as well as the descriptions of individuals who are to be entitled to receive them.

In practice, enabling powers such as these may be used for multiple forms of assistance. For example, the powers found at section 31 of the 2018 Act for disability assistance have been utilised to legislate for both Adult Disability Payment and Child Disability Payment within secondary legislation. In the same way, whilst the powers for care experience assistance are intended in the first instance to be used to introduce the Care Leaver Payment, they could also be used in the future to deliver other forms of financial assistance for people with care experience.

A public consultation on the Care Leaver Payment was launched on 3 November 2023 and closed on 26 January 2024. The responses to the consultation will be independently analysed and a report will be published in due course. The responses to the consultation will be used to inform policy development and Ministerial decision-making on the payment. As required by the Bill at section 93A(10), further consultation will be carried out prior to regulations being laid, ensuring the details of the scheme have been informed by people with care experience and those delivering support to care experienced people.

Additionally, any regulations made using the power at section 93A will be subject to the affirmative procedure, giving an opportunity for further parliamentary scrutiny.

2. The power taken in the Bill, and the procedures that will be followed to make regulations under this power, are consistent with the approach for other forms of assistance.

It is currently intended the further consultation, in terms of section 93A(10), will commence in early 2025. The Scottish Government will set out their plans for regulations as soon as possible following that consultation. This is of course, also subject to the passage of the Bill and parliamentary timetables.

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3. Development of the Care Leaver Payment will continue as the Bill progresses. As noted above, a further public consultation will be carried out before regulations are laid. This consultation will be based on an outline of the regulations and the policy details of the payment. This consultation is currently intended in early 2025.

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

The Committee asks:

1. 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
2. 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?

The Scottish Government responds as follows:

1. While the Scottish Government is keen to provide as much clarity as possible to the Delegated Powers and Law Reform Committee, we consider that secondary legislation is the most appropriate place to specify those categories of individual that do not need to provide information, rather than by inclusion of a list of categories on the face of this Bill.

The criteria to be applied to determine the exemption categories is best detailed within guidance, to allow for flexibility to reflect the various circumstances that may affect clients. The accompanying documents for any regulations prepared in exercise of the power at section 87B(5) will also set out explanations for the categories to be exempted.

In the development of this Bill, the Scottish Government considered the inclusion of a non-exhaustive list of those who will be exempt, which could be amendable by regulations. Undertaking audits and requiring individuals to provide information will require the implementation of new processes for Social Security Scotland. The policies and procedures will evolve as the process is introduced and beds in. Changes may include alterations or additions to the categories of individuals who are to be exempted from these provisions. Additionally, the regulation making power at section 87B(5) is subject to the affirmative procedure, giving an opportunity for further parliamentary scrutiny of any list of exempted groups. Including a list of categories within secondary legislation therefore ensures a balance between flexibility for future amendments whilst ensuring appropriate parliamentary scrutiny.

As noted below, the Scottish Government considers that a consultation requirement prior to the exercise of the power to make regulations would be in line with its person-centred approach to social security. The Scottish Government would in practice intend to consult in the absence of a requirement to do so, however we agree that a consultation requirement on the face of the Bill itself provides clarity. As a result, it is not at this stage proposed that a non-exhaustive list will be included on the face of the Bill.

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2. The Scottish Government continues to engage with a wide-range of stakeholders on the proposed provisions in relation to information for audit. We are keen to hear a range of views on these proposals and we agree, as noted above, to the inclusion of a consultation requirement before the exercise of the power at section 87B(5). The Scottish Government commits to make a government amendment to this effect at Stage 2.

## **Section 17(2) - Compensation Recovery**

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

The Committee highlights that 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 wide discretion "to make provision about the liability imposed on the insurer under subsection (1)."

The Committee therefore asks:

1. What sort of provision do the Scottish Ministers anticipate making under this power?
2. 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?
3. Is the intention to use the power to limit or to exclude liability under sub-section 1?

The Scottish Ministers respond as follows:

1. Under this power, the Scottish Ministers anticipate making potential provisions detailing the circumstances where the liability of the insurer would be limited.
2. The Scottish Government agrees that wider discretion is not required compared to the equivalent section of the UK legislation and the intention is that the insurer's liability would be limited in the same way in practice.
3. The Scottish Government can confirm that the intention is to use this power to limit the amount of liability imposed on the insurer under subsection (1), similar to section 22(4) of the Social Security (Recovery of Benefits) Act 1997. The Scottish Government commit to make a government amendment to this effect at Stage 2, to narrow the terms of the power at section 94H(4).

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

The Committee asks:

1. What sort of cases and circumstances is it intended that the Scottish Ministers will be able to undertake a review on their own initiative?

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The Scottish Ministers respond as follows:

1. It is intended that Scottish Ministers will be able to undertake reviews on their own initiative where a mistake has been made in the preparation of the certificate of recoverable assistance. This can be in relation to errors identified in the types of assistance, amounts, rates, or periods specified within the certificate. Furthermore, it is the intention that Scottish Ministers would have the power to undertake a review in situations where incorrect or insufficient information has been provided by the compensator resulting in inaccurate information stated on the certificate.

Section 94M(5) also extends to setting out the circumstances in which a request for review can be made. The policy intention is that the grounds to request a review will be similar to those in which Scottish Ministers can undertake a review under their own initiative. The grounds to request a review will include cases where types of assistance, amounts, rates or periods included in the certificate are incorrect or where assistance included was not received as a result of an accident, injury or disease. Setting these cases and circumstances out in regulations will allow for the list to be updated if new circumstances are identified for which a review will be suitable. This mirrors the UK position, where section 10 of the Social Security (Recovery of Benefits) Act 1997 provides that a review can be carried out in “prescribed cases or circumstances” (“prescribed” being defined at section 29 as “prescribed in regulations”). Additionally, the power at section 94M(5) is subject to the affirmative procedure and so there will be parliamentary scrutiny in due course of any provisions made using this power.

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

The Committee asks:

1. 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?
2. How will the rights of individuals to whom the medical advice or medical evidence relates be considered in exercise of this power?

The Scottish Ministers respond as follows in relation to both questions 1 and 2:

The intention of section 94O(11) was to provide the power to restrict the disclosure or release of medical information provided to the First-tier Tribunal, similar to section 12(7) in the Social Security (Recovery of Benefits) Act 1997. This would enable the First-tier Tribunal to restrict or prohibit the public disclosure of medical documentation. However, on reconsidering the Scottish Government has come to the view that rule 14 in the schedule of the First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018, already in practice, makes sufficient provision in relation to the disclosure of documents and information. As a result, it is recognised that it is not necessary to include section 94O(11) within the Bill and the Scottish Government commits to a government amendment at Stage 2 to remove it.

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

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

1. Can the Scottish Government provide an outline of the behaviours this power is intended to capture?
2. In addition, is the offence provision intended to capture offences by omission as well as purposive acts?
3. 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?

The Scottish Government responds as follows:

1. It is the intention that this power will be used in relation to any person who is or has been liable for making a compensation payment, or a payment to the Scottish Ministers under 94E. This may include, for example, an insurer. The Scottish Government intends to address behaviours such as the intentional delaying or obstruction of an investigation by an authorised officer in the exercise of their functions (which are to be conferred by regulations under section 94U). The Scottish Government also intends to address refusals or neglect to comply with any requirement to provide information or give access to electronic information to an authorised officer.
2. The offences to be created will only apply where an investigation occurs in terms of regulations made under section 94U, and a person intentionally delays or obstructs an authorised person in the exercise of their functions, or refuses or neglects to comply with any requirement in relation to the provision of information or access to electronic information. As such, failure to comply with the requirements of an investigation by omission will be caught within the terms of any offences made under these provisions.
3. The Bill provides for regulation making powers within section 94U, to detail how investigations will be carried out. Including the details of the offences within regulations will allow additional time to engage and consult with relevant stakeholders in the development of any associated offences created through the powers in the Bill, as well as ensuring that details of the offences created align with the investigatory provisions and apply correctly to corporate bodies. Other examples of powers to create offences in this way can be seen at sections 79(2)(g) and 84A(2)(b) of the 2018 Act.

Yours sincerely,



**SHIRLEY-ANNE SOMERVILLE**

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