**EXPLANATORY MEMORANDUM TO**

**THE SCOTLAND ACT 1998 (MODIFICATION OF SCHEDULE 5) (No. 2) ORDER 2013**

**2013 No. [XXXX]**

**1.** 1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments.

## 2. Purpose of the instrument

2.1 The purpose of this Order is to amend Schedule 5 to the Scotland Act 1998 to provide a new exception to the social security reservation. This will mean that following the abolition by the Welfare Reform Act 2012 of community care grants and crisis loans for living expenses from the Social Fund, the legislative competence of the Scottish Parliament will be widened so that it can provide newly created assistance to those members of the community who might previously have applied for a community care grant or a crisis loan for living expenses. The Order also gives certain previous devolved enactments (those conferring functions on Scottish Ministers or local authorities) effect as if this new version of the social security reservation was in place when those enactments were passed or made, rather than the version of the social security reservation which actually existed at that time.

## 3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This Order is being made under section 30(2) and (4) of the Scotland Act 1998. Section 30(2) provides a mechanism whereby Schedule 4 or Schedule 5 to that Act can be modified by an Order in Council, subject to the agreement of both the UK and Scottish Parliaments. This Order modifies Schedule 5. Section 30(4) enables modification of other enactments where that is considered necessary or expedient in connection with other provision made by the Order.

3.2 This Order is, by virtue of section 115 of, and paragraphs 1 and 2 of Schedule 7 to, the Scotland Act 1998, subject to affirmative resolution procedures in both Houses of the UK Parliament and the Scottish Parliament.

## 4. Legislative Context

4.1 The Social Fund, and all of its elements, are reserved to the UK Parliament and are the responsibility of the Department for Work and Pensions, through Section F1 in Part 2 of Schedule 5 to the Scotland Act 1998 (“the social security reservation”). However, the Welfare Reform Act 2012 (“the 2012 Act”) contains provisions to abolish

the discretionary Social Fund. Therefore, community care grants and crisis loans for living expenses will be abolished (see section 70 of the 2012 Act). The Department for Work and Pensions intends to commence the relevant provisions of the 2012 Act with effect from 1st April 2013. No provision for any assistance to replace the discretionary Social Fund is provided within the 2012 Act.

4.2 For an interim period of two years, the Scottish Government has decided that local authorities should provide newly created assistance to those members of the community who might previously have applied for a community care grant or a crisis loan for living expenses. To do that, those authorities will use their powers under section 20 of the Local Government in Scotland Act 2003, known as their power to advance well-being. In the future, the Scottish Government may decide to legislate to provide new assistance through primary legislation.

4.3 As the Scottish Parliament does not have the legislative competence to provide new assistance in Scotland, the social security reservation has to be amended. Similarly, section 20 of the 2003 Act (having been enacted by the Scottish Parliament) does not at present give local authorities a power in an area for which the Scottish Parliament could not legislate when the 2003 Act was passed. There may be other Scottish Ministerial or local authority functions that are relevant to the exercise of the new area of devolved competence that similarly need to be expanded. Therefore, it is expedient to modify any relevant devolved enactments made prior to the Order to enable the Scottish Ministers and local authorities to use such functions to provide the new assistance. Article 3 of the Order makes that modification. Timings also make it necessary to include that modification in the Order, to allow local authorities in Scotland to use the power in section 20 of the 2003 Act from 1 April 2013. These modifications do not, however, affect anything done before the Order comes into force.

4.4 To ensure continuity, this Order will take effect from 1st April 2013, the date on which section 70 of the 2012 Act will be commenced.

## 5. Territorial Extent and Application

5.1 This instrument extends throughout the UK, except article 3 (the consequential modification of previous enactments) which has Scotland only extent, as the legislation it modifies only requires modification in relation to Scotland.

## 6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Scotland, the Rt Hon David Mundell MP, has made the following statement regarding Human Rights:

> *"In my view the provisions of the Scotland Act 1998 (Modification of Schedule 5) (No.2) Order 2013 are compatible with the Convention rights."*

## 7. Policy background

7.1 There are three elements of the discretionary Social Fund. These are community care grants; crisis loans for living expenses; and budgeting loans. Community care grants are payments intended to help vulnerable people live as independent a life as possible in the community. Crisis loans for living expenses are generally paid to individuals to cover immediate short-term needs that arise because of a disaster or emergency. Budgeting loans are generally paid to those individuals in receipt of a qualifying benefit who have intermittent expenses which are difficult to budget for.

7.2 The 2012 Act contains provisions to abolish the discretionary Social Fund (see section 70 of the 2012 Act). It is the intention of the Department for Work and Pensions to commence the relevant provisions so that community care grants and crisis loans for living expenses are abolished with effect from 1st April 2013. Budgeting loans will continue for individuals in receipt of legacy benefits.

7.3 However, the 2012 Act does not make provision for any assistance to replace community care grants or crisis loans for living expenses. The UK Government's policy is that new assistance will be delivered in England using existing powers in the Local Government Act 2000 and that it will be for the Scottish and Welsh Governments to decide on what new assistance will be provided in Scotland and Wales respectively. Funding will transfer from the Department for Work and Pensions to local authorities in England to enable them to establish a new system of local welfare assistance and to the Welsh and Scottish Governments to enable them to establish newly created systems. It will be for the Scottish Government to make decisions as to the type of any new assistance to be provided in Scotland.

7.4 However, the social security reservation means that the Social Fund, and all of its elements, are reserved to the UK Parliament. Therefore, new arrangements cannot be legislated for, or provided by, the Scottish Parliament or Scottish Government within existing competence. An amendment to the social security reservation is therefore required.

7.5 Article 2 of this Order provides an exception to the social security reservation. This exception will cover the circumstances in which a person would previously have been entitled to either a community care grant or a crisis loan for living expenses.

7.6 However, article 2 of this Order also outlines circumstances which are not to be excepted from the social security reservation. This provision ensures that the Scottish Parliament will not have competence to legislate for the circumstances detailed as follows: providing financial assistance for the purposes of meeting maternity expenses; funeral expenses; or, expenses for heating incurred due to cold weather. Article 2 ensures these payments will continue to be reserved whether they are paid from the Social Fund or not. This provision also ensures that the Scottish Parliament will not have competence to legislate in relation to the subject-matter contained within section 138 of the Social Security Contributions and Benefits Act 1992 (payments out of the Social Fund) and the subject-matter contained within section 69 of the Child Support, Pensions and Social

Security Act 2000 (discretionary housing payments). However, it should be noted that the subject-matter of section 138 only covers payments made from the Social Fund itself.

7.7 Following a consultation on the successor arrangements for community care grants and crisis loans for living expenses, the Scottish Government concluded that from April 2013, newly created arrangements will be provided by local authorities on an interim basis using their powers under section 20 of the Local Government in Scotland Act 2003 ("the 2003 Act"). The Scottish Government will offer guidance to local authorities about new arrangements. The Scottish Government has indicated that, after this interim arrangement has operated for two years, it expects to make provision in primary legislation for arrangements for new assistance.

7.8 However, section 20 of the 2003 Act (having been enacted by the Scottish Parliament) does not at present give local authorities a power in an area for which the Scottish Parliament could not have legislated in 2003. There may be other Scottish Ministerial or local authority functions that are relevant to the exercise of the new area of devolved competence that similarly need be expanded. Therefore, to enable the Scottish Ministers and local authorities to use such functions to provide the new assistance, article 3 makes provision that gives enactments such as the 2003 Act effect as if article 2 of this Order had been in force at the time when it was passed. However, this provision only expands the relevant powers from the date the Order comes into force, and has no effect on anything done prior to that date.

## 8. Consultation outcome

8.1 On 15th June 2009, the Calman Commission on Scottish Devolution published its report, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*. The Commission recommended that, as part of its consideration of future reform of the Social Fund, the UK Government should consider devolving the discretionary elements of the Social Fund to the Scottish Parliament. Following the Department for Work and Pensions' consultation, *21st Century Welfare*, which ran from 30th July 2010 to 1st October 2010, the UK Government issued its White paper, *Universal Credit: welfare that works*, outlining its intention to reform the system of community care grants and crisis loans for living expenses, to enable local authorities in England to deliver new locally-based provision, while the Scottish and Welsh Governments would determine the most appropriate arrangements for Scotland and Wales.

8.2 The Scottish Government ran its consultation, *Devolution of Community Care Grants and Crisis Loans: Consultation on Successor Arrangements*, for a 12 week period from 5th August 2011. This document sought views on different ways to deliver support and how appeals should be organised. There was particular interest in whether:

- The successor arrangements should combine the current systems of grants and loans into one grant fund;
- There should a centralised or local delivery system, and if local, which organisations might deliver a locally based scheme;

- Eligibility for the scheme should be re-focused;
- Goods might be provided rather than grants, for example, through furniture recycling or government procurement; and,
- Other support or advice might be provided, such as budgeting and encouraging savings.

8.3 There were 50 responses to this consultation. Forty-six responses were from organisations while the remaining 4 individual responses were from people with professional experience of the issues. Of these 50 responses, 29 were from third sector organisations, 13 were from local authorities and 4 were from other public sector organisations, including the Social Fund Commissioner.

8.4 Independent analysis, by Research for Real, of these responses showed that there was a qualified endorsement of the proposal that the new arrangements should operate a single grant fund. However, there was a common desire to have more information about the future system and there were concerns about funding this system. Further consultation was desired by responders to understand how the devolved fund would work in practice. The Scottish Government decided that, while in the future it may make provision for newly created assistance in primary legislation, from April 2013 that new assistance will be provided by local authorities using their powers under section 20 of the 2003 Act to promote or improve well-being.

## 9. Guidance

9.1 No additional guidance is required for this Order, though the Scottish Government will offer guidance to local authorities about their use of section 20 of the 2003 Act and any other relevant powers following the making of the Order.

## 10. Impact

10.1 There is limited impact on business, charities or voluntary bodies. Some charities and voluntary bodies provide advice to individuals seeking community care grants and crisis loans for living expenses. If they wish to continue to provide such a service, they will have to become familiar with the new arrangements.

10.2 There is no impact on the public sector other than local authorities that will be delivering the new arrangements. The funding being transferred from the Department for Work and Pensions to the Scottish Government includes a separate element for administration and set up costs. The Scottish Government will transfer this funding to local authorities to support the delivery of the new arrangements.

10.3 An Equalities Impact Assessment has been undertaken by the Scottish Government for the new arrangements. The Scottish Government is also considering undertaking a Business Regulatory Impact Assessment, to assess the impact on charities and voluntary bodies.

## 11. Regulating small business

11.1 The legislation does not apply to small business.

## 12. Monitoring & review

12.1 As the purpose of this Order is to provide an exception to the social security reservation to allow the Scottish Parliament to consider how it can appropriately legislate for the set of circumstances specified in article 2, and provides a permanent change to the reservation, no monitoring or review of the effects of this Order are required by the UK Government.

12.2 However, the Scottish Government will keep under review the new arrangements to determine the effectiveness of these. The intention is for the new interim arrangements to operate for two years. Any subsequent new arrangements will be informed by the outcome of the monitoring and evaluation of the interim arrangements. Appropriate arrangements for monitoring and reviewing the new arrangements will be set up to determine the continuing provision of such assistance.

## 13. Contact

13.1 Emma Lopinska at the Scotland Office Tel: 0131 244 9026 or email: emma.lopinska@scotlandoffice.gsi.gov.uk can answer any queries regarding the instrument.