Subordinate Legislation Committee

13th Report, 2011 (Session 4)

Legislative Consent Memorandum
on the Welfare Reform Bill
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Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(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; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Chic Brodie
Nigel Don (Convener)
James Dornan (Deputy Convener)
Kezia Dugdale
Mike MacKenzie
John Scott
Drew Smith

Committee Clerking Team:

Clerk to the Committee
Irene Fleming

Assistant Clerk
Euan Donald

Support Manager
Lori Gray
The Committee reports to the Parliament as follows—

1. At its meeting on 8 November 2011, the Committee considered the provisions in the Welfare Reform Bill (“the Bill”) which confer on the Scottish Ministers powers to make subordinate legislation.

2. The Scottish Government provided the Parliament with a legislative consent memorandum (“LCM”).

3. The Scottish Government has not yet brought forward a Legislative Consent Motion, but expects to do so before Christmas recess. Paragraph 5 of the LCM sets out its reasons for taking this course of action.

4. During the last session of the Parliament the Subordinate Legislation Committee (SLC) considered an LCM in relation to the Welfare Reform Bill and agreed a report. The report expressed contentment with the relevant provisions, but noted that the Bill had not properly adopted the standard terminology for “the negative procedure” and “the affirmative procedure” set out in sections 28 and 29 of the Interpretation and Legislative Reform (Scotland) Act 2010.

5. In its report, the SLC noted that the Scottish Government did not intend to bring forward a legislative consent motion during the third session of the Parliament and that the Health and Sport Committee would not be considering the LCM before the end of the third session. For those reasons, the SLC intimated that it would be for the successor Subordinate Legislation Committee in session 4 to determine whether it would endorse its report for submission to the appropriate lead committee.

6. This LCM is different to the one lodged last session and on which the SLC reported. It reflects amendments to the Bill which have been agreed since then.

7. Amongst other things, the Bill has been amended to respond to the concerns expressed about the terminology used in relation to negative and affirmative procedure.
8. However, as regards provisions conferring on the Scottish Ministers powers to make subordinate legislation, there are no additional provisions to those considered by the SLC in the last session of the Parliament.

The Bill

9. The Welfare Reform Bill gives the UK Government powers to abolish a range of existing social security benefits (Working Tax Credit, Child Tax Credit, Housing Benefit, Income Support, income-based Jobseeker’s Allowance and income-based Employment and Support Allowance) and replace them with a new benefit to be known as Universal Credit for people of working age. It will also replace Disability Living Allowance with a new benefit to be known as Personal Independence Payment. The Bill also makes other modifications to social security law, for example by abolishing Council Tax Benefit.

10. The Bill was presented in the House of Commons on 16 February 2011. It had its third reading in the House of Commons on 15 June and is currently at the committee stage in the House of Lords.

11. Paragraph 26 of the LCM identifies five areas of the Bill which trigger the need for legislative consent:

• the introduction of Universal Credit
• data sharing between the Department for Work and Pensions and welfare service providers in Scotland (e.g. local authorities)
• the introduction of Personal Independence Payment
• changes to Industrial Injuries Disablement Benefit
• establishment of the Social Mobility and Child Poverty Commission

12. Two provisions in the Bill confer power on the Scottish Ministers to make subordinate legislation: clause 33, which enables them to make ancillary provision in relation to the introduction of Universal Credit, and clause 89, which similarly enables them to make ancillary provision in relation to the introduction of Personal Independence Payment.

Delegated powers provisions

Clause 33(1): Power to make supplementary and consequential provision etc.

13. Clause 33(1) permits “the appropriate authority” by regulations to make such consequential, supplementary, incidental or transitional provision in relation to the introduction of Universal Credit as that authority considers appropriate. In general, the appropriate authority is the Secretary of State. However, where the provision falls within the legislative competence of the Scottish Parliament, the appropriate
authority is the Scottish Ministers. Similarly, the appropriate authority is the Welsh Ministers when the provision falls within the legislative competence of the National Assembly for Wales.

14. Paragraph 39 of the LCM states that this power will enable the Scottish Ministers to make necessary amendments to Scottish legislation to remove references to existing benefits and replace them with references to Universal Credit.

15. The Committee notes that regulations made by the Scottish Ministers under this clause may amend, repeal or revoke any primary or secondary legislation. Regulations which amend or repeal primary legislation are subject to affirmative procedure, while all other regulations are subject to negative procedure.

16. The Committee further notes that regulations made by the Secretary of State under clause 33 are subject to negative procedure, whereas those made by the Welsh Ministers are subject to affirmative procedure.

17. Despite the different procedural approaches taken in each jurisdiction, the Committee considers the approach chosen for Scotland to be appropriate and in accordance with normal practice.

18. The Committee therefore reports to the lead committee that it considers the power in clause 33 to be acceptable in principle and that the power should be subject to affirmative procedure when used to amend or repeal primary legislation, and should be otherwise subject to negative procedure.

Clause 89(2): Power to make supplementary and consequential provision

19. Clause 89(2) permits the Scottish Ministers by regulations to make such consequential, supplementary or incidental provision in relation to the introduction of Personal Independence Payment as they consider appropriate, provided that the provision is within the legislative competence of the Scottish Parliament. Clause 89(1) confers a similar power on the Secretary of State, but no power is conferred on the Welsh Ministers in relation to Personal Independence Payment.

20. The Committee notes that this power gives the Scottish Ministers similar powers in relation to the introduction of Personal Independence Payment as clause 33 does in relation to the introduction of Universal Credit. It therefore envisages this power would similarly be exercised to replace references to Disability Living Allowance in Scottish legislation with references to Personal Independence Payment.

21. The Committee does, however, note that this power differs slightly from that in clause 33(1) in that it does not confer power on the Scottish Ministers to make transitional provision. Power to make transitional provision in relation to the coming into force of provisions in relation to Personal Independence Payment is given only to the Secretary of State under clause 90. However, given the limited circumstances in which it is envisaged that the Scottish Ministers will use their powers conferred by this clause, the Committee does not consider that this would
be problematic. Accordingly, the Committee considers this power to be acceptable in principle.

22. The Committee notes that regulations made by the Scottish Ministers under this clause may amend, repeal or revoke any primary or secondary legislation passed or made before the day on which the Bill is passed. The regulations may also amend or repeal any provision of an Act passed on or after that day, but within the same session of Parliament. Regulations which amend or repeal primary legislation are subject to affirmative procedure. All other regulations are subject to negative procedure. By contrast, regulations made by the Secretary of State under clause 89 are subject to negative procedure.

23. Despite the different procedural approach taken in each jurisdiction, the Committee considers the approach chosen for Scotland is appropriate and in accordance with normal practice.

24. The Committee therefore reports to the lead committee that it considers the power in clause 89 to be acceptable in principle and that the power should be subject to affirmative procedure when used to amend or repeal primary legislation, and should be otherwise subject to negative procedure.
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