



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Subordinate Legislation Committee**

**22nd Report, 2012 (Session 4)**

### **Welfare Reform (Further Provision) (Scotland) Bill**

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The Scottish Parliament  
Pàrlamaid na h-Alba

## **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)  
Mike MacKenzie  
Michael McMahon  
John Pentland  
John Scott

**Committee Clerking Team:**

Clerk to the Committee  
Irene Fleming

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Support Manager  
Daren Pratt



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## Subordinate Legislation Committee

### 22nd Report, 2012 (Session 4)

#### Welfare Reform (Further Provision) (Scotland) Bill

The Committee reports to the Parliament as follows—

#### INTRODUCTION

1. At its meetings on 27 March, 17 April and 24 April 2012, the Subordinate Legislation Committee considered the delegated powers provisions in the Welfare Reform (Further Provision) (Scotland) Bill (“the Bill”) at Stage 1. The Committee submits this report to the Welfare Reform Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).<sup>1</sup>
3. Officials from the Scottish Government also provided oral evidence to the Committee at its meeting on 17 April 2012. After this evidence session, the Committee agreed to seek further information in writing. The Committee’s letter and the Scottish Government’s response are reproduced in the Annex.

#### OVERVIEW OF THE BILL

4. The Welfare Reform (Further Provision) (Scotland) Bill was introduced in the Scottish Parliament on 22 March 2012. It comes into force on the day after Royal Assent.
5. The Bill is required as a consequence of the decision of the Parliament to refuse to agree to powers to make consequential and other provision being conferred on the Scottish Ministers by the United Kingdom Welfare Reform Act 2012 (“the UK Act”)<sup>2</sup>. In short, it broadly replicates the powers which the Parliament rejected in the UK Act. The Bill is therefore purely enabling.

<sup>1</sup> Welfare Reform (Further Provision) (Scotland) Bill. Delegated Powers Memorandum. Available at: [http://www.scottish.parliament.uk/S4\\_Welfare\\_Reform\\_Committee/Welfare\\_reform\\_bill\\_DPM.pdf](http://www.scottish.parliament.uk/S4_Welfare_Reform_Committee/Welfare_reform_bill_DPM.pdf)

<sup>2</sup> Welfare Reform Act 2012. Available at: <http://www.legislation.gov.uk/ukpga/2012/5/contents/enacted>

## DELEGATED POWERS PROVISIONS

6. Section 1 of the Bill confers power in consequence of the introduction of universal credit by the UK Act. Section 2 makes similar provision in consequence of personal independence payment introduced by the UK Act. Section 3 expands each of the powers so that the powers may:

- make provision in direct or indirect consequence of the UK Act or instruments made under it;
- make provision which is not of itself in consequence of the UK Act if the provision concerns any matter arising in direct or indirect consequence (or previously arising);
- make different provision for different cases or purposes; and
- include supplemental, incidental, consequential, transitional, transitory or saving provision.

7. There are two important points to highlight by way of introduction which are of particular relevance to the Committee's remit and consideration of the powers which it is proposed to confer on Ministers through this Bill.

8. First, the powers in the Bill go further than those which were originally proposed in the bill for the UK Act and which were not consented to by the Parliament. The Bill does not seek solely to deal with the immediate consequences of the UK Act for devolved matters. The Bill also seeks to use the general powers to allow for the "future-proofing" of changes made in consequence of the UK Act.

9. Second, much of the discussion on the exercise of the powers conducted to date has focused on the primary policy objective of ensuring continued access to devolved benefits which currently accrue to those who receive welfare benefits (the devolved benefits are commonly described as "passport benefits"). However, the bill does not restrict the exercise of the powers to delivery of this objective. The powers conferred allow any provision to be made within devolved competence as Ministers consider appropriate provided there is a link back to the consequences of the UK Act or a link to matters which themselves arose in consequence of that Act. The powers are therefore extensive in their potential effect, which goes beyond the task of embedding the changes to the UK welfare system properly within the current sphere of passported benefits.

10. The Bill provides that where the regulations made under either section 1 or 2 textually amend primary legislation they will be subject to the affirmative procedure. In any other case they will be subject to the negative procedure.

### **Delegation of the powers in principle**

11. The Committee recognises the context within which these powers are to be conferred. A substantial amount of work is required in order to make the changes to legislation relating to devolved matters as a result of the UK Act. The Committee

understands that the roll-out of the UK changes will commence with effect from 1 April 2013, although this will be a process which will continue for a number of years beyond that date. As a Scottish Government official put it, “the bill provides a practical means to a necessary end.”<sup>3</sup> The Committee accepts that the timetable and the pace at which the changes need to be made are set by the UK Act and by implementing measures that are still to be made by UK Ministers under that Act. These are matters beyond the control of the Scottish Parliament or the Scottish Government. The Committee also recognises that both the timetable and the current lack of availability of the operational detail set out in instruments to be made under the UK Act mean that it would not be possible to deliver these changes by 1 April 2013 through the standard primary legislation process rather than subordinate legislation.

12. Nevertheless, the Committee also recognises that the changes which these powers could deliver are extremely significant. They are capable of having a profound effect on people in Scotland who currently receive passported benefits or who might in the future expect to be entitled to receive them. Scottish Government officials advised the Committee that the changes made by the UK Act have precipitated the first review of passported benefits “in the round”. This is a matter which is clearly of importance and concern to a wide range of stakeholders.

**13. The Committee accepts that it is appropriate in principle to delegate the powers sought in order to achieve the primary objective of ensuring the continued delivery of passported benefits from 1 April 2013. However, the Committee considers that the current context illustrates that the potential reach of ancillary powers of this kind can be of significant impact in practice. The scrutiny of the grant of such powers by the Parliament is therefore an important matter which requires careful consideration in addition to ensuring proper scrutiny of the exercise of the powers themselves. The Committee considers this further below.**

#### **Scope and duration of the powers to be conferred**

14. As noted above, the powers go further than proposed in the bill for the UK Act and are drafted in terms which permit changes to be made that are wider than is necessary to achieve the primary objective of ensuring the continued delivery of passported benefits to current recipients. In its evidence, the Scottish Government confirmed that a number of these passported benefits are currently regulated through subordinate legislation. Therefore, in a number of cases, Ministers could already have the powers necessary to conduct the exercise of engaging these benefits with the UK Act.

15. As a general principle the Committee considers that it is preferable that subordinate legislation is made using enabling powers which have been conferred for specific purposes where these are available rather than general ancillary powers of the kind proposed in the Bill. Some of those existing specific powers may be subject to additional statutory requirements such as consultation with stakeholders which are not replicated in the general powers proposed in this Bill.

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<sup>3</sup> Scottish Parliament Subordinate Legislation Committee. *Official Report*, 17 April 2012, Col 348.

16. The Scottish Government indicated that it is currently too early in the process to determine whether the existing powers are sufficient. The full scope of the necessary work is not known and the policy approach to be adopted is not yet sufficiently developed to be clear whether the existing powers are adequate. The Scottish Government's legal adviser explained:

"It is true that some of the powers will be sufficient to make the changes that will ultimately be made. However, at the moment, it is not possible to say exactly what the changes will be to a particular provision, which means that we cannot say whether the power that is available under subordinate legislation will be apt to make the change that we ultimately want to make. Against that background, we are looking to take a general power to allow us to make the changes that we need to make in order to ensure that passported benefits are available."<sup>4</sup>

17. The Committee accepts that, in the particular circumstances, it is necessary to legislate to confer powers at a point at which the scope of the task is unknown. It recognises that this is a challenging task and that it is important to ensure that Ministers have adequate powers at their disposal to ensure that passported benefits continue to be delivered.

18. Where existing powers are available, the Scottish Government has indicated that this may provide Ministers with a choice whether to use those powers or those to be granted under the Bill and consideration will be given to whether it is appropriate to use existing powers and comply with any existing pre-conditions. Ministers will be accountable to the Parliament for the manner in which they exercise that choice. The Committee accepts that the choice will depend on the context of each case.

**19. The Committee is reassured by the Scottish Government's comments that consideration would be given to fulfilling any existing consultation requirements if it were considered appropriate to do so and if this would not put the timetable at risk.**

20. There may also be other necessary consequential changes such as those where the eligibility for receipt of benefits is used as a criterion for other matters. The Scottish Government provided the examples of eligibility to repay debt under the Bankruptcy (Scotland) Act 1985 and determining the ability of disabled persons to vote on their own account. These are consequential changes of a fairly standard nature. Whether the changes made are controversial in policy terms will depend on future policy decisions. However, the Committee recognises that, were eligibility criteria to be altered using these powers, this could prove controversial.

**21. The Committee accepts that in the current circumstances it is not possible to draw the powers to be conferred more narrowly without the risk of possibly impeding the primary objective of ensuring the continued availability of passported benefits with effect from 1 April 2013 and making other necessary consequential changes. Therefore, so far as the powers are**

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<sup>4</sup> Scottish Parliament Subordinate Legislation Committee. *Official Report*, 17 April 2012, Cols 352-3.



**necessary to enable the UK Act to be fully embedded with devolved matters, the Committee is content with the scope of the powers.**

22. The Committee accepts that there is a need for the eligibility criteria for passported benefits which Ministers set out in regulations to remain relevant and up to date. For example, a means should be available so that any financial limits which may be set could be adjusted to retain their real value over time. Future uprating of this kind would not involve any significant policy change. However, the Committee is concerned that these general ancillary powers provide the power to go beyond the ability to future-proof criteria in this manner.

23. In its evidence, the Scottish Government confirmed that the future-proofing element of the powers sought would allow Ministers to introduce very different eligibility criteria from those which are introduced when passporting existing benefits, provided that a link to a change made as a consequence of the UK Act can be established. If such a link is established, the powers permit Ministers to make whatever changes they think fit. If the Bill is passed in this form, the Parliament will have delegated to Ministers the power to make substantial revisions to the criteria by which entitlement to passported benefits is assessed for the foreseeable future.

24. The Committee considers that the Parliament may wish to consider significant revisions to the eligibility criteria for such benefits on a longer timescale and cannot rule out the possibility that the Parliament would prefer to do so using primary legislation rather than through the use of these powers.

25. The Committee accepts that it will be necessary to allow a significant transitional period to encapsulate the time throughout which the UK Act changes are rolled out and to allow for a period of operation during which any practical problems could be identified and rectified. It accepts that it would not be a good use of parliamentary time to revisit the enabling powers during this period. The Committee also recognises that the changes made using the powers would also require to continue in effect.

26. As outlined above, the Committee considers that it is largely the urgency of the current UK welfare reform project and the unknown scope of the current passported benefits which justify the conferral of these broad general powers. The Committee is not satisfied that the delegation of general powers of this kind to permit significant variations once that project is completed, without parameters as to what those variations may comprise, has been justified.

**27. The Committee therefore considers that serious consideration should be given to whether the delegated powers should continue to be available indefinitely. The Committee is not in a position to identify a specific period after which the powers should no longer be available. The Committee would expect that a reasonable period should be allowed to ensure full implementation and that some further adjustments may be required beyond 2013 to ensure the system operates effectively and as intended. The Committee therefore recommends that the justification for the continued availability of general powers should be reviewed by the Parliament after the implementation period is complete and that provision to this effect should**

**be included in the Bill. This would not affect the continued operation of provision made under exercise of the powers.**

**Parliamentary procedure which should apply to the exercise of the powers**

28. It is clear from the evidence submitted to the lead committee to date that stakeholders are more concerned with the content of the regulations which are to be made under the Bill than the terms of the Bill itself. For example, Jeannette Campbell from Citizens Advice Scotland said:

“We are more interested to see the subordinate legislation and regulations, because they are where all the information and detail will be; that is the important bit for CAS. We want to see the eligibility criteria and we want to know exactly what system will need to be in place within a year to 18 months.”<sup>5</sup>

29. Stakeholders are therefore concerned to ensure that the regulations which are to be made under the Bill receive as much scrutiny as, if not more than, the Bill itself. John Dickie, from the Child Poverty Action Group in Scotland, said:

“We therefore seek assurance ... that the committee will give equal scrutiny to the regulations that are still to come, where the meat of the issue will be in relation to passporting”.<sup>6</sup>

30. This concern reflects the Committee’s acknowledgement above that the exercise of the powers will have a significant practical impact and that, until the regulations themselves are available, stakeholders will not have the opportunity to see and comment on what that impact will be.

31. The Bill currently provides that regulations which make textual amendments to primary legislation will require the Parliament’s approval. Regulations which do not make such textual amendments do not require approval but could be annulled by resolution of the Parliament within 40 days of being laid.

32. Stakeholders have given evidence that in their opinion this is not a sufficient level of scrutiny given the importance of the subject matter. Some have suggested that consultation on drafts in addition to the affirmative procedure would be merited given the importance of the regulations (“super-affirmative procedure”). Others have recognised that affirmative procedure is merited, although negative procedure would normally be considered sufficient for changes to subordinate legislation, or suggested that affirmative procedure would be appropriate for the first set of regulations to be made under each section.<sup>7</sup>

33. The Scottish Government explained the approach taken in the Bill as follows:

“with regard to amendments to primary legislation, the Parliament has already voted on the actual wording of that legislation and, instead of allowing certain provisions to be made in secondary legislation, has

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<sup>5</sup> Scottish Parliament Welfare Reform Committee. *Official Report*, 17 April 2012, Col 93.

<sup>6</sup> Scottish Parliament Welfare Reform Committee. *Official Report*, 17 April 2012, Col 114.

<sup>7</sup> Scottish Parliament Welfare Reform Committee. *Official Report*, 17 April 2012, Cols 117-8.

determined that particular terms are sufficiently important to be used in primary legislation ... there is a qualitative difference between that kind of amendment and an amendment to secondary legislation.”<sup>8</sup>

34. The Committee endorses the view that where regulations make amendments to primary legislation they should be approved by the Parliament for the reasons set out by the Scottish Government.

35. However, the Committee questioned whether it was possible to say that the changes which Ministers might wish to make to subordinate legislation using these powers differed in content, effect or their financial implications from those to be made to primary legislation. The Scottish Government responded:

“It is difficult to answer your question about the content, effect and financial implications of instruments, because instruments will vary from case to case. Some will have significant effect, in that they will broadly continue to make a passported benefit available to the group that currently receives it; others might have an effect that varies in some way, depending on the policy. At the moment, however, I am unable to draw a distinction between the content, effect and financial implications of changes to primary and secondary legislation.”<sup>9</sup>

36. The Committee concludes that one of the implications of the breadth of the power and the current stage in the programme of this project is that it is not possible to predict at the moment whether the changes to be made to secondary legislation will be less significant, as significant or more significant than those which are to be made to primary legislation. In light of this, and the concerns clearly expressed by stakeholders, it therefore does not appear to the Committee to be appropriate to make a distinction as to the scrutiny to be applied solely on the basis of whether the regulations amend primary legislation or not.

37. The Committee is not attracted to the proposal that the first set of regulations could be subject to a higher level of scrutiny than subsequent regulations for the same reason. It does not necessarily follow that subsequent regulations will have a less significant effect than the first set of regulations.

38. The Committee recognises that, if some distinction is to be made between regulations which are to be subject to the affirmative procedure and those which are to be subject to the negative procedure, that distinction must be made by way of a clear criterion. The current criterion does fulfil the requirement of clarity. A criterion based on an assessment of the significance of the effect of the regulations or something similar would not be sufficiently clear since whether or not something has a significant effect is essentially a subjective matter.

39. The Committee considers that the reason why stakeholders would prefer affirmative or super-affirmative procedure is because these procedures provide the opportunity to consider the proposed regulations in draft before they are made. The Committee welcomes that the Deputy First Minister and Cabinet Secretary for

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<sup>8</sup> Scottish Parliament Subordinate Legislation Committee. *Official Report*, 17 April 2012, Col 361.

<sup>9</sup> Scottish Parliament Subordinate Legislation Committee. *Official Report*, 17 April 2012, Col 360.

Health, Wellbeing and Cities Strategy has given a written undertaking to the Welfare Reform Committee that the Scottish Government will make available material on the relevant subordinate legislation from the UK Government as it becomes available and to continue to work with stakeholders throughout the process of developing the Scottish regulations. This is an important commitment and goes a considerable way towards the additional expectations that would be imposed through a super-affirmative form of procedure.

40. The Committee recognises that a formal requirement for consultation drafts to be laid for a standstill period or the blanket application of affirmative procedure could have an adverse effect on the timetable for this project, which is set by matters beyond the Scottish Government's control. Given that the timetable is fixed, a balance is to be struck between using the limited time available to work up proposals fully and allowing time for consultation. Formalising the Cabinet Secretary's offer in the legislative process could risk delivery to time if the necessary information from the UK Government is late or there are subsequent changes made as a result of the consultation processes. All of these possibilities are at least foreseeable.

41. The Committee also accepts that affirmative scrutiny of more minor changes would use up valuable committee and parliamentary time which could be better spent on other matters.

**42. The Committee considers that in these particular circumstances the pragmatic and collaborative approach already adopted by the Scottish Government, stakeholders and the Welfare Reform Committee is likely to deliver a better solution than a formal requirement for consultation or additional procedure. The Committee encourages all parties to continue to work together in this manner.**

43. The Committee recognises that at this point it is not possible to predict whether regulations which modify subordinate legislation will have significant effects or not. The Committee therefore considers that where regulations do not make amendments to primary legislation the Bill should allow the regulations to proceed by either affirmative or negative procedure. The Committee's expectation would be that the Scottish Government would adopt the affirmative procedure unless it is clear that the subject matter is not significant or, where the regulations do have a significant effect, if for reasons beyond the Scottish Government's control there is not enough time to adopt the affirmative procedure.

44. The choice of which procedure to use in any particular case would be one for Ministers to make, in addition to considering whether any existing powers would be more appropriate. However, Ministers would be accountable to the Parliament and to stakeholders for their choice of procedure. Given the close working relationship established with the Welfare Reform Committee, which the Committee expects will continue throughout the implementation of this project, the Committee anticipates that this is a matter which the Welfare Reform Committee could pursue as work on the regulations progresses.

**45. In conclusion, the Committee agrees that regulations which amend primary legislation should be subject to the affirmative procedure as the Bill**

**currently provides. The Committee recommends that regulations which do not amend primary legislation should be capable of being made under either affirmative or negative procedure. The Committee's expectation would be that affirmative procedure would be adopted where the subject matter of those regulations is considered to be significant.**

## **ANNEX**

### **Subordinate Legislation Committee letter to Scottish Government**

In considering its conclusions on the Bill, the Committee would appreciate further information from the Scottish Government regarding the inclusion in the Bill of a sunset clause applying to the delegated powers provisions once the changes consequential on the UK Act have been made.

Although the issue was explored at the meeting today, the Committee would welcome further explanation from the Scottish Government as to why it is considered that this is an unnecessary provision. In particular, can you provide justification for these powers being retained and further information on the consequences of such a provision on the operation of the Bill?

The Committee accepts that sufficient time must be given to address fully the consequences of the UK Act and that this may extend over a significant period of time as the UK changes are rolled out. Also changes made using the powers must obviously continue in effect. However the Committee would like clarification of the need to maintain powers of this nature beyond the period of full transition to the new UK Act system. In particular, would it be possible for any future changes to be considered on a longer timeframe and for more specific powers to be taken at that point if they were required?

### **Scottish Government response to the Subordinate Legislation Committee**

Thank you for your letter of 17 April. You have asked, on the Committee's behalf, for a further explanation as to why we consider that a sunset clause would be an unnecessary provision in our Bill. As you acknowledge, this matter was discussed at our meeting with Committee on Tuesday and there will be a limit as to how much further explanation I can provide as I think that discussion covered the salient points. We do not believe that a sunset clause would be appropriate. Furthermore, we consider that if the Bill were to be amended to include such a clause, that this approach would give rise to additional risk as a consequence.

Taking these points in turn, we believe that a sunset clause would be unnecessary because the Bill's provisions are intended for the longer-term, not just the period immediately affected by the transition to Universal Credit and the Personal Independence Payment. We tried to illustrate this point yesterday by citing the example of an income threshold, which might be set to determine eligibility to passported benefits. Whatever figure is set for the income threshold, this is likely to become less useful over time, as a means of accurately identifying low income for the purposes of entitlement to passported benefits.

This is because inflationary pressures on the cost of living mean that, if a household which is currently in receipt of, for example, an income of £16,000 can hypothetically be said to be in relative poverty in comparison with other households in Scotland, this may not be true in 10 years' time. By that time, inflationary pressures may mean that households with an income of above

£16,000 may also be at an equivalent relative level of poverty. We would require to adjust the income threshold, in order to ensure that we could continue to accurately capture households with low, relative incomes over time and not exclude those which are at risk of falling into poverty as the cost of living rises.

As things stand, we would be able to make this adjustment using the powers enabled by the Bill. If these powers ceased, because of a sunset clause, we might then have to recourse to further primary legislation – which we do not consider to be a useful or effective use of government or Parliamentary resources. We believe therefore, that this requirement, to use a term from yesterday, to “futureproof” our eligibility criteria for passported benefits justifies these powers being retained in order to keep the related legislation operating effectively over time. I hope this also clarifies the need to maintain powers of this nature beyond the period of full transition to the new UK Act system.

You also asked for further information on the consequences of a sunset clause for the operation of the Bill. We believe that one consequence would be to give rise to additional risk. This is the risk that - if the UK Government were to decide to amend the welfare system in the future, in a way which in turn, also effected devolved legislation - then Scottish Ministers might need to react quickly in order to deal with the implications of those changes. We would expect UK amendments to be made by way of subordinate legislation, which the UK Government would be able to do, in part because the powers delegated by the UK Welfare Reform Act 2012 are not subject to a sunset clause.

For as long as Scottish Ministers are able to use the enabling powers proposed in our Bill, then they would be able to bring about adjustments to timescales which would likely be equivalent to those undertaken in the UK. Depriving Scottish Ministers of these powers could, at some future point, result in a need for further primary legislation which would in turn, potentially cause delay and a risk to continued provision. We believe that we have been quite explicit thus far, about the Scottish Government’s wish in bringing forward this legislation, to avoid any risk to the provision of passported benefits.

Finally, you asked if it would be possible for any future changes to be considered on a longer timeframe and for more specific powers to be taken at that point if they were required. We do not see any reason why this would not be theoretically possible. However, we do not believe that this approach would be as effective a means of ensuring continued provision as the one taken in the Bill. To reiterate something I said on Tuesday, “the primary policy intent of this Bill is to ensure continued access to passported benefits”. Introducing a sunset clause would not, in our view, ensure continued access – it would ensure access for a fixed period, after which the same issue would have to be addressed again.

We understand, to an extent, Committee’s concern about delegating these powers in perpetuity. However, we feel that the existing Parliamentary procedures for scrutinising regulations, such as those which will be made under the Bill, should provide sufficient assurance that these powers will be used appropriately.

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