



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

57th Report, 2014 (Session 4)

Welfare Funds (Scotland) Bill

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Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (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.
 - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

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Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
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Delegated Powers and Law Reform Committee

57th Report, 2014 (Session 4)

Welfare Funds (Scotland) Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 24 June, 5 August and 7 October, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Welfare Funds (Scotland) Bill at stage 1 (“the Bill”)¹. The Committee submits this report to the 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”)².

OVERVIEW OF BILL

3. This Government Bill was introduced on 10 June 2014, by Nicola Sturgeon MSP. The lead Committee is the Welfare Reform Committee.
4. In outline, the Bill is designed to make provision for the establishment of welfare funds which will be maintained by local authorities. Welfare funds will operate on a discretionary basis, and are intended to (1) provide a safety net in an emergency when there is an immediate threat to health and safety and (2) enable people to live, or to continue to live, independently preventing the need for institutional care.
5. The Policy Memorandum notes that this Bill, together with associated regulations and guidance which will be produced in due course, are designed to set out arrangements which have been in place on an interim basis since April 2013 (“the interim scheme”). Following abolition by the Department for Work and Pensions of elements of its Discretionary Social Fund covering this type of relief, funding for Scotland was transferred to the Scottish Government to establish systems. This led to the establishment of the interim scheme, currently

¹ Welfare Funds (Scotland) Bill [as introduced] available here:
[http://www.scottish.parliament.uk/S4_Bills/Welfare%20Funds%20\(Scotland\)%20Bill/b51s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Welfare%20Funds%20(Scotland)%20Bill/b51s4-introd.pdf)

² Welfare Funds (Scotland) Bill Delegated Powers Memorandum available here:
http://www.scottish.parliament.uk/S4_Bills/WF_DPM_final.pdf

administered by local authorities under section 20 of the Local Government in Scotland Act 2003.

6. The Scottish Government now wishes to legislate to put the interim scheme on a permanent footing. The Scotland Act 1998 (Modification of Schedule 5) (No. 2) Order 2013 (“the Order”) widened the legislative competence of the Scottish Parliament to enable it to legislate on the provision of local welfare assistance.

DELEGATED POWERS PROVISIONS

7. The Committee considered each of the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

- Section 5 – Welfare funds: further provision
- Section 6 – Guidance

8. At its meeting of 24 June, the Committee agreed to write to the Scottish Government to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the **Annex**.

9. The Committee’s comments, and where appropriate, recommendations on the remaining delegated powers in the Bill are detailed below.

Section 4(1), (2) and (5) – Review of decisions

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative procedure

10. Section 4(1) and (2) provide that regulations may be made to require local authorities to review the decisions made by them under section 2, as to the use of welfare funds. The regulations may make all decisions subject to review, or they can set out particular types of decision which would be subject to review.

11. The regulations can set out that decisions of a reviewable type only require to be reviewed in particular circumstances. Section 4(3) provides that if dissatisfied with the outcome of such review, the individual concerned may apply to the Scottish Public Services Ombudsman (“the Ombudsman”) for a further review.

12. The DPM explains that section 4 is considered necessary by the Scottish Government, to allow requirements to be placed on local authorities to carry out reviews of decisions in relation to applications for assistance through welfare funds. Regulations are considered more suitable, to set out the details of which decisions need to be reviewed. This will allow the flexibility to restrict or widen the category of reviewable decisions, in the light of experience with the operation of the welfare funds over time.

13. The right to obtain a review of a decision on funds used for immediate short term or community care needs may be significant to the individuals who may be

affected by the exercise of this power. Section 4(3) provides that the right to a further independent review to the Scottish Public Services Ombudsman applies where an individual is dissatisfied with the outcome of a first review. That “second tier” right of review pre-supposes that a first review has been required by regulations.

14. Accordingly the Committee sought further explanation why it has been considered appropriate that section 4(1) is framed as permissive - allowing the Scottish Ministers to regulate to require local authority reviews - rather than requiring regulations which will put the review process in place. Further, section 4(2)(a) provides for a choice which may be implemented by the Ministers in the regulations - that all decisions under section 2 may be subject to review, or only certain types of decision would be subject to review. The Committee therefore also sought explanation why (similarly) this power is framed as permissive, to allow the Scottish Ministers to regulate to implement one of these 2 options, rather than requiring the regulations to provide for one option.

15. The Committee also asked for more information as to how it is envisaged that this power could be used.

16. The Scottish Government’s response in the Annex generally explains the policy intent - that there should be a power to require Councils to review decisions made under section 2, but the possibility should be left open that not every decision should be subject to review. The response acknowledges that the section may have been framed in different ways, but the Government has considered that section 4(1) and (2) provide an appropriate way of delivering the policy.

17. The Scottish Government has also provided a couple of examples of how the powers could be used. Regulations under section 4(2)(a) could specify it is not appropriate for there to be a right to require review of a decision to refuse assistance out of a welfare fund, where there are no monies left in the fund at the time of the application. The power under section 4(2)(b) to provide for circumstances in which decisions are to be reviewed might be used to put a time limit on a request for assistance, before a review is required.

18. The Committee considers that an issue of principle remains: why, given the significance of the rights to have decisions on crisis grants and community care grants reviewed, is there a *discretionary* power to make regulations, rather than there simply being a *requirement* placed on the Scottish Ministers to make regulations which either say that all decisions are reviewable, or some of them, and which provide for the circumstances in which decisions are to be reviewed?

19. While the Government’s present intention may be to put suitable regulations in place forthwith once section 4 has been brought into force by a commencement order, the Bill terms do not secure this. The provisions allow for an indefinite period, before any regulations may be either made, or brought into force.

20. The Committee has also considered that in terms of section 4(3), the ability to have a second independent review by the Ombudsman of a local authority decision on an application depends on the ability to have an initial review under the regulations. This is more than a matter of administrative detail – a wide scope

is proposed in the section, to specify any types of decision which would be subject to review (or otherwise), and also the circumstances in which reviewable decisions are to be reviewed (or otherwise).

21. The policy intention is that there should be a power to require local authorities to review decisions made by them under section 2, “but that the possibility should be left open that not every decision should be subject to review”. While the Scottish Government has provided a couple of examples of how this power might be used, the Committee is unclear why the wide power in section 4(2) requires to be taken, to provide for *any* types of decision which would be subject to review, or to provide for *any* circumstances in which reviewable decisions are to be reviewed (at the discretion of the Scottish Ministers).

22. It appears therefore that there could be scope to draw the power more narrowly. The Scottish Government has acknowledged that the powers in section 4(1) and (2) could be formulated differently. For example, a more defined approach would be to list, in various heads, the types of decision that may be subject to review, or which may be excluded from review, or the circumstances in which decisions could be reviewed. If such an approach could be taken, then in being asked to approve the terms of section 4 the Parliament would be approving a range of permissible types of decision and circumstances, in respect of which the right of review by the local authority and the Ombudsman could apply, or could be excluded (if not all decisions are to be reviewable). Within that range, the regulations would later specify the types of decision that would be subject to review, or the circumstances in which decisions could be reviewed.

23. The Committee notes that a comparable approach, listing various heads of possible provision that could be in the regulations, is taken in section 5(2), concerning the powers to make further provision in connection with the Act.

Affirmative or negative procedure

24. Section 4(5) provides that the regulations are subject to the negative procedure. The DPM states that this has been considered appropriate because matters of administrative detail would be covered in the regulations. This is considered to provide a suitable balance between “expedition and convenience” and the need for scrutiny of which decisions under section 2 should be reviewed.

25. The powers do not only cover matters of administrative detail – the regulations will provide substantive rights to have the decisions of local authorities reviewed. As above this power is of wide scope, as the regulations can determine which decisions of local authorities under section 2 would be subject to review, and determine the circumstances in which decisions would be reviewed. For any affected individual, the right to have a local authority decision on an application for welfare funds reviewed may be a significant matter.

26. The Committee therefore considers that, as the powers are presently framed in section 4(1) and (2), the regulations should be subject to the affirmative procedure, unless there is good reason why that procedure would not be suitable.

27. The Committee therefore reports as follows, in relation to the powers in section 4(1), (2) and (5):

28. The Committee notes that the Scottish Government considers these powers are framed appropriately to implement the policy intentions, but it acknowledges that the formulation in section 4(1) and (2) could have been framed in various different ways.

29. Given that it is proposed to delegate powers to the Scottish Ministers to implement the requirement for local authorities to review decisions made under section 2, the Committee considers that in principle there should be a requirement for the regulations under section 4(1) and (2) to be brought into force within an appropriate period following the passing of the Bill, rather than there being a discretion to make regulations. In relation to section 4(2), the Committee sees no good reason why there should not be a requirement to provide for the matters set out in the subparagraphs (a) and (b), rather than this being discretionary.

30. The Committee also draws to the lead committee's attention that, where regulations propose to make only some types of decision subject to review, or provide for the circumstances in which reviewable decisions are reviewed, the section confers wide power to specify any such types of decision and circumstances. The right of an affected individual to obtain a review of a local authority decision under section 2 is a significant matter, and in terms of section 4(3) a right of further review by the Ombudsman is dependent on there being a right of first review under the regulations.

31. The Committee considers that the delegated powers to specify in regulations the types of decision and the circumstances of review should be drawn as narrowly as may be appropriate, and consistent with conferring on persons suitable rights to review the decisions made by local authorities under section 2.

32. The Scottish Government should consider for Stage 2 of the Bill whether section 4(2) could identify the proposed range of the types of decision which may be subject to review, of the types which may be excluded from review, and of the circumstances in which decisions are to be reviewed. That approach would have the benefit that Parliament would be asked to approve within the Bill the range of the types of reviewable decision and circumstances of review, which would be the permitted parameters for the review system. The regulations could then propose the types of decision to be subject to review and the circumstances for review, within those parameters.

33. The decision in accordance with section 4(2) as to the types of decision which would be subject to review, and the circumstances in which decisions are to be reviewed, is a significant matter for those persons who may be affected by the proposals. The Committee therefore considers that, as the powers are presently framed in section 4(1) and (2), the regulations should be subject to the affirmative procedure, unless there is good reason why that procedure would not be suitable. If the powers in section 4 are amended

at Stage 2, the Committee will re-consider the scrutiny procedure proposed, after that Stage.

Section 7 – Commencement

Power conferred on:	Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Laid, no further procedure

34. Section 7 enables sections 1 to 6 to be commenced by order. Section 7(3) provides that any commencement order may include incidental, supplementary, consequential, transitional, transitory or saving provision.

35. The Delegated Powers Memorandum states in relation to section 7 that as the Bill provides for setting on a statutory footing the ongoing arrangements for the provision of welfare funds by local authorities, this possibly may give rise to the need to include transitional or other supplementary provisions in a commencement order.

36. The Committee considers that it is not usual for the commencement powers in a Bill of this scope to include powers to make *incidental, supplemental or consequential* provision, where the power is not subject to the negative procedure. On the other hand, it is more usual for the commencement powers to include powers to make *transitional, transitory and savings* provisions, subject to the “laid only” procedure. The Committee therefore sought an explanation.

37. The Scottish Government’s response in the Annex has explained that it is unlikely that any provision of particular consequence may be required under section 7(3) (which permits incidental, supplementary, consequential, transitional, transitory or saving provisions). The response also explains that as the Bill is introducing a new statutory regime, it does not include a section enabling ancillary provisions by means of a “free-standing” order (not a commencement order). Some ancillary powers are therefore needed, given that Councils are operating at present a non-statutory system for welfare funds which is broadly equivalent to the system in the Bill.

38. The Committee considers that the *likelihood* whether ancillary provision could be required under section 7(3) is not of any particular relevance to the Parliamentary scrutiny procedure which should be applied to the provisions. The Scottish Government’s explanation to the Committee has offered no analysis why any incidental, supplementary or consequential provision that might be made in a commencement order should not be subject to the right of the Parliament to annul the provision, should the Parliament determine that it is unacceptable. The Committee is firmly of the view that any such ancillary provisions made in a commencement order under this Bill should be subject to the negative procedure.

39. The Committee reports as follows, in relation to the commencement powers in section 7.

40. Section 7(3) is not a usual provision within commencement powers, so far as it proposes that a commencement order made under section 7(2)

could make incidental, supplementary, or consequential provision, as well as making transitional, transitory or saving provision.

41. The Committee acknowledges in light of the Scottish Government's response to it that these ancillary powers might possibly require to be exercised, when provisions in the Bill are commenced. However the Committee considers that the powers to include incidental, supplementary, or consequential provision should be subject to the negative procedure, so that the Parliament would be entitled to annul such provision, should it so determine. It is apparent from the Scottish Government's response that it is not certain what such provision might cover, or indeed whether such provision will actually be required, when the Bill provisions are commenced.

42. If the Scottish Government considers that the position should be consistent between all the types of ancillary provision referred to in section 7(3), then the powers should all be subject to the negative procedure.

ANNEX

Correspondence with the Scottish Government—

On 24 June 2014, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

1. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 24 June and seeks an explanation of the following matters:

Section 4 – Review of decisions

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative procedure

2. Section 4(1) and 4(2) provide that regulations may be made, to require local authorities to review the decisions made by them under section 2, as to the use of welfare funds.

3. The Delegated Powers Memorandum explains that section 4 is considered necessary by the Scottish Government, to allow requirements to be placed on local authorities to carry out reviews of decisions in relation to applications for assistance through welfare funds.

4. Further, section 4(3) provides that the right of a further independent review to the Scottish Public Services Ombudsman applies where an individual is dissatisfied with the outcome of a first review. That “second tier” right of review pre-supposes that a first review has been required by regulations.

5. The Committee asks the Scottish Government:

- **To explain why it has been considered appropriate that section 4(1) is framed as permissive - allowing the Scottish Ministers to regulate to require local authority reviews, rather than requiring regulations which will put the review process in place?**

6. Section 4(2)(a) provides for a choice which may be implemented by the Ministers in the regulations - that all decisions under section 2 may be subject to review, or only certain types of decision would be subject to review.

7. The Committee asks the Scottish Government:

- **Why this power is framed as permissive, to allow the Scottish Ministers to regulate to implement one of these 2 options, rather than requiring the regulations to provide for one option?**
- **How it is envisaged that this power could be used?**
- **What examples could be given of the types of decision that could be made subject to review (or otherwise), and the types of**

circumstances that might be specified in which reviewable types of decision are to be reviewed? and;

- **Why could these not be stated initially in the Bill, though subject to adjustment in future by regulation?**

Section 7 – Commencement

Power conferred on:	Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Laid, no further procedure

8. Section 7 enables sections 1 to 6 to be commenced by order. Any order under section 7 may include incidental, supplementary, consequential, transitional, transitory or saving provision.

9. In regard to section 7(3), the Committee considers that it is unusual in a Bill of this scope for the commencement powers to include power to make incidental, supplemental and consequential provision, where the power is exercisable by an order which is laid before Parliament but is not subject to the negative procedure.

10. **The Committee therefore asks the Scottish Government:**

- **To explain why Parliamentary scrutiny by the negative procedure is not considered appropriate for the exercise of those ancillary powers, or whether the Scottish Government could agree to lodge an amendment at Stage 2 of the Bill, so that the negative procedure would be applied in those circumstances?**

On 15 July 2014, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

Section 4

The policy intent behind section 4 is that there should be a power to require local authorities to review decisions made by them in pursuance of section 2 of the Bill, but that the possibility should be left open that not every such decision should be subject to review.

Whilst the section could have been framed in various different ways, the Scottish Government considers that the formulation in section 4(1) and (2) provides an appropriate way of delivering the policy.

You asked for examples of how the powers in section 4 could be used. Regulations made under 4(2)(a) could specify that it is not appropriate for there to be a right to require review of a decision by a local authority to refuse assistance out of a welfare fund because there are no monies left in that fund at the time of an application being made.

The power within section 4(2)(b) is available to, for example, require review only if a request is made within a certain period of time by or on behalf of an applicant for financial assistance.

The Scottish Government considers that the detail of the review process is better suited to subordinate legislation, following consideration as outlined in section 4 of the Delegated Powers Memorandum.

Section 7

The Scottish Government thinks it unlikely that any provision of particular consequence is likely to require made in terms of section 7(3) of the Bill.

The Bill is introducing a new statutory regime and hence there is no requirement to cover the transition from one statutory regime to another. This is reflected in the fact that the Bill does not include the standard section for ancillary provision to be made by way of a free-standing order. However, the possibility of ancillary provision being required cannot be totally ruled out, particularly given that local authorities are operating at present a non-statutory system for providing financial assistance which is broadly equivalent to the system which the Bill (if enacted) will set up.

In the circumstances, the Scottish Government does not consider there to be any good reason to apply negative procedure to a commencement order which includes provision made by virtue of section 7(3).

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