The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

16th Meeting, 2012 (Session 4)

Tuesday 12 June 2012

The Committee will meet at 2.30 pm in Committee Room 4.

1. **Instruments subject to negative procedure:** The Committee will consider the following—

National Health Service Superannuation Scheme etc. (Miscellaneous Amendments) (Scotland) Regulations 2012 (SSI 2012/163);
Parole Board (Scotland) Amendment Rules 2012 (SSI 2012/167);
Licensed Legal Services (Interests in Licensed Providers) (Scotland) Regulations 2012 (SSI 2012/154);
Sports Grounds and Sporting Events (Designation) (Scotland) Amendment Order 2012 (SSI 2012/164);
Town and Country Planning (Development Management Procedure) (Scotland) Amendment Regulations 2012 (SSI 2012/165);
European Fisheries Fund (Grants) (Scotland) Amendment Regulations 2012 (SSI 2012/166);
Adults with Incapacity (Requirements for Signing Medical Treatment Certificates) (Scotland) Amendment Regulations 2012 (SSI 2012/170);
National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Amendment Regulations 2012 (SSI 2012/171);
Individual Learning Account (Scotland) Amendment Regulations 2012 (SSI 2012/172);
Poultry Health Scheme (Fees) (Scotland) Regulations 2012 (SSI 2012/176);
Animal By-Products (Miscellaneous Amendments) (Scotland) Regulations 2012 (SSI 2012/179);
Property Factors (Registration) (Scotland) Regulations 2012 (SSI 2012/181);
Leader Grants (Scotland) Amendment Regulations 2012 (SSI 2012/182);
Marine Licensing (Fees) (Scotland) Amendment Regulations 2012 (SSI 2012/183).

2. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

   Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 10 and Saving Provisions) Order 2012 (SSI 2012/160 (C.15));
   Bluetongue (Scotland) Amendment Order 2012 (SSI 2012/184);
   Property Factors (Scotland) Act 2011 (Commencement No. 2 and Transitional) Order 2012 (SSI 2012/149 (C.12)).

3. **Scottish Civil Justice Council and Criminal Legal Assistance Bill:** The Committee will consider its approach to the scrutiny of the Bill at Stage 1.

4. **Welfare Reform (Further Provision) (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.

5. **Crime and Courts Bill (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Crime and Courts Bill (UK Parliament legislation).

6. **Electoral Registration and Administration Bill (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Electoral Registration and Administration Bill (UK Parliament legislation).

7. **Local Government Finance Bill (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Local Government Finance Bill (UK Parliament legislation).

Irene Fleming
Clerk to the Subordinate Legislation Committee
Room T2.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5212
Email: irene.fleming@scottish.parliament.uk

The papers for this meeting are as follows—

Agenda Items 1 and 2

Legal Brief (private) SL/S4/12/16/1 (P)

Agenda Items 1 and 2

Instrument Responses SL/S4/12/16/2

Agenda Item 3

Scottish Civil Justice Council and Criminal Legal Assistance Bill - as introduced

Scottish Civil Justice Council and Criminal Legal Assistance Bill - DPM

Briefing Paper (private) SL/S4/12/16/3 (P)

Agenda Item 4

Welfare Reform (Further Provision) (Scotland) Bill - SLC Stage 1 Report

Briefing Paper SL/S4/12/16/4

Agenda Item 5

Crime and Courts Bill (UK Parliament legislation) - LCM

Briefing Paper (private) SL/S4/12/16/5 (P)

Agenda Item 6

Electoral Registration and Administration Bill (UK Parliament legislation) - LCM

Briefing Paper (private) SL/S4/12/16/6 (P)

Agenda Item 7

Local Government Finance Bill (UK Parliament legislation) - LCM

Briefing Paper (private) SL/S4/12/16/7 (P)

SUBORDINATE LEGISLATION COMMITTEE

16th Meeting, 2012 (Session 4)

Tuesday 12 June 2012

Instrument Responses

INSTRUMENTS SUBJECT TO THE NEGATIVE PROCEDURE

Licensed Legal Services (Interests in Licensed Providers) (Scotland) Regulations 2012 (SSI 2012/154)

On 24 May 2012, the Scottish Government was asked:

1. The term "loan creditor" is used in regulations 2(2)(a), 3(2)(a), 4(3)(a) and 5(3)(a). It is not defined in this instrument or in the Legal Services (Scotland) Act 2010. Standing the apparently restricted definition of that term in section 453 of the Corporation Tax Act 2010 for the purposes only of Part 10 (close companies) of that Act, the Scottish Government is asked to explain:
a. what the term means, and – in particular – what the term means in relation to entities which are not close companies;
b. why the Scottish Government considers that meaning to be sufficiently clear to end-users of this instrument in the absence of statutory definition.

2. Regulation 6(2)(c) provides that, for the purposes of regulation 5, "the trustee of any settlement under which the individual has a life interest (in England and Wales a life interest in possession)" is an associate of an investor who is an individual. The Scottish Government is asked to explain:
a. the significance of the reference to a settlement under which the individual has a life interest (as opposed to settlements under which individuals have an interest more generally), and to indicate the circumstances in which this might arise;
b. why the provision includes the bracketed reference to England and Wales, and the effect of so providing.

The Scottish Government responded as follows:

1. Regulations 2, 3, 4 and 5 are all designed to provide more detail in helping to assess the level of a person's interest in a corporate entity, whether it is a licensed legal services provider or a body having an interest in a licensed legal services provider, for the various purposes set out in the Legal Services (Scotland) Act 2010 ("the Act"). In order to make this assessment, regardless of the corporate structure that the licensed legal services provider or entity takes, recourse is to be had to the investor's voting rights, income rights and capital rights.

Regulations 2(2)(a), 3(2)(a), 4(3)(a) and 5(3)(a) provide that any rights that a person has as a loan creditor are to be disregarded for the purposes of ascertaining their rights as an investor. It is necessary to make this provision as, on a return of capital to the members of an entity, for example, an investor may receive an amount in respect of loans made to the entity as well as a return of the capital that was directly

invested. The rationale for making such provision is to ensure that any rights that a member of an entity may accrue through the provision of a loan to the entity are to be disregarded in assessing that individual's rights as an investor.

The Scottish Government considers that this is achieved through the use of the term loan creditor which will be given its ordinary meaning in the context in which it occurs, namely a creditor who has lent money to the entity referred to in the relevant provisions. Defining the term with reference to the definition in the Corporation Tax Act 2010 was not considered to be appropriate as this seeks to limit the ordinary meaning of the term for tax purposes as well as confine its application to companies. No such limitation was necessary for the purposes of the Regulations and given that the Regulations deal with a range of corporate entities it was not appropriate to confine the definition to companies.

Through its consultation with the various bodies which had shown an interest in applying to become approved regulators (and would, therefore, be working with the Regulations in preparing and administering their regulatory schemes), it was apparent that regulations 2(2)(a), 3(2)(a), 4(3) and 5(3)(a) would be construed as the Scottish Government intended.

The Scottish Ministers have the ability to make guidance for the purposes of, or in connection with, Part 2 of the Act under section 46 of the Act and is already working with the bodies that have indicated an interest in applying to become approved regulators to ensure that suitable guidance is prepared on the technical aspects of these Regulations. The Scottish Government is grateful to the legal advisers to the Subordinate Legislation Committee for bringing this issue to our attention and will consider whether it would be appropriate to expand on this matter in the guidance to be issued under section 46.

2. The two basic types of trust which are used by individuals to hold interests in a corporate entity (such as shares in the capital of a limited company) are life interest trusts and discretionary trusts. The trusts allow the individuals in question to benefit from those interests without having legal ownership.

Discretionary trusts do not entitle the beneficiary to the income or capital of the assets held in the trust as a matter of right. In establishing the trust, the settlor confers a discretion on the trustees with regard to the administration of the trust assets which means that a beneficiary may not receive any entitlement to the income derived from the trust assets. The existence of this discretion means it is not appropriate for the trustees of a discretionary trust to be regarded as an associate of the beneficiary as there is a clear break in the link between the beneficiary and the income derived from the trust assets (i.e. the discretion of the trustees).

Life interest trusts give the trustees no such discretion. A life interest trust confers the benefit of the income derived from the trust assets (the life interest or liferent) on a nominated beneficiary (the liferenter) during a specified period while the capital of the trust assets may accrue to another beneficiary on the expiry of that period. Although a life interest will often last for the lifetime of the liferenter this need not be the case and it can be for a specified period. Since the liferenter has an automatic entitlement to any income derived from the trust assets it is considered appropriate

for the trustees of any settlement in which an individual has a life interest to be regarded as an associate of that individual.

A life interest in a trust is known as a “life interest in possession” in England and Wales. Regulation 6(2)(c) references this so that a trustee of any settlement under which an individual has a life interest in possession would also be regarded as an associate of the individual for the purposes of ascertaining the individual’s interest in a licensed legal services provider in regulation 5.

This is consistent with the manner in which the term “associate” has been defined in a similar context in paragraph 5(2)(c) of Schedule 13 to the Legal Services Act 2007.

The Scottish Government is grateful to the legal advisers to the Subordinate Legislation Committee for bringing this issue to our attention and will, again, consider whether it would be appropriate to expand on this matter in the guidance to be issued under section 46 of the Act.

National Health Service Superannuation Scheme etc. (Miscellaneous Amendments) (Scotland) Regulations 2012 (SSI 2012/163)

On 30 May 2012, the Scottish Government was asked:

(1) Regulation 1 provides that regulation 27 has effect from 1 April 2008. However that regulation introduces the amendments made to the National Health Service (Scotland) (Injury Benefits) Regulations 1998 by regulations 28 and 29. Regulation 1 also provides that regulation 28 has effect from 28 June 2012, and regulation 29 has effect from 11 August 2011.

(a) Could you clarify on which dates it is intended that regulations 27 to 29 have effect?

(b) Could the provisions be clearer, if it is intended that regulation 28 has effect from 1 April 2008 rather than 28 June 2012 - consistently with regulation 27 having effect on 1 April 2008?

(c) Could the provisions be clearer, in respect that regulation 27 amends SI 1998/1594 in accordance with regulation 29 and has effect from 1 April 2008, but regulation 29 has effect from 11 August 2011? Why is it appropriate that regulation 27 has effect before 29, rather than on the same date?

(2) In regulation 7(c), (inserting regulation T3(10) in the 2011 Regulations), is the reference to section 273C of the 2004 Act an error, and should it refer to section 237C, as there is no section 273C? Assuming you agree, would you propose to correct this by an amendment?

The Scottish Government responded as follows:

(1a). Regulations 27 and 28 are to take effect on 1st April 2008. Regulation 29 is to take effect on 11th August 2011.

(1b). Regulation 1(2) is clear that the regulations have effect from 28th June 2012 except as provided in paragraphs (3) to (10) of that regulation. The exception in paragraph (3) provides that regulation 27 has effect from 1st April 2008. Since regulation 27 applies the amendment in regulation 28 it is clear that regulation 28 also has effect from 1st April 2008.

(1c). Although regulation 27 (which has effect from 1st April 2008) applies the amendments in regulation 29, the specific exception in regulation 1(6) makes it clear that regulation 29 is to have effect from 11th August 2011 as opposed to 1st April 2008. The same effect could be achieved in other ways but we think that the effect of these provisions is clear.

(2).The inserted provision should refer to section 237C instead of section 273C. Since it is clear from the context (and the absence of section 273C) that the provision is intended to refer to section 237C, we think that a court will construe that it refers to section 237C. In any event, the inserted provision applies only in relation to charges that are “due”. Since those charges will not be due if the exceptions in

section 237C apply, the inserted provision will have the same effect. We will however rectify this error by correction slip.

Parole Board (Scotland) Amendment Rules 2012 (SSI 2012/167)

On 31 May 2012, the Scottish Government was asked:

1. Rule 7 of these Rules amends rule 14 of the Parole Board (Scotland) Rules 2001 ("the principal Rules") and, in particular, rule 14(2) is amended so that any case (other than a case to be dealt with by way of an oral hearing under rule 15A) may be dealt with by any 2 members of the Board appointed by the chairman for that purpose. Rule 14(2) accordingly appears to confer a discretion to appoint 2 members of the Board to deal with a case. However, it appears from subsequent provisions (and the Explanatory Note) that the intention is that 2 is the minimum number of members required to deal with a case, but that the Board might be constituted by a greater number of members. Standing the discretionary nature of rule 14(2) (and hence the possibility of the whole Board considering a matter if that discretion is not exercised), the Scottish Government is asked to explain the basis for relying on rule 14(2) to appoint more than 2 members to deal with a case.

2. Rule 14(6) of the principal Rules refers to the appointment under paragraph (2) of Board members for the purposes of a rule 15A hearing. Given the insertion of the words "other than a case that is to be dealt with by way of an oral hearing under rule 15A" into rule 14(2) by rule 7(b)(ii) of these Rules, the Scottish Government is asked to explain how rule 14(2) can be used to appoint members of a Board for the purposes of rule 15A.

3. Rule 14(7) of the principal Rules applies subject to rule 14(8), which is inserted by these Rules. As rule 14(7) appears only to apply in relation to members of the Board who have been appointed under rule 14(2) (and hence where the Board is constituted by 2 members), the Scottish Government is asked to explain how rule 14(7) could ever apply without rule 14(8) being triggered, and what purpose the alternatives in rule 14(7)(a) and (b) then serve as rule 14(8) would appear to override them.

4. Rule 15H of the principal Rules is amended to provide for the situation where the Board appointed for a rule 15A hearing (which would ordinarily have 3 members) has been reduced to 2. As before, rule 14(7) in relation to absent members appears only to apply in relation to members of the Board who have been appointed under rule 14(2). The Scottish Government is accordingly asked to explain how the newly-inserted rule 15H(3) could have effect, and the basis for the Board appointed for a rule 15A hearing reducing from 3 to 2 members.

5. Rule 16 of the principal Rules is substituted in its entirety by rule 13 of these Rules. Rule 16(2) refers to the situation where a Board constituted by 2 members cannot reach a unanimous decision, and obliges the chairman to appoint a third member "in terms of rule 14(2)". The Scottish Government is asked to explain why rule 14(2) is considered to give a power to appoint a third member.

The Scottish Government responded as follows:

We accept the Committee's points on this instrument and accept that the drafting of S.S.I. 2012/167, in particular rule 7, does not adequately deliver the intended policy, which is to allow the Board to operate with a *quorum* of 2 in certain cases. We apologise for that, and are grateful to the Committee for pointing out the issue.

It is our view that the issues raised all flow from the amendments made to rule 14(2) of the principal rules by rule 7 of S.S.I. 2012/167. We propose to address these issues by urgently laying a further set of amendment rules to revoke and replace rule 7 of the present rules with a new rule that takes account of the Committee's points.

It is anticipated that only a small amount of re-drafting will be required to correct the issues that the Committee have raised. In particular, we will seek to -

- Clarify the relationship between rule 14(2) of the principal rules and other rules (as amended by S.S.I. 2012/167), in particular rules 14(7), 14(8), 15H and 16;
- Make clear in what circumstances and on what basis the Board can appoint further members to deal with a case.

INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Property Factors (Scotland) Act 2011 (Commencement No. 2 and Transitional) Order 2012 (SSI 2012/149 (C. 12))

On 23 May 2012, the Scottish Government was asked:

Paragraph 2 of the Executive Note states twice that the transitional provision in article 3 is designed to protect property factors from the section 12 offence provision where a factor starts operating after 1 July, and they submit an application for registration "by 1 October". Paragraph 1 refers to "the 1 October deadline". Article 3(a) provides that the requirement for exemption is that the person "is so operating on 1 October 2012 *having made* an application for entry in the register".

Could you clarify whether it is intended that an application should be made by close of 30 September or 1 October, for the transitional exemption to apply? If the latter, is the statement of the deadline in article 3 sufficiently clear?

The Scottish Government responded as follows:

The aim of the transitional provision is to extend the effect of section 12(2) of the parent Act to those who begin operating as a property factor after 1 July 2012 when section 3 comes into force. The drafting follows section 12(2) closely and therefore means that the application must have been submitted by the date on which the person is assessed as acting as a property factor. This is in line with the construction of legislative requirements for things to be done "by" or "on" a particular date which are construed as referring to things being done on the whole of the day in question.

In other words, the intention is that, as with section 12(2), an application for registration made at any time before midnight at the end of 1 October 2012 would be covered by the transitional provision. As with section 12, the drafting relies on tense to make the position clear.

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 10 and Saving Provisions) Order 2012 (SSI 2012/160 (C.15))

On 25 May 2012, the Scottish Government was asked:

1. Section 205(1) of the 2010 Act contains the express power to make savings provisions in connection with a commencement order. Would you agree that section 205 is being relied on to make the savings in article 4, and so should have been cited in the preamble? Otherwise, given that a specific power is conferred for this purpose, why is article 4 considered to be a proper and usual exercise of the powers in section 201 and 206?

2. Section 201(3) provides that commencement of provisions under section 206 is not subject to procedure (laid only), but an order using the powers in section 205 is subject to the negative procedure. Assuming you agree that the powers in section 205 are being relied on, would you agree that the whole provisions of this order are made in reliance of the power to combine negative and "laid only" provisions in section 33 of the Interpretation and Legislative Reform (S) Act 2010 ("ILRA"), and so the instrument is subject to the negative procedure?

3. If it is agreed that section 205 of the 2010 Act and section 33 of ILRA should have been included in the preamble as enabling powers, please explain the effect of the omission, given that the preamble does not include reference to other enabling powers available to make the instrument?

4. Article 3 applies the commencement of provisions to criminal proceedings commenced on or after 25 June 2012, irrespective of the date the offence was committed. However sections 168 and 171 of the 2010 Act provide for new statutory tests in relation to the special defence available to persons who lack criminal responsibility by reason of mental disorder at time of committing the offence; the plea of diminished responsibility; and the abolition of all common law rules on the special defence of insanity and the plea of diminished responsibility. These are substantive matters of criminal responsibility and penalty, rather than procedure. It appears that article 3 would have the effect of altering the substantive rules on criminal liability, in relation to relevant acts or omissions constituting offences committed before 25 June.

a. Could you fully explain why the commencement powers in section 201 and 206 of the 2010 Act permit the application of sections 168 and 171 to acts or omissions constituting offences which were committed before the date this order comes into force, and so in a different manner?

b. Could you explain whether and how, in consequence of the application of sections 168 and 171 to offences committed before 25 June 2012, any persons could be convicted of an offence, or subject to a higher penalty, who would not otherwise have been convicted if applying the law applicable to the relevant acts or omissions when done? If so, could you fully explain why the application provision in article 3 complies with article 7(1) of the European Convention on Human Rights, which prohibits the retrospective application of offences, so as to penalise conduct which was not criminal at the time when the relevant act or omission occurred?

The Scottish Government responded as follows:

1. As cited in its preamble, the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 10 and Savings Provisions) Order 2012 ('the Order') is made under the powers conferred by sections 201(1), (2) and 206(1) of the Criminal Justice and Licensing (Scotland) Act 2010 ('the Act'). In particular, saving provision is competently included in the Order by virtue of the reference in the preamble to section 201(2) of the Act. Section 201(2) enables the Scottish Ministers to make 'such incidental, supplementary, consequential, transitional, transitory or saving provision' in an order as they consider necessary or expedient.

As such, we do not agree that it was necessary for section 205 (Transitional provision etc) of the Act to be cited in the preamble of the Order Act to enable the making of saving provision. Indeed, we note that the following commencement orders made under the Act all included transitional or saving provision and none cited section 205 in their preambles: SSI 2010/385 and 413, 2011/157 and 178, 354. In this context, the saving provision made relates directly to the coming into force of the Act. As such in our view it was appropriate to include them in this Order rather than in a separate Order made under section 205(1). In other contexts, citation of section 205(1) may be necessary or appropriate and in particular, when textually amending an enactment.

2 & 3. In light of our reply to question 1, these questions do not require to be answered.

4a. As already explained, the Order has been made under authority of section 201(2) of the Act (amongst other powers). Section 201(2) of the Act enables the Order to contain saving provision. It also confers power to make different for different purposes.

4b. Before addressing the issue you raise, it may be helpful to explain our approach to commencement. In general terms, the provisions commenced by the Order will apply to any criminal proceedings begun on or after 25th June 2012, even if the conduct giving rise to the proceedings occurred before that date (Article 3). We have excepted from that general approach, changes made to the common law of diminished responsibility (Article 4(2)). The common law of diminished responsibility will continue to apply to proceedings commenced on or after 25th June 2012 where the conduct giving rise to the proceedings occurred before that date. In our view, it was necessary to adopt this approach in relation to diminished responsibility as developments in the common law since the Act received Royal Assent gave rise to the possibility that the abolition of the common law rules and the substitution of the provisions to be inserted as section 51B of the Criminal Procedure (Scotland) Act 1995 might have had the effect of making the plea of diminished responsibility unavailable in circumstances where it would otherwise have been available. The effect of Article 4(2) is to ensure that in those cases the common law of diminished responsibility will continue to have effect.

As such, the issue that you have identified arises only in relation to the abolition of the special defence of insanity and the application of section 168 of the Act. The provisions in section 168 that are to be inserted as section 51A of the Criminal

Procedure (Scotland) Act 1995 replicate, in all material respects, the terms of the draft provision proposed by the Scottish Law Commission ('the Commission') in its Report on Insanity and Diminished Responsibility published in July 2004. In paragraph 5.66 of that Report, the Commission considers the issue raised. It states that the changes recommended to the special defence of insanity 'do not have the effect of imposing criminal liability when none existed before, but of potentially removing or reducing such liability'. It went on to recommend that the new law should apply to all cases where proceedings are commenced after the relevant provisions come into force.

The Scottish Government agrees with the Commission's assessment of the effect of the new provisions. The traditional formulation of the state of mind required to establish the special defence of insanity is that of a 'total alienation of reason' in regard to the crime charged. This is already interpreted as requiring the existence of a mental illness, and as excluding states of mind induced through the consumption of drugs or alcohol. However, the new provisions make clear that the availability of the defence is less dependent on the severity of that condition, as implied in the 'total alienation of reason' test, than on the impact the condition in question has on the ability to appreciate the wrongfulness of the act.

The Commission also concluded that it was already the case that the condition of psychopathy does not fall within the ambit of the existing special defence. The terms of section 51A(2) would not therefore operate to deprive an accused of a defence that existed previously.

In conclusion, we are content that our approach to commencement will not result in persons being convicted of an offence they could not have been convicted of, or subject to a higher penalty than that which could have been imposed, under the law applying at the time of the relevant acts or omissions.

On consideration of this response, on 31 May 2012 the Scottish Government was then asked:

Article 3 of the Order is not stated to be subject to article 4. In relation to section 168 of the 2010 Act (so far as inserting section 51B of the 1995 Act) and section 171 of that Act (so far as abolishing the plea of diminished responsibility) ("the provisions"), article 3 brings the provisions into force on 25 June 2012, and applies them to proceedings on or after 25 June 2012 – but where an offence was committed before 25 June 2012. Article 4(2) provides that in relation to those proceedings and those offences committed before that date, the provisions are not commenced, and the common law of diminished responsibility continues to apply.

Please explain—
(a) why article 3 required to apply those provisions, from 25 June 2012, to offences committed prior to that date, rather than article 4(2) alone providing for the saving and incidental application provision, and

(b) how this apparent contradiction between the articles is resolved, so that only article 4(2) must be given effect?

The Scottish Government responded as follows:

The explanatory notes to the Order set out in plain English our approach to commencement, namely:-

"The provisions come into force on 25th June 2012 and apply in general to all criminal proceedings commenced on or after that date, irrespective of when the conduct giving rise to the proceedings occurred. There is one exception to this general approach. In the light of developments in the common law of diminished responsibility that have occurred since the Act received Royal Assent, section 168 of the Act (in so far as inserting section 51B in the Criminal Procedure (Scotland) Act 1995) does not apply where the conduct giving rise to the proceedings took place before 25th June 2012, even when the proceedings are commenced after that date. In such cases the common law of diminished responsibility continues to have effect."

In our view, Article 3 (Commencement of provisions) and Article 4(2) (Savings provision) of the Order clearly give effect to the above approach. In particular, Article 3 deals with commencement more generally (including the abolition of the plea of diminished responsibility) and Article 4(2) ensures that notwithstanding the general approach, the common law of diminished responsibility is preserved in certain cases. In our view, it is clear from the approach taken that Article 3 of the Order is subject to Article 4.

As question (a) infers, there are no doubt various ways in which the Order could have been drafted to deliver the approach set out in the explanatory note. Notwithstanding that, we are content that the interaction between Articles 3 and 4(2), and the overall legal effect of the Order, is clear.

We note that question 5b seems to suggest that the Order should have expressly stated that Article 3 of the Order is subject to Article 4. As already indicated, we disagree. Given the context, we consider the interaction between the provisions self-evident. The very essence of the savings provision (like any other savings provision in a commencement order) is to modify the general approach to commencement.

Bluetongue (Scotland) Amendment Order 2012 (SSI 2012/184)

Breach of laying requirements: letter to Presiding Officer

The Bluetongue (Scotland) Amendment Order 2012 SSI 2012/184 was made by the Scottish Ministers under section 72 of the Animal Health Act 1981 on 31 May 2012. It came into force on 5 June 2012 and is being laid before the Scottish Parliament today, 6 June 2012.

Section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) ("the 2010 Act") has not been complied with. In accordance with section 31(3) of the 2010 Act, this letter explains why.

The Order gives effect to an EU obligation – Commission Implementing Regulation (EU) No 456/2012. This was published in the Official Journal on 31 May 2012 (OJ No L 141, 31.05.2012, p7). By article 2 of the Regulation it was provided that it would come into force on the fifth day following its publication – i.e. 5 June 2012. Given the closure of the Parliament from 1 June to 5 June, 6 June is the earliest day on which the Order can be laid.

SUBORDINATE LEGISLATION COMMITTEE

16th Meeting, 2012 (Session 4)

Tuesday 12 June 2012

Welfare Reform (Further Provision) (Scotland) Bill – Scottish Government Response

Background

1. The Subordinate Legislation Committee reported on the delegated powers in the Welfare Reform (Further Provision) (Scotland) Bill on 25 April 2012 in its 22nd Report of 2012.

2. The Cabinet Secretary for Health, Wellbeing and Cities Strategy responded to the report in a letter on 1 June 2012. The response is reproduced in the appendix to this paper.

3. The Bill is due to be considered at Stage 2 on Wednesday 13 June. The Committee will only have a formal role after Stage 2 if any amendments are agreed to which amend the delegated powers provisions in the Bill.

4. However, the Committee is invited to consider the Cabinet Secretary's response in advance of Stage 2. This paper summarises the response and sets out suggested action.

Committee report

5. In its report at Stage 1, the Committee made six substantive points. These covered both the scope of the delegated powers in the Bill and the parliamentary procedure that should apply to the exercise of those powers.

6. First, the Committee accepted that it is appropriate in principle to delegate the powers in the Bill, but it considered that those powers could have a significant impact in practice (paragraph 13). Secondly, the Committee noted that it was reassured that the Scottish Government had committed to fulfilling existing consultation requirements, when appropriate, even when it exercises powers under the Bill rather than the existing ones (paragraph 19).

7. The Committee was content with the scope of the powers so far as they are necessary to enable the UK Act to be fully embedded with devolved matters (paragraph 21). However, the Committee asked that, given the breadth of the general delegated powers, serious consideration should be given to whether they should continue to be available indefinitely, and it recommended that the Parliament be required to review the justification for the continued availability of those powers after the initial implementation period (paragraph 27).

8. In considering the parliamentary procedure under which the powers should be exercised, the Committee concluded that a pragmatic and collaborative approach involving 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 (paragraph 42).

9. The Committee also agreed that, as provided for in the Bill, regulations that amend primary legislation should be subject to the affirmative procedure. However, it recommended that regulations which do not amend primary legislation should be capable of being made under the affirmative or negative procedure (which is sometimes referred to as "open procedure"). It also stated its expectation that Ministers would elect to use the affirmative procedure when the subject matter of the regulations is considered to be significant (paragraph 45).

Scottish Government response

10. In the Scottish Government's response, the Cabinet Secretary welcomes the Committee's report as considered and thought provoking. She also states that she supports the points made in paragraphs 13, 19, 21 and 42.

Review of justification for delegated powers

11. On the first of the other two points, the Cabinet Secretary states that she believes that the recommendation in paragraph 27 – for the justification of the continued availability of the general powers – is inappropriate for three reasons. First, she states that the Scottish Government needs to retain the powers in order to make any adjustments to devolved matters that are consequential to changes made by the United Kingdom Government, and thereby minimise the risk of disruption to provision.

12. Secondly, the Cabinet Secretary states that the Scottish Government requires the powers in order to make adjustments to passported benefits. In particular, it is the Scottish Government's intention to put in place a system of passported benefits using these powers that will operate for the foreseeable future without the need for primary further legislation, and the Cabinet Secretary believes that the review mechanism would interfere with that intention.

13. Finally, the Cabinet Secretary points out that the Parliament will be informed as to the use of the powers via the subordinate legislation process, under which any Member may challenge the subordinate legislation brought forward.

Parliamentary procedure

14. The Cabinet Secretary states that she will consider further the Committee's final recommendation, which was that regulations under the Bill that do not amend primary legislation should be capable of being made under either affirmative or negative procedure. She states that her sense is that stakeholders are more focused on maximising the value and impact of benefits rather than technical matters of parliamentary procedure, but she commits to reflecting further on the issue.

Proposed action

15. It is proposed that the Committee write to the Cabinet Secretary to clarify the Committee's approach to the substantive points in paragraphs 27 and 45 of its report and to seek confirmation of the Scottish Government's plans, particularly considering the tight timescales involved.

Review of justification for delegated powers

16. On the Committee's recommendation for a review of delegated powers, it may be worth re-emphasising to the Scottish Government the reasoning behind the approach in the report, as outlined below.

17. The Committee accepted that it is appropriate in principle to delegate the powers in the Bill in order to achieve the primary objective of ensuring the continued delivery of passported benefits from 1 April 2013. However, it also commented on the breadth of the powers, which go further than those in the original UK Bill, and noted that it is largely the urgency of the current UK welfare reform project and the unknown scope of the current passported benefits that justify the conferral of these broad powers.

18. The Committee considered that the delegation of general powers to permit significant variations once the welfare reform project is completed, without any parameters, was not justified. It therefore called for serious consideration to be given to whether the delegated powers should continue to be available indefinitely. In particular, it recommended that the Parliament should review the justification for the continued availability of the general powers after the implementation of the welfare reform project.

19. As noted at Stage 1, as a result of this process the issue of passported benefits is undergoing a structured review for the first time since devolution. The Parliament is not yet aware of the Government's policy as regards these benefits or what the review's outcomes may be. This is of necessity, since the Scottish Government awaits the detail of the UK Welfare reforms. In these circumstances, the Committee was prepared to accept powers framed more broadly than it would normally consider acceptable.

20. Separately, the Government is seeking authority to regulate passported benefits using delegated powers once the welfare reforms are in place and settled. The circumstances in which the powers to regulate would be available are quite different. The Parliament may wish to scrutinise such a regulatory framework once it has seen the outcome of the welfare reforms, and it may wish to do so over a longer and considered timeframe. It could do so once a position of stability as regards the new UK welfare reforms and their devolved counterparts has been reached.

21. It is with the continued availability of powers which have been framed in a particular way to deal with the immediate legislative imperative that the Committee raised its concerns. Once the circumstances which gave rise to these broad powers no longer exist, the Parliament may wish to give more extensive consideration as to how devolved benefits will be regulated going forward.

Parliamentary procedure

22. As noted in the response, the Cabinet Secretary will reflect further on the Committee's recommendation on the adoption of the open procedure for regulations that do not amend primary legislation. The Committee may therefore wish to reiterate in its response the reasoning for its recommendation, as outlined below.

23. As noted in the Committee's report, stakeholders gave evidence to the lead Committee that, given the importance of the subject matter, the negative procedure is not a sufficient level of scrutiny for instruments that do not make amendments to primary legislation. Indeed, some suggested that a requirement for consultation on draft instruments would be merited in addition to the affirmative procedure (a "super-affirmative" procedure).

24. In its report, the Committee accepted that, given the short timetable for implementation of changes by 1 April 2013, a pragmatic and collaborative approach

is likely to deliver a better solution than a formal requirement for consultation. However, given the fact that regulations that do not amend primary legislation could have significant effects – a fact accepted by Government officials in evidence – the Committee recommended that such regulations should be capable of being made under either affirmative or negative procedure. The choice of procedure would be for Ministers to make, and they would be accountable to the Parliament for that decision.

25. As well as reiterating its thinking, the Committee may also wish to seek from the Cabinet Secretary a response to the recommendation in advance of Stage 3. Stage 3 is expected to be in the last week before summer recess, which would mean that the deadline for Stage 3 amendments is Friday 22 June.

26. In order for the Committee to consider the Scottish Government's response and for the Government to have time to include the Committee's views in its consideration on the Bill in advance of the deadline, the Committee is invited to seek a response from the Cabinet Secretary by Friday 15 June.

Recommendation

27. **Members are invited to note the Cabinet Secretary's response on this matter and agree that a letter be sent by the Convener, on behalf of the Committee, to—**

- **reiterate the reasoning behind the Committee's recommendations on the review of delegated powers in the Bill and on adopting the open procedure for regulations that do not amend primary legislation; and**

- **seek a response from the Cabinet Secretary to allow the Committee to consider it in advance of the Stage 3 amendment deadline on Friday 22 June.**

Appendix

Scottish Government Response

Dear Nigel,

I write in response to the Report of the Subordinate Legislation Committee on the Scottish Government's Welfare Reform (Further Provision) (Scotland) Bill. I am grateful to you and your members for the time and effort you have put in to producing this report, which I found considered and thought-provoking. I'm particularly grateful to the Committee for working within tight timescales due to the need to have effective and robust secondary legislation in place by next April, that supports some of the poorest and most vulnerable members of society.

I am aware that my officials met with Committee on 17 April and that some additional, written evidence was provided by letter on 19 April. I trust this was helpful to Committee, in your consideration and drafting of your report.

As I said to the Welfare Reform Committee, when I appeared before them on 1 May, I am pleased that the evidence given to the three committees involved in the Stage One scrutiny of this Bill has provided a good consensual basis on which to proceed and I am pleased that this is reflected, for the most part, in your report.

Turning to the report itself, I see you make six substantive points. In line with the commitment I made to the Welfare Reform Committee, I have fully considered all of these and am happy to support the four made at paragraphs 13, 19, 21 and 41/42. In particular I am pleased to see at paragraph 41 that the Committee recognises as I do, that the "affirmative scrutiny of more minor changes would use up valuable committee and parliamentary time which could be better spent on other matters".

Let me turn to your remaining two substantive points: at paragraph 27 you have recommended 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".

I do not believe that this would be appropriate for several reasons. Firstly, I believe that it is necessary for Scottish Ministers to retain these powers for as long as the UK Government retains their powers to alter aspects of the welfare system, as enabled by the UK Welfare Reform Act 2012. While these UK powers remain in place, it is possible that the UK Government may make adjustments to the UK system which would, in turn, require consequential adjustments to devolved matters – such as those we are currently preparing to make to devolved, passported benefits. For as long as we retain the powers enabled by this Bill, we would be able to make any such adjustments in a timely and efficient manner by way of subordinate legislation and, by so doing, we would be able to minimise any risk of disruption to provision. Without these powers, we would not be able to do this.

Secondly, as I advised the Welfare Reform Committee on 1 May, Scottish Ministers will require the powers delegated in this Bill in the future, to make adjustments to passported benefits. For example, to adjust an income threshold which triggers entitlement to a particular benefit, in order to take account of an inflationary rise in the cost of living. It is our intention, in bringing forward this Bill, to put in place a

system of passported benefits that will operate without the need for further primary legislation. It seems to me that a review mechanism, such as you propose, would interfere with this entirely sensible intent.

Finally, Parliament will be informed as to the use of these powers via the subordinate legislation process by which any changes will be made. There exist appropriate opportunities for any Member to challenge the subordinate legislation brought before Parliament as a result of this Bill. It is not clear to me how the review mechanism you propose would work in practice and how it would add to this. I do not accept therefore, that the need for an additional parliamentary review mechanism exists.

The remaining substantive point is made in your report, at paragraph 45, where you recommend that “regulations which do not amend primary legislation should be capable of being made under either affirmative or negative procedure”. You have also said your expectation is that “affirmative procedure would be adopted where the subject matter of those regulations is considered to be significant.”

I note that, where the Welfare Reform Committee refers to this recommendation in its report, it has welcomed my commitment to fully consider all of your Committee’s recommendations and has invited me to reflect on the evidence from stakeholders heard by that Committee throughout Stage 1.

My sense of stakeholder concerns is that they are possibly more focussed on how they can help us maximise the value and impact of these ‘lifeline’ benefits within our existing, straitened budgets, rather than with more technical matters of parliamentary procedure important though that is, my feeling is that the focus should be on consultation with stakeholders but I will further consider your recommendation in this respect.

I trust this is helpful and remain, as before, very grateful to you and the members of your Committee for their work on this Bill. I am copying this letter to Michael McMahon MSP, in his role as Convener of the Welfare Reform Committee, for his Committee’s information.

Best wishes

Nicola Sturgeon