The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

20th Meeting, 2012 (Session 4)

Tuesday 18 September 2012

The Committee will meet at 10.30 am in Committee Room 4.

1. **Decision on taking business in private:** The Committee will decide whether to take item 8 in private.

2. **Instruments subject to affirmative procedure:** The Committee will consider the following—

   Crofting Reform (Scotland) Act 2010 (Commencement No. 3, Transitory, Transitional and Savings Provisions) Order 2012 [draft];

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

   Local Government Pension Scheme (Administration) (Scotland) Amendment Regulations 2012 (SSI 2012/236);
   Elmwood College, Oatridge College and The Barony College (Transfer and Closure) (Scotland) Order 2012 (SSI 2012/237);
   Jewel and Esk College and Stevenson College Edinburgh (Transfer and Closure) (Scotland) Order 2012 (SSI 2012/238);
   Bathing Waters (Scotland) Amendment Regulations 2012 (SSI 2012/243);

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

   Children's Hearings (Scotland) Act 2011 (Commencement No. 5) Order 2012 (SSI 2012/246 (C.20));
   Act of Sederunt (Registration Appeal Court) 2012 (SSI 2012/245;
   Public Records (Scotland) Act 2011 (Commencement No. 2) Order 2012 (SSI 2012/247 (C.21));
   Criminal Cases (Punishment and Review) (Scotland) Act 2012 (Commencement, Transitional and Savings) Order 2012 (SSI 2012/249 (C.22)).

5. **Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.

6. **Social Care (Self-directed Support) (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.

7. **Prisons (Interference with Wireless Telegraphy) Bill (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Prisons (Interference with Wireless Telegraphy) Bill (UK Parliament legislation).

8. **Consolidation of instruments:** The Committee will receive an update on the consolidation of Scottish statutory instruments.

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The papers for this meeting are as follows—

Agenda Items 2, 3 and 4

Legal Brief (private)	SL/S4/12/20/1 (P)

Agenda Items 2, 3 and 4

Instrument Responses	SL/S4/12/20/2

Agenda Item 5

Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill - SLC Report	
Briefing Paper	SL/S4/12/20/3

Agenda Item 6

Social Care (Self-directed Support) (Scotland) Bill - SLC Report	
Briefing Paper	SL/S4/12/20/4

Agenda Item 7

Prisons (Interference with Wireless Telegraphy) Bill – Legislative Consent Memorandum	
Briefing Paper (private)	SL/S4/12/20/5 (P)

Agenda Item 8

Briefing Paper (private)	SL/S4/12/20/6 (P)

SUBORDINATE LEGISLATION COMMITTEE

20th Meeting, 2012 (Session 4)

Tuesday 18 September 2012

Instrument Responses

INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE

Crofting Reform (Scotland) Act 2010 (Commencement No. 3, Transitory, Transitional and Savings Provisions) Order 2012 [draft]

On 7 September 2012, the Scottish Government was asked:

1. The power in section 53(2)(b) of the 2010 Act is relied upon to make the transitory and transitional provisions in paragraphs 1, 5(1), 8 and 12 of schedule 2 to the Order. Paragraph 1 makes many textual modifications to the 1993 and 2010 Acts, with effect from 30 November 2012 to 30 November 2013. Paragraphs 5(1), 8 and 12 modify provisions in the 1993 Act, so far as provisions are to be read differently, where the circumstances set out in those paragraphs apply before 30 November 2013.

Section 53(2)(b) of the 2010 Act contains a power "bolted on" to the power to commence the provisions by order, to make transitory, transitional and savings provisions, which does not specify a power to modify enactments. In contrast, section 52 provides a power to modify enactments to facilitate consolidation, and section 54 provides the power by order to make supplementary, etc. (but not transitional or transitory) provisions for the purposes of the Act's provisions, including the power to modify enactments.

In light of that, could you explain why the textual modifications made to primary legislation by Schedule 2, paragraph 1, and the modifications made by paragraphs 5(1), 8 and 12, are considered properly to be within the power conferred by the Parliament in section 53(2), or whether any other powers are relied on to make those provisions?

2. Schedule 2, paragraph 11(2) makes a saving provision, that the coming into force of paragraph 3(9)(c) of schedule 4 to the 2010 Act on 30 November 2012, by virtue of article 3(1)(b), has no effect in relation to an *unregistered* croft, where the application under section 9(1) of the 1993 Act for consent to divide the croft is made before 30 November 2013.

(a) Paragraph 3(9)(c), schedule 4 to the 2010 Act substitutes a new section 9(3) of the Crofters (Scotland) Act 1993 which provides for rules in connection with the consent of the Commission to a division of a croft "in relation to a *registered croft (other than a first registered croft*)". Could you explain why the saving made by schedule 2, paragraph 11(2) of this Order has any effect, because that provision relates to an unregistered croft?

(b) That savings provision appears to provide that paragraph 3(9)(c), schedule 4 to the 2010 Act (modifying section 9(3) of the 1993 Act) will not have effect for unregistered crofts at 30 November 2012, but for the saving to operate, an application for consent to divide the croft requires to be made before 30 November 2013.

Could you clarify (incidentally) how the operation of that savings provision can be determined from 30 November 2012 until 30 November 2013, because the saving to be made with effect from 30/11/12 depends on a condition which can be implemented at any time up to 30/11/2013?

The Scottish Government responded as follows:

1. Paragraphs 1, 5(1), 8 and 12 of Schedule 2 of the Order arise from the commencement of the registration provisions of the 2010 Act in stages. It is necessary to bring the provisions concerned into force on 30 November 2012 in order that they can support other provisions being brought into force on that day. But the full effect of the provisions concerned depends on other provisions which come into force only on 30 November 2013. These paragraphs accordingly make special provision for the effect which the provisions are to have while they cannot have their full effect. Paragraph 1 makes provision about references within the provisions being commenced on 30 November 2012 to provisions which are not being commenced until 30 November 2013. (It is submitted, in passing, that paragraph 1 should not be distinguished on any ground that it goes further and makes textual modifications. Like the other provisions, it leaves the text unchanged and merely instructs that in a certain period, provisions are to be read differently or as if certain words were omitted.) Paragraphs 5(1), 8 and 12 provide that certain actions take effect on entry into the existing Register of Crofts rather than the new Crofting Register.

The two previous commencement orders for the 2010 Act contained provision with similar effect. For example, article 4 of the Crofting Reform (Scotland) Act 2010 (Commencement No.2, Transitory, Transitional and Savings Provisions) Order 2011 (SSI 2011/334) provided that any reference to "the Commission" or "the Crofting Commission" in any provision of the 2010 Act commenced by the Order "is to be read as" a reference to the Crofters Commission.

It is considered that these provisions are within the power conferred on the Scottish Ministers by section 53(2)(b) of the 2010 Act to "make such transitory, transitional or saving provision as they consider necessary or expedient". A classic example of a transitory provision is to provide that until a subsequent legislative change occurs, a reference to that change in a provision of an Act being commenced *is to be read as* a reference to the existing law. It is the function of a transitional provision "to make special provision for the application of the new law to circumstances which exist at the time when it comes into force" (Thornton, *Legislative Drafting*, 4th ed., 383, cited with approval by Lord Keith of Kinkel in *R v Secretary of State for Social Security, ex parte Britnell* (1991) 1 WLR 198 at 202). Such provisions clearly modify the effect of the provision being commenced; otherwise, it is difficult to see what the powers could in fact be used for. In the view of the Scottish Government, it is an inherent element of transitional, transitory or saving provision that it modifies the effect which

the Act being commenced would otherwise have and it is not necessary to provide expressly that the power to make such provisions includes power to modify enactments in order to provide for such modified effect. The position in relation to incidental, supplementary and consequential provisions may be thought to be different in that it is possible to have such provisions without modifying the Act concerned. The difference in approach as between section 53(2)(b) and 54 of the Act can, therefore, be explained.

2(a) Section 9(1A) of the 1993 Act, which is inserted by paragraph 3(9)(a) of schedule 4 to the 2010 Act, prohibits the Crofting Commission from granting consent to a division of an unregistered croft unless an application for first registration is submitted within a given period. Section 9(1A) of the 1993 Act is not brought into force until 30 November 2013. Accordingly, the Commission will until then continue to be able to grant consent in relation to an unregistered croft as it does today. Paragraph 11(1) of Schedule 2 to the Order saves that position where an application for consent in relation to an unregistered croft is outstanding on 30 November 2013. Paragraph 3(9)(c) of schedule 4 to the 2010 Act substitutes for section 9(3) of the 1993 Act two new subsections – subsection (3) and subsection (3A). It is correct that new subsection (3) has no effect in relation to an unregistered croft. Subsection (3A), on the other hand, provides that "The Keeper must make up and maintain a registration schedule in accordance with section 11 of the 2010 Act in respect of a new croft *created by a division under this section*." It is considered that this applies in relation to the division of an unregistered croft as well as the division of a registered croft and it is in relation to this effect of section 9(3A) of the 1993 Act that paragraph 11(2) of Schedule 2 to the Order is directed. It has the effect of disapplying the obligation which section 9(3A) of the 1993 Act would otherwise impose on the Keeper to make up and maintain a registration schedule in relation to new crofts created by a division of an unregistered croft under section 9, where the division is in consequence of an application to divide the unregistered croft made before 30 November 2013 (i.e. the division is one which is occurring under the old law by virtue of paragraph 11(1) of Schedule 2).

2(b) As noted above, paragraph 11(2) of Schedule 2 to the Order then disapplies the requirement which would otherwise be on the Keeper to make up and maintain a registration schedule in relation to the new crofts created by the division of the unregistered croft. The savings provision in paragraph 11(2) of Schedule 2 to the Order comes into effect on 30 November 2012 and operates so that wherever an application for division of an unregistered croft is made before 30 November 2013, the old law continues in effect (i.e. the Keeper is not required to make up and maintain a registration schedule in relation to the new crofts created by the division). For the Keeper's purposes, the relevant factor in determining whether the saving applies in a given case will be the date of the application under section 9(1) for consent to divide the croft.

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Local Government Pension Scheme (Administration) (Scotland) Amendment Regulations 2012 (SSI/2012/236)

On 7 September 2012, the Scottish Government was asked:

1. (a) There are qualifying words "who immediately before the transfer…." at the end of the new paragraphs 44 to 51 of Part II, Schedule 4 to the 2008 Regulations, inserted by regulation 3(2). Are those words intended to qualify the immediately preceding reference to former employees of the Scottish Police Services Authority transferred to the Scottish Police Authority ("SPA") by the Police and Fire Reform (Scotland) Act 2012? Or are they intended to qualify the initial references in each paragraph to former employees of Strathclyde Joint Police Board (or other Boards or Police Authorities) or constituent local authorities, who have transferred to the SPA by that Act? Could this be clearer?

(b) If the latter, why is the drafting considered to be appropriate, given that we do not consider those qualifying words can be read to refer to those initial and immediately preceding references, and not to the second references in each paragraph to employees of the SPA (which have not transferred)?

2. The Explanatory Note states that the Regulations provide that employees (except police officers) of the SPA and of the Scottish Fire and Rescue Service ("SFRS") (other than fire-fighters) are eligible to be members of the local government pension scheme, and that this extends to new employees. However the various categories of employee listed in regulation 3(2) are either employees transferred to SPA or SFRS, or employees who before the 2012 Act would have been employed by the specified authorities.

(a) Could you clarify whether it is intended that the words "any employee of the SPA who prior to the Police and Fire Reform (Scotland) Act 2012 would have been employed, if based on location of employment, by Strathclyde Joint Police Board or constituent local authorities" (taking the first such reference in the new paragraphs 44 to 59 of Part II, Schedule 4 to the 2008 Regulations) are intended to encompass all such new employees of the SPA and SFRS, except police officers and fire-fighters, who are employed after the passing of the 2012 Act ? If not, could you clarify the intended purpose and effect of those words, as that is not explained in the Explanatory or Policy Notes?

(b) If so, could you clarify why the test in those quoted words is appropriate, rather than a simpler reference to all such new employees?

(c) Is it intended (as the drafting suggests) that those quoted words will exclude from eligibility for membership of the appropriate fund any such new employees who could be employed by the SPA or the SFRS—

(i) in any new role which would not before the 2012 Act have been a role that was an employment of the applicable joint police board, police authority or joint fire and rescue board, or

(ii) in a new role where the work is located across the whole or parts of Scotland, beyond the location of a specific former joint police board, police authority, or joint fire and rescue board?

The Scottish Government responded as follows:

1. In respect of question (1)(a), the qualifying words "who immediately before the transfer…." at the end of the new paragraphs 44 to 51 of Part II, Schedule 4 to the 2008 Regulations, inserted by regulation 3(2) are intended to qualify the immediately preceding reference to former employees of the Scottish Police Services Authority transferred to the Scottish Police Authority ("SPA") by the Police and Fire Reform (Scotland) Act 2012. We think this is clear because other categories of employees referred to in the relevant paragraphs have separate qualifying words and as is pointed out in question (1)(b) it is not considered that the qualifying words can be read to refer to the initial and immediately preceding references.

2. In respect of question (2)(a), the words "any employee of the SPA who prior to the Police and Fire Reform (Scotland) Act 2012 would have been employed, if based on location of employment, by Strathclyde Joint Police Board or constituent local authorities" (taking the first such reference in the new paragraphs 44 to 59 of Part II, Schedule 4 to the 2008 Regulations) are intended to encompass all such new employees of the SPA and SFRS, except police officers and fire-fighters, who are employed after the passing of the 2012 Act.

In respect of question (2)(b), we think that having dealt first with persons employed at the passing of the Act, the formulation clearly then captures new employees and the hypothetical formulation "would have been employed" makes it clear that they were not employed as at that date.

In respect of question (2)(c), it is not intended that those quoted words will exclude from eligibility for membership of the appropriate fund any such new employees who could be employed by the SPA or the SFRS—

(i) in any new role which would not before the 2012 Act have been a role that was an employment of the applicable joint police board, police authority or joint fire and rescue board, or;

(ii) in a new role where the work is located across the whole or parts of Scotland, beyond the location of a specific former joint police board, police authority, or joint fire and rescue board.

In respect of category (i), it is irrelevant in what capacity a person is employed in provided the person is not a fire-fighter or police officer. No qualification is made and we do not understand why it is stated that the drafting suggests this.
In respect of category (ii), a person may have to travel but all employees have a main place of work which will determine the fund to which the employee will belong.

INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Children's Hearings (Scotland) Act 2011 (Commencement No. 5) Order 2012 (SSI/2012/246 (C. 20))

On 7 September 2012, the Scottish Government was asked:

1. The Schedule commences Schedule 1, paragraph 10(1) of the 2011 Act on 19 September 2012, but not paragraph 10(2). Paragraph 10(1) incorporates the qualification that the functions of the National Convener conferred by virtue of the Act (or any other enactment) may be carried out on the National Convener's behalf by a person as explained in the sub-paragraph, but other than the functions mentioned in paragraph 10(2).

Could you explain why it is appropriate to so commence paragraph 10(1) (without limited purposes) and not paragraph 10(2), and what the effect of that is in relation to the reference to 10(2) - or is there an intention also to commence paragraph 10(2) for any purposes?

2. The Schedule also commences (inter alia) on 19 September, Schedule 1, paragraph 14(7) of the 2011 Act (without limited purposes), but not paragraph 14(1). Paragraph 14(7) provides that an area support team must comply with a direction given to it by the National Convener about (a) the carrying out of the functions mentioned in sub-paragraph (1).

So far as that direction making power relates directly to the ability conferred by paragraph 14(1) of an area support team to carry out for its area the functions conferred on the National Convener by section 6 of the Act, could you clarify why it has been appropriate to so commence paragraph 14(7) (without limited purposes) and not 14(1)? Or is there any intention to commence paragraph 14(1) for any purposes?

The Scottish Government responded as follows:

1. Unfortunately it was overlooked that paragraph 24 of schedule 1 is in force. This paragraph requires that the National Convener prepare and submit to Children's Hearings Scotland an annual report. The next report will be due after 31 March 2013. The effect of not commencing paragraph 10(2)(a) of schedule 1 is that the National Convener could technically delegate this function. A further commencement order will be made shortly to commence paragraph 10(2)(a) to rectify this. There will be no practical effect since the annual report is not due for some months.

It is not intended that paragraph 10(2)(b) of schedule 1 will be commenced at this stage since paragraph 1(2) to (6) of schedule 2 is not yet in force.

2. The commencement of paragraph 14(1) of schedule 1 is not required at this stage since the selection of members of a children's hearing (under section 6) is an operational matter which will not require to take place until commencement of the new system as a whole. The provisions being commenced at this stage are to allow

the National Convenor to start the process of establishing area support teams. The commencement of paragraph 14(7) is to ensure that in doing so an area support team must comply with any direction which National Convener may give to it about the carrying out of a function delegated to it under paragraph 14(2). The commencement of paragraph 14(7)(a) will therefore have no practical effect until substantive commencement of the Act which will include paragraph 14(1) of schedule 1 and section 6.

SUBORDINATE LEGISLATION COMMITTEE

20th Meeting, 2012 (Session 4)

Tuesday 18 September 2012

Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill
Response from the Scottish Government

Background

1. The Subordinate Legislation Committee reported on the delegated powers in the Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill on 23 May 2012 in its 28th Report of 2012.

2. The Minister for Transport and Veterans (formerly the Minister for Housing and Transport) has responded to the report. His letter is reproduced in the appendix.

Government response

3. The Minister welcomes the Committee's support for the powers in section 1 and 3 of the Bill to make or amend regulations in relation to both empty property relief for business rates and requirements on owners and other liable people to provide information to the relevant Council for council tax purposes as regards whether or not their home is occupied.

Section 2 – power to provide for variation of council tax liability for unoccupied dwellings

4. In its Stage 1 report, the Committee raised concerns that section 2 of the Bill places no limit on the level of council tax increase brought forward by Councils to be set out in the regulations.

5. In the response, the Minister gives an assurance that the Scottish Government has no intention of allowing Councils to impose any council tax increase of more than 100%. In response to the Committee's concerns, the Minister commits to bringing forward an amendment to the Bill at Stage 2 to place a limit of 100% (i.e. double the standard rate of council tax for the applicable band) on the amount of any increase within the primary legislation.

Section 2 - interaction with section 74 of the Local Government Finance Act 1992

6. The Committee sought clarification of how section 74 of the Local Government Finance Act 1992 relates to section 2 of the Bill. The Committee asked for a response to this point, as part of the Government's response to its Stage 1 report. The Committee suggested that the clarity of drafting could be considered further by the Scottish Government, rather than this being any question as to the acceptability of the Bill's delegated powers in principle, or their scope.

7. Section 74 controls the proportionate amounts payable between the different valuation bands. There is no provision in section 74 which relates to the effect of any permitted increase in tax amount, whether any increase relates to unoccupied properties generally, or properties within a particular valuation band. The Committee

therefore sought clarification of the effect of any increases in charge brought about by section 2 on the operation of section 74. The Committee also concluded that the understanding of the connection between those sections is complicated by the requirement to consult various different enactments. It noted the Scottish Government's commitment to reflect further on the terms of section 74 of the 1992 Act in relation to section 2, in advance of Stage 2.

8. Having considered the Committee's remarks. The Minister indicates that he does not consider there is a problem with the drafting of section 2, and that no further elaboration is required, as to the connection between section 74 of the 1992 Act and section 2 of the Bill. The Scottish Government's view is that there is no complicated connection between section 74 of the 1992 Act and section 2 of the Bill.

Section 2 – relationship with other enactments

9. The Committee also noted that section 78 of the 1992 Act is expressly subject to sections 79 and 80, which have the principal enabling provisions on discounts and reduced amounts of tax. In the Committee's view, this makes it clear that the basic amount of tax is subject to discounts and reduced amounts. It noted that the Bill however does not make a similar qualifying provision in relation to any increases in tax amounts which would be enabled by section 2 of the Bill.

10. The Minister's response indicates that he does not consider it problematic that there will be no reference in section 78 to any tax increases that section 2 of the Bill will enable, and that the modifying provisions are explicit about their effects on the amount of tax payable.

11. Finally, the Minister welcomes the Committee's agreement that the affirmative procedure is appropriate for consideration by the Parliament of regulations brought forward under section 2 of the Bill.

Conclusion

12. Unless amendments are made to the Bill at Stage 2 that affect the delegated powers provisions, the Committee will not consider it again. Members are therefore invited to make any comments they wish on the Bill at this stage.

Recommendation

13. Members are invited to note the Government's response on the Bill and to make any comments they wish at this stage.

Appendix

Correspondence from the Minister for Housing and Transport dated 5 September 2012

Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill: Report by the Subordinate Legislation Committee

1. I am grateful to the Subordinate Legislation Committee for its report of 23 May 2012 on the proposed delegated powers within the Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill. The Scottish Government welcomes the Committee's support for the powers in section 1 and 3 of the Bill to make or amend regulations in relation to both empty property relief for business rates and requirements on owners and other liable people to provide information to the relevant Council for council tax purposes as regards whether or not their home is occupied.

2. I would like to respond in more detail to the specific issues raised in the Committee's report. Firstly, the Committee raised concerns that section 2 of the Bill places no limit on level of council tax increase that could be brought forward as this was to be set out in the regulations. I can assure the Committee that the Scottish Government has no intention of allowing Councils to impose any council tax increase of more than 100% and I have taken on board the Committee's concerns about this. As a result, I plan to bring forward an amendment to the Bill at stage 2 to place a limit of 100% (i.e. double the standard rate of council tax for the applicable band) on the amount of any increase within the primary legislation.

3. In its report the Committee asked the Scottish Government to respond to its comments about the interaction between, on the one hand, sections 74 and 78 of the Local Government Finance Act 1992 ("the 1992 Act") and, on the other hand, section 2 of the Unoccupied Properties Bill. We have reflected on the Committee's remarks and remain satisfied that there is no problem with the drafting of section 2.

4. As regards section 74 of the 1992 Act, the Committee commented at paragraph 27 of its report that:

> The understanding of the connection between those sections [section 74 of the 1992 Act and section 2 of the Bill] is complicated by the requirement to consult various different enactments.

5. The Scottish Government does not share the Committee's view that there is a connection between section 74 of the 1992 Act and section 2 of the Bill that needs to be elaborated. The equation used for calculating the basic amount of council tax payable in respect of a property on any given day is set out in section 78 of the 1992 Act. The equation is A ÷ D, where A is the council tax rate set for the valuation band the property falls into and D is the number of days in the financial year. Section 74, as the Committee's report explains, deals with how the tax rates are to be set by reference to valuation bands. In other words, section 74 is concerned with establishing the value of A in the section 78 equation.

6. After the basic amount of tax has been calculated in accordance with section 78, the amount actually payable may be affected by certain modifying provisions. One of the modifying provisions, the one that relates to unoccupied properties specifically, is regulations made under section 33 of the Local Government in Scotland Act 2003 ("the 2003 Act"). Section 2 of the Bill will, if passed, amend section 33 of the 2003 Act so that whereas regulations made under that section can presently provide only for council tax discounts, the regulations will in future also be able to provide for increases in the amount payable in respect of unoccupied properties.

7. It is irrelevant when calculating the basic amount of tax under section 78 (which is the point at which section 74 is relevant) that at a later stage of the calculation the amount may be modified by regulations made under section 33 of the 2003 Act (whether in its present form or as amended by section 2 of the Bill). The Scottish Government therefore does not believe that there is a complicated connection between section 74 of the 1992 Act and section 2 of the Bill.

8. Furthermore, the Scottish Government does not agree with the Committee's suggestion at paragraph 27 that section 2 of the Bill, if passed, will increase the number of enactments that need to be consulted. The present position is that in order to determine the tax liability in respect of a property it is necessary to consult sections 78 to 80A of the 1992 Act and the regulations made under section 33 of the Local Government in Scotland Act 2003 (currently S.S.I. 2005/51). The Bill will not change that position.

9. As explained above, section 2 of the Bill will amend section 33 of the 2003 Act. Once section 33 has been amended by the Bill, the Scottish Government intends to revoke S.S.I. 2005/51 and replace it with a new set of regulations which make use of the flexibility provided by the amendment of section 33. The number of enactments that need to be consulted to determine a property's tax liability will therefore remain unchanged; that is, in order to determine the tax liability in respect of a property it will be necessary to consult sections 78 to 80A of the 1972 Act and the regulations made under section 33 of the 2003 Act. Consideration of the powers in section 2 will not be required, as the Committee posits, because section 2 of the Bill is simply an amending provision.
As regards section 78 of the 1992 Act, the Committee commented at paragraph 28 of its report that:

> Section 78 is expressly subject to sections 79 and 80, which have the principal enabling provisions on discounts and reduced amounts of tax. It is clear therefore that the basic amount of tax is subject to discounts and reduced amounts. The Bill does not however make a similar qualifying provision, in relation to any increases in tax amounts which would be enabled by section 2 of the Bill.

10. The Scottish Government does not consider it problematic that there will be no reference in section 78 to any tax increases that section 2 of the Bill will enable. In addition to the expressly mentioned sections 79 and 80, the basic amount of tax calculated in accordance with section 78 may presently be modified by section 80A of the 1992 Act and by regulations made under section 33 of the 2003 Act. There are no express references acting as signposts to those enactments in section 78. The Scottish Government does not consider such signposts necessary. The modifying

provisions are clear and unambiguous about their effects on the amount of tax payable.

11. It is important to reiterate once more that section 2 of the Bill will not, itself, be another modifier of the basic amount of council tax. Section 2 only provides for an amendment of section 33 of the 2003 Act so that, whereas regulations made under that section can presently provide only for a discount in respect of unoccupied properties, the regulations will in future also be able to provide for tax increases. We believe therefore that it would not be helpful to the reader to include in section 78 a signpost to section 2 of the Bill. The enactment that modifies the basic amount of council tax on account of a property's being unoccupied will remain the regulations made under section 33 of the 2003 Act. I hope that this is useful in clarifying the drafting approach which has been taken.

12. Finally, I welcome the Committee's agreement that the affirmative procedure is appropriate for consideration by the Parliament of regulations brought forward under section 2 of the Bill.

13. The Scottish Government is currently consulting on draft *Council Tax (Variation for Unoccupied Dwellings) (Scotland) regulations* (a copy of the consultation is available on the Scottish Government website at Empty Homes until 5 October and, subject to the Parliament's support for the Bill, I look forward to discussing these regulations further with the Committee and the wider Parliament.

14. I trust that you will find this information helpful. I am copying this letter to Joe Fitzpatrick MSP, Convener of the Local Government and Regeneration Committee.

Keith Brown

SUBORDINATE LEGISLATION COMMITTEE

20th Meeting, 2012 (Session 4)

Tuesday 18 September 2012

Social Care (Self-directed Support) (Scotland) Bill

Response from the Scottish Government

Background

1. The Subordinate Legislation Committee reported on the delegated powers in the Social Care (Self-directed Support) (Scotland) Bill on 23 May 2012 in its 29th Report of 2012.

2. The Minister for Public Health has responded to the report. His letter is reproduced in the appendix.

Government response

3. The Minister welcomes the Committee's report and addresses each of the substantive points raised as follows:

Section 12 – power to modify section 3

4. In its Stage 1 report, the Committee drew the power in section 12 to the attention of the lead committee, believing it to be particularly broad in scope. In addition, the Committee concluded that the power could be used to defeat the entire policy and purpose of the Bill by reducing the options for choice in section 3 to a single option. Accordingly, the Committee asked the Scottish Government to consider revising the power and recommended that the power be subject to a statutory requirement to consult interested bodies on any draft regulations.

5. In his response, the Minister acknowledges the significance of section 12 but disagrees with the Committee's interpretation of the breadth of the power. The Minister states that rather than reducing the options for choice, the power instead allows for choice across a number of sections of the Bill which is the overall intention of the Bill. For that reason, the Minister deems a revision of the power unnecessary. However, in response to the Committee's concerns, the Minister is happy to support the recommendation that the power be subject to a statutory requirement to consult interested bodies on any draft regulations, and furthermore, commits to bringing forward an appropriate amendment at Stage 2.

Section 20(1)(b) – Regulations: general

6. The Committee recommended in its report that the Scottish Government consider whether it is appropriate that the significant powers in section 12(a) and 21(1) are capable of attracting two separate sets of ancillary powers, and whether as a result the power in section 20(1)(b) is necessary save in relation to section 13.

7. The concerns of the Committee are noted by the Minister but he remains minded to retain section 20(1)(b) as it stands as regards sections 12 and 13. The

Minister sees section 20(1)(b) as a general power to be used to amend other enactments, whereas the powers in sections 12 and 21 are specific powers to amend the Bill. Whether or not it is necessary for the power in section 21 to also attract the powers in section 20(1)(b) is something that the Minister wishes to consider further. If he concludes that the power is indeed unnecessary then the Minister will bring forward an amendment to remove it.

Section 21 – Power to modify application of Act

8. Whilst accepting that the power in section 21(1) to disapply section 4(2) or 7(2) of the Bill is appropriate, in its report the Committee recommended that the Scottish Government explain whether it considers it necessary to remove the element of choice entirely using section 21(1) if Option 2 is considered not to be appropriate. If this is not the case, then an explanation is required as to how this can be reconciled with the Scottish Government's stated position that section 21 should only be used to remove choice entirely, and not to interfere with the available options.

9. The Minister reassures the Committee that section 21 would only be used to remove choice completely, citing confusion over the examples given by officials as the reason for the Committee being misguidedly concerned that section 21 could be used to restrict access to a particular option as well as being deployed to remove any element of choice.

10. The Committee suggested that subsection (4) could continue to operate despite the Scottish Governments reliance on section 4(2) or 7(2) to disapply those sections in their entirety.

11. The Minister disagrees with this interpretation and confirms that it is the Government's view that the disapplication of section 4(2) or 7(2) clearly means that the remainder of those sections fails to operate.

12. In its report, the Committee questioned the appropriateness of the supplementary power in section 21(2)(b) to modify or disapply any section of the Bill in connection with the removal of choice under section 4(2) or 7(2). The Committee called for clarification on the sections of the Bill to which the power might apply and asked the Scottish Government to consider whether it is in fact necessary that the power in section 21(2)(b) should permit the modification of any other section of the Bill. Specifically there was a concern that the generous wording of the provision could allow for modifications beyond those immediately concerned with the power to which section 21 (2)(b) attaches.

13. The Minister agreed to consider whether section 21(2)(b) is needed but disagrees with the view that the power could be used to modify distinct provisions such as section 6(2). Since the Minister cannot foresee any connection between removing choice under section 4(2) or 7(2) and modification of support for carers he considers that the power in section 21(2)(b) cannot be used to do so. In his view a specific power would be required if that was what was intended.

14. The Committee stated that exercise of the section 21 power ought to be subject to a statutory requirement to consult with interested bodies on any draft regulations and that were it subject to such a requirement, would be content that the regulations are subject to the affirmative procedure.

15. Regarding any regulations made under section 21, the Minister pledges to bring forward an amendment to create a statutory duty of consultation prior to the exercise of the powers in this section.

Section 24 – Ancillary provision

16. In its report, the Committee recommended that the Scottish Government, in light of its stated intention not to use the power in section 24 to modify the Bill itself, consider whether section 24(2) might be revised so as to put the matter beyond doubt.

17. The Minister confirmed that there is no intention to use the power in section 24 to modify the Bill and as a result does not consider that section 24 needs to be amended.

18. While the Minister has confirmed the current administration's intentions as regards their proposed use of the power this has not resolved the underlying question of whether the provision is capable of being used to modify the Bill once enacted or not. The intended scope of the provision therefore remains unclear. Also it is not possible for this administration to bind any future administration as regards the use of the power within its limits.

Section 25 – Transitional provision

19. Similarly, the Committee suggested that the Scottish Government consider whether section 25(2) might be revised so as to put it beyond doubt that the power in section 25 may not be used to modify the Bill. The Committee recommended that the power in section 25 should also be subject to the affirmative procedure given that it could be used to make textual amendments to primary legislation.

20. The Minister confirmed that there is no intention to use the power in section 25 to modify the Bill and does not consider that an amendment is required. Nor does the Minister deem it necessary for the power to be subject to the affirmative procedure, considering the negative procedure to be appropriate in the context of this particular Bill and in connection with the exercise of powers which are by their nature time limited in their effect.

21. Once again, while the Minister has confirmed the current administration's intentions as regards their proposed use of the power this has not resolved the underlying question of whether the provision is capable of being used to modify the Bill once enacted or not. The intended scope of the provision therefore remains unclear. As noted above it is not possible for this administration to bind any future administration as regards the use of the power within its limits.

Recommendation

22. Members are invited to note the Government's response on the Bill and to make any comments they wish at this stage.

Appendix

Correspondence from the Minister for Public Health dated 23 July 2012

Social Care (Self-directed Support) (Scotland) Bill: Report by the Subordinate Legislation Committee

I write in response to the Report of the Subordinate Legislation Committee on the Scottish Government's Social Care (Self-directed Support) (Scotland) Bill. I would like to thank the Committee for the time and effort you have put into producing this report, which I found extremely thorough, and I will address each of the substantive points you raise in turn.

Section 12 – power to modify section 3

26. The Committee draws the power in section 12 to the attention of the lead Committee as it considers it to be particularly broad in its scope, and observes that it appears to be possible for it to operate in the future so as to defeat the entire policy and purpose of the Bill by reducing the options for choice in section 3 to a single option.

27. The Committee accordingly recommends that the Scottish Government consider whether the power might be revised so that it may not be used in that manner, while still enabling the Government to achieve its stated aim of preserving sufficient flexibility to adapt the Bill to keep pace with changing social work practice in future.

28. The Committee considers that the section 12 power ought to be subject to a statutory requirement to consult interested bodies on any draft regulations. Were it subject to such a requirement, the Committee would be content that the regulations are subject to the affirmative procedure.

Section 12 is, as you have recognised, significant, as it ensures that the Bill can adapt to any future innovation in social work practice. I do not believe that the power in section 12 is as broad as you suggest, as such an interpretation is not supported by the generality of the Bill. The Bill is about choice. If the power in section 12 was used to remove all choice other sections of the Bill beyond sections 3, 4, 6 and 7, which section 12 allows to be modified, would cease to make sense. For example, sections 8-11 and 17 all talk about options in the plural. The clear overall intention of the Bill is to have more than one option. Because that is so fundamental, I do not think that revising the power is necessary.

As my officials confirmed when they gave evidence, the Scottish Government has developed this Bill in meaningful partnership with stakeholders and intends to continue this approach in developing any Regulations which were required under section 12. The comparison my officials made to the Local Government Finance (Unoccupied Properties) Bill was in the context of rejecting the necessity for the "super-affirmative" procedure (in whatever form that would take). In the Scottish Government's view, it is important to exercise care in what comparisons are drawn

across Bills. In this case, I do not think that there is a relevant comparison between the procedures under that Bill and this Bill.

Having said that, as we would have every intention of consulting on any such Regulations and I think it is appropriate for this Bill, I am happy to support your recommendation to make this a statutory obligation and will commit to bringing forward an appropriate amendment at Stage 2.

Section 20(1)(b) – Regulations: general

44. The Committee accordingly recommends that the Scottish Government consider whether it is appropriate that the significant powers in section 12(a) and 21(1) are capable of attracting two separate sets of ancillary powers, and whether as a result the power in section 20(1)(b) is necessary save in relation to section 13.

I note your concern that the powers in sections 12(a) and 21(1) attract two separate sets of ancillary powers. The powers in sections 12(b) and 21(2)(b) are specific powers to amend the Bill, whereas section 20(1)(b) is a more general power to amend other enactments. They therefore have different, but equally necessary, functions. We would not, however, characterise this as complex; it simply reflects the fact that we have provided for an explicit limited power to amend the Bill itself while attracting what are standard "bolt-on" ancillary powers. While those powers could be redrawn by bringing the power to amend other enactments into sections 12 and 21 directly it is not clear what this would add.

With regard to the power in section 20(1)(b), I believe that it is necessary for it to be wider than just section 13. For example, in relation to section 12, consequential amendments to regulations such as the Direct Payment Regulations (made under section 13) may be required if the options are changed. Whilst this could be achieved through the ancillary power in section 24, this would require 2 separate instruments, which would take up valuable Parliamentary time and clutter the statute book. I am therefore minded to retain section 20(1)(b) as it stands as regards sections 12 and 13.

I will, however, give further consideration as to whether it is necessary for the power in section 21 to also attract the powers in section 20(1)(b). If it is concluded that the power is, in hindsight, unnecessary I will bring forward an amendment to remove it.

Section 21 – Power to modify application of Act

69. The Committee accepts that the power in section 21(1) to disapply section 4(2) or 7(2) of the Bill is, in principle, appropriate.

70. However, the Committee recommends that the Scottish Government explain whether it considers it necessary to remove the element of choice entirely using section 21(1) if Option 2 is considered not to be appropriate in any given situation. If this is not the case, then it is asked to explain how this may be reconciled with its stated position that section 21 should only be used to remove choice entirely, and not to interfere with the available options.

As my officials confirmed, section 21 powers are only intended to be deployed to remove any element of choice, not to restrict access to a particular option. There appears to have been some confusion around the examples given to you - I can clarify that, in the examples given of homelessness or drug or alcohol addiction, officials were referring to Option 2 being inappropriate *in addition* to Option 1 being unavailable. Therefore there would be no choice, not simply the removal of Option 2 which is entirely consistent with our stated position that section 21 would only be used to remove choice entirely.

71. The Committee also recommends that the Scottish Government consider whether it is sufficient to rely on the disapplication of section 4(2) or 7(2) impliedly to disapply the remainder of those sections, given that it is arguable that subsection (4) could sensibly continue to operate despite such a disapplication.

I note your point but respectfully disagree and believe that the disapplication of section 4(2) and 7(2) clearly means that the remainder of those sections fail to operate.

72. The Committee does not accept that the supplementary power in section 21(2)(b) to modify or disapply any other section of the Bill in consequence of a disapplication of section 4(2) or 7(2) – as presently drafted – is appropriate.

73. The Committee calls on the Scottish Government to identify the sections of the Bill to which section 21(2)(b) might apply, given that a number of sections are expressed to apply only where a local authority has given a person the opportunity to choose one of the options.

74. Given that it appears to be intended that certain sections of the Bill, such as section 6(2), should not be modified, the Committee invites the Scottish Government to consider whether it is necessary that the power in section 21(2)(b) permit the modification of any other section of the Bill, or if it could feasibly identify the provisions which should be protected from modification using this power.

I am grateful for your observations on this point. I will consider whether section 21(2)(b) is needed although I do not accept that it could be used to modify section 6(2). I cannot foresee any way in which limiting the choice available for carers' support could be made in connection with removing choice for other forms of support. To do so a clear power to disapply section 6(2) would also be needed.

75. The Committee also considers that the section 21 power ought to be subject to a statutory requirement to consult with interested bodies on any draft regulations. Were it subject to such a requirement, the Committee would be content that the regulations are subject to the affirmative procedure.

As stated above, the Scottish Government has involved stakeholders fully in the preparation of this legislation and would be happy to commit to do so as regards any regulations made under section 21. For this reason, and because I think it is appropriate for this Bill, I will bring forward an amendment to create a statutory duty of consultation prior to the exercise of the powers in section 21.

Section 24 – Ancillary provision

83. The Committee recommends that the Scottish Government, in light of its stated intention not to use the power in section 24 to modify the Bill itself, consider whether section 24(2) might be revised so as to put the matter beyond doubt in order to make it clear that it may not be used to modify the Bill itself.

I can confirm that there is no intention to use the power in section 24 to modify the Bill. That being the case, I do not consider that section 24 needs to be amended.

Section 25 – Transitional provision etc.

92. The Committee recommends that the Scottish Government consider whether section 25(2) might be revised so as to put it beyond doubt that the power in section 25 may not be used to modify the Bill itself.

93. The Committee recommends that, as is the case with the power under section 24, the power in section 25 should be subject to the affirmative procedure where it is used to make textual amendments to primary legislation, and to the negative procedure otherwise.

Again, there is no intention to use the power to modify the Bill. I therefore do not consider an amendment is necessary.

We also do not feel that it is necessary for the transitional, transitory and saving provisions to be subject to the affirmative procedure and, hence, consider that the negative procedure is appropriate. The equivalent provision in the Police and Fire Reform Bill must be seen within the context of that Bill. Clearly care should be taken in treating use of similar provisions elsewhere as a precedent and in any event I do not accept that it is the reflection of wider Government practice.

As I think you will accept, it is often difficult to determine the appropriate dividing line for procedure when dealing with supplementary, incidental, consequential transitional, transitory and saving provisions. While determining procedure based on textual amendment can be used, it is not always appropriate, particularly in the case of time-limited powers such as section 25.

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 Duncan McNeil MSP, in his role as Convener of the Health and Sport Committee, for his Committee's information.

Michael Matheson