



OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 3 October 2017

Session 5



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DELEGATED POWERS AND LAW REFORM COMMITTEE

27th Meeting 2017, Session 5

CONVENER

Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Alison Harris (Central Scotland) (Con)

Monica Lennon (Central Scotland) (Lab)

*David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jeane Freeman (Minister for Social Security)

Fraser Gough (Scottish Government)

Pauline McNeill (Glasgow) (Lab) (Committee Substitute)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 3 October 2017

[The Deputy Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Deputy Convener (Stuart McMillan):

Good morning and welcome to the 27th meeting in 2017 of the Delegated Powers and Law Reform Committee. Monica Lennon has sent her apologies, and I welcome Pauline McNeill, her substitute. I also welcome David Torrance back; he has been off for a few weeks.

It is proposed that the committee take items 8, 9, 10 and 11 in private. Item 8 is consideration of our approach to the proposed draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018; item 9 is consideration of the Scottish Government's response to the committee's questions on the delegated powers provisions in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill; item 10 is consideration of the contents of our report to the Equalities and Human Rights Committee on the delegated powers in the Gender Representation on Public Boards (Scotland) Bill; and item 11 is consideration of the evidence that we are about to hear from the minister on the Social Security (Scotland) Bill. Does the committee agree to take those items in private?

Members *indicated agreement.*

Social Security (Scotland) Bill: Stage 1

10:01

The Deputy Convener: Item 2 is consideration of the Social Security (Scotland) Bill. I welcome Jeane Freeman, the Minister for Social Security, who is here to speak about the bill, and her Scottish Government officials: Chris Boyland, legislation team leader in the social security policy division; Fraser Gough, parliamentary counsel; and Colin Brown, senior principal legal officer. I understand that the minister wants to make opening remarks.

The Minister for Social Security (Jeane Freeman): Thank you for the opportunity to come to committee and answer your questions—I hope productively.

I thought that it might be helpful to begin by outlining the thinking behind the Government's approach to the bill. We have introduced the bill in the Parliament with a track record of positive engagement with stakeholders and all those who have an interest in ensuring that our future Scottish social security system works well. The approach that we have taken to the bill is the result of our keeping foremost in our minds the interests of those who will use, advise on and operate the system.

The United Kingdom Government's approach has been to put its benefit rules partly in primary legislation while requiring that its primary legislation has to be read alongside further rules in subordinate legislation. In our view, that makes the UK legislation confusing, difficult to follow and open to different interpretations.

By contrast, putting the detailed rules for the operation of our devolved benefits into subordinate legislation allows us to make our legislation clearer and more accessible. It will also ensure that our legislation is flexible enough to deal with changing circumstances.

In general, I am pleased that the stakeholder community has acknowledged the logic in our approach and the reasoning behind it. For example, Citizens Advice Scotland said in its submission to the Social Security Committee:

"Citizens Advice Scotland accepts the Scottish Government's view that setting out some of the rules for the new benefits should be made in Regulations. Much of the important detail affecting the operation of the social security system is contained in regulations and guidance which are regularly issued and updated."

In recognition of the part that secondary legislation will play in our overall approach, we have made a commitment to produce illustrative

versions of some of the regulations that we will make under the bill. I am pleased to say that we have already begun to honour that commitment. Committee members will have received the illustrative drafts of our planned best start grant regulations last week, along with a briefing paper that explains the policy intent behind the regulations. Those documents make clear how we intend to use the relevant powers, both specifically in relation to the best start grant and more generally in the context of our indicative approach to drafting regulations across the piece.

Given the emphasis that we intend to place on co-production and developing all the constituent parts of the overall system in collaboration with others, I have also been mindful of the need to ensure that regulations are considered in an open and transparent way that allows stakeholders to provide evidence and feed in their views. We have produced the illustrative regulations so that the wider public and the stakeholder community can see what we intend to do with the powers under the bill. That is also why, with the exception of a small number of areas that mostly deal with administrative matters, regulations that are made under the bill will be subject to the affirmative procedure, which will allow for full scrutiny by the committee.

I would like to say a bit more about scrutiny. For some time, I have consistently made it clear in my discussions with stakeholders that I believe that there is a need for independent expert scrutiny of social security matters in Scotland, and I am happy to make that point clear once again. If we are agreed on the need for scrutiny, the next question is about when we should scrutinise. How do we ensure that the right people are involved at the right stage to deliver the most value? In my view, the absence of such involvement represents a failing in the current UK arrangements that we should correct.

The statutory rules at UK level that currently govern the work of the advisory committees mean that regulations come to the existing committees only once they have been drafted—there are a number of exceptions, whereby the secretary of state can circumvent the committees' involvement—and the committees' advice is provided to the Government, not to Parliament.

That is not the only difference between what currently happens at UK level and what will happen in relation to our devolved social security system. It is likely that there will also be a difference in the volume of regulations that are scrutinised. When Professor Gráinne McKeever gave evidence to the Social Security Committee on 14 September, she said that the UK Social Security Advisory Committee had scrutinised 44 pieces of legislation in the previous year. That is a

significant volume, but it is not directly comparable to what will happen in Scotland once the initial sets of regulations to establish the new system have been made. My advisers estimate that, of the instruments that were considered by the UK Social Security Advisory Committee in 2016-17, only around four or five would fall within devolved competence.

If we have a commitment to involve stakeholders and experts and we are potentially dealing with a smaller volume of regulations that will give us the time and space to submit those regulations to a full and detailed scrutiny process, the next question is who, exactly, should provide that scrutiny. I have made it clear that I do not think that that is a question that the Scottish Government can answer on its own. It is not for us to decide how our proposed legislation should be scrutinised. To me, that would feel a bit like marking our own homework.

I will tell the committee what I have done so far. Back in May, I met the convener of the Social Security Committee to ask her and her committee's members to consider what role the Parliament should play in filling the space left by the existing UK advisory committees. I have since written to Dr Jim McCormick, who is the chair of our expert advisory group on disability and carers benefits, to ask him to set up a short-life working group from among his members to consider how scrutiny of social security matters should work as part of our new Scottish system. I have asked for an initial response from him in line with what I understand to be the timetable for the drafting of the Social Security Committee's stage 1 report. I think that it is important that the expert group's initial findings should, if at all possible, be taken into account at this stage in the parliamentary process.

As Dr Jim McCormick outlined to the Social Security Committee on 21 September, the expert group plans to engage with that committee and the Public Audit and Post-legislative Scrutiny Committee, and I will be interested to hear from members if you feel that the Delegated Powers and Law Reform Committee could also make a contribution to that work. Once those various groups and bodies have had an opportunity to consider the matter, I expect to be able to say more on how we will ensure that expert scrutiny is built in to the system later on during the bill process.

In all of that, I ask that we do not lose sight of the real prize: a system that works in the best interests of all those people who depend on it. To do that, we need scrutiny arrangements that are expert led, open minded and forward looking, and that drive improvements in the system and make things better. By the end of this parliamentary

process, I hope that that is what we will have in place.

I am happy to take any questions that members may have.

The Deputy Convener: Thank you, minister, for that comprehensive opening statement, which I am sure will have touched on many areas of questioning. A number of respondents to the Social Security Committee's call for evidence on the bill have expressed concern about the uncertainty that is created by not including in the bill detail about eligibility and what will be provided for each type of assistance. In light of those concerns, have you considered including more information in the bill?

Jeane Freeman: We have designed the bill to give flexibility for policy development, now and in the future. We have used a framework that allows Parliament to control what is provided as it sees fit. It is important to keep it in mind that the schedules to the bill do not aim to define individual benefits; they are the framework within which benefits will be designed. For some types of assistance, there will be more than one benefit—for example, disability assistance currently covers four benefits.

Working within that framework, we intend to co-design policy for our new social security system, working with people who have lived experience of the existing system. That is where the role of our social security experience panels comes into play. They involve more than 2,400 people who have recent experience of receiving benefits to help us to develop our policies and to design and test the new system so that it works for them.

Alongside the experience panels is our disability and carers benefits expert advisory group, chaired by Dr McCormick, which I have referred to. By putting those together, I am confident that we will come up with the right policy solutions at the right time to ensure the safe and secure transfer of benefits to those people who receive them and to deliver our overall ambition.

Some UK social security legislation is confusing because certain rules have been put up front in the primary legislation, reflecting the views that were held when the legislation was made. As things have moved on, and perhaps new Governments have been elected, secondary legislation has qualified or undercut the rules that were initially in the primary legislation. By contrast, the illustrative draft of the early years assistance regulations shows how the first paragraph in each schedule to the regulations sets out all the eligibility rules that apply for the different grants. People who are trying to understand the legislation can find everything that they need to know about who is eligible, right there in the regulations,

without having to be concerned that the rules are displaced or altered by another piece of legislation somewhere else.

The Deputy Convener: The committee is grateful for the illustrative early years assistance regulations that were provided by the Scottish Government, which you have touched on. As the Scottish Government recognises, the final version of the regulations might be different, depending on any comments that it receives. Similarly, a future Government might seek to exercise the powers in the bill in a different way from those that are set out in the illustrative regulations. Has any consideration been given to limiting the breadth of powers, with a focus on including more detail in the schedules to the bill on what the regulations must or must not do?

10:15

Jeane Freeman: We included the schedules to the bill precisely because we think that it is important to ensure proper parliamentary involvement in setting the core rules that will govern the giving of assistance under our social security systems. The schedules set out a mixture of rules about things that must be included and things that may be included in the regulations. As they stand, they reflect the Government's view of those matters at the time the bill was introduced. Through the bill process, Parliament has complete control over the final terms of the bill, including the schedules. It is the Parliament that will decide whether further rules should be included in any of the "may" or "must" categories, whether those presently in the "may" category should move to the "must" category and whether rules should be added about what regulations must not include.

I can give you an example of that. One of the areas that have come up already in my discussions with stakeholders, and in evidence that has been given to the Social Security Committee, is a concern that people should be given assistance in kind and not financial assistance. Our policy intent is that individuals should have the choice. It is reasonable to say that there might be a case to be made for bringing about a change in the primary legislation that makes clear the policy decision to ensure that individuals should have a choice between receiving assistance in kind or financially. That is an example of a case in which, as issues are dealt with by the Social Security Committee and others, it will be for Parliament to determine whether what is currently in the bill should be changed.

Alison Harris (Central Scotland) (Con): Schedule 3 makes provision about winter heating assistance regulations. No mandatory provision is made in schedule 3, so there does not appear to be any specific limit on what winter heating

assistance regulations could provide for. Your response to the committee's written questions explains that that is because no mandatory provision is currently described. Can you expand on that explanation by explaining why it is considered appropriate that the schedule contains no mandatory provision?

Jeane Freeman: It is a bit of a stretch to say that there are no limits on what winter heating assistance regulations can be used to provide for. Section 13 defines "winter heating assistance" as assistance to help people

"meet ... heating costs during the winter months",

and any regulations that are made about it will have to be consistent with that purpose.

My officials' response to the committee made a comparison between all of the other schedules and schedule 3 to illustrate that every other schedule contains what was described as mandatory provision or limits. Mandatory provision is about defining the essence of who is to receive each type of assistance. For example, in order to receive carers assistance, the individual has to be or have been a carer; disability assistance depends on first having a disability; early years assistance depends on the person having a child; and so on. At the moment, winter heating assistance is mostly paid to people of state pension age. However, I see no reason to rule out the possibility that that might be extended in the future—indeed, we have already said that it will be extended to families with severely disabled children. That is why we have not set the same limits on the rules for who will receive it.

Alison Harris: Schedules 1 to 7 each provide that the generality of the power to make regulations is not limited. In schedule 3, for example, which relates to winter heating assistance regulations, paragraph 7 states that

"nothing in this schedule is to be taken to limit what may be prescribed in the regulations."

For the other schedules, that limitation applies to particular parts of the schedule. Given that the stated purpose of the schedules is to ensure that parliamentary control is not sacrificed in light of the regulation-making powers, why is that provision necessary?

Jeane Freeman: Parliament has control because, if there are rules that it wants to add to the schedules and make mandatory, it can amend the schedules to achieve that during the bill's consideration. Using schedule 3 as an example is misleading. Only that schedule has the wording relating to no limits, because winter heating assistance has no mandatory criteria around who is eligible for help.

The wording for all the other schedules expressly says that the generality does not override what Parliament agrees as mandatory provision. The current balance between which parts of the schedule create mandatory rules and which parts illustrate what regulations might provide is based on the Government's view, at the time that the bill was introduced, of where that balance should lie. The bill process allows Parliament to change that balance, should it wish to.

David Torrance (Kirkcaldy) (SNP): Good morning, minister. Provision for the types of assistance will be made in regulations, which means that the Parliament will be able only to accept or reject them in their entirety. Does that not limit parliamentary scrutiny, because there is no opportunity to amend the eligibility criteria or what assistance is to be provided? How do you respond to the argument that parliamentary scrutiny would be more effective if provision for those types of assistance had been included in the bill?

Jeane Freeman: I, too, welcome you, Mr Torrance. It is good to see you back.

David Torrance: Thank you.

Jeane Freeman: Parliament has a power of veto, and I think that it is overstating the case a bit to say that that is limited control. Parliament can simply reject regulations entirely if members are not happy with what they hear about them. Because of that, the onus is on the Government to do the consultative work in advance, to ensure that any proposals that it makes are ones that Parliament can support. That would be true even if the bill that finally emerges were to contain no express consultation requirements.

However, as we have consistently said, we recognise that the bill should probably say more about how proposals for regulations should be scrutinised. We are keen to hear the views of Parliament on what role it should have in that process, as I outlined in my opening statement.

The scrutiny of regulations is reactive, but I hope that Parliament and stakeholders will play a proactive role in influencing the design and development of the social security system. My reference to the expert group, the many stakeholder groups that we are engaging with, and, in particular, our experience panels underlines our commitment to that proactive role. It is a mistake to wait for draft regulations to be issued and for regulations to be considered as the be-all and end-all, if you like. It is the Government's job to ensure that its draft regulations have been adequately consulted on, that those views have been heard and that

Parliament does not feel obliged to exercise its power of veto.

David Torrance: If the rules on eligibility and the assistance to be given are to be contained in regulations, does the Scottish Government think that there would be any merit in applying a super-affirmative type of procedure to the regulations, to give the Parliament the opportunity to shape the regulations and approve them?

Jeane Freeman: If we are talking about opportunities for people to feed into the process by which regulations are developed and drafted, in order to identify issues and help to ensure that they are fixed before the regulations become law, then, yes, I think that that should be the case. I think that we have already taken the first steps towards that in producing our illustrative drafts of the best start grant regulations.

There are many models for the super-affirmative process and my mind is open to considering what might be the best approach in the bill. However, as I said, this is not something that the Government can or should address on its own, because Parliament also needs to consider its role in this space. I look forward to having a response from not only the Social Security Committee but Dr McCormick and, indeed, this committee—I think that I made that offer at a previous appearance before the committee. It is not just about the process that attaches to the regulations; they are only a part of the picture, and we need to look more widely at the scrutiny roles in the Parliament and any independent expert-led scrutiny body that it might be appropriate to establish.

David Torrance: The Scottish Government's delegated powers memorandum refers to the objective of improving the accessibility of the rules that govern each type of assistance. If the rules on eligibility and the assistance to be given are to be contained solely in regulations, what are you doing to ensure that the rules are accessible in terms of language and availability?

Jeane Freeman: What counts as accessible differs for different audiences. The delegated powers memorandum talks about making the legislation as accessible as possible. I hope that you will find that the illustrative drafts of the best start grant regulations that we have provided are drafted in a logical order and in fairly plain English.

Of course it will not be accessible to everyone. The need for legislation to be drafted in a way that delivers legal certainty makes that impossible. Therefore, information will be provided and made available in different formats, to meet the needs of different audiences. I think that we have been clear throughout that the information that people need will be available in whatever format people need it to be in. We have demonstrated that in the

past year, from our consultation to our current work with the experience panels.

What needs to be legislatively clear will inevitably not be accessible to every audience. Therefore, our intent is to provide information in whatever format individuals need it to be in, so that they can understand what the legislation says.

The Deputy Convener: Before I bring in Pauline McNeill, I want to clarify one point. A number of months ago, minister, you and I had a discussion regarding the provision of information in various formats, as I chair the Parliament's cross-party group on visual impairment. Can you confirm that information about the bill will be provided in formats that people who are blind and visually impaired will be able to access?

Jeane Freeman: Yes.

Pauline McNeill (Glasgow) (Lab): Good morning. Section 18(1) provides for short-term assistance. Although subsection (3) provides for those who are entitled to such assistance, there is very little limit on the power in subsection (5) to set alternative forms of eligibility rules, other than that the assistance must be for a short-term need. As that power is potentially very wide, has consideration been given to making primary legislation to provide for other types of short-term assistance, or to applying a super-affirmative procedure to instruments that make provision for additional eligibility rules?

Jeane Freeman: As we explained in the delegated powers memorandum, the power to provide for short-term assistance is being taken to deal with circumstances that, at present, cannot be fully anticipated. Primary legislation can take up to a year to change, and it is not, in my view, the best vehicle for dealing with the unexpected. A power to deal with the unforeseen must necessarily be broad because, by definition, the Government does not know what situations it might need the power to deal with.

On scrutiny procedure, as I said—I do not want to keep repeating myself—I believe that there should be independent scrutiny. My mind is open to looking at the various models that are available under the term “super-affirmative procedure”. However, I do not think that it is the role of Government exclusively to turn our minds to that. This Parliament has an important role, particularly given the scrutiny responsibilities that our parliamentary committees have. I would hope that we as a Government would be able to reach a view—based on views certainly from the lead committee and perhaps from other committees and from the expert group—on what should be in the legislation by way of independent scrutiny of Government exercise of social security powers.

10:30

The Deputy Convener: Is flexibility about the need to have an eye to potential changes to the social security rules at Westminster, given that 85 per cent of social security powers remain reserved? If something is in the bill, does that make it potentially difficult to deal with any change at Westminster that has an effect on citizens in Scotland? Am I incorrect to think that?

Jeane Freeman: No, broadly speaking you are correct and I agree with you. The nature of making a provision for short-term assistance is to allow a Government to deal with the unexpected. Because it is unexpected, we cannot list what it is going to be—that is not possible or sensible. If we create a power to provide short-term assistance and specify the things that it covers, we will undercut it because the point is to cover the unexpected.

As the convener rightly said, we are talking about legislation that covers 11 benefits. The UK welfare system will still be covering the majority of the spend on benefits, including virtually all the employment-related benefits. It is, therefore, sensible for the Scottish Government to have the power to provide short-term assistance in circumstances that cannot, at this point, be foreseen. Does Colin Brown or Fraser Gough want to add anything to that?

Fraser Gough (Scottish Government): The constraint on short-term assistance is that it has to be for a short-term need. It could not be used to institute a mechanism to replace an entire benefit that had disappeared from the Westminster model. The Government is clear that if we were going to create a whole new type of assistance to run on a long-term basis, that ought to come back before Parliament for proper scrutiny and consideration. However, if there were short-term needs arising from the UK Government rolling people on to universal credit and leaving them without benefits for six weeks, for example, the Scottish Government might want the power to step in and help people out a bit in that kind of unexpected circumstance.

Alison Harris: I would like to ask about the top-up of reserved benefits. Why does the bill not contain provisions specifying the existing UK benefits that the Scottish ministers seek to top up? Was any consideration given to specifying in the bill the relevant existing UK benefits, while taking a power to amend the bill to respond to future changes in the UK benefits system?

Jeane Freeman: The bill does not specify existing reserved benefits that Scottish ministers seek to top up because at present there are no plans to top up such benefits. In addition, if we were to list in the bill specific benefits that could be topped up, section 45 would have to be updated

every time the UK benefits system changed. Whether that was done via an amending power or in any other way, I do not think that it would be a particularly sensible use of parliamentary time.

Again, we cannot sensibly anticipate what might or might not be done at UK level. At present, the power is provided to top up any reserved benefit within the limits of devolved legislative competence. We have deliberately framed it broadly to reflect fully the devolution settlement. I think that that is clear and generally understood, but I am happy to commit to ensuring that our new social security agency publishes information that explains very clearly which benefits are delivered by the Scottish Government and which remain reserved to the UK.

Pauline McNeill: We have probably covered this in part, but I will ask my question anyway.

The guidance on discretionary housing assistance that can be issued by the Scottish ministers under section 52(2) might contain details relating to a wide range of matters that, in relation to the other forms of assistance in the bill, are set out in regulations and are subject to a particular parliamentary procedure. In your written response to the committee you said that to require parliamentary approval of guidance of that type would not seem to be an appropriate use of parliamentary time. I guess that that is the same theme.

Jeane Freeman: It remains my view that the best use of Parliament's time is making law, not guidance. The obligation on local authorities is to have regard for the guidance that will be issued under section 52(2) of the bill. That reflects the current arrangements, which work well without detailed ministerial direction. Guidance is not binding on local authorities, to allow them a degree of scope to deliver services in a way that suits their particular local needs and circumstances. Our preference is always to allow for that degree of flexibility for local delivery. However, any such guidance will be laid under section 52(5) of the bill, which requires a copy to be laid before Parliament. That means that Parliament will be free to take any steps that it thinks appropriate at that stage.

Pauline McNeill: Thank you for your helpful opening remarks on parliamentary scrutiny. You said that there is an important role for the Scottish Parliament in scrutinising the regulations and the primary legislation. Given the technical nature of the regulations, do you have a view about the balance between an independent scrutiny committee and the Parliament itself? In terms of the scrutiny of the operation of the regulations as a whole, would there be any advantage in having some kind of cross arrangement with Westminster

so that we could use the technical expertise that is available there?

Jeane Freeman: Sorry, could you explain what you mean by a “cross arrangement”?

Pauline McNeill: I am asking the question in my capacity as a member of the Social Security Committee, which heard from a witness who talked about the Irish situation. The witness said that it would be worth considering having someone from the independent scrutiny committee at Westminster sitting on any committee that might be set up for independent scrutiny of Scottish Parliament regulations, and vice versa, as such people deal with technical regulations all the time.

Jeane Freeman: Currently, two members of the Social Security Advisory Committee, which operates at UK level, are on the expert group. They are Dr McCormick, who is the chair, and a member who recently joined. What they bring in terms of their experience of the operation of that committee is invaluable.

The situation in Northern Ireland is different in that Northern Ireland has some powers over the delivery of the entire social security system, which we do not have. However, there is a limitation on those powers, as it is not really possible to change too much between what is implemented in England and what is delivered in Northern Ireland. Therefore, in making comparisons, we need to be mindful of the differences.

That said, in the consideration of how we go forward with independent scrutiny, it might be helpful and valuable to ensure that what is done in relation to social security in Scotland—and, equally, what is done south of the border—does not create unintended consequences. I have often said elsewhere that whatever we do in the immediate or longer term with the 11 benefits for which we will take responsibility, any future Government needs be able to work in a complementary way with what remains of the UK welfare system, because, at times, individuals will be in receipt of benefits from both Governments.

We do not want to get into a situation where what one Government does creates an unintended negative impact on what another Government does. There are issues about how the fiscal framework seeks to deal with that. For example, as I think that I said to Parliament when I made the statement on the new social security agency, we have recently resolved the issue of abolishing bedroom tax at source. Therefore, I can see value in making sure that at senior level there is at least co-operation, in terms of understanding and experience, between whatever body we have in Scotland and the Social Security Advisory Committee.

Just so that we are all clear, I say that I have always believed that there is an important role for independent scrutiny of how social security in Scotland is designed, delivered and legislated for in future. We should not simply say that we will do what is done south of the border, because it is not an easy comparison, for two reasons. First, our Parliament is different and its committees have a clear scrutiny role that Westminster committees do not have. Secondly, I do not believe that it is right to have an independent body operating at such a level and with such a purpose that ministers of any Government can bypass when they introduce measures, as is currently the case at UK level.

I am keen to reach a final conclusion—with, I hope, input from the Social Security Committee and the expert group, as well as from this committee if it has views—that will allow us, before the bill completes its road through the Parliament, to be clear about what the independent scrutiny arrangements will be, what role such a committee will have, what requirements there will be on the Scottish ministers to consult it and to whom it might report.

The Deputy Convener: I have a final question. The experience panels, which involve more than 2,400 people, have an input role, but will they have a role in scrutiny as well?

Jeane Freeman: Under the bill, they do not currently have such a role. That issue is part of what the expert group is considering. As I think that I said, and as Dr McCormick has certainly said, the group will want to engage with the Social Security Committee and perhaps other committees of the Parliament. It will also want to consider views from other stakeholder groups, including the experience panels. It is up to the expert group, which is independent, to work out exactly how it wants to do that.

The Deputy Convener: As we have no further questions, I thank the minister and her team.

10:43

Meeting suspended.

10:44

On resuming—

Instruments subject to Affirmative Procedure

Private Housing (Tenancies) (Scotland) Act 2016 (Consequential Provisions) Regulations 2017 [Draft]

The Deputy Convener: The Private Housing (Tenancies) (Scotland) Act 2016 introduces a new type of tenancy for all future lets in the private rented sector. Regulation 5(2)(b) of the draft regulations will amend paragraph 82 of the schedule to the Letting Agent Code of Practice (Scotland) Regulations 2016 (SSI 2016/133), which is on visiting and entering property, so that part of the paragraph reads:

“Section 184 of the Housing (Scotland) Act 2006 specifies that at least 24 hours’ notice must be given, or 48 hours’ notice where the tenancy is a private residential tenancy, unless the situation is urgent”.

Regulation 5(2)(b) could have been drafted more clearly, given that the 48 hours’ notice period is set out not in section 184 of the 2006 act but in paragraph 6 of the schedule to the draft Private Residential Tenancies (Statutory Terms) (Scotland) Regulations 2017, which were laid before the Parliament on 14 September. The Scottish Government has undertaken to include a provision to clarify the matter in an instrument that will amend SSI 2016/133 prior to those regulations coming into force on 31 January 2018.

Does the committee agree to draw these regulations to the Parliament’s attention on reporting ground (h), as the meaning of regulation 5(2)(b) could be clearer in a particular respect?

Members indicated agreement.

The Deputy Convener: Does the committee wish to welcome the Scottish Government’s undertaking that it will clarify the matter in an amending instrument?

Members indicated agreement.

The Deputy Convener: No points have been raised by our legal advisers on the following two instruments.

Scotland Act 1998 (Insolvency Functions) Order 2017 [Draft]

Legal Aid (Scotland) Act 1986 Amendment Regulations 2017 [Draft]

The Deputy Convener: Is the committee content with the instruments?

Members indicated agreement.

Instruments subject to Negative Procedure

Agricultural Holdings (Modern Limited Duration Tenancies and Consequential etc Provisions) (Scotland) Regulations 2017 (SSI 2017/300)

10:46

The Deputy Convener: A main purpose of the regulations is to make provision on who a “new entrant” to farming is for the purposes of determining whether a person’s lease of a modern limited duration tenancy under the Land Reform (Scotland) Act 2016 can contain a break clause. Paragraphs 2, 3, 5 and 6 of schedule 2 to the regulations all provide that, until the coming into force of section 92 of the 2016 act for all purposes, various specified enactments are to be read as if references to certain phrases that are expressed in quotation marks in each regulation were omitted. Those phrases are “repairing tenancy” and “a repairing tenancy”.

Our legal advisers suggest that the provisions could be more clearly expressed if the precise wording that falls to be omitted or modified in each enactment were quoted, so that the provision as modified reads sensibly. In the case of paragraphs 2, 3, 5 and 6 of schedule 2 to the regulations, the precise wording is not quoted in the provisions. The Scottish Government has acknowledged that it might have been clearer to have drafted the transitory provisions in the manner that has been outlined.

Does the committee agree to draw the regulations to the Parliament’s attention on reporting ground (h), as the meaning of various transitory provisions could be made clearer in a particular respect? That applies to paragraphs 2, 3, 5 and 6 of schedule 2 to the regulations.

Members indicated agreement.

The Deputy Convener: Does the committee agree to call on the Scottish Government to further consider laying an amending instrument to clarify the drafting of the provisions?

Members indicated agreement.

The Deputy Convener: No points have been raised by our legal advisers on the following two instruments.

**Functions of Health Boards (Scotland)
Amendment Order 2017 (SSI 2017/304)**

**Civil Legal Aid (Scotland) (Miscellaneous
Amendments) Regulations 2017
(SSI 2017/310)**

The Deputy Convener: Is the committee content with the instruments?

Members *indicated agreement.*

**Instruments not subject to
Parliamentary Procedure**

**Private Housing (Tenancies) (Scotland)
Act 2016 (Commencement No 2 and
Saving Provision) Regulations 2017
(SSI 2017/293 (C 21))**

10:49

The Deputy Convener: The regulations commence the remaining provisions of the Private Housing (Tenancies) (Scotland) Act 2016 on 1 December 2017, with the exception of paragraph 5 of schedule 4, and they make saving provision for existing short assured tenancies. However, no provision appears to have been made to reflect the terms of paragraph (a) or (b) of section 79(4) of the 2016 act in relation to the commencement of section 1 of that act. The Scottish Government has confirmed that that is an oversight and that it intends immediately to bring forward an amending instrument to make provision that reflects the terms of section 79(4).

Does the committee agree to draw the instrument to the Parliament's attention under reporting ground (g), on the basis that it was made by what appears to be an unusual or unexpected use of the powers conferred by the parent statute?

Members *indicated agreement.*

The Deputy Convener: Does the committee agree to welcome the Scottish Government's undertaking to bring forward an amending instrument immediately to make provision that reflects the terms of section 79(4)?

Members *indicated agreement.*

**Land Reform (Scotland) Act 2016
(Commencement No 6, Transitory and
Saving Provisions) Regulations 2017
(SSI 2017/299 (C 23))**

The Deputy Convener: A main purpose of the regulations is to commence a number of provisions of part 10 of the Land Reform (Scotland) Act 2016 on 30 November 2017. The regulations make provision, until the coming into force of section 92 of the 2016 act for all purposes, for various specified enactments to be read as if references to certain words that are expressed in quotation marks in each regulation were omitted. Those words are "a repairing tenancy" and "repairing tenancies".

Our legal advisers suggest that the provisions could be more clearly expressed if the precise wording that falls to be omitted or modified in each enactment were quoted, so that the provisions as

modified read sensibly. In the case of regulations 5 to 11, regulation 12(a) to (j), regulation 12(m), regulation 12(n) in respect of section 77(4) of the Agricultural Holdings (Scotland) Act 2003 and regulation 13, the precise wording is not quoted in the provisions.

The Scottish Government has undertaken to lay an amending instrument before the Parliament to correct an error in regulation 1(2) at the earliest opportunity, and before the regulations come into force on 30 November 2017.

Does the committee agree to draw the regulations to the Parliament's attention on reporting ground (i), as there appears to be defective drafting in regulation 1(2), where a "limited duration tenancy" is defined for the purposes of the regulations as having the same meaning as in section 93 of the Land Reform (Scotland) Act 2016, but the definition is in section 93 of the Agricultural Holdings (Scotland) Act 2003; and on reporting ground (h), as the meaning of various transitory provisions in regulations 5 to 11, regulation 12(a) to (j), regulation 12(m), regulation 12(n) in respect of section 77(4) of the 2003 act and regulation 13 could be made clearer in a particular respect?

Members *indicated agreement.*

The Deputy Convener: Given the Scottish Government's undertaking to lay an amending instrument to correct the error in regulation 1(2), and its indication that it might have been clearer to have drafted the transitory provisions in the way that has been indicated, does the committee agree to call on the Government to so clarify the provisions by means of the amending instrument?

Members *indicated agreement.*

Lobbying (Scotland) Act 2016

10:53

The Deputy Convener: Item 6 is consideration of motion S5M-07795, which relates to the Lobbying (Scotland) Act 2016 (Reporting Procedures) Resolution 2017. The purpose of the motion is to seek agreement to that resolution. Our legal advisers have raised no points on the motion. Is the committee content with the resolution that is set out in motion S5M-07795?

Members *indicated agreement.*

Seat Belts on School Transport (Scotland) Bill: After Stage 2

10:54

The Deputy Convener: The Seat Belts on School Transport (Scotland) Bill is a member's bill that was introduced by Gillian Martin on 28 February 2016. The bill passed stage 1 on 23 May 2017 and amendments were agreed to by the Rural Economy and Connectivity Committee at stage 2 on 28 June 2017.

The committee has before it a paper that considers a revision that was made at stage 2 to the sole delegated power in the bill, which inserted a new subsection into the commencement provisions at section 5. The new subsection requires that regulations that make provision in relation to the commencement of section 1

"may not appoint a day later than 31 December 2018."

Section 1 requires a school authority to ensure that seat belts are fitted to each passenger seat that is used for a dedicated school transport service.

Our legal advisers have raised no issues with the amended power. Does the committee agree to find the commencement power in section 5 of the bill, as amended at stage 2, to be acceptable in principle?

Members indicated agreement.

The Deputy Convener: Is the committee content that regulations made under that section will be laid before the Parliament but will not be subject to any further parliamentary procedure?

Members indicated agreement.

The Deputy Convener: Is the committee content to report to the lead committee accordingly?

Members indicated agreement.

10:55

Meeting continued in private until 11:49.

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