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Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 17 April 2012

Session 4

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CONTENTS

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE	347
WELFARE REFORM (FURTHER PROVISION) (SCOTLAND) BILL: STAGE 1	348
INSTRUMENT SUBJECT TO AFFIRMATIVE PROCEDURE	363
Waste (Scotland) Regulations 2012 [Draft]	363
INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE	364
Public Contracts (Scotland) Regulations 2012 (SSI 2012/88)	364
Utilities Contracts (Scotland) Regulations 2012 (SSI 2012/89).....	365
Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2012 (SSI 2012/108).....	365
Scottish Secure Tenancies (Proceedings for Possession) (Confirmation of Compliance with Pre-Action Requirements) Regulations 2012 (SSI 2012/93).....	366
Adoption and Children (Scotland) Act 2007 (Commencement No 4, Transitional and Savings Provisions) Amendment Order 2012 (SSI 2012/99).....	366
Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2012 (SSI 2012/101)...	366
INSTRUMENTS NOT SUBJECT TO PARLIAMENTARY PROCEDURE	367
Town and Country Planning (Continuation in force of Local Plans) (Highland) (Scotland) Order 2012 (SSI 2012/90)	367
Act of Sederunt (Rules of the Court of Session Amendment) (Fees of Shorthand Writers) 2012 (SSI 2012/100).....	367
SCOTLAND BILL	368

SUBORDINATE LEGISLATION COMMITTEE

10th Meeting 2012, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*James Dornan (Glasgow Cathcart) (SNP)

COMMITTEE MEMBERS

*Chic Brodie (South Scotland) (SNP)

*Mike MacKenzie (Highlands and Islands) (SNP)

*Michael McMahon (Uddingston and Bellshill) (Lab)

*John Pentland (Motherwell and Wishaw) (Lab)

*John Scott (Ayr) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Chris Boyland (Scottish Government)

Ann McVie (Scottish Government)

John Paterson (Scottish Government)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament
Subordinate Legislation
Committee

Tuesday 17 April 2012

[The Convener *opened the meeting at 14:34*]

Decision on Taking Business in
Private

The Convener (Nigel Don): I welcome members to the 10th meeting in 2012 of the Subordinate Legislation Committee. We have received no apologies. I remind members and everybody else to turn off mobile phones, please, so that they do not interfere with the broadcasting system.

Under agenda item 1, it is proposed that the committee take in private item 7, which is consideration of the evidence that we are about to take on the Welfare Reform (Further Provision) (Scotland) Bill. Are members content to do so?

Members *indicated agreement.*

Welfare Reform (Further
Provision) (Scotland) Bill: Stage
1

14:34

The Convener: Agenda item 2 is evidence on the Welfare Reform (Further Provision) (Scotland) Bill.

I welcome our visitors from the Scottish Government—namely, Chris Boyland, who is the bill manager, Ann McVie, who is a team leader in the welfare division, and John Paterson, who is from the legal directorate. Chris Boyland will make an opening statement.

Chris Boyland (Scottish Government): Thank you for inviting us to come and give evidence.

The committee will be aware that the bill has its genesis in the legislative consent process for the United Kingdom Welfare Reform Act 2012 and the Scottish Parliament's partial refusal of legislative consent for that act. The bill that is now before you makes a provision to confer powers on the Scottish ministers in respect of the introduction of universal credit and the personal independence payment that would have been made by the UK act, had the Scottish Parliament granted full legislative consent.

The bill's policy intent is to do nothing more and nothing less than the relevant clauses of the UK act; the bill provides a practical means to a necessary end. It will give the Scottish ministers powers to make changes to devolved legislation in consequence of the UK act. The powers are needed mostly—albeit not exclusively—to ensure that the legislative basis for access to devolved passported benefits, such as free school lunches and blue-badge disabled persons parking permits, can be properly adjusted to take account of the new UK system, and to ensure that there will be no unfortunate consequences in respect of the provision of such important benefits in Scotland.

The committee will have questions about the extent of the powers that the bill will delegate to ministers, how wide ranging they are, and whether there are existing powers that could make some of the necessary provisions. We would be happy to take questions on those points and others in due course. However, I would like to remind the committee that the bill will not confer powers generally in relation to social security, but that it will confer powers specifically in consequence of the UK act and that there are links to that act throughout the bill.

In so far as the powers that are to be conferred on ministers can be described as being wide ranging, that is entirely because the work that we

need them to do is also wide ranging. I will clarify that point. Although the primary policy intent of the bill is to ensure continued access to passported benefits, we also need the bill to make a number of technical changes to primary and secondary legislation in relation to other devolved matters. Examples of the changes are provided in the delegated powers memorandum.

The committee may have concerns about the timetable and the pace at which the changes need to be made. It is worth putting on the record that the timetable is not of our making, but is driven by the pace of the UK Government's welfare reforms. The committee will be keenly aware that the greater part of the work that the bill enables will come at the subordinate legislation stage, which is when the practical operational adjustments will be made. The tight timetable for the bill has been set in order to allow as much time as possible for that practical work to be carried out.

The committee may have concerns about the amount of available detail. The detail—or perhaps the lack thereof—will be one of the main themes of the legislative process of the bill.

The bill is the shape that it is because the vital operational detail on the new UK system, which we need in order to make the necessary adjustments to our subordinate legislation, is simply not yet available. According to the UK Government, that detail is unlikely to be available before June at the earliest. That is why the bill is essentially a piece of enabling legislation. The detail of the adjustments that we will make will have to be set out later, once we have the information that we need on the UK system. We do appreciate the committee's desire for the detail, and we will do our best to provide whatever we can as early as we can.

By way of assurance on that point, the committee will be aware that the Cabinet Secretary for Health, Wellbeing and Cities Strategy gave an undertaking by letter to the convener of the Welfare Reform Committee that we will make available the material on the relevant subordinate legislation that is at our disposal to that committee. As I have said, we will provide what we can as soon as we can, but we remain grateful for the forbearance and willingness of all of the committees involved in the process to proceed on that basis.

That is all that I have to say by way of introduction. We would be more than happy to take any questions that members may have.

The Convener: Thank you very much, Mr Boyland. That is much appreciated. We have a range of questions, some of which you have pre-empted to an extent, but there are still issues that we want to cover.

James Dornan (Glasgow Cathcart) (SNP): You went some way towards answering the first question that I would have asked, which was about the width of the delegated powers and the fact that the bill does not contain much detail. Can you tell us more about the reasons for the lack of detail, or is the situation pretty much as you described it?

Chris Boyland: The essential reason for the lack of detail is the unavailability of information from the UK Government—as we have touched on. We could perhaps say something about the range of things that we need powers to make changes to under the subordinate legislation process.

Ann McVie (Scottish Government): I will step back a little. One primary purpose of the bill is to enable us to protect access to passported benefits from April 2013, when the UK Government will introduce universal credit and personal independence payments. Our goal is to have in place adequate arrangements to protect that access from April 2013—that is the end point from which we are working back.

The timescale is tight and our focus has been on quantifying existing passported benefits. That might sound like a simple task, but nobody has looked at passported benefits in the round before, so collating all that information in one place in the Scottish Government has been challenging. We now have a table that shows the list of passported benefits, a rough idea of the number of recipients who benefit from them and the eligibility criteria against which people are assessed. That is one piece of policy work that we have done.

In parallel, we have tried to scope the number of acts and instruments that refer to the six benefits that are being withdrawn and replaced with universal credit. That has been an even larger piece of work. Some of the benefits that are being withdrawn have been in place for quite a number of years. The current estimate is that something like 20 acts and more than 100 pieces of subordinate legislation either refer to the benefits that are being withdrawn because of the introduction of universal credit or will be affected by the removal of disability living allowance and its replacement by the PIP. The scale of the operation to map out what we need to change means that the task remains challenging.

We have not finished; we are still scoping what we need to consider. We will then need to work out what we will change and how we will do that. That takes us back to the approach to the bill, which gives us the flexibility to do what we need to do for April 2013.

James Dornan: That was a full answer to my first question.

As was noted in the debate on the legislative consent motion on the UK Government's bill, the Westminster Joint Committee on Human Rights criticised that bill and said that an approach

"which focuses on a framework in primary legislation accompanied by multiple regulation-making powers ... can undermine parliamentary scrutiny."

The JCHR also expressed concern that reliance on subordinate legislation could risk incompatibility with rights under the European convention on human rights. Has any thought been given to those points?

John Paterson (Scottish Government): On parliamentary scrutiny, I understand that the debate in December on the legislative consent motion made reference to a study, by the Strathclyde centre for disability research, on the potential human rights implications of the UK Government's plans to disqualify people who live in residential care homes from receiving the mobility element of the DLA. Those plans were dropped, and Maria Miller announced on 1 December 2011 that care-home residents will continue to receive the mobility component. The Scottish Government had expressed concerns about that proposal right through the process, so it welcomed that change.

By virtue of its including regulation-making powers that will be subject to parliamentary scrutiny, the Welfare Reform (Further Provision) (Scotland) Bill will ensure that appropriate levels of scrutiny that the Parliament has approved will be given to secondary legislation.

As for concerns about incompatibility with rights under the European convention on human rights because of relying on subordinate legislation, I say first that it is beyond the Scottish ministers' powers to make any secondary legislation that is incompatible with convention rights. That is the first protection.

14:45

I would also say that the JCHR's concern was raised in the context of changes to the social security system that are being made by the United Kingdom Parliament, as opposed to the types of change that will be made by secondary legislation under the bill, which is about putting in place a mechanism to allow changes to be made so that where, for example, the disability living allowance no longer applies and has been replaced by the personal independence payment, that change can be reflected in legislation, so that the passported benefit can continue to be paid.

Mike MacKenzie (Highlands and Islands) (SNP): Given that the primary legislative objective is limited to ensuring continued access to passported benefits—we have just heard that you

have done a lot of work to identify them—why is it necessary for the powers to be framed so broadly? It seems to me that you are beginning to get an understanding that might allow them to be framed more narrowly.

Ann McVie: I think that, by saying that we are beginning to understand what needs to be done, you have answered your own question. We are not at the end of that process yet. I cannot say today that we have identified every piece of legislation that might need to be amended as a consequence of the changes that are happening as a result of the UK act.

The ways in which the benefits have been used or referred to in Scottish legislation are quite diverse. There are a few examples in the delegated powers memorandum. Others include the Bankruptcy (Scotland) Act 1985, which refers to benefits that are being withdrawn as things that are not treated as income for the purposes of assessing eligibility to repay debt. That might not immediately strike you as being something to take into account in thinking about welfare reform changes.

Another example is in the Representation of the People (Electoral Registration Data Schemes) Regulations 2011, which deal with people who cannot vote on their own part because of disability. The range and scale of the things that we are trying to grapple with at the moment are diverse and broad. We certainly have not come to a firm view about everything that needs to be changed, and we definitely have not yet come to a view about how we might want to change the references in legislation.

Mike MacKenzie: As well as your undoubted other talents, you also seem to be something of a mind reader, because you have answered the question that I was going to ask next. I will just pass on that question, as you have given a good explanation of the situation.

John Pentland (Motherwell and Wishaw) (Lab): Some of the passported benefits to which the Scottish Government refers are regulated using the existing powers to make subordinate legislation, so why are the current powers not considered sufficient to make changes to those regimes?

John Paterson: It is true that some of the powers will be sufficient to make the changes that will ultimately be made. However, at the moment, it is not possible to say exactly what the changes will be to a particular provision, which means that we cannot say whether the power that is available under subordinate legislation will be apt to make the change that we ultimately want to make. Against that background, we are looking to take a general power to allow us to make the changes

that we need to make in order to ensure that passported benefits are available.

If we were to make a guess, we might say that 50 or 70 per cent of the changes that ultimately need to be made could currently be made under existing secondary legislation, but we cannot say exactly what changes those are. If we came back to you in 12 months and said that we had been able to make 70 per cent of the changes that are needed to ensure that passported benefits are available from 1 April 2013, but we had not been able to make the remaining 30 per cent because we did not take wide enough powers, the committee might want to criticise us for that.

Chris Boyland: We also need to keep options open for ministers in order to ensure that, when we come to the subordinate legislation process, we are able to advise ministers that they can make the changes through either an existing power or through powers that have been delegated through the bill. They will then be able to choose the appropriate option. By framing the bill in this way, we are seeking not to close things off but to keep options open.

John Pentland: You have probably answered this question, but I will ask it all the same. If the existing regimes require a higher level of scrutiny or other preconditions, such as consultation of interested groups, to be satisfied, should the same preconditions apply to the exercise of those powers? How would the Government ensure that that happened? If more stringent conditions apply to powers that are already available, will those existing powers be used in place of the new powers?

John Paterson: We have not ruled out keeping the same level of scrutiny or the same preconditions if ministers decide that there are sound policy reasons for doing so. However, the amount of effort that would be required to meet existing preconditions in relation to, for example, a very minor change might not be justified in terms of Government resources and parliamentary time. If a major change was going to be made and a power already existed in secondary legislation that required consultation, it might be thought appropriate to use that power, have the consultation and then make the change.

However, given the very short timescale—we expect to have more information by June and must have measures in place by next April—the duty to consult might take so long that it might not be practicable. Indeed, consultation might not be particularly appropriate or useful, because we might be talking about only a very minor change, such as changing references to DLA to references to the PIP. In such cases, consultation would only delay the implementation of the change that would be necessary to allow the passported benefit to

flow from 1 April, and we would seek to use the new power to ensure that it was available. Other proposed changes might be very substantial, so it would be appropriate to proceed with consultation under the existing legislation.

The Convener: In his opening statement, Mr Boyland said that everything in the bill refers to the UK act. I suspect that you know this very short bill by heart, but I refer you to section 3(2)(b), which says:

“The regulations may ... contain provision not by itself in consequence of ... that Act”.

That is not something that we see in most pieces of devolved legislation. Why does the provision need to be so wide ranging?

Chris Boyland: First and foremost, I point out that when I said that the bill will do nothing more and nothing less than the UK act, I prefaced that with a reference to policy intent. The bill gives ministers powers to make adjustments that are necessary as a consequence of the UK act—which, indeed, was the intention behind the relevant clauses in the original UK act.

We have had a little more time to think about the bill's content than our Westminster colleagues might have had when they were drafting the respective clauses in their bill and, as a result, we have been able to consider the mechanism that might need to exist in the future as well as the immediate need to make these changes by 2013.

Let us take as an example the use of a means or income threshold to replace entitlement to certain benefits as the trigger for passported benefits. We might assume that people who receive £16,000 or less—I am talking purely hypothetically—will receive some passported benefits. In the future, £16,000 might no longer be an appropriate threshold if we are to deliver benefits to the people who need them, because the cost of living will have changed and inflation will be such that £16,000 is no longer a valid trigger. We want to provide a mechanism that will allow the figure to be changed—it is most likely to be increased—so that it continues to identify the recipient group that we want it to identify, without our having to have recourse to primary legislation every time we want to make a change.

Ann McVie: May I pick up on that point from a policy perspective?

The Convener: Please do so.

Ann McVie: Universal credit will be a different type of benefit from income support and jobseekers allowance, in that it will cover people who are in work as well as people who are out of work. We do not yet know what the level of universal credit will be, but the minimum award will be 10p. From a policy perspective, the issue is not

as simple as replacing all references to the benefits that are vanishing with “universal credit”, because we are not talking about like-for-like change.

The provision offers a way of future proofing how we might choose to identify a separate hook for passported benefits. It gives us a mechanism for changing a threshold in line with inflation, if we choose to do that, without going back to primary legislation, as Chris Boyland said.

The Convener: In essence, we are looking at a provision that will enable the Scottish ministers to bring forward pretty much anything that might relate to social security in Scotland. We need appropriate mechanisms for scrutinising such a provision, which is what this committee is all about. It appears that the provision has been drafted to be about as wide as it could be. I am not suggesting that you are making a bad job of defending such an approach, but can you tell me what limits it will have?

Chris Boyland: Reference to the UK act is present throughout the bill. Every substantive section contains the words “the UK Act”. Section 3, on ancillary provision, will allow provision even in

“indirect consequence of a relevant portion of the UK Act”.

John Paterson: What can be done under the bill is action in consequence of the UK Welfare Reform Act 2012. Section 3 will ensure that in the future, when the Scottish ministers can no longer rely on a direct link between what they want to do and something that was done under the Welfare Reform Act, they will be able to rely on an indirect link. Ministers will be able to say, “On the introduction of universal credit, we changed a reference to ‘income support’ to ‘income of £12,000 a year’” and then use section 3 to change the figure to £13,000 or to make some other change. It will always be about matters that are within devolved competence and that in a general sense are not just directly but indirectly consequential to the UK Welfare Reform Act 2012.

The Convener: Could the Scottish ministers regulate on a matter that the 2012 act does not cover, because it had not been thought of? Let me offer a hypothetical situation, which might be wrong. You talked about benefits being predicated on a certain level of income. Let us suppose that a benefit is predicated on the number of children that a person happens to have—I do not know whether that is relevant. Would it be possible for such a criterion to be introduced by regulation if it had not previously applied?

John Paterson: Yes—if the change could be traced back to a change that had been made by the UK Welfare Reform Act. However, if it could not be traced back to the UK act, the answer is no.

The Convener: Would that be possible if the criterion in question was one that related to a benefit that was covered by the UK act, but which had not previously been thought of?

John Paterson: That would be possible if it were covered by the UK act but, if it were not, that would not be possible.

15:00

The Convener: I think that that takes us far enough.

I want to pick up on one other issue. Has any thought been given to the inclusion of a sunset clause or some other way of recognising that what we are talking about might be a temporary piece of work and of ensuring that we revisit the issue at some point?

John Paterson: I do not think that this is a temporary piece of work. We propose to make changes through subordinate legislation to a fairly wide body of legislation that relates mainly to passported benefits. We expect that those passported benefits will continue to be made available in five, 10 and 20 years’ time. It would not be appropriate to have, say, a five-year sunset clause, because the ability to pay the passported benefits would go in five years’ time.

The Convener: I think that, in that case, the Parliament would have to consolidate what it had previously done and establish it in statute rather than in regulations. That is the answer, although I am not necessarily advocating that that is a good thing to do. I just wanted to clarify the Government’s thinking on the subject.

John Paterson: That would be possible; it would be possible to make primary legislation that consolidated all the changes that had been made under the powers in question.

The Convener: Thank you very much. We now come to the meat of the issue, which is scrutiny.

Chic Brodie (South Scotland) (SNP): Good afternoon. In the course of the discussion, comments have been made on the state of the legislation in the UK and the fact that as much time as possible is needed and that the changes could be substantial. Can you share with us the details of the implementation timetable, given that the endgame date is 1 April 2013? What is the timetable for the Scottish Government, as you see it?

Ann McVie: We are working towards having everything in place for April 2013. We know for sure that the first lot of regulations that the Department for Work and Pensions will produce on universal credit will appear no earlier than June of this year, but—

Chic Brodie: Do you believe that the DWP is on target?

Ann McVie: As far as I understand it; I was just about to say that those will be the first detailed regulations that we will see, but we know for a fact that the DWP intends to introduce further regulations at Westminster, and that that will not happen until the autumn. Understanding the detail of what will happen with universal credit and PIPs will be a gradual process. It will be towards the end of this calendar year before we are clear on the full detail of how the new benefits will operate.

Chic Brodie: What would the implications be if we missed that date—1 April 2013?

Ann McVie: Universal credit and PIPs both come into force across the UK on 1 April 2013. The PIP system will begin to be rolled out across the UK from that date, so if we do not have alternatives in place by then, we will lose the hook for any PIP-related passported benefit for which the Scottish Government is responsible.

The main roll-out of universal credit across the UK will not start until October 2013, but the DWP is planning to launch a pathfinder from April 2013. If anyone in the pathfinder area were to leave it and come to Scotland, we would lose the ability to pay them a passported benefit for which the Scottish Government was responsible if we did not have arrangements in place for 1 April 2013.

Chic Brodie: Thank you.

In the debate in December on the legislative consent motion relating to the UK act, the Cabinet Secretary for Health, Wellbeing and Cities Strategy said that conferring powers through Scottish primary legislation

“will give the Parliament the opportunity to scrutinise more fully the implications of the changes”.—[*Official Report*, 22 December 2012; c 4946.]

How will the bill deliver fuller scrutiny than would have been allowed with the UK bill?

Chris Boyland: I ask the committee to consider hypothetically the level of scrutiny that it would have had if the measures had remained in the UK bill. I suggest that, if the measures had stayed in that bill rather than being in a separate piece of Scottish legislation, the extent to which not just this committee but any parliamentary committee would have been consulted on the detail of the measures would have been much less.

I will return briefly to our discussion of section 3(2)(b) of the Scottish bill, which is an example of one way in which we might be able to improve on measures that were in the UK bill before the legislative consent motion was voted on. The Parliament also has an opportunity to amend the

Scottish bill, which it would not have had if the provisions had remained in the UK bill.

For all those reasons put together, I certainly think that the cabinet secretary was correct to say that, because the bill is Scottish legislation, the level of scrutiny that will apply to the provisions under it will be greater than it would have been if the provisions had just stayed in the UK bill.

Chic Brodie: The expectation is that the full 40 days' scrutiny will be available as a minimum. When will drafts of instruments be available and will they be shared with the Parliament?

Chris Boyland: We touched on that to an extent when we described our work programme. Our firm commitment is to provide what we can as soon as we can. Drafts are unlikely to be available within what we see as the timetable for the bill; they are more likely to come forward in the subordinate legislation process that will start afterwards.

John Paterson: Drafts are unlikely to be available while the bill is being considered, because it will be June before anything starts to flow through from Westminster and Whitehall.

The Convener: I take your point that drafts are unlikely to be available while the bill is being considered, so I will move ahead to the point when delegated legislation is introduced and comes to the committee. I need not rehearse with you the timetables that will apply then. Are you confident that you will be able to meet those timetables, so that instruments get proper scrutiny not just in this committee but in subject committees?

John Paterson: We certainly intend to comply with statutory requirements and to lay instruments as soon as is practicable. We cannot rule out circumstances in which legislation must be made on a shorter timescale, although that is very much to be avoided. We look to comply fully with requirements.

The Convener: Forgive me—I do not know how such things work. Are you having discussions with the folk down in Westminster—the officials—so that there is a reasonable expectation that they will complete their process in time for us to go through our process? If they need to have measures in place only for April 2013, they could in principle leave us with a day in which to do our process, although I do not suggest that they want to do that.

Ann McVie: We are in fairly close contact with our counterparts in the DWP about the issue and they are alert to the timetable. Similarly, they are anxious to ensure that we make the changes in our legislation that we need to make, so that things operate properly across the UK. DWP officials know the timescales to which we are

working, and it is in their interests to help us to meet the timetables.

Chic Brodie: Why is that in those officials' interests?

Ann McVie: They know that lots of references are made to benefits that are being withdrawn. They are concerned about a risk arising if the Scottish Government and the Welsh Government do not play their part, in the same way as Government departments at Westminster need to review their legislation that has hooks to benefits that are being withdrawn. Officials are aware of the need to make a raft of changes to legislation in the different parts of the UK. That is something that they have in their sights. It is not that they regard the matter as their responsibility but that they know that changes must be made and, as part of their broader implementation plan, they want to ensure that we are alert to the changes that we need to make.

Chic Brodie: Given that the start date is 1 April, we are talking about the beginning of financial year 2013-14, so there are financial considerations. The powers in the bill are broad and could be used not only to maintain the status quo but to deliver significant changes to the devolved benefits regime. What is the potential financial impact of the proposed powers?

Chris Boyland: The financial memorandum that was lodged with the bill provides details of the envelope within which the changes will take effect. Officials currently have no basis on which to proceed other than on the assumption that entitlement will continue for roughly the same recipient group as currently receives the benefits—or as close as we can make it. If that is the case, the financial implications should not be proportionately terribly significant, because the cost of providing the benefits will be roughly equivalent.

There will be cost changes as part of year-on-year inflation and what have you. Where possible, we have identified such costs in the financial memorandum. Some budgets for benefits have already been allocated, and that has also been identified in the financial memorandum. However, broadly speaking, until a policy decision is made—

Chic Brodie: Did you say that budgets have already been allocated?

Chris Boyland: Some of them have been.

Chic Brodie: Are they predicated on the existing situation, notwithstanding the changes that are coming through in the legislation?

Chris Boyland: As things stand, that is the case in some instances. Off the top of my head I cannot tell you which ones.

Until there is a policy decision to vary entitlement one way or the other, the information that we provided on the financial implications is as close as we can get to the financial picture.

John Scott (Ayr) (Con): The full scrutiny process takes about the same amount of time, whether an instrument is subject to the affirmative or the negative procedure. What difficulty would be caused if the Parliament required the affirmative procedure in all cases?

John Paterson: It is fair to say that the affirmative procedure would not be appropriate in all cases. Very minor changes simply do not merit the affirmative procedure. Members are aware of the demands that the affirmative procedure makes on the time of committees and the Parliament.

John Scott: Okay. It says in the delegated powers memorandum that the affirmative procedure will apply to instruments that make textual changes to primary legislation, and that the negative procedure is regarded as appropriate in other cases. To what extent is it considered that amendment to primary legislation will be required, as opposed to amendment to secondary legislation? To what extent will such changes differ in their content, effect and financial impact?

John Paterson: Our current figures show that, in relation to secondary legislation, roughly 120 instruments fall to be amended and, in relation to primary legislation, roughly 21 acts fall to be amended. Members should bear in mind that those are not definitive figures. However, the figures give an idea of what will happen; we are talking about six times as many pieces of secondary legislation as pieces of primary legislation.

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

15:15

John Scott: It is possible for amending subordinate legislation and stand-alone provision to have the same impact as changes to primary legislation. Given the bill's wide powers, it seems that the Government cannot predict at this point when the higher level of scrutiny will be appropriate. Would it therefore be reasonable for instruments made under the bill to be subject to

affirmative procedure when they change primary legislation and to be subject to the open procedure in other cases? Would that not enable the Government to choose either the affirmative or negative procedure and to explain its approach to Parliament when it introduces such subordinate legislation?

John Paterson: I feel that the current approach, in which the affirmative procedure is used for amendments to primary legislation and the negative procedure for amendments to secondary legislation, has some logic. For example, with regard to amendments to primary legislation, the Parliament has already voted on the actual wording of that legislation and, instead of allowing certain provisions to be made in secondary legislation, has determined that particular terms are sufficiently important to be used in primary legislation. As a result, when you come to make amendments, there is a qualitative difference between that kind of amendment and an amendment to secondary legislation. The logical thing would be to maintain such a differentiation for amendments made using the powers in this bill. In other words, amendments to primary legislation would use affirmative procedure and amendments to secondary legislation negative procedure.

Michael McMahon (Uddingston and Bellshill) (Lab): I want to return to Ms McVie's comment about hooks. One of the hooks for passported benefits that have been identified in evidence to the Welfare Reform Committee is council tax benefit, and it was acknowledged that some hook or legislative vehicle had to be found to allow the Scottish Government to take those powers. Has that matter been examined further and is subordinate legislation one of the vehicles that are being considered?

Chris Boyland: As I understand it, it is not an existing hook.

Michael McMahon: But the benefit itself is going to be devolved to the Scottish Government. As a result, it will be a hook for the passported benefits that will be distributed by local authorities.

Chris Boyland: It is possible to use council tax benefit in the way that you have described—if I have understood you correctly. However, we have not developed our policy thinking in that regard enough to be able to make much comment on the matter right now. Perhaps, in light of our continuing engagement with the Welfare Reform Committee, we can take it away, give it some more consideration and report back on it.

Michael McMahon: Is council tax benefit referred to in the UK act? If so, might this bill be the vehicle for it?

Chris Boyland: The UK act makes little mention of council tax benefit, other than to abolish it; almost everything to do with the benefit happens outwith that act. The devolution of council tax benefit—if that is what you want to call it—amounts to the transfer of funding from the UK Government to the Scottish Government through existing funding mechanisms and, as things stand, the successor arrangements for council tax benefit in Scotland very much fall outside the bill's scope. We are happy to consider and discuss the possibility of using it as a hook for some passported benefits, but we will need to go away, consider the matter and report back on it.

The Convener: You have talked a lot about passported benefits, which are the bill's primary task. Does the Government intend to use the bill to deal with other—clearly ancillary—matters?

Chris Boyland: As I said in my opening remarks, the bill's policy intention is to mirror the intention behind the clauses that were taken out of the UK bill as a consequence of the Parliament's vote on the legislative consent motion. Personally, I would say that, given the timescale, we have quite enough to do on passported benefits without seeking to add to our work.

The Convener: I am grateful for that reassurance. Do members have anything to add?

Chic Brodie: I do wish the Government would change the date from 1 April to 2 April.

The Convener: I take the point, but I suspect that that is outwith our control. I should also add that, in my previous remarks about officials' relationship with the British Government, I did not in any way intend to suggest that officials down there would not want to help or co-operate with you. I know far better than to suggest such a thing as far as officialdom is concerned and I am sure that you are having a very good time trying to make all this work.

I thank our witnesses for attending the meeting and their comprehensive responses. I suspend the meeting briefly to allow them to leave.

15:21

Meeting suspended.

15:24

On resuming—

Instrument subject to Affirmative Procedure

Waste (Scotland) Regulations 2012 [Draft]

The Convener: New duties are imposed by new section 34(2L) and (2F) as read with (2H) of the Environmental Protection Act 1990, which the regulations create. The scope of those duties will be informed by a code of practice to be issued by the Scottish ministers that is not subject to parliamentary scrutiny. The clarity of the new offences created of failing to discharge those duties requires to be assessed in conjunction with that code of practice, which is not yet available. The lead committee may wish to explore the scope of the duties and the clarity of those offences as part of its consideration of the instrument.

Does the committee therefore agree to draw the attention of the lead committee to the duties that are imposed by new section 34(2L) and (2F) as read with (2H) of the Environmental Protection Act 1990, which the regulations create?

Members indicated agreement.

The Convener: The Pollution Prevention and Control (Scotland) Regulations 2000, which are amended by these regulations, have now been amended 24 times. Does the committee agree to write to the Scottish Government to suggest that the 2000 regulations would merit consolidation, and to ask whether the Scottish Government has plans to consolidate them?

Members indicated agreement.

The Convener: I note that our legal advisers have said that the 2000 regulations are “impossible to follow”. We might want to endorse their judgment.

Instruments subject to Negative Procedure

Public Contracts (Scotland) Regulations 2012 (SSI 2012/88)

15:26

The Convener: The drafting of schedule 1 appears to be defective, in that the list of contracting authorities in the schedule omits health boards that are constituted under section 2 of the National Health Service (Scotland) Act 1978. Does the committee agree to draw the instrument to the attention of the Parliament on reporting ground (i), as the drafting appears to be defective?

Members indicated agreement.

Chic Brodie: How on earth can one miss out national health service boards from the list of contracting authorities, when they are the largest spenders of public money?

The Convener: I hope that that is a rhetorical question, because I am sure that I do not have a good answer for you.

Chic Brodie: It is a rhetorical question. That defies belief.

The Convener: I am sure that it will be noted elsewhere.

Schedule 1 also includes within the list of contracting authorities the National Archives, the General Register Office for Scotland and the Scottish Record Office. The Scottish Government has acknowledged that the listing requires to be amended to take into account the merger of the National Archives of Scotland with the General Register Office to form the National Records of Scotland.

There is a further drafting error in schedule 1. The reference to the Crofters Commission should be to the Crofting Commission, which is the correct designation of the commission when the regulations come into force on 1 May 2012.

Does the committee agree to draw the instrument to the attention of the Parliament on the general reporting ground in those two respects?

Members indicated agreement.

The Convener: Finally, does the committee welcome the fact that the Scottish Government has brought forward an amending instrument to correct those errors in time for the coming into force of the regulations on 1 May 2012? We will deal with that shortly.

Members indicated agreement.

Utilities Contracts (Scotland) Regulations 2012 (SSI 2012/89)

The Convener: The committee may wish to draw the attention of the Parliament to the instrument on the general reporting ground in three respects. First, there is a drafting error in schedule 5. The revocation of the Public Contracts and Utilities Contracts (Postal Services and Common Procurement Vocabulary Codes) Amendment (Scotland) Regulations 2008 (SSI 2008/376) extends to the whole regulation so far as extending to the Public Contracts (Scotland) Regulations 2006, but it should refer to the Utilities Contracts (Scotland) Regulations 2006.

Secondly, there is a further error in schedule 5. The substitutions made in regulations 4(d) and 6(4) to (6) of the Defence and Security Public Contracts Regulations 2011 (SI 2011/1848) should replace the Utilities Contracts (Scotland) Regulations 2006, but the reference omits "2006".

Thirdly, there is a failure to follow proper drafting practice in the second paragraph of the preamble. That paragraph should have added reference to Commission regulation (EC) No 1564/2005, in addition to the existing references to directives 2004/18/EC and 2004/17/EC.

Does the committee agree to draw the instrument to the attention of the Parliament on the general reporting ground in those respects?

Members indicated agreement.

The Convener: As before, does the committee welcome the fact that the Scottish Government has brought forward an amending instrument to correct those errors in time for the coming into force of the regulations on 1 May 2012?

Members indicated agreement.

Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2012 (SSI 2012/108)

15:30

The Convener: The amendment regulations have been introduced to correct drafting errors in the two previous instruments. Does the committee agree to draw the regulations to the Parliament's attention under reporting ground (j), as there has been a failure to lay the instrument at least 28 days before it comes into force as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members indicated agreement.

The Convener: However, as urgent action was required to correct the errors that the committee identified in SSI 2012/88 and SSI 2012/89

timeously for the coming into force of those instruments on 1 May 2012, does the committee agree to find the explanation provided by the Scottish Government for the failure to lay the instrument as required to be acceptable?

Members indicated agreement.

Scottish Secure Tenancies (Proceedings for Possession) (Confirmation of Compliance with Pre-Action Requirements) Regulations 2012 (SSI 2012/93)

The Convener: The form or meaning of the regulations could be clearer, in that the terminology that is used in regulation 2 is insufficiently precise, risks confusion between different types of court procedure and does not appear adequately to make reference either to ordinary cause or to summary cause procedure. Does the committee therefore agree to draw the regulations to the attention of the Parliament on reporting ground (h), as the meaning could be clearer?

Members indicated agreement.

Adoption and Children (Scotland) Act 2007 (Commencement No 4, Transitional and Savings Provisions) Amendment Order 2012 (SSI 2012/99)

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2012 (SSI 2012/101)

The committee agreed that no points arose on the instruments.

Instruments not subject to Parliamentary Procedure

Town and Country Planning (Continuation in force of Local Plans) (Highland) (Scotland) Order 2012 (SSI 2012/90)

15:32

The Convener: The meaning of article 2(1) could be clearer, in the respect that the article provides that the specified provisions of the eight local plans described in paragraphs (a) to (h) shall continue in force in relation to the area to which the Highland-wide development plan relates. The order could have made clearer that the continuation of the provisions of each local plan can mean only that they continue to apply in relation to their respective areas and no further.

Does the committee therefore agree to draw the order to the Parliament's attention under reporting ground (h), as its meaning could be clearer?

Members *indicated agreement.*

Act of Sederunt (Rules of the Court of Session Amendment) (Fees of Shorthand Writers) 2012 (SSI 2012/100)

The committee agreed that no points arose on the instrument.

Scotland Bill

15:33

The Convener: The next item of business is consideration of the delegated powers in the Scotland Bill, a piece of UK Parliament legislation.

The committee's predecessor in session 3 considered and reported on such powers in the Scotland Bill as introduced. The bill has been amended during its passage through the Westminster Parliament and it has now completed its scrutiny in the House of Lords. Some of the powers previously considered have been amended and some additional powers have been added, specifically in clauses 3(1), 16 and 24.

No points have been raised by the legal advisers on any of the powers. Is the committee therefore content with the delegated powers in the Scotland Bill?

Members *indicated agreement.*

The Convener: Item 7 will be taken in private.

15:34

Meeting continued in private until 16:00.

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