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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Period Products (Free Provision) (Scotland) Bill: Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 17 September and 17 November 2019, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Period Products (Free Provision) (Scotland) Bill ("the Bill") at Stage 1.ⁱ
2. The Committee submits this report to the lead Committee for the Bill (the Local Government and Communities Committee) under Rule 9.6.2 of the Standing Orders.
3. The Scottish Government has provided the Parliament with a memorandum on the delegated powers provisions in the Bill.ⁱⁱ

ⁱ The Bill as introduced is available [here](#).

ⁱⁱ The Delegated Powers Memorandum ("DPM") is available [here](#).

Overview of the Bill

4. This Member's Bill was introduced by Monica Lennon on 23 April 2019. The lead Committee is the Local Government and Communities Committee.
5. The aim of the Bill, as set out in the Explanatory Notes which accompany the Bill, is "to ensure that all who menstruate are able to access period products, at no cost, as and when required". The Scottish Ministers are required to make a period products scheme for the purposes of achieving this.
6. The Bill also places a duty on the education providers in schools, universities and colleges to make period products available free of charge for pupils or students who need to use them and on "public service bodies" within their premises.

Delegated Powers Provisions

7. When the Committee considered this Bill at its meeting on 17 September 2019, it was content with the delegated powers in the following provisions:
 - Section 5(2)(c) – power to specify requirements about how education providers are to make period products available free of charge for pupils and students.
 - Section 6(2) – power to specify how, where and when products are to be made available by specified public service bodies
 - Section 7(2)(b) – power to specify actions councils etc. must take to inform persons seeking to obtain them about the availability of products.
8. The Committee sought further information from the Member in relation to the following provisions:
 - Section 2(1) – power to make the period products scheme
 - Section 6(1) – power to specify particular public service bodies required to make products available in their premises
9. The full correspondence with the Member can be found in the Annex.
10. The Committee then reconsidered the delegated powers in these provisions at its meeting on 17 December.

Section 2(1) – power to make the period products scheme

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by statutory instrument

Parliamentary procedure: affirmative if making the scheme or replacing it, negative for other changes to the scheme.

Provision

11. Section 2(1) of the Bill requires the Scottish Ministers to make a “period products scheme”. The purpose of the scheme is to regulate and facilitate the right created in section 1 of the Bill that everyone in Scotland who needs to use period products has the right under Part 1 of the Bill to obtain them free of charge.
12. Section 2(2) requires that the scheme must oblige any or all of the bodies listed to make period products available (or secure that they are made so available). Apart from councils (which are already specified in section 2(2)(a)), the other bodies listed there can be specified by the Scottish Ministers in the scheme.
13. The scheme is to be made in regulations which are subject to the affirmative procedure. A replacement scheme is also to be subject to the affirmative procedure. Any other changes to the scheme are subject to the negative procedure.

Committee Consideration

14. The Committee wrote to the Member to ask three questions about the delegated power in section 2 of the Bill. The Member was asked why it is considered appropriate for subsequent changes to a period products scheme, which might include adding a further specified public-facing body or other specified person to the scheme, to be subject to the negative procedure. The Member was also asked why is it not considered necessary to consult a body or person before specifying them in a period products scheme. The Committee also asked the Member to explain why the definition of “public-facing bodies” in the Bill does not set out in more detail the types of body that the Scottish Ministers could specify.
15. Section 9 of the Bill sets out the circumstances in which regulations made under the Bill will be subject to the affirmative or negative procedure. In her response, the Member explained that the intention of this provision is to create a boundary between smaller scale changes, which will attract the negative procedure, and changes amounting to a replacement of the scheme, which will attract the affirmative procedure. The Member accepted that it is not clear whether adding a further specified public-facing body or other specified person to the scheme would be considered a smaller scale change or a change amounting to the replacement of the scheme, and that such regulations could therefore be subject to the negative procedure. The Member therefore confirmed that she was willing to lodge an amendment so that any regulations which will impose obligations for the first time on any public-facing body or other person would be subject to the affirmative procedure.

16. The Committee welcomes the Member's willingness to lodge an amendment to make any regulations that specify any public-facing body or other person in a period products scheme for the first time subject to the affirmative procedure and calls on her to do so at Stage 2.

17. In response to the second question about consultation with a specified public-facing body or other specified person, the Member said that the Scottish Ministers would be required to engage in negotiations with prospective partners in a period products scheme in order to make the scheme effective. The Member took the view that imposing a statutory duty to consult those public-facing bodies or other persons who are to be specified in a period products scheme would add no practical benefit.
18. The Committee is of the view that a statutory duty to consult would provide assurance that consultation will be carried out. The Committee also considered that it is not clear that consultation will be carried out when a public-facing body or other person is specified in subsequent amending regulations. A statutory duty to consult would ensure that those bodies and persons would always be consulted before being specified in regulations.

19. The Committee therefore calls on the Member to reconsider her response regarding consultation and to consider lodging an amendment to include a duty to consult with a body or person before specifying them in any regulations made under Section 2.

20. In response to the third question about the level of detail set-out in the definition of “public-facing body”, the Member said that the Bill purposely gives the Scottish

Ministers as much scope as possible in terms of what the scheme looks like and who they will enter into arrangements with to run the scheme.

21. If the Member brings forward the two amendments suggested above then the Committee does not consider it necessary to make any further recommendation about the definition of "public-facing bodies". The Committee will monitor the Bill's progress and revisit this issue when considering the Bill as amended at Stage 2.

Section 6(1) – power to specify particular public service bodies required to make products available in their premises

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by statutory instrument

Parliamentary procedure: affirmative

Provision

22. Section 6 requires each "specified public service body" to make period products available free of charge on its premises to those who need to use them. Section 10(1) of the Bill defines "specified" for the purposes of Part 2 of the Bill (which includes section 6) as "specified in regulations". Section 9(1) of the Bill specifies that regulations are to be made by the Scottish Ministers. Accordingly, the power in section 6(1) is a power delegated to the Scottish Ministers to specify public service bodies which will be subject to the duty to provide free period products on their premises.
23. Section 10(4) of the Bill restricts the definition of "public service body" to those bodies that are constituted by or under an enactment and which have functions that consist of or include providing public services or otherwise serving the public interest.

Committee Consideration

24. The Committee wrote to the Member to ask why the definition of "public service body" does not list the specific bodies, as constituted by or under an enactment, that should be subject to the duty to make period products available free of charge.
25. The Member explained in her response that the intention is to allow the Scottish Ministers to determine which public service bodies they should extend the duty to. Further, the Member noted that there are, at present, over 120 public bodies that could fall within the definition and that it does not seem necessary to replicate this list on the face of the Bill.
26. The Committee noted that the Bill restricts this provision to bodies that are constituted by or under an enactment, and which have functions which have functions which consist or include providing public services or are serving the public interest. It also noted the Scottish Ministers must consult any such bodies, and that the regulations are subject to the affirmative procedure. The Committee is therefore content with the response from the Member in relation to this matter.

27. The Committee is content with this power in principle and that it is subject to the affirmative procedure.

Annex

Letter to Monica Lennon MSP dated 24 September 2019

Period Products (Free Provision) (Scotland) Bill at Stage 1

The Delegated Powers and Law Reform Committee considered the above Bill on 17 September 2018 and seeks an explanation of the following matters:

Section 2(1) – power to make the period products scheme

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by statutory instrument

Parliamentary procedure: affirmative if making the scheme or replacing it, negative for other changes to the scheme.

Section 2(1) of the Bill requires the Scottish Ministers to make a “period products scheme”.

Section 2(2) requires that the scheme must oblige any or all of the bodies specified in the scheme to make period products available (or secure that they are made so available).

The scheme will be set out in regulations which will be subject to the affirmative procedure when the scheme is set out for the first time or when a scheme is replaced but any other changes to the scheme are to be subject to the negative procedure.

It would appear that it is possible to specify an additional body or person under section 2(2)(b) or (c) at a later stage after a scheme has been made, making this subject to the negative procedure.

Why is the negative procedure considered appropriate for subsequent changes to a period products scheme which might include adding a further specified public-facing body or other specified person to the scheme under section 2(2)(b) or (c)?

There could be significant impact on a body or person specified in the scheme. Unlike a similar provision specifying bodies for the purpose of Part 2 of the Bill (section 6), there is no requirement to consult any body or person before being specified in a period products scheme under section 2 of the Bill.

Why is it not considered necessary to consult a body or person before specifying them in the period products scheme which is to be made under the powers in section 2 of the Bill?

Section 2(2)(b) makes reference to “specified public-facing bodies”. Section 10(2) defines “public-facing bodies” as bodies or other organisations appearing to the Scottish Ministers:

- (a) to be bodies or other organisations to the premises of which the public or a section of the public has frequent access, and
- (b) to be otherwise suitable to be specified.

Why does this definition not set out in more detail the types of body that the Scottish Ministers might specify in regulations under section 2?

Could examples be provided of the type of body that it is anticipated would be specified? Could this, for example, include coffee shops and cafes?

Section 6(1) – power to specify particular public service bodies required to make products available in their premises

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by statutory instrument

Parliamentary procedure: affirmative

Section 6(1) is a power delegated to the Scottish Ministers to specify public service bodies which will be subject to the duty to provide free period products on their premises.

Section 10(4) of the Bill restricts the definition of “public service body” to those bodies that are constituted by or under an enactment and which have functions that consist of or include providing public services or otherwise serving the public interest.

Why does the definition of “public service body” in section 10(4) not list the specific bodies (as constituted by or under an enactment) that should be subject to the duty to make period products available free of charge?

I’d be grateful if you could please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Friday 25 October 2019.

Thank you.

Andrew Proudfoot

Clerk to the Delegated Powers and Law Reform Committee

[Response from Monica Lennon MSP dated 17 October 2019](#)

Period Products (Free Provision) (Scotland) Bill at Stage 1

Thank you for your letter of 24 September 2019 seeking an explanation of a number of matters in relation to my member’s bill. A response to each of the Delegated Powers and Legislative Reform Committee’s questions is set out below.

Question 1

Why is the negative procedure considered appropriate for subsequent changes to a period products scheme which might include adding a further specified public-facing body or other specified person to the scheme under section 2(2)(b) or (c)?

The Bill seeks to strike a balance that reflects the policy, namely to allow the Scottish Ministers to choose their delivery arrangements for a scheme under Part 1 of the Bill relatively easily, whilst allowing for appropriate scrutiny.

I recognise that choosing delivery partners for the scheme is integral to creating an effective scheme, and could play a major part in determining how effective the scheme is

in practice. That is part of the reason why the original scheme, which will specify Ministers' initial choice of delivery partners, is subject to the affirmative procedure. As the Committee's question recognises, however, adding further delivery partners could be considered a mere modification, not replacement, of the scheme and therefore be subject only to the negative procedure.

It's worth keeping in mind that, in choosing their delivery partners, the Scottish Ministers have a responsibility to ensure they act in an ECHR-compliant way. In particular, Ministers would have to ensure that their delivery partners were financially no worse off as a result of their participation in the scheme. This would involve taking account of the costs of a well-run undertaking that is adequately equipped to provide the service. Ministers would also be subject to relevant procurement processes and would be obliged to negotiate fairly the necessary financial arrangements. In addition, Section 8 of the Bill allows the Scottish Ministers to make payments to their delivery partners.

The drafting of section 9(2)(a) creates a boundary – between smaller-scale changes that attract the negative procedure, and changes amounting to a replacement of the scheme that attract the affirmative procedure – that is admittedly not entirely clear-cut. However, part of the Committee's role is to scrutinise such boundaries and to query any instrument which it considers has been made subject to an inappropriate procedure.

Should the Committee feel strongly, however, that the boundary needs to be clarified further – in particular to make clear that the affirmative procedure applies to any regulations that impose obligations, for the first time, on any public-facing body or other person – I would be willing to lodge an amendment to that effect at Stage 2.

Question 2

Why is it not considered necessary to consult a body or person before specifying them in the period products scheme which is to be made under the powers in section 2 of the Bill?

As already noted, the duty to create a scheme rests on Scottish Ministers, who are required to choose delivery partners in order to make the scheme effective. In practice, that requires Ministers to engage in negotiations with prospective partners; they could not simply impose the obligation (to participate in the scheme), without prior negotiation, and expect it to work. Seen in that context, therefore, imposing a statutory duty to consult delivery partners prior to including them in the scheme would serve no useful purpose.

There is a contrast to be drawn with section 6, which allows Ministers (by regulations) to oblige specified bodies to make period products available in their own premises. This section (unlike section 2) does include a duty on Ministers to consult the relevant bodies (see subsection (3)). This is because, in the section 6 context, Ministers themselves would have no role in delivery of the obligation (to provide period products), so would not need to have engaged in negotiations with those bodies before imposing the obligation.

Therefore, while it is acknowledged that there may initially appear to be an inconsistency in approach between section 2 and section 6, the Scottish Ministers are bound in practice to negotiate with any bodies about their involvement in the scheme, under section 2, so a statutory duty to consult them would arguably not add anything in practice.

Question 3

Why does [the] definition [of “specified public-facing bodies”] not set out in more detail the types of body that the Scottish Ministers might specify in regulations under section 2?

Could examples be provided of the type of body that it is anticipated would be specified? Could this, for example, include coffee shops and cafes?

Further information about “public-facing bodies” is set out in the Bill’s Explanatory Notes and Policy Memorandum:

- Paragraph 9 of the Explanatory Notes refers to public-facing bodies as “bodies or organisations whose premises are frequently accessed by members of the public”.
- The Policy Memorandum (under the section on “Detail of the Bill”) includes suggestions of how the scheme might operate, such as the “C-Card” scheme. Adopting a similar scheme for this purpose would mean that anyone who requires period products would be able to obtain them free of charge at designated locations, such as community centres, youth clubs, pharmacies, medical centres or clinics.

Of key significance in this context is the fact that the Bill only sets a minimum framework for what a universal scheme must contain – the Bill purposely gives the Scottish Ministers as much freedom as possible in terms of what the scheme looks like and who they will enter into arrangements with in terms of delivering the scheme (see section 3 (3)). Giving examples of the types of bodies on the face of the Bill might arguably put a restriction on the Scottish Ministers in terms of the scheme they wish to create.

Question 4

Why does the definition of “public service body” in section 10(4) not list the specific bodies (as constituted by or under an enactment) that should be subject to the duty to make period products available free of charge?

Similar to the response to question 3, the policy is to leave it open to the Scottish Ministers to decide to which public bodies they might wish to extend the duty to provide period products in future.

There are over 120 public bodies that could fall within the above definition (see the national public bodies directory). Replicating such a list on the face of the Bill does not seem necessary and, unless measures were taken to update it over time, could in future impose unintended restrictions on Scottish Ministers (if, for example, new bodies matching the definition had been created in the interim).

Yours sincerely,

Monica Lennon MSP

