



The Scottish Parliament
Pàrlamaid na h-Alba

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Andrew Proudfoot
Clerk to the Delegated Powers and Law Reform Committee
By email

17 October 2019

Dear Andrew

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.

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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

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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,

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