



The Scottish Parliament  
Pàrlamaid na h-Alba

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Dear James

### **Period Products (Free Provision) (Scotland) Bill**

I am writing to follow up on a number of points discussed at my evidence session at the Local Government and Communities Committee meeting on 15 January.

I would also like to take this opportunity to comment on a couple of other areas which were not discussed at the meeting, but which were raised in the Cabinet Secretary's letters of 14 January and 22 January and which have been copied to the Committee. I appreciate the Committee's work on my Bill so far and for consideration of correspondence from myself and the Cabinet Secretary in-between evidence sessions. I have since had a constructive meeting with the Cabinet Secretary on 23 January and we continue to engage in dialogue ahead of the conclusion of Stage 1.

#### Section 8

There are numerous examples in existing legislation of duties placed on public sector bodies that are reliant on Scottish Government funding, where the duty is liable to increase those bodies' costs but where no express provision is made in the legislation requiring (or even enabling) Ministers to make (additional) payments to the body concerned. Indeed, as I understand it, this is entirely normal and reflects the principle that central government is expected to fund all public bodies on the basis of the full range of functions and obligations to which they are subject, subject to an annual negotiating process. As soon as a statutory funding obligation was created in relation to any specific function of one type of body, it would create an expectation for equivalent obligations to be created in relation to all the others functions of such bodies, and then to all other types of body, and the end-result could only be a rigid and inflexible statutory straitjacket that would make the annual public-sector budgetary negotiating round next-to-impossible.

Examples of legislation such as described above include legislation placing duties on education authorities to provide free school meals, to provide books, materials and clothing to pupils free of charge or to promote and support Gaelic in schools.

Accordingly, if my Bill only imposed duties on public bodies, section 8 would not have been included.

One of the distinctive features of my Bill, however, is that it allows Scottish Ministers the flexibility to choose private sector bodies (for example, pharmacies) as delivery partners for Part 1 (the universal scheme) if they so wish. On that basis, it was considered appropriate to give Ministers legislative authority for making payments to those bodies, as such expenditure would not form part of the normal public-sector budgetary framework and might otherwise be challenged. Even in relation to private-sector bodies, however, it would not be appropriate to *require* Ministers to make compensating payments – for example, a private-sector body might agree to act as a delivery partner (supplying free period products from its premises) for free, perhaps as an expression of “corporate

social responsibility". Other private-sector bodies, however, are unlikely to agree to act as delivery partners without a guarantee of full compensation for their additional costs. It would be up to Scottish Ministers to decide whether that was an appropriate arrangement but, if they did, section 8 would put beyond challenge their right to use public funds for that purpose. That is why section 8 is expressed as a power ("may") rather than a duty ("must") to make payments. In addition, the flexibility to make such "payments as the Scottish Ministers consider appropriate" enables Ministers to differentiate as they think fit among the persons and bodies set out in Parts 1 and 2 of the Bill.

As I said in evidence, funding provisions such as section 8 are not new in legislation. Section 71 of the Forestry and Land Management Act 2018 is one example, providing that: "The Scottish Ministers may, for the purposes of or in connection with the carrying out of their functions under this Act, provide such financial assistance to any person as they consider appropriate..." Another example can be found in section 97 of the Charities and Trustee Investment (Scotland) Act 2005, where "The Scottish Ministers may make such payments as they think fit...". I can provide further examples, if helpful.

#### Rights-based approach

In the Bill, a "rights based" approach is set out in Part 1 to tackle period poverty and period dignity. Section 1 has to be read with section 2 of the Bill: the right is a qualified and specific one, in that it applies to those who need to use period products and depends on the nature of the scheme that is put in place to "regulate that right and facilitate its exercise". The right in section 1, in other words, is essentially the corollary of the duty imposed by section 2 (on Ministers to establish a universal scheme), and the language of a right was used primarily to signify the change of culture that the Bill seeks to achieve.

#### Projected costs

In her letter the Cabinet Secretary estimates the total cost of the Bill "to the end of the next Parliament, given a five percentage point increase in uptake among those not in full-time education". However, no explanation is given of why uptake would increase by this percentage, still less of why it would continue to increase by the same proportion year-on-year. Nor is there any explanation of why the period "to the end of the next Parliament" covers six full years – given that there is no real prospect of this Bill being passed before mid-2020, the 12-month interval before the universal scheme needs to be operational would not end until Session 6 had already started, and Scottish Parliament sessions last for no more than 5 years. I continue to engage with the Cabinet Secretary on a number of the issues she has raised.

#### Private sector

There was some confusion during the evidence session about whether the Bill would impose obligations on private businesses generally to provide free period products in toilets (on a similar basis to free toilet paper and soap) – you suggested that this would "take us to a completely different level of potential costs".

I would like to take this opportunity to confirm again that there is no provision in the Bill imposing obligations on all private businesses in Scotland. The only provision made in the Bill that obliges any private-sector body to provide free products in toilets is section 5, insofar as it applies to private schools. Otherwise, the obligation to provide free period products in toilets only applies to public-sector education providers (under that section) and any other "public service body" that may (at Ministers' discretion) be specified in regulations under section 6.

#### Framework Bill

The question of whether this is a framework Bill has come up repeatedly. A "framework" Bill is one that creates a structure that can only amount to a complete statutory scheme when it has been

“fleshed out” with further provision made in the form of subordinate legislation (or non-statutory codes of practice, guidance etc.). Part 1 of the Bill fits this model, as it requires a universal scheme to be established, and sets some key parameters for the scheme, but leaves the detail to be developed later, by Ministers, in regulations. Section 3(4) and 4 of the Bill set the minimum criteria that any scheme has to meet – for example, that any preliminary procedure must be cost-free and reasonably easy to use, and must allow for proxy applications; and that the scheme must give users a reasonable choice of different types of period product. Within those parameters, Ministers have complete flexibility as to how the scheme operates in practice – including, for example, in the choice of “delivery partners”.

There are numerous other examples of framework primary legislation that establish a scheme and leave the detail to regulations - section 40 of the Transport (Scotland) Act 2005, for example, enables the detail of concessionary travel schemes to be set out in regulations.

Thank you for your time and consideration ahead of the committee’s consideration of the Stage 1 report.

Yours sincerely,

Monica Lennon MSP