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

Fuel Poverty (Target, Definition and Strategy) (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 18 September, 13 and 27 November 2018, the Delegated Powers and Law Reform Committee considered the delegated powers in the Fuel Poverty (Target, Definition and Strategy) (Scotland) Bill (“the Bill”).ⁱ The Scottish Government issued a Delegated Powers Memorandum (“DPM”) on the delegated powers provisions in the Bill.ⁱⁱ
2. This Scottish Government Bill was introduced by the then Cabinet Secretary for Communities, Social Security and Equalities, Angela Constance MSP, on 26 June 2018.
3. The Committee submits this report to the lead Committee for the Bill (the Local Government and Communities Committee) under Rule 9.6.2 of Standing Orders.

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

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

Overview of the Bill

4. The Bill contains 14 sections and sets a target relating to the eradication of fuel poverty. That target is that by the year 2040 no more than 5% of households in Scotland are in fuel poverty. The Bill contains a complex definition of fuel poverty, the essence of which is that a household will be in fuel poverty if:
 - after having paid its housing costs, it would need more than 10% of its remaining net income to pay for its reasonable fuel needs, and
 - having paid for its reasonable fuel needs, its childcare costs and its housing costs, this then leaves the household unable to maintain an acceptable standard of living.ⁱⁱⁱ
5. The Bill requires the Scottish Ministers to consult on and publish a fuel poverty strategy. They must also consult on and publish five-yearly reports on progress towards the fuel poverty target, as well as a final report. The Bill also consequentially amends and repeals existing provisions on fuel poverty contained in the Housing (Scotland) Act 2001.

ⁱⁱⁱ See page 2 of the Explanatory Notes, which are available [here](#).

Consideration of the delegated powers in the Bill

6. At its meeting on 18 September 2018, the Committee agreed to write to the Scottish Government to raise questions in relation to the delegated powers in sections 2(6)(e) and 10(b) and (c) of the Bill. The Committee's questions, and the response received from the Scottish Government to them, are included in the Annex to this report.
7. The Committee reports as follows on the delegated powers in the Bill. The Committee is content with the remaining powers, subject to the Committee's comments made at paragraphs 24 to 35 below on the scope of the powers in the Bill considered as a whole.

Section 2(6)(e)(ii) – Power to determine other person to determine “minimum income standard”

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Administratively by determination**
- **Parliamentary procedure: None**

Provisions

8. Section 2(5) provides that a household's remaining adjusted net income is sufficient to maintain an acceptable standard of living (for the purpose of section 2(1)(b)) if it is at least 90% of the minimum income standard applicable to the household after deduction of the notional costs allocated as part of that standard to rent, council tax and water rates, fuel, and childcare.
9. Section 2(6)(e)(ii) defines “minimum income standard” as the minimum income standard determined by (i) the Centre for Research in Social Policy at Loughborough University in conjunction with the Joseph Rowntree Foundation, or (ii) such other person as the Scottish Ministers may from time to time determine.
10. The power is not exercisable by an instrument which is to be laid before the Scottish Parliament and is also not subject to any parliamentary procedure.

Correspondence with Scottish Government

11. The Committee sought an explanation from the Scottish Government in relation to the two methods in the Bill by which Ministers can change the person defined in section 2(6)(e)(i) and determine an alternative person. These two powers are:
 - the administrative power in section 2(6)(e)(ii); or
 - the power in section 10(b) to modify the defined terms used in section 2(6) by regulations subject to the affirmative procedure.

12. The DPM does not explain when the Scottish Ministers would use the administrative power and when they would use the regulation-making power.
13. Firstly, the Committee asked for an explanation of the circumstances in which Ministers would rely on a “minimum income standard” (“MIS”) determined by a person other than the person currently set out in section 2(6)(e)(i). The Scottish Government responded that this would occur if the Centre for Research in Social Policy at Loughborough University in conjunction with the Joseph Rowntree Foundation (named in section 2(6)(e)(i)) were to suddenly cease publishing the current UK MIS. It could also occur if those bodies changed their names or ceased to exist in their current form, thereby making the definition of MIS inoperable.
14. Secondly, the Committee sought an explanation from the Scottish Government of why the administrative power in section 2(6)(e)(ii) is considered necessary and appropriate. The Scottish Government responded that the administrative power would allow Ministers to react quickly to designate another person to produce the MIS, allowing section 2(5) to continue to be used to determine if a household has a sufficient standard of living.
15. Thirdly, the Committee sought an explanation of the circumstances in which the regulation-making power in section 10(b) would be used instead of the administrative power to modify the definition of MIS and whether this could be clearer. The Scottish Government responded that section 10(b) would be used if the current UK MIS changed in such a manner that it was no longer deemed appropriate to use in the measurement of fuel poverty in Scotland.

Committee Consideration

16. The Committee considers that while it is reasonable to make provision to ensure the legislation remains functional, the use of an administrative power precludes parliamentary scrutiny of the person chosen to replace the person named in section 2(6)(e)(i).
17. The Committee’s view is that it would be acceptable for the power to be exercised administratively where the underlying determination of MIS would remain the same. However, there is no guarantee that the alternative person chosen administratively by the Scottish Ministers would define MIS in the same way as the person for the time being set out in the Bill as enacted.
18. There is also no guarantee that the person designated to determine MIS is independent of the Scottish Government or that it has a requisite level of experience relating to minimum income standards.
19. The Committee therefore considers that further provision should be made on the face of the Bill regarding the choice of person. This could include provisions requiring that any alternative person is independent from the Scottish Government and that the chosen person has a requisite level of experience in relation to minimum income standards.
20. It could also be clearer on the face of the Bill that the power in section 10(b) (i.e. to make regulations subject to the affirmative procedure) would apply where a different source for determining the MIS was required due to the current UK MIS changing in such a manner that it was no longer appropriate to use in the measurement of fuel poverty in Scotland.

Recommendations

21. **The Committee recognises that the MIS may need to change at short notice where the person currently designated in section 2(6)(e)(i) ceases to publish the current UK MIS or if that person changes its name or ceases to exist in its current form, thereby making the definition of the MIS inoperable.**
22. **However, the Committee draws to the attention of the lead Committee that the administrative power in section 2(6)(e)(ii), as currently drafted, is capable of being exercised to designate a new person who may determine the minimum income standard differently to the body currently designated in section 2(6)(e)(i).**
23. **The Committee recommends that the lead Committee may wish to consider whether further clarity should be set out on the face of the Bill regarding the choice of person. This could include the options outlined at paragraphs 19 and 20 above.**

Scope of powers in the Bill considered as a whole

24. The Bill contains the following significant powers to set and amend the overall definition of fuel poverty:
 - a. Section 2(4) – Power to specify the types of households for which enhanced heating is appropriate for the purposes of the Bill’s calculations;
 - b. Section 10(a) – Power to amend section 2(3) so as to modify the meaning of requisite temperatures and requisite number of hours;
 - c. Section 10(b) – Power to amend the definitions in section 2(6); i.e. “adjusted”, “childcare costs”, “household”, “housing costs”, “minimum income standard” and “net income”; and
 - d. Section 10(c) – Power to make different provision as to when a household’s remaining adjusted net income is sufficient, or is insufficient, to maintain an acceptable standard of living for members of the household.
25. These powers are subject to the affirmative procedure. Before laying draft regulations under these powers the Scottish Ministers must consult such persons as they consider appropriate, which must include individuals who are living, or have lived, in fuel poverty.

Correspondence with Scottish Government

26. The Committee sought an explanation from the Scottish Government as to why it is necessary to have the powers in sections 2(4) and 10 to alter a number of the key metrics defining fuel poverty. This was specifically asked in the context that a similar number of powers were not considered necessary in relation to the four 2030 child poverty targets in the Child Poverty (Scotland) Act 2017 (“the 2017 Act”). The 2017

Act only contains one power in section 3(2) to change the base date for measuring absolute poverty.

27. The Scottish Government responded that the 2017 Act and the current Bill measure different things in different ways and so the powers required to ensure the legislation can function are also different.
28. In the context of the power in section 10(c), the Scottish Government explained that the use of MIS in measuring fuel poverty requires potential changes to definitions contained in the Bill because MIS is determined by a non-statutory body. If the parameters used in determining MIS change, the definitions in the legislation may need to be changed to continue to compare like with like.
29. The Scottish Government's response explains that the 2017 Act does not define certain components of the four types of poverty to which it relates. This means that these terms will have their ordinary meaning. This provides flexibility as these ordinary meanings can evolve. By way of contrast, the components of the definition of fuel poverty are defined in the Bill. In order to provide the same flexibility as the 2017 Act, the Scottish Government states that it has to be possible to adjust these defined components.
30. The Scottish Government states that the lifespan of the fuel poverty legislation is "almost double" the 2017 Act and that it was accordingly considered necessary to provide for possible amendments to definitions to take account of changing economic and/or social circumstances without requiring new primary legislation.

Committee Consideration

31. The Committee accepts that a degree of flexibility is required to take account of social and economic changes that may occur over the lifetime of the Bill as enacted.
32. However, the Committee considers that the powers in sections 2(4) and 10 of the Bill considered as a whole are particularly wide, allowing a large number of the key elements of the fuel poverty target to be altered. Future Governments could significantly alter the concept of fuel poverty, and the level of the threshold at which it applies, through subordinate legislation.
33. Furthermore, the Committee considers that the ordinary meaning of the terms used in the 2017 Act restrain the meaning that can be given to those terms without the necessity for a number of significant delegated powers to amend the meaning of those terms.

Recommendations

34. **For these reasons, the Committee draws the lead Committee's attention to the number and wide scope of the powers to alter the definition of fuel poverty in the Bill.**
35. **The Committee accepts that future Governments may require some flexibility to react to social and economic changes that could occur over the lifetime of the Bill as enacted. However, considered as a whole, the powers in sections 2(4) and 10 are particularly wide, allowing future**

Governments to significantly alter a large number of the key elements of the fuel poverty target.

Annex

LETTER FROM THE DELEGATED POWERS AND LAW REFORM COMMITTEE OF 19 SEPTEMBER 2018

Section 2(6)(e)(ii) – Power to determine other person to determine “minimum income standard”

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Administrative determination**
- **Parliamentary procedure: None**

Section 2(6)(e)(ii) defines “minimum income standard” as the minimum income standard determined by (i) the Centre for Research in Social Policy at Loughborough University in conjunction with the Joseph Rowntree Foundation, or (ii) such other person as the Scottish Ministers may from time to time determine.

No explanation is provided in the DPM as to why it is considered appropriate that the Scottish Ministers may from time to time administratively determine an alternative person to that set out in section 2(6)(e)(i) to determine the “minimum income standard”. It is also not clear in what circumstances the regulation-making power in section 10(b) would be used instead to modify the definition of “minimum income standard”.

Furthermore, the person chosen to determine the minimum income standard may do so differently to the body currently set out in section 2(6)(e)(i). There is no requirement that the person chosen to determine the “minimum income standard” is independent. The Parliament also cannot exercise any scrutiny of the person chosen administratively by the Scottish Ministers under the power in section 2(6)(e)(ii).

(a) Please explain the circumstances in which Ministers would rely on a “minimum income standard” determined by a person other than the person currently set out in section 2(6)(e)(i)?

(b) Please explain why the administrative power in section 2(6)(e)(ii) is considered necessary and appropriate.

(c) Please explain the circumstances in which the regulation-making power in section 10(b) would be used instead to modify the definition of “minimum income standard” and whether this could be clearer.

Section 10(b) – Power to amend the definitions in section 2(6)

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Affirmative**

Section 10(b) allows the Scottish Ministers by regulations to amend section 2 so as to modify the definitions for the time being in section 2(6).

No explanation is provided in the DPM as to why the Scottish Ministers would need to amend the definitions of “adjusted” or “household”.

Please explain why these terms would need to change, whether to take account of changing economic circumstances or otherwise, over the lifespan of the legislation.

Section 10(c) – Power to make different provision in section 2(5) as to a household’s sufficient/insufficient remaining net income

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Affirmative**

(a) The power in section 10(c) allows the Scottish Ministers by regulations to amend section 2 so as to make different provision as to when a household’s remaining adjusted net income is sufficient, or is insufficient, to maintain an acceptable standard of living for members of the household.

Please explain why it is necessary and appropriate that the scope of the power in section 10(c) is drafted widely to allow the Scottish Ministers to adjust the figure of 90% of the minimum income standard at which a household’s remaining adjusted net income is sufficient to maintain an acceptable standard of living in section 2(5).

(b) More widely, considered as a whole, it appears that the three powers in section 10 of the Bill (in addition to the power in section 2(4)) allow the Scottish Ministers to make significant amendments to the overall definition of fuel poverty. By way of contrast, the Child Poverty (Scotland) Act 2017 only contains one delegated power relating to one of the four poverty targets (absolute poverty) that make up the “2030 targets”.

Please explain why it is necessary for the Scottish Ministers to have the powers in section 10 to alter a number of the key metrics that make up the definition of fuel poverty when a similar number of powers were not necessary in relation to the four poverty targets that make up the 2030 targets in the 2017 Act.

RESPONSE FROM THE SCOTTISH GOVERNMENT OF 12 OCTOBER 2019

In my capacity as Bill Team Leader of the Fuel Poverty (Target, Definition and Strategy) (Scotland) Bill (“the Bill”), I am writing in response to the issues raised in your letter with regard to sections 2(6)(e)(ii) and 10 of the Bill.

Section 2(6)(e)(ii) - Power to determine other person to determine “minimum income standard” (“MIS”)

- **Power Conferred on: Scottish Ministers (“Ministers”)**
- **Power Exercisable by: Administrative Decision**
- **Parliamentary Procedure: None**

(a) Please explain the circumstances in which Ministers would rely on a MIS determined by a person other than the person currently set out in section 2(6)(e)(i)?

This would occur if the Centre of Research in Social Policy at Loughborough University in conjunction with the Joseph Rowntree Foundation were suddenly to cease to publish the current UK MIS. This is a non-statutory tool and these bodies have no obligation to publish it. They could announce that they were discontinuing it without giving a sufficient amount of notice to allow for subordinate legislation to be made. Alternatively, either or both of these bodies could cease to exist in their current form (for instance, due to something as simple as a name change). Were this to occur, the definition of MIS in section 2(6)(e)(i) would be rendered inoperable if there was no ability to replace it.

(b) Please explain why the administrative power in section 2(6)(e)(ii) is considered necessary and appropriate.

The grant to Ministers of an administrative power for use in the circumstances outlined in the response to question (a) above would allow Ministers to react quickly by designating another body or bodies to produce the MIS formerly produced by the Centre of Research in Social Policy at Loughborough University in conjunction with the Joseph Rowntree Foundation. This, in turn, would allow section 2(5) to continue as the litmus test for whether a sufficient standard of living has been achieved for the purpose of measuring whether a household is in fuel poverty.

(c) Please explain the circumstances in which the regulation-making power in section 10(b) would be used instead to modify the definition of MIS and whether this could be clearer.

Section 10(b) would be used if the decision were to be made to use a different source for MIS due to the current UK MIS changing in a such a manner that it was deemed no longer appropriate to use it in the measurement of fuel poverty in Scotland.

Section 10(b) - Power to amend the definitions in section 2(6)

- **Power Conferred on: Ministers**
- **Power Exercisable by: Regulations made by Scottish Statutory Instrument**
- **Parliamentary Procedure: Affirmative**

Please explain why the terms "adjusted" or "household" would need to change, whether to take account of changing economic circumstances or otherwise, over the lifespan of the legislation.

Since the legislation is intended to have a lengthy lifespan, it is important to have flexibility to amend the meaning of the terminology used in the definition of fuel poverty without requiring primary legislation. For instance, there could be circumstances over the lifespan of the legislation which would make it appropriate to deduct costs in calculating "adjusted" net income other than those which are defined as housing costs in the Bill. This could arise if an expense currently deducted as a "housing cost" were to be replaced by something else which did not naturally fall within that term, meaning that it would need to be specified as a deduction separately. Living practices may change so as to make it desirable to alter the definition of "household". If the meaning of "household" were to change under any forthcoming Census Order then, since its definition in the Bill is broadly the same as in the current Census Order, amendment to this definition may be appropriate.

Section 10(c) - Power to make different provision in section 2(5) as to a household's sufficient/ insufficient remaining net income

- **Power Conferred on: Ministers**
- **Power Exercisable by: Regulations made by Scottish Statutory Instrument**
- **Parliamentary Procedure: Affirmative**

Please explain why it is necessary and appropriate that the scope of the power in section 10(c) is drafted widely to allow Ministers to adjust the figure of 90% of the MIS at which a household's remaining adjusted net income is sufficient to maintain an acceptable standard of living in section 2(5).

If the methodology by virtue of which the UK MIS is currently calculated were to change, this could result in higher or lower MIS levels. As a consequence of such change, it may become appropriate to treat a higher or lower percentage of MIS as determinative of the question of whether a household has sufficient remaining adjusted net income to maintain an acceptable standard of living after the deduction of the notional costs allocated as part of MIS which are contained in section 2(5)(a) - (e) of the Bill.

Please explain why it is necessary for Ministers to have the powers in section 10 to alter a number of the key metrics that make up the definition of fuel poverty when a similar number of powers were not necessary in relation to the four poverty targets that make up the 2030 targets in the Child Poverty (Scotland) Act 2017 ("the 2017 Act").

While the Bill and the 2017 Act both set targets and provide for the monitoring of those targets, they measure different things and they do so in different ways. As such, the powers which are needed in order to ensure that the legislation can function effectively differ between the two.

As opposed to the position in respect of child poverty, in the measurement of fuel poverty, the Scottish Government is proposing to use a key metric (MIS) which is a non-statutory tool. Definitions may need to change if the definitions used in MIS change so that we are continuing to compare like with like.

In addition, the 2017 Act does not define certain components of the four types of poverty to which it refers, such as the meaning of "household". Thus, these components would have an ordinary meaning which can evolve, which provides flexibility. In contrast, the components of the definition of fuel poverty are defined in the Bill. In order to achieve the same flexibility, it is therefore necessary to be able to adjust these defined terms. Further, given that the lifespan of the fuel poverty legislation is intended to be almost double that of the 2017 Act, it is important to retain an ability to amend the meaning of the key terms used in the definition of fuel poverty in order to take account of changing economic and/or social circumstances without requiring new primary legislation.

It should, however, be noted that the parliamentary procedure to be used in respect of any regulations introduced to alter these metrics is affirmative, thus involving a high level of parliamentary scrutiny and necessitating the approval of Parliament for any changes to be made.

