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

Consumer Scotland Bill: Stage 1



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Contents

Introduction	1
Brief Overview of the Bill	2
Delegated Powers	3
Annex: Correspondence with the Scottish Government	7

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 29 October 2019, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Consumer Scotland Bill (“the Bill”).ⁱ
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of 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 is available [here](#).

Brief Overview of the Bill

4. This Government Bill was introduced by the Cabinet Secretary for Finance, Economy & Fair Work, Derek Mackay MSP, on 5 June 2019. The lead Committee is the Economy, Energy and Fair Work Committee.
5. The Bill has two main policy aims: 1) to establish Consumer Scotland, a consumer advocacy and advice body; and 2) to create a duty on public authorities to have regard to consumer interests when taking decisions of a strategic nature.
6. In relation to the first policy aim, the Bill establishes Consumer Scotland as a body corporate and provides it functions, powers and reporting duties. Its core functions are the provision of consumer advocacy and advice to reduce harm to consumers in Scotland, increase consumer confidence and increase the extent to which consumer matters are taken into account by public authorities. Consumer Scotland will have a number of ancillary functions and a power to obtain information. The Policy Memorandum^[1] notes that the advocacy function will allow consumers to have representation when policy decisions are being made by the Scottish Ministers and the advice function will allow publicly funded assistance to be provided to Scottish consumers to help them to understand their rights.ⁱⁱⁱ
7. In relation to the second policy aim, the public authorities subject to the duty to have regard to consumer interests will be in subordinate legislation. The Policy Memorandum explains that the duty does not mean that consumer interests will take precedence over other considerations but is simply to ensure they are had regard to. Consumer Scotland will be able to issue guidance on the duty and the guidance will be subject to the approval of the Scottish Ministers. The public authorities subject to the duty will be required to report on the steps they have taken to comply with the duty.

ⁱⁱⁱ The Policy Memorandum is available [here](#).

Delegated Powers

8. When the Committee considered the Bill on 17 September, it was content with the delegated powers in the following provisions:
 - Section 4(1)(c) – Information that Consumer Scotland may obtain, analyse and review
 - Section 5(1)(c) – The information function
 - Section 12(2) – Exemptions from requirement to provide information
 - Section 19(1) – Power to modify Consumer Scotland’s functions
 - Paragraph 2(6) of schedule 1 – Membership
 - Section 25(1) – Ancillary provision
 - Section 27(2) – Commencement
9. The Committee agreed to seek further information from the Scottish Government in relation to the following provisions:
 - Section 8(2)(d) – Requirement to provide information to Consumer Scotland
 - Section 8(6)(a) and (b) – Requirement to provide information to Consumer Scotland
 - Section 20(2) – Duty to have regard to consumer interests
10. The Committee reconsidered these powers at its meeting on 29 October after receiving a response from the Scottish Government to its questions. This correspondence can be found in the Annex.
11. The issues considered by the Committee in relation to these powers are discussed below.

Section 8(2)(d) – Requirement to provide information to Consumer Scotland

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative

Provision

12. Section 8(1) provides Consumer Scotland the power to serve notice requiring certain persons to provide it with such information as it requests and to do so within a reasonable time. Section 8(2)(a) to (c) details the persons that can be served with a notice under section 8(1). Section 8(2)(d) provides that Scottish Ministers may specify any other person or description of persons who can be subject to a notice under section 8(1).

Committee Consideration

13. In relation to section 8(2)(d) it was not clear to the Committee why the power in section 8(2)(d) is necessary when the persons listed in sections 8(2)(1) and 8(2)(c) are so broad. The Committee therefore asked the Scottish Government for an explanation of why it considered it necessary for the Parliament to delegate this power to Scottish Ministers. The Committee also asked for detail on what categories of persons might be covered in future and what consideration had been given to providing criteria on the face of the Bill to be applied by the Scottish Ministers when determining whether a person or description of persons should be specified for the purposes of section 8(2)(d).
14. The Committee is content with the Scottish Government's response on this issue (available in full in the Annex).

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

Section 8(6)(a) and (b) – Requirement to provide information to Consumer Scotland

Powers conferred on: the Scottish Ministers

Powers exercisable by: regulations

Parliamentary procedure: negative

Provision

16. As noted above, section 8 enables Consumer Scotland to serve a notice on a person listed in subsection (2), requiring the person to provide it with certain information. The persons listed in subsection (2) and therefore potentially subject to this requirement include a designated regulator and a regulated provider. Section 9 makes provision regarding failure by a designated regulator to comply with a section 8 notice, while section 10 makes provision for Consumer Scotland to refer regulated providers to the relevant designated regulator (being the designated regulator under whose jurisdiction the regulated provider in question falls). Under section 8(6)(a) and (b) the Scottish Ministers can specify, by regulations, which persons are “designated regulators” and “regulated providers” for the purposes of sections 8, 9, 10 and 11, as well as specifying which designated regulator is the relevant designated regulator for each regulated provider.

Committee Consideration

17. The Committee noted that no information is provided in the Bill, the DPM or the Bill's accompanying documents on who might be specified as a “designated regulator”. The Committee also noted the designated regulators will play a significant role in relation to Consumer Scotland's information gathering and investigative functions. The Committee therefore asked why no regulatory bodies have been specified as designated regulators on the face of the Bill.
18. The Committee is content with the Scottish Government's response on this issue (available in full in the Annex).

19. **The Committee is content with this power in principle and that it is subject to the negative procedure.**

Section 20(2) – Duty to have regard to consumer interests

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative

Provision

20. Section 20 places a duty on relevant public authorities, when making decisions of a strategic nature, to consider the impact on consumers in Scotland and the desirability of reducing harm to consumers in Scotland. Subsection (2) provides for the Scottish Ministers, through regulations, to set out which persons are “relevant public authorities” and therefore to determine which persons are subject to the duty. The Scottish Ministers must consult such persons as they consider appropriate before designating a relevant public authority. This consultation must always include any person whom they intend to designate as a relevant public authority who is not already designated.

Committee Consideration

21. The Committee noted that the Bill does not specify any bodies as relevant public authorities. It therefore asked the Scottish Government whether there are any public authorities that it considers could be specified on the face of the Bill. It also asked for examples of which persons might be determined as a relevant public authority under this power (see full correspondence in the Annex).
22. In its response, the Scottish Government explained that Scottish Ministers plan to work collaboratively with public authorities to ascertain the bodies to which the duty should apply. That work is yet to be done and therefore the Scottish Ministers are not in a position to specify any particular public authorities on the face of the Bill at this stage.
23. The Scottish Government provided some examples of potential relevant public authorities in its response. It noted that it is anticipated that local authorities, the Law Society of Scotland, and the Scottish Legal Complaints Commission will be designated. However, it explained that this thinking is provisional and subject to detailed consultation with the persons concerned. It also explained that this list was not exhaustive. The response explained that the Scottish Government wants the authorities concerned to be fully on board with the idea of putting consumer interests at the heart of their strategic decision-making. The Scottish Ministers ideally want authorities to be willing partners in the process.
24. The Committee noted that the Scottish Government has yet to work with potential relevant public bodies to ascertain which public authorities should be subject to the duty. The Committee queried whether such work could have been done before the Bill was introduced, allowing for some public authorities to be designated as relevant public authorities with a power to modify that list.

25. The Committee considered that there appear to be some clear examples of bodies which could be made subject to such a duty, for example, local authorities.
26. The Committee also noted that the Scottish Government suggested in its response that specifying certain public authorities on the face of the Bill and others in regulations could lead to a misplaced perception that the duty applies in some lesser way to the bodies not specified on the face of the Bill. The Committee does not share this view.

Recommendation

27. **The Committee recommend that the Economy, Energy and Fair Work Committee consider further whether any public bodies, such as those noted in the Scottish Government's response, could be named on the face of the Bill.**

Annex: Correspondence with the Scottish Government

Letter to the Scottish Government dated 18 September

Consumer (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 8(2)(d) – Requirement to provide information to Consumer Scotland

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative

Section 8(2)(d) provides that Scottish Ministers may specify any other person or description of persons who can be subject to a notice under section 8(1) to those already in Section 8(2)(a) to (c).

Section 8(2)(a) to (c) covers designated regulators, regulated providers and any other person who supplies goods or services in the course of a business carried on by that person. Section 23(1) defines “business” as including a profession and the activities of any government department, local or public authority or other public body.

The Committee considers that the persons listed in section 8(2)(c) are broad so are not clear on why it would be necessary to specify another person under section 8(2)(d).

Why does the Scottish Government consider it necessary for the Scottish Parliament to delegate the power in section 8(2)(d) to Scottish Ministers when section 8(2)(c) is so broad in scope?

Could the Scottish Government provide detail on what categories of persons Scottish Ministers might want to cover in future using this power?

What consideration has the Scottish Government given to providing criteria on the face of the Bill to be applied by Scottish Ministers when determining whether a person or description of persons should be specified for the purposes of section 8(2)(d)?

Section 8(6)(a) and (b) – Requirement to provide information to Consumer Scotland

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative

Under section 8(6)(a) and (b) the Scottish Ministers can specify, by regulations, which persons are “designated regulators” and “regulated providers” for the purposes of sections

8, 9, 10 and 11, as well as specifying which designated regulator is the relevant designated regulator for each regulated provider.

No information is provided in the Bill, the DPM or the Bill's accompanying documents on which regulators might be specified as a "designated regulator".

Could the Scottish Government explain why no regulatory bodies have been specified as designated regulators on the face of the Bill?

Section 20(2) – Duty to have regard to consumer interests

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative

Subsection (2) provides for the Scottish Ministers, through regulations, to set out which persons are "relevant public authorities" and therefore to determine which persons are subject to the duty. There are no public authorities currently specified on the face of the Bill

Are there any public authorities that could be specified on the face of the Bill? If not, could the Scottish Government provide examples of which persons might be determined as a "relevant public authority"?

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 11 October 2019.

Response from the Scottish Government dated 11 October

Consumer (Scotland) Bill at Stage 1

Thank you for your letter to James Hynd of 18 September 2019 requesting an explanation on the rationale behind the proposed use of delegated powers in the Consumer Scotland Bill. As the Bill manager, I am responding to your request and I trust that the undernoted answers your questions.

Section 8(2)(d) – Requirement to provide information to Consumer Scotland

You asked why the Scottish Government considers it necessary for the Scottish Parliament to delegate the power in section 8(2)(d) to Scottish Ministers when section 8(2)(c) is so broad in scope, and whether the Scottish Government could provide detail on what categories of persons Scottish Ministers might want to cover in future using this power.

Whilst it is unlikely that the Scottish Ministers might want to make a person other than those already specified in section 8(2)(a) to (c) (designated regulators, regulated providers and any other person who supplies goods or services in the course of a business carried on by that person) subject to the requirement to provide information to Consumer Scotland, it is not inconceivable. It may be the case that experience acquired from the operation of Consumer Scotland will result in the identification of a need to make other persons subject to the information-producing requirement. To future-proof the Bill, it is considered desirable to have flexibility in this regard. It is accepted, however, that there may be sensitivities around extending such a requirement to persons outwith section 8(2)(a) to (c), and for that reason the affirmative procedure is considered appropriate and

has been provided for, to afford Parliament the opportunity to carefully scrutinise any such proposed extension.

Categories of person that the Scottish Ministers might want to cover in future using this power could conceivably include those who were, until very recently, supplying goods or services as part of a business but have ceased to do so – important information could be held by such a category of person, particularly if they have had a significant market presence. This is an example for illustrative purposes, and other categories may only come to light once Consumer Scotland is operational.

You also asked what consideration the Scottish Government has given to providing criteria on the face of the Bill to be applied by Scottish Ministers when determining whether a person or description of persons should be specified for the purposes of section 8(2)(d).

The Scottish Government does not consider it appropriate to provide criteria on the face of the Bill to be applied by the Scottish Ministers when determining whether a person or description of persons should be specified for the purposes of section 8(2) (d), as the nature of the provision is that it is a catch-all provision to cover currently unforeseen categories of person. The affirmative procedure will allow the Scottish Parliament to scrutinise any regulations and to take appropriate action if it feels that it is inappropriate to extend the information-gathering power to any particular new category of person.

Section 8(6)(a) and (b) – Requirement to provide information to Consumer Scotland

You asked if the Scottish Government Could explain why no regulatory bodies have been specified as designated regulators on the face of the Bill.

No regulatory bodies were included on the face of the Bill because the Scottish Ministers intend to engage with regulators and regulated providers to ascertain those which should be subject to the requirement to provide information to Consumer Scotland. In addition, the names and structure of regulators tend to change relatively frequently, making this information more appropriate for subordinate legislation.

The final decision as to which regulators are to be specified as designated regulators in regulations under section 8(6)(a) and (b) will be taken in due course, but potential candidates include The Water Industry Commission for Scotland and Food Standards Scotland. Where it is desirable to bring UK regulators, for example Ofgem and Ofcom, within the scope of the powers, a separate Scotland Act Order will be sought.

Section 20(2) – Duty to have regard to consumer interests

You asked if there are any public authorities that could be specified on the face of the Bill, and if not, for the Scottish Government to provide examples of which persons might be determined as a “relevant public authority”.

As indicated in the Delegated Powers Memorandum, the Scottish Ministers wish to work collaboratively with public authorities in ascertaining the bodies to which the duty should apply. That work is yet to be done. As such, Ministers are not in a position to specify any particular public authorities on the face of the Bill at this stage. Further, specifying certain public authorities on the face of the Bill and others in regulations could lead to a misplaced perception that the duty applies in some lesser way to the bodies not specified on the face of the Bill.

As examples, it is anticipated that local authorities, The Law Society of Scotland, and the Scottish Legal Complaints Commission will be designated. That thinking is provisional and subject to detailed consultation with the persons concerned – those named here are also illustrative and do not represent an exhaustive list. The Scottish Government wants the authorities concerned to be fully on board with the idea of putting consumer interests at the heart of their strategic decision-making, and although the duty will be there to compel recalcitrant authorities, Ministers ideally want authorities to be willing partners in the process.

I have answered your questions as fully as possible and I hope you find this helpful.

