DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

18th Meeting, 2015 (Session 4)

Tuesday 26 May 2015

The Committee will meet at 11.30 am in the Adam Smith Room (CR5).

1. **Decision on taking business in private:** The Committee will decide whether to take items 8 and 9 in private.

2. **Instruments subject to affirmative procedure:** The Committee will consider the following—

   - Education (School Lunches) (Scotland) Regulations 2015 [draft];
   - Registers of Scotland (Voluntary Registration, Amendment of Fees, etc.) Order 2015 [draft];
   - Water Environment and Water Services (Scotland) Act 2003 (Modification of Part 1) Regulations 2015 [draft];
   - Historic Environment Scotland Act 2014 (Ancillary Provision) Order 2015 [draft];
   - Scottish Public Services Ombudsman Act 2002 Amendment Order 2015 [draft].

3. **Instruments subject to negative procedure:** The Committee will consider the following—

   - Rural Development (Scotland) Regulations 2015 (SSI 2015/192);
   - Rural Payments (Appeals) (Scotland) Regulations 2015 (SSI 2015/194).

4. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

   - Historic Environment Scotland Act 2014 (Commencement No. 3) Order 2015 (SSI 2015/196 (C.31)).

5. **Prisoners (Control of Release) (Scotland) Bill:** The Committee will consider the Scottish Government's response to points raised on the delegated powers provisions in this Bill at Stage 1.
6. **Pensions instruments:** The Committee will consider correspondence from the Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy.

7. **Public Services Reform (Scotland) Act 2010 (Part 2 Extension) Order 2015:** The Committee will consider correspondence from the Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy.

8. **Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill:** The Committee will consider a draft report to the Justice Committee.

9. **Correspondence from the Minister for Parliamentary Business:** The Committee will consider a paper by the Clerk.

Euan Donald
Clerk to the Delegated Powers and Law Reform Committee
Room T1.01
The Scottish Parliament
Edinburgh
Tel: 0131 348 5212
Email: euan.donald@scottish.parliament.uk
The papers for this meeting are as follows—

**Agenda Items 2, 3 and 4**

Legal Brief (private) DPLR/S4/15/18/1

**Agenda Item 5**

Briefing Paper DPLR/S4/15/18/2

**Agenda Item 6**

Briefing Paper DPLR/S4/15/18/3

**Agenda Item 7**

Briefing Paper DPLR/S4/15/18/4

**Agenda item 8**

Inquiry into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill - as introduced

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill - Delegated Powers Memorandum

Draft Report (private) DPLR/S4/15/18/5(P)

**Agenda Item 9**

Briefing Paper (private) DPLR/S4/15/18/6(P)
DELEGATED POWERS AND LAW REFORM COMMITTEE

18th Meeting, 2015 (Session 4)

Tuesday 26 May 2015

Prisoners (Control of Release) (Scotland) Bill

Correspondence from the Scottish Government

Introduction

1. The Committee reported on the delegated powers in the Prisoners (Control of Release) (Scotland) Bill\(^1\) on 2 December 2014, in its 71st report of 2014.

2. In so doing, the Committee raised concerns about the commencement provisions at section 3.

3. Attached as an annex to this paper is a letter from the Cabinet Secretary for Justice responding to those concerns.

Background

Section 3 – Commencement

Provisions

4. Section 3(2) provides that the Scottish Ministers may by order bring section 1 and 2 of the Bill into force on an appointed day. (Section 8 of the Interpretation and Legislative Reform (Scotland) Act 2010 allows different days to be appointed for different purposes).

5. Section 3(3) provides that a commencement order may include transitional, transitory or saving provision.

Committee report

6. The Committee noted that a commencement order made under section 3 will not be subject to any form of parliamentary procedure (it will be ‘laid-only’). The Committee also noted that, as provided for in section 3(3), the order may contain transitional, transitory or saving provisions.

7. The Committee accepted in principle that transitional, transitory and saving provisions may be required in a commencement order under this Bill. However, the Committee considered that the use of such provisions could have a potentially

---

\(^{1}\) Prisoners (Control of Release) (Scotland) Bill [as introduced] available here: [http://www.scottish.parliament.uk/S4_Bills/Prisoners%20(Scotland)%20Bill/b54a4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Prisoners%20(Scotland)%20Bill/b54a4-introd.pdf)
significant effect on certain persons affected by the Bill. The Committee noted, for example, that a commencement order made under section 3 could contain transitional provisions relating to the adjustment of prisoner release dates. Further to this, the Committee considered that it may be possible for the powers to be exercised in such a way as to have a different effect on different prisoners. This possibility of differential effects on prisoners could, depending upon the provisions, raise consideration of rights which are protected by the European Convention on Human Rights.

8. The Committee therefore recommended that the Scottish Government bring forward an appropriate amendment at stage 2, to make a commencement order made under section 3(2) subject to the negative procedure, where it contains transitional, transitory or saving provisions.

Scottish Government response

9. The Government’s response to the report argued that it would not be appropriate for the power at section 3(2) to be made subject to any form of Parliamentary procedure (other than being laid before Parliament).

10. The Government also pointed out that the Parliament will be given an opportunity to express its views on the commencement order made under section 3 when it is laid before Parliament.

11. The Committee considered this response at its meeting on 24 February and in light of this response, agreed to pursue the issue in the course of the stage 1 debate.

12. Following the stage 1 debate the Convener wrote to the Cabinet Secretary for Justice to reiterate these concerns.

Correspondence from the Cabinet Secretary for Justice

13. On 19 May the Cabinet Secretary wrote to the Convener agreeing to amend the Bill to respond to the Committee’s concerns.

14. Specifically, he has lodged amendments putting the transitional and saving provision for the coming into force of section 1 of the Bill on the face of the Bill thereby allowing Parliament an opportunity scrutinise the provisions.

Recommendation

15. The Committee is invited to consider the response from the Cabinet Secretary for Justice.
Correspondence from the Cabinet Secretary for Justice, dated 15 May 2015.

PRISONERS (CONTROL OF RELEASE) (SCOTLAND) BILL

Thank you for your letter of 29 April relating to the delegated power contained within the Prisoners (Control of Release) (Scotland) Bill ("the Bill").

Having reflected on the concerns of the Delegated Powers and Law Reform Committee in relation to that power, I can advise that I have lodged Stage 2 amendments to the Bill and I hope these amendments will, if approved, assuage the Committee's concerns.

My amendments will put on the face of the Bill transitional and saving provision for the coming into force of section 1 of the Bill. This will ensure there is ample opportunity for effective Parliamentary scrutiny of the transitional and saving provision approach for the provisions in the Bill that will affect the fundamental rights of a significant number of persons i.e. long-term prisoners already serving a sentence when the current system of automatic early release is ended by section 1 of the Bill. Indeed, putting the transitional and saving provision on the face of the Bill means there will be a greater opportunity for Parliament to scrutinise the provision than if it were contained in subordinate legislation subject to either affirmative or negative procedure as MSPs will, if they wish, be able to lodge their own amendments to the provision proposed by the Government.

Thank you for your Committee's consideration of the Bill. A copy of this letter goes to the Justice Committee.
DELEGATED POWERS AND LAW REFORM COMMITTEE
18th Meeting, 2015 (Session 4)
Tuesday 26 May 2015

Firefighters’ Pension Schemes (Amendment) (Scotland) Regulations 2015 (SSI 2015/141)

Police Pension Scheme (Scotland) Regulations 2015 (SSI 2015/142)

Correspondence from the Scottish Government

Introduction

1. At its meeting on 28 April, the Committee reported on the following instruments—
   - Firefighters’ Pension Schemes (Amendment) (Scotland) Regulations 2015 (SSI 2015/141)
   - Police Pension Scheme (Scotland) Regulations 2015 (SSI 2015/142)

2. In so doing, the Committee raised concerns about the number of errors contained within those instruments and, with that in mind, the quality control process applied to those instruments.

3. Attached as an annex to this paper is a letter from the Deputy First Minister responding to those concerns.

Background

4. These two instruments are part of a package of instruments implementing changes to public service pension schemes.

5. Both instruments contained large numbers of errors. The Committee reported both instruments and in so doing expressed considerable dissatisfaction with the quality control process applied to these instruments.

6. The Committee recognised that there are time pressures associated with the delivery of these instruments that has reduced the time available for internal checking. Specifically, the Committee noted its awareness that the Scottish Government is following the UK Government in making provision for these pension schemes and as such must wait for the UK Government to make the schemes before the Scottish Government can draft its instruments.

7. However, the Committee concluded that some of the errors, particularly in the Firefighters Regulations, were of such a patent nature that they should have been identified.
8. Previous instruments within this package of instruments raised similar concerns about the quality control process and with that in mind, the Committee agreed to write to the Deputy First Minister inviting him to reflect on these concerns.

9. In addition, the letter invited the Scottish Government to commit to correct all of the errors identified by the Committee in the Firefighters’ Regulations.

**Correspondence from the Deputy First Minister**

10. On 19 May the Deputy First Minister wrote to the Committee responding to these concerns.

11. The letter highlights the time pressures associated with the drafting and laying of these instruments associated with awaiting regulations from the UK Government.

12. Insofar as the quality control process is concerned, the response makes a commitment to improve that process.

13. Finally, the Deputy First Minister commits to correcting all the errors identified by the Committee in the Firefighters’ Regulations.

**Recommendation**

14. The Committee is invited to consider the response from the Deputy First Minister.
Correspondence from the Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy, dated 19 May 2015.

Firefighters’ Pension Schemes (Amendment) (Scotland) Regulations 2015 (SSI 2015/141). Police Pension Scheme (Scotland) Regulations 2015 (SSI 2015/142)

Dear Nigel,

Thank you for your letter of 29 April 2015 raising further concerns over the quality of recent pension legislation. I agree that it is regrettable that you have found it necessary to contact me again about issues associated with the timetable for and quality control of that legislation. Please accept my apologies on this point.

If I might deal first with scheduling issues, I am grateful to the committee for its recognition of the limited amount of time available to the Scottish Government to make the unprecedented volume of pensions legislation required by the UK Government’s Public Service Pensions Act. The Act hard-coded a deadline of 1 April 2015 for replacing the main public service pension schemes in Scotland with reformed pension schemes, and both I and the Minister for Parliamentary Business have previously written to the committee explaining the challenges that deadline presented — including, on 9 March, advanced warning that the above instruments would breach the 28 day rule and reasons for that course of action.

I can confirm that HM Treasury was challenged on a number of occasions over the impact of that deadline for Scotland, regrettably with no effect. In the absence of a more sympathetic timetable, I can confirm that the Scottish Government did consider the use of retrospection as part of its approach to contingency planning. However HMRC confirmed that the new schemes had to be legally established by 1 April 2015 to allow necessary registration for tax purposes. Failure to register the schemes with HMRC in time would have resulted in a number of significant and unwanted impacts for scheme members and administrators, effectively ruling-out the use of retrospection. It was also our view that other risks around safeguarding pension rights would have existed had we allowed the ‘old’ pension schemes to lapse without
successor pension schemes in place. However, I note the committee’s views and would like to confirm the Scottish Government’s on-going intention to continue to use a range of planning options when considering the delivery of legislative change.

Further to assurances provided by Mr Fitzpatrick in his 31 March letter to you, I would also like to reaffirm our intention to take all opportunities open to us to ensure that the UK Government takes Scotland’s needs fully into consideration when timetabling policy changes which affect Scotland.

Turning to quality control, I would like to take this opportunity to reaffirm Ministers’ commitment to improved legislative quality control processes. In relation to the two instruments mentioned above, I would note that both were made and laid before Mr Fitzpatrick’s 31 March letter was sent. Whilst this in no way excuses the errors identified in these instruments by the Committee it does regrettably follow that the steps we have agreed to take had not, at that point, been taken in full.

In so far as the Firefighters’ Regulations are concerned, you are correct to point out that they largely copy the equivalent Regulations which apply to England and Wales. This must be the case for us to secure consistency and equality of treatment for members of these pension schemes – and is, in particular, something that Scotland’s stakeholders look for. That being said they were not simply copied and laid before the Scottish Parliament without further checking. They were subject to legal input and to our quality control processes albeit on a truncated timescale. I fully understand the Committee’s concerns in this respect and am pleased to confirm that the Scottish Government will correct all of the errors identified by the Committee in the Regulations.

I can assure you and the Committee that lessons have been learned from this package of instruments and that the Scottish Government is committed to processes to avoid a repeat of the difficulties encountered here in any future pensions legislation it presents to the Parliament.
DELEGATED POWERS AND LAW REFORM COMMITTEE

18th Meeting, 2015 (Session 4)

Tuesday 26 May 2015

Public Services Reform (Scotland) Act 2010 (Part 2 Extension) Order 2015 [draft]

Correspondence from the Scottish Government

Introduction


2. In so doing, the Committee raised concerns about the absence of consultation undertaken in relation to the Order.

3. Attached as an annex to this paper is a letter from the Deputy First Minister responding to those concerns.

Background

4. This draft instrument, if approved, will extend the effect of Part 2 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”) and its associated schedules for a period of 5 years from the date on which the instrument is made. If the order is not made before 1 August 2015 Part 2 of the 2010 Act will cease to have effect from that date.

5. Part 2 of the 2010 Act allows the Scottish Ministers to make orders to add, remove or change the functions of public bodies to improve efficiency, effectiveness and economy, and to remove burdens resulting from legislation. When the Bill for the 2010 Act was being scrutinised by the Parliament the principle of whether or not such powers should be delegated to subordinate legislation attracted considerable debate. As a result provisions were inserted into the Bill to address the concerns which had been expressed including the provision which requires the powers to be renewed by order every five years. The rationale behind this requirement appeared to be to provide the Parliament with the opportunity to review the use of the powers to date and whether the case had been made out for their renewal for a further 5 year period. This is the first occasion on which the question of renewal arises.

6. The policy note accompanying the draft instrument notes that no consultation has been undertaken on it, but in the view of the Committee, offered no reasoned justification for not having done so. In the absence of a statutory requirement (as in this case) the decision on whether to consult is for the Scottish Government. The Scottish Government Consultation Good Practice Guidance indicates that this decision will be “informed by the history of the policy area, the issue under
consultation, the existence of any Parliamentary/EU obligations to consult and the stage of the policy/legislative process”.

7. In the absence of a considered justification for the absence of a consultation on the draft instrument the Committee’s asked the Scottish Government to explain in light of the history of the policy area and the intention behind the sunset clause why no consultation had been undertaken.

8. The Scottish Government’s response maintained that a public consultation was neither needed nor would it have been beneficial. Furthermore, it contended that it is for the Parliament to decide whether the Part should remain in force and that stakeholders were unlikely to have any particular views on the issue of continuation.

9. In considering that response the Committee considered that it had not received a satisfactory explanation as to why the Scottish Government concluded that a formal consultation on the principle of continuing the effect of the substantial delegated powers in Part 2 of the 2010 Act was not merited. The Committee expressed concern that the Government took the view that it is unlikely that stakeholders would have any particular views on the matter. The Committee considered that the views of stakeholders (or the absence of views) should be established through the consultation process rather than assumptions made in the absence of an opportunity for comment.

10. The Committee therefore wrote to the Deputy First Minister inviting him to reflect further on the Scottish Government’s decision not to consult on the draft Order.

11. More generally, the Committee sought some assurance that the Scottish Government was not revising its approach to consultation, mindful of the statement made in relation to this order that the likelihood of receiving responses was a determining factor in deciding not to undertake consultation.

**Correspondence from the Deputy First Minister**

12. On 19 May the Deputy First Minister wrote to the Committee responding to these concerns.

13. The response notes that there has been no change in the Scottish Government’s approach to consultation.

14. Insofar as this instrument is concerned, the response reiterates the view that there would have been no merit in a consultation in this instance. It contends that the provisions themselves contain no detail, and as such the only views that a consultation could have elicited would have been for or against continuation, and would not have led to any changes to the Order.

15. The response further suggests that the best evidence as to the impact of these powers is the experience of how they have been used to date and the consultation undertaken into those orders made under these powers. It notes that in consulting on these individual orders under this power no issues were raised about the exercise of these powers under Part 2 of the 2010 Act.
Recommendation

16. The Committee is invited to consider the response from the Deputy First Minister.
Correspondence from the Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy, dated 19 May 2015.

Public Services Reform (Scotland) Act 2010 (Part 2 Extension) Order 2015 [draft]

Thank you for your letter of 13 May regarding the Delegated Powers and Law Reform Committee's consideration of the Public Services Reform (Scotland) Act 2010 (Part 2 Extension) Order 2015 [draft].

As the Committee notes, there is no specific requirement for consultation on the bringing forward of an order under section 134 (4) of the 2010 Act. However, there is a general expectation that there will be public consultation on proposals for legislation.

I should like to reassure the Committee that the Scottish Government has not revised its approach to consultation. We continue to believe that consultation is an important aspect of Scottish Government working methods and should be carried out on proposals for legislation except on rare occasions like this.

I should like to offer the Committee a full explanation of why, exceptionally, we did not consider that consultation was appropriate in this instance, given the particular nature of the instrument.

As the Order seeks only to extend the duration of Part 2 of the 2010 Act, and the provisions themselves contain no detail, the only views that a consultation could have elicited would have been for or against continuation, and would not have led to any changes to the Order.

It is, therefore, unlike the vast majority of legislation, on which a full, substantive consultation on provisions can take place. The position is also unusual insofar as the main stakeholders are public bodies (which are for the most part subject to Ministerial control) as opposed to the general public.

We consider that the best evidence of the impact of Part 2 is how it has been used in practice since it came into force in 2010. The order-making powers have been used eight times since the provisions have been in place (detail of these is provided in Annex). On each occasion, the orders were subject to full public consultation, in line with the requirements of Part 2 and the affirmative Parliamentary procedure.

No issues were raised regarding the use of the Part 2 powers as opposed to primary legislation through public consultation, and there have been no communications to the Scottish Government since enactment of the 2010 Act suggesting that the powers have caused problems or been used in an inappropriate manner.
It remains the view of Scottish Government that the powers are a vital mechanism for making small-scale changes to public functions without taking forward primary legislation.

As such they enable Government to propose changes to public bodies as and when the need arises and for Parliament to consider these quickly and efficiently under an affirmative procedure.

Ultimately, it is for Parliament to decide whether or not the powers should be continued on the basis of their past use and potential future use in relation to improving efficiency, effectiveness and economy, and removing and reducing burdens.

I look forward to discussing these issues with the Finance Committee tomorrow, Wednesday 20 May.
Annex: Orders taken forward under Part 2 of the Public Services Reform (Scotland) Act 2010

Orders using Section 14

SSI 2011 No 215 The Public Services Reform (General Teaching Council for Scotland) Order 2011

SSI 2013 No 197 The Public Services Reform (Commissioner for Ethical Standards in Public Life in Scotland etc.) Order 2013

SSI 2015 No 39 The Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2015

Orders using Section 17

SSI 2011 No 232 The Public Services Reform (agricultural Holdings) (Scotland) Order 2011

SSI 2012 No 102 The Public Services Reform (Recovery of Expenses in respect of Inspection of Independent Further Education Colleges and English Language Schools) (Scotland) Order 2012

SSI 2013 No 24 The Public Services Reform (Planning) (Local Review Procedure) (Scotland) Order 2013

SSI 2013 No 25 The Public Services Reform (Planning) (Pre-application consultation) (Scotland) Order 2013

SSI 2013 No 220 The Public Services Reform (Functions of the Common Services...