DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

1st Meeting, 2018 (Session 5)

Tuesday 16 January 2018

The Committee will meet at 10.00 am in the Adam Smith Room (CR5).

1. Declaration of interests: Neil Findlay will be invited to declare any relevant interests.

2. Decision on taking business in private: The Committee will decide whether to take items 6, 7 and 8 in private.

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

   Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 [draft];
   Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2018 [draft];
   Registers of Scotland (Digital Registration, etc.) Regulations 2018 [draft];
   Community Empowerment (Scotland) Act 2015 (Supplementary and Consequential Provisions) Order 2018 [draft].

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

   National Health Service Superannuation Scheme (Scotland) (Miscellaneous Amendments) (No. 2) Regulations 2017 (SSI 2017/434);
   Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017 (SSI 2017/451);
   National Health Service Pension Scheme (Scotland) (Miscellaneous Amendments) (No. 2) Regulations 2017 (SSI 2017/433);
   Firefighters’ Pension Scheme (Amendment and Transitional Provision) (Scotland) Regulations 2017 (SSI 2017/435);
   Universal Credit (Claims and Payments) (Scotland) Amendment Regulations 2017 (SSI 2017/436);
   Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2017 (SSI 2017/450).
5. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

- Teachers' Pension Scheme (Scotland) (No. 2) Amendment Regulations 2017 (SSI 2017/454);
- Specified Crustaceans (Prohibition on Landing, Sale and Carriage) (Scotland) Order 2017 (SSI 2017/455);
- Allotments (Compensation) (Scotland) Regulations 2017 (SSI 2017/457);
- Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 (Relevant Third Party) Order 2017 (SSI 2017/461).

6. **Work programme:** The Committee will consider its work programme and further consider its approach to the European Union (Withdrawal) Bill.

7. **Consideration of the work of the Committee during the parliamentary year 2016-17:** The Committee will give further consideration to matters arising from the recent evidence session with the Minister for Parliamentary Business.

8. **Report on instruments considered during the second quarter of the parliamentary year 2017-18:** The Committee will consider a draft of its second quarterly report for the parliamentary year 2017-18.

---

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@parliament.scot
The papers for this meeting are as follows—

**Agenda Items 3, 4 and 5**

Briefing on Instruments (private)  
DPLR/S5/18/1/1(P)

**Agenda Item 4**

Instrument Responses  
DPLR/S5/18/1/2

**Agenda Item 6**

*European Union (Withdrawal) Bill - as Amended in Committee*

Briefing Paper (private)  
DPLR/S5/18/1/3(P)

**Agenda Item 7**

*Letter from the Convener following the Minister’s appearance before the Committee on 5 December 2017*

*Reply from the Minister dated 19 December 2017*

*Council Tax Reduction (CTR) scheme - letter from the Cabinet Secretary for Finance and the Constitution to the Convener*

Briefing Paper (private)  
DPLR/S5/18/1/4(P)

**Agenda Item 8**

*Second Quarterly Report 2017-18 [draft] (private)*  
DPLR/S5/18/1/5(P)
DELEGATED POWERS AND LAW REFORM COMMITTEE

1st Meeting, 2018 (Session 5)

Tuesday 16 January 2018

Instrument Responses

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

National Health Service Pension Scheme (Scotland) (Miscellaneous Amendments) (No. 2) Regulations 2017 (SSI 2017/433)

On 18 December 2017, the Scottish Government was asked:

We refer to the “Report to the Scottish Parliament in respect of changes to the National Health Service Pension Scheme (Scotland)” (SG/2017/281) laid under section 22 of the Public Service Pensions Act 2013.

Paragraph 4 of that report states that the revised tables (inserted into regulations 30 and 31 of the National Health Service Pension Scheme (Scotland) Regulations 2015 by regulations 3 and 4 of the instrument) “will be applicable with retrospective effect from 1 April 2017 only for officer members changing employment within the scheme year 2017/18, new starters and practitioners and non-GP providers whose contributions are based on current year income. For the majority of members, the revised bandings will be applied from 1 April 2018.” The same wording appears in the Policy Note.

Regulation 1 of the instrument provides that the instrument comes into force on 31 January 2018. Regulations 6, 7, 12, 13, 14 and 17 have effect from 1 April 2015. It appears therefore that the instrument makes no retrospective provision in respect of the revised tables in regulations 3 and 4 of the instrument for any category of scheme member.

Please explain whether and, if so, how the instrument ensures that the revised tables have retrospective effect from 1 April 2017 for the minority of members referred to in the quotation above. Alternatively, please clarify whether the policy intention has been properly expressed in the report referred to above and the Policy Note.

The Scottish Government responded as follows:

*In reply to the question,* there was an error in the Report and it is proposed to submit a revised Report which makes clear that the new tables come into force on 31st January 2018 and are applied to the 2018/2019 Scheme Year.
National Health Service Superannuation Scheme (Scotland) (Miscellaneous Amendments) (No. 2) Regulations 2017 (SSI 2017/434)

On 18 December 2017, the Scottish Government was asked:

1. The third paragraph of the Policy Note states that the “revised employee contribution table” will be applicable with retrospective effect from 1 April 2017 for officer members changing employment within the scheme year 2017/2018, new starters, practitioners and non GP partners whose contributions are based on current year income.

However regulations 3, 6, 10 and 17, which include new tables with contribution rates, come into force on 31st January 2018, and the provisions mentioned in regulation 1(2) have effect from 1 April 2015 and 1 April 2016, as specified there.

Is there any error in not making provision with effect from 1 April 2017, or is there an error in the Policy Note? Otherwise please explain why the provisions are considered to be appropriate.

2. Regulation 1(2)(a) provides that regulation 7 has effect from 1 April 2015. Is there any error or lack of clarity, as regulation 7 introduces the amendment of the National Health Service Superannuation Scheme (2008 Section) (Scotland) Regulations 2013 in accordance with regulations 8 to 18, but of those regulations, only regulations 9, 13, 16 and 18 have effect from 1 April 2015 in accordance with regulation 1(2)(a)?

(In contrast, the introducing regulation 2 comes into force on 31st January 2018, and of regulations 3 to 6, regulation 4 has effect from 1 April 2016.)

Otherwise please explain why the provisions are considered to be appropriate.

3. Is corrective action proposed?

The Scottish Government responded as follows:

_In reply to question 1_, there was an error in the Policy Note and it is proposed to submit a revised Policy Note which makes clear that the new tables come into force on 31st January 2018 and are applied to the 2018/2019 Scheme Year.

_In reply to question 2_, it is accepted that regulation 1(2)(a) has an error or certainly a lack of clarity because as the Committee points out only certain of regulations 8 to 18 have retrospective effect from 1st April 2015, namely the ones listed in regulation 1(2)(a). We think that those reading the regulation would be able to bypass the error by going to the regulations listed in regulation 1(2)(a). Nevertheless the Scottish Government would propose to clarify the reference in the next set of amending regulations.
Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017 (SSI 2017/451)

On 5 January 2018, the Scottish Government was asked:

A letter of 15 December 2017 has been sent from Marine Planning and Policy, Marine Scotland to the Presiding Officer to explain why section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (‘the 28 day rule’) has not been complied with. The letter provides reasons why Marine Scotland has considered that the Regulations should have been commenced at an early date. The Regulations have come into force on 18th December 2017.

However section 28(2) requires at least 28 days between the date of laying the instrument and the commencement date. To assist the Committee, please explain why it has been considered appropriate to lay the Regulations on 15th December, and so why they could not be planned for laying at an earlier date which would have complied with the 28 day rule.

The Scottish Government responded as follows:

Response to first point (why it has been considered appropriate to lay the Regulations on 15th December)

The Scottish Government considered it necessary to lay the Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017 (SSI 2017/451) (the ‘Regulations’) on 15 December 2017 with an entry into force date of 18 December 2017.

As explained by Marine Scotland in the letter to the Presiding Officer of 15 December 2017, the Regulations streamline the procedure for considering variation applications under section 36 of the Electricity Act 1989 and update references to “the Conservation of Habitats and Species Regulations 2010” which have been revoked.

As set out in more detail in the letter of 15 December 2017, there are a number of reasons why the Scottish Government required the Regulations to be laid on 15 December 2017 and come into force on 18 December 2017. Without the Regulations, the EIA process as contained within the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations (‘SSI 2017/101’) placed a significant regulatory burden on both the Scottish Government as the competent authority and consultation bodies. In light of the fact that the Scottish Government anticipated a number of large scale offshore wind applications (including variation applications) to be submitted to Marine Scotland from late 2017 onwards, urgent amendment of SSI 2017/101 was necessary to unify the scope of the EIA process within SSI 2017/101 and Directive 2011/92/EU (the ‘EIA Directive’) as soon as possible. This urgent amendment was therefore necessary to reduce regulatory burden, avoid additional delays to offshore wind development and thus allow the Scottish Government to achieve its policy of reducing carbon emissions and promoting economic growth.

As regards the reason why the Regulations could not have been laid at a date earlier than 15 December 2017, the following analysis addresses that issue.
Response to second point (why they could not be planned for laying at an earlier date which would have complied with the 28 day rule)

The Regulations were laid on 15 December 2017 and could not have been planned for laying at an earlier date. This is due to the fact that it only recently came to the attention of Marine Scotland that urgent action was required to streamline the EIA process in SSI 2017/101 in order to achieve the policy objective of aligning its scope more precisely with the EIA Directive.

SSI 2017/101 was laid before Parliament on 31 March 2017 and came into force on 16 May 2017. This instrument updates the EIA process for variation applications under section 36 of the Electricity Act 1989. Since the entry into force of SSI 2017/101, Marine Scotland did not receive any variation applications until end November 2017.

Aware that a number of large scale offshore wind applications (including variation applications) were expected to be submitted to Marine Scotland from late 2017 onwards, Marine Scotland’s Licensing and Operations team conducted a review of relevant procedures, including the EIA process for variation applications under SSI 2017/101.

While undertaking this review, Marine Scotland realised that amendment to SSI 2017/101 was required to meet the policy objective of streamlining the EIA procedure for variation applications under section 36 of the Electricity Act 1989. Without amendment, SSI 2017/101 required variations to section 36 consents under the Electricity Act 1989 to be subject to an entire, fresh EIA process even in circumstances where there would be no adverse environmental effects from the variation or where in fact there could be environmental benefits from the variation, therefore far exceeding the requirements of the EIA Directive. This approach would result in an additional regulatory burden for both the Scottish Government as the regulator, and other stakeholders.

Once this urgent policy objective was identified, Marine Scotland acted as quickly as possible to provide policy instructions to SGLD for the matter to be rectified by amendment. As soon as we received the amendment instructions, SGLD acted on an expedited basis to prepare the Regulations ready to be laid and brought into force as quickly as possible to meet Marine Scotland’s policy needs and to bring SSI 2017/101 into line with the requirements of the EIA Directive.
Breach of laying requirements: letter to the Presiding Officer

The above amending instrument was made on 14th December 2017 by the Scottish Ministers under sections 2(2) of the European Communities Act 1972, and section 36C(2) of the Electricity Act 1989. It is being laid before the Scottish Parliament today, and comes into force on 18 December 2017.

Section 28(2) (the 28 day rule) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) has not been complied with. To meet the requirements of section 31(3) of that Act, this letter explains the reasons for this.

This instrument is required to amend the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations (SSI 2017/101). SSI 2017/101 was laid before Parliament on 31 March 2017 and came into force on 16 May 2017. The amendment clarifies the procedure for considering variation applications under section 36 of the Electricity Act 1989, and updates references to “the Conservation of Habitats and Species Regulations 2010” which have been revoked.

Without these amendments, SSI 2017/101 as drafted requires variations to section 36 consents under the Electricity Act 1989 to go through the EIA process even where there are no adverse environmental effects from the variation or where in fact there may be environmental benefits, therefore going well beyond the requirements of Directive 2011/92/EU (the “EIA Directive”). This process places a significant regulatory burden on both the Scottish Government as the competent authority and consultation bodies. The amendment will ensure that the scope of the EIA process is the same in both SSI 2017/101 and the EIA Directive.

The development of offshore wind farms in Scotland strongly supports Scottish Government policy aims of reducing carbon emissions and encouraging economic growth, however the industry also faces significant challenges relating to funding and judicial review.

Four large scale offshore wind farm projects which received consent in October 2014 have faced serious delays due to judicial review proceedings brought by the RSPB. Court proceedings have only just ended and it is critical that these projects are not delayed further due to unnecessary regulatory burden. These projects may come forward with applications for variations due to technological advances since significant time has passed from when these projects were consented.

In addition, once CfD has been secured, strict milestones must be met in order to be compliant with the terms of the award. Advances in technologies during this time means that by the time developers have secured their funding they are required to vary consents in order to include these advances in technology. Variations may then be required urgently to meet CfD milestones. Technological advances may often result in reduced environmental effects.

In addition, within SSI 2017/101 there is an incorrect reference to the Conservation of Habitats and Species Regulations 2010 which have been revoked and replaced by the Conservation of Habitats and Species Regulations 2017. This Instrument corrects that reference.

We regret this breach of the 28 day rule, but we consider that it is necessary to make this amending instrument and bring it into force early, to unify the scope of the EIA
process within the 2017 Regulations and the EIA Directive as soon as possible, reduce regulatory burden, avoid additional delays to offshore wind development and thus allow Scottish Government to achieve its policy of reducing carbon emissions and promoting economic growth.

We will engage with the Environment, Climate Change and Land Reform Committee both constructively and positively and at the earliest opportunity to explain the rationale behind this exceptional breach of the 28 day rule.
Teachers’ Pension Scheme (Scotland) (No. 2) Amendment Regulations 2017 (SSI 2017/454)

On 3 January 2018, the Scottish Government was asked:

The effect of section 23(4) of the Public Service Pensions Act 2013 is to require the Scottish Ministers to lay a report before the Scottish Parliament in a case falling within section 23(1) or (2).

Regulation 2(2) of the instrument makes retrospective provision to the effect that the death grant payable in terms of regulations 135, 136(1), 137(1) and 138(1) of the Teachers’ Pension Scheme (Scotland) (No. 2) Regulations 2014 is discretionary.

Please explain why it is considered that the amendments made by regulation 2(2) of the instrument do not have significant adverse effects in relation to the pension payable to or in respect of members of the scheme or in any other way in relation to members of the scheme in terms of section 23(1) or (2) of the 2013 Act. In particular, in what circumstances could payment of the death grant be refused and why is it considered that such discretion could not lead to a significant adverse effect?

Furthermore, with reference to the Policy Note, is it the case that death grants currently paid under the provisions of the 2014 Regulations cited above are subject to Inheritance Tax and that by making death grant payments discretionary the instrument will allow a death grant to be paid without becoming subject to that tax?

The Scottish Government responded as follows:

In reply to the questions, it is agreed that legally regulation 2(2) of the instrument makes retrospective provision to the effect that the death grant payable in terms of regulations 135, 136(1), 137(1) and 138(1) of the Teachers’ Pension Scheme (Scotland) (No. 2) Regulations 2014 becomes discretionary. This does not affect the pension payable and therefore section 23(1) of the Public Service Pensions Act 2013 is not applicable. The reason it does not apply is that ‘pension’ in section 23(1) of the Public Service Pensions Act 2013 means a continuing flow of payments to a member or a deceased member’s dependents, which are not affected by the regulations above mentioned.

It also does not appear to the Scottish Government that the provisions could have significant adverse effects in any other way in relation to the members of the scheme and therefore section 23(2) of the Public Service Pensions Act 2013 is not applicable. SG took the view that section 23(2)(b) could in principle be engaged, in that there could be adverse effects in relation to a member because the amount of a lump sum payable as a death grant after death affects the amount of assets the member may bequeath or otherwise dispose to beneficiaries in the event of the member’s death. However in this case because in practice death grants have always been paid out by SPPA without exception in the circumstances set out in the regulations, whether legally expressed as an entitlement or as previously as a discretionary payment, and because there is no intention to change the policy in this regard, there are no adverse effects let alone any significant adverse effects. On the contrary, if the payment legally is not expressed as a discretion, HMRC has advised (and this is to answer the second question) there is a risk that Inheritance Tax will be chargeable in certain circumstances on such payments (see:
https://www.gov.uk/hmrc-internal-manuals/inheritance-tax-manual/ihtm17051). The legal change is made to obviate this risk which could adversely affect members and is positively to the benefit of members.

Where this risk arises in relation to England and Wales schemes (teachers and police) also covered by section 23 of the Public Service Pensions Act 2013, the same analysis has been made by HMG and amending instruments in the same terms are scheduled for E and W using the negative procedure.