DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

5th Meeting, 2018 (Session 5)

Tuesday 20 February 2018

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

1. **Decision on taking business in private:** The Committee will decide whether to take items 7 and 8 in private.

2. **Planning (Scotland) Bill:** The Committee will take evidence on the delegated powers in the Bill at Stage 1 from—

   Kevin Stewart, Minister for Local Government and Housing; Jean Waddie, Bill Co-ordinator; Norman MacLeod, Senior Principal Legal Officer, Scottish Government Legal Directorate; John McNairney, Chief Planner, Scottish Government.

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

   - Equality Act 2010 (Authorities subject to the Socio-economic Inequality Duty) (Scotland) Regulations 2018 [draft];
   - Budget (Scotland) Act 2017 Amendment Regulations 2018 [draft];
   - Carers (Scotland) Act 2016 (Adult Carers and Young Carers: Identification of Outcomes and Needs for Support) Regulations 2018 [draft].

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

   - Carers (Scotland) Act 2016 (Review of Adult Carer Support Plan and Young Carer Statement) Regulations 2018 (SSI 2018/33);
   - Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Services) (Protected Adults) Amendment Regulations 2018 (SSI 2018/28);
   - Self-directed Support (Direct Payments) (Scotland) Amendment Regulations 2018 (SSI 2018/29);
   - Carers (Waiving of Charges for Support) (Scotland) Amendment Regulations 2018 (SSI 2018/31);
   - Carers (Scotland) Act 2016 (Short Breaks Services Statements) Regulations 2018 (SSI 2018/32);
Conservation of Salmon (Scotland) Amendment Regulations 2018 (SSI 2018/37);
Local Governance (Scotland) Act 2004 (Remuneration) Amendment Regulations 2018 (SSI 2018/38);
Council Tax (Discounts) (Scotland) Amendment Regulations 2018 (SSI 2018/39);
Carbon Accounting Scheme (Scotland) Amendment Regulations 2018 (SSI 2018/40);
National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2018 (SSI 2018/41);
Community Care (Provision of Residential Accommodation Outwith Scotland) (Scotland) Amendment (No. 2) Regulations 2018 (SSI 2018/42);
National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2018 (SSI 2018/43);
Disabled Persons (Badges for Motor Vehicles) (Scotland) Amendment Regulations 2018 (SSI 2018/44);
Council Tax (Exempt Dwellings) (Scotland) Amendment Order 2018 (SSI 2018/45);
Non-Domestic Rate (Scotland) Order 2018 (SSI 2018/46);
Personal Injuries (NHS Charges) (Amounts) (Scotland) Amendment Regulations 2018 (SSI 2018/47);
Premises Licence (Scotland) Amendment Regulations 2018 (SSI 2018/49);
Scottish Road Works Register (Prescribed Fees) Amendment Regulations 2018 (SSI 2018/50);

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

   Education (Scotland) Act 2016 (Commencement No. 5 and Savings Provision) Regulations 2018 (SSI 2018/36 (C.5));
   Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 (Commencement No. 4) Regulations 2018 (SSI 2018/56 (C.6)).

6. **Islands (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.

7. **Scottish Crown Estate Bill:** The Committee will consider its approach to the delegated powers provisions in this Bill at Stage 1.

8. **Planning (Scotland) Bill:** The Committee will consider the evidence it heard earlier in the meeting.

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The papers for this meeting are as follows—

**Agenda Items 2 and 8**

Planning (Scotland) Bill - As Introduced

Planning (Scotland) Bill - Delegated Powers Memorandum

Briefing Paper (private)  DPLR/S5/18/5/1(P)

**Agenda Items 3, 4 and 5**

Briefing on Instruments (private)  DPLR/S5/18/5/2(P)

**Agenda Items 3 and 4**

Instrument Responses  DPLR/S5/18/5/3

**Agenda Item 6**

Islands (Scotland) Bill - As Introduced

Islands (Scotland) Bill - Delegated Powers Memorandum

49th Report, 2017 (Session 5) - Islands (Scotland) Bill at Stage 1

Islands (Scotland) Bill - Scottish Government Response to the Committee's Stage 1 Report

Briefing Paper  DPLR/S5/18/5/4

**Agenda Item 7**

Scottish Crown Estate Bill - As Introduced

Scottish Crown Estate Bill - Delegated Powers Memorandum

Briefing Paper (private)  DPLR/S5/18/5/5(P)
Equality Act 2010 (Authorities subject to the Socio-economic Inequality Duty (Scotland) Regulations 2018 [draft]

On 31 January 2018, the Scottish Government was asked:

1. The policy note lists the public authorities which the Scottish Government proposed in its public consultation should be named under the duty in section 1(1) of the Equality Act 2010. That list included Scottish Ministers and the policy note goes on to state that ""Scottish Ministers" includes the following: The Scottish Government, Accountant in Bankruptcy; Disclosure Scotland; Education Scotland; Scottish Prison Service; Scottish Public Pensions Agency; Student Awards Agency for Scotland; Transport Scotland."

Please clarify why it is considered appropriate for the proposed new section 1(3)(a) of the Equality Act 2010 (in respect of Scotland) to refer to "Scottish Ministers" without further reference to the Government agencies specified in the policy note.

2. Section 1 of the Equality Act 2010 extends to England, Scotland and Wales. Regulation 2(2) substitutes section 1(3) of the Act in respect of Scotland only. Please explain why it has been considered appropriate not to have included an extent provision in regulation 1? Is it considered to be proper or normal drafting practice to include one in these circumstances?

The Scottish Government responded as follows:

1. To assist in maximising the effectiveness of the public consultation, the consultation paper set out a range of bodies that would be subject to the duty in section 1(1) of the Equality Act 2010. Those mentioned are operational agencies of the Scottish Ministers, but as they have no separate legal identity from the Scottish Ministers it is neither necessary nor appropriate to list them in the legal instrument that imposes the duty. The drafting convention is only to make separate reference to bodies of this type where there is a particular reason to do so, such as in a Budget Bill for fiscal transparency.

The Committee can therefore be assured that they are included in the duty through the reference that is proposed to be inserted into section 1 to “the Scottish Ministers”. The Policy Note has been used to assist the reader to understand the coverage of the reference, since no separate reference is made on the face of the legislation to some bodies that may be familiar to the reader.
2. The power to make the SSI is contained in section 2 of the Equality Act 2010, which expressly limits the power of the Scottish Ministers to make provision in several ways, including that the duty created in section 1 of that Act can only be varied by them in relation to authorities whose functions are exercisable only in or as regards Scotland. That is not quite the same as using the powers “in respect of Scotland only”.

Section 1 of the Act will be commenced from 1 April 2018 by the Equality Act 2010 (Commencement No. 13) (Scotland) Order 2017 (S.S.I. 2017/403). The section extends to England, Wales and Scotland, as provided for by section 217 of the Act, but has not been subject to any other commencement. Therefore the 2017 Commencement Order gives the totality of its present commencement.

Although the commencement is by SSI, that does not of itself limit the commencement to Scottish extent, though it will apply the duty only in relation to Scottish authorities. Those authorities only have functions that are exercisable in or as regards Scotland (and do not relate to reserved matters). It follows that there is no reason in principle to limit the extent of the amendment to Scotland, though its application will only be to Scottish bodies. The extent of the amendment follows the extent of the Act, which needs no stating in the SSI.

In practice, however, the limits on the authorities that can be listed will mean that the amendment only has meaning in or as regards Scotland, since the bodies cannot exercise functions more widely.
INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Carers (Scotland) Act 2016 (Review of Adult Carer Support Plan and Young Carer Statement) Regulations 2018 (SSI 2018/33)

On 7 February 2018, the Scottish Government was asked:

1. Regulation 4 contains a reference to regulations 2(d) and 3(f) in order to explain the meaning of ‘material impact’, which is referred to in regulations 2(c) and 3(c). This would appear to be a drafting error as there are no regulations 2(d) or 3(f)? Accordingly, is it considered that the reference should state regulations 2(c) and 3(c)?

2. Is corrective action proposed?

The Scottish Government responded as follows:

In response to question 1, we agree that the reference to regulations 2(d) and 3(f) is a drafting error and that the reference should state regulations 2(c) and 3(c).

In response to question 2, we confirm that corrective action will be taken by way of a correction slip.
DELEGATED POWERS AND LAW REFORM COMMITTEE

5th Meeting, 2018 (Session 5)

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Islands (Scotland) Bill: Stage 1

Response from the Scottish Government

Background

1. The Committee reported at Stage 1 on the delegated powers in the Islands (Scotland) Bill (the “Bill”) on 1 November 2017, in its 49th Report, 2017 Session 5.¹

2. The Rural Economy and Connectivity Committee considered the Bill as lead committee and reported on 22 January 2018.

3. The Scottish Government responded to the Committee’s report and has agreed to the Committee’s recommendation. The Committee did not draw the Parliament’s attention to the other delegated powers in the Bill.

Committee recommendation

Section 7(3) – Duty to have regard to island communities

- Power conferred on: the Scottish Ministers
- Power exercisable by: Regulations
- Parliamentary procedure: Affirmative

Provisions

4. Section 7(3) provides that the Scottish Ministers may by regulations amend the schedule which lists the “relevant authorities”, that is, the bodies, office-holders and other persons which are to be subject to the duty imposed by section 7(1). That duty is to have regard to island communities in carrying out their functions.

5. Regulations may amend the schedule by either adding an entry for any person, body or office-holder, or removing an entry.

Committee consideration

6. The Committee noted in correspondence with the Scottish Government that some other Acts include a power to modify a list of authorities contained in the schedule, by modifying an entry in the list. For example, section 6(2) of the British Sign Language (Scotland) Act 2015 enables the Scottish Ministers by order to modify the schedule of that Act by (in short) adding, removing or modifying entries.

¹ The Bill, as introduced, is available here.
7. The Scottish Government responded that it considered the approach taken in the Bill was sufficient to ensure that the list of relevant authorities correctly identifies those persons, bodies or office-holders which must have regard to island communities in carrying out their functions. In particular, where a relevant authority has its name changed, the entry under the former name may be removed and the new name added to the list in the appropriate place.

8. The Committee accepts that, were it to be required to change the name of an authority listed in the schedule, the practical effect of providing for the removal of the existing entry and the addition of a new entry with the changed name is the same as providing for the variation or modification of the name. However the Committee saw no good reason why, for consistency with other previous examples, this power could not be expanded to include the power to modify an entry. For example, this would be consistent with the drafting of section 6(2) of the British Sign Language (Scotland) Act 2015.

Recommendation

9. The Committee was not persuaded by the Government's explanation for why the powers in section 7(3) do not include a power to amend the schedule by modifying an entry. The Committee considers that to include this power would be consistent with the approach taken in earlier provisions, such as in section 6(2) of the British Sign Language (Scotland) Act 2015. The Committee therefore recommended that a consistent approach should be taken to the drafting of this power, unless there is a good reason not to include the power to modify an entry.

10. The Committee accepts that the exercise of the power is subject to scrutiny by the affirmative procedure.

Scottish Government Response

11. The Scottish Government responded to the Committee’s Stage 1 report in the following terms:

The Scottish Government notes the recommendation and will bring forward amendments at Stage 2.