DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

21st Meeting, 2018 (Session 5)

Tuesday 12 June 2018

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

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

   - Scotland Act 1998 (Agency Arrangements) (Specification) Order 2018 (SI 2018/626);
   - Beef and Pig Carcase Classification (Scotland) Amendment Regulations 2018 (SSI 2018/182).

2. **Prescription (Scotland) Bill (in private):** The Committee will consider a draft Stage 1 report.

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The papers for this meeting are as follows—

**Agenda Item 1**

Briefing on Instruments (private)                  DPLR/S5/18/21/1(P)
Instrument Responses                              DPLR/S5/18/21/2

**Agenda Item 2**

Prescription (Scotland) Bill - As Introduced
Prescription (Scotland) Bill - Explanatory Notes
Prescription (Scotland) Bill - Policy Memorandum
Prescription (Scotland) Bill - Delegated Powers Memorandum
Draft Report (private)                             DPLR/S5/18/21/3(P)
DELEGATED POWERS AND LAW REFORM COMMITTEE

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Instrument Responses

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE


On 30 May 2018, the Scottish Government was asked:

Article 2 provides that it comes into force immediately after "the end of the period determined in accordance with regulation 4" of the Scotland Act 2016 (Transitional) Regulations 2017 (S.I. 2017/444). Paragraph (1) of regulation 4 specifies the period ending with 31st March 2020. However paragraph (2) provides that, if earlier, the period will end-

(a) in summary, when a provision contained in an Act of the Parliament ("ASP") within competence by virtue of exception 1 in Section F1 (disability and industrial injuries benefits) comes into force;
(b) again in summary, when a provision contained in an ASP within competence by virtue of exception 2 in Section F1 (carer's benefits) comes into force.

(1) Please clarify, in the circumstance where two different earlier dates may be determined under (a) and (b) given that the relevant provisions could be brought into force on different dates, which commencement date is intended to apply by virtue of the reference to “the end of the period determined in accordance with regulation 4”?

(2) Therefore in that circumstance, which date would properly be determined as the commencement date under article 2? Or is there considered to be any need to clarify the commencement provision?

The Scottish Government responded as follows:

The number of dates that can be determined under regulation 4 of the Scotland Act 2016 (Transitional) Regulations 2017 (“the Transitional Regulations”) is actually four dates, not two as set out in the question, by virtue of regulation 4(3). That regulation allows creation of separate dates for the period to end in respect in individual paragraphs of exception 1 in Section F1, therefore potentially there could be as many as three dates determined under paragraph (2)(a) and one date determined under paragraph (2)(b), each instead of the default date for the period to end, that is otherwise set by paragraph (1)(b), of 31 March 2020.

The purpose of regulation 4 of the Transitional Regulations is to allow staged devolution of executive responsibility for the three types of disability benefits and for carer’s benefits, as described in the exceptions. The triggers for each stage are commencement of provisions in any Act of the Scottish Parliament that derive their legislative competence from these exceptions; in practice these will be provisions in
the Social Security (Scotland) Act 2018 (“the 2018 Act”). The Government’s expectation is that it will end first in relation to carer’s benefits and at a later date (or dates) in relation to the various types of disability and industrial injuries benefits.

The Scotland Act 1998 (Agency Arrangements) (Specification) Order 2018 (“the Order”) will allow the Scottish Ministers and the Secretary of State to agree arrangements for the social security functions that it describes as and when they become the responsibility of the Scottish Ministers.

There are three possible ways that the reference to the period’s end in article 2 could possibly be interpreted:

1. The period ends when it first ends for any purpose.
2. The period ends when it finally ends for all purposes.
3. Article 2 could be construed as bringing the Order into force for different purposes as the period ends for different purposes.

The Government’s view is that only the first of these can be correct. The way that article 2 is framed is incompatible with the third interpretation. Giving the words of the article their ordinary meaning, it bears to bring the whole Order into force on a single day. Of the other two possible interpretations, the Government considers that the first must be the correct interpretation, having regard to the Order’s purpose.

In practice, the first use of the agency arrangements that the Order enables is expected to be in relation to exception 2, carer’s benefits. When provision in Part 3 of the 2018 Act for a carer’s allowance supplement is commenced, which is expected to be later this year, the Scottish Ministers will assume responsibility for delivery of the current DWP carer’s allowance. Agency arrangements will be made at that time for the Secretary of State to continue delivery of carer’s allowance on behalf of the Scottish Ministers until such time as the Scottish Social Security Agency takes over its delivery, or commences delivery of the assistance for carers in Scotland that is provided for in Part 2 of the 2018 Act. This is explained further in the “Policy Objectives” part of the Policy Note that accompanies the Order.

The purpose of the Order is to allow the Scottish and UK Governments to enter into agency arrangements when executive competence for certain benefits devolves, for a transitional period. Article 4 of the Transitional Regulations governs when executive competence for each benefit devolves. To enable Ministers of the Crown to continue, without interruption, to deliver benefits falling under section 22 of the Scotland Act 2016 (the 2016 Act”) after executive competence devolves the Order must enable agency agreements to be entered into immediately after executive competence devolves for any benefit falling under section 22 of the 2016 Act.

Construing article 2 to mean that an agency agreement could be entered into only after executive competence for all benefits falling under section 22 of the 2016 Act had devolved would not deliver the Order’s purpose. There would necessarily be an interruption in delivery, for all but the last benefit to devolve. The Scottish Ministers would require to administer each benefit directly for a period, until the Order commenced with the final transfer of executive competence, at which point the Scottish Ministers could enter into an agency arrangement to pass the task of administering each benefit back to the Secretary of State. There is no sensible purpose that such an interruption would serve and, therefore, to interpret article 2 in that way would be to impute to the legislator an irrational intention.
While article 2 could have been drafted more clearly, the Scottish Government does not consider there to be a need for further legislation to clarify the article’s meaning. Taking a purposive approach resolves any doubt about the article’s meaning and avoids patent absurdity of the two possible alternative interpretations.