DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

23rd Meeting, 2018 (Session 5)

Tuesday 26 June 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 item 5 in private.

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

   - Common Financial Tool (Scotland) Regulations 2018 [draft];
   - Debt Arrangement Scheme (Scotland) Amendment Regulations 2018 [draft].

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

   - Tuberculosis (Miscellaneous Amendments) (Scotland) Revocation Order 2018 (SSI 2018/202);
   - Legal Aid (Employment of Solicitors) (Scotland) Amendment Regulations 2018 (SSI 2018/193).

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

   - Act of Sederunt (Simple Procedure Amendment) (Miscellaneous) 2018 (SSI 2018/191);
   - Regulatory Reform (Specification of Basic Safety Standards Directive) (Scotland) Order 2018 (SSI 2018/192);
   - Seat Belts on School Transport (Scotland) Act 2017 (Commencement) Regulations 2018 (SSI 2018/195 (C.16)).

5. **Report on instruments considered during the fourth quarter of the parliamentary year 2017-18:** The Committee will consider a draft of its fourth quarterly report for the parliamentary year 2017-18.
The papers for this meeting are as follows—

**Agenda Items 2, 3 and 4**

Briefing on Instruments (private)  
DPLR/S5/18/23/1(P)

**Agenda Item 3**

Instrument Responses  
DPLR/S5/18/23/2

**Agenda Item 5**

Draft Quarterly Report (private)  
DPLR/S5/18/23/3(P)
Legal Aid (Employment of Solicitors) (Scotland) Amendment Regulations 2018 (SSI 2018/193)

On 19 June 2018, the Scottish Government was asked:

The stated policy intention of these Regulations is to remove the current restriction, contained in regulation 3 of the Legal Aid (Employment of Solicitors) (Scotland) Regulations 2001 ("2001 Regulations"), which prevents the Board from employing a solicitor for the purposes of providing services mentioned in section 26(2) of the Legal Aid (Scotland) Act 1986 ("1986 Act"), unless the Board:

(a) has received a written request from a local organisation for the services of a solicitor; and
(b) is satisfied that the services of such a solicitor would enhance the services offered by the organisation to applicants.

1. Please explain why regulation 2 is considered to be properly made by virtue of the power contained in section 26(1) of the Legal Aid (Scotland) Act 1986, given that regulation 2 does not appear to prescribe any "cases of a particular description" falling within section 26(1)(a) or (b)?

2. Alternatively, is it considered that regulation 2 is properly made by virtue of the power contained in section 27 of the 1986 Act; in which case please explain why that is so, and whether there is considered to be any error in the preamble citation of section 26(1)?

(Section 27 provides the power to make provision as to the employment of solicitors under Part V of the Act and as to the circumstances in which solicitors may be so employed.)

3. Please explain why regulation 2 is considered to be a more appropriate or usual use of the powers contained in the 1986 Act, compared with omitting regulation 3(1) of the 2001 Regulations, given that regulation 2 appears to duplicate the effect of section 26 of the 1986 Act?

The Scottish Government responded as follows:

1. We thank the DPLRC for bringing this to our attention. Regrettably, section 26(1) was incorrectly cited and the preamble should have referred to section 27(1). However, for the reason set out in the response below, this does not affect the validity of the 2018 Regulations.
2. The preamble does refer to “all other powers” enabling the Scottish Ministers to make the regulations, and is therefore capable of including powers which are wrongly omitted or incorrectly cited, as is the case in this instance. In *Vibixa Ltd v Komori UK Ltd and Ors* [2006] EWCA Civ 536 the Court of Appeal stated:

“General enabling powers in the preamble to a statutory instrument may be interpreted as referring to an enabling power, not expressly invoked, in situations such as the following:-

(i) where, in order for the SI to have effect, the maker of the instrument must necessarily have invoked that power, or

(ii) where the operative provisions of the SI make it clear that its maker must have invoked that power”.

Regulation 2 of the 2018 Regulations replaces regulation 3 of the 2001 Regulations and it is clear from the context that it is about the arrangements for employment of solicitors by the Board under section 27(1). In our view regulation 2 of the Regulations falls within the situation described in (i) and (ii) and, accordingly, the general enabling power can be interpreted as referring to section 27(1).

3. Regulation 2 of the 2001 Regulations is a prelude to regulations 3 and 4, in that regulation 2 allows the Board to employ a solicitor in accordance with sections 26 to 28 on such terms and conditions as it may consider appropriate but that is specifically stated to be in accordance with the regulations that follow. Section 26 applies Part V of the 1986 Act where solicitors are employed for the purposes set out in that section. However, section 26 does not provide the authority for the Board to employ solicitors. The Scottish Government takes the view that for assistance to be provided in accordance with section 26, it is necessary for regulations to be made under section 27(1). If regulation 3 were omitted without being replaced, the remaining regulation, regulation 4, would appear to only allow the Board to employ a solicitor to provide criminal legal assistance in limited circumstances. To ensure that the Board has authority to employ solicitors to provide advice and assistance, act for persons receiving legal aid and provide the services mentioned in section 26(2), new regulation 3 is required.
Tuberculosis (Miscellaneous Amendments) (Scotland) Revocation Order 2018 (SSI 2018/202)

Breach of laying requirements: letter to the Presiding Officer

NOTIFICATION OF BREACH OF THE 28 DAY RULE

The Tuberculosis (Miscellaneous Amendments) (Scotland) Revocation Order 2018 was made by the Scottish Ministers under sections 1, 8(1), 28, 32(2), 32(3), 34(7) and 83(2) of the Animal Health Act 1981 on 22 June 2018. It is being laid before the Scottish Parliament today. This instrument is subject to negative procedure by virtue of section 33 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“the 2010 Act”).

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 has not been complied with. To meet the requirements of 31(3) of that Act, I am writing to explain why.

However, before doing so, I should explain that regrettably due to an oversight the Tuberculosis (Miscellaneous Amendments) (Scotland) Order 2018 (“the principal Order”) which is being revoked by this instrument, was laid under the incorrect procedure, (namely laid no procedure as defined in section 30 of the 2010 Act). This overlooked the fact that one of the enabling powers relied on for the instrument (section 32(3) of the Animal Health Act 1981) was specifically subject to negative procedure (by virtue of express provision to that effect in section 32(3)) and hence the instrument as a whole required to be subject to such procedure, in accordance with section 33 of the 2010 Act. Whilst in light of section 31(2) of the 2010 Act this did not affect the underlying validity of the principal Order and, in any event, the principal Order respected in practice the requirements of section 28(2) of the 2010 Act, I apologise for this oversight.

From 7 September to 30 November 2017 the Scottish Government ran a public consultation on proposals to amend aspects of our bovine tuberculosis (TB) control and compensation policy. Following this consultation and analysis of the responses received The Tuberculosis (Miscellaneous Amendments) (Scotland) Order 2018 was signed by the responsible Cabinet Secretary on 17 May 2018 and laid before the Scottish Parliament on 21 May 2018. This Order should have been subject to negative Parliamentary procedure, however as explained above, was inadvertently laid as 'laid no procedure'.

On 11 June 2018 it came to light that two consultation responses, one from the NFUS and the other from the British Veterinary Association (BVA) had been submitted (by e-mail, not through Citizen Space) but not received by the Scottish Government and consequently were not included in our analysis of responses. A retrospective analysis of these responses showed that the BVA agreed with the proposals set out in our consultation paper. The NFUS agreed with the majority of the Scottish Government’s proposals, however they do not agree with one of the more significant changes, that being to cap compensation payments for high-value animals that are culled for disease control reasons.
On 13 June 2018, we received notice from the Clerk to the Rural Economy and Connectivity Committee that the NFUS had made representations to the Committee highlighting that their consultation response had not been considered nor had their concerns on the proposed cap been addressed. We were further advised that the Committee, in light of the NFUS correspondence, intended to discuss The Tuberculosis (Miscellaneous Amendments) (Scotland) Order 2018 in Committee on 20 June 2018. We subsequently wrote to the Committee on the 20 June to advise of our intention to revoke the Order to ensure transparency and that due process is followed. The Committee welcomed this decision.

While the Scottish Government believes that the provisions set out in The Tuberculosis (Miscellaneous Amendments) (Scotland) Order 2018 are sound, we feel that it would be prudent to engage further with the NFUS on this matter, particularly given their significance as a key and valued stakeholder and the importance of this issue to their members. Accordingly, the Tuberculosis (Miscellaneous Amendments) (Scotland) Revocation Order 2018 is being laid today to revoke The Tuberculosis (Miscellaneous Amendments) (Scotland) Order 2018 prior to its coming into force date of 10 July 2018 and it has therefore been necessary to breach the 28 day rule. The Scottish Government will lay a new amending Instrument before the Scottish Parliament once our deliberations with the NFUS have concluded.

I am copying this letter to Edward Mountain, Convenor of the Rural Economy and Connectivity Committee and Graham Simpson, Convenor of the Delegated Powers and Legislative Reform Committee.