DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

34th Meeting, 2018 (Session 5)

Tuesday 20 November 2018

The Committee will meet at 9.30 am in the Adam Smith Room (CR5).

1. **Decision on taking business in private:** The Committee will decide whether to take item 4 in private.

2. **Instruments subject to negative procedure:** The Committee will consider the following—
   - Environmental Noise (Scotland) Amendment Regulations 2018 (SSI 2018/342);
   - First-tier Tribunal for Scotland Social Security Chamber (Rules of Procedure) Amendment Regulations 2018 (SSI 2018/343);
   - Charities Accounts (Scotland) Amendment Regulations 2018 (SSI 2018/344);
   - Diligence against Earnings (Variation) (Scotland) Regulations 2018 (SSI 2018/345);

3. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—
   - Gender Representation on Public Boards (Scotland) Act 2018 (Commencement No. 1) Regulations 2018 (SSI 2018/340 (C.21)).

4. **Report on instruments considered during the first quarter of the parliamentary year 2018-19:** The Committee will consider a draft of its first quarterly report for the parliamentary year 2018-19.

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The papers for this meeting are as follows—

**Agenda Items 2 and 3**

Briefing on Instruments (Private)  
Instrument Responses

**Agenda Item 4**

1st Quarterly Report 2018-19 [draft] (Private)
First-tier Tribunal for Scotland Social Security Chamber (Rules of Procedure) Amendment Regulations 2018 (SSI 2018/343)

On 9 November 2018, the Scottish Government was asked:

Regulation 2(4) substitutes rule 9(3) of the schedule to the First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations (SSI 2018/273) with new provision in light of the Committee’s report on subordinate legislation considered at its meeting on 2 October 2018.

Rule 9(3)(b) of SSI 2018/273 as originally drafted provides that a person who receives due notice of the appointment of a representative may assume that the representative is and remains authorised as such until the person receives written notification that this is not so from the representative or represented party. A person who could receive notice of the appointment would include a party to the proceedings who receives a copy of the notice from the First-tier Tribunal under rule 9(2).

With reference to the words “it may assume” at the beginning of new rule 9(3)(b), inserted by regulation 2(4) of the current instrument, is it intended that it is only the First-tier Tribunal, and not a party to the proceedings who receives the notice from the First-tier Tribunal under rule 9(2), that can make the assumption in rule 9(3)(b) that the representative is and remains authorised? If not, could this be clearer?

The Scottish Government responded as follows:

The word “it” refers only to the First-tier Tribunal. The wording of rule 9(3)(a) as amended makes clear that it is only the First-tier Tribunal which now has a duty in relation to provision of documents to representatives. As a result, only the First-tier Tribunal need be subject to the assumption that a representative continues to be appointed as such.

In practice, rule 2(2)(c) of the rules of procedure of the Social Security Chamber, setting out the overriding objective of ensuring that parties are able to participate fully in the proceedings, means that the First-tier Tribunal would notify the other party or parties that a representative was no longer appointed as such.
On 8 November 2018, the Scottish Government was asked:

Section 8(3), (4) and (5) of the Gender Representation on Public Boards (Scotland) Act 2018 imposes duties on the Scottish Ministers, appointing persons and public authorities (to be specified in regulations) to publish reports on the carrying out of their respective functions under sections 3 to 6 of that Act.

Regulation 2 of this instrument commences section 8 for all purposes (as well as other sections), but the instrument does not commence sections 3 to 6 which provide for the functions that must be reported on in terms of section 8.

(1) As it appears that the Scottish Ministers, appointing persons and public authorities cannot publish reports on the exercise of the functions until they have effect under sections 3 to 6 once commenced, is it considered that a proper or preferable drafting approach may have been for this instrument either to have commenced sections 3 to 6 in addition, or to have delayed the commencement of section 8(3),(4) and (5) for all purposes to a later instrument (once the regulations under section 8(6) have specified the appointing persons and the public authorities)? If not, please explain why?

(2) Please explain the consequences of commencing the requirements to publish reports on 1 December 2018, given that the functions to be reported on have not yet been brought into force, and that it appears that at the date of laying this instrument regulations under section 8(6) have not been made to specify the appointing persons and public authorities which will have the duty to publish?

The Scottish Government responded as follows:

In answer to question (1):

Although it would have been possible to have delayed the commencement of section 8(3),(4) and (5) for all purposes to a later instrument, the decision was taken that it was preferable, for the reasons set out below, to proceed to commence all subsections of section 8 at this stage, in advance of commencing sections 3 to 6, and in advance of making further regulations under section 8(6).

After considering various implementation options, the Scottish Government decided to implement the Gender Representation on Public Boards (Scotland) Act 2018 (the Act) in 2 phases. In the first phase this instrument will bring into force the provisions of the Act which allow the further regulations to be made which are necessary to fully implement the Act, as well as allow for guidance to be published. In the second phase, further commencement regulations will be made to commence all remaining provisions of the Act, and, at or around the same time, further regulations will be made to set out detailed provisions in relation to the various functions of various specified persons under sections 3 to 6.

There are various cross references in subsection (6) to other subsections of section 8. Section 8(6)(a) refers to subsection (4), section 8(6)(b) refers to subsection (5) and section 8(6)(c) refers to subsections (1) to (5). Therefore, it was decided that it
was preferable as part of the first phase of implementation, and would be clearer for those using the legislation, to bring all subsections of section 8 into force for all purposes at this time.

Regulations to implement sections 3 to 6, along with all remaining provisions of the Act, are being prepared and will be made in 2019, as the second phase of implementation.

In answer to question (2):

There are no adverse consequences for any person caused by commencing the general requirement to publish on 1 December 2018, in advance of the relevant functions being brought into force and regulations under section 8(6) being made, as no duty arises on any person until these further steps have been taken. It is clear under section 8(3), (4) and (5) that the reports must be published in accordance with provision made in regulations under subsection (6). No duty on any person arises in advance of those regulations being made to specify the appointing persons and public authorities affected.

As part of the second phase of the implementation plan, regulations under section 8(6) will be made to set out detailed provisions in relation to the various functions of various specified persons under sections 3 to 6, and commencement regulations will be made to bring the remainder of the Act into force.