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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate Legislation (revised 8 March 2017 to correct an administrative error)



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on:

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 21 February 2017, the Committee agreed to draw the attention of the Parliament to the following instrument—

National Health Service Superannuation Scheme (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/27)

2. The Committee's recommendation in relation to the above instrument is set out below.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments that are set out at the end of this report.

Points raised: Instruments subject to negative procedure

[National Health Service Superannuation Scheme \(Miscellaneous Amendments\) \(Scotland\) Regulations 2017 \(SSI 2017/27\)](#) (Health and Sport)

4. The National Health Service Superannuation Scheme (Scotland) Regulations 2011 (*“the 2011 Regulations”*) and the National Health Service Superannuation Scheme (2008 Section) (Scotland) Regulations 2013 (*“the 2013 Regulations”*) require members of the NHS Superannuation Scheme to pay contributions to the Scheme, as a condition of membership. The 2011 Regulations have consolidated the “1995 Section” of the Scheme, and the 2013 Regulations have consolidated the “2008 Section” of the Scheme.
5. The main purpose of this instrument is to make changes to the pay and earnings bands stated in the relevant tables in the 2011 and 2013 Regulations, against which the employee contribution is set for the Scheme year 2017-18.
6. Employees who are members of the Scheme pay a percentage of their pensionable pay to the Scheme dependent on the level of their pensionable earnings. As explained in the Policy Note for the instrument, it was agreed during Scheme reform discussions that the employee contribution percentage rates for 1 April 2015 to 31 March 2019 would not change. However the pay and earnings bands against which the contribution is assessed would be adjusted each year, in line with national NHS pay awards in Scotland.
7. The instrument therefore inserts into the 2011 and 2013 Regulations a revised employee contribution table, to reflect the pay uplift from 1 April 2016 and which will apply to majority of members from 1 April 2017. The Policy Note explains that the revised table is applicable with retrospective effect from 1 April 2016 for officer members changing employment within the scheme year 2016/2017, new starters, practitioners and non GP partners whose contributions which are based on current year income.
8. The Policy Note also states that the increase in the pay bands on which contributions are based is beneficial to members of the Scheme.
9. The Regulations come into force on 13 March 2017. However as set out in regulation 1, various provisions have retrospective effect from particular dates, ranging from 1 April 2009 up to 6 April 2016. Retrospective provision is allowed in terms of the Superannuation Act 1972.
10. Regulations 31 and 40 amend regulations 2.J.8 and 3.E.27 of the 2013 Regulations. Collectively with regulations 13, 25 and 46, regulations 31 and 40 make provision to enable the forfeiture of a spouse’s or surviving civil partner’s guaranteed minimum pension if so directed by the Scottish Ministers, where the beneficiary is convicted of murder or culpable homicide or another offence involving unlawful killing.
11. The Scottish Government has acknowledged in writing that an error has been made in regulation 1(2). Regulations 31 and 40 should not come into force on 13 March

2017 as is provided for, but should have effect retrospectively from 6 April 2016. This means that these regulations would be commenced with effect from a date which is not intended.

The Committee therefore draws the Regulations to the attention of the Parliament on reporting ground (i), as regulation 1(2) appears to be defectively drafted. In accordance with the Scottish Government's intention, regulation 1(2) should have provided that regulations 31 and 40 have retrospective effect as from 6th April 2016, rather than coming into force on 13th March 2017.

The Committee also welcomes that the Scottish Government has undertaken to make the necessary amendment to provide for that retrospective effect, when the National Health Service Superannuation Scheme (2008 Section) (Scotland) Regulations 2013 (S.S.I 2013/174) are next amended.

No points raised

12. At its meeting on 21 February 2017, the Committee considered the following instruments. The Committee determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit.

Finance and Constitution

Budget (Scotland) Act 2016 Amendment Regulations 2017 [draft]

Health and Sport

National Health Service Pension Scheme (Scotland) (Miscellaneous Amendments) Regulations 2017 (SSI 2017/28)

Justice

Scottish Tribunals (Listed Tribunals) Regulations 2017 [draft]

First-tier Tribunal for Scotland Tax Chamber and Upper Tribunal for Scotland (Composition) Regulations 2017 [draft]

Tribunals (Scotland) Act 2014 (Ancillary Provisions) Regulations 2017 [draft]

Community Justice (Scotland) Act 2016 (Commencement No. 2, Transitional and Saving Provisions) Regulations 2017 (SSI 2017/33 (C.4))

Annex A

National Health Service Superannuation Scheme (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/27)

On 7 February 2017, the Scottish Government was asked:

1. Regulation 13 amends regulation T7 of the National Health Service Superannuation Scheme (Scotland) Regulations 2011, with the effect of extending the circumstances in which a guaranteed minimum pension (GMP) payable under the Regulations may be forfeited on direction by the Scottish Ministers. The present circumstances, specified in regulation T7(1)(b) and (c), when forfeiture of a GMP is permitted relate to conviction of a member of the scheme before the benefit becomes payable for an offence of treason, or certain serious offences under the Official Secrets Acts.

The extended circumstances provided for by regulation 13 are that all or part of a GMP payable in respect of a member may be forfeited, where it is payable to a person specified in regulation T7(2)(a) to (d), and that person is convicted of the offence of murder or culpable homicide of that member, or of any other offence of which the unlawful killing of that member is an element. This amendment has effect retrospectively, from 6 April 2016.

“The European Court of Human Rights scrutinises with particular circumspection legislation which confiscates property without compensation or operates retrospectively. In the case of confiscation, it will normally be disproportionate not to afford reasonable compensation, and a total lack of compensation will only be justifiable in ‘exceptional circumstances’. In the case of retrospective legislation, ‘special justification’ will be required before the court will accept that a fair balance has been struck...”

(In re Medical Costs for Asbestos Diseases (Wales) Bill, per Lord Mance, paras 52 - 53.)

(a) Given that there is no explanation in the Policy Note, please explain why regulation 13 is compatible with Article 1 of Protocol 1 to the Convention. Assuming that it is considered that a forfeiture of a GMP amount in the circumstances described above interferes with a “possession”, please explain why such forfeiture (without provision in the regulation for compensation) is justified as being in accordance with law, pursues a legitimate aim, and is proportionate?

(b) Given the lack of provision for compensation, what ‘exceptional circumstances’ are considered to justify the regulation, and what is the ‘special justification’ for making retrospective provision?

2. The same questions (a) and (b) are asked in relation to these provisions which are similar in effect to regulation 13:

(i) regulation 25, which amends regulation 2.E.27 of the National Health Service Superannuation Scheme (2008 Section) (Scotland) Regulations 2013 with effect from 6 April 2016;

(ii) regulation 31, which amends regulation 2.J.8 of those 2013 Regulations, but with effect from 13 March 2017 so that the question as to retrospective provision does not apply;

(iii) regulation 40, which amends regulation 3.E.27 of those 2013 Regulations, but with effect from 13 March 2017 so that the question as to retrospective provision does not apply;

(iv) regulation 46 which amends regulation 3.J.8 of those 2013 Regulations, retrospectively with effect from 6 April 2016.

3. (a) Why, in the absence of explanation in the Policy Note and in accordance with regulation 1, do regulations 31 and 40 come into force on 13 March 2017 whereas regulations 13, 25 and 46 have effect retrospectively from 6 April 2016?

(b) If there is any error in that respect, would corrective action be proposed?

On 14 February 2017, the Scottish Government responded:

1. The background to regulation 13 (and to the other regulations referred to in question 2) is provided by the abolition of contracting-out for salary-related pension schemes which was effected on 6th April 2016 by way of section 24(1) of the Pensions Act 2014. The Scottish NHS Superannuation Scheme (constituted by the National Health Service Superannuation Scheme (Scotland) Regulations 2011 (“the 2011 Regulations”) and the National Health Service Superannuation Scheme (2008 Section) (Scotland) Regulations 2013 (“the 2013 Regulations”)) was previously a contracted-out scheme.

Sections 17 and 21 of the Pension Schemes Act 1993 make relevant provision in relation to guaranteed minimum pensions for widows, widowers and surviving civil partners under contracted-out schemes and in relation to forfeiture of those pensions. In terms of section 21(2), section 17 does not preclude a scheme from providing for a guaranteed minimum pension to be forfeited “in such circumstances as may be prescribed”.

In connection with the abolition of contracting-out, the Occupational Pension Schemes (Schemes that were Contracted-out) (No. 2) Regulations 2015 (S.I. 2015/1677) came into force (for most purposes) on 6th April 2016. Regulation 26(2)(c) of those Regulations permits a pension scheme to provide for a widow’s, widower’s or surviving civil partner’s guaranteed minimum pension to be forfeited where the person who would otherwise receive the pension has been convicted of an offence involving the unlawful killing of the person from whose occupational service the pension is derived. These present Regulations involve inserting into the 2011 and 2013 Regulations provisions regarding forfeiture which became “competent” only with the coming into force of S.I. 2015/1677 on 6th April 2016.

Given the foregoing background and the strong public policy interest in ensuring that a person does not benefit financially to any extent from the killing of another person, the Scottish Government does not consider that there would be difficulties in successfully resisting any legal challenge brought on the basis that regulation 13 is incompatible with Article 1 of Protocol 1 to the ECHR. Neither the retrospective application of the regulation nor the absence of any provision for compensation would in our view be difficult to justify.

2. Reference is made to answer 1 above.

3. Regulations 31 and 40 should indeed have had retrospective effect as from 6th April 2016. The Scottish Government is grateful to the Committee for spotting this error and relevant changes will be made when the 2011 and 2013 Regulations are next amended.”

