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

Subordinate legislation considered by the Delegated Powers and Law Reform Committee on 26 September 2017



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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 the following (and any additional matter added under Rule 6.1.5A)—

(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.



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Introduction

1. At its meeting on 26 September 2017, the Committee agreed to draw to the attention of the Parliament the following instruments—
 - Public Water Supplies (Scotland) Amendment Regulations 2017 (SSI 2017/281)
 - Teachers' Superannuation and Pension Scheme (Additional Voluntary Contributions) (Scotland) Regulations 2017 (SSI 2017/283)
 - Individual Learning Account (Scotland) Amendment Regulations 2017 (SSI 2017/288)
2. The Committee's recommendations and conclusions in relation to these instruments are set out in the following sections of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out by the relevant lead committee at the end of this report.

Points Raised: Instruments subject to negative procedure

Public Water Supplies (Scotland) Amendment Regulations 2017 (SSI 2017/281) (Environment, Climate Change and Land Reform)

4. This instrument amends the Public Water Supplies (Scotland) Regulations 2014 to implement provisions of Commission Directive EU 2015/1787 on monitoring requirements for drinking water, and of Council Directive 2013/51/Euratom on radioactive substances in drinking water. The Regulations come into force on 27th October 2017.
5. In new schedule 1A, to be inserted into those 2014 Regulations, paragraph 4(3) of Part E, on radioactive substances, provides that, where indicative dose requires to be monitored, the frequency of the monitoring must be determined depending on the screening strategy adopted pursuant to Part B of schedule 1A. The Scottish Government has confirmed that the reference to Part B is an error, and that the reference should be to Part F instead.
6. In Table 1 in Part B of new schedule 3, to be substituted into the 2014 Regulations, in the second column of the table, headed "Uncertainty of measurement", the value given for polycyclic aromatic hydrocarbons is 30. The Scottish Government has confirmed that this is an error, and that the value should be 50.
7. In Table 2 in Part B of new schedule 3, in the fourth column of the table, headed "Limit of detection", the value given for oxidisability is 25. The Scottish Government has confirmed that this is an error, and that the value should be 10.
8. Annex A contains the exchange of correspondence with the Scottish Government on these matters.

The Committee agrees to report the instrument to the Parliament under reporting ground (i), as the drafting appears to be defective as outlined in paragraphs 5 to 7 above.

The Committee welcomes the Scottish Government's intention to correct the instrument by making and laying an amending instrument at the earliest opportunity.

Teachers' Superannuation and Pension Scheme (Additional Voluntary Contributions) (Scotland) Regulations 2017 (SSI 2017/283) (Education and Skills)

9. These Regulations update and amend the Teachers' Superannuation (Additional Voluntary Contributions) (Scotland) Regulations 1995. The instrument enables members of the reformed Scottish Teachers' Pension Scheme to participate in the Scottish Teachers' Additional Voluntary Contributions arrangements. The Regulations come into force on 1 November 2017.

10. Regulation 14(8) contains a superfluous reference to regulation 12(5) of the instrument.
11. The Committee notes that the Scottish Government has undertaken to correct this error in the next set of Regulations to include amendments of this instrument.
12. Annex B contains the exchange of correspondence with the Scottish Government on this matter.

The Committee agrees to draw the Regulations to the attention of the Parliament on the general reporting ground, as they contain a minor drafting error.

Individual Learning Account (Scotland) Amendment Regulations 2017 (SSI 2017/288) (Education and Skills)

13. The general purpose of the Regulations is to amend the Individual Learning Account (Scotland) Regulations 2011, to rename “Individual Learning Accounts” as “Individual Training Accounts”, and to modify the ILA scheme to enable grants to be paid for training for employment. The Regulations come into force on 15 October 2017.
14. The intention of regulation 6(7)(d) is to substitute “Training Account Administrator” for “Learning Account Administrator”, comparably with several other substitutions in the instrument. However in error, the provision specifies “A Training Account Administrator” and “A Learning Account Administrator”.
15. Annex C contains the exchange of correspondence with the Scottish Government on this matter.

The Committee agrees to draw the Regulations to the attention of the Parliament on the general reporting ground, as there is a minor drafting error in regulation 6(7)(d), which amends regulation 4(6) of the Individual Learning Account (Scotland) Amendment Regulations 2011.

No points raised

Environment, Climate Change and Land Reform

Land Reform (Scotland) Act 2016 (Supplemental Provision) Regulations 2017 [draft]

Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2017 [draft]

Scotland Act 1998 (Specification of Devolved Tax) (Wild Fisheries) Order 2017 [draft]

Health and Sport

Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 (Commencement No.2) Regulations 2017 (SSI 2017/294 (C.22))

Justice

Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Publicity, Remedial and Remediation Orders) 2017 (SSI 2017/298)

Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No. 2) Order 2017 (SSI 2017/301)

Local Government and Communities

Private Residential Tenancies (Information for Tenants) (Scotland) Regulations 2017 [draft]

Private Residential Tenancies (Statutory Terms) (Scotland) Regulations 2017 [draft]

Notice to Local Authorities (Scotland) Amendment Regulations 2017 (SSI 2017/295)

Private Residential Tenancies (Information for Determining Rents and Fees for Copies of Information) (Scotland) Regulations 2017 (SSI 2017/296)

Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 (SSI 2017/297)

Rural Economy and Connectivity

Land Reform (Scotland) Act 2016 (Supplementary, Consequential, Transitory and Saving Provisions) Regulations 2017 [draft]

M8/M73/M74 Motorways (30mph, 40mph and 50mph Speed Limit) Regulations 2017 (SSI 2017/286)

Annex A

Public Water Supplies (Scotland) Amendment Regulations 2017 (SSI 2017/281)

On 14 September 2017, the Scottish Government was asked:

1. In new schedule 1A, to be inserted into the 2014 Regulations, paragraph 4(3) of Part E (radioactive substances) provides that, where elevated natural radionuclide levels require indicative dose to be monitored, Scottish Water must determine the frequency of the monitoring required depending on the screening strategy adopted pursuant to Part B of schedule 1A. It appears that Part B sets out various parameters to be monitored by monitoring programmes, but specifically excludes indicative dose. Part F of schedule 1A, however, appears to set out monitoring requirements for indicative dose, including screening strategies for radionuclides. Please confirm whether the reference to Part B of schedule 1A in paragraph 4(3) of Part E of that schedule is correct, or whether the reference should be to Part F instead.

2. The Policy Note explains that the provisions of the 2014 Regulations as regards monitoring of public water supplies are amended to introduce new monitoring provisions which are closely aligned to the requirements of the Drinking Water Directive as amended by the Amending Directive. Table 1 in Part B of schedule 3, to be substituted into the 2014 Regulations, implements Table 1 in Part B of Annex III of the Drinking Water Directive (as amended by the Amending Directive). Each value in the second column of Table 1 in Part B of new schedule 3, to be inserted into the 2014 Regulations, is identical to the corresponding value in the second column of Table 1 in Part B of Annex III of the Drinking Water Directive (as amended), save for one value. The value for Polycyclic aromatic hydrocarbons is 30 in the Regulations and 50 in the Directive. Please confirm whether this difference in value is intentional, or whether there is some error.

3. Similarly, every value in the third column of Table 2 in Part B of new schedule 3, to be inserted into the 2014 Regulations, is identical to the corresponding value given in the corresponding Table 2 in the Drinking Water Directive (as amended), save for one value. The value for Oxidisability is 25 in the Regulations and 10 in the Directive. Please confirm whether this difference in value is intentional, or whether there is some error.

4. In the Notes to Tables 1 and 2, referred to above, Note 8 refers to European Standard EN ISO 8467:1995, entitled "Water quality - Determination of permanganate index (ISO 8467:1993)". The footnote to this Note gives the reference for the European Standard as EN ISO 8467:1995. Is there some error?

5. In the footnote to Note 2, no ISBN number is given for International Standard ISO 5725, as is the case for all other Standards referred to in the Regulations. Is this intentional, or has the relevant ISBN number been omitted in error from the footnote?

The Scottish Government responded as follows:

1. In relation to the Committee's questions (1)-(3), regrettably the points referred to are errors. The reference to Part B of schedule 1A, in paragraph 4(3) of Part E of that schedule, should be to Part F instead. In the second column of Table 1 in Part B of new schedule 3, the value for polycyclic aromatic hydrocarbons should be 50 (not 30). In the fourth column (headed "limit of detection") of Table 2 in Part B of new schedule 3, the value for oxidisability should be 10 (not 25).

2. The Scottish Government is grateful to the Committee for bringing these points to its attention, and regrets that these errors have been made. The Scottish Government notes that these points also apply in respect of the Water Intended for Human Consumption (Private Supplies) (Scotland) Regulations 2017 (SSI/2017/282). The two instruments implement Commission Directive (EU) 2015/1787 (amending Annexes II and III to Council Directive 98/83/EC on the quality of water intended for human consumption), which has a transposition deadline of 27 October 2017, the date that both instruments will come into force. The Scottish Government will correct both instruments, by making and laying an amending instrument at the earliest opportunity, to come into force on 27 October 2017. Whilst bringing this amending instrument in force on the 27 October 2017 will regrettably breach the 28 day laying rule, the Scottish Government considers that in these circumstances it is the most appropriate course of action, in order to correctly transpose the Directive by the deadline.

3. In relation to the Committee's question (4), in the Notes to Tables 1 and 2 in Part B of schedule 3, the Scottish Government confirms that there is no error. The International Organization for Standardization (ISO) published this standard under reference ISO 8467:1993. This standard was approved by the European Committee for Standardization (CEN) under reference "EN ISO 8467:1995". Accordingly, no corrective action is proposed.

4. In relation to the Committee's question (5), in the Notes to Tables 1 and 2 in Part B of new schedule 3, the relevant ISBN numbers for international standard ISO 5725 were omitted in error from the footnote. Thank you for pointing this out. Whilst the omission is regrettable, the Scottish Government considers that the standard is clearly identified by its title and by the British Standards Institution references contained in the footnote to Note 2. Accordingly, no corrective action is proposed.

Annex B

Teachers' Superannuation and Pension Scheme (Additional Voluntary Contributions) (Scotland) Regulations 2017 (SSI 2017/283)

On 13 September 2017, the Scottish Government was asked:

1. The definition of "AVC policy age" in regulation 2(1) means " (c) in respect of a pension credit member, the pension debit member's normal pension age on the date that an election under regulation 4 is made"

Please clarify why it is considered appropriate that that definition should apply to a pension credit member and not to a pension debit member also, or is there any error?

2. Is there an error in regulation 14(8), which provides: "In regulation 16, wherever regulation 12(5), (6) or (9) is referred to, the reference shall include a reference to that regulation as modified by this regulation in relation to pension credits". Does regulation 16 omit reference to regulation 12(5)?

3. Is any corrective proposed?

4. The Committee can consider whether to draw an instrument to the attention of the Parliament on the ground that it is made in pursuance of an enactment which contains specific provisions excluding it from challenge in the courts, on all or certain grounds, or that it contains such provisions. Regulation 19 provides that all questions arising under these Regulations are to be determined by the Scottish Ministers and a determination by them is final. Paragraph 10 of schedule 3 of the Superannuation Act 1972 enables provision for the determination of all questions arising under the regulations and for any decision that falls to be taken by Ministers in accordance with the regulations to be final. Therefore:

(a) Is it considered that regulation 19 has the effect that the instrument contains a provision which (in pursuance of paragraph 10 of schedule 3 of the 1972 Act) excludes it from challenge in the courts, on all or certain grounds?

(b) Given that the Superannuation Act was enacted in 1972, please outline to assist the Committee why it has been considered that regulation 19 is compatible with Article 6 of the European Convention on Human Rights (right to a fair trial or hearing)?

The Scottish Government responded as follows:

In reply to question 1, there is no error. The AVC policy age of the pension debit member is already covered in regulation 2(1) in the definition of AVC policy age in (a). Because the pension credit member has a derivative pension, it has to be made clear that the pension credit member's AVC policy age is that of the pension debit member (and not for example the pension credit member's normal retirement age).

In reply to questions 2 and 3, it is accepted that there is in regulation 14(8) a superfluous reference to regulation 12(5), which is not referred to in regulation 16. Because there is no reference in regulation 16, it is thought that this reference can be ignored. Nevertheless the Scottish Government would propose to correct out the reference in the next set of amending regulations.

In reply to question 4, it is thought that regulation 19 does not oust judicial review but only normal appeals. Given the existence of judicial review and that the interpretation of public pension regulations is an area of special expertise, it is thought that regulation 19 is compatible with a right to a fair hearing under article 6 (see for example *R. (on the application of Cart) v. Upper Tribunal 2012 UK SC20*, [2012] 1 A.C. 663; and *R (Alconbury Developments) v Secretary of State for the Environment* [2001] 2 WLR 1389.).

Annex C

Individual Learning Account (Scotland) Amendment Regulations 2017 (SSI 2017/288)

On 11 September 2017, the Scottish Government was asked:

(a) Regulation 6(7)(d) substitutes “A Learning Account Administrator” with “A Training Account Administrator” in regulation 4(6) of the principal 2011 Regulations. Is there an error as regulation 4(6)(b) refers to “the Learning Account Administrator”? Please clarify what substitution is intended?

(b) Is any corrective action proposed?

The Scottish Government responded as follows:

(a) The intended amendment made by regulation 6(7)(d) is to substitute the words “*Learning Account Administrator*” where they occur in regulation 4(6)(b) of the principal 2011 Regulations with the words “*Training Account Administrator*”. The inclusion of the indefinite article in both the text to be substituted and the substituting text is an error.

(b) The Scottish Government considers that this is a small scale and obvious error for which the correction is equally obvious – the removal of the indefinite article from both the substituting and substituted text. The Scottish Government, therefore, considers that it is appropriate to make this correction by correction slip.

