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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 16 January 2018



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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 16 January 2018, the Committee agreed to draw to the attention of the Parliament the following instruments—
 - National Health Service Superannuation Scheme (Scotland) (Miscellaneous Amendments) (No. 2) Regulations 2017 (SSI 2017/434)
 - Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017 (SSI 2017/451)
2. The Committee's recommendations and conclusions in relation to these instruments are set out in the following chapters 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

National Health Service Superannuation Scheme (Scotland) (Miscellaneous Amendments) (No. 2) Regulations 2017 (SSI 2017/434) (Health and Sport)

Background and Purpose

4. The NHS Superannuation Scheme requires members to pay contributions to the Scheme as a condition of membership. The general objective of these Regulations is to amend the Scheme to insert updated employee contribution bands for the scheme year 2018-2019. The Scheme is contained in 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").
5. This instrument makes changes to the salary/earnings bands stated in various tables contained in the 2011 Regulations and the 2013 Regulations, against which the employee contribution is set. Employee members of the Scheme pay a percentage of their pensionable pay to the scheme dependent on the level of their pensionable earnings.
6. The Regulations also make miscellaneous minor changes, and provide that anyone detrimentally affected by the amendments may elect that the amendments do not apply to them.
7. The Regulations are subject to the negative procedure. They come into force on 31 January 2018, but as permitted by the Superannuation Act 1972, some provisions have effect retrospectively from 1 April 2015, and another provision from 1 April 2016.

Discussion

8. Regulation 7 provides that the 2013 Regulations (SSI 2013/174) are amended in accordance with regulations 8 to 18. However, of those Regulations, only regulations 9, 13, 16 and 18 have effect from 1 April 2015, in accordance with the remainder of regulation 1(2)(a). Correspondence with the Scottish Government on this matter is set out in Annex A to this report.
9. The error in regulation 1(2)(a) concerns the date when provisions of the instrument have effect, which is a matter of significance. Regulation 1(2)(a) is not consistent in its effects. Firstly it provides that regulation 7 has effect from 1 April 2015. Regulation 7 provides that the 2013 Regulations are amended in accordance with regulations 8 to 18. On the other hand, the remainder of regulation 1(2)(a) provides that only regulations 9, 13, 16 and 18 have effect from 1 April 2015. The remaining regulations (8, 10, 11, 12, 14, 15 and 17) have effect from 31st January 2018.

10. Although there is a drafting error, it is not entirely clear to the Committee from the correspondence with the Scottish Government which precise amendment should be made to regulation 1(2)(a), to reflect the intended position. It appears that it might possibly be intended that regulation 8, rather than regulation 7, should be given retrospective effect from 1 April 2015. Regulation 8 inserts into the 2013 Regulations a definition of “the 2014 Act” (the Public Service Pensions Act (Northern Ireland) 2014). Regulation 9 is given retrospective effect from 1 April 2015, and that regulation includes various references to “the 2014 Act”, so regulations 8 and 9 appear to be connected provisions.
11. The Scottish Government proposes to correct regulation 1(2)(a) in the next set of Regulations which would amend the 2013 Regulations. Given that the error concerns the date when provisions of the instrument have effect, the Committee considers that it should be corrected by amendment as soon as possible.

Recommendation

12. The Committee draws the Regulations to the attention of the Parliament on reporting ground (i), as the drafting of regulation 1(2)(a) appears to be defective, in providing that regulation 7 has effect from 1 April 2015 and it is not intended that regulation 7 should have this retrospective effect.
13. The Committee recommends that the error is corrected by amendment as soon as possible, given that the error concerns the date when provisions of the instrument have effect.

Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017 (SSI 2017/451) (Environment, Climate Change and Land Reform)

Background and Purpose

14. These Regulations make amendments to the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (“the principal Regulations”) to clarify the procedure for considering “variation applications”. Those are applications to vary consent granted under section 36 of the Electricity Act 1989 (“the 1989 Act”) to construct, extend or operate certain types of generating station.
15. The instrument also updates references to the Conservation of Habitats and Species Regulations 2010, following the revocation of that instrument and its replacement by the Conservation of Habitats and Species Regulations 2017.
16. The instrument is subject to the negative procedure and came into force on 18 December 2017.
17. The principal Regulations implement Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (“the EIA

Directive”). This provides that before consent is given to certain projects likely to have significant effects on the environment - by virtue of, for example, their nature, size or location - those projects must be made subject to a requirement for development consent and an assessment with regard to their effects. Such an assessment is known as an “environmental impact assessment”, or EIA.

18. Prior to these amending Regulations, it has not been clear from the terms of the principal Regulations that an EIA is only to be carried out in relation to a variation application where the proposed variation would be “likely to have significant (adverse) effects on the environment”. The resulting requirement to submit an EIA for a variation application in all instances goes further than the requirements of the EIA Directive, imposing a significant regulatory burden in cases where the application would not result in adverse environmental effects, or where it would in fact bring environmental benefits.
19. This instrument therefore amends the principal Regulations to bring them into line with the requirements of the EIA Directive, and to provide clarity on when an EIA is required in relation to a variation application.

Breach of the "28 day rule"

20. The Regulations fail to comply with the “28 day rule” contained in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”). They were laid before the Parliament on 15 December 2017, and came into force on 18 December 2017.
21. The “28 day rule” provides that where a Scottish statutory instrument is subject to the negative procedure, it must be laid at least 28 days before the instrument comes into force. A breach of the rule does not affect the validity of the Regulations.
22. A breach of the rule is reported by the Committee under "ground (j)" in the Standing Orders (rule 10.3.1). That ground includes where there has been a failure to lay the instrument in accordance with section 28(2) of ILRA.
23. In accordance with section 31 of ILRA, Marine Scotland’s Marine Planning and Policy Division has written to the Presiding Officer to explain why the requirements of section 28(2) have not been met in this case. The correspondence has been reproduced at Annex B.
24. The letter notes that urgent variation applications may be required for four large-scale offshore wind farm projects, which have already been significantly delayed due to judicial review proceedings. Since further delays would result from the requirement in the principal Regulations that an EIA be completed in relation to these proposed variations (despite them not adversely impacting on the environment or being beneficial to it), the Scottish Government considered it necessary to bring into force an amending instrument as a matter of urgency.
25. The Scottish Government has further explained, in a written response to the Committee, that the instrument could not be planned for laying at an earlier date because it had only recently come to the attention of Marine Scotland that the principal Regulations required to be amended, particularly as no variation applications were received by it until the end of November 2017. Once the need for amendment was identified, the instrument was prepared on an expedited basis and brought into force as soon as possible, to avoid the principal Regulations continuing

to impose an additional and unnecessary regulatory burden on stakeholders and the Scottish Government as the regulator.

Recommendation

- 26. Accordingly, the Committee draws the Regulations to the attention of the Parliament on reporting ground (j) as they fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
- 27. The Regulations were laid before the Parliament on 15 December 2017 and came into force on 18 December 2017. This does not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.**
- 28. The Committee finds the failure to comply with section 28(2) to be acceptable in the circumstances as outlined in correspondence from the Scottish Government to the Presiding Officer on 15 December 2017, supplemented by the written response to the Committee on the Regulations.**

No points raised

Economy, Jobs and Fair Work

Registers of Scotland (Digital Registration, etc.) Regulations 2018 [draft]

Education and Skills

Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 [draft]

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2018 [draft]

Teachers' Pension Scheme (Scotland) (No. 2) Amendment Regulations 2017 (SSI 2017/454)

Health and Sport

National Health Service Pension Scheme (Scotland) (Miscellaneous Amendments) (No. 2) Regulations 2017 (SSI 2017/433)

Justice

Firefighters' Pension Scheme (Amendment and Transitional Provision) (Scotland) Regulations 2017 (SSI 2017/435)

Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 (Relevant Third Party) Order 2017 (SSI 017/461)

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 14 and Saving Provision) Order 2017 (SSI 2017/445 (C.33))

Criminal Finances Act 2017 (Commencement) (Scotland) Regulations 2017 (SSI 2017/456 (C.34))

Act of Sederunt (Summary Applications, etc) (Transfer from Lands Tribunals for Scotland) 2017 (SSI 2017/459)

Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules Amendment (Drug Dealing Telecommunications Restriction Orders) 2017 (SSI 2017/460)

Local Government and Communities

Community Empowerment (Scotland) Act 2015 (Supplementary and Consequential Provisions) Order 2018 [draft]

Allotments (Compensation) (Scotland) Regulations 2017 (SSI 2017/457)

Community Empowerment (Scotland) Act 2015 (Commencement No. 10, Saving, Transitional and Transitory Provisions) Order 2017 (SSI 2017/458 (C.35))

Rural Economy and Connectivity

Delegated Powers and Law Reform Committee

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Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2017 (SSI 2017/450)

Specified Crustaceans (Prohibition on Landing, Sale and Carriage) (Scotland) Order 2017 (SSI 2017/455)

Social Security

Universal Credit (Claims and Payments) (Scotland) Amendment Regulations 2017 (SSI 2017/436)

Annex A

National Health Service Superannuation Scheme (Scotland) (Miscellaneous Amendments) (No. 2) Regulations 2017 (SSI 2017/434)

On 18 December 2017, the Scottish Government was asked:

1. The third paragraph of the Policy Note states that the “revised employee contribution table” will be applicable with retrospective effect from 1 April 2017 for officer members changing employment within the scheme year 2017/2018, new starters, practitioners and non GP partners whose contributions are based on current year income.

However regulations 3, 6, 10 and 17, which include new tables with contribution rates, come into force on 31st January 2018, and the provisions mentioned in regulation 1(2) have effect from 1 April 2015 and 1 April 2016, as specified there.

Is there any error in not making provision with effect from 1 April 2017, or is there an error in the Policy Note? Otherwise please explain why the provisions are considered to be appropriate.

2. Regulation 1(2)(a) provides that regulation 7 has effect from 1 April 2015. Is there any error or lack of clarity, as regulation 7 introduces the amendment of the National Health Service Superannuation Scheme (2008 Section) (Scotland) Regulations 2013 in accordance with regulations 8 to 18, but of those regulations, only regulations 9, 13, 16 and 18 have effect from 1 April 2015 in accordance with regulation 1(2)(a)?

(In contrast, the introducing regulation 2 comes into force on 31st January 2018, and of regulations 3 to 6, regulation 4 has effect from 1 April 2016.)

Otherwise please explain why the provisions are considered to be appropriate.

3. Is corrective action proposed?

The Scottish Government responded as follows:

In reply to question 1, there was an error in the Policy Note and it is proposed to submit a revised Policy Note which makes clear that the new tables come into force on 31st January 2018 and are applied to the 2018/2019 Scheme Year.

In reply to question 2, it is accepted that regulation 1(2)(a) has an error or certainly a lack of clarity because as the Committee points out only certain of regulations 8 to 18 have retrospective effect from 1st April 2015, namely the ones listed in regulation 1(2)(a). We think that those reading the regulation would be able to bypass the error by going to the regulations listed in regulation 1(2)(a). Nevertheless the Scottish Government would propose to clarify the reference in the next set of amending regulations.

Annex B

Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017 (SSI 2017/451)

On 5 January 2018, the Scottish Government was asked:

A letter of 15 December 2017 has been sent from Marine Planning and Policy, Marine Scotland to the Presiding Officer to explain why section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ('the 28 day rule') has not been complied with. The letter provides reasons why Marine Scotland has considered that the Regulations should have been commenced at an early date. The Regulations have come into force on 18th December 2017.

However section 28(2) requires at least 28 days between the date of laying the instrument and the commencement date. To assist the Committee, please explain why it has been considered appropriate to lay the Regulations on 15th December, and so why they could not be planned for laying at an earlier date which would have complied with the 28 day rule.

The Scottish Government responded as follows:

Response to first point (why it has been considered appropriate to lay the Regulations on 15th December)

The Scottish Government considered it necessary to lay the Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017 (SSI 2017/451) (the 'Regulations') on 15 December 2017 with an entry into force date of 18 December 2017.

As explained by Marine Scotland in the letter to the Presiding Officer of 15 December 2017, the Regulations streamline the procedure for considering variation applications under section 36 of the Electricity Act 1989 and update references to "the Conservation of Habitats and Species Regulations 2010" which have been revoked.

As set out in more detail in the letter of 15 December 2017, there are a number of reasons why the Scottish Government required the Regulations to be laid on 15 December 2017 and come into force on 18 December 2017. Without the Regulations, the EIA process as contained within the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations ('SSI 2017/101') placed a significant regulatory burden on both the Scottish Government as the competent authority and consultation bodies. In light of the fact that the Scottish Government anticipated a number of large scale offshore wind applications (including variation applications) to be submitted to Marine Scotland from late 2017 onwards, urgent amendment of SSI 2017/101 was necessary to unify the scope of the EIA process within SSI 2017/101 and Directive 2011/92/EU (the 'EIA Directive') as soon as possible. This urgent amendment was therefore necessary to reduce regulatory burden, avoid additional delays to offshore wind development and thus allow the Scottish Government to achieve its policy of reducing carbon emissions and promoting economic growth.

As regards the reason why the Regulations could not have been laid at a date earlier than 15 December 2017, the following analysis addresses that issue.

Response to second point (why they could not be planned for laying at an earlier date which would have complied with the 28 day rule)

The Regulations were laid on 15 December 2017 and could not have been planned for laying at an earlier date. This is due to the fact that it only recently came to the attention of Marine Scotland that urgent action was required to streamline the EIA process in SSI 2017/101 in order to achieve the policy objective of aligning its scope more precisely with the EIA Directive.

SSI 2017/101 was laid before Parliament on 31 March 2017 and came into force on 16 May 2017. This instrument updates the EIA process for variation applications under section 36 of the Electricity Act 1989. Since the entry into force of SSI 2017/101, Marine Scotland did not receive any variation applications until end November 2017.

Aware that a number of large scale offshore wind applications (including variation applications) were expected to be submitted to Marine Scotland from late 2017 onwards, Marine Scotland's Licensing and Operations team conducted a review of relevant procedures, including the EIA process for variation applications under SSI 2017/101.

While undertaking this review, Marine Scotland realised that amendment to SSI 2017/101 was required to meet the policy objective of streamlining the EIA procedure for variation applications under section 36 of the Electricity Act 1989. Without amendment, SSI 2017/101 required variations to section 36 consents under the Electricity Act 1989 to be subject to an entire, fresh EIA process even in circumstances where there would be no adverse environmental effects from the variation or where in fact there could be environmental benefits from the variation, therefore far exceeding the requirements of the EIA Directive. This approach would result in an additional regulatory burden for both the Scottish Government as the regulator, and other stakeholders.

Once this urgent policy objective was identified, Marine Scotland acted as quickly as possible to provide policy instructions to SGLD for the matter to be rectified by amendment. As soon as we received the amendment instructions, SGLD acted on an expedited basis to prepare the Regulations ready to be laid and brought into force as quickly as possible to meet Marine Scotland's policy needs and to bring SSI 2017/101 into line with the requirements of the EIA Directive.

Breach of laying requirements: letter to the Presiding Officer

The above amending instrument was made on 14th December 2017 by the Scottish Ministers under sections 2(2) of the European Communities Act 1972, and section 36C(2) of the Electricity Act 1989. It is being laid before the Scottish Parliament today, and comes into force on 18 December 2017.

Section 28(2) (the 28 day rule) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) has not been complied with. To meet the requirements of section 31(3) of that Act, this letter explains the reasons for this.

This instrument is required to amend the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations (SSI 2017/101). SSI 2017/101 was laid before Parliament on 31 March 2017 and came into force on 16 May 2017. The amendment clarifies the procedure for considering variation applications under section 36 of the Electricity Act 1989, and updates references to "the Conservation of Habitats and Species Regulations 2010" which have been revoked.

Without these amendments, SSI 2017/101 as drafted requires variations to section 36 consents under the Electricity Act 1989 to go through the EIA process even where there are no adverse environmental effects from the variation or where in fact there may be environmental benefits, therefore going well beyond the requirements of Directive 2011/92/EU (the “EIA Directive”). This process places a significant regulatory burden on both the Scottish Government as the competent authority and consultation bodies. The amendment will ensure that the scope of the EIA process is the same in both SSI 2017/101 and the EIA Directive.

The development of offshore wind farms in Scotland strongly supports Scottish Government policy aims of reducing carbon emissions and encouraging economic growth, however the industry also faces significant challenges relating to funding and judicial review.

Four large scale offshore wind farm projects which received consent in October 2014 have faced serious delays due to judicial review proceedings brought by the RSPB. Court proceedings have only just ended and it is critical that these projects are not delayed further due to unnecessary regulatory burden. These projects may come forward with applications for variations due to technological advances since significant time has passed from when these projects were consented.

In addition, once CfD has been secured, strict milestones must be met in order to be compliant with the terms of the award. Advances in technologies during this time means that by the time developers have secured their funding they are required to vary consents in order to include these advances in technology. Variations may then be required urgently to meet CfD milestones. Technological advances may often result in reduced environmental effects.

In addition, within SSI 2017/101 there is an incorrect reference to the Conservation of Habitats and Species Regulations 2010 which have been revoked and replaced by the Conservation of Habitats and Species Regulations 2017. This Instrument corrects that reference.

We regret this breach of the 28 day rule, but we consider that it is necessary to make this amending instrument and bring it into force early, to unify the scope of the EIA process within the 2017 Regulations and the EIA Directive as soon as possible, reduce regulatory burden, avoid additional delays to offshore wind development and thus allow Scottish Government to achieve its policy of reducing carbon emissions and promoting economic growth.

We will engage with the Environment, Climate Change and Land Reform Committee both constructively and positively and at the earliest opportunity to explain the rationale behind this exceptional breach of the 28 day rule.

