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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 15 May 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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# Committee Membership



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**Deputy Convener**  
**Stuart McMillan**  
Scottish National Party



**Tom Arthur**  
Scottish National Party



**Neil Findlay**  
Scottish Labour



**Alison Harris**  
Scottish Conservative  
and Unionist Party

# Introduction

1. At its meeting on 15 May 2018, the Committee agreed to draw to the attention of the Parliament the following instrument—

Local Government Pension Scheme (Scotland) Regulations (SSI 2018/141).

2. The Committee's recommendations and conclusions in relation to this instrument 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: Instrument subject to the negative procedure

## Local Government Pension Scheme (Scotland) Regulations 2018 (SSI 2018/141) (Local Government and Communities)

### Purpose

4. The Local Government Pension Scheme (Scotland) Regulations 2018 (SSI 2018/141) consolidates, with certain amendments, the Local Government Pensions Scheme (Scotland) Regulations 2014 (the “2014 Regulations”).
5. The instrument is laid under the negative procedure. It comes into force generally on 1 June 2018, although certain provisions have retrospective effect on 1 April 2015, 31 March 2016, or 5 April 2016.

### Background and Committee Consideration

6. The 2014 Regulations established a scheme for the payment of pensions and other benefits to or in respect of persons employed by Scheme employers. The Policy Note states that the instrument takes account of the day-to-day experience of applying the 2014 Regulations since 1 April 2015 where areas for clarification have been sought or a change in approach has been requested. The UK Government Pension Schemes Act 2015 has also been taken into account.
7. The Policy Note explains that the changes include amendments to allow more flexibility for administering authorities to manage liabilities when employers leave the Scheme and provide for an “exit credit” to existing employers if appropriate. They also provide more options for using Additional Voluntary Contributions in the Scheme following the introduction of the UK Government’s “Freedom and Choice in Pensions” policy. The regulations deal with how the Scheme operates within the Public Sector Transfer Club. There are also a number of amendments to improve the administration of the Scheme.
8. Various issues were raised with the Scottish Government and that correspondence is reproduced in the Annex to this report. The Scottish Government acknowledges a number of the points raised by the Committee. However, the Committee disagrees with the Scottish Government’s response in respect of the following matters.
9. Firstly, regulation 1(2) provides that regulation 30(2) (award of additional pensions) has retrospective effect from 1 April 2015. However, similar provision made in regulation 16(6) (additional pension contributions) is not stated in regulation 1 to apply retrospectively from that date. The Committee considers that it is important that where retrospective provision is contained in these Regulations it is made consistently. There is a risk that making one provision have retrospective effect and not the other could lead to confusion about the effect of these similar provisions.

10. Secondly, regulation 20(2)(l) refers to “the SDS Scheme”. That expression, which the Scottish Government has explained refers to Skills Development Scotland, is not defined. The Committee considers that providing a definition for that expression would provide clarity to the meaning and application of regulation 20(2).
11. Thirdly, regulation 43(11) (survivor benefits: children of deferred members) provides that additional pension purchased under regulation 16 is not excluded for the purposes of paragraph (4)(c). Unlike similar provision made in regulation 40(11), however, internal cross-references are not also made to paragraphs (5)(c), (9)(c) and (10)(c). The Scottish Government acknowledges that this omission is wrong, but argues that it can be rectified by correction slip on the basis that it is an obvious typing error and that anyone consulting regulation 43(10A) of the 2014 Regulations would recognise this. However, the Committee considers that this error is not patent in nature, and that it is not clear that the reader would necessarily consult the 2014 Regulations, which are revoked by these regulations.
12. Finally, the Committee considers more generally that although, taken individually, the majority of the errors were capable of rectification by correction slip, taken together it is disappointing that the Scottish Government intends to rectify those errors by correction slip.

## **Recommendations**

13. **The Committee draws the instrument to the attention of the Parliament on the following reporting grounds:**
  1. **On the general reporting ground, in respect of the following errors:**
    - **In regulation 1, there is an inconsistency insofar as regulation 30(2) is stated to apply retrospectively from 1 April 2015, whereas similar provision made in regulation 16(6) is not.**
    - **Regulation 3(7)(d) cross-refers to "regulation 89 (forfeiture of pension rights after conviction for employment-related offences)", which should be a cross-reference to regulation 86.**
    - **In regulation 22(10)(b), the reference to regulation 2(3) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 should be to regulation 3 of those Regulations.**
    - **Regulation 43(11) provides that additional pension purchased under regulation 16 is not excluded for the purposes of paragraph (4)(c) if certain circumstances apply. However, reference should also be made to paragraphs (5)(c), (9)(c) and (10)(c).**
    - **Regulation 45(4)(e) should refer to regulation 17(6)(b)(i) rather than regulation 17(7)(b)(i).**
  2. **On reporting ground (h), on the basis that it could be clearer what the expression “SDS Scheme” means in regulation 20(2)(l).**

14. **The Committee also comments that although, taken individually, the majority of the errors were capable of rectification by correction slip, taken together it is disappointing that the Scottish Government intends to rectify those errors by correction slip.**

15. **More specifically, the Committee calls on the Scottish Government to rectify the error in regulation 43(11) by amending instrument rather than correction slip on the basis that the error is not patent in nature.**

# No points raised

## **Finance and Constitution**

Scottish Fiscal Commission (Modification of Functions) Regulations 2018 [draft]

## **Local Government and Communities**

Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2018 (SSI 2018/142)

# Annex

## Local Government Pension Scheme (Scotland) Regulations 2018 (SSI 2018/141)

On 4 May 2018, the Scottish Government was asked:

1. The effect of section 23(4) of the Public Service Pensions Act 2013 is to require the Scottish Ministers to lay a report before the Scottish Parliament in a case falling within section 23(1) or (2).

Regulation 1(2) provides that regulation 18(7) has retrospective effect from 1st April 2015. Regulation 18(7) provides that if a member dies before repayment of the deferred refund, these shall be treated as a lump sum death benefit for the purposes of Part 2 of schedule 29 of the Finance Act 2004 and taxed accordingly.

Please explain why it is considered that this does not have significant adverse effects in relation to the pension payable to or in respect of members of the scheme or in any other way in relation to members of the scheme in terms of section 23(1) or (2) of the 2013 Act. In particular, why is it considered that the imposition of such a tax retrospectively is not a significant adverse effect?

2. Regulation 1(2) also provides that regulation 30(2) (award of additional pension) has retrospective effect from 1 April 2015. Please explain why it is considered appropriate that similar provision made in regulation 16(6) (additional pension contributions) does not apply retrospectively from 1 April 2015.
3. Regulation 3(3) provides that in the specific circumstances set out there a person becomes an active member on "whichever is the earliest" of sub-paragraphs (a) to (c). Should regulation 3(5) similarly provide that in the specific circumstances set out there a person becomes an active member on *whichever is the earliest* of sub-paragraphs (a) or (b)?
4. Regulation 3(7)(d) cross-refers to "regulation 89 (forfeiture of pension rights after conviction for employment-related offences)". Should this cross-reference instead be to regulation 86?
5. The first line after regulation 17(12)(e) states that "*the appropriate administering authority shall, at its absolute discretion, decide that any life assurance sum due under sub-paragraph (a), and the realisable value of any arrangement under sub-paragraphs (b) to (e), should be paid to or for the benefit of the member's nominee, personal representatives or any person appearing to the authority to have been a relative or dependent of the member.*"

By way of contrast, regulations 38(2), 41(2), and 44(2) provide that "*The administering authority may, at its absolute discretion, pay the death grant to or for the benefit of the member's nominee, personal representatives or any person appearing to the authority to have been a relative or dependent of the member.*"

- a. Is it intended that in the circumstances of regulation 17(12)(e) the appropriate administering authority must decide that the sums referred to should be paid, but that the recipient of those sums is at the discretion of the administering authority; but that in the circumstances of regulations 38(2), 41(2) and 44(2) the

administering authority has discretion both as to whether to pay and, if so, who the recipient will be?

- b. Could the duties and discretion of the appropriate administering authority be clearer in regulation 17(12)(e)?
6. Regulation 20(2)(l) refers to "the SDS Scheme". However, that term is not defined. What does that term mean and should it be made clearer?
7. In regulation 22(10)(b), should the reference to regulation 2(3) of the TUPE Regulations be to regulation 3 of those Regulations?
8. Regulation 41(4) provides that regulation 41 applies to pension credit members as it applies to deferred members with the modification that for the amount of death grant calculated under paragraph (3), the amount calculated under paragraph (3)(a) and (b) is multiplied by 5.  
  
Please explain how this differs from what regulation 41(3) already provides in relation deferred members, given that that provision already refers to multiplying the amount by 5 based on the assumptions in sub-paragraphs (a) and (b).
9. Regulation 43(11) provides that additional pension purchased under regulation 16 is not excluded for the purposes of paragraph (4)(c) if certain circumstances apply. Should reference also be made to paragraph (5)(c), (9)(c) and (10)(c) (c.f. regulation 40(11))?
10. Should the reference to regulation 17(7)(b)(i) in regulation 45(4)(e) be to regulation 17(6)(b)(i)?
11. The "appropriate fund" is referred to in regulation 51(3), with reference to the funds specified in schedule 4. However "appropriate fund" also appears in regulations 19, 61, 62, 63, 67, 83, 87, 92 and 93. Should therefore a definition of "appropriate fund" in schedule 1 (interpretation) have been included?
12. Similarly, a "rates and adjustment certificate" is referred to in regulation 60(4), but this expression also appears in regulations 15, 52, 60 (in other places), 61, and paragraph 6 of schedule 4. Should therefore a definition of "rates and adjustment certificate" have been included in schedule 1?

**The Scottish Government responded as follows:**

In answer to question 1, the drafting of consolidated regulation 18 of the 2014 regulations did not make clear the tax position in relation to a lump sum death benefit. The new wording of regulation 18(7) makes the position clear. No rights are affected and the tax position remains the same; so section 23(4) of the Public Pensions Act 2013 is not engaged.

In answer to question 2, the back dating of regulation 30(2) is probably not needed given the terms of section 15(2)(b) of the Interpretation and Legislative Reform (Scotland) Act 2010 but makes clear that rights start to accrue on 1<sup>st</sup> April 2015. Regulation 16(6) would also be covered by section 15(2)(b) of the Interpretation and Legislative Reform (Scotland) Act 2010 and is about liabilities; so no need for extra clarification that goes beyond section 15(2)(b).

In answer to question 3, SG does not agree with the suggestion. Regulation 3(3) applies to the employer's responsibilities, whereas 3(5) offers a choice for the employee at any time when they are not a member (couched in these terms to allow for the administrative process). This is underpinned by the over-arching automatic enrolment regulations which apply on the 'auto enrolment' date.

In answer to question 4, SG agrees need for change and proposes to do this by a correction slip. An obvious typing error has been made given the terms of the heading of regulation 86 and therefore no confusion is likely to arise if a correction slip fixes the problem.

In answer to question 5, SG thinks that no change of wording is required. The discretion in relation to AVCs extends only to who the recipient is meant to be. On the other death grants the discretion covers recipient and whether it is paid at all. Without there being this complete discretion, a death grant can be caught by inheritance tax.

In answer to question 6, SG are of the view that SDS means Skills Development Scotland and is a well-known acronym and does not need to be defined. It is not defined in the 2014 regulation.

In answer to question 7, it is accepted by SG that "regulation 2(1) and (3) should read "regulation 2(1) and 3". It is proposed to change this by correction slip. Reading the 2006 TUPE regulations can give no other reading.

In answer to question 8, it is accepted by SG that the wording is infelicitous because there is no modification of position. The infelicity came in with regulation 24(c) of the Local Government Pension Scheme (Scotland) Amendment Regulations 2015, which changed a previous multiplier from 3 to 5. It is not proposed to change this.

In answer to question 9, it is accepted by SG that the reference is wrong and will be altered by correction slip. It is an obvious typing error and any one consulting regulation 43(10A) of the original consolidated instrument would recognise this.

In answer to question 10, it is accepted by SG that the reference is wrong and will be altered by correction slip. It is an obvious typing error and any one consulting regulation 17 would not be confused. It is also clear from original consolidated instrument.

In answer to question 11, it is accepted by SG that having a definition in schedule 1 would have been perhaps a neater way of drafting but because the instrument is a consolidating instrument the original text was followed. Regulation 51 deals with administering authorities which is also an appropriate place for a definition of this type.

In answer to question 12, it is accepted by SG that having a definition in schedule 1 would have been perhaps a neater way of drafting but because the instrument is a consolidating instrument the original text was followed. Regulation 60(4) deals with actuarial matters which is also an appropriate place for a definition of this type.

