Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. 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; and
   (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.

Membership:

Nigel Don (Convener)
John Mason (Deputy Convener)
Margaret McCulloch
John Scott
Stewart Stevenson
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth Anderson

Support Manager
Daren Pratt
The Committee reports to the Parliament as follows—

1. At its meeting on 17 February 2015, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015 [draft];

   Firefighters’ Pension Scheme (Scotland) Regulations 2015 (SSI 2015/19);


2. The Committee's recommendations in relation to the above instruments are set out below.

3. The Committee determined that it did not need to draw the Parliament's attention to the instruments which are set out at the end of this report.
POINTS RAISED: INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE

Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015 [draft] (Devolution (Further Powers) Committee)

4. This order is subject to the affirmative procedure in the Scottish Parliament and a similar procedure in both Houses of the Westminster Parliament. If so approved it would confer legislative competence on the Scottish Parliament to:

   a) reduce the minimum voting age to 16 at elections for the membership of the Scottish Parliament and Scottish local elections (or both); and

   b) make provision about the registration of electors in order to give effect to (a).

5. The order also modifies the restrictions set out in Schedule 4 to the Scotland Act 1998 to permit the Parliament to modify sections 11 (electors), 12 (Scottish Ministers’ powers to make provision about elections) or 12A (Secretary of State’s power to make provision about elections) of that Act for the purposes of (a) or (b) above.

6. The order does not confer legislative competence on the Parliament in relation to the digital service for applications for registration (IERDS) or for verifying information contained in applications for registration. However the order extends the executive competence of the Scottish Ministers in this area. It does so by allowing the Scottish Ministers to share existing functions of the Secretary of State under the Representation of the People Act 1983 (“the 1983 Act”) relating to the IERDS subject to certain qualifications. These functions would allow the Scottish Ministers to make regulations about the use of the IERDS for applications for registration or for verifying information contained in such applications in order to give effect to any provision lowering the minimum voting age at Scottish Parliament or Scottish local elections to 16.

7. In considering the instrument, the Committee asked the Scottish Government for an explanation of certain matters relating to the clarity of the functions to be conferred on the Scottish Ministers. The correspondence is reproduced at Annex A.

8. Article 5 of the order sets out the functions which are to be shared by the Scottish Ministers and the Secretary of State in or as regards Scotland. The Committee recognises that the functions to be shared are subject to a number of qualifying factors set out in that article. The Scottish Ministers require the agreement of a Minister of the Crown and are only exercisable for the specific purpose of giving effect to provision reducing the minimum voting age in elections to the Scottish Parliament or Scottish local government elections to 16.

9. The shared functions listed in article 5(3) are also limited to those which relate to the use of the IERDS for applications for registration or for verifying information contained in applications for registration.
10. The Committee is satisfied that these restrictions on the scope of the functions which are to be shared with the Scottish Ministers are clearly set out in the order. However the Committee takes the view that the drafting of article 5 of the order could be clearer in describing the extent of the functions which are to be exercisable subject to these restrictions.

11. Article 5(3)(a) appears to confer on the Scottish Ministers any of the provisions set out in Schedule 2 to the 1983 Act subject to the limiting factors described elsewhere in that article. However article 5(3)(b) then specifically confers only certain paragraphs of Schedule 2. It is therefore not clear whether only the more limited scope of 5(3)(b) applies.

12. The Committee therefore draws the order to the attention of the Parliament under reporting ground (h) as its meaning could be clearer.

13. In doing so however the Committee notes that the Scottish Government does not consider this to present a problem for the order’s practical application or to prevent the Government from achieving the overarching policy objective in the event that the Scottish Parliament were to exercise the additional legislative competence which this order would confer if made.
14. These regulations set up a new pension scheme for firefighters in Scotland. They come into force on 1 April 2015, the day on which the new scheme will take effect.

15. In considering the instrument, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at Annex B.

16. Chapter 1 of Part 8 to the regulations uses the term “the scheme employer”. That term is not defined in the regulations. The Scottish Government has acknowledged in correspondence that the preferred term is “the authority”, defined in the regulations as the Scottish Fire and Rescue Service. The Committee considers that the references to “the scheme employer” should instead be references to the defined term “the authority” and that use of the undefined term “the scheme employer” is apt to create confusion for users of the legislation.

17. The Committee draws the regulations to the attention of the Parliament on the general reporting ground. Chapter 1 of Part 8 to the regulations uses the phrase “the scheme employer” in several places. The term “the scheme employer” is not defined in the regulations. The correct phrase is “the authority”, which is defined in regulation 3 as the Scottish Fire and Rescue Service. The use of the term “the scheme employer” could be confused with the term “the scheme manager”, which is defined in regulation 3 as the Scottish Ministers.
18. The purpose of the instrument is to set out the procedure to be followed where there is a dispute between Revenue Scotland and another person about whether a document required to be produced under an information notice is subject to legal professional privilege.

19. The instrument comes into force on 1 April 2015.

20. In considering the instrument, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at Annex C.

21. The Committee draws the instrument to the attention of the Parliament on the general reporting ground as regulation 5(8) contains a patent drafting error. The regulation requires an application to the tribunal to be made “no later than twenty working days of the date after” the notification given by Revenue Scotland of the documents it requires to be produced. The regulation is intended to require such an application to be made “no later than twenty working days after the date of” that notification. The words “of” and “after” have been accidentally transposed.
NO POINTS RAISED

22. At its meeting on 17 February 2015, 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:

**Economy, Energy and Tourism**

Bankruptcy and Debt Advice (Scotland) Act 2014 (Commencement No. 2, Savings and Transitionals) Amendment Order 2015 (SSI 2015/54 (C.10)).

**Education and Culture**

Charity Test (Specified Bodies) and the Protection of Charities Assets (Exemption) (Scotland) Amendment Order 2015 [draft];

Historic Environment Scotland Act 2014 (Commencement No. 2) Order 2015 (SSI 2015/31 (C.6)).

**Finance**

Scottish Landfill Tax (Qualifying Material) Order 2015 (SSI 2015/45);

Proceeds of Crime Act 2002 (Disclosure of Information to and by Lord Advocate and Scottish Ministers) Amendment Order 2015 [draft];

Scottish Tax Tribunals (Voting and Offences etc.) Regulations 2015 [draft];

Revenue Scotland and Tax Powers Act (Postponement of Tax Pending a Review or Appeal) Regulations 2015 [draft];

Budget (Scotland) Act 2014 Amendment Order 2015 [draft];

Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Order 2015 [draft];

Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2015 [draft];

Revenue Scotland and Tax Powers Act (Fees for Payment) Regulations 2015 (SSI 2015/36);


**Health and Sport**

General Medical Council (Fitness to Practise and Over-arching Objective) and the Professional Standards Authority for Health and Social Care (References to Court) Order 2015 [draft];
Delegated Powers and Law Reform Committee, 12th Report, 2015 (Session 4)

Health and Care Professions Council (Registration and Fees) (Amendment) Rules Order of Council 2015 (SI 2015/93);

Fish Labelling (Scotland) Amendment Regulations 2015 (SSI 2015/48);

Public Bodies (Joint Working) (Scotland) Act 2014 (Commencement No. 2) Amendment Order 2015(SSI 2015/44 (C.8)).

Infrastructure and Capital Investment

Scotland Act 1998 (Modification of Schedule 5) Order 2015 [draft].

Justice

European Protection Order (Scotland) Regulations 2015 [draft];

Scottish Courts and Tribunals Service (Procedure for Appointment of Members) Regulations 2015 (SSI 2015/53);

Act of Sederunt (Rules of the Court of Session Amendment) (Regulation (EU) No. 1215/2012) 2015 (SSI 2015/26);

Act of Sederunt (Rules of the Court of Session Amendment No. 2) (Regulatory Reform (Scotland) Act 2014) 2015 (SSI 2015/35).

Local Government and Regeneration

Non-Domestic Rate (Scotland) Order 2015 (SSI 2015/47).

Rural Affairs, Climate Change and Environment

Little Loch Broom Scallops Several Fishery Order 2015 (SSI 2015/28);

Loch Ewe, Isle of Ewe, Wester Ross, Scallops Several Fishery Order 2015 (SSI 2015/30).

Reservoirs (Scotland) Act 2011 (Commencement No. 2) Order 2015 (SSI 2015/43 (C.7)).
Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015 [draft]

On 22 January 2015, the Scottish Government was asked:

1. Article 5(3) of the order describes functions which are to be exercisable by the Scottish Ministers subject to the restrictions set out in article 5(1) and (2). Article 5(3)(a) describes the functions conferred by section 53(1) and (3) of the Representation of the People Act 1983. Section 53(3) provides that regulations made with respect to the matters set out in section 53(1) may contain such provisions as are mentioned in Schedule 2 to the 1983 Act. The description of section 53(3) in article 5(3)(a) without qualification appears to confer on the Scottish Ministers the function of making regulations with respect to all of the matters set out in Schedule 2. However, article 5(3)(b) of the order then describes paragraphs 1A, 3ZA and 8C of Schedule 2 separately as if only the powers in those paragraphs of Schedule 2 are to be so conferred.

Can the Scottish Government confirm which of the functions in Schedule 2 to the 1983 Act are intended to be conferred on the Scottish Ministers and advise whether in its view the order is clear and unambiguous in this respect?

2. Paragraph 8C of Schedule 2 to the 1983 Act provides a power to make provision requiring the retention or disposal, or otherwise regulating the processing of (amongst other things) information provided in an application under section 10A of the 1983 Act. Applications under section 10A are applications for registration made to the Chief Electoral Officer for Northern Ireland in respect of an address in Northern Ireland.

Can the Scottish Government explain to what extent the power to make provision in relation to the retention, disposal or processing of information in applications for registration in respect of an address in Northern Ireland might be required in relation to the registration of electors to give effect to any lowering of the minimum voting age to 16 in elections to the Scottish Parliament or Scottish local elections?

3. Article 8 of the order makes specific provision for the procedure which is to apply to the exercise of the functions transferred by article 5. No express provision is made for the manner in which the functions are to be exercised. Section 201 of the 1983 Act provides that the functions under section 53 are exercisable by statutory instrument. Article 7 of the order applies section 117 of the Scotland Act 1998 to the exercise of functions by the Scottish Ministers conferred by virtue of article 5. This has the effect of substituting the Scottish Ministers for the reference to the Secretary of State in section 201 of the 1983 Act. Section 201 could therefore be read as making provision for the function to be exercisable by statutory instrument.

The Interpretation and Legislative Reform (Scotland) Act 2010 (ILRA) makes provision for the manner in which functions of the Scottish Ministers to make subordinate legislation are to be exercised. Section 27(2)(a) of that Act provides a
default rule that functions conferred on the Scottish Ministers to make regulations are exercisable by SSI. However section 27(3)(a) precludes the operation of the default rule where the enactment conferring the function or any other enactment provides that the function is not to be exercisable by Scottish statutory instrument. It is unclear whether in applying the gloss in section 117 of the Scotland Act it is intended that article 7 has the effect of saving section 201 of the 1983 Act which will trump the default rule by operation of section 27(3)(a) of ILRA.

Schedule 2 to ILRA modifies functions under pre-commencement enactments to remove the effect of provisions which provide for the exercise of subordinate legislation making functions by the Scottish Ministers by SI. However it is not clear that “pre-commencement enactments” for this purpose cover the present situation since the conferral of the function post-dates the commencement of part 2 of ILRA arising as it does by virtue of a subsequent instrument.

In the only previous s63 order made since the commencement of Part 2 of ILRA specific provision was made to disapply the provision in the parent act which specified the means by which the function is to be exercised. It thereby avoided the scope of the gloss in section 117 of the Scotland Act which was also applied for the purpose of that order. This seems to be the manner in which legal certainty is to be achieved. (See SI 2014/2918) It is unclear why that approach was not adopted in this case.

Does the Scottish Government consider that the manner in which the functions transferred by the order are to be exercised are clear and unambiguous and can it explain the manner that is to be used and the reason for its view?

**The Scottish Government responded as follows:**

1. Article 5(3) of the draft Order confers the functions in section 53(1) and (3) of the Representation of the People Act 1983 (“the 1983 Act”). Section 53(1) is the general power to make provision by regulations with respect to, amongst other things, the form of the electoral register; the procedure to be followed in the preparation of the register and the place and manner of its publication and generally with respect to any matters incidental to the provisions of the 1983 Act so far as those provisions relate to the registration of electors.

Section 53(3) provides “without prejudice to the generality of subsection (1)” that regulations made with respect to the matters mentioned in subsection (1) *may* contain any provisions as are mentioned in Schedule 2 to the 1983 Act. So Schedule 2 sets out a non-exhaustive, illustrative list.

The extent to which the functions in section 53(1) and (3) are conferred on the Scottish Ministers by the Order is limited by two subject matter qualifications. The first qualification is that the functions are only exercisable in order to give effect to provision reducing the minimum voting age to 16 at the relevant elections (article 5(2)(b)). The second qualification is that the functions must relate to the use of the digital service for applications for registration or for verifying information contained in applications for registration (article 5(3), closing words).
Given these limitations, it was considered otiose to introduce a further qualification into article 5(3)(a) by providing that section 53(3) is only transferred insofar as relating to paragraphs 1A, 3ZA and 8C of Schedule 2.

Article 5(3)(b) (which is also limited by the two subject-matter qualifications) was included to make clear that the functions in these paragraphs of Schedule 2 will, if the Order is made, be concurrently exercisable by the Scottish Ministers and a Minister of the Crown. The three paragraphs that are mentioned are the only paragraphs of Schedule 2 that the Scottish Government and the UK Government have identified as potentially applying to the use of the digital service.

The Scottish Government considers that there is no risk of the reader misconstruing article 5(3)(a) when regard is had to the subject-matter limitations in that article.

2. The Scottish Government has not identified any requirement to make provision that relates to Northern Ireland using the article 5 powers. However, the power being considered here, in paragraph 8C of Schedule 2 to the 1983 Act, can only be exercised:

(i) in order to give effect to provision reducing the minimum voting age to 16 at the relevant elections, and

(ii) so far as relating to the use of the digital service for applications for registration or for verifying information contained in applications for registration.

Because there are such clear subject-matter limitations, it was considered unnecessary to complicate the drafting by seeking to carve out powers that might prove unnecessary (or indeed to risk unforeseen problems by inadvertently carving out too much). It is for this same reason that the draft Order does not attempt to carve out the digital-service specific functions in section 53(1) of the 1983 Act, but relies on the subject-matter limitation to constrain the use that could be made of them.

3. The Scottish Government accepts that it would have been possible to draft in a way that used the provision at section 201(1), (2) and (2C) of the 1983 Act to provide for the procedure that is to apply to Regulations made by virtue of the functions described in article 5(3) of the draft Order.

However, a simple reference to section 201 could leave doubt as to the intended operation of section 201(2C), which was inserted into the 1983 Act by the Electoral Registration and Administration Act 2013 (“the 2013 Act”), to provide that in the situation described in article 8(2) of the draft Order negative procedure (in Scottish Parliament terminology) is to apply, rather than affirmative procedure (again, in Scottish Parliament terminology).

The approach adopted in S.I. 2014/2918 shows one way to the result, but the draft Order adopts that of section 22 of the 2013 Act, which amended the Representation of the People Act 2000 to confer a regulation-making power on the Scottish Ministers. That Act does not expressly disapply the procedural
requirements of section 201 of the 1983 Act (which would otherwise apply because of paragraph 1(2) of Schedule 4 to Representation of the People Act 2000). It expressly provides that affirmative procedure is to apply to the exercise of the power. Section 27(2)(a) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA 2010”) operates to provide that the exercise of the power is by Scottish statutory instrument.

No consequences flow from the approach of the 2013 Act and the draft Order in not expressly disapplying section 201 of the 1983 Act. The same effect would apply whether it is expressly disapplied or whether it is left to the glosses in ILRA 2010 to deal with it (specifically the disapplication of the reference to the function being exercisable by statutory instrument, which will cease to have effect as a result of paragraph 2 of Schedule 2 of ILRA 2010, and the filling of that gap by section 27(2)(a) of ILRA 2010).

As article 8 states clearly what the procedural requirements are to be, the Scottish Government does not consider that there can be any doubt what the procedural requirements are, and that the procedure is by SSI, in accordance with ILRA 2010. The use of Scottish Parliament terminology also serves to guide the reader to that conclusion.
On 30 January 2015, the Scottish Government was asked:

1. Regulations 3 and 65(3) both define the term “ill-health award” for the purposes of the regulations. Regulation 3 defines an ill-health award as a lower tier ill-health pension and a higher tier ill-health pension, whereas regulation 65(3) defines the term as the entitlement to payment of a lower tier ill-health pension and, in cases where the member is also entitled to a higher tier ill-health pension, the payment of a higher tier ill-health pension. What does the Scottish Government consider the effect of the duplicate definition to be? Is there any intended difference between the two definitions?

2. What is the meaning of the term “scheme employer” as used in Chapter 1 of Part 8? The term does not appear to be defined. Does the Scottish Government consider these provisions to be sufficiently clear standing the absence of a definition?

3. Regulation 144(4)(c) provides that a statement must be sent to P in accordance with that regulation to the effect that, if P wishes to appeal against the scheme manager’s determination on an issue of a medical nature, P must give written notice to the scheme manager “not later than 28 days” after P receives the last of the documents required to be supplied under paragraph (4). Regulation 145(1) then provides that a written notice of appeal must be given to the scheme manager “within 28 days” of the date on which P receives the documents referred to in regulation 144(4). Please explain whether there is considered to be any difference between “not later than 28 days” and “within 28 days” as used in the context of regulations 144(4)(c) and 145(1).

4. Chapter 2 of Part 11 relates to appeals to the board of medical referees. Regulation 146 provides that where an appeal has been lodged against a determination of the scheme manager on an issue of a medical nature, that appeal must be referred to the board. Regulation 148 provides, however, that the board must supply the parties with a written report of its decision on the relevant medical issues (and not a decision on the appeal as a whole). Is it intended that the Board will be responsible for making a decision on the correctness or otherwise of the determination of the scheme manager against which the appeal has been lodged? If so, as regulation 148 limits the written report to the relevant medical issues, is this sufficiently clear to provide that the report should constitute a decision on the appeal as a whole? If it is not intended that the board make a decision on the scheme manager’s determination, who is responsible for making such a decision, and how is this provided for under the regulations?

5. Regulation 160 limits the assignation of benefits awarded under the scheme to a “dependant” of the person entitled to the award and regulation 161(4) provides that the scheme manager may apply for the benefit of any “dependant” of the member so much of any pension that has been withheld under that regulation. What is the meaning of the term “dependant” in regulations 160 and 161? Does
the Scottish Government consider these two regulations to be sufficiently clear without such a definition?

**The Scottish Government responded as follows:**

**Question 1**

The phrase “ill-health award” is intended to have a consistent meaning throughout the Regulations. Given the definition of the phrase in regulation 3, the wording (in marginally different terms) in regulation 65(3) adds nothing and did not require to be included in the Regulations. However, we do not consider that the presence of both provisions could lead to any doubt as to what a reference to “ill-health award” in the Regulations actually means.

**Question 2**

The only employer of members of the scheme will be the Scottish Fire and Rescue Service (referred to in the Regulations as “the authority”). It would have been preferable if the references to the “scheme employer” within Chapter 1 of Part 8 had been references to “the authority”, but we do not consider that it possible to read the references other than being references to the SFRS.

**Question 3**

We do not consider there to be any difference between the period referred to in regulation 144(4)(c) and that referred to in regulation 145(1).

**Question 4**

The right of appeal provided by regulation 144(1) is a right to appeal against a “determination on an issue of a medical nature”. Given that, the reference in regulation 148 is consequential on the fact that any decision made by the board is simply a decision on a medical issue.

**Question 5**

References to a “dependant” of a person are common within pensions law, without the need for that word to be defined (for an example within primary legislation, see section 9 of the Police Pensions Act 1976 although the spelling there is “dependent”). The test in practice is simply whether a person (such as a child or spouse) was dependent on the pensioner at a relevant date.
Revenue Scotland and Tax Powers Act (Privileged Communications) Regulations 2015 (SSI 2015/38)

On 4 February 2015, the Scottish Government was asked:

Regulation 5(8) provides for an application to the tribunal in respect of a disputed information notice to be given “no later than twenty working days of the date after the notification required under paragraph (4)”. (Paragraph (4) refers to notification by Revenue Scotland of any documents on the list which Revenue Scotland requires to be produced and considers are not privileged). Can the Scottish Government explain what is meant by the formulation twenty working days “of the date after the notification”, and does it consider the meaning of the provision to be clear and unambiguous?

The Scottish Government responded as follows:

The Scottish Government is grateful to the Committee for raising this point. The words “of” and “after” in the quoted passage have been accidentally transposed. Given that regulation 5(8) requires the parties to seek agreement on the time period for an application, we do not consider that in practice there will be difficulty in interpreting the passage in accordance with the intended meaning.
Members who would like a printed copy of this Numbered Report to be forwarded to them should give notice at the Document Supply Centre.