



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

30th Meeting, 2019 (Session 5)

Tuesday 3 December 2019

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Decision on taking business in private:** The Committee will decide whether to take item 6 in private.

2. **Subordinate legislation:** The Committee will take evidence on the Criminal Justice (Scotland) Act 2016 (Support for Vulnerable Persons) Regulations 2019 [draft] from—

Ash Denham, Minister for Community Safety, Lucy Lawson, Senior Policy Officer, and Katie McGarvey, Lawyer, Scottish Government.

3. **Subordinate legislation:** Ash Denham (Minister for Community Safety) to move—

S5M-19844—That the Justice Committee recommends that the Criminal Justice (Scotland) Act 2016 (Support for Vulnerable Persons) Regulations 2019 [draft] be approved.

4. **HMICS Thematic Inspection of the Scottish Police Authority:** The Committee will take evidence from—

Gill Imery QPM, HM Chief Inspector of Constabulary in Scotland, HM Inspectorate of Constabulary in Scotland.

5. **Subordinate legislation:** The Committee will consider the following negative instruments—

Firefighters' Pension Scheme (Scotland) Amendment Regulations 2019 (SSI 2019/357);  
Firefighters' Pension Schemes (Scotland) Amendment Order 2019 (SSI 2019/358);  
Police Pensions Amendment (Increased Pension Entitlement) (Scotland) Regulations 2019 (SSI 2019/380);

Firefighters' Pension Scheme Amendment (Increased Pension Entitlement) (Scotland) Order 2019 (SSI 2019/381);  
Firefighters' Pension and Compensation Schemes (Amendment) (Scotland) Order 2019 (SSI 2019/382).

6. **HMICS Thematic Inspection of the Scottish Police Authority:** The Committee will review the evidence heard earlier in the meeting.
7. **Scottish Biometrics Commissioner Bill (in private):** The Committee will consider a draft Stage 1 report.

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The papers for this meeting are as follows—

**Agenda item 2**

Paper by the Clerk

J/S5/19/30/1

PRIVATE PAPER

J/S5/19/30/2 (P)

**Agenda items 4 and 6**

Paper by the Clerk

J/S5/19/30/3

PRIVATE PAPER

J/S5/19/30/4 (P)

PRIVATE PAPER

J/S5/19/30/5 (P)

**Agenda item 5**

Paper by the Clerk

J/S5/19/30/6

**Agenda item 7**

PRIVATE PAPER

J/S5/19/30/7 (P)

## Justice Committee

30th Meeting, 2019 (Session 5), Tuesday 3 December 2019

### Subordinate legislation

#### Note by the clerk

#### Purpose

1. This paper invites the Committee to consider the following affirmative instrument:

- [Criminal Justice Scotland Act 2016 \(Support for Vulnerable Persons\) Regulations 2019 \[draft\]](#)

#### Introduction

2. The instrument is made in exercise of the powers conferred by sections 98(1)(b) and (2), 99, 100(a), 101(a)(i) and (b) and 104(1) and (2) of the Criminal Justice Scotland Act 2016.

3. The purpose of the Regulations is to place non-statutory Appropriate Adult (“AA”) services on a statutory footing by setting out the definition of “appropriate adult support” and conferring functions pertaining to the delivery of AA services, the training of those undertaking the role of AA and the quality assessment of AA provision.

4. Further details on the purpose of the Regulations can be found in the policy note attached at **Annexe A**.

#### DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

5. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 12 November 2019 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

#### JUSTICE COMMITTEE CONSIDERATION

6. The Justice Committee is required to report to the Parliament on the instrument by 10 December 2019. The Cabinet Secretary for Justice has lodged motion S5M-19844 proposing that the Committee recommends approval of the instrument. The Minister for Community Safety is due to attend the meeting on 3 December to answer any questions on the instrument and to move the motion for approval.

7. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 10 December 2019. Thereafter, the Parliament will be invited to approve the instrument.

**8. The Committee is asked to delegate to the Convener authority to approve the report on the instrument for publication.**

**POLICY NOTE – APPROPRIATE ADULT SUPPORT SSIs****THE CRIMINAL JUSTICE (SCOTLAND) ACT 2016 (COMMENCEMENT NO. 6 AND TRANSITIONAL PROVISION) ORDER 2019  
SSI 2019/363 (C. 18)****THE CRIMINAL JUSTICE (SCOTLAND) ACT 2016 (SUPPORT FOR VULNERABLE ADULTS) REGULATIONS 2019  
SSI 2019/XXX**

1. The Criminal Justice (Scotland) Act 2016 (Commencement No. 6 and Transitional Provision) Order 2019 (“the 2019 Order”) is made in exercise of the powers conferred by section 117(2) and (3) of the Criminal Justice (Scotland) Act 2016 (“the 2016 Act”) and all other powers enabling Scottish Ministers to make the Order. This instrument is subject to no procedure.
2. The Criminal Justice (Scotland) Act 2016 (Support for Vulnerable Adults) Regulations 2019 (“the 2019 Regulations”) are made in exercise of the powers conferred by sections 98(1)(b) and (2), 99, 100(a), 101(a)(i) and (b) and 104(1) and (2) of the 2016 Act. This instrument is subject to affirmative procedure.

**Purpose**

3. The purpose of the 2019 Order is to commence section 42 of the 2016 Act which places a duty on the police<sup>1</sup> to identify vulnerable adults in custody and to facilitate the provision of communication support for these individuals. The Order also makes provision to commence sections 102 and 103 of the 2016 Act - which relate to the training and quality assessment functions outlined in paragraph 4, below - so that they come into force on the same date as the 2019 Regulations.
4. The purpose of the 2019 Regulations is to place non-statutory Appropriate Adult (“AA”) services on a statutory footing by setting out the definition of “appropriate adult support” and conferring functions pertaining to the delivery of AA services, the training of those undertaking the role of AA and the quality assessment of AA provision.
5. The establishment of a statutory AA service, using these powers, is considered necessary for the effective commencement of the duty on the police under section 42 of the 2016 Act and will help ensure high quality and consistent support for vulnerable adults in the Scottish criminal justice system.

**Policy Objectives**

6. The primary role of an AA is to facilitate communication between the police and vulnerable adults (aged 16 and over) during police procedures. AA services have been delivered in Scotland on a non-statutory basis since the early 1990s, providing support

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<sup>1</sup> Section 42 applies to certain other constables and officials when operating in Scotland by virtue of Article 2 of S.S.I. 2017/465 and Articles 6 and 7 and schedules 2 and 3 of S.I. 2018/46. Cross-border provision is contained in Part X of the Criminal Justice and Public Order Act 1994 (c.33).

to suspects, accused persons, victims and witnesses who have communication difficulties due to a mental disorder.

7. As part of his review of the Scottish legal system in 2011, Lord Carloway recommended that there should be a statutory definition of a vulnerable adult and that individuals who meet this definition should have a legal right to an AA when in police custody. These recommendations were ultimately incorporated into the 2016 Act, which contains a definition of a “vulnerable person”<sup>2</sup>, places a duty on the police to facilitate the provision of communication support for such persons in police custody, and provides Scottish Ministers with regulation-making powers to create a statutory AA service.

### **Definition of AA Support**

8. Regulation 3 in the 2019 Regulations defines AA support to include support at any stage during a police investigation for victims, witnesses and those suspected or accused of committing an offence.

9. Non-statutory AA services currently provide support to victims and witnesses, as well as to suspects and accused persons for non-custody related procedures. The definition in regulation 3 means that local authorities will have a duty to continue providing AA support to all of these groups when the statutory service commences.

10. While duty on the police in section 42 of the 2016 Act relates specifically to vulnerable adults in police custody, the police currently request AA support for all vulnerable adults who require it, including victims and witnesses, during police investigations and will continue to do this when the statutory service commences

### **Delivering AA Services and Providing Training for AAs**

11. The functions of delivering AA services and providing training for AAs are conferred on local authorities by regulations 4 and 6 respectively of the 2019 Regulations.

12. At present, local authorities work in a variety of ways to deliver AA services and train AAs, including partnerships between different local authority areas and with health and justice partners, as well as contracting out to third parties. Regulations 4(2) and 6(2) provide local authorities with the flexibility to continue to tailor their AA service and training provision in order to suit local needs by allowing them to enter into contracts with others.

13. Section 101(a)(ii) of the 2016 Act allows for a function to be conferred to provide training to people in other roles who interact with individuals who require AA support. Such roles include the police, advocacy and support workers, and legal and health professionals. This function is not being conferred at this time as engagement with stakeholders has suggested that a non-legislative approach is more suitable to address these training needs. A stakeholder group comprised of representatives from Scottish Government and the justice, health and third sectors has been established to

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<sup>2</sup> A description of a vulnerable person is contained in section 42(1)(c) of the 2016 Act and the definition of “vulnerable person” contained in section 98(3) of that Act largely replicates this description.

develop a national training framework for AAs, and part of this group's remit is to explore ways to improve training relating to AA support for these other roles.

14. Section 102(1)(a) of the 2016 Act allows for the AA training provider to make recommendations about the way AA support is provided to the person on whom the function to deliver AA services is conferred. As set out in paragraph 11, local authorities will be responsible for the duties to deliver AA services and to train AAs. The statutory guidance for local authorities which will accompany these regulations sets out how this will work in practice, namely that all AA services will be expected to have a formal management structure in place which will have involvement in the training function and can make recommendations about service provision.

### **Quality Assessment of AA Support**

15. Section 103 of the 2016 Act, places a duty on Scottish Ministers to ensure that a quality assessment function is conferred as part of the statutory AA service. This function is conferred on Social Care and Social Work Improvement Scotland (commonly known as "the Care Inspectorate") by regulation 5 of the 2019 Regulations.

16. In this role the Care Inspectorate will work with local authorities to identify key themes, issues and good practice to help ensure that AA provision is of a high standard and is consistent across Scotland. Section 102(1)(a) of the 2016 Act allows for the Care Inspectorate to make recommendations about AA provision to local authorities, to which local authorities must have regard.

### **Consultation**

17. The model for the statutory AA service was developed by a working group consisting of representatives from the Scottish Appropriate Adult Network and COSLA, as well as health and justice partners, cross-policy Scottish Government officials and statutory bodies including the Care Inspectorate and Mental Welfare Commission. An advisory group of organisations representing service users was established to offer expert opinion on the model developed by the working group.

18. A public consultation on the model developed by these groups took place between 3 April 2018 and 26 June 2018, including workshops held in conjunction with the SOLD Network and Support in Mind Scotland. Responses to the consultation and the analysis of these responses can be accessed on the Scottish Government website <https://consult.gov.scot/criminal-justice/appropriate-adult-service/>.

### **Impact Assessments**

19. The following impact assessments have been completed:

- [Equalities Impact Assessment](#)
- Data Protection Impact Assessment

No equality and privacy issues have been identified by these assessments.

20. Screening has been carried out for other impact assessments (Environmental, Fairer Scotland Duty, Child Rights and Wellbeing) and this has determined that they are not required.

## **Financial Effects**

21. The Cabinet Secretary for Justice confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no significant financial effects on the Scottish Government, local government or on business.

22. As set out above, local authorities currently provide AA services on a non-statutory basis and the 2019 Regulations allow them flexibility to continue delivering AA services to suit local needs. A costing exercise has, however, been undertaken in conjunction with COSLA and additional funding of £1 million per annum has been agreed to help local authorities meet the statutory duties in these regulations.

23. Recurring funding of £180,000 per annum has also been agreed to enable the Care Inspectorate to undertake the quality assessment function.

Criminal Justice Division  
Scottish Government

*29 October 2019*

## Justice Committee

30th Meeting, 2019 (Session 5), Tuesday 3 December 2019

### HMICS Thematic Inspection of the Scottish Police Authority

#### Note by the clerk

#### Introduction

1. On 26 September 2019, HM Inspectorate of Constabulary in Scotland (HMICS) published its [Thematic Inspection of the Scottish Police Authority](#) (SPA). The **Annex** to this paper contains a summary of the key findings and recommendations.
2. HMICS's report "concluded that the model of governance by an independent police authority is a sound one." The report also made 14 recommendations for the SPA, the Scottish Government and Police Scotland.
3. The aim of the Thematic Report was to assess the effectiveness and efficiency of the SPA in terms of fulfilling its core role and scrutinise how it was meeting its statutory obligations.
4. At its publication, HMICS stated that:

"... there has been genuine progress at the Scottish Police Authority (SPA) over the past 18-24 months. However it also found that, six years after it was established, challenges still remain for the SPA in terms of fulfilling its core statutory role. Differing interpretations of the Act, associated roles and responsibilities, and its implementation have continued to cause confusion and uncertainty as to the SPA's governance role as defined in the Police and Fire Reform (Scotland) 2012 Act. The negative consequences of each differing interpretation have been primarily on public confidence, the wider reputation of policing and on some of its staff."
5. Today's meeting is an opportunity for the Justice Committee to take evidence from Gill Imery QPM, HM Chief Inspector of Constabulary in Scotland, on the contents of the Thematic Report and any follow-on actions.
6. This evidence follows-on from the Justice Committee's [post-legislative scrutiny](#) of the Police and Fire Reform (Scotland) Act 2012 and continuing scrutiny of issues around governance and reform of the system of police complaints currently being [reviewed](#) by Dame Elish Angiolini. The Committee held an [evidence session](#) with Dame Elish Angiolini on 24 June 2019, on her interim report.
7. HMICS provided a [written response](#) on 10 May to the Committee's post-legislative scrutiny report. The Scottish Government also [responded](#) to the Committee's report on 23 May 2019 and, similarly, Police Scotland [responded](#) on 13 June. The SPA provided a formal [written response](#) to the Committee's report on 26 November.

8. The SPA has also now responded formally to HMICS following its Board meeting of 27 November, publishing a [letter](#) from its Interim Chief Executive to Gill Imery QPM.

**Justice Committee Clerks  
November 2019**

## ANNEX – SUMMARY OF HMICS’S KEY FINDINGS AND RECOMMENDATIONS

### *Capacity to deliver*

- There have been significant efforts to redesign and develop the approaches to recruitment of chief officers and new Board members by the Scottish Police Authority resulting in a number of successful recruitment exercises.
- The current SPA Chair and Board members bring a wealth of experience and skills from a range of professional backgrounds that can usefully be brought to bear on the governance of policing.
- Issues of constrained capacity and capability within the SPA corporate function have been raised consistently over the years, but despite numerous past recommendations to tackle structural issues, there has been limited progress. This lack of pace has had a profound effect on a number of staff in terms of morale and wellbeing, compounded by recent public assertions in the Chair’s reports to the Board.

### *Governance*

- SPA has made a number of changes and improvements over the last 18 - 24 months to improve the overall system of governance, including a revised Committee structure, a new Governance Framework, Standing Orders and Scheme of Delegation. However many aspects are under-developed and much work is still required.
- The implementation of the role of Chair and its associated responsibilities, remains subject to interpretation. This is reflected in the differing approaches taken by each of the three Chairs, each of whom has rooted their interpretation in the legislation and developed both their leadership approach and the governance framework to suit that interpretation.
- The Chair and a number of Board members are acting well outwith their core non-executive role, contrary to agreed job descriptions and guidelines set out in On Board guidance.
- A number of reserved matters relating to policing remain controlled by central government resulting in anomalous relationships, accountability and lack of clear locus for the SPA.
- Some local authorities remain concerned that national policy decisions, and their impact locally, are not the subject of effective engagement and consultation and that there is a disconnect between local scrutiny and the SPA Board.
- The SPA has improved its visibility and engagement with local authorities and has recognised the need to improve its overall approach, but has no current communications and engagement strategy or plan, setting out its wider programme of engagement activity with clear aims, objectives and outcomes.
- There is a lack of clarity as to the continuing role and remit of the Justice Sub-Committee on Policing which some consider to be duplicating, or compensating for, the role of the SPA in scrutiny, and often focusing on operational matters.

*Maintenance of the police*

- Recent SPA financial reporting shows a definite improvement in the quality of information being produced, but concerns remain about the ability to balance its budget and meet longer term strategic objectives.
- Strategic workforce planning, an essential component of effective resource management, is under-developed.
- Effective engagement with staff associations and unions in the system of governance is very limited with little opportunity for engagement directly with the SPA Board to inform decision-making.
- There is a continuing lack of maturity in the current approach to the governance of change and transformation with effective scrutiny still not taking place over two years since the launch of the 'Serving a Changing Scotland' strategy and 18 months since the transformation programme was first considered by the Board.
- Given the financial challenges facing policing, there are limitations on the ability of the SPA to effectively discharge its maintenance function. However the SPA has been aware of the extent of these challenges for some considerable time and has failed to advocate this position effectively on the national stage.

*Promoting the policing principles*

- There is no clear vision, strategy or plan in place for the SPA resulting in a lack of wider understanding of the intended outcomes and steps which require to be taken to achieve the Board's vision.

*Promoting and supporting continuous improvement*

- Improvement is being driven in a number of settings by the SPA, but interpretation of this function was varied and capacity for continuous improvement was limited in both the SPA and Police Scotland. There is no system-wide approach to organisational learning and a lack of focus on key areas of strategic risk.

*Keep under review and hold to account*

- There is a wide variance in expectation regarding the role of the SPA, a perception pervades of a passive approach from the SPA and a lack of rigour or effectiveness in holding the Chief Constable to account.
- A lack of effective impact assessment of some operational policing policy decisions has given rise to a number of reputational issues.
- The lack of effective policing performance reporting has to date been a major obstacle to effective SPA scrutiny, supporting continuous improvement and holding to account.

*Providing services*

- There is a fundamental conflict of interest in the SPA being both a service provider to and scrutiny body of Police Scotland and limited attention has been given to previous recommendations to review delivery options for both Forensic Services and the Independent Custody Visiting Scheme.

**Recommendations**

*Recommendation 1*

The Scottish Police Authority Chief Executive should lead and expedite the implementation of a new Scottish Police Authority corporate structure and ensure an appropriate focus on existing staff wellbeing.

*Recommendation 2*

The Scottish Government should clarify in what respects the Scottish Police Authority differs from other public bodies and specify the implications for the system of governance for policing.

*Recommendation 3*

The Scottish Government and the Scottish Police Authority should undertake an immediate review of the roles of the Chair and Board members in executive work, in line with principles of good governance, empowering the Scottish Police Authority executive team to assume operational management of the organisation.

*Recommendation 4*

The Scottish Government, the Scottish Police Authority and Police Scotland should develop a clear system of engagement and governance for reserved policing matters.

*Recommendation 5*

The Scottish Police Authority should proceed to formally co-opt COSLA to their Board and appropriate Sub-Committees in order to enhance the link between local and national policing.

*Recommendation 6*

The Scottish Government, the Scottish Police Authority and Police Scotland should review the designation of Accountable Officer(s) within policing.

*Recommendation 7*

The Scottish Police Authority should implement effective engagement and feedback mechanisms with staff associations and unions as part of a wider stakeholder engagement and consultation approach.

*Recommendation 8*

The Scottish Police Authority executive team should develop proposals for effective governance of change and transformation, bringing forward proposals as a matter of urgency.

*Recommendation 9*

The Scottish Police Authority executive team should develop and secure approval from the Board for a new corporate plan.

*Recommendation 10*

The Scottish Police Authority should further develop its self-assessment and performance monitoring approach to include examples and measures of the Scottish Police Authority's own impact on continuous improvement.

*Recommendation 11*

The Scottish Police Authority requires to set out in detail how it will exercise its duty to hold the Chief Constable to account through its system of governance.

*Recommendation 12*

The Scottish Police Authority and Police Scotland should develop a forward planning system of proactive risk awareness and post-implementation scrutiny for policing policy changes which are likely to have an impact on public confidence.

*Recommendation 13*

The Scottish Police Authority should review the role of the Forensics Committee to work effectively with other Scottish Police Authority Committees and review the optimum governance and delivery options for Forensic Services.

*Recommendation 14*

The Scottish Police Authority should improve visibility of the work of the Independent Custody Visiting Scheme, direct scrutiny of custody arrangements and outcomes for detainees. It should also review the optimum governance and delivery options for the Independent Custody Visiting Scheme.

**Justice Committee**

**30th Meeting, 2018 (Session 5), Tuesday 3 December 2019**

**Subordinate legislation**

**Note by the clerk**

**Purpose**

1. This paper invites the Committee to consider the following negative instruments:
  - [Firefighters' Pension Scheme \(Scotland\) Amendment Regulations 2019 \(SSI 2019/357\)](#) [*see page 4*];
  - [Firefighters' Pension Schemes \(Scotland\) Amendment Order 2019 \(SSI 2019/358\)](#) [*see page 5*];
  - [Police Pensions Amendment \(Increased Pension Entitlement\) \(Scotland\) Regulations 2019 \(SSI 2019/380\)](#) [*see page 6*];
  - [Firefighters' Pension Scheme Amendment \(Increased Pension Entitlement\) \(Scotland\) Order 2019 \(SSI 2019/381\)](#) [*see page 8*];
  - [Firefighters' Pension and Compensation Schemes \(Amendment\) \(Scotland\) Order 2019 \(SSI 2019/382\)](#) [*see page 10*].
2. If the Committee agrees to report to the Parliament on any of the instruments it is required to do so by 9 December 2019 on SSI 2019/357 and SSI 2019/358 and 13 January 2020 on SSI 2019/380, SSI 2019/381 and SSI 2019/382.

**Delegated Powers and Law Reform Committee Consideration**

3. The Delegated Powers and Law Reform Committee considered instruments SSI 2019/357 and SSI 2019/358 at its meeting on 12 November 2019 and agreed that it did not need to draw them to the attention of the Parliament on any grounds within its remit.
4. Instruments SSI 2019/380, SSI 2019/381 and SSI 2019/382 were considered at its meeting on 26 November 2019. The Delegated Powers and Law Reform Committee agreed to draw these instruments to the attention of the lead Committee on the following grounds:
  - [Police Pensions Amendment \(Increased Pension Entitlement\) \(Scotland\) Regulations 2019 \(SSI 2019/380\)](#) under reporting ground (h) (meaning could be clearer)
  - [Firefighters' Pension Scheme Amendment \(Increased Pension Entitlement\) \(Scotland\) Order 2019 \(SSI 2019/381\)](#) under reporting ground (h) (meaning could be clearer)

- Firefighters' Pension and Compensation Schemes (Amendment) (Scotland) Order 2019 (SSI 2019/382) under the general reporting ground (i) (drafting appears to be defective)
5. The relevant extract from the [Delegated Powers and Law Reform Committee's report](#) is attached in Annexe A.

### **Procedure for negative instruments**

6. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
7. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
8. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
9. Each negative instrument appears on the Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
10. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

### **Guidance on subordinate legislation**

11. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:  
<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>

### **Recommendation**

12. **The Committee is invited to consider the instruments.**

## **The Firefighters' Pension Scheme (Scotland) Amendment Regulations 2019**

### **SSI 2019/357**

The above instrument was made in exercise of the powers conferred by section 1(1) and (2)(f) of, and paragraph 6(c) of Schedule 2 to, the Public Service Pensions Act 2013. The instrument is subject to negative procedure.

#### **Purpose of the instrument**

These regulations make an amendment to the Firefighters Pension Scheme (Scotland) 2015 to allow protected members of the 1992 to retain protection when they transfer from England, Wales or Northern Ireland.

#### **Policy Objectives**

Under the Firefighters' Pension Scheme (Scotland) Regulations 2015, protected members of the 1992 scheme transferring to Scotland from England, Wales and Northern Ireland are not permitted to remain as 1992 scheme members. Regulation 3 clarifies that such members are not included in the general prohibition on new joiners to the 1992 Scheme, maintaining the position that existed prior to 1 April 2015.

#### **Consultation**

To comply with the requirements of section 21 of the 2013 Act, a consultation was undertaken from 6 August to 29 October 2018. All stakeholders were consulted, including the Fire Brigades Union, Fire Officers Association and relevant Scottish and UK Government Departments. No responses were received. A copy of the consultation document is available on the Scottish Public Pension Agency's website [www.pensions.gov.scot](http://www.pensions.gov.scot)

#### **Impact Assessments**

This policy does not impose any additional costs or reduce existing costs for business, third or public sector organisations and on that basis no Business and Regulatory Impact

Assessment is required for these Regulations.

Scottish Public Pensions Agency  
An Agency of the Scottish Government  
29 October 2019

## **The Firefighters' Pension Scheme (Scotland) Amendment Order 2019**

### **SSI 2019/358**

The above instrument was made in exercise of the powers conferred by section 26(5) of the Fire Services Act 1947(a), section 34(2)(e) and (m) and (4) of the Fire and Rescue Services Act 2004, sections 12 and 16 of the Superannuation Act 1972 and all other powers enabling them to do so. The instrument is subject to negative procedure.

#### **Purpose of the instrument**

The purpose of this instrument is to make amendments to the 1992 and 2006 Firefighters Pension Schemes in respect of firefighters in Scotland.

#### **Policy Objectives**

This order amends The Firefighters' Pension Scheme Order 1992 and schedule 1 of the Firefighters' Pension Scheme (Scotland) Order 2007. The Order makes amendments to both of the Schemes.

1992 and 2006 Scheme members are permitted to 'split' their pension in certain cases where they have a reduction in salary. Articles 3 and 6(3)(a) clarify that, where a firefighter has an entitlement to two pensions following such a split, the amount of the first pension is up-rated annually from the date that the firefighter ceased to earn the higher rate of pay.

Divorcing partners of scheme members may be granted pension credit may be granted pension credit, which they may subsequently be permitted to commute for a lump sum. Articles 4 and 6(5) update an out of date statutory reference in the 1992 and 2006 Orders to such commutation of pension credit.

Article 6 removes the requirement for a deceased member to have completed a nomination form before a survivor's pension can be paid

#### **Consultation**

A formal consultation was undertaken from 6 August to 29 October 2018. The consultation was issued to representatives of firefighters and employers and relevant Scottish and UK Government departments

#### **Impact Assessments**

This policy does not impose any additional costs or reduce existing costs for business, third or public sector organisations and on that basis no Business and Regulatory Impact Assessment is required for these Regulations.

Scottish Public Pensions Agency  
An Agency of the Scottish Government

**The Police Pensions Amendment (Increased Pension Entitlement) (Scotland)  
Regulations 2019**

**SSI 2019/380**

The above instrument was made in exercise of the powers conferred by section 1 of the Police Pensions Act 1976. Functions under that Act as regards Scotland have been executively devolved to the Scottish Ministers. The instrument is subject to negative procedure.

**Purpose of the instrument**

The purpose of this instrument is to ensure continuity of an affected member's pension at its current rate where incorrect GMP data has applied to the annual indexation of that pension. The incorrect element of the award is converted to an award of Increased Pension Entitlement.

**Policy Objectives**

Contracted out employment was abolished from April 2016 with the introduction of the new single tier State Pension. A Guaranteed Minimum Pension (GMP) accrued for contracted out service between April 1978 and April 1997. It reflects the level of earnings related state pension a member would have received had they not been contracted out. With the ending of contracting out public service schemes are undertaking a reconciliation of their GMP data with HMRC.

For those scheme members who reached state pension age before April 2016 and had claimed their state pension the annual indexation of their GMP is shared between the scheme and the Department for Work and Pensions (DWP). Annual indexation for a GMP accrued between April 1978 and April 1988 is fully paid by DWP. Payment of the annual indexation of a GMP accrued between April 1988 and April 1997 is shared between the scheme and DWP with the scheme paying the annual increase up to the value of 3% with any remainder paid by DWP.

In cases where either no GMP details are held or the GMP data is incorrect, the result can be indexation has been applied incorrectly leading to an overpayment which is compounded year on year by further incorrect indexation being applied. The GMP reconciliation exercise will establish correct GMP data allowing any identified incorrect pensions to be corrected.

The indexation of GMP's for those reaching state pension age after April 2016 is fully paid by the scheme so similar errors will not arise going forward from that date.

A similar exercise was undertaken in 2008/9 which identified GMP related overpayments across the public service schemes. At that time Scottish Ministers chose to allow the pension in payment to remain unadjusted going forward for affected pensioners in the Police, Firefighter and Local Government Pension Schemes. This was achieved by introducing legislation that provided for a new scheme award known as an Increased Pension Entitlement (IPE) which reflected the GMP-related overpayment.

Scottish Ministers have decided that a similar approach should be taken for GMP-related overpayments that arise from the current reconciliation exercise. This means that affected pensioners in the Police, Firefighters' and Local Government schemes will see their existing level of pension maintained by the award of an IPE.

The regulations make amendments to the existing provisions which introduced an IPE in 2009. There are no changes to the approach taken in 2009 and the aim of the amendments is to:

- i) Calculate the value of the IPE which is based on the annual GMP related overpayment for 2019/20.
- ii) Apply the IPE from 8 April 2019 and reflect the requirements of the Pensions (Increase) Act 1971 in calculating the final level of IPE applicable.
- iii) The regulations provide for payments made before 8 April 2019 to be authorised but any overpayments accrued prior to 8 April 2019 will be for the scheme's Accountable Officer to determine.
- iv) The net outcome aims to allow the affected member's pension to continue at its current rate.

### **Consultation**

A formal consultation was undertaken from 12 July to 11 October 2018. The consultation was issued to representatives of police officers, employers and relevant Scottish and UK Government departments.

### **Impact Assessments**

This policy does not impose any additional costs or reduce existing costs for business, third or public sector organisations and on that basis no Business and Regulatory Impact Assessment is required for these Regulations.

### **Financial Effects**

The final costs of introducing the IPE will be finalised once the GMP reconciliation has concluded. Costs will be reflected in scheme valuations which set the employer contribution rate paid to the scheme. The introduction on the IPE will not have a material impact on the costs of the scheme or the employer contribution rate.

Scottish Public Pensions Agency  
An Agency of the Scottish Government  
7 November 2019

**Firefighters' Pension Scheme Amendment (Increased Pension Entitlement)  
(Scotland) Order 2019**

**SSI 2019/381**

The above instrument was made in exercise of the powers conferred by section 26(1) to (5) of the Fire Services Act 1947(a), sections 12 and 16 of the Superannuation Act 1972(b). The instrument is subject to negative procedure.

**Purpose of the instrument**

The purpose of this instrument is to ensure continuity of an affected member's pension at its current rate where incorrect GMP data has applied to the annual indexation of that pension. The incorrect element of the award is converted to an award of Increased Pension Entitlement.

**Policy Objectives**

Contracted out employment was abolished from April 2016 with the introduction of the new single tier State Pension. A Guaranteed Minimum Pension (GMP) accrued for contracted out service between April 1978 and April 1997. It reflects the level of earnings related state pension a member would have received had they not been contracted out. With the ending of contracting out public service schemes are undertaking a reconciliation of their GMP data with HMRC.

For those scheme members who reached state pension age before April 2016 and had claimed their state pension the annual indexation of their GMP is shared between the scheme and the Department for Work and Pensions (DWP). Annual indexation for a GMP accrued between April 1978 and April 1988 is fully paid by DWP. Payment of the annual indexation of a GMP accrued between April 1988 and April 1997 is shared between the scheme and DWP with the scheme paying the annual increase up to the value of 3% with any remainder paid by DWP.

In cases where either no GMP details are held or the GMP data is incorrect, the result can be indexation has been applied incorrectly leading to an overpayment which is compounded year on year by further incorrect indexation being applied. The GMP reconciliation exercise will establish correct GMP data allowing any identified incorrect pensions to be corrected.

The indexation of GMPs for those reaching state pension age after April 2016 is fully paid by the scheme so similar errors will not arise going forward from that date.

A similar exercise was undertaken in 2008/9 which identified GMP related overpayments across the public service schemes. At that time Scottish Ministers chose to allow the pension in payment to remain unadjusted going forward for affected pensioners in the Police, Firefighter and Local Government Pension Schemes. This was achieved by introducing legislation that provided for a new scheme award known as an Increased Pension Entitlement (IPE) which reflected the GMP-related overpayment.

Scottish Ministers have decided that a similar approach should be taken for GMP-related overpayments that arise from the current reconciliation exercise. This means that affected pensioners in the Police, Firefighters' and Local Government schemes will see their existing level of pension maintained by the award of an IPE.

The regulations make amendments to the existing provisions which introduced an IPE in 2009. There are no changes to the approach taken in 2009 and the aim of the amendments is to:

- i) Calculate the value of the IPE which is based on the annual GMP related overpayment for 2019/20.
- ii) Apply the IPE from 8 April 2019 and reflect the requirements of the Pensions (Increase) Act 1971 in calculating the final level of IPE applicable.
- iii) The regulations provide for payments made before 8 April 2019 to be authorised but any overpayments accrued prior to 8 April 2019 will be for the scheme's Accountable Officer to determine.
- iv) The net outcome aims to allow the affected member's pension to continue at its current rate.

### **Consultation**

A formal consultation was undertaken from 12 July to 11 October 2018. The consultation was issued to representatives of firefighters, employers and relevant Scottish and UK Government departments.

### **Impact Assessments**

This policy does not impose any additional costs or reduce existing costs for business, third or public sector organisations and on that basis no Business and Regulatory Impact Assessment is required for these Regulations.

### **Financial Effect**

The final costs of introducing the IPE will be finalised once the GMP reconciliation has concluded. Costs will be reflected in scheme valuations which set the employer contribution rate paid to the scheme. The introduction on the IPE will not have a material impact on the costs of the scheme or the employer contribution rate.

Scottish Public Pensions Agency  
An Agency of the Scottish Government  
7 November 2019

## **The Firefighters' Pension and Compensation Schemes (Amendment) (Scotland) Order 2019**

### **SSI 2019/382**

The above instrument was made in exercise of the powers conferred by section 26(1) to (5) of the Fire Services Act 1947(1), section 12 of the Superannuation Act 1972(2), section 34(1) to (5) and (8) and 60(2) of the Fire and Rescue Services Act 2004(3). The instrument is subject to negative procedure.

The purpose of this instrument is to:

- a) in calculating entitlement to survivors of civil partnerships and same sex marriages align the member's service used with benefits paid female survivors of opposite sex marriages.
- b) ensure that a firefighter is not disadvantaged by the provision which allows for two pensions to be calculated and awarded separately to reflect a reduction in pay during the firefighters pensionable employment.
- c) allow the Scottish Fire and Rescue Service discretion to allow and pay for the difference in a lump sum based on two and a quarter times the members pension where the scheme provides for a lower restricted lump sum.

### **Policy Objectives**

The changes to survivor benefits are to reflect the Supreme Court's ruling on 12 July 2017 in the Walker v Innospec case ([2017] UKSC 47) that the company's position had been incompatible with EU Directive 2000/78/EC on discrimination in the workplace. It was concluded that Mr Walker's male spouse should be entitled to a pension calculated on the basis of all the years of his service with Innospec, provided that at the time of Mr Walker's death they remained married. The amendments are fully retrospective and remove the current restriction on using only service from April 1988 for benefits paid to survivors of civil partnerships and same sex marriages.

Only the 1992 Order is being amended for this amendment because this is the only scheme that limits the service to be taken into account when calculating the survivor benefit for same-sex civil partners or spouses. The Compensation Order is being amended for the same reason.

Entitlement to two pensions in the Firefighters' Pension Scheme relates to circumstances where a scheme member received a higher level of salary earlier in their career and then changed role, resulting in a salary reduction. In certain circumstances this results in an entitlement to two separate pensions in the Firefighters' Pension Scheme 1992. The amendment to rule B5A clarifies that two pensions should only be awarded in cases where the member's resulting overall level of benefit would be higher than if a single pension were to be awarded.<sup>1</sup>

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(1) 1947 c.41. Section 26 was repealed by sections 52 and 54 and schedule 2 of the Fire and Rescue Services Act 2004 (c.21). Subsections (1) to (5) of section 26 continue to have effect for the purposes of the

The order makes provision for the limit on the amount of pension that may be commuted for a lump sum to be increased up to a quarter of the pension at the discretion of the authority. Any additional costs will be met by the authority.

### **Consultation**

A formal consultation was undertaken from 26 August to 30 September 2019. The consultation was issued to representatives of firefighters and employers and relevant Scottish and UK Government departments.

### **Impact Assessments**

This policy does not impose any additional costs or reduce existing costs for business, third or public sector organisations and on that basis no Business and Regulatory Impact Assessment is required for these Regulations.

### **Financial Effects**

The changes provided by this instrument will not have a material impact on the costs of the scheme.

Scottish Public Pensions Agency  
An Agency of the Scottish Government  
29 October 2019

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Firefighters' Pension Scheme, in relation to Scotland by virtue of S.I. 2004/2306. The name of the scheme was changed to the Firefighters' Pension Scheme by S.I. 2004/2306. Section 26 was amended by section 42 of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 (c.65), section 29 and Schedule 8 of the Superannuation Act 1972 (c.11), section 1 of the Police and Firemen's Pensions Act 1997 (c.52), section 256 of, and Schedule 25 to, the Civil Partnership Act 2004 (c.33), and S.I. 1976/551. The Secretary of State's functions under section 26, in so far as they were exercisable in relation to Scotland, were devolved to Scottish Ministers by S.I. 1999/1750 and S.I. 2006/304.

(2) 1972 c.11. Section 16 applies section 12 with the necessary modifications to orders under section 26 of the Fire Services Act 1947. Section 16 is repealed by section 52 and schedule 2 of the Fire and Rescue Services Act 2004, but continues to have certain effect by virtue of S.I. 2004/2306.

(3) 2004 c.21. The functions of the Secretary of State in respect of section 34(1) to (5) and (8) and 60(2) as regards Scotland were transferred to the Scottish Ministers by virtue of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2005 S.I. 2005/849.

**Extract from Delegated Powers and Law Reform Committee 61st Report, 2019**

**Instruments Drawn to the Attention of the Lead Committee**

**Police Pensions Amendment (Increased Pension Entitlement) (Scotland) Regulations 2019 (SSI 2019/380)**

Purpose

5. This instrument amends the Police Pensions Regulations 1987 to make provision to ensure continuity of an affected member's police pension at its current rate where incorrect Guaranteed Minimum Pension data has applied to the annual indexation of that pension. The incorrect element of the award is converted to an award of Increased Pension Entitlement.

Committee Consideration

6. Regulation 3(b) inserts a definition of "reconciliation exercise" into regulation N1 (interpretation) of the 1987 Regulations. Reference is made in that definition to "HMRC" and "SPPA" without defining what these acronyms mean.

7. The Scottish Government accepts that this is an oversight but does not propose any corrective action on the basis that, considered in the context of the 1987 Regulations, it will be well understood to the reader that "HMRC" is a reference to "Her Majesty's Revenue and Customs" and "SPPA" is a reference to "Scottish Public Pensions Agency".

8. However, this is not in line with the Scottish Government's SSI drafting guidance which states that acronyms "nearly always need the support of a definition". The terms "HMRC" and "SPPA" are also undefined in the 1987 Regulations that are being amended and the parent statutes.

9. The Committee therefore reports this instrument to the Justice Committee under reporting ground (h) as the meaning of the terms "HMRC" and "SPPA" could be clearer.

10. The Committee calls on the Scottish Government to amend the 1987 Regulations to clarify this matter at the next available opportunity.

**Firefighters' Pension Scheme Amendment (Increased Pension Entitlement) (Scotland) Order 2019 (SSI 2019/381)**

Purpose

11. This instrument amends the Fireman's Pension Scheme Order 1992 to make provision to ensure continuity of an affected firefighter's pension at its current rate where incorrect Guaranteed Minimum Pension data has applied to the annual

indexation of that pension. The incorrect element of the award is converted to an award of Increased Pension Entitlement.

#### Committee Consideration

12. Similarly to the above instrument, paragraph 1(b) of the schedule inserts a definition of "reconciliation exercise" into rule P1 (interpretation) in schedule 2 of the Firemen's Pension Scheme Order 1992. Reference is made in that definition to "HMRC" and "SPPA" without defining what these acronyms mean.

13. For the reasons given above, the Scottish Government acknowledges the error but proposes no corrective action.

14. As noted in relation to the above instrument, the Scottish Government's SSI drafting guidance states that acronyms "nearly always need the support of a definition". The terms "HMRC" and "SPPA" are also undefined in the 1992 Order that is being amended and the parent statutes.

15. The Committee reports this instrument to the Justice Committee under reporting ground (h) as the meaning of the terms "HMRC" and "SPPA" could be clearer.

16. The Committee calls on the Scottish Government to amend the 1992 Order to clarify this matter at the next available opportunity.

#### **Firefighters' Pension and Compensation Schemes (Amendment) (Scotland) Order 2019 (SSI 2019/382)**

##### Purpose

17. The instrument amends the Firemen's Pension Scheme Order 1992 and the Firefighter's Compensation Scheme (Scotland) Order 2006. The purposes of these amendments are as follows:

1. They remove the current restriction in relation to firefighters' pensions on using only service from April 1988 for benefits paid to survivors of civil partnerships and same sex marriages. This aligns the position with the benefits payable to survivors of opposite-sex marriages in line with a Supreme Court decision in 2017.
2. They ensure that a firefighter is not disadvantaged by provision which allows for two pensions to be calculated and awarded separately where a scheme member received a higher level of salary earlier in their career and then changed role, resulting in a salary reduction.
3. They enable the Scottish Fire and Rescue Service to pay a lump sum in excess of two and a quarter times the full amount of the pension.

Committee Consideration

18. There is an error relating to the consistency of the retrospective provision made in article 1(3). Article 1(3)(b) provides that article 2 has effect from 5 December 2005 insofar as necessary to give effect to articles 5, 6 and 8, which are also given retrospective effect from that date.

19. For consistency, article 2 should have retrospective effect from 1 April 2007 insofar as necessary to give effect to article 3, which has effect from that date. Article 2 should also have retrospective effect from 16 December 2014 insofar as necessary to give effect to article 7, which has effect from that date. Furthermore, article 9 should have retrospective effect from 5 December 2005 insofar as necessary to give effect to articles 10 to 12, which have effect from that date.

20. The Committee reports this instrument to the Justice Committee under the general reporting ground and calls on the Scottish Government to lay an amending instrument to rectify these errors.