



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

#### 16th Meeting, 2014 (Session 4)

**Tuesday 20 May 2014**

The Committee will meet at 9.15 am in the Sir Alexander Fleming Room (CR3).

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

Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulations 2014 (SSI 2014/95);

Firemen's Pension Scheme (Amendment No. 2) (Scotland) Order 2014 (SSI 2014/108);

Firefighters' Compensation Scheme (Scotland) Amendment Order 2014 (SSI 2014/109);

Firefighters' Pension Scheme (Scotland) Amendment (No. 2) Order 2014 (SSI 2014/110).

2. **Subordinate legislation:** The Committee will consider the following instrument which is not subject to any parliamentary procedure—

Act of Sederunt (Fitness for Judicial Office Tribunal Rules) 2014 (SSI 2014/99).

3. **Annual report:** The Committee will consider a draft annual report for the Parliamentary year from 11 May 2013 to 10 May 2014.

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The papers for this meeting are as follows—

**Agenda item 1**

Paper by the clerk

J/S4/14/16/1

[Right to Interpretation and Translation in Criminal Proceedings \(Scotland\) Regulations 2014 \(SSI 2014/95\)](#)

[Firemen's Pension Scheme \(Amendment No. 2\) \(Scotland\) Order 2014 \(SSI 2014/108\)](#)

[Firefighters' Compensation Scheme \(Scotland\) Amendment Order 2014 \(SSI 2014/109\)](#)

[Firefighters' Pension Scheme \(Scotland\) Amendment \(No. 2\) Order 2014 \(SSI 2014/110\)](#)

**Agenda item 2**

Paper by the clerk

J/S4/14/16/2

[Act of Sederunt \(Fitness for Judicial Office Tribunal Rules\) 2014 \(SSI 2014/99\)](#)

**Agenda item 3**

Private paper

J/S4/14/16/3 (P)

**Justice Committee**

**16<sup>th</sup> Meeting, 2013 (Session 4), Tuesday 20 May 2014**

**Subordinate legislation**

**Note by the clerk**

**Purpose**

1. This paper invites the Committee to consider the following negative instruments:
  - Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulations 2014 (SSI 2014/95);
  - Firemen's Pension Scheme (Amendment No. 2) (Scotland) Order 2014 (SSI 2014/108);
  - Firefighters' Compensation Scheme (Scotland) Amendment Order 2014 (SSI 2014/109);
  - Firefighters' Pension Scheme (Scotland) Amendment (No. 2) Order 2014 (SSI 2014/110).
2. Further details on the procedure for negative instruments are set out in Annexe A attached to this paper.

**Right to Interpretation and Translation in Criminal Proceedings (Scotland)  
Regulations 2014 (SSI 2014/95)**

**Introduction**

3. The purpose of the instrument is to give suspected or accused persons who require it the statutory right to interpretation in police custody and during police questioning, and also in criminal proceedings before a court.
4. The instrument comes into force on 19 May 2014.
5. Further details on the purpose of the instrument can be found in the policy note (see below). An electronic copy of the instrument is available at:  
<http://www.legislation.gov.uk/ssi/2014/95/contents/made>

**Consultation**

6. The policy note on the instrument confirms that the Regulations have been considered by a Working Group on Interpretation and Translation, consisting of representatives of the Crown Office and Procurator Fiscal Service, the Law Society of Scotland, Police Scotland, the Scottish Legal Aid Board, the Scottish Court Service, the Scottish Association of Sign Language Interpreters, and Skills for Justice. These represent those who provide interpretation and translation, those who will be required

to ensure that persons who are suspected or accused receive them, and those who represent such persons.

### **Delegated Powers and Law Reform Committee consideration**

7. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 22 April 2014 and agreed that it did not need to draw the attention of the Parliament to the instrument on any grounds within its remit.

### **Justice Committee consideration**

8. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 26 May 2014.

### **Policy Note:**

#### **Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulations 2014 (SSI 2014/95)**

The above instrument was made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972. The instrument is subject to the negative procedure.

### **Policy Objectives**

The provision of interpretation and translation in criminal proceedings, for persons who would otherwise be unfairly disadvantaged because they do not understand or speak English, has long been considered essential in Scotland. This position has been reinforced by the Human Rights Act 1998<sup>1</sup>, which incorporates into Scots law the European Convention on Human Rights, including its requirements that trials be fair.

On 20 October 2010 the European Parliament and Council adopted the Directive on the right to interpretation and translation in criminal proceedings<sup>2</sup>. This provides that Member States shall ensure that suspected or accused persons who do not speak or understand the language of criminal proceedings, or who have hearing or speech impediments, are provided with interpretation and a written translation of essential documents.

Accordingly, the Regulations are intended to transpose the Directive's requirements in so far as it is within the Scottish Parliament's legislative competence to do so (which excludes the requirements relating to European arrest warrants). While the Regulations come into force after the transposition deadline of 27 October 2013 they will essentially put on a statutory footing the administrative arrangements that have been in place since long before that date and which largely give effect to the Directive's requirements.

The policy intent embodied in the Regulations has been to give suspected or accused persons who require it the statutory right to interpretation in police custody and during police questioning, and also in criminal proceedings before a court. The Regulations make clear that the purpose of this is to safeguard the fairness of the proceedings in accordance with the Directive. The Directive requires interpretation to be provided

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<sup>1</sup> 1998 c. 42

<sup>2</sup> Directive 2010/64/EU (OJ L 280, 26.10.2010, p.1).

during police questioning and all court hearings, and also – where necessary to ensure fairness – for communication between a suspected or accused person and his or her legal representative in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications (Article 2(1) and (2)). Regarding the latter, where interpretation is provided in criminal proceedings, it is expected that this will cover any such communication concerning appeals or procedural applications as occur in court (for example, for the purpose of lodging a bail appeal or applying for leave to appeal the court's decision on a preliminary matter). However, it is for the solicitor to provide for private consultations outwith the court, and legal aid is available for qualifying persons.

Similarly, suspected or accused persons who require it have been given the right to translation of essential documents. The Directive does not affect national law concerning the right of access of a suspected or accused person to documents in criminal proceedings (Article 1(4)). Therefore translation is offered of those categories of documents listed as essential in Article 3(2) which are provided under any legislation (whether currently or in the future) to a person who is in police custody or the subject of criminal proceedings before a court. Should fairness require that other documents not comprehended by this definition be translated, the court has the power to order this. An oral translation may be provided instead of a written one unless fairness requires otherwise. The right to translation may be waived only if done unequivocally and in full awareness of the consequences: such a waiver is to be recorded.

The Directive requires that Member States are to meet the costs of interpretation and/or translation (Article 4): accordingly the Regulations provide, at regulation 16, that this assistance is to be provided free of charge.

Mechanisms are provided so that suspected or accused persons can seek a review of any determination that they do not require interpretation or translation of essential documents, or complain about the quality of interpretation or translation offered to them. The intention is to give persons who enjoy the right to interpretation and translation access to rapid means of giving effect to that right, so that interpretations and/or translations of acceptable quality are made available quickly where these are needed. The review provisions in relation to court proceedings do not, however, replace any current right of appeal open to accused persons requiring interpretation and/or translation.

A record is to be kept of certain information concerning the use of interpretation and translation in police custody, during police questioning and in criminal proceedings before a court.

Other provisions of the Directive, which do not directly involve giving effect to suspected or accused persons' rights to interpretation and translation, are to be transposed by administrative arrangements. In relation to Article 5, regarding the quality of interpretation and translation, there is a Scottish Government framework agreement which addresses the standard of interpretation and translation services to be provided as well as obligations of confidentiality. There is a Diploma in Public Service Interpreting (Scottish legal option), and possession of this is one of the standard conditions of the framework agreement. Separately, the Scottish Legal Aid Board maintains a register of interpreters and translators which is available to solicitors. In relation to Article 6, regarding training on dealing with interpreters in criminal proceedings, it will be for those responsible for the training of the judiciary and

prosecutors to make the necessary training arrangements. Those responsible are aware of the requirements in the Directive.

## **Consultation**

The Regulations have been considered by a Working Group on Interpretation and Translation, consisting of representatives of the Crown Office & Procurator Fiscal Service, the Law Society of Scotland, Police Scotland, the Scottish Legal Aid Board, the Scottish Court Service, the Scottish Association of Sign Language Interpreters, and Skills for Justice. These represent between them those who provide interpretation and translation, those who will be required to ensure that persons who are suspected or accused receive them, and those who represent such persons.

## **Impact Assessment**

There are no equality impact issues: any equality impact can only be favourable, by securing rights to interpretation and translation.

## **Financial Effects**

A final Business and Regulatory Impact Assessment (BRIA) has been completed.

Scottish Government  
Justice Directorate  
March 2014

### **Firemen's Pension Scheme (Amendment No.2) (Scotland) Order 2014 (SSI 2014/108)**

### **Firefighters' Compensation Scheme (Scotland) Amendment Order 2014 (SSI 2014/109)**

### **Firefighters' Pension Scheme (Scotland) Amendment (No.2) Order 2014 (SSI 2014/110)**

## **Introduction**

9. The purpose of these instruments is to provide retained firefighters with equal treatment and comparable rights as whole-time firefighters following new employment legislation in 2000.

10. The instruments come into force on 23 May 2014.

11. Further details on the purpose of these instruments can be found in the policy note (see below). Electronic copies of the instruments are available at:

<http://www.legislation.gov.uk/ssi/2014/108/contents/made>

<http://www.legislation.gov.uk/ssi/2014/109/contents/made>

<http://www.legislation.gov.uk/ssi/2014/110/contents/made>

## Consultation

12. The policy note on the instruments confirms that a formal consultation with representatives of firefighters and employers and relevant Scottish and UK Government Departments was undertaken from 6 September to 18 October 2013.

## Delegated Powers and Law Reform Committee consideration

13. The Delegated Powers and Law Reform (DPLR) Committee considered these instruments at its meeting on 13 May 2014 and agreed that it did not need to draw the attention of the Parliament to the **Firemen's Pension Scheme (Amendment No.2) (Scotland) Order 2014 (SSI 2014/108)** on any grounds within its remit.

14. In relation to the **Firefighters' Compensation Scheme (Scotland) Amendment Order 2014 (SSI 2014/109)**, the DPLR Committee agreed to draw the Order to the attention of the Parliament as it contains a minor drafting error, namely that the word "his" was included in paragraph 11(c) of the Schedule in error. The word should have been omitted, as otherwise the Order is drafted in gender neutral terms.

15. In relation to the **Firefighters' Pension Scheme (Scotland) Amendment (No.2) Order 2014 (SSI 2014/110)**, the DPLR Committee agreed to draw the Order to the attention of the Parliament as paragraph 1(a)(iv) of the schedule is defectively drafted and there are also other minor drafting errors. In responding to these issues, the Scottish Government accepted the points raised by the DPLR Committee and has agreed to lay an amending instrument which will correct the errors identified with the present instrument prior to its commencement on 23 May 2014.

16. The relevant extracts from the DPLR Committee's report on the instruments are reproduced on page 7 of this paper.

## Justice Committee consideration

17. If the Committee agrees to report to the Parliament on these instruments, it is required to do so by 2 June 2014.

### Policy Note:

**Firemen's Pension Scheme (Amendment No.2) (Scotland) Order 2014 (SSI 2014/108); Firefighters' Compensation Scheme (Scotland) Amendment Order 2014 (SSI 2014/109); Firefighters' Pension Scheme (Scotland) Amendment (No.2) Order 2014 (SSI 2014/110).**

The above instruments were made in exercise of the powers conferred by the preserved section 26 (1) to (5) of the Fire Services Act 1947 and sections 34 and 60 of the Fire and Rescue Services Act 2004. Functions under these Acts as regards Scotland have been executively devolved to the Scottish Ministers. The instruments are subject to negative procedure.

## Policy Objectives

The Firemen's Pension Order 1992 (SI 1992/129) ("the 1992 Order") provides a pension scheme to Scottish firefighters recruited before 1 April 2006. The Firefighters' Compensation Scheme (Scotland) Order 2006 (SSI 2006/338) provides compensation benefits for all Scottish firefighters who suffer a work related injury.

Following new employment legislation in 2000, retained firefighters, supported by the Fire Brigades Union (FBU) and Retained Firefighters Union (RFU), submitted an ultimately successful employment tribunal claim seeking equal treatment with whole-time firefighters. The tribunal determined that the FBU and officials at the Department for Communities and Local Government (DCLG) should negotiate and deliver an outcome that provided the necessary comparable rights.

The main terms of the modified scheme are based on those provided under the 1992 Order.

Those individuals that would be eligible to purchase pension rights under the terms of the new pension arrangements are those individuals who were employed as retained firefighters between 1 July 2000 and 5 April 2006. An individual who was employed on retained duties and as a whole-time regular firefighter by the same employer is not eligible to benefit from these proposed pension arrangements. Membership will be open to all eligible persons – they do not need to have made an employment tribunal claim.

An exercise is being undertaken to identify all eligible members and to alert them to the new provisions.

### **Consultation**

A formal consultation was undertaken from 6 September to 18 October 2013. The consultation was issued to representatives of firefighters and employers and relevant Scottish and UK Government Departments.

### **Financial Effects**

The actual financial impact will not be known until after 31 March 2015 when take up of the offer to join the new terms will be known.

No Business and Regulatory Impact Assessment has been prepared because no impact on the private or voluntary sector is foreseen.

Scottish Public Pensions Agency  
An Agency of the Scottish Government  
April 2014



***Extracts from the Delegated Powers and Law Reform Committee 33<sup>rd</sup> Report  
2014***

**Firefighters' Compensation Scheme (Scotland) Amendment Order 2014  
(SSI 2014/109) (Justice Committee)**

1. The Order makes a series of technical amendments to Schedule 1 to the Firefighters' Compensation Scheme (Scotland) Order 2006, which sets out the compensation scheme for firefighters and their dependants in Scotland.
2. The amendments made to rule 2 of the Compensation Scheme remove the right of a retained firefighter who was employed as such before 6 April 2006 to an injury award calculated as though he or she were a whole-time firefighter, as from the date of commencement of the Order.
3. The amendments are consequential on changes to the pension arrangements for retained firefighters made by the Firefighters' Pension Scheme (Scotland) Amendment (No. 2) Order 2014 (SSI 2014/110)..
4. The Order comes into force on 23 May 2014.
5. In considering the instrument, the Committee asked the Scottish Government as to certain matters. The correspondence is reproduced in Appendix A.
6. The Order contains a drafting error, as follows:
7. **The Committee draws the Order to the attention of the Parliament on the general reporting ground, as it contains a minor drafting error. The word "his" was included in paragraph 11(c) of the Schedule in error. The word should have been omitted, as otherwise the Order is drafted in gender neutral terms.**
8. **The Committee notes that the Scottish Government has undertaken to amend the provision when the Firefighters' Compensation Scheme (Scotland) Order 2006 is next amended for other purposes.**

**Firefighters' Pension Scheme (Scotland) Amendment (No. 2) Order 2014  
(SSI 2014/110) (Justice Committee)**

9. The purpose of this instrument is to amend the Firefighters' Pension Scheme (Scotland) Order 2007 ("the 2007 Order") so as to enable retained firefighters to obtain the same pension benefits as regular full time firefighters.
10. The Order comes into force on 23 May 2014.
11. In considering the instrument, the Committee asked the Scottish Government as to certain matters. The correspondence is reproduced in Appendix B.
12. Paragraph 1(a)(iv) of the schedule to the Order inserts a definition of the term "initial date" into rule 2(1) of Part 1 of schedule 1 to the 2007 Order. The initial date is defined as 1 April 2014. Paragraph 10 of the schedule to the Order then inserts a new rule 5A into Part 11 of schedule 1 to the 2007 Order. Rule 5A(4) provides that within two months of the initial date, the Scottish Fire and Rescue Service shall use all

reasonable endeavours to notify eligible employees and former employees of the service who may be entitled to join the Scheme that they may be so entitled.

13. The Scottish Government has explained that the policy intention is to give the Scottish Fire and Rescue Service two months from the date of commencement of this Order to comply with the duty in the new rule 5A(4) of Part 11. The Committee therefore considers that paragraph 1(a)(iv) is defectively drafted, as it frustrates the intended policy, given that the Order does not come into force until 23 May 2014. The duty imposed by the new rule 5A(4) does not take effect until that date.

14. The Order also contains a number of more minor drafting errors, detailed in the Committee's recommendations below. The Scottish Government has accepted that the instrument contains drafting errors and proposes to lay a corrective instrument, to take effect prior to the date of commencement of this instrument, which will rectify the error identified with paragraph 1(a)(iv) of the Order as well as the other errors listed below

**15. The Committee accordingly draws the instrument to the attention of the Parliament under reporting ground (i) as paragraph 1(a)(iv) of the schedule is defectively drafted. That paragraph inserts a definition of the term "initial date" into rule 2(1) of Part 1 of schedule 1 to the Firefighters' Pension Scheme (Scotland) Order 2007.**

**16. The "initial date" is defined as 1 April 2014. The Order then inserts a new rule 5A into Part 11 of schedule 1 to the 2007 Order. Rule 5A(4) provides that within two months of the initial date, the Scottish Fire and Rescue Service shall use all reasonable endeavours to notify eligible employees and former employees of the service who may be entitled to join the Scheme that they may be so entitled. The Scottish Government has explained that the policy intention is to give the Scottish Fire and Rescue Service two months from the date of commencement of this Order to comply with this duty. The definition of "initial date" as 1 April 2014 therefore renders paragraph 1(a)(iv) of the schedule to the Order defective, as the Order does not come into force until 23 May 2014.**

**17. The Committee also draws the instrument to the attention of the Parliament under the general reporting ground, as it contains the following, more minor, drafting errors:**

- Paragraph 10 of the schedule to the Order inserts a new rule 6A into Part 11 of schedule 1 to the 2007 Order. Rule 6A(2)(a), (4), (5) and (6) contain references which are not gender neutral. Similar references appear in the new rule 6B(7) as inserted into Part 11 of schedule 1 to the 2007 Order and in the new rule 18(5) and 18(6)(b) as inserted by paragraph 11 of the Order into Part 12 of schedule 1 to the 2007 Order
- The references to "Part 14" in paragraph 12 of the schedule to the Order should be to "Part 13"
- Paragraph 1(a)(vii) of the schedule to the Order is superfluous and should be omitted
- The Order fails to revoke the definition of "the Scheme Actuary" which is intended to be replaced by a definition of "Scheme Actuary" inserted into

**rule 2 of Part 1 of schedule 1 to the 2007 Order by 1(a)(xi) of the schedule to this Order**

- **The reference to “rule 5(13)” in the new rule 11A in Part 12 of schedule 1 to the 2007 Order should be to “rule 5A(13) of Part 11”**

**18. The Committee notes that the Scottish Government has agreed to lay an amending instrument which will correct the errors identified with the present instrument prior to its commencement on 23 May 2014.**

**Appendix A**

**Firefighters' Compensation Scheme (Scotland) Amendment Order 2014 (SSI 2014/109)**

**On 2 May 2014, the Scottish Government was asked:**

The Firefighters' Compensation Scheme (Scotland) Order 2006 and this amending Order are drafted in gender neutral terms, for example within the formula specified in paragraph 10(c) of the schedule to this Order.

Would you agree that the reference to "his relevant service" within the formula in paragraph 11 (c) of the schedule (the last line of this Order), used to calculate an award on the death of a retained firefighter, is an error? If so what is the effect, and would you propose to amend it?

**The Scottish Government responded as follows:**

We can confirm that the word "his" was included in paragraph 11(c) of the Schedule to this Order in error. Given the terms of sections 6 and 23 of the Interpretation Act 1978, this error has no legal effect but the word will be deleted when SSI 2006/338 is next amended for other purposes.

**Appendix B****Firefighters' Pension Scheme (Scotland) Amendment (No. 2) Order 2014 (SSI 2014/110)****On 2 May 2014, the Scottish Government was asked:**

1. Paragraph 10 of the Schedule to the Order inserts a new rule 6A into Part 11 of Schedule 1 to the Firefighters' Pension Scheme (Scotland) Order 2007 ("Election to purchase service during the limited period). Rule 6A(2)(a), 6A(4), 6A(5) and 6A(6) contain references which are not gender neutral. Similar references appear in the new Rule 6B(7) as inserted into Part 11 of the Schedule to the 2007 Order ("Election to purchase service during the limited period: supplemental provision") and in the new Rule 18(5) and 18(7)(b) as inserted by paragraph 11 of the Order into Part 12 of the Schedule to the 2007 Order. Does the Scottish Government agree that these references are errors in that they are drafted in non-gender neutral terms? If so, does the Scottish Government propose to take any corrective action?
2. Paragraph 12 of the Schedule to the Order is headed "Amendment of Part 14 (payment of awards)". The first line of that paragraph then begins "In Part 14". Does the Scottish Government agree that these references to Part 14 should be references to Part 13?
3. Paragraph 1(a)(vii) of the Schedule to the Order inserts additional wording into the definition of "opt in" in rule 2 (interpretation) of Part 1 of the Schedule to the 2007 Order. There does not, however, appear to be a definition of "opt in" in rule 2 of that Part of the Schedule (looking at the most up to date version). Can the Scottish Government clarify where that definition is to be found for the purposes of the provision made in paragraph 1(a)(vii)?
4. Paragraph 1(a)(iv) of the Schedule to the Order inserts a definition of "initial date" into rule 2 of Part 1 of Schedule 1 to the 2007 Order. The initial date is defined to mean 1st April 2014. The Order also inserts a new rule 5A into Part 11 of the Schedule to the 2007 Order. Rule 5A(4) provides that within 2 months of the initial date, the authority shall use reasonable endeavours to notify all those existing employees and former employees who may be entitled to join the Scheme as a special member that they may be so entitled. Can the Scottish Government explain how the authority may comply with this duty within the allotted timescale of two months from 1st April 2014 (i.e. the "initial date"), having regard to the fact that this instrument will only come into force on 23rd May 2014?
5. Paragraph 1(a)(xi) of the Schedule to the Order inserts a definition of "Scheme Actuary" into rule 2 (interpretation) of Part 1 of the Schedule to the 2007 Order. There would appear to already be a definition of "the Scheme Actuary" in rule 2 of Part 1 of the Schedule (looking at the most up to date version). Is the definition as inserted by paragraph 1(a)(xi) of the Order intended to replace the current definition?
6. The Order inserts a new rule 11A (Transfer of accrued rights under the 1992 Scheme to special membership of this scheme) into Part 12 of the Schedule to the 2007 Order. Rule 11A(3) provides that where an application made under paragraph (1) of that rule is not made at the time specified in paragraph (2), it shall be made during the period of one year beginning with the day on which the authority gave the applicant the notice required by rule 5(13). Can the Scottish Government clarify the

meaning of “rule 5(13)” for the purposes of this paragraph? Is it intended to refer to rule 5A(13) of Part 11 of the 2007 Order, or to some other rule?

**The Scottish Government responded as follows:**

1. We agree that these references are errors (it is presumed that the reference to “18(7)(b)” in question 1 should in fact be to “18(6)(b)”).
2. We agree that these references should be to Part 13.
3. There is no definition of “opt in” in rule 2 of Part 1 of Schedule 1 to the 2007 Order. The text which this Order mistakenly purports to insert in a definition of this phrase was incorrectly lifted from the equivalent English instrument (S.I. 2014/445) and is not in fact required for the purposes of the 2007 Order.
4. We accept that a period of two months from the commencement date of this Order should have been given to the Scottish Fire and Rescue Service to allow it to complete the task set out in rule 5A(4) of Part 11 of Schedule 1 to the 2007 Order.
5. The definition of “Scheme Actuary” is intended to replace the current definition in the 2007 Order.
6. New rule 11A in Part 12 of Schedule 1 to the 2007 Order should have referred to “rule 5A(13) of Part 11” rather than “rule 5(13)”.

We are grateful to the Committee for pointing out these errors and we intend to make shortly an amending instrument, correcting matters appropriately with effect from 23rd May.

**ANNEXE A****Negative instruments: procedure**

Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. 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).

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.

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.

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. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

**Guidance on subordinate legislation**

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/64215.aspx>

**Justice Committee**

**16th Meeting, 2013 (Session 4), Tuesday 20 May 2014**

**Subordinate legislation**

**Note by the clerk**

**Introduction**

1. This paper invites the Committee to consider the following instrument which is not subject to any parliamentary procedure:

- Act of Sederunt (Fitness for Judicial Office Tribunal Rules) 2014 (SSI 2014/99).

**Purpose of instrument**

2. The purpose of the instrument is to make provision as to the procedure to be followed by tribunals constituted under section 12A(1) of the Sheriff Courts (Scotland) Act 1971 or section 35(1) of the Judiciary and Courts (Scotland) Act 2008 to investigate and report on a judicial office holder's fitness for office.

3. The instrument comes into force on 20 May 2014.

4. An electronic copy of the instrument is available at:  
<http://www.legislation.gov.uk/ssi/2014/99/contents/made>

**Delegated Powers and Law Reform Committee consideration**

5. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting 22 April 2014 and agreed to draw the instrument to the attention of the Parliament as it is defectively drafted in the following respects:

- a) In rule 2, "presenting officer" is defined as the person appointed under rule 9(1), when the correct reference should be to rule 8(1);
- b) In rule 2, "investigating officer" is defined as the person appointed under rule 5(1), when the correct reference should be to rule 4(1); and
- c) Rules 8(1) and 8(6) refer to the "presiding officer" when the correct references should be to the "presenting officer".

6. The DPLR Committee also draws the instrument to the Parliament's attention under reporting ground (h) as the meaning of rule 6(2)(a) could be clearer. Rule 6(2)(a)(ii) refers to the date on which the tribunal notifies the judicial office holder that it has determined an application under rule 5(1). Under rule 5(4), where the tribunal *refuses* an application under rule 5(1), it must notify the judicial office holder of that decision. There is no provision for the tribunal to notify the judicial office holder in circumstances where it has *granted* an application under rule 5(1). The DPLR Committee considered that it is not clear what the relevant date for the purposes of rule 6(2)(a)(ii) is in circumstances where the tribunal has made a determination to grant an application under rule 5(1).



7. The DPLR Committee noted that the Lord President's Private Office intends to lay a corrective instrument which rectifies the errors identified at paragraph 1 above, clarifies the meaning of rule 6(2)(a) and addresses the minor points identified at the Annex. The corrective instrument will revoke the present instrument prior to its coming into force.

8. The relevant extract from the DPLR Committee's report on the instrument is reproduced on page 2 of this paper.

### **Justice Committee consideration**

9. The instrument was laid on 4 April 2014 and the Justice Committee has been designated as lead committee.

#### *Procedure*

10. This instrument is not subject to any parliamentary procedure. It has been referred to the Committee under Rule 10.1.3 of Standing Orders. However, there is no formal requirement for the Committee to consider it.

11. The Committee has agreed that these types of instruments will not normally be placed on a Committee agenda unless—

- the Delegated Powers and Law Reform Committee has drawn the instrument to the lead Committee's attention on technical grounds; or
- a Member of the Justice Committee has proposed to the Convener that the instrument goes on the agenda, and the Convener agrees.

12. In addition, where the clerks are aware of particular issues with an instrument not subject to parliamentary procedure, they will draw this to the Convener's attention, for consideration of whether to put it on the agenda.

### **Recommendation**

13. The Committee is invited to note the instrument and make any comment on it. In particular, in light of the concerns raised by the DPLR Committee, the Committee is invited to endorse the conclusions reached in the DPLR Committee's report.

### ***Extract from the Delegated Powers and Law Reform Committee 28<sup>th</sup> Report 2014***

#### **Act of Sederunt (Fitness for Judicial Office Tribunal Rules) 2014 (SSI 2014/99)** (Justice Committee)

1. This instrument makes provision for the procedure to be followed by a tribunal constituted under section 12A(1) of the Sheriff Courts (Scotland) Act 1971 ("the 1971 Act") or section 35(1) of the Judiciary and Courts (Scotland) Act 2008 ("the 2008 Act") to investigate and report on a judicial office holder's fitness for office.

2. The instrument is laid before the Parliament under section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. It is not subject to any further Parliamentary procedure, and it comes into force on 20 May 2014.

3. Rule 2 of the instrument contains two patent cross-referencing errors. In particular, the definition of "presenting officer" refers to rule 9(1) as the rule by virtue of

which a presenting officer is appointed, when the correct reference should be to rule 8(1). Similarly, the definition of “investigating officer” in rule 2 refers to rule 5(1) as the rule by virtue of which such an officer is appointed, when the correct reference should be to rule 4(1).

4. Rule 8 also contains two further patent errors. Both rules 8(1) and 8(6) refer to the “presiding officer” when the correct references should be to “presenting officer”. The Committee considers that these errors are apt to cause confusion to the reader and that, taken together, they render the drafting of the instrument defective.

5. The Committee also considers that the meaning of rule 6(2)(a) of the instrument could be clearer. Rule 6(2)(a)(ii) refers to the date on which the tribunal notifies the judicial office holder that it has determined an application under rule 5(1). Rule 5(1) provides that the judicial office holder may apply to the tribunal for further specification of the information contained in the statement of reasons which the investigating officer submits to the tribunal in accordance with rule 4(6) where he or she considers, having investigated the tribunal case, that further procedure is required.

6. Where the tribunal considers an application under rule 5(1) and determines that it should be refused, it must notify the judicial office holder in writing of its decision. The rules make no provision, however, for the tribunal to notify the judicial office holder in cases where it has *granted* an application under rule 5(1); instead they require the tribunal to direct the investigating officer to provide the further specification requested. It is accordingly not clear what the date referred to in rule 6(2)(a)(ii) is in circumstances where the tribunal has granted an application under rule 5(1). The Committee considers that clarity as to the relevant date is important because it constitutes the beginning of the 28 day period within which the judicial office holder may lodge a written response to the investigating officer’s recommendation and statement of reasons by virtue of rule 6(1).

**7. The Committee therefore draws the instrument to the Parliament’s attention under reporting ground (i) as it is defectively drafted in the following respects:**

- d) In rule 2, “presenting officer” is defined as the person appointed under rule 9(1), when the correct reference should be to rule 8(1);**
- e) In rule 2, “investigating officer” is defined as the person appointed under rule 5(1), when the correct reference should be to rule 4(1); and**
- f) Rules 8(1) and 8(6) refer to the “presiding officer” when the correct references should be to the “presenting officer”.**

**8. The Committee also draws the instrument to the Parliament’s attention under reporting ground (h) as the meaning of rule 6(2)(a) could be clearer. Rule 6(2)(a)(ii) refers to the date on which the tribunal notifies the judicial office holder that it has determined an application under rule 5(1). Under rule 5(4), where the tribunal *refuses* an application under rule 5(1), it must notify the judicial office holder of that decision. There is, however, no provision for the tribunal to notify the judicial office holder in circumstances where it has *granted* an application under rule 5(1). It is accordingly not clear what the relevant date for the purposes of rule 6(2)(a)(ii) is in circumstances where the tribunal has made a determination to grant an application under rule 5(1).**

9. The Committee notes, however, that the Lord President's Private Office has laid a corrective instrument which rectifies the errors identified at paragraph 1 above, clarifies the meaning of rule 6(2)(a) and addresses the minor points identified at the Annex. The corrective instrument revokes the present instrument prior to its coming into force.