



OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Equalities, Human Rights and Civil Justice Committee

Tuesday 21 May 2024

Session 6



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Tuesday 21 May 2024

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EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE

12th Meeting 2024, Session 6

CONVENER

*Karen Adam (Banffshire and Buchan Coast) (SNP)

DEPUTY CONVENER

*Maggie Chapman (North East Scotland) (Green)

COMMITTEE MEMBERS

*Meghan Gallacher (Central Scotland) (Con)

*Marie McNair (Clydebank and Milngavie) (SNP)

*Paul O’Kane (West Scotland) (Lab)

*Evelyn Tweed (Stirling) (SNP)

*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Siobhian Brown (Minister for Victims and Community Safety)

Rachel Innes (Scottish Government)

Michael Paparakis (Scottish Government)

CLERK TO THE COMMITTEE

Katrina Venters

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 21 May 2024

[The Convener opened the meeting at 10:00]

Subordinate Legislation

Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2024 [Draft]

Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2024 [Draft]

The Convener (Karen Adam): Welcome to the 12th meeting of 2024, in session 6, of the Equalities, Human Rights and Civil Justice Committee. There are no apologies.

We will consider a total of four affirmative instruments. Our first agenda item is the consideration of the first two of those, which are the draft Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2024 and the draft Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2024. I welcome Siobhian Brown, Minister for Victims and Community Safety; Jenny Hunt, senior policy manager, safety openness and learning legislation team; Rachel Innes, community interventions team leader, community justice division; and Jordan McGrory, solicitor, legal directorate—all from the Scottish Government. I refer members to paper 1 and invite the minister to speak to the draft instruments.

The Minister for Victims and Community Safety (Siobhian Brown): Good morning, convener and committee. The two Scottish statutory instruments that you are considering are routine. They concern the application of the public sector equality duty and the Scotland-specific equality duties to two public authorities: Community Justice Scotland and the Patient Safety Commissioner for Scotland.

The office of the Patient Safety Commissioner for Scotland was established by legislation that was passed by the Parliament in September last year and came into effect at the start of this month. That legislation was introduced in response to a recommendation of the independent medicines and medical devices safety review, which followed a number of high-profile instances in which harm resulted from healthcare professionals not heeding concerns that were

raised by patients about the safety of medical interventions.

The commissioner will be an independent public advocate for patients on issues of safety. They will champion the value of listening to patients and holding organisations to account for their responsibility to take patients' concerns seriously. They will bring together evidence of patients' experiences and concerns with wider patient safety data and use that to identify potential systemic patient safety issues. They will have powers to require information from healthcare organisations and to investigate patients' safety concerns where they feel that there is a need to do so. I understand that the Parliament is currently in the process of recruiting the first commissioner.

Community Justice Scotland is a national body for community justice in Scotland. It was established in April 2017, when the new model for community justice was introduced. Community Justice Scotland's aim is to promote and advance the national strategy for community justice, in order to create a more robust and effective community justice system based on local planning and delivery by a range of statutory and other partners, supported and guided by national leadership and oversight. It also monitors, promotes and supports improvement in performance in the provision of community justice across Scotland.

The Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2024 will add Community Justice Scotland and the Patient Safety Commissioner for Scotland to the list of public authorities that are required to comply with the public sector equality duty. That duty requires public authorities, when exercising their functions, to have due regard to the need to eliminate discrimination, harassment and victimisation; the need to advance equality of opportunity; and the need to foster good relations between persons who share protected characteristics and persons who do not.

The Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2024 will apply the Scotland-specific equality duties by adding the bodies to the Equality Act 2010 (Specific) (Duties) Scotland Regulation 2012. Those regulations will, for example, require Community Justice Scotland and the Patient Safety Commissioner for Scotland to publish equality outcomes and report on progress towards achieving those outcomes; report on mainstreaming equality; and publish information on the gender pay gap and equal pay.

With regard to Community Justice Scotland, it is worth noting that, although the organisation has existed for a number of years, equality legislation was not updated when it was first established. The

Equality and Human Rights Commission subsequently recommended that appropriate changes be made to include Community Justice Scotland. The Scottish Government agrees with that recommendation, and this legislation will ensure that Community Justice Scotland is fully subject to the provisions therein. The committee might wish to note, however, that, up to this point, Community Justice Scotland has considered itself to be under the general public sector equality duty from the outset, and it has acted accordingly.

In summary, I recognise the importance of ensuring that our public authorities have regard to their equality duties when exercising any functions. I consider these SSIs to be the best approach to ensure that that happens.

I hope that that provides a useful overview. I will be happy to take any questions that the committee might have.

The Convener: Thank you, minister. Do members have any questions?

Maggie Chapman (North East Scotland) (Green): Good morning, minister. Thank you for being here this morning.

I seek some reassurance. In your remarks you said what the public sector equality duties are and what these organisations need to do. One of those is to foster good relations. Are you confident that both organisations have the resources that they need to meet their obligations under the Equality Act 2010? Some of the ones that you mentioned are about data gathering, but an obligation to foster good relations is in a different category to those. Are you confident that there are sufficient resources and awareness of what is needed for that specific obligation?

Siobhian Brown: Yes. No issues or financial complications have been raised. Although Community Justice Scotland has not needed to demonstrate that it follows that duty until now, it has been doing so since it was established in 2017.

I do not know whether my officials have any insight on the concerns that have been raised.

Rachel Innes (Scottish Government): As the minister said, to date, CJS has considered itself to be under that duty. We are engaging with it to ensure that its board of management is content with the legislation that we are introducing and is ready to report against the specific Scottish duties.

The Convener: Thank you. That is helpful.

No member has indicated that they wish to ask further questions or make further comments, so we will now move to item 2, which is formal consideration of the instruments. I invite the

minister to move motions S6M-12908 and S6M-12909.

Motions moved,

That the Equalities, Human Rights and Civil Justice Committee recommends that the Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2024 [draft] be approved;

That the Equalities, Human Rights and Civil Justice Committee recommends that the Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2024 [draft] be approved.—[*Siobhian Brown*]

Motions agreed to.

The Convener: I invite the committee to agree to delegate to me the publication of a short factual report on our deliberations on the affirmative instruments that we have considered today.

Members indicated agreement.

The Convener: That completes our consideration of the first two affirmative instruments. We will suspend briefly, to allow for a change of officials.

10:08

Meeting suspended.

10:09

On resuming—

Scottish Tribunals (Listed Tribunals) Regulations 2024 [Draft]

The Convener: Item 3 is consideration of an affirmative instrument. I welcome back to the meeting minister Siobhian Brown, who is now accompanied by Scottish Government officials Lisa Davidson, tribunals policy team leader, and Natalie Milligan, solicitor, legal directorate.

I again refer members to paper 1. I invite the minister to speak to the draft instrument.

Siobhian Brown: The draft Scottish Tribunals (Listed Tribunals) Regulations 2024 are relatively straightforward regulations. They amend the Tribunals (Scotland) Act 2014 to include the transport tribunal in the list of tribunals listed at schedule 1 to that act, whose functions may then be transferred to the Scottish tribunals. The regulations also specify the appeal functions for the transport tribunal that may be transferred, namely the devolved appeals function.

The Tribunals (Scotland) Act 2014 created a new simplified statutory framework for tribunals in Scotland by establishing the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland, known collectively as the Scottish tribunals. The act brought the existing tribunal jurisdictions together and provided a structure for new

jurisdictions. Schedule 1 to the 2014 act sets out the bodies whose functions may transfer into the Scottish tribunals.

The draft regulations are part of a wider suite of regulations that are required to transfer certain appeal functions of the transport tribunal under section 39 of the Transport (Scotland) Act 2001 to the Upper Tribunal for Scotland, and to allocate new appeal functions in relation to bus service improvement partnerships under the Transport (Scotland) Act 2019 to the Upper Tribunal for Scotland. It is intended that the respective transfer and allocation of these appeals functions to the Upper Tribunal occur at the same time. The Scottish Government is currently working towards a transfer and allocation date in December 2024. Further regulations to effect that transfer and allocation will follow.

The Scottish Tribunals (Listed Tribunals) Regulations 2024 support the Scottish Government's policy intention to transfer devolved appeal functions into the Scottish Tribunals.

Finally, I understand that the Delegated Powers and Law Reform Committee considered the draft regulations on 23 April 2024, but raised no queries in respect of them.

I will be happy to answer any questions.

The Convener: As members have no further questions or comments we will move straight to item 4, which is consideration of the motion for approval of the affirmative instrument. I invite the minister to move motion S6M-12847.

Motion moved,

That the Equalities, Human Rights and Civil Justice Committee recommends that the Scottish Tribunals (Listed Tribunals) Regulations 2024 [draft] be approved.—
[*Siobhian Brown*]

Motion agreed to.

The Convener: I invite the committee to agree to delegate to me the publication of a short factual report on our deliberations on the affirmative SSI that we have considered today.

Members indicated agreement.

The Convener: That completes our consideration of the affirmative instrument. We will suspend briefly, to allow for a change of officials.

10:13

Meeting suspended.

10:13

On resuming—

Damages (Review of Rate of Return) (Scotland) Regulations 2024 [Draft]

The Convener: Our fifth agenda item is consideration of an affirmative instrument. I welcome back to the meeting minister Siobhian Brown, who is now accompanied by Scottish Government officials Michael Paparakis, policy and bill programme manager, private law unit, and Scott Matheson, senior principal legal officer, legal directorate.

I again refer members to paper 1. I invite the minister to speak to the draft instrument.

Siobhian Brown: The personal injury discount rate is the rate by which an award of damages for personal injury, which includes future loss in the form of a lump sum, is adjusted to reflect the fact that the injured person can invest the money. The way in which the discount rate is calculated was reformed in 2019 by the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019. Under that legislation, the current discount rate is 0.75 per cent.

10:15

The legislation requires a statutory review of the rate every five years, and a review is therefore required to begin on 1 July 2024 and to be completed within 90 days. Ahead of the review, the Scottish ministers must consider whether the factors to be used in that review continue to meet the needs of the hypothetical investor. That consideration is now complete, and the draft regulations before you amend some of the factors that the Government actuary must use in reviewing the personal injury discount rate.

The factors that are being amended are as follows. The index for impact of inflation will change from the retail prices index to the average weekly earnings index, and the standard adjustment for tax and costs will change from 0.75 per cent to 1.25 per cent. The period of investment will change from 30 years to 43 years.

Those amendments have been informed both by consultation carried out last year with stakeholders and by work that we have commissioned jointly with the Northern Ireland Executive in the form of a report from the Government Actuary's Department. I am happy to take any questions.

Meghan Gallacher (Central Scotland) (Con): Good morning, minister. What is the evidence behind the increase in the standard adjustment from 0.75 per cent to 1.25 per cent? Do you have

anything to back up the decision that the Government wants to take?

Siobhian Brown: In May last year the Scottish Government invited views on the need or otherwise to adjust any of the statutory factors, and it requested any evidence to support those views. In addition, we invited views and evidence on whether a single or multiple rate should apply, and a total of 24 responses were received, including from all the key stakeholders.

The Scottish Government has asked GAD to consider those responses and other available evidence and to provide advice to the Scottish Government. As I said, the consultation was carried out in consultation with the Northern Ireland Executive.

I will bring in Michael Paparakis regarding any further evidence.

Michael Paparakis (Scottish Government): On the specific point about the 0.5 per cent increase, the Government Actuary's Department set that matter out in its review. In essence, its view is that there has been an increase in the tax drag by 0.5 per cent between 2019, when the rate was last set, and now. Accordingly, the Scottish Government has taken the view that the current rate of 0.75 per cent should move by 0.5 per cent to 1.25 per cent.

Meghan Gallacher: The minister mentioned the Northern Ireland Executive. It is my understanding that it paused to collate more evidence on the matter. Has there been any further correspondence with the Northern Ireland Executive directly? Is it now moving forward, or would Scotland be an outlier in doing so?

Siobhian Brown: My understanding is that more information has been requested for the relevant committee. I will bring in Michael Paparakis, who has been corresponding.

Michael Paparakis: As I understand it, questions have been asked; there has not been a request for a pause in the review. The Northern Ireland Executive has a different procedure from ours for statutory instruments. The committee there has asked for more information, and I understand that officials in Northern Ireland will be passing that on, rather than there being a pause in the review as such.

Meghan Gallacher: I meant a pause until further information was collated. Apologies for how I worded that.

There could be implications for our national health service should the change go through. Could the minister give us a further explanation as to what direct or unintended consequences the change could have on the functionality of our NHS? I am talking about the cost of operations

and the major instrumental things that need to happen in our NHS.

Siobhian Brown: Absolutely. It is right that the defender, whoever they are, meets the costs of the award. For catastrophic injury, regardless of whether the defender is a business or is publicly funded, it is important to note that, in cases where they are not properly compensated and they face the prospect of their money running out, pursuers will inevitably have to fall back on the NHS and other public social and care services, which places a burden on those services during their lifetime. That surely cannot be the right outcome.

The use of periodical payment orders can, of course, mitigate the impact of the discount rate. We are working to ensure that those provisions come into force so that the courts in Scotland may, for the first time, impose a periodical payment order, which would be helpful for bodies such as the NHS, which could be deemed to secure funding for the purposes of those provisions that relate to periodical payment orders.

I do not know whether Michael Paparakis or Scott Matheson have anything further to add to that.

Michael Paparakis: I am happy to come in. As the minister has said, periodical payment orders are there to offset some of the potential difficulties that come with a lump sum award, and we are working with the Scottish Civil Justice Council to try to set up court rules to bring that part of the 2019 act into force.

It is perhaps helpful to point out that the rate has not been set yet. With this SSI, we are setting the parameters, and the Government actuary will then set the rate. We do not know what will happen with that rate—whether it will go up or, potentially, down. That comes afterwards. Therefore, it is difficult to quantify the potential impact that the change could have.

Meghan Gallacher: I have two further questions—sorry, convener. In relation to concerns that have been raised about the rate parameters, does the minister understand that the changes could lead to some individuals being what is determined as overcompensated? Is the minister aware of anyone ever being undercompensated up until this point, through the previous rate?

Siobhian Brown: The GAD analysis suggests that the current further 0.5 per cent margin remains applicable, and it is probably worth reiterating that that margin broadly results in a 30 to 35 per cent chance of undercompensation. It is impossible to ensure that no one in receipt of damages to which the discount rate applies will ever be undercompensated or overcompensated, but we can reduce the likelihood of pursuers being

undercompensated through that important protection on the further margin.

Historically, there is a very fine balance between overcompensation and undercompensation, which is hard to determine specifically. Do you want to add anything to that, Michael?

Michael Papparakis: There is not much more that I can say. Whether someone is undercompensated or overcompensated will depend on the individual circumstances in the case. With the personal injury discount rate, we have one size to fit all cases. For instance, suiting a personal injury discount rate to the circumstances of each individual case would be significantly more complex than the approach that the Parliament took with the 2019 act.

Meghan Gallacher: My final question is in relation to insurance bills. Is there a risk that insurance bills—for example, premiums for motorists and other premiums—could increase as a result of this decision? Could it have an impact on the wider public?

Siobhian Brown: We have seen an increase in all insurance premiums since the cost of living crisis—every household has been impacted. I do not know whether the decision will increase insurance premiums specifically.

Michael Papparakis: It will be for those companies to decide how they will act. As I said, the rate has not been set yet, so it could increase as much as decrease—that would be for the Government to determine. Ultimately, the insurance companies will decide whether they want to pass costs on and, if there are any costs to pass on, will set their own premiums.

The Convener: No other members have indicated that they want to ask any questions or make any more comments, so we will move to item 6, which is consideration of the motion for approval for the affirmative instrument. I invite the minister to move motion S6M-12994.

Motion moved,

That the Equalities, Human Rights and Civil Justice Committee recommends that the Damages (Review of Rate of Return) (Scotland) Regulations 2024 [draft] be approved.—[*Siobhian Brown.*]

The Convener: Do members have any final comments?

Meghan Gallacher: Would it be appropriate for us to fall in line with the additional information that the Northern Ireland Executive is seeking and, perhaps, to ask for more information on the matter before proceeding?

The Convener: Do you want to formally suggest that and put the motion to a vote?

Meghan Gallacher: Yes, please.

The Convener: The question is, that motion S6M-12994 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Adam, Karen (Banffshire and Buchan Coast) (SNP)
Chapman, Maggie (North East Scotland) (Green)
McNair, Marie (Clydebank and Milngavie) (SNP)
O’Kane, Paul (West Scotland) (Lab)
Tweed, Evelyn (Stirling) (SNP)

Against

Gallacher, Meghan (Central Scotland) (Con)
Wells, Annie (Glasgow) (Con)

The Convener: The result of the division is: For 5, Against 2, Abstentions 0.

Motion agreed to,

That the Equalities, Human Rights and Civil Justice Committee recommends that the Damages (Review of Rate of Return) (Scotland) Regulations 2024 [draft] be approved.

The Convener: I invite the committee to agree to delegate to me the publication of a short factual report on our deliberations on the affirmative SSI that we have considered today.

Members indicated agreement.

The Convener: We could still write to the Government, Meghan, if you would like to set out your questions around what happened today.

Meghan Gallacher: Yes. I am certainly not against the principle of the instrument, but it is just to get more information as to what its unintended consequences could be.

The Convener: That completes consideration of the affirmative instrument. I thank the minister and all our officials for their attendance today.

10:27

Meeting continued in private until 10:44.

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