

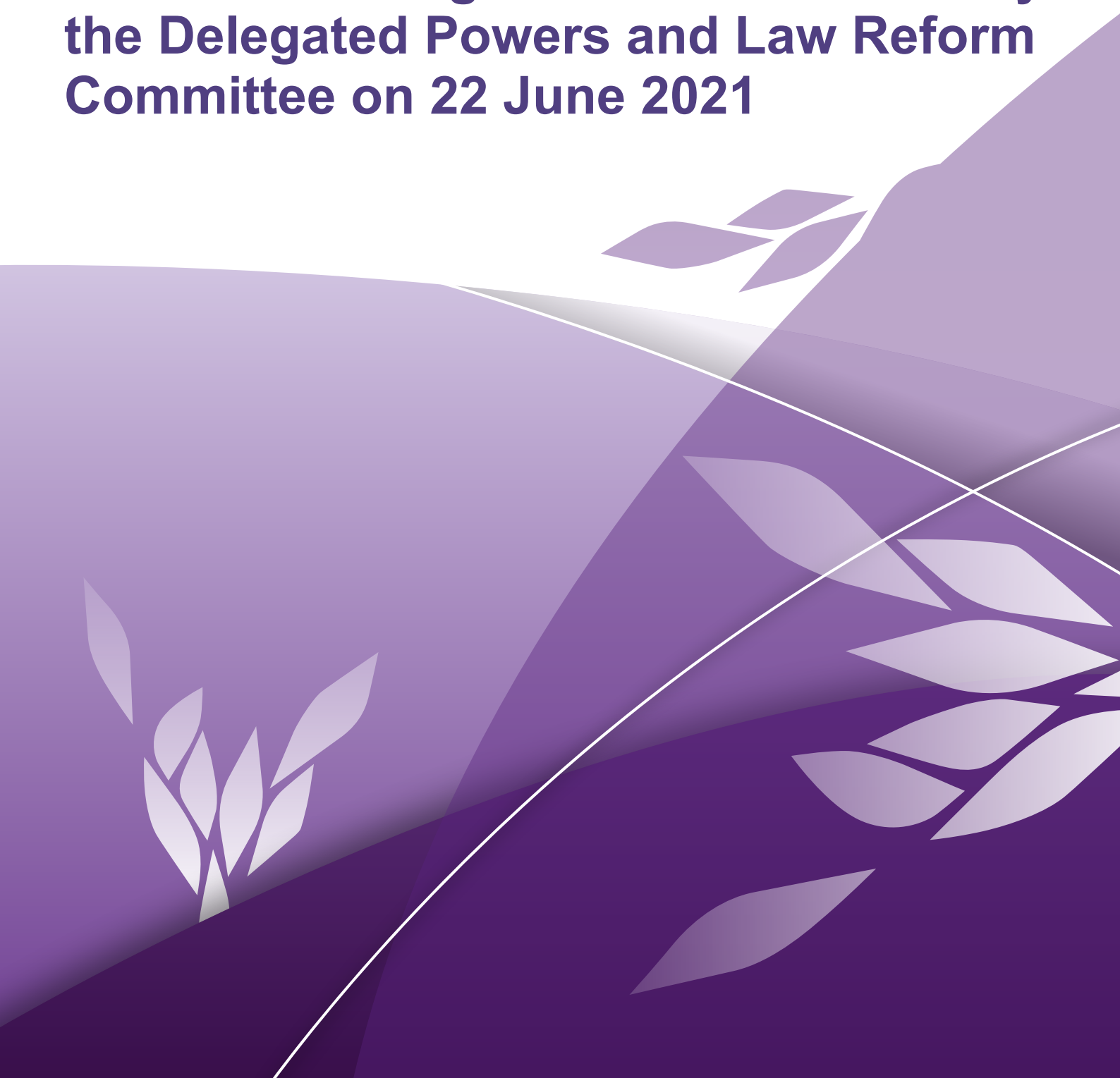


The Scottish Parliament
Pàrlamaid na h-Alba

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Delegated Powers and Law Reform Committee

Subordinate Legislation Considered by the Delegated Powers and Law Reform Committee on 22 June 2021



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Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Committee Membership



Convener
Stuart McMillan
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Deputy Convener
Bill Kidd
Scottish National Party



Graham Simpson
Scottish Conservative
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Craig Hoy
Scottish Conservative
and Unionist Party



Paul Sweeney
Scottish Labour

Introduction

1. At its meeting on 22 June 2021, the Committee considered the following instrument under its remit and agreed to draw it to the attention of the lead committee:
 - Coronavirus (Scotland) Act 2020 Early Expiry of Provisions (No.2) Regulations 2021 (SSI 2021 236)

The Committee's recommendations in relation to this instrument are set out in the next section of this report.

2. The Committee also determined that it did not need to draw the Parliament's attention to the instruments set out at the end of this report.

Scrutiny of instruments under the Committee's remit: instruments drawn to the attention of the lead committee

Coronavirus (Scotland) Act 2020 Early Expiry of Provisions (No.2) Regulations 2021 (SSI 2021 236)

3. This instrument brings forward the expiry date of three provisions in the Coronavirus (Scotland) Act 2020 affecting the work of the Parole Board for Scotland.
4. The instrument was laid on 10 June 2021 and came into force on 14 June 2021. As it was laid less than 28 days before it came into force, it is in breach of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, which requires that negative instruments are laid at least 28 days before they come into force, not counting recess periods of more than 4 days.
5. The Scottish Government wrote to the Presiding Officer explaining why the 28-day rule had not been complied with.
6. A copy of the correspondence can be found in **Annex A**.

7. **The Committee agrees to draw this instrument to the attention of the Parliament on reporting ground (j) in that it has been laid less than 28 days before coming into force and therefore has breached the laying requirements under section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
8. **The Committee is content with the explanation provided by the Scottish Government for failure to comply with the laying requirements.**

No points raised

COVID-19 Recovery Committee

Coronavirus (Scotland) Act 2020 (Early Expiry of Provisions) Regulations 2021 (SSI 2021/214)

Health Protection (Coronavirus) (Restrictions and Requirements)(Local Levels) (Scotland) Amendment (No. 25) Regulations 2021 (SSI2021/224)

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 26) Regulations 2021 (SSI 2021/227)

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 12) Regulations 2021 (SSI 2021/230)

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 13) Regulations 2021 (SSI 2021/237)

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 27) Regulations 2021 (SSI 2021/238)

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 28) Regulations 2021 (SSI 2021/242)

- The Committee noted that concerns had been raised about the potential lack of provision for consumer rights in relation to cancelled rail journeys stemming from the Regulations and agreed to highlight this to the lead committee.

Education, Children and Young People Committee

Education (Scotland) Act 1980 (Modification) Regulations 2021 (SSI2021/210)

Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 (Commencement No. 1) Regulations 2021 (SSI 2021/234(C.13))

Social Justice and Social Security Committee

Sexual Offences Act 2003 (Prescribed Police Stations) (Scotland) Amendment Regulations 2021 (SSI 2021/220)

Act of Sederunt (Fees of Messengers-at-Arms and Sheriff Officers) (Amendment) 2021 (SSI 2021/225)

- A copy of the correspondence with the Lord President's Private Office in relation to this instrument can be found in Annex B.

Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Qualified One-Way Costs Shifting) 2021 (SSI 2021/226)

Domestic Abuse Act 2021 (Commencement) (Scotland) Regulations 2021 (SSI 2021/239 C.14))

Welfare Foods (Best Start Foods) (Scotland) Amendment Regulations 2021 (SSI 2021/221)

Social Security Administration and Tribunal Membership (Scotland) Act 2020
(Commencement No. 2) Regulations 2021 (SSI 2021/232(C.12))

Local Government, Housing and Planning Committee

Homeless Persons (Unsuitable Accommodation) (Scotland) (Modification and Revocation) (Coronavirus) Amendment Order (SSI 2021/222)

Valuation Timetable (Coronavirus) (Scotland) Amendment Order 2021 (SSI 2021/231)

Annex A

Coronavirus (Scotland) Act 2020 Early Expiry of Provisions (No.2) Regulations 2021 (SSI 2021 236)

Correspondence from the Scottish Government to the Presiding Officer

The Coronavirus (Scotland) Act 2020 (Early Expiry of Provisions) (No. 2) Regulations 2021 SSI 2021/236 was made by the Scottish Ministers under section 13(1) of the Coronavirus (Scotland) Act 2020 (“the 2020 Act”) on 10 June 2021. It is being laid before the Scottish Parliament today, 10 June 2021 and comes into force on 14 June 2021.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. On this occasion, this has not been complied with and to meet the requirements of section 31(3) of that Act, this letter explains why.

These Regulations make provision for the expiry of provisions in the 2020 Act (schedule 4, paragraph 18((2) and (4)) which make changes to the Parole Board (Scotland) Rules 2001 (“the 2001 Rules”) with the effect that extended sentence prisoners recalled under section 17(3) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 and serving the extension part of their sentence, can be considered under Part III of the the 2001 Rules instead of an oral hearing under Part IV.

The Regulations also provide for the expiry of the provisions at schedule 4, paragraph 18(5) of the 2020 Act. This provision modified the requirement for an oral hearing in a Part IV case under the 2001 Rules, to enable hearings only where the Parole Board considered it was in the interests of justice to have one.

As these provisions have now been identified as no longer essential, there is no policy justification to continue these provisions in effect. The Scottish Government has previously indicated that modifications made by the 2020 Act would not be retained any longer than necessary.

In keeping with this commitment it is the view of the Scottish Government that these provisions should expire as soon as possible, now that it has become clear that they are no longer essential.

The provisions being expired adjust the procedure applied to hearings of the Parole Board and, in particular, modify the entitlement of certain prisoners to have their case considered at an oral hearing. As these modifications, for as long as they remain in place, continue to impact on live cases of individual prisoners before the Parole Board we consider it is essential to remove them as quickly as practicable. In particular, we consider the modifications should be removed to allow hearings of cases by the Parole Board which have already been scheduled for the second half of June 2021 to proceed without any restrictions on oral hearings. Accordingly in these circumstances it is necessary to breach the 28-day Rule to allow the SSI to come into force from 14 June.

Expiry of these provisions from that date ensures that all provisions relating to the entitlement to Parole Board oral hearings are expired as soon as possible, to reinstate the provisions determining a prisoners’ entitlement to an oral hearing in parole proceedings to the pre-2020 position.

Annex B

Act of Sederunt (Fees of Messengers-at-Arms and Sheriff Officers) (Amendment) 2021 (SSI 2021/225)

The Lord President's Private Office was asked:

1. The Instrument amends the Act of Sederunt (Fees of Messengers-at-Arms) (No. 2) 2002 and the Act of Sederunt (Fees of Sheriff Officers) (No. 2) 2002. The instrument substitutes new Tables of Fees for Messengers-at-Arms and sheriff officers in the Court of Session, Sheriff Court and Sheriff Appeal Court. The new fees are noted in the Explanatory Note as being representative of a 6% increase on the existing fees. This increase appears to be significantly above the rate of inflation, which is currently approximately 1.6%.

Please explain, with reference to the decision of the Supreme Court in R (on the application of UNISON) (Appellant) v Lord Chancellor [2017] UKSC 51, why it is considered that such an increase does not interfere unjustifiably with rights of access to justice.

2. The instrument bears the date of it having been laid before the Scottish Parliament on 28 May 2021, but was actually laid on 27 May 2021 in order to comply with the laying requirements. The laying letter accompanying this instrument refers to the fact that the Office of the Clerk was closed on 28 May 2021 and also refers to regulation 5 of the Scottish Statutory Instruments Regulations 2011 (SSI 2011/195).

Regulation 5(2) of the 2011 regulations provides that if an instrument has been laid before the Scottish Parliament in accordance with the requirements of any enactment, the Queen's Printer must also ensure that every copy of that instrument published by the Queen's Printer bears a statement showing the date on which the instrument was laid before the Parliament. Since, the instrument does not show the correct date on which the instrument was laid, is it intended that this would be corrected, for example by way of a correction slip?

The Lord President's Private Office responded:

1. We appreciate that some background explanation would be helpful to set out why a 6% increase in the fees of Messengers-at-Arms and Sheriff Officers is considered by the Court to be appropriate and lawful. We attach a link to the relevant part of the SCJC website SCJC meeting - 26 April 2021 - papers and minutes from which you can access the relevant policy paper with accompanying documents and the minutes of the SCJC meeting of 26 April (at which the instrument was approved by members). You will note that the last inflationary uplift in relation to these fees was in 2018. It is therefore a 6% increase in respect of a number of years of inflation to reflect the costs of Messengers-at-Arms and Sheriff Officers in performing their role.

The 6% increase was based on a blend of CPI/CPIH over the period 2009 – 2019. This approach was considered appropriate as it took account of the inflation figures over that ten-year period as well as the fee uplift in 2018 and incorporated an element of inflationary uplift. At the meeting of 26 April, members noted Annex A and B to Paper 3.2 which show the pattern of percentage increases for every amendment order made since 2002. The indexation indicates that the figure of 6% is a reasonable and justifiable uplift to bring fees

up to a fully inflation adjusted position since the last approved fee increase in 2018. Having regard to that evidence base we do not consider that such an adjustment of fees interferes unjustifiably with rights of access to justice, having regard to the terms of the UNISON decision of the UK Supreme Court. To the extent that any degree of intrusion on the right to access to justice might exist in the future, such intrusion would be justified as necessary and proportionate. The instrument is accordingly within the powers of the parent Act.

2. In relation to the incorrect laying date, I can confirm that a correction slip is in hand.

