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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate legislation considered by the Delegated Powers and Law Reform Committee on 20 February 2018



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is 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; and

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

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



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 20 February 2018, the Committee agreed to draw to the attention of the Parliament the following instruments—

Equality Act 2010 (Authorities subject to the Socio-economic Inequality Duty) (Scotland) Regulations 2018 [draft]

Carers (Scotland) Act 2016 (Review of Adult Carer Support Plan and Young Carer Statement) Regulations 2018 (SSI 2018/33)

2. The Committee's recommendations and conclusions in relation to these instruments are set out in the following sections of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out by the relevant lead committee at the end of this report.

Points raised: instrument subject to affirmative procedure

Equality Act 2010 (Authorities subject to the Socio-economic Inequality Duty) (Scotland) Regulations 2018 [draft] (Equalities and Human Rights)

Background and purpose

4. The Equality Act 2010 (Authorities subject to the Socio-economic Inequality Duty) (Scotland) Regulations 2018 amend section 1 of the Equality Act 2010 ("the 2010 Act").
5. Section 1 of the 2010 Act applies to Scotland, England and Wales (although it has only been commenced in relation to Scotland).
6. Section 1(1) of the 2010 Act requires authorities to which the section applies to have due regard, when making decisions of a strategic nature about how to exercise its functions, to the desirability of exercising those functions in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.
7. Section 1(3) of the 2010 Act lists the authorities to which section 1(1) applies. The authorities currently listed in that section are all UK or English public authorities. The Scottish Ministers have the power to add or remove "relevant authorities". "Relevant authorities" are those whose functions: (i) are exercisable only in or as regards Scotland; (ii) are wholly or mainly devolved Scottish functions; and (iii) correspond or are similar to those of an authority currently listed in section 1(3).
8. The Scottish Government carried out a public consultation on the list of public authorities which should be subject to the duty in the 2010 Act.
9. The Regulations are subject to affirmative procedure. If approved by the Parliament, they will come into force on 1 April 2018.

Discussion

10. Regulation 2(2) substitutes the list of authorities in section 1(3) of the 2010 Act. However, the power conferred on Scottish Ministers by section 2(4) of the 2010 Act permits the addition or removal of "relevant authorities" from the list of authorities in section 1(3).
11. The power does not enable the substitution of the list of authorities contained in section 1(3). Accordingly, Regulation 2(2) can only have effect to add to the list of authorities in respect of Scottish authorities.
12. This unusual use of the power conferred on Scottish Ministers by the 2010 Act was identified by the Committee following an explanation from the Scottish Government

on a separate matter relating to why the instrument did not contain an extent provision. A copy of this correspondence is set out in Annex A.

13. The Committee accepted the Scottish Government's explanation as to why there is no extent provision in the instrument. However, the Committee considered that there was an unusual or unexpected use of the power to make regulation 2(2) under section 2(4) of the 2010 Act.

Recommendation

14. **The Committee draws the instrument to the attention of the Parliament on reporting ground (g) as Regulation 2(2) has been made by what appears to be an unusual or unexpected use of the powers conferred by the parent statute.**

Points raised: instrument subject to negative procedure

Carers (Scotland) Act 2016 (Review of Adult Carer Support Plan and Young Carer Statement) Regulations 2018 (Health and Sport)

Purpose

15. Sections 10(a) and 16(a) of the Carers (Scotland) Act 2016 enable details to be set out, for the responsible local authority, of the specific circumstances in which an adult carer support plan ('ACSP') or young carer statement ('YCS') must be reviewed. The requirement to review ensures that the information contained in the ACSP or YCS is kept up to date, and the carer's needs for support and personal outcomes are still relevant.
16. These Regulations require a review of the ACSP or YCS to take place where there has been a material change in circumstances which affects the care provided by the carer.
17. The Regulations are subject to the negative procedure. They come into force on 1 April 2018.
18. The Scottish Government consulted on draft Regulations from July to September. The majority of respondents were supportive of the approach in the draft Regulations. They were adjusted from the draft, in response to the consultation.

Discussion

19. Regulation 4 provides that any change to the services provided to a cared-for person, as a result of a community care assessment or assessment of the needs of a disabled child, may have a material impact on the care provided by the carer, so as to trigger a review of an ACSP or a YCS.
20. Regulation 4 defines what a material impact on the care provided by a carer may include "for the purpose of regulations 2(d) and 3(f)". There is no regulation 2(d) or 3(f). The only references to "material impact" in the instrument are contained in regulation 2(c) and 3(c).
21. The Scottish Government has acknowledged that there is a drafting error in regulation 4 and intends to rectify this error using a correction slip. Correction slips are used to avoid resorting to a further amending SSI. They are printed similarly to an SSI, and distributed to all known recipients of the original SSI. Corrections are also applied on the legislation.gov.uk website, and printed copies of the instrument. A copy of the correspondence with the Government is set out in Annex B.
22. The use of a correction slip is only appropriate if the error is highly minor and self-evident in nature. Its use will also require to be agreed between the Scottish Government and the Queen's Printer for Scotland.

23. However, the references to the non-existent regulations 2(d) and 3(f) are meaningless.
24. The Committee considered, in this instance that it would be preferable to correct the error by means of an amendment.

Recommendations

25. **The Committee draws the Regulations to the attention of the Parliament on the general reporting ground, as there is a drafting error in regulation 4.**
26. **The Committee recommends to the Scottish Government that the error should be corrected by means of an amendment.**

No points raised

Education and Skills

Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Services) (Protected Adults) Amendment Regulations 2018 (SSI 2018/28)

Education (Scotland) Act 2016 (Commencement No. 5 and Savings Provision) Regulations 2018 (SSI 2018/36 (C.5))

Environment, Climate Change and Land Reform

Conservation of Salmon (Scotland) Amendment Regulations 2018 (SSI 2018/37)

Carbon Accounting Scheme (Scotland) Amendment Regulations 2018 (SSI 2018/40)

Finance and Constitution

Budget (Scotland) Act 2017 Amendment Regulations 2018 [draft]

Health and Sport

Carers (Scotland) Act 2016 (Adult Carers and Young Carers: Identification of Outcomes and Needs for Support) Regulations 2018 [draft]

Self-directed Support (Direct Payments) (Scotland) Amendment Regulations 2018 (SSI 2018/29)

Carers (Waiving of Charges for Support) (Scotland) Amendment Regulations 2018 (SSI 2018/31)

Carers (Scotland) Act 2016 (Short Breaks Services Statements) Regulations 2018 (SSI 2018/32)

National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2018 (SSI 2018/41)

Community Care (Provision of Residential Accommodation Outwith Scotland) (Scotland) Amendment (No. 2) Regulations 2018 (SSI 2018/42)

National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2018 (SSI 2018/43)

Personal Injuries (NHS Charges) (Amounts) (Scotland) Amendment Regulations 2018 (SSI 2018/47)

Duty of Candour Procedure (Scotland) Regulations 2018 (SSI 2018/57)v

Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 (Commencement No. 4) Regulations 2018 (SSI 2018/56 (C.6))

Justice

Premises Licence (Scotland) Amendment Regulations 2018 (SSI 2018/49)

Local Government and Communities

Local Governance (Scotland) Act 2004 (Remuneration) Amendment Regulations 2018 (SSI 2018/38)

Council Tax (Discounts) (Scotland) Amendment Regulations 2018 (SSI 2018/39)

Council Tax (Exempt Dwellings) (Scotland) Amendment Order 2018 (SSI 2018/45)

Non-Domestic Rate (Scotland) Order 2018 (SSI 2018/46)

Rural Economy and Connectivity

Disabled Persons (Badges for Motor Vehicles) (Scotland) Amendment Regulations 2018 (SSI 2018/44)

Scottish Road Works Register (Prescribed Fees) Amendment Regulations 2018 (SSI 2018/50)

Annex A

Equality Act 2010 (Authorities subject to the Socio-economic Inequality Duty (Scotland) Regulations 2018 [draft])

On 31 January 2018, the Scottish Government was asked:

1. The policy note lists the public authorities which the Scottish Government proposed in its public consultation should be named under the duty in section 1(1) of the Equality Act 2010. That list included Scottish Ministers and the policy note goes on to state that ""Scottish Ministers" includes the following: The Scottish Government, Accountant in Bankruptcy; Disclosure Scotland; Education Scotland; Scottish Prison Service; Scottish Public Pensions Agency; Student Awards Agency for Scotland; Transport Scotland."

Please clarify why it is considered appropriate for the proposed new section 1(3)(a) of the Equality Act 2010 (in respect of Scotland) to refer to "Scottish Ministers" without further reference to the Government agencies specified in the policy note.

2. Section 1 of the Equality Act 2010 extends to England, Scotland and Wales. Regulation 2(2) substitutes section 1(3) of the Act in respect of Scotland only. Please explain why it has been considered appropriate not to have included an extent provision in regulation 1? Is it considered to be proper or normal drafting practice to include one in these circumstances?

The Scottish Government responded as follows:

1. To assist in maximising the effectiveness of the public consultation, the consultation paper set out a range of bodies that would be subject to the duty in section 1(1) of the Equality Act 2010. Those mentioned are operational agencies of the Scottish Ministers, but as they have no separate legal identity from the Scottish Ministers it is neither necessary nor appropriate to list them in the legal instrument that imposes the duty. The drafting convention is only to make separate reference to bodies of this type where there is a particular reason to do so, such as in a Budget Bill for fiscal transparency.

The Committee can therefore be assured that they are included in the duty through the reference that is proposed to be inserted into section 1 to "the Scottish Ministers". The Policy Note has been used to assist the reader to understand the coverage of the reference, since no separate reference is made on the face of the legislation to some bodies that may be familiar to the reader.

2. The power to make the SSI is contained in section 2 of the Equality Act 2010, which expressly limits the power of the Scottish Ministers to make provision in several ways, including that the duty created in section 1 of that Act can only be varied by them in relation to authorities whose functions are exercisable only in or as regards Scotland. That is not quite the same as using the powers "in respect of Scotland only".

Section 1 of the Act will be commenced from 1 April 2018 by the Equality Act 2010 (Commencement No. 13) (Scotland) Order 2017 (S.S.I. 2017/403). The section extends to England, Wales and Scotland, as provided for by section 217 of the Act, but has not been subject to any other commencement. Therefore the 2017 Commencement Order gives the totality of its present commencement.

Although the commencement is by SSI, that does not of itself limit the commencement to Scottish extent, though it will apply the duty only in relation to Scottish authorities. Those authorities only have functions that are exercisable in or as regards Scotland (and do not relate to reserved matters). It follows that there is no reason in principle to limit the extent of the amendment to Scotland, though its application will only be to Scottish bodies. The extent of the amendment follows the extent of the Act, which needs no stating in the SSI.

In practice, however, the limits on the authorities that can be listed will mean that the amendment only has meaning in or as regards Scotland, since the bodies cannot exercise functions more widely.

Annex B

Carers (Scotland) Act 2016 (Review of Adult Carer Support Plan and Young Carer Statement) Regulations 2018 (SSI 2018/33)

On 7 February 2018, the Scottish Government was asked:

1. Regulation 4 contains a reference to regulations 2(d) and 3(f) in order to explain the meaning of 'material impact', which is referred to in regulations 2(c) and 3(c). This would appear to be a drafting error as there are no regulations 2(d) or 3(f)? Accordingly, is it considered that the reference should state regulations 2(c) and 3(c)?

2. Is corrective action proposed?

The Scottish Government responded as follows:

In response to question 1, we agree that the reference to regulations 2(d) and 3(f) is a drafting error and that the reference should state regulations 2(c) and 3(c).

In response to question 2, we confirm that corrective action will be taken by way of a correction slip.

