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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 12 June 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.



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Introduction

1. At its meeting on 12 June 2018, the Committee agreed to draw to the attention of the Parliament the following instrument—
 - Scotland Act 1998 (Agency Arrangements) (Specification) Order 2018 (SI 2018/626).
2. The Committee's recommendations and conclusions in relation to this instrument are set out in the following section of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instrument set out by the relevant lead committee at the end of this report.

Points raised: Instrument subject to negative procedure

Scotland Act 1998 (Agency Arrangements) (Specification) Order 2018 (SI 2018/626) (Social Security)

Purpose

4. This is an Order in Council (a UK statutory instrument) which was made on 23 May 2018. It is subject to negative procedure, both at Westminster and the Parliament.
5. The general purpose of the Order is to enable the Scottish Ministers to make agency arrangements for certain of their functions to be exercised on their behalf by UK Ministers. Such arrangements will enable the UK Government to continue to deliver certain benefits which devolve under section 22 of the Scotland Act 2016, when executive competence for those benefits has transferred to the Scottish Government.
6. Any such arrangement would require agreement between the UK Government and the Scottish Government. This instrument enables such arrangements to be agreed, under powers contained in the Scotland Act 1998 (sections 93 and 113).
7. The Policy Note for the Order explains that one such arrangement relates to the devolution of 'Carer's Allowance'. The Scottish Government has made a commitment to introduce a 'Carer's Allowance Supplement' from summer of this year. At the point at which the devolved legislation that will enable the new supplement is commenced (in the Social Security (Scotland) Act 2018), the Scottish Government will become responsible for delivery of Carer's Allowance.
8. The Policy Note also explains that the UK Government and Scottish Government have agreed for the Scottish Government to enter into an agency arrangement with the Department of Work and Pensions (DWP), so that DWP can continue to deliver Carer's Allowance in Scotland on behalf of the Scottish Government for a transitional period, with flexibility for either Government to determine when that period would end. This aims to ensure that there is no 'break in service' in delivering the benefit.
9. In addition to Carer's Allowance, this Order enables the Scottish Government to agree that DWP should undertake delivery of elements of any of the presently "DWP-delivered" benefits that are specified in section 22 of the Scotland Act 2016, on an agency arrangement. Those benefits are (in terms of that section) disability benefits, severe disablement benefit and industrial injuries benefits.

Background

10. This Order follows on from a complex legislative background. Further to the Scotland Act 2016 provisions mentioned above, the Social Security (Scotland) Act 2018 ("the 2018 Act") contains provisions for 11 existing benefits that will become

devolved. The 2018 Act also provides for a Carers' Allowance Supplement. The Act also sets out an over-arching legislative framework for the administration of social security.

11. The Policy Note for the Order also explains that the UK and Scottish Governments agreed to commence sections of the Scotland Act 2016, including section 22, using a "split competence" approach. The Policy Note states that this means that legislative competence has devolved fully from 17 May 2017. The executive competence of the Scottish Government to provide the benefits specified in section 22 would devolve by 1 April 2020. This is implemented by the Scotland Act 2016 (Transitional) Regulations 2017 ("the Transitional Regulations"). The Parliament has been enabled, by virtue of those arrangements, to enact the 2018 Act without the Scottish Government having to take immediate responsibility for the benefits that are being devolved.

Committee consideration

12. To implement the purpose of the Order, the commencement provision in article 2 provides that it will come into force "immediately after the end of the period determined in accordance with regulation 4" of the Transitional Regulations.
13. The Committee considered whether article 2 implements the policy intention sufficiently clearly, as to when the provisions of the Order will commence (and so have legal effect).
14. Regulation 4(2) of the Transitional Regulations enables up to four dates to be specified, earlier than a default date of 31st March 2020, in respect of when provisions of an Act of the Parliament related to certain types of benefit would be commenced. Those provisions relate to:
 - (a) disability benefits,
 - (b) severe disablement benefit,
 - (c) industrial injuries benefits,
 - (d) carer's benefits.
15. The Scottish Government has confirmed in its written response to the Committee that the policy intention is that this Order would be commenced on the same day as when *the first* of those provisions would be commenced, for any purpose. This is expected to be when the relevant provisions of the Social Security (Scotland) Act 2018 are commenced in relation to Carer's Allowance. The relevant correspondence is reproduced in the Annex to this report.
16. The Scottish Government has also acknowledged that there are three ways that the reference to the "end of the period" in article 2 could possibly be interpreted:
 - (a) When it first ends for any purpose
 - (b) When it finally ends for all purposes
 - (c) The Order would be brought into force for different purposes, as the period ends for different purposes.

17. The Government's response also acknowledges that article 2 might have been drafted more clearly. It considers, however, that there is no need for further legislation to clarify the article's meaning. The Government contends that taking a "purposive approach" would resolve any doubt about the article's meaning, and that if that approach is taken, the interpretation (a) should be adopted.
18. The Committee considered, however, that it is entitled to consider the clarity of the drafting of article 2, having regard to the plain meaning of the words used, and whether article 2 could be drafted more clearly. The Committee considers that "immediately after the end of the period determined in accordance with regulation 4" is not sufficiently precise to implement clearly the policy intention as explained in the Scottish Government's response contained in the Annex. The Committee considered that, if the commencement provision in article 2 could be made clearer or it is ambiguous in effect, then it is unsatisfactory that a purposive approach to different possible interpretations should be relied upon, to give the provision the meaning sought. The Committee considered that the commencement provision is very significant to the agency arrangements in the Order.

Recommendations

19. **Accordingly, the Committee draws the Order to the attention of the Parliament on reporting ground (h), as the meaning of article 2 (commencement) could be clearer. Article 2 provides that the Order comes into force immediately "after the end of the period determined in accordance with regulation 4" of the Scotland Act 2016 (Transitional) Regulations 2017.**
20. **The Committee also recommends that further consideration is given to whether an amendment of article 2 is needed to deliver the policy intention more clearly, and given the significance of the arrangements in this Order.**

No points raised

Rural Economy and Connectivity

Beef and Pig Carcase Classification (Scotland) Amendment Regulations 2018 (SSI 2018/182)

Annex

Scotland Act 1998 (Agency Arrangements) (Specification) Order 2018 (SI 2018/626)

On 30 May 2018, the Scottish Government was asked:

Article 2 provides that it comes into force immediately after "the end of the period determined in accordance with regulation 4" of the Scotland Act 2016 (Transitional) Regulations 2017 (S.I. 2017/444). Paragraph (1) of regulation 4 specifies the period ending with 31st March 2020. However paragraph (2) provides that, if earlier, the period will end-

(a) in summary, when a provision contained in an Act of the Parliament ("ASP") within competence by virtue of exception 1 in Section F1 (disability and industrial injuries benefits) comes into force;

(b) again in summary, when a provision contained in an ASP within competence by virtue of exception 2 in Section F1 (carer's benefits) comes into force.

(1) Please clarify, in the circumstance where two different earlier dates may be determined under (a) and (b) given that the relevant provisions could be brought into force on different dates, which commencement date is *intended to apply* by virtue of the reference to "the end of the period determined in accordance with regulation 4"?

(2) Therefore in that circumstance, which date would properly be determined as the commencement date under article 2? Or is there considered to be any need to clarify the commencement provision?

The Scottish Government responded as follows:

The number of dates that can be determined under regulation 4 of the Scotland Act 2016 (Transitional) Regulations 2017 ("the Transitional Regulations") is actually four dates, not two as set out in the question, by virtue of regulation 4(3). That regulation allows creation of separate dates for the period to end in respect in individual paragraphs of exception 1 in Section F1, therefore potentially there could be as many as three dates determined under paragraph (2)(a) and one date determined under paragraph (2)(b), each instead of the default date for the period to end, that is otherwise set by paragraph (1)(b), of 31 March 2020.

The purpose of regulation 4 of the Transitional Regulations is to allow staged devolution of executive responsibility for the three types of disability benefits and for carer's benefits, as described in the exceptions. The triggers for each stage are commencement of provisions in any Act of the Scottish Parliament that derive their legislative competence from these exceptions; in practice these will be provisions in the Social Security (Scotland) Act 2018 ("the 2018 Act"). The Government's expectation is that it will end first in relation to carer's benefits and at a later date (or dates) in relation to the various types of disability and industrial injuries benefits.

The Scotland Act 1998 (Agency Arrangements) (Specification) Order 2018 ("the Order") will allow the Scottish Ministers and the Secretary of State to agree arrangements for the social security functions that it describes as and when they become the responsibility of the Scottish Ministers.

There are three possible ways that the reference to the period's end in article 2 could possibly be interpreted:

1. The period ends when it first ends for any purpose.
2. The period ends when it finally ends for all purposes.
3. Article 2 could be construed as bringing the Order into force for different purposes as the period ends for different purposes.

The Government's view is that only the first of these can be correct. The way that article 2 is framed is incompatible with the third interpretation. Giving the words of the article their ordinary meaning, it bears to bring the whole Order into force on a single day. Of the other two possible interpretations, the Government considers that the first must be the correct interpretation, having regard to the Order's purpose.

In practice, the first use of the agency arrangements that the Order enables is expected to be in relation to exception 2, carer's benefits. When provision in Part 3 of the 2018 Act for a carer's allowance supplement is commenced, which is expected to be later this year, the Scottish Ministers will assume responsibility for delivery of the current DWP carer's allowance. Agency arrangements will be made at that time for the Secretary of State to continue delivery of carer's allowance on behalf of the Scottish Ministers until such time as the Scottish Social Security Agency takes over its delivery, or commences delivery of the assistance for carers in Scotland that is provided for in Part 2 of the 2018 Act. This is explained further in the "Policy Objectives" part of the Policy Note that accompanies the Order.

The purpose of the Order is to allow the Scottish and UK Governments to enter into agency arrangements when executive competence for certain benefits devolves, for a transitional period. Article 4 of the Transitional Regulations governs when executive competence for each benefit devolves. To enable Ministers of the Crown to continue, without interruption, to deliver benefits falling under section 22 of the Scotland Act 2016 (the 2016 Act") after executive competence devolves the Order must enable agency agreements to be entered into immediately after executive competence devolves for any benefit falling under section 22 of the 2016 Act.

Construing article 2 to mean that an agency agreement could be entered into only after executive competence for all benefits falling under section 22 of the 2016 Act had devolved would not deliver the Order's purpose. There would necessarily be an interruption in delivery, for all but the last benefit to devolve. The Scottish Ministers would require to administer each benefit directly for a period, until the Order commenced with the final transfer of executive competence, at which point the Scottish Ministers could enter into an agency arrangement to pass the task of administering each benefit back to the Secretary of State. There is no sensible purpose that such an interruption would serve and, therefore, to interpret article 2 in that way would be to impute to the legislator an irrational intention.

While article 2 could have been drafted more clearly, the Scottish Government does not consider there to be a need for further legislation to clarify the article's meaning. Taking a purposive approach resolves any doubt about the article's meaning and avoids patent absurdity of the two possible alternative interpretations.

