



The Scottish Parliament
Pàrlamaid na h-Alba

Published 28 October 2021
SP Paper 35
13th Report, 2021 (Session 6)

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 26 October 2021

Published in Scotland by the Scottish Parliamentary Corporate Body.

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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.



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Stuart McMillan
Scottish National Party



Bill Kidd
Scottish National Party



Convener
Graham Simpson
Scottish Conservative
and Unionist Party



Craig Hoy
Scottish Conservative
and Unionist Party



Paul Sweeney
Scottish Labour

Introduction

1. At its meeting on 26 October 2021, the Committee considered the following instrument under the SSI Protocol agreed between the Scottish Government and the Scottish Parliament in respect of SSIs made using the powers under the European Union (Withdrawal) Act 2018:
 - Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) Regulations 2021 (SSI 2021/342).
2. The Committee's recommendations in relation to this instrument under both the SSI Protocol and the Committee's technical remit are set out in the next section of the report.
3. The Committee also considered the following instruments under its remit and agreed to draw them to the attention of the relevant lead committees:
 - Council Tax Reduction (Scotland) Amendment (No. 4) Regulations (SSI 2021/337); and
 - Social Security Administration and Tribunal Membership (Scotland) Act 2020 (Commencement No. 3) Regulations 2021 (SSI 2021/338 (C. 23)).
4. The Committee's recommendations in relation to these instruments are set out later in this report.
5. 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. Some broader points raised by the Committee are noted below the relevant instruments.

Instruments considered under the European Union (Withdrawal) Act 2018

Committee consideration of the scrutiny procedure under which an instrument has been laid and the categorisation applied by the Scottish Government

Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 2) Regulations 2021 (SSI 2021/342)

6. The instrument relates to the start date from which imports of animal products to Scotland from EU/EEA and related countries will be subject to additional requirements. Specifically, it:
 - postpones the date from which the requirement for prior notification of products of animal origin applies; and
 - postpones the date from which accompanying health certificates for products of animal origin and animal by-products are required.
 7. The instrument has been laid under the negative procedure and has been categorised by the Scottish Government as of low significance.
8. The Committee was content that the appropriate scrutiny procedure has been applied to the instrument and that the SSI has been categorised properly as of low significance.

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

Council Tax Reduction (Scotland) Amendment (No. 4) Regulations (SSI 2021/337)

9. The instrument amends the Council Tax Reduction (Scotland) Regulations 2012 (the “Working Age Regulations”) and the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 (the “Pension Age Regulations”) (together, the “Principal Regulations”). The amendments extend the classes of persons who do not need to meet residence criteria in the UK in order to qualify for a council tax reduction. The new classes are persons:
- to whom leave is granted under the immigration rules by virtue of the Afghan Relocations and Assistance Policy or the previous scheme for locally-employed staff in Afghanistan (otherwise known as the ex-gratia scheme);
 - to whom leave is granted under the Afghan Citizens Resettlement Scheme; and
 - not coming within those schemes, but who arrived in Great Britain from Afghanistan in connection with the fall of the Afghan government that took place on 15 August 2021.

Breach of the 28 day rule

10. The instrument was laid on Thursday 23 September 2021 and came into force the following day. Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 requires that instruments subject to the negative procedure are laid at least 28 days before they come into force (not counting recess periods of more than 4 days). This is known as the ‘28 day rule’.
11. The Scottish Government wrote to the Presiding Officer (the full text of the letter is included in the Annex) to explain why the 28-day rule had not been complied with. The letter stated that the need to bring the instrument into force the day after it was laid was necessary “because of the sudden and unexpected nature of the situation in Afghanistan and the need to provide support to those arriving from Afghanistan. Delay in the legislation coming into force would cause potential delays in access to the Council Tax Reduction scheme for those affected. The changes are consistent with those applied by DWP to Housing Benefit and also those made to devolved Social Security measures.”
12. The Committee draws the instrument to the attention of the Parliament under reporting ground (j) as it has been laid less than 28 days before coming into force.
13. However, as the Regulations are intended to provide access to the Council Tax Reduction scheme on an emergency basis for those arriving from

Afghanistan, the Committee is satisfied with the reasons given for the breach of the 28 day rule.

Devolution issue

14. The Committee also noted that there had previously been a longstanding disagreement between its predecessor Committee and the Scottish Government on whether regulations in respect of the Council Tax Reduction scheme give rise to a devolution issue insofar as they relate to matters which are reserved in Section F1 (social security schemes) of Part 2 of schedule 5 of the Scotland Act 1998. This issue is engaged by the instrument insofar as it amends the unconsolidated Council Tax Reduction (Scotland) Regulations 2012 and the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012.
15. At its [meeting on 30 October 2018](#), the Session 5 Committee agreed that instead of continuing to highlight this disagreement with every new set of Council Tax Reduction regulations, it would instead note its position on both the devolution issue and undertaking consolidation as stated in its previous reports to the Parliament. The Session 5 Committee therefore agreed that it did not consider it necessary to repeat that view again. However, it continued to encourage the Scottish Government to undertake a consolidation of the principal Regulations, within a reasonable timescale in the interests of clarity and accessibility.
16. At its [meeting on 31 August 2021](#), the Committee considered the Council Tax Reduction (Scotland) Regulations 2021 (SSI 2021/249). Those Regulations consolidate the Working Age Regulations and will come into force on 1 April 2022. The Committee decided that it was content that the devolution issue outlined above would no longer arise in respect of the Working Age Regulations once this new instrument comes into force. The Committee noted that SSI 2021/249 consolidates the Working Age Regulations only. It does not seek to consolidate the Pension Age Regulations, which implements the Council Tax Reduction scheme for people of pensionable age. This means that future Council Tax Reduction instruments, insofar as they amend the Pension Age Regulations, will still give rise to the same devolved competence issue that the Committee has highlighted previously.

17. The Committee notes its predecessor Committee's position on both the devolution issue and undertaking consolidation (to the extent that is still outstanding in respect of the Pension Age Regulations) and restates that position for this Session.

Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) Regulations 2021 (SSI 2021/342)

18. The instrument amends Regulation (EU) 2017/625 (EUR 2017/625) and the Trade in Animals and Related Products (Scotland) Regulations 2012. It changes the date from which the requirement for prior notification of products of animal origin applies and also the date for which accompanying health certificates for products of animal origin and animal by-products are required, from 1 October 2021 to 1 January 2022.

19. The instrument was laid on 28 September 2021 and came into force on 1 October. As with the previous instrument in this report, it does not comply with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 and so breaches the 28 day rule.
20. In its letter to the Presiding Officer outlining its reasons for bringing the instrument into force so quickly (the full text of the letter is included in the Annex), the Scottish Government wrote that this was due to a late announcement by the UK Government to revise the timetable for the introduction of all remaining border operating model checks due to commence on 1 October. Accordingly, the Scottish Government stated that in order to avoid disruption to imports into Scotland, it was not able to comply with the 28 day rule.
21. The Committee draws the instrument to the attention of the Parliament under reporting ground (j) as it has been laid less than 28 days before coming into force.
22. However, the Committee is satisfied with the reasons given for the breach of the 28 day rule.

Social Security Administration and Tribunal Membership (Scotland) Act 2020
(Commencement No. 3) Regulations 2021 (SSI 2021/338 (C. 23))

23. The instrument commences section 7 of the Social Security Administration and Tribunal Membership (Scotland) Act 2020. Section 8 of the 2020 Act makes transitional provision in consequence of section 7 so should be brought into force at the same time. However, the instrument does not bring section 8 into force.
24. Following a question from the Committee, the Scottish Government acknowledged in its response that this was an oversight. Thanking the Committee for bringing this to its attention, the Scottish Government said it would bring forward further regulations to commence section 8. This has since been done by the Social Security Administration and Tribunal Membership (Scotland) Act 2020 (Commencement No. 4) Regulations 2021 (SSI 2021/352 (C. 26)) which was laid on 6 October and also considered at the Committee's meeting on 26 October.
25. The full correspondence between the Committee and the Scottish Government is included in the Annex.
26. The Committee draws the instrument to the attention of the Parliament on reporting ground (i) on the basis that its drafting appears to be defective.
27. The Committee also welcomes that SSI 2021/352 (C. 26) has since been laid to correct the oversight.

No points raised

COVID-19 Recovery Committee

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 3) Regulations 2021 (SSI 2021/350)

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 4) Regulations 2021 (SSI 2021/357)

- While the Committee was content with SSI 2021/357, it nevertheless highlighted in its discussion on the instrument the importance it places on consistency of terminology in secondary legislation particularly when terms are defined. The full correspondence between the Committee and the Scottish Government on this point is included in the Annex.

Equalities, Human Rights and Civil Justice Committee

Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2021 (SSI 2021/draft)

Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2021 (SSI 2021/draft)

Independent Reviewer (Modification of Functions) (Scotland) Regulations 2021 (SSI 2021/draft)

Civil Partnership (Scotland) Act 2020 (Commencement No. 4, Saving and Transitional Provision) Regulations 2021 (SSI 2021/351 (C. 25))

Finance and Public Administration Committee

Budget (Scotland) Act 2021 Amendment Regulations 2021 (SSI 2021/draft)

- The Committee noted that following initial written questions from the Committee to the Scottish Government, the Budget (Scotland) Act 2021 Amendment Regulations 2021 were withdrawn and re-laid.

Health, Social Care and Sport Committee

NHS Education for Scotland Amendment Order 2021 (SSI 2021/330)

Local Government, Housing and Planning Committee

Valuation and Rating (Coronavirus) (Scotland) Order 2021 (SSI 2021/draft)

- While the Committee had no comments on the Order under its technical remit, it agreed to write to the lead committee to highlight points for its consideration of the policy.

Town and Country Planning (Local Place Plans) (Scotland) Regulations 2021 (SSI 2021/348)

Net Zero, Energy and Transport Committee

Traffic Regulation Orders (Procedure) (Miscellaneous Amendments) (Scotland) Regulations 2021 (SSI 2021/348)

- While the Committee had no comments on the Regulations under its technical remit, it agreed to write to the lead committee to highlight points for its consideration of the policy.

Social Justice and Social Security Committee

Social Security (Switzerland) (Further provision in respect of Scotland) Order 2021

Social Security Administration and Tribunal Membership (Scotland) Act 2020 (Commencement No. 4) Regulations 2021 (SSI 2021/352 (C. 26))

Annex

Council Tax Reduction (Scotland) Amendment (No. 4) Regulations (SSI 2021/337)

Letter from the Scottish Government to the Presiding Officer

The Council Tax Reduction (Scotland) Amendment (No. 4) Regulations 2021, SSI 2021/337 were made by the Scottish Ministers under sections 80 and 113(1) and paragraph 1 of schedule 2 of the Local Government Finance Act 1992 on 23 September 2021. This instrument is subject to negative procedure. The Regulations are being laid before the Scottish Parliament today, 23 September 2021 and come into force on 24 September 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) that Act, this letter explains why.

The Regulations amend the Council Tax Reduction scheme so that those covered by one of the Home Office resettlement schemes for those from Afghanistan, or evacuated from / fleeing Afghanistan in connection with the collapse of the Afghan government, do not need to meet the usual residency requirements in the Council Tax Reduction scheme. This change is necessary because of the sudden and unexpected nature of the situation in Afghanistan and the need to provide support to those arriving from Afghanistan. Delay in the legislation coming into force would cause potential delays in access to the Council Tax Reduction scheme for those affected. The changes are consistent with those applied by DWP to Housing Benefit and also those made to devolved Social Security measures.

I am copying this letter to Neil Gray, Convener of the Social justice and Social Security Committee and Stuart McMillan, Convener of the Delegated Powers and Law Reform Committee.

23 September 2021

Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) Regulations 2021 (SSI 2021/342)

Letter from the Scottish Government to the Presiding Officer

The Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 2) Regulations 2021 (the Regulations) were made by the Scottish Ministers under by paragraphs 1(1) and (3) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018 and laid before the Scottish Parliament today, **Tuesday 28 September 2021**, with a coming into force date of 1 October 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, it has not been possible to comply with this requirement. In accordance with the requirements of section 31(3) of that Act, this letter explains why this requirement has been breached.

This instrument is being brought forward [following an announcement made on 14](#)

[September 2021 by the UK Government](#) to yet further changes being made to the Border Operating Model (BOM). The second phase of the BOM had been due to commence across Great Britain on 1 October 2021 seeing the introduction of pre-notification requirements for products of animal origin. Export Health Certificate requirements for products of animal origin and animal by products were also due to apply from the same date. However, with less than 3 weeks to go to the implementation deadline the UK Government unilaterally made further changes to the BOM timelines, with no collaboration or discussion with the Devolved Administrations. These changes included that the prior notification and health certification requirements due to commence on 1 October will not proceed.

The Scottish Government remains concerned at the UK Government's unilateral decision to alter and delay further importing stages of the BOM, and the [Cabinet Secretary for Rural Affairs and Islands wrote to Lord Frost on this basis on 15 September](#) highlighting concern at the lack of consultation with the devolved nations, and that Scottish Ministers had no involvement in something that has a material impact on Scotland and its food and drink industry

In order to prevent disruption to imports into Scotland, it has been necessary to bring forward this instrument to provide that prior notification and health certificate requirements do not apply to the import of animal products into Scotland from 1 October 2021 also. Given the late announcement by the UK Government, it has not been possible for the Scottish Government to comply with the 28 day rule.

The Scottish Government fully acknowledge the difficulties that breaching the 28 day rule poses in terms of Parliamentary scrutiny, and regret that on this occasion it has not been possible to comply with this requirement.

Social Security Administration and Tribunal Membership (Scotland) Act 2020 (Commencement No. 3) Regulations 2021 (SSI 2021/338 (C. 23))

On 29 September 2021, the Scottish Government was asked:

The instrument commences section 7 of the Social Security Administration and Tribunal Membership (Scotland) Act 2020 which modifies sections 77 and 78 of the Social Security (Scotland) Act 2018. These sections concern Scottish Ministers' duties to consider the effect of inflation on the value of assistance under devolved benefits schemes and uprate certain types of assistance annually. The instrument includes the Scottish Child Payment in the types of assistance for which annual uprating is required. Regulation 2 appoints 11 October 2021 as the day on which section 7 comes into force.

Section 8 of the 2020 Act makes transitional provision in consequence of section 7. In the absence of a Policy Note, please explain why the transitional provision in consequence of section 7 is not commenced at the same time as section 7.

Is any corrective action proposed, and if so, what action and when?

On 5 October 2021 the Scottish Government responded:

The Scottish Government is grateful for the Committee drawing this point to our attention. Not commencing section 8 is an oversight and we shall bring forward another set of regulations to commence section 8 before the report considering the effects of inflation is carried out in November.

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 4) Regulations 2021 (SSI 2021/357)

On 14 October 2021, the Scottish Government was asked:

The instrument amends the International Travel Regulations. Regulation 15 provides for insertion of new schedule 5A into the International Travel Regulations which in terms of regulation 3 of the instrument are to be read subject to the specific provisions of schedule 5A, which modify the principal Regulations. Schedule 5A contains provisions relating to the COP and the COP World Leaders summit event.

Paragraph 1(1) of schedule 5A creates a defining label for the COP World Leaders summit event for the purposes of applying the principal Regulations: “the WLS event”. The term “WLS event” is used throughout the Schedule. However schedule 5A also refers to:

- the ‘World Leaders summit event’ in the heading of paragraph 2 and in paragraph 3(1)(a)
- the ‘COP World Leaders summit event’ at paragraph 2(1)(b)(ii), where paragraph 2(1)(b)(i) refers to the WLS event
- the ‘world leader summit event’ at paragraphs 4(1)(a) and 5(1)(a)
- the ‘World Leader summit event’ at paragraph 6(1)(a).

1. Should these various references also be to “the WLS event” as defined in paragraph 1(1) of schedule 5A?

2. Is any corrective action proposed, and if so, what action and when?

On 19 October 2021 the Scottish Government responded:

1. We agree that, in the references noted above, the term “WLS event”, which is defined in paragraph 1(1) of schedule 5A, has not always been consistently used. We do not consider, however, that the inconsistencies alter the legal effect of the relevant provisions.

The references to paragraph 2 in paragraphs 3(1)(a), 4(1)(a), 5(1)(a) and 6(1)(a) of schedule 5A seek to repeat, only as a parenthetical description, part of the heading of paragraph 2. It is accepted that the wording and capitalisation in the descriptions is not consistent with each other or with the defined term. However, we are of the view that these inconsistencies in the terms used do not alter the legal effect of the provisions and that there is no adverse legal effect.

In relation to the reference in paragraph 2(1)(b)(ii) of schedule 5A, the full wording of the term defined in paragraph 1(1) (“the COP World Leaders summit event”) is used rather than the term “the WLS event” as defined in paragraph 1 of the schedule. However, we are of the view that, while not ideal (especially given the use of the defined term in the preceding head), it is not legally incorrect to use the full term defined in regulation 2 and doing so has no adverse legal effect.

We consider that, despite the inconsistencies, it is clear what is being referred to in the various references noted in the questions and so do not consider that there is any real risk of confusion as to the meaning of these provisions.

2. In light of the conclusions set out above, we do not consider that corrective action is

necessary. In addition, we note that these provisions are effectively time-limited, since COP 26 runs from 31 October to 12 November 2021 and it is likely that many participants will have arrived in the UK by the time amendments to the provisions would be in force.

