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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 2 March 2021



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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 2 March 2021, the Committee considered the following instruments under its remit and agreed to draw them to the attention of the lead committee:
 - Health Protection (Coronavirus) (International Travel) (Managed Accommodation and Testing) (Scotland) Regulations 2021 (SSI 2021/74);
 - Disability Assistance for Children and Young People (Consequential Amendment and Transitional Provision) (Scotland) Regulations 2021 (SSI 2021/73); and
 - Health and Care Professions Council (Coronavirus) (Amendment) (No. 2) Rules Order of Council 2021 (SI 2021/167).
2. The Committee's recommendations in relation to these instruments is set out in the next section of the report.
3. The Committee also 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.

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

Health Protection (Coronavirus) (International Travel) (Managed Accommodation and Testing) (Scotland) Regulations 2021 (SSI 2021/74)

4. The purpose of this instrument is to make amendments to the Health Protection (Coronavirus) (International Travel) (Scotland) Regulations 2020 to implement new testing and isolation requirements following international travel. It requires that all passengers arriving in Scotland from international travel obtain a “managed self-isolation package”, which means such passengers must stay in managed accommodation for a period of at least 10 days following their arrival in Scotland and undertake two coronavirus tests during their time there.
5. The Committee wrote to the Scottish Government highlighting what appeared to be a drafting error in new regulation 5J(1)(c). Specifically, it did not appear to achieve the policy intention of creating a criminal offence in respect of a responsible adult failing to ensure that a child undertakes tests in accordance with the requirements in these regulations. Furthermore, a potential drafting error was also highlighted in new regulation 5J(3)(d). It did not appear to achieve the policy intention of creating a reasonable excuse for failing to undertake tests on account that the person failing to undertake such tests had travelled in order to leave Scotland, provided they have done so directly. These errors could therefore impede the delivery of the intended policy.
6. In its response, the Scottish Government acknowledged there had been drafting errors. It has since corrected these errors in the amending instrument SSI 2021/107, the Health Protection (Coronavirus) (International Travel) (Managed Accommodation and Testing etc.) (Scotland) Amendment Regulations 2021 (SSI 2021/107).
7. A copy of all correspondence can be found in the **Annex**.

8. **The Committee agrees to draw this instrument to the attention of the Parliament on reporting ground on reporting ground (i) - that the instrument's drafting appears to be defective, in relation to new regulation 5J(1)(c) and new regulation 5J(3)(d).**
9. **The Committee notes the Scottish Government has since legislated to correct these errors.**

Disability Assistance for Children and Young People (Consequential Amendment and Transitional Provision) (Scotland) Regulations 2021 (SSI 2021/73)

10. This instrument makes provision that is transitional and consequential to the draft Disability Assistance for Children and Young People (Scotland) Regulations 2021. Those draft Regulations introduce a new form of disability assistance, known as the

Child Disability Payment, which will eventually replace the Disability Living Allowance for Children.

11. The Committee wrote to the Scottish Government in relation to the clarity and consistency of the meaning of “care home” in the subordinate legislation amended by certain regulations of the instrument.
12. In its response, the Scottish Government acknowledged that those regulations of the instrument should be consistent with the definition of “care home” in regulation 2 of the draft Disability Assistance for Children and Young People (Scotland) Regulations 2021, which is used in respect of amendments made by the instrument to other subordinate legislation.
13. A copy of all correspondence can be found in the **Annex**.

14. **The Committee agrees to draw this instrument to the attention of the Parliament on reporting ground (h) on the basis that the meaning of “care home” in the subordinate legislation amended by regulations 10, 11(5), 13(5)(h)(ii) and 14(6)(c)(ii) of the instrument could be clearer.**
15. **The Committee welcomes the commitment given by the Scottish Government to lay an instrument to come into force alongside this instrument to amend the relevant provisions of this instrument to include consistent definitions of “care home”.**

Health and Care Professions Council (Coronavirus) (Amendment) (No. 2) Rules Order of Council 2021 (SI 2021/167)

16. This instrument corrects a drafting error in the Health and Care Professions (Coronavirus) (Amendment) Rules Order of Council 2021 (SI 2021/27) before that instrument comes into force on 4 March.
17. These instruments are made by the Privy Council and approve rules made by the Health and Care Professions Council.
18. Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 requires that negative instruments are laid at least 28 days before they come into force, not counting recess periods of more than 4 days. As this instrument was laid on 23 February 2021 and comes into force immediately before 4 March 2021, it has therefore breached this rule.
19. The Scottish Government wrote to the Presiding Officer explaining why the 28-day rule has not been complied with.
20. A copy of the correspondence can be found in the **Annex**.

21. **The Committee agrees to draw this instrument to the attention of the Parliament on reporting ground (j) on the basis 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.**

22. **The Committee is content with the explanation provided by the Scottish Government for failure to comply with the laying requirements.**
23. **The Committee also notes that this instrument rectifies the drafting error in SI 2021/27 before that instrument comes into force on 4 March 2021. The error was identified by the Committee in its report on subordinate legislation considered on 2 February 2021.**

No points raised

COVID Committee

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 16) Regulations 2021 (SSI 2021/86)

Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2021 (SSI 2021/draft)

Coronavirus (Scotland) Acts (Early Expiry and Suspension of Provisions) Regulations 2021 (SSI 2021/93)

Finance and Constitution Committee

Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2021 (SSI 2021/89)

Health and Sport Committee

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 6) Regulations 2021 (SSI 2021/81)

National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2021 (SSI 2021/76)

National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2021 (SSI 2021/77)

National Health Service Superannuation and Pension Schemes (Miscellaneous Amendments) (Scotland) Regulations 2021 (SSI 2021/102)

Health and Care Professions Council (Registration and Fees) (Amendment) Rules Order of Council 2021 (SI 2021/170)

Justice Committee

Fireworks (Scotland) Miscellaneous Amendments Regulations 2021 (SSI 2021/79)

Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment Rules 2021 (SSI 2021/80)

Local Government and Communities Committee

Town and Country Planning (Cairnryan Border Control Posts) (EU Exit) (Scotland) Special Development Order 2021 (SSI 2021/98)

Planning (Scotland) Act 2019 (Commencement No. 6 and Transitional Provision) Regulations 2021 (SSI 2021/101 (C.4))

Rural Economy and Connectivity Committee

Plant Health (Export Certification) (Scotland) Amendment Order 2021 (SSI 2021/88)

Bee Diseases and Pests Control (Scotland) Amendment Order 2021 (SSI 2021/91)

Social Security Committee

Social Security Up-rating (Scotland) Order 2021 (SSI 2021/draft)

Disability Assistance for Children and Young People (Scotland) Regulations 2021 (SSI 2021/draft) (Withdrawn and re-laid)

Social Security (Industrial Injuries Benefit and Personal Independence Payment) (Telephone and Video Assessment) (Miscellaneous Amendments) (Scotland) Regulations 2021 (SSI 2021/97)

Annex

Health Protection (Coronavirus) (International Travel) (Managed Accommodation and Testing) (Scotland) Regulations 2021 (SSI 2021/74)

On 18 February, the Scottish Government was asked:

1. New regulation 5J(1)(c) provides that it is an offence to contravene a requirement in regulation 5F(1). Regulation 5J(3) provides a list of examples of reasonable excuses for contravening 5F(1) or (3). Was the intention to also create an offence in respect of contravening a requirement in regulation 5F(3)? If so, is corrective action proposed?
2. New regulation 5J(3)(d) states that a reasonable excuse for contravening regulation 5F(1) or (3) includes where P has left Scotland in accordance with regulation 6(2)(b), or left the common travel area in accordance with regulation 9(7)(a).
3. Regulation 6(2), as amended by these regulations, states that “P must, on their arrival in Scotland, travel without undue delay to specified premises in Scotland and, except to the extent that a defence would be available under regulation 9(6), must not leave those premises until whichever is the earlier of—(a) the end of the tenth day after the day on which they last departed from or transited through a non-exempt country or territory, or (b) the end of the period specified in regulation 5G or, as the case may be, 5H”.

Is the reference to regulation 6(2)(b) in new regulation 5J(3)(d) correct? If not, is corrective action proposed?

4. Regulation 5J provides that it is an offence to contravene a requirement without a reasonable excuse in regulation 5D, 5E(1) and (2) and 5(F)(1). Regulation 5J(2) provides examples of reasonable excuses for contravening requirements in 5D, and 5J(3) provides examples of reasonable excuses for contravening requirements in 5(F)(1) and (3). Is the intention that the regulations do not list any reasonable excuses for contravening requirements in regulation 5(E)(1) and (2)?

On 23 February 2021, the Scottish Government responded:

1. We thank the Committee’s legal advisers for bringing this matter to our attention. We agree that this is a drafting error and will make corrective provision in the Health Protection (Coronavirus) (International Travel) (Scotland) Regulations 2020 (“the principal regulations”) at the next opportunity, this week.
2. The intention of regulation 5J(3)(d) is to provide that a person who has lawfully left Scotland has a reasonable excuse for failing to undertake a day 2 or a day 8 test. We agree that the reference to regulation 6(2) does not articulate that clearly and propose to make provision to refer instead to regulation 9(6)(a) in the principal regulations at the next opportunity this week.
3. This drafting is intentional and we do not propose to make corrective provision.

Disability Assistance for Children and Young People (Consequential Amendment and Transitional Provision) (Scotland) Regulations 2021 (SSI 2021/73)

On 19 February 2021, the Scottish Government was asked:

1. Regulation 3(3)(b) inserts text referring to a “care home” into paragraph 3 of schedule 2 of the National Assistance (Assessment of Resources) Regulations 1992. Regulation 3(3)(c) inserts text defining “care home” in the text inserted by regulation 3(3)(b). See also the reference to “care home” and the definition of that term at regulation 18(3)(c) of the instrument, amending the Winter Heating Assistance for Children and Young People (Scotland) Regulations 2020. In each case, the definitions refer to the meaning of “care home” given in regulation 2 of the draft Disability Assistance for Children and Young People (Scotland) Regulations 2021.

The definition of “care home” in regulation 2 of the draft 2021 Regulations appears to be specific in nature, referring to the specific definition in paragraph 2 of schedule 12 of the Public Services Reform (Scotland) Act 2010 and providing, in addition, that it includes a residential educational establishment.

a) Please explain why equivalent definitions of “care home” are not inserted in respect of the insertions made by regulations 10 and 11(5) of the instrument given that neither the Regulations being amended by those regulations (nor their parent Acts) appear to contain a definition of “care home”. Is this meaning of “care home” sufficiently clear in these instances?

b) There are existing definitions of “care home” in the Regulations being amended by regulations 13(5)(h)(ii), and 14(6)(c)(ii) of the instrument. Please explain whether and why those definitions are considered sufficient given that they do not include the specific clarification set out in the definition of “care home” in regulation 2 of the draft 2021 Regulations that they include a residential educational establishment.

2. Regulation 11(3) of the instrument amends article 3(k) of the National Bus Travel Concession Scheme for Older and Disabled Persons (Eligible Persons and Eligible Services) (Scotland) Order 2006.

a) Regulation 11(3)(a) omits “or” at the end of Article 3(k)(iv) and regulation 11(3)(b) inserts a new sub-paragraph (vi) after sub-paragraph (v). Are amendments to these provisions forthcoming, as it appears that there is no “or” to omit where that is done and no sub-paragraph (v); or are these errors?

b) Likewise, please explain whether there are amendments forthcoming that provide a paragraph (m) for regulation 11(4) of the instrument to insert into; or is there an error?

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

On 23 February 2021, the Scottish Government responded:

1

a) The Scottish Government considers that the meaning of “care home” is sufficiently clear given the context of the provisions inserted into Table B of the schedule of the National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Regulations 2003 and after article 3 of the National Bus Travel Concession Scheme for Older and Disabled Persons (Eligible Persons and Eligible Services) (Scotland) Order 2006 by regulations 10 and 11(5).

In all of these inserted provisions explicit reference is made to regulations 17 and 20 of the

draft Disability Assistance for Children and Young People (Scotland) Regulations 2021 (“the CDP Regulations”). These two regulations are found in Part 5 of the CDP Regulations which is headed “[e]ffect of time spent in care homes and in legal detention”. Regulation 17 deals with the “[e]ffect of admission to a care home on ongoing entitlement to care component”. Regulation 20 deals with “[e]ntitlement beginning while in alternative accommodation” and, in paragraph (1), states “This regulation applies where an individual is resident in a care home or in legal detention on the day on which entitlement to Child Disability Payment begins.” Therefore it is considered sufficiently clear that the reference is to care homes in the context of those provisions and as such that the definition which applies for the purposes of those provisions, set out in regulation 2 of the CDP Regulations, will apply.

b) The Scottish Government acknowledges that the Council Tax Reduction (Scotland) Regulations 2012 and the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 (“the CTR Regulations”) contain definitions of “care home” which are different to that set out in regulation 2 of the draft Disability Assistance for Children and Young People (Scotland) Regulations 2021 (“the CDP Regulations”). The Scottish Government considers that it is possible for the references to “care home” in the provisions being inserted into each of the CTR Regulations to be read in the context of the provisions of the CDP Regulations to which those references relate. However, we agree it would be preferable to define “care home” for the purposes of the new inserted text in the CTR regulations given that the existing, different definition of “care home” in those regulations could lead to potential ambiguity and cause a risk that, as the CTR definition is narrower, the wording could exclude persons who meet the CDP definition, but do not meet the CTR definition.

2

a) The Scottish Government can confirm that the amendments made by regulation 11(3)(a) and (b) are not in error. The amendments to article 3 of the National Bus Travel Concession Scheme for Older and Disabled Persons (Eligible Persons and Eligible Services) (Scotland) Order 2006 (“the 2006 Order”) made by regulation 11 of the present instrument will be preceded by other amendments to the 2006 Order made by the forthcoming National Bus Travel Concession Scheme for Young Persons (Scotland) Order 2021, currently laid in draft before the Scottish Parliament. Article 19(3)(b) of that Order, which is due to come into force on 1 April 2021, substitutes sub-paragraph (iv) and adds new sub-paragraphs (iv) (with an “or” at the end) and (v) in the 2006 Order.

b) Similarly, the Scottish Government can confirm the amendment made by regulation 11(4) is not in error. The amendments made by the National Bus Travel Concession Scheme for Young Persons (Scotland) Order 2021 will insert a provision (m) into article 3(b)(5) of the National Bus Travel Concession Scheme for Older and Disabled Persons (Eligible Persons and Eligible Services) (Scotland) Order 2006.

3. Whilst the Scottish government does not consider any legal clarification in relation to the queries raised in questions 1(a) and (b) is strictly needed, it nonetheless accepts that for the avoidance of ambiguity it would be prudent to insert the appropriate definition of “care home” into the CTR regulations before the coming into force date of the present instrument.

Further, for the avoidance of any doubt, we intend to include a definition of “care home” in all the other provisions in which it appears. It is therefore proposed that the Scottish Government makes an amending instrument to come into force alongside the present

instrument to insert appropriate definitions supporting the amendments made to National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Regulations 2003, the National Bus Travel Concession Scheme for Older and Disabled Persons (Eligible Persons and Eligible Services) (Scotland) Order 2006, the Council Tax Reduction (Scotland) Regulations 2012 and the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012.

Health and Care Professions Council (Coronavirus) (Amendment) (No. 2) Rules Order of Council 2021 (SI 2021/167)

22 February 2021, the Scottish Government wrote to the Presiding Officer:

The Health and Care Professions Council (Coronavirus) (Amendment) (No.2) Rules Order of Council 2021, S.I. 2021/167 (“the No.2 Rules Order of Council”) was made by the Privy Council under articles 26(3), 32, and 37(4) and (5) of the Health Professions Order 2001 on 19 February 2021. It is being laid before the Scottish and UK Parliaments on 23 February and comes into force immediately before 4 March 2021.

It has not been possible to comply with the usual arrangement whereby instruments breaching the 28 day rule are made and laid on the same day wherever possible. This has not been possible as, due to Privy Council processes, this Order must be made two working days before being laid in both the UK and Scottish Parliaments.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that Scottish Statutory Instruments must be laid before the Scottish Parliament under the negative procedure at least 28 days before coming into force and schedule 4 of that Act applies section 28 (and section 31) to certain statutory instruments. On this occasion, the laying requirement has not been complied with and to meet the requirements of section 31(3) of that Act, this letter explains the reasons for the timings.

The No.2 Rules Order of Council is necessary to correct technical drafting errors in earlier legislation to ensure that the Health and Care Professions Council (HCPC) can continue to deliver its statutory functions in the current COVID-19 pandemic and during future emergencies.

The Health and Care Professions Council’s (“HCPC”) earlier COVID-19 order (S.I.2021/27) was laid in both the Scottish and UK Parliaments on 14 January 2021, however, the Delegated Powers and Law Reform Committee noted that S.I. 2021/27, in amending HCPC rules, omitted a provision that defines the date a document is treated as being sent. This was omitted in error and so the No.2 Rules Order of Council corrects that error.

The 28 day rule has been breached because S.I 2021/27 comes into force on 4 March 2021 and this required correction, made by the No.2 Rules Order of Council, must come into force immediately beforehand.

