

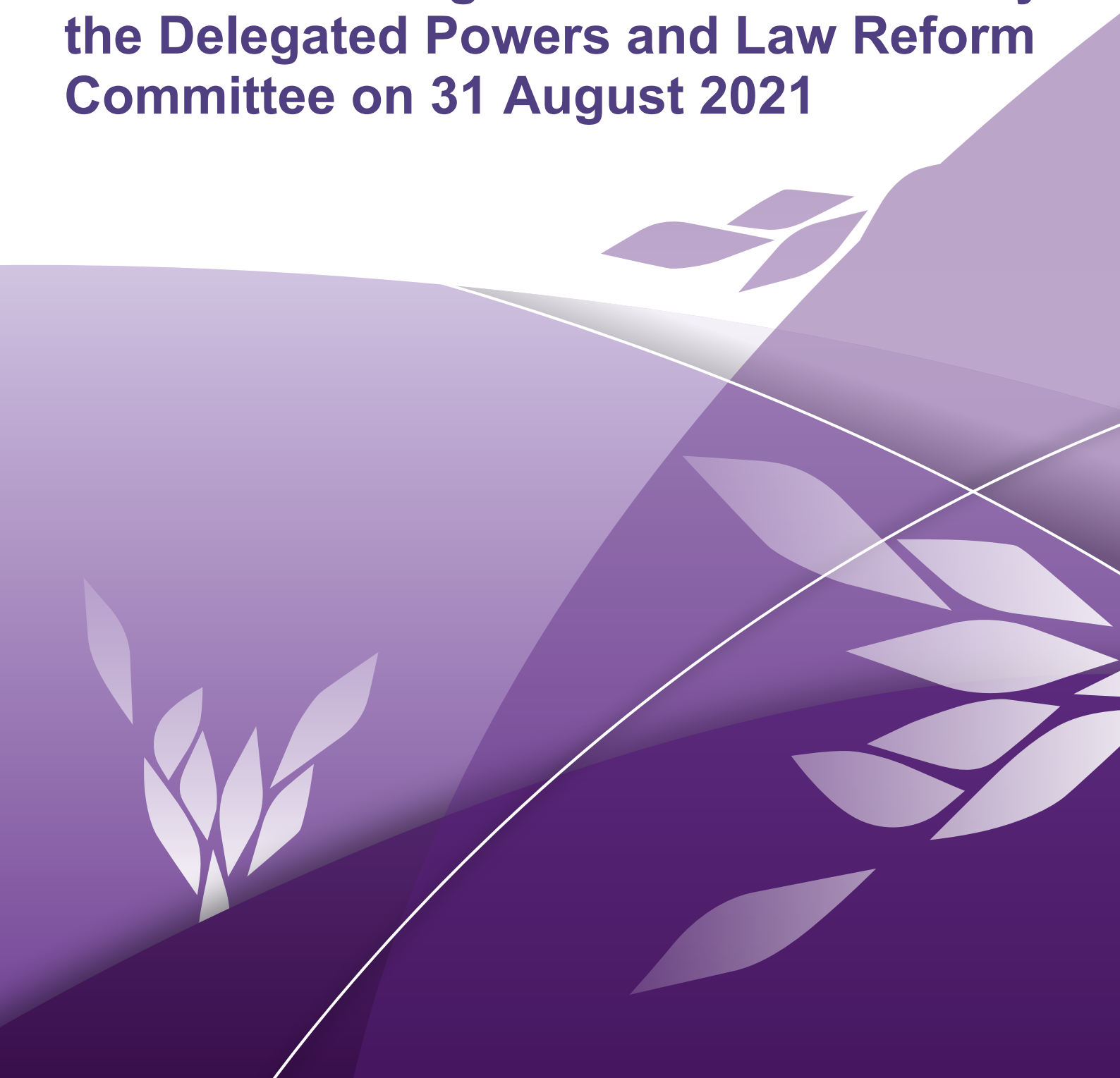


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Delegated Powers and Law Reform Committee

Subordinate Legislation Considered by the Delegated Powers and Law Reform Committee on 31 August 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.



helen.costello@parliament.scot

Committee Membership



Convener
Stuart McMillan
Scottish National Party



Deputy Convener
Bill Kidd
Scottish National Party



Graham Simpson
Scottish Conservative
and Unionist Party



Craig Hoy
Scottish Conservative
and Unionist Party



Paul Sweeney
Scottish Labour

Introduction

1. At its meeting on 31 August 2021, the Committee considered the following instruments under its remit and agreed to draw them to the attention of the relevant lead committees:

Made affirmative instrument

- Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (SSI 2021/277)

Negative instruments

- Age of Criminal Responsibility (Scotland) Act 2019 (Register of Child Interview Rights Practitioners) Regulations 2021 (SSI 2021/233)
 - National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Amendment Regulations 2021 (SSI 2021/241)
 - Council Tax Reduction (Scotland) Regulations 2021 (SSI 2021/249)
 - Milk and Healthy Snack Scheme (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/274)
2. The Committee's recommendations in relation to these instruments are set out in the next section of this report.
 3. 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

Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (SSI 2021/277)

4. The instrument revokes the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (SSI 2020/344). It nevertheless retains some requirements still considered necessary by the Scottish Government in response to the coronavirus pandemic and provides that these are applied uniformly across Scotland. The instrument still requires that, subject to some exemptions, face coverings are worn in most indoor spaces.
5. The guidance accompanying this instrument states that face coverings are not required to be worn whilst dancing in a nightclub or dancehall. However, a specific exemption for dancing is not listed in this instrument.
6. In correspondence with the Scottish Government (please see Annex A), it considered that dancing is a form of exercise which reasonably requires that the person is not wearing a face covering. An exemption for exercise is provided for by regulation 5(r) and the Scottish Government said that "the guidance is based on this consideration."
7. The Committee raised a number of points in relation to the exemption in regulation 5(r), namely:
 - the importance of clarity of law in order that provisions might be properly understood. For example, "dancing" does not appear in the instrument and therefore there is no definition of what constitutes dancing;
 - whether it is sufficiently clear to a reader of the instrument that dancing in a nightclub or dancehall is considered a form of exercise;
 - whether dancing might be considered an appropriate exemption in other premises outwith a nightclub or dancehall;
 - whether there might be opportunities to investigate how the regulations interact with licensing law;
 - whether the explanatory notes might include a definition and also practical scenarios where the consideration could arise; and
 - how these regulations are being enforced in nightclubs and dancehalls.
8. While acknowledging that some of these points were in relation to policy rather than its own technical and legal scrutiny, the Committee agreed to highlight these questions to the lead committee.

9. **In relation to the Committee's specific remit with regards to the definition of “taking part in exercise of a type which reasonably requires that the person is not wearing a face covering”, in regulation 5(r), it draws the instrument to the attention of the Parliament under reporting ground (h) – that its meaning or form could be clearer.**

10. Furthermore, the Committee noted that the instrument revokes the Health Protection (Coronavirus) (Scotland) Regulations 2020 but does not revoke all the other instruments which amended that instrument. The Scottish Government was grateful that this oversight was brought to its attention and confirmed by correspondence that the relevant amending instruments will be revoked at the earliest convenient opportunity.

11. **Whilst welcoming the Scottish Government’s commitment to revoke the relevant amending instruments at the next legislative opportunity , the Committee also draws the instrument to the attention of the Parliament under the general reporting ground.**

Age of Criminal Responsibility (Scotland) Act 2019 (Register of Child Interview Rights Practitioners) Regulations 2021 (SSI 2021/233)

12. These Regulations make provision for the establishment and maintenance of a register of ‘child interview rights practitioners’ (“ChIRPs”) to provide children with advice, support and assistance in relation to their involvement in investigative interviews.

13. The Committee noted that regulation 3(6)(a) provides that a person who is included in the register must comply with the Child Interview Rights Practitioners’ Code of Practice published by the Scottish Government on 4 June 2021. Regulation 4 provides that the Scottish Ministers may remove a person from the register if at any point they consider that the person no longer meets, or is no longer able to meet, the requirements for inclusion in the register as mentioned in regulation 3 (i.e. including compliance with the Code of Practice).

14. Regulation 3(7) of the instrument requires that a ChIRP must, as soon as practicable, notify the Scottish Ministers in writing if they are no longer entitled to provide children’s legal assistance, are barred from regulated work with children, or become a member of, or employed by, various bodies such as Children’s Hearings Scotland and the Scottish Children’s Reporter Administration.

15. By way of contrast, paragraph 17 of the Code of Practice states that a registered ChIRP must notify the Scottish Government in advance or, which failing, within no more than twenty working days (or longer if special reason for exceeding twenty days can be shown) of any changes to information or documentation relevant to that person’s registration as a ChIRP.

16. The Committee's correspondence with the Scottish Government on these Regulations is listed in Annex B. Among other things, the Scottish Government’s position is that the Code of Practice and the Regulations will have to be read alongside each other and that, in the event of any perceived inconsistency between

the two, it is the Regulations which will take precedence.

17. The Committee considered that regulation 3(7) of the instrument, when compared against the mandatory requirements contained in paragraph 17 of the Code of Practice, appear to provide differing notification timescales and requirements for ChIRPs, yet both must be complied with.

- 18. The Committee draws the instrument to the attention of the Parliament under reporting ground (h) – that its meaning or form could be clearer – on the basis that the meaning of regulation 3(7) could be clearer when compared against the mandatory requirements contained in paragraph 17 of the Code of Practice. It also calls on the Scottish Government to clarify this apparent misalignment as soon as possible.**

19. The Committee also considered that there appeared to be an unusual or unexpected use of the enabling powers conferred by the parent statute. As noted above, regulation 3(6)(a) requires compliance with the ChIRP Code of Practice, which is not provided for in the Age of Criminal Responsibility (Scotland) Act 2019. It would be more usual and expected for the Parliament to be given the opportunity to scrutinise the Code of Practice where there is a requirement in law to comply with it.

- 20. The Committee therefore also brings the instrument to the attention of the Parliament under reporting ground (g) on the basis that it has been made by Scottish Ministers by what appears to be an unusual and unexpected use of the enabling power.**

National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Amendment Regulations 2021 (SSI 2021/241)

21. The instrument amends the National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Regulations 2003 (SSI 2003/460) to extend free dental treatment for all young people aged between 18 and 25 years.
22. 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. The Regulations were laid on 15 June 2021 and came into force on 24 August. However, as Parliament was in recess from 26 June until 29 August, it was laid less than 28 days before it came into force.
23. The Scottish Government wrote to the Presiding Officer to explain the reasons for the breach of the 28 day rule. While the Committee accepts that a breach of the 28-day rule may be necessary where there are cogent reasons for doing so, the Committee sought a further explanation from the Scottish Government of the reasons for doing so. The Scottish Government's letter to the Presiding Officer along with the Committee's correspondence with the Scottish Government are listed in Annex B.

24. **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.**
25. **The Committee was not persuaded that the Scottish Government's explanation justified this breach of the laying requirement and wishes to highlight its expectation that the Scottish Government should adhere to the 28 day rule to facilitate proper parliamentary scrutiny.**

Council Tax Reduction (Scotland) Regulations 2021 (SSI 2021/249)

26. The instrument replaces the Council Tax Reduction (Scotland) Regulations 2012 (SSI 2012/303), known as the “Working Age Regulations.”
27. The Session 5 Committee had called on the Scottish Government to consolidate both the Working Age Regulations and the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 (SSI 2013/319), known as the “Pension Age Regulations”, for a number of years.

28. **The Committee therefore welcomes that the instrument will consolidate the Council Tax Reduction (Scotland) Regulations 2012 as the Session 5 Committee had called for previously.**
29. **As the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 are however yet to be consolidated, the Committee will write to the Scottish Government to ask if and when those Regulations are also to be consolidated.**

30. The Committee also noted that there are two incorrect references in both regulation 20(3)(h) and regulation 77(1) of the instrument.
31. Regulation 20(3)(h) makes reference to a child “boarded out within the meaning of the Social Work (Scotland) Act 1968.” The term “boarded out” no longer applies to children. The reference should instead be to “children placed under paragraph (a), or the making of arrangements in respect of children under paragraph (c), of section 26(1) of the Children (Scotland) Act 1995 by local authorities”.
32. Regulation 77(1) of the instrument should refer to “care provided by a carer under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014”, rather than the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010, which have been revoked.
33. The full details of these references can be seen in the correspondence with the Scottish Government in Annex B.

34. **The Committee draws the instrument to the attention of the Parliament under the general reporting ground in respect of these drafting errors. However, it welcomes the Scottish Governments commitment to bring forward an amending SSI to correct these errors before the Regulations**

come into force on 1 April 2022.

Milk and Healthy Snack Scheme (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/274)

35. The instrument makes a number of amendments to the Milk and Healthy Snack Scheme (Scotland) Regulations 2021 (SSI 2021/82).
36. It was laid on 28 July 2021 and came into force the following day and so is in breach of the 28 day rule. A letter from the Scottish Government to the Presiding Officer (this can be read in Annex B) explains that laying requirements were not able to be complied with due to circumstances specific to the year of the pandemic leading to unanticipated delays. The need to bring the Regulations into force with immediate effect was to enable local authorities to make payments for the launch of the Scottish Milk and Healthy Snack Scheme from 1 August 2021. The correspondence also highlights that this is the second amending instrument to these Regulations where the laying requirements have not been complied with.

37. **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.**
38. **While the Committee recognises the Scottish Government's necessity for the breach of the 28-day rule in this instance, it considers the circumstances of the breach to be unsatisfactory. This is the second amending instrument breaching the laying requirements. The basis for calculating payments under the scheme is an important aspect of the operation of the scheme itself, and an earlier amending instrument amended the regulation determining the amount payable. The Committee again emphasises that the Scottish Government should normally comply with laying requirements to facilitate timely parliamentary scrutiny of such important policy choices.**

No points raised

COVID-19 Recovery Committee

Coronavirus Act 2020 (Suspension: Disposal of Bodies) (Scotland) Regulations 2021 (SSI 2021/250)

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 29) Regulations 2021 (SSI 2021/252)

Health Protection (Coronavirus) (International Travel etc.) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 (SSI 2021/254)

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 30) Regulations 2021 (SSI 2021/255)

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 14) Regulations 2021 (SSI 2021/256)

Health Protection (Coronavirus) (International Travel etc.) (Miscellaneous Amendments) (Scotland) (No. 4) Regulations 2021 (SSI 2021/261)

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 31) Regulations 2021 (SSI 2021/262)

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 32) Regulations 2021 (SSI 2021/263)

Health Protection (Coronavirus) (International Travel etc.) (Miscellaneous Amendments) (Scotland) (No. 5) Regulations 2021 (SSI 2021/264)

Health Protection (Coronavirus) (International Travel etc.) (Miscellaneous Amendments) (Scotland) (No. 6) Regulations 2021 (SSI 2021/265)

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 15) Regulations 2021 (SSI 2021/275)

Health Protection (Coronavirus) (International Travel etc.) (Miscellaneous Amendments) (Scotland) (No. 7) Regulations 2021 (SSI 2021/278)

Criminal Justice Committee

Conference of the Parties to the United Nations Framework Convention on Climate Change (Immunities and Privileges) (Scotland) Order 2021 (SSI 2021/draft)

European Union and European Atomic Energy Community (Immunities and Privileges) (Scotland) Order 2021 (SSI2021/draft)

Education, Children and Young People Committee

Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment (No. 2) Order 2021 (SSI 2021/draft)

Registration of Independent Schools (Scotland) Amendment Regulations 2021 (SSI 2021/251)

Net Zero, Energy and Transport Committee

National Bus Travel Concession Scheme for Young Persons (Scotland) Amendment Order 2021 (SSI 2021/draft)

Local Government, Housing and Planning Committee

Planning (Scotland) Act 2019 (Commencement No. 7) Regulations 2021 (SSI 2021/244 (C.15))

Annex A: Correspondence on made affirmative instrument

Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (SSI 2021/277)

The Scottish Government was asked:

(a) New guidance published by the Scottish Government, titled “Coronavirus (COVID-19): staying safe and protecting others”, states that “Masks may be removed for dancing, as well as for eating and drinking under the allowed exemptions” in nightclubs, discos, dance halls and adult entertainment venues. Regulation 6 of these

regulations lists nightclubs, discos and dance halls as premises where face coverings must be worn in accordance with regulation 5. Regulation 5 provides exemptions for scenarios where face coverings will not be required, including when a person is eating or drinking in any of the premises listed in regulation 6. There is also a specific exemption in regulation 5(1)(e) where persons are seated at a table in hospitality premises such as nightclubs and dance halls. There is no specific exemption for dancing in any of the venues listed above. Is it intended that an exemption should be included in the list in regulation 5 for dancing? If not, please explain how the advice provided in the new guidance that face coverings are not required when dancing is consistent with the requirements and exemptions provided for by regulations 5 and 6 of these regulations.

(b) In the “Coronavirus (COVID-19): face coverings” guidance, the list of exemptions has been updated to reflect the move from 2 metre distancing to 1 metre distancing, however it does not list “dancing” as an exempted activity and it contains a link to the now revoked Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020. Will this guidance be updated?

(c) Regulation 20 revokes the Health Protection (Coronavirus) (Restriction and Requirements) (Local Levels) Scotland Regulations 2020. SSIDM states that “where a principal instrument is to be revoked, all extant instruments which have amended that instrument and which would be spent on its revocation should themselves be revoked”. Please explain why it is not considered necessary to revoke amending instruments still in force, such as 2021/263, 2021/262, and 2021/252?

The Scottish Government responded:

(a) It is considered that dancing is a form of exercise which reasonably requires that the person is not wearing a face covering (regulation 5(1)(r)) and the guidance is based on this consideration.

(b) Thank you for drawing this matter to our attention. We intend to update this guidance.

(c) Thank you for drawing this oversight to our attention. The amending instruments to which you refer will be revoked at the earliest convenient opportunity.

Annex B: Correspondence on negative instruments

Age of Criminal Responsibility (Scotland) Act 2019 (Register of Child Interview Rights Practitioners) Regulations 2021 (SSI 2021/233)

The Scottish Government was asked:

(a) Regulation 2 (recruitment and selection of child interview rights practitioners) states that the Scottish Ministers may invite applications from, or nominate, potential child interview rights practitioners. Regulation 3 then outlines the criteria that will apply to this role. Please explain why it is considered appropriate that no provision is made for notification of the decision (c.f. regulation 4 – see below), and the reasons for such a decision, to be included or not be included in the register.

(b) Further, regulation 4(3) (removal from the register) provides “if the Scottish Ministers decide to remove a person from the register in accordance with paragraph (1) or (2), they must give the person notice in writing of that decision”. Please explain

why it is considered appropriate that no provision is made requiring reasons to be provided with the notice.

Regulation 3(6) provides that a “person who is included in the register must comply with— (a) the Code of Practice, and (b) any condition of registration as notified in writing to that person by the Scottish Ministers”. Regulation 3(7) provides that “a person who is included in the register must, as soon as practicable, notify the Scottish Ministers in writing if they— (a) are no longer entitled to provide children’s legal assistance under section 28M of the Legal Aid (Scotland) Act 1986(b), (b) are barred from regulated work with children by virtue of the Protection of Vulnerable Groups (Scotland) Act 2007, or (c) become a person as described in paragraph (5)”.

The Code of Practice referred to in the Regulations* that ChIRP’s must comply with states at paragraph 17 “a registered ChIRP must notify the Scottish Government in advance or, which failing, within no more than twenty working days (or longer if special reason for exceeding twenty days can be shown) of any changes to information or documentation relevant to that person’s registration as a ChIRP”.

* We note the link at footnote (d) on page 2 appears to be broken.

Please explain whether and why it is considered that the Code of Practice and the Regulations are sufficiently clearly aligned in terms of time frames for notification of a change in information/circumstances in relation to the requirements in regulation 3(7)?

Please explain why it is considered that the 2019 Act confers vires to make the provision in regulation 3(6) requiring compliance with the Code of Practice (which does not appear to be provided for in the 2019 Act) where no such authorisation appears to be explicitly provided for in section 56.

Regulation 8(4) provides that the Scottish Ministers must establish and publish procedures for complaints in relation to- (a) the operation and management of the register, (b) persons included in the register in the performance of their functions. The enabling power in section

56(3) of the 2019 Act is for the Scottish Minister by regulations to make further provision in connection with the register and child interview rights practitioners.

Please explain whether and why it is considered that the provision in regulation 8(4) is sub-delegation of the power in section 56(3), whether this is authorised in that enabling power, and why it is considered the provision is within the scope of the enabling power.

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

The Scottish Government responded:

(a) The Scottish Government agrees that giving notification of a decision is an essential component of the decision-making process: it is a natural consequence of making a decision that the person(s) affected by it should be notified. Whilst there is no general rule requiring that reasons should be given for all decisions, in most cases fairness requires that they should.

The intention of the Scottish Ministers is that management of the register will primarily be done administratively. Specific provision is not needed in the regulations to govern every detail of the processes to be followed. The fact that there is no express provision in the regulations for the notification of a decision not to include a person on the register, and the giving of reasons for that decision, does not preclude Ministers from doing so. Indeed, Ministers are mindful of their common law and statutory obligations such as those to act fairly and reasonably and in a manner which is compatible with Convention rights so far as engaged. The Scottish Government does not consider that the absence of an express power of this nature will cut across the need to act in accordance with those obligations – see, for example, *South Lanarkshire Council v McKenna* 2013 S.C. 212.

Additionally, the lack of express provision would not in itself preclude an individual from challenging the actions of the Scottish Ministers, if they had not been notified of a decision, or the reasons for it.

Accordingly, the Scottish Government does not consider it to be essential that the regulations contain such provision.

(b) For the same reasons, the Scottish Government does not consider it to be essential for regulation 4(3) to make express provision for the giving of reasons. Nevertheless, it was considered appropriate to include a requirement to notify in regulation 4(3) as it is essential that a person is made aware of any decision to remove them from the register, as it would have a direct bearing on their capacity to continue or take on work as a child interview rights practitioner. It will be necessary for the effective operation of the scheme that individuals who have been removed from the register are aware of this, so they know that they are no longer able to act.

The Scottish Government is mindful of its obligations to give reasons for a decision and fully intends to meet those obligations in its management of the register. This will particularly be the case given the importance of a decision to remove a person from the register. The lack of an express requirement to do so does not change that.

Paragraph 17 of the Code of Practice is a general requirement, which will place an obligation to notify the Scottish Government of a wide range of changes which may be relevant to a person's registration. For example, this could be a change in the firm at which a solicitor is employed or a change of contact details. The fact that the Code of Practice contains this general requirement does not mean that different requirements cannot be set

out for different circumstances. Regulation 3(7) creates more stringent notification requirements in respect of specific changes in circumstances which have the potential to seriously affect the lawful, safe and appropriate delivery of child interview rights practitioners to children. As such, it was felt that these particular changes in circumstances merit separate notification requirements on the face of the regulations.

The Scottish Government's position is that the Code of Practice and the Regulations will have to be read alongside each other. In the event of any perceived inconsistency between the two, it is the Regulations which will take precedence.

The Scottish Government considers that the power in section 56(3) of the Act is sufficiently broad and inclusive to permit the provision in regulation 3(6), requiring compliance with the Code of Practice. This power allows the Scottish Ministers to make provision in connection with "the register (including the establishment and maintenance of the register)" and with "child interview rights practitioners...". The

Scottish Government is satisfied that this is sufficiently broad enough to enable provisions requiring compliance with a Code of Practice.

The Scottish Ministers have consulted on the Code of Practice and reference is made in the regulations to a specific version of that Code. It is therefore clear that, should the Scottish Ministers wish to update the Code of Practice, the Regulations would also require to be updated to reflect the most up to date version of that Code. The standards to be met by those on the register are therefore published and transparent and are sufficiently linked to the requirements as set out in the Regulations themselves.

The Scottish Ministers have an obligation under section 56(1) of the Act to establish and maintain a register of persons who are authorised to provide advice, support and assistance to children in relation to their involvement in investigative interviews. As noted above, the power in section 56(3) to make further provision in connection with the register of child interview rights practitioners is sufficiently broad to include a general provision along the lines of regulation 8(4). This signposts the intention to establish, under administrative arrangements, procedures to deal with complaints. The power in section 56(3) does not prevent other things from being set up administratively. There is nothing specifically within that power that suggests an intention on the part of the Parliament that such procedures, or indeed the detail of them, would require to be set out in detail in the Regulations.

As discussed in relation to question 1 above, the Scottish Government is mindful of its wider obligations to act compatibly with administrative law. Appropriate complaints mechanisms in relation to the operation of the register, and those registered under it, will help ensure that members of the public, and those registered, have an understanding of how such the register will be managed and how complaints will be dealt with administratively. The Scottish Government does not consider that it is necessary, however, for detailed provisions to be set out in the Regulations or that regulation 8(4) amounts to unauthorised sub-delegation of the power in section 56(3) of the Act.

The Scottish Government is grateful to the Committee's legal advisers for raising these points but does not consider there to be any requirements for corrective action.

National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Amendment Regulations 2021 (SSI 2021/241)

Letter from the Scottish Government to the Presiding Officer:

The National Health Service (Travelling Expenses And Remission Of Charges) (Scotland) (No. 2) Amendment Regulations 2021 SSI were made by the Scottish Ministers under sections 75A and 105 of the National Health Service (Scotland) Act 1978 on 15 June. It is being laid before the Scottish Parliament today, 15 June and comes into force on 24 August 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.

In order to bring the instrument to come into force on 24 August 2021, the Scottish Government have, on this occasion, been unable to lay this negative instrument before the Scottish Parliament at least 28 days before it comes into force. The Scottish Government are cognisant of the difficulties that breaching the 28 day rule poses in terms of Parliamentary scrutiny, and regret that on this occasion it has been impossible to comply with this requirement.

The remittance of dental charges for care experienced young adults between 18 and 26 years of age became a 2019/20 Programme for Government commitment following many representations from people with care experience through a number of routes. These included the early identification of key issues of importance to people with care experience arising from the Independent Care Review's improvement work prior to publication of its final "The Promise" suite of documents, and direct engagement between people with care experience and the First Minister over the duration of the Care Review.

However, due to the pandemic, resources within Dental Policy have been focussed on the sustainability and subsequent remobilisation of the Scottish Dental sector, and so this important public health undertaking has not been able to be prioritised until now: hence the request to progress this at speed. Furthermore, due to this year of uncertainty, the proposed policy will include all people aged 18-25 inclusive: it is hoped that such a widening will provide health benefits for all young adults at this difficult time, provide continuity of dental care (which starts with Scotland's national programme, Childsmile), and improve oral health for all Scotland's young adults.

We hope you and your colleagues will be accepting of such a request at this time.

The Scottish Government was asked:

The instrument amends the National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Regulations 2003 (SSI2003/460) to make free dental care available to people aged between 18 and 25 years. According to the documents accompanying the instrument, this policy began as a commitment given in the Programme for Government 2019/20 (i.e. in September 2019) to care experienced young people aged 18 to 25 inclusive and a decision was taken to extend the policy to provide free dental care to include all young people aged 18 – 25 years.

The instrument, which is subject to the negative procedure, was laid on 15 June and comes into force on 24 August. This does not allow at least 28 days between the instrument being laid before the Parliament and the provisions coming into force, not counting periods of recess of more than 4 days. The Parliament is in recess between 26 June and 29 August (inclusive). Therefore the instrument breaches the laying requirements in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act

2010.

The letter to the Presiding Officer dated 15 March 2021, sent as required under section 31(3) of the 2010 Act, states that “due to the pandemic, resources within Dental Policy have been focussed on the sustainability and subsequent remobilisation of the Scottish Dental sector, and so this important public health undertaking has not been able to be prioritised until now”. The letter further explains that “Furthermore, due to this year of uncertainty, the proposed policy will include all people aged 18-25 inclusive: it is hoped that such a widening will provide health benefits for all young adults at this difficult time”.

1. Please explain in further detail why it was not possible to lay the instrument approximately two and a half weeks earlier to afford the Parliament the full 28 days required under section 28(2) of the 2010 Act in circumstances where the original commitment was given in September 2019.

2. In particular, reference is made in the Business and Regulatory Impact Assessment to the proposal being raised by the Cabinet Secretary with the British Dental Association on 8 June 2021. When did it become clear that the policy was to be extended?

The Scottish Government responded:

1. There were a number of practical complexities that were being worked through with the commitment made to people with care experience in the Programme for Government 2019 / 20 immediately prior to the onset of the pandemic. When a person presents for NHS dental treatment, they are required to make a declaration regarding their entitlement to free NHS dental care. If they are entitled to the remittance of NHS dental charges, they are required to provide satisfactory evidence to prove that status. Work was ongoing to establish what appropriate evidence should be required for young people who were care experienced. The Scottish Government’s aim was that satisfactory proof which is necessary to protect the NHS from potential fraud should be provided in a manner that does not create an undue evidential burden on this group of people. As noted in the letter from the Scottish Government to the Presiding Officer dated 15 June 2021, the careful work required on this issue was delayed to divert necessary resource to addressing the harms associated with the pandemic.

This work has recently resumed. Ministers were presented with further advice on how the Programme for Government 2019 / 20 commitment may be taken forward as soon as practicably possible after the formation of the new Government and the appointment of Ministers. It was decided that this delayed public health commitment should be delivered as a matter of urgency. Therefore it was unfortunately not possible to comply with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 on this occasion.

2. Once advice was offered by officials, Ministers made the decision, in the interests of young people in Scotland, to expand the offer to this wider group. The instrument was laid at the first opportunity following a discussion which the Cabinet Secretary had with British Dental Association’s Scottish Committee to take their views on the policy.

Council Tax Reduction (Scotland) Regulations 2021 (SSI 2021/249)

The Scottish Government was asked:

1. Regulation 20(3)(h) disapplies the general exclusion of students from entitlement to Council Tax Reduction to a student who is “a single applicant with whom a child is placed by a local authority or voluntary organisation within the meaning of the Children Act 1989

or boarded out within the meaning of the Social Work (Scotland) Act 1968". The Children Act 1989 relates to children placed by English local authorities. The Social Work (Scotland) Act 1968 as originally enacted included powers under section 5(2) and (3)(b) for Scottish Ministers to make regulations relating to the boarding out of 'persons' whether adults or children.

SI 1996/3201 commenced Schedule 4, paragraph 15(4)(d) of the Children (Scotland) Act 1995, which replaces the term "boarding out" of children with "the placing of children under paragraph (a), or the making of arrangements in respect of children under paragraph (c), of section 26(1) of the Children (Scotland) Act 1995 by local authorities" in Scotland. Section 86(3) of the 1968 Act retains a reference to a child being "boarded out under this Act or under the Children and Young Persons (Scotland) Act 1937" for the purposes of identifying periods of residence in a local authority area which are disregarded when determining the ordinary residence of a child. However, there is no definition and no longer any substantive provision in respect of 'boarding out' of children in either the 1968 Act or the 1937 Act.

Is the intention that regulation 20 is to capture all the circumstances in which a single applicant who is a student is not excluded from entitlement to council tax reduction when caring for a child placed with them by a Scottish local authority? If so, should the reference properly be to "children placed under paragraph (a), or the making of arrangements in respect of children under paragraph (c), of section 26(1) of the Children (Scotland) Act 1995 by local authorities" which has superseded the reference to children being "boarded out" in the 1968 Act?

2. Regulation 77(9)(m) makes reference to "care provided by a carer under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010" (SI 2010/781) in relation to child care which attracts the child care costs deduction when calculating weekly income for assessment of entitlement to Council Tax Reduction. The 2010 regulations referred to were revoked by the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (SI/2936), Pt 6 reg.25(a), subject to savings provisions which are not relevant in this context. Given that these regulations have been revoked, is it the intention that the reference to these regulations captures a cohort of carers providing child care at certain period of time? Or should the reference be to "care provided by a carer under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. Noting that both the 2010 regulations and the 2014 regulations apply only in England and Wales, is there an alternative reference to be cited?

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

The Scottish Government responded:

(1) Regulation 20(3)(h) is intended to capture the circumstances in which a single applicant who is a student is not excluded from entitlement to council tax reduction when caring for a child placed with them by a Scottish local authority. The reference

in this provision should link to "children placed under paragraph (a), or the making of arrangements in respect of children under paragraph (c), of section 26(1) of the Children (Scotland) Act 1995 by local authorities" which has substantively superseded the reference to children being "boarded out" in the 1968 Act. The Scottish Government is grateful to the Committee for drawing this point to its attention. The Government intends to bring forward an amendment to regulation 20(3)(h) to reflect this point.

(2) Again, the Scottish Government is grateful to the Committee for drawing this point to its attention. This is an outdated reference to revoked provision; there was no intention to capture a cohort of carers providing child care at certain period of time. If the reference were amended to “care provided by a carer under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014”, the Government considers that this would have clear meaning. The Government also intends to bring forward an amendment to regulation 77(9)(m) to address this point.

(3) The Scottish Government proposes to address these points in an amending set of Regulations which it intends to bring forward in the coming months. The intention is that these amendments will also come into force on 1 April 2022.

The Milk and Healthy Snack Scheme (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/274)

Letter from the Scottish Government to the Presiding Officer:

The Milk and Healthy Snack Scheme (Scotland) Amendment (No.2) Regulations 2021 (S.S.I. 2021/274) was made by the Scottish Minister under section 13 of the Social Security Act 1988 and section 175 (5) of the Social Security Contributions and Benefits Act 1992 on 28 July 2021. It is being laid before the Scottish Parliament today, 28 July 2021 and comes into force on 29 July 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.

The Regulations are required to amend the Milk and Healthy Snack Scheme (Scotland) Regulations 2021 (“the principal instrument”) in order to offer greater clarity in respect of regulations 9 and 10 and of the principal instrument and add a new schedule 3 . The amendments need to come into force with immediate effect to enable local authorities to make payment under the scheme from 1 August 2021 in line with the amended requirements under this instrument. Principally the amending instrument makes it clear that payments made under the scheme will be based on the Local Serving Rate which has been agreed by Scottish Ministers and Scottish Local Authorities.

To make the amendments in time to be accommodated for the launch of the Scottish Milk and Healthy Snack Scheme on 1 August 2021, it is therefore necessary for the amending instrument to have a coming into force date of 29 July 2021 and to breach the 28 day rule in laying the amending regulations.

All of the amendments set out in this instrument are technical in nature and do not change the policy intention as set out in the principal instrument.

We apologise for breaching Standing Orders on this occasion, and we acknowledge that, highly unusually, this is the second such amendment to this regulation. Circumstances specific to this year of the pandemic have led to unanticipated delays in technical implementation and thus to belated understanding of the requirement for this amendment. This is, however, considered necessary in order to ensure this clarification is in place for the start of the scheme on 1 August 2021. For these reasons we are unable to meet the 28 day requirement.

