



The Scottish Parliament
Pàrlamaid na h-Alba

Published 16 November 2022
SP Paper 260
60th Report, 2022 (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 15 November 2022



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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 15 November, the Committee considered the following instrument under its remit and agreed to draw it to the attention of the relevant lead committee:
 - Scottish Child Payment (Ancillary Provision) Regulations 2022 (SSI 2022/326).
2. The Committee's recommendations in relation to this instrument are set out in the next section of this report.
3. The Committee also determined that in terms of its remit, it did not need to draw the Parliament's attention to the instrument at the end of the report.

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

Scottish Child Payment (Ancillary Provision) Regulations 2022 (SSI 2022/326)

4. The instrument, which is subject to the negative procedure, makes ancillary provisions in connection with the amendments made by the Social Security (Miscellaneous Amendment and Transitional Provision) (Scotland) Regulations 2022 to the Scottish Child Payment Regulations 2020. That instrument was laid in draft under the affirmative procedure and came into force on 14 November 2022.
5. Under section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, instruments subject to the negative procedure must be laid at least 28 days before they come into force, not counting recess periods of more than 4 days. This instrument breaches this requirement as it was laid on 8 November 2022 and came into force on the 14 November 2022.
6. In correspondence with the Presiding Officer which can be read in Annex A, the Scottish Government acknowledged that this is the second SSI breaching the 28-day rule that has been required to seek to ensure that the draft affirmative instrument works as intended. The Committee recently considered the Scottish Child Payment (Saving Provisions) Regulations 2022 on 1 November 2022. That instrument, which was laid on 26 October and also came into force on 14 November 2022, made savings provisions in connection with the amendments made by the draft affirmative instrument.
7. In respect of the current latest instrument, the letter to the Presiding Officer indicates that it was necessary to breach the 28-day rule to address further issues that have been identified. The short timescales are required to deliver the policy intent and ensure that the required provisions come into force at the same time as the substantive provisions in the draft affirmative instrument.
8. The Minister for Social Security and Local Government, Ben MacPherson MSP, has written separately to the Social Justice and Social Security Committee dated 8 November 2022 (see Annex B), copied to this Committee, offering an apology and noting that all matters should have been addressed in the draft affirmative instrument. That letter indicates that the current instrument became necessary following an urgent review of all procedural aspects of transition for existing clients and following further engagement with the Scottish Commission on Social Security (SCoSS).
9. **The Committee draws the instrument to the attention of the Parliament under reporting ground (j) for failure to comply with the laying requirements in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
10. **Whilst the Committee welcomes the Scottish Government's apology for this**

breach, it nevertheless considers it to be unsatisfactory that this is the second instrument breaching the 28-day rule required in this area.

11. **The Committee calls on the Scottish Government to ensure that its quality assurance processes are sufficient to ensure that subordinate legislation laid before the Parliament is fit for purpose.**

No points raised

Net Zero, Energy and Transport Committee

Electricity (Applications for Consent and Variation of Consent) (Fees) (Scotland) Amendment Regulations 2022 (SSI 2022/310)

Annex A

Scottish Child Payment (Ancillary Provision) Regulations 2022 (SSI 2022/326)

On 8 November 2022, the Scottish Government wrote to the Presiding Officer:

The Scottish Child Payment (Ancillary Provision) Regulations 2022 The Scottish Child Payment (Ancillary Provision) Regulations 2022 (“the negative instrument”) was made by the Scottish Ministers under section 95 of the Social Security (Scotland) Act 2018 on 8 November. It is being laid before the Scottish Parliament today, and comes into force on 14 November 2022.

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.

Background

The Social Security (Miscellaneous Amendment and Transitional Provision) (Scotland) Regulations 2022 (“the draft affirmative instrument”) were laid on 20 September. The draft affirmative instrument, amongst other things, includes provisions to extend Scottish Child Payment (SCP) to individuals responsible for under 16 year olds and increase the weekly rate to £25 per child.

We wrote to you on 26 October setting out details of a negative instrument - the Scottish Child Payment (Saving Provisions) Regulations 2022 – that made saving provision that was required to ensure the draft affirmative instrument aligned with the policy intent. At that time we also made the Scottish Commission on Social Security (SCoSS) aware of this and they subsequently replied highlighting an issue relating to transition that had not previously been identified. We have urgently reviewed all procedural aspects of transition for existing clients , and have identified one further transitional issue.

It has therefore become necessary to lay a further negative instrument to come into force on the same day as the draft affirmative instrument to ensure that:

- for existing clients, their ongoing entitlement is extended so that it can continue until their child turns 16, rather than 6,
- for new clients, they can be awarded SCP with an ongoing entitlement until their child turns 16,
- for clients who were told before 14 November that their entitlement to SCP had ended because they no longer had a child responsibility benefit or a qualifying benefit, the 12 week period during which a client’s SCP claim can be restarted will continue to run from the date they were informed that their SCP entitlement had ended, rather than from the date when their circumstances changed.

Failure to comply with the laying requirements

The Scottish Government accepts that, in the ordinary course of events, it would be usual to withdraw draft affirmative instruments and re-lay them when issues are identified after

laying. However, on this occasion the Scottish Government does not believe that it would be possible to withdraw the draft affirmative instrument and re-lay it while preserving the proposed coming into force date of 14 November 2022, particularly as the Social Justice and Social Security Committee considered the draft affirmative instrument on 27 October and recommended to the Parliament that it be approved. A delay in the coming into force date would have significant negative consequences for the recipients of Scottish Child Payment because it would delay the increase in the weekly rate and the extension of the benefit in respect of older children.

Accordingly, the Scottish Government has taken the unusual approach of laying a further standalone instrument under section 95 of the Social Security (Scotland) Act 2018, which is subject to the negative procedure. It contains consequential, transitional and saving provisions which need to come into force at the same time as the substantive amendments in the draft affirmative instrument (i.e. on 14 November) to ensure that the intended policy is delivered. If these provisions did not come into force until the 28 day period envisaged by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 elapsed, there would be significant consequences for affected individuals. In particular, recipients of SCP whose child turns 6 before the transitional provisions come into force would lose their ongoing entitlement to SCP and would have to make a new application, which is not the intention. This would inconvenience those affected and might result in them receiving less SCP than they would have if the transitional provision comes into force on 14 November.

The Scottish Government therefore submits that it is necessary, despite non-compliance with the 28 day rule, to lay the negative instrument at this time to ensure that the required provisions come into force at the same time as the substantive provisions in the draft affirmative instrument (subject to the Parliament's approval of that instrument).

The Scottish Government acknowledges that it is undesirable to have to lay not one but two instruments in quick succession, neither of which comply with the laying requirements, in order to ensure that the draft affirmative instrument operates as intended and does not disadvantage individuals who may be affected by the transition. It accepts that it would have been preferable from the perspective of end-users and in the interests of Parliamentary scrutiny if these issues had been identified before the draft affirmative instrument was laid, so that they could be addressed in it.

The Scottish Government has sought to make, lay and bring into force this instrument as soon as possible. The Minister for Social Security and Local Government is writing separately to the Convener of the Social Justice and Social Security Committee to make them aware of this instrument, given its recent consideration of the draft affirmative instrument. He is also writing to SCoSS to provide an update, given its role in identifying these issues.

Annex B

Letter from the Minister for Social Security and Local Government to the Deputy Convener of the Social Justice and Social Security Committee, 8 November 2022

I am writing in relation to the Social Security (Miscellaneous Amendment and Transitional Provision) (Scotland) Regulations 2022 (the “draft affirmative instrument”) which the Scottish Government laid on 20 September 2022.

As you will recall, I wrote to the Committee on 26 October setting out that the Scottish Government had identified that ancillary provisions were required to ensure that the draft affirmative instrument would have the desired effects. We accordingly made and laid the Scottish Child Payment (Saving Provisions) Regulations 2022 to come into force on 14 November 2022.

We have urgently reviewed all procedural aspects of transition for existing clients and, following further engagement with the Scottish Commission on Social Security (SCoSS), have identified further transitional issues where provision is required. It is therefore necessary to lay a further negative instrument – the Scottish Child Payment (Ancillary Provision) Regulations 2022 - to come into force on the same day as the draft affirmative instrument.

The Scottish Government accepts that it would be usual to withdraw draft affirmative instruments and re-lay them when issues are identified after laying. However, on this occasion the Scottish Government does not believe that it would be possible to withdraw the draft affirmative instrument and re-lay it while preserving the proposed coming into force date of 14 November 2022, particularly as the Social Justice and Social Security Committee considered the draft affirmative instrument on 27 October and recommended to the Parliament that it be approved. A delay in the coming into force date would have significant negative consequences for the recipients of Scottish Child Payment because it would delay the increase in the weekly rate and the extension of the benefit in respect of older children.

Accordingly, the Scottish Government has taken the unusual approach of laying a further standalone instrument under section 95 of the Social Security (Scotland) Act 2018, which is subject to the negative procedure. This instrument contains consequential, transitional and saving provisions which need to come into force at the same time as the substantive amendments in the draft affirmative instrument on 14 November.

The Scottish Government therefore submits that it is necessary to lay the negative instrument at this time to ensure that the required provisions come into force at the same time as the substantive provisions in the draft affirmative instrument (subject to the Parliament’s approval of that instrument). The Minister for Parliamentary Business has written to the Presiding Officer setting out the reasons for non-compliance with the 28 day rule.

Whilst making changes to live benefits can be complicated, I fully recognise that all relevant matters should have been addressed in the original draft affirmative instrument, so that the Committee had proper time to consider all provisions in the round. I hope it is of some reassurance that the negative instruments do nothing to change the policy intent or delivery plans upon which scrutiny and stakeholder engagement has been based. I apologise to the Committee and can assure you that lessons will be learned and

procedures will be strengthened to avoid such a situation happening again.

I have copied this letter to the Scottish Commission on Social Security (SCoSS) and the Delegated Powers and Law Reform Committee.

