The Scottish Parliament
Pàrlamaid na h-Alba

Published 2 November 2022
SP Paper 249
54th 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 1 November 2022

Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:
http://www.parliament.scot/abouttheparliament/91279.aspx

For information on the Scottish Parliament contact Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

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

Jeremy Balfour
Scottish Conservative and Unionist Party

Oliver Mundell
Scottish Conservative and Unionist Party

Paul Sweeney
Scottish Labour

Introduction

1. At its meeting on 1 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 (Saving Provisions) Regulations 2022 (SSI 2022/302).

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 instruments at the end of the report.

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

Scottish Child Payment (Saving Provisions) Regulations 2022 (SSI 2022/302)

4. The instrument makes savings 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.

5. The savings provisions ensure that the higher weekly rate of the Scottish Child Payment of £25 only applies to periods of entitlement which fall on or after 14 November 2022, and an individual's entitlement to a double payment where a child dies does not apply where the child in question dies before 14 November 2022.

6. 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 26 October 2022 and will come into force on 14 November 2022.

7. In correspondence with the Presiding Officer, the Scottish Government explained that, following an issue being identified, it was necessary to breach the 28-day rule in order that the savings provisions come into force at the same time as the substantive provisions so the policy intent is delivered and to prevent there being a gap between the substantive changes to the law and the coming into force of savings provisions on a later date.

8. **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.**

9. **The Committee notes that this instrument makes necessary saving provisions in order to give full effect to the Social Security (Miscellaneous Amendment and Transitional Provision) (Scotland) Regulations 2022.**

No points raised

<u>Education, Children and Young People Committee</u>

Police Act 1997 (Offences in Schedules 8A and 8B) Amendment (Scotland) Regulations 2022 (SSI 2022/Draft)

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment (No. 2) Order 2022 (SSI 2022/Draft)

<u>Local Government, Housing and Planning Committee</u>

Town and Country Planning (Miscellaneous Amendment) (Scotland) Regulations 2022 (SSI 2022/286)

Annex

Scottish Child Payment (Saving Provisions) Regulations 2022 (SSI 2022/302)

On 26 October 2022, the Scottish Government wrote to the Presiding Officer:

The Scottish Child Payment (Saving Provisions) Regulations 2022 SSI 2022/302 ("the negative instrument") was made by the Scottish Ministers under section 95 of the Social Security (Scotland) Act 2018 on 25 October. It is being laid before the Scottish Parliament today, 26 October 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. If approved by Parliament, the draft affirmative instrument will make provision:

- To increase the weekly rate of Scottish Child Payment to £25 per week, per eligible child,
- To open applications for Scottish Child Payment to all eligible individuals responsible for under-16s – with all payments backdated to the date we receive their application - ensuring that around an additional 300,000 children are potentially eligible for it,
- To provide for the weekly rate to be doubled for the 12 week period preceding the death of a child.

The policy intention is that:

- the higher weekly rate of £25 should only apply to periods of entitlement which fall on or after 14 November 2022, and
- entitlement to a double payment of Scottish Child Payment where their child dies does not apply where the child in question dies before 14 November 2022.

The Scottish Government has identified that ancillary provisions will be required to ensure that the draft affirmative instrument, if approved, has that effect, and so the negative instrument contains two savings provisions.

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. 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 standalone savings instrument under section 95 of the Social Security (Scotland) Act 2018, which is subject to the negative procedure. It is necessary for the savings provisions 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 the savings 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, the intended policy would largely be frustrated, as there would be a gap between the substantive changes to the law on 14 November and the coming into force of savings on a later date.

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 savings 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 has sought to make, lay and bring into force this instrument as soon as possible. The Minister for Social Security and Local Government is to appear before the Social Justice and Social Security Committee on 27 October 2022 in connection with the draft affirmative instrument, and so the Minister is writing separately to the Convener of that Committee to make them aware of this instrument in advance of that meeting. The Minister is also writing to the Scottish Commission on Social Security, given its earlier consideration of the draft affirmative instrument.