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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 29 March 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 29 March, the Committee considered the following instrument under the SSI Protocol agreed between the Scottish Government and the Scottish Parliament in respect of SSIs made using the powers under the European Union (Withdrawal) Act 2018:
 - Crime (International Co-operation) Act 2003 (Freezing Order) (EU Exit) (Scotland) Regulations 2022 (SSI 2022/95).
2. The Committee's recommendations in relation to this instrument, under the SSI Protocol, are set out in the next section of the report.
3. The Committee also considered the following instruments under its technical remit and agreed to draw them to the attention of the relevant lead committee:
 - National Health Service Pension Schemes (Scotland) Amendment Regulations 2022 (SSI 2022/100);
 - Police Pensions (Scotland) Amendment Regulations 2022 (SSI 2022/101);
 - Teachers' Pension Scheme (Scotland) Amendment Regulations 2022 (SSI 2022/102);
 - Firefighters' Pension Scheme (Scotland) Amendment Regulations 2022 (SSI 2022/103); and
 - National Health Service (Charges to Overseas Visitors) (Scotland) Amendment Regulations 2022 (SSI 2022/114).
4. The Committee's recommendations in relation to these instruments are set out later in the report.
5. The Committee also determined that in terms of its technical remit, it did not need to draw the Parliament's attention to the instruments at the end of the report.

Instruments considered under the European Union (Withdrawal) Act 2018

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

Crime (International Co-operation) Act 2003 (Freezing Order) (EU Exit) (Scotland) Regulations 2022 (SSI 2022/95)

6. The instrument relates to orders to preserve evidence. When the UK was a member of the EU, Council Framework Decision 2003/577/JHA established the rules under which EU Member States would recognise and execute in their territory a freezing order issued by a judicial authority of another Member State in the context of criminal proceedings. This was implemented in UK domestic law by the Crime (International Co-operation) Act 2003.
 7. The instrument is made under the power to correct deficiencies in retained EU law in the European Union (Withdrawal) Act 2018. It removes references in the 2003 Act to the EU Council Framework Decision, inserts definitions of “executing State”, “freezing order” and “issuing State”, and adds two new schedules replicating from the EU Council Framework Decision the list of offences and specified information.
8. **The Committee is content that the appropriate scrutiny procedure and categorisation have been applied to the instrument.**

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

National Health Service Pension Schemes (Scotland) Amendment Regulations 2022 (SSI 2022/100)

Police Pensions (Scotland) Amendment Regulations 2022 (SSI 2022/101)

Teachers' Pension Scheme (Scotland) Amendment Regulations 2022 (SSI 2022/102)

Firefighters' Pension Scheme (Scotland) Amendment Regulations 2022 (SSI 2022/103)

9. All four of these instruments are made under the Public Service Pensions Act 2013 ("the 2013 Act"). The 2013 Act introduced reforms to public service pension schemes including those in devolved nations. Transitional protections were provided for some scheme members which were found to be discriminatory against younger members in the Court of Appeal. The Public Service Pensions and Judicial Offices Act 2022 was passed containing the provision necessary to remedy the discrimination caused by these transitional protections, with the 2022 Act receiving Royal Assent on 10 March 2022. The instruments close the existing legacy pension schemes, except for limited purposes, to the accrual of pension benefits on and after 1 April 2022. Members treated as being in pensionable service under the existing pension schemes will, on that date, begin accruing benefits in the relevant scheme established by existing regulations.
10. The instruments were laid on 17 March 2022 and come into force on 1 April 2022. As they were laid less than 28 days before coming into force, they are in breach of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("the 2010 Act"). This rule requires that instruments subject to the negative procedure are laid at least 28 days before they come into force, not counting recess periods of more than 4 days.
11. In correspondence with the Presiding Officer, the Scottish Government explained that these regulations are as a consequence of the 2022 Act and are required to come into force immediately to ensure legal certainty and fairness. If there is a delay, then there will be a period in which certain members can no longer accrue pension in the legacy scheme, but scheme rules would prevent those members from joining the new scheme.
12. A copy of the correspondence can be found in the **Annex**.

13. The Committee draws SSIs 2022/100, 2022/101, 2022/102 and 2022/103 to the attention of the Parliament on reporting ground (j) for failure to lay the instruments in accordance with the laying requirements in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

14. **The Committee is nevertheless content with the explanations provided by the Scottish Government for failure to comply with the laying requirements.**

National Health Service (Charges to Overseas Visitors) (Scotland) Amendment Regulations (SSI 2022/114)

15. The instrument allows overseas visitors lawfully in Scotland from Ukraine who have been displaced as a result of the ongoing conflict with Russia to receive relevant healthcare services, provided by NHS Scotland, at no charge.
16. The instrument is made under the National Health Service (Scotland) Act 1978, was laid on 24 March 2022 and came into force the same day. As it was laid less than 28 days before coming into force, it is in breach of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("the 2010 Act"). As noted above, this requires that instruments subject to the negative procedure are laid at least 28 days before they come into force, not counting recess periods of more than 4 days.
17. In correspondence with the Presiding Officer, the Scottish Government explained that the regulations are required to come into force immediately to provide clarity to those who are responsible for making and recovering charges. The letter explains that the instrument provides assurance to displaced people from Ukraine that they are entitled to receive any treatment and care they require from NHS Scotland, at no charge, while lawfully present in Scotland.
18. A copy of the correspondence can be found in the **Annex**.

19. **The Committee draws the instrument to the attention of the Parliament on reporting ground (j) for failure to lay it in accordance with the laying requirements in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
20. **The Committee is nevertheless content with the explanation provided by the Scottish Government for failure to comply with the laying requirements.**

No technical points raised

Criminal Justice Committee

- Electronic Monitoring (Relevant Disposals) (Modification) (Scotland) Regulations 2022 (SSI 2022/93)
- Crime (International Co-operation) Act 2003 (Freezing Order) (EU Exit) (Scotland) Regulations 2022 (SSI 2022/95)
- Management of Offenders (Scotland) Act 2019 (Commencement No. 6 and Saving Provisions) Regulations 2022 (SSI 2022/94 (C.7))

Annex

National Health Service Pension Schemes (Scotland) Amendment Regulations 2022 (SSI 2022/100)

Police Pensions (Scotland) Amendment Regulations 2022 (SSI 2022/101)

Teachers' Pension Scheme (Scotland) Amendment Regulations 2022 (SSI 2022/102)

Firefighters' Pension Scheme (Scotland) Amendment Regulations 2022 (SSI 2022/103)

On 17 March 2022, the Scottish Government wrote to the Presiding Officer:

The above named SSIs, were made by the Scottish Ministers under section 1 of the Public Service Pensions Act 2013 ("the 2013 Act") on 17 March 2022. They are being laid before the Scottish Parliament today, 17 March 2022 and come into force on 1 April 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) that Act, this letter explains why.

These instruments provide the necessary regulations to begin to remove the discrimination identified by the Court of Appeal (known as the McCloud judgment), that was found in the transitional protections in the pension reforms in the 2013 Act. These SSIs represent the first of two pieces of subordinate legislation required for each pension scheme in order to fully remedy the discrimination and are required by the Public Service Pensions and Judicial Offices Act 2022 ("the 2022 Act").

These instruments could not be made and laid sooner because they were dependent on the 2022 Act receiving Royal Assent. This was originally expected to be received on 3 March 2022 however due to unavoidable delay, Royal Assent was received on 10 March 2022.

Chapter 4 of Part 1 of the Act, contains the operative prospective remedy provision necessary to bring to an end the unlawful age discrimination identified in the McCloud judgment.

In particular, section 88(2)(c) of the Act has the effect of closing the legacy public service pension schemes to future accrual after 31st March 2022. These instruments make consequential provision for the relevant pension schemes. This provision must come into force immediately after the legacy pension schemes are closed to future accrual by the Act to ensure legal certainty and fairness. If there is any delay, then there will be a period in which certain members can no longer accrue pension in the legacy scheme but scheme rules would prevent those members from joining the new scheme.

Consequently I must regrettably inform you that these four instruments will breach the 28 day rule. On 8 March 2022, Tom Arthur, Minister for Public Finance, Planning & Community Wealth, wrote to the Convener of the Delegated Powers and Law Reform Committee setting out that it would not be possible to meet the 28 day rule for these regulations. I attach a copy of that letter for information. For further supporting information, I also attach a copy of a letter sent by HM Treasury Legal Advisors to the Counsel to the

Joint Committee on Statutory Instruments, setting out the reasons for breaching their 21 day convention.

National Health Service (Charges to Overseas Visitors) (Scotland) Amendment Regulations (SSI 2022/114)

On 24 March 2022, the Scottish Government wrote to the Presiding Officer:

The National Health Service (Charges to Overseas Visitors) (Scotland) Amendment Regulations 2022 was made by the Scottish Ministers under sections 98 and 105 of the National Health Service (Scotland) Act 1978 on 24 March 2022. It is being laid before the Scottish Parliament today, 24 March 2022, and comes into force at 5pm today.

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.

This amending instrument is necessary to ensure that those fleeing the conflict in Ukraine, who are lawfully present in the United Kingdom are not charged for certain healthcare services provided by NHS Scotland. The UK Government, recently announced visa routes open to persons fleeing Ukraine. Individuals who come to the UK under those schemes would be charged under the current provisions in the NHS (Charges to Overseas Visitors) (Scotland) Regulations 1989 for certain healthcare services provided by NHS Scotland.

This instrument introduces a new regulation 4C, which creates an exemption from the charges for all people who are ordinarily resident in Ukraine and are lawfully present in the UK. The exemption also applies to those people's spouses, civil partners or children. This approach ensures that the exemption is consistent across the available visa routes.

We are bringing these provisions into force now to provide clarity to those who are responsible for making and recovering charges, and to provide assurance to displaced people from Ukraine that they are entitled to receive any treatment and care they require from NHS Scotland, at no charge, while lawfully present in Scotland. Similar amendments which apply in England have been in force since 5pm on 17 March.

A copy of this letter goes to Stuart McMillan, Convenor of the Delegated Powers and Law Reform Committee, and Gillian Martin, Convenor of the Health, Social Care and Sport Committee.

