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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 19 September 2023



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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 19 September, the Committee considered the following instruments under its remit and agreed to draw them to the attention of the Parliament:
 - Police Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/239);
 - Local Government Pension Scheme (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/240);
 - Teachers' Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/241);
 - Firefighters' Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/242); and
 - National Health Service Pension Schemes (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/246).
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, 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 instruments under the Committee's remit: instruments drawn to the attention of the Parliament

Police Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/239)

4. This instrument is made under powers in the Public Service Pensions Act 2013 and the Public Service Pensions and Judicial Offices Act 2022.
5. The instrument makes changes to Scottish police pension schemes which are necessary following a successful challenge to police and other public sector pension schemes in the Court of Appeal in 2018.
6. It forms part of a package of measures to address the age discrimination that was identified by the Court in the transitional protections afforded to some scheme members in public service pension schemes.
7. 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. The instrument breaches this requirement as it was laid on 30 August and comes into force on 1 October 2023.
8. In a letter to the Presiding Officer, the Scottish Public Pensions Agency explained that:
 - as public service pensions are reserved to Westminster, legislation for Scotland was contingent on equivalent statutory instruments being introduced by other UK responsible authorities;
 - UK Government had to consider the interaction of retrospective changes to pension schemes with pensions taxation legislation. This was extremely complex matter that required changes to the Finance Act 2004 as well as subordinate legislation that came into force in two phases during 2023. This has contributed to delays to the overall remedy policy development for all UK schemes; and
 - the instruments were dependent on the completion of the public consultations, which ran variously from May 2023 and until July 2023. As Parliament entered recess before the respective mandatory consultation periods ended in July 2023, there was no opportunity to make these regulations before the recess or lay them before Parliament for the necessary period before the required coming into force date of 1 October 2023.
9. In correspondence with the Scottish Government, the Committee raised a number of points concerning the provisions:
 1. whether the references in regulation 10(c) and paragraph 1(1) of the schedule to an “immediate choice election” could be to a defined term;

2. whether the references in regulations 13(4), 16(b) and paragraph 1(1) of the schedule to a “deferred choice election decision” could be to a defined term; and
 3. whether in paragraph 3 of the schedule, where the eligible decision-maker is a guardian only, whether reference should also be made to a parent.
10. The Committee also identified a number of other drafting points in the instrument:
1. in the preamble, the reference to paragraph 7(a) of schedule 2 of the Public Service Pensions Act 2013 (which provides that scheme regulations for members of a police force may be made by the Secretary of State in or as regards England), should be to paragraph 7(b) (which provides that such regulations made be made by the Scottish Ministers in or as regards Scotland);
 2. in regulation 18(2) the reference to “regulation 23(3) and (4)” should be to regulation 22(3);
 3. in regulation 24(1)(b)(i) the reference to “the end section of the section 6 election period” should be a reference to “the end of the section 6 election period” in line with the defined term; and
 4. in the schedule, paragraph 1(1), in the definition of “eligible decision-maker, the references to regulations 5(2)(b), 7(2)(b) and 11(2)(b) should be to regulations 6(2)(b), 8(2)(b), and 12(2)(b) respectively.
11. The Scottish Government confirmed it proposes to amend all of the above issues via an amending instrument, with the exception of the error in the preamble, which it proposes to amend by correction slip.
12. A copy of the correspondence can be found in the **Annex**.
13. The lead committee for this instrument is the Criminal Justice Committee.

14. 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.

15. The Committee is content with the Scottish Government’s explanation provided for this breach of the laying requirements.

16. The Committee also draws the instrument to the attention of the Parliament on:

1. reporting ground (h) (the meaning could be clearer) in that:

- **the references in regulation 10(c) and paragraph 1(1) of the schedule to**

an “immediate choice election” could be to a defined term;

- the references in regulations 13(4), 16(b) and paragraph 1(1) of the schedule to a “deferred choice election decision” could be to a defined term; and
- in paragraph 3 of the schedule, the eligible decision-maker is a guardian only, but it appears that this should also include a parent.

and

2. the general reporting ground, in that:

- in the preamble, the reference to paragraph 7(a) of schedule 2 of the 2013 Act should be to paragraph 7(b);
- in regulation 18(2) the incorrect cross-reference to “regulation 23(3) and (4)”;
- in regulation 24(1)(b)(i) the reference to “the end section of the section 6 election period” should be a reference to “the end of the section 6 election period”; and
- in the schedule, paragraph 1(1), in the definition of “eligible decision-maker, the incorrect cross-references to regulations 5(2)(b), 7(2)(b) and 11(2)(b).

17. The Committee notes the Scottish Government proposes to correct the error in the preamble by correction slip, and to address the other points raised by way of an amending instrument.

Local Government Pension Scheme (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/240)

18. This instrument is made under powers in the Public Service Pensions Act 2013 and the Public Service Pensions and Judicial Offices Act 2022.
19. The instrument makes changes to Scottish local government pension schemes which are necessary following a successful challenge to police and other public sector pension schemes in the Court of Appeal in 2018.
20. It forms part of a package of measures to address the age discrimination that was identified by the Court in the transitional protections afforded to some scheme members in public service pension schemes.
21. 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. The instrument breaches this requirement as it was laid on 30 August and comes into force on 1 October 2023.
22. In a letter to the Presiding Officer, the Scottish Public Pensions Agency explained

that:

- as public service pensions are reserved to Westminster, legislation for Scotland was contingent on equivalent statutory instruments being introduced by other UK responsible authorities;
- UK Government had to consider the interaction of retrospective changes to pension schemes with pensions taxation legislation. This was extremely complex matter that required changes to the Finance Act 2004 as well as subordinate legislation that came into force in two phases during 2023. This has contributed to delays to the overall remedy policy development for all UK schemes; and
- the instruments were dependent on the completion of the public consultations, which ran variously from May 2023 and until July 2023. As Parliament entered recess before the respective mandatory consultation periods ended in July 2023, there was no opportunity to make these regulations before the recess or lay them before Parliament for the necessary period before the required coming into force date of 1 October 2023.

23. The Committee identified erroneous references in regulations 2(4), 3(13), 3(15) and 13(4) of the instrument to “the Local Government Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023”
24. The Scottish Government confirmed that these are errors, and have arisen because they refer to the draft title of the instrument rather than the final title of the instrument as laid (the final title being the “Local Government Pension Scheme (Remediable Service) (Scotland) Regulations 2023”). The Scottish Government stated that it proposes to correct these errors via a correction slip.
25. A copy of the correspondence can be found in the **Annex**.
26. The lead committee for this instrument is the Local Government, Housing and Planning Committee.

27. 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.

28. The Committee is content with the Scottish Government’s explanation provided for this breach of the laying requirements.

29. The Committee also draws the instrument to the attention of the Parliament on the general reporting ground for the erroneous references to the Local Government Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023 in regulations 2(4), 3(13), 3(15) and 13(4) of the instrument.

30. The Committee notes the Scottish Government has undertaken to correct

the errors by correction slip.**Teachers' Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/241)**

31. This instrument is made under powers in the Public Service Pensions Act 2013 and the Public Service Pensions and Judicial Offices Act 2022.
32. The instrument makes changes to Scottish teachers' pension schemes which are necessary following a successful challenge to police and other public sector pension schemes in the Court of Appeal in 2018.
33. It forms part of a package of measures to address the age discrimination that was identified by the Court in the transitional protections afforded to some scheme members in public service pension schemes.
34. 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. The instrument breaches this requirement as it was laid on 30 August and comes into force on 1 October 2023.
35. In a letter to the Presiding Officer, the Scottish Public Pensions Agency explained that:
 - As public service pensions are reserved to Westminster, legislation for Scotland was contingent on equivalent statutory instruments being introduced by other UK responsible authorities;
 - UK Government had to consider the interaction of retrospective changes to pension schemes with pensions taxation legislation. This was extremely complex matter that required changes to the Finance Act 2004 as well as subordinate legislation that came into force in two phases during 2023. This has contributed to delays to the overall remedy policy development for all UK schemes; and
 - the instruments were dependent on the completion of the public consultations, which ran variously from May 2023 and until July 2023. As Parliament entered recess before the respective mandatory consultation periods ended in July 2023, there was no opportunity to make these regulations before the recess or lay them before Parliament for the necessary period before the required coming into force date of 1 October 2023.
36. The Committee identified a number of drafting errors in the instrument:
 1. in regulation 2(1) and paragraph 1(1) of the schedule, reference is made to “deferred choice election decision” rather than to the defined term “deferred choice decision”;
 2. regulation 46(7) refers to “compensatable amount” whereas the defined term is “compensation amount”;

3. paragraph 1(1) of the schedule, refers to “immediate choice election” whereas the defined term is “immediate choice decision”; and
 4. in paragraph 3 of the schedule, the eligible decision-maker is a guardian only, but it appears that this should also include a parent.
37. In its response to the Committee, the Scottish Government suggested that points a – c above are clear in context. However, the Committee considered it would be clearer to use the defined terms. In relation to point d above, the Scottish Government advised that in most cases, a child’s status as the sole beneficiary of death benefits (as referred to in the relevant paragraph) would be as a result of the death of both of their parents, but to take account of circumstances where a child has a surviving parent who is not a beneficiary of death benefits, for instance due to divorce, this reference will be amended to also refer to “parent”.
38. The Committee also identified the following cross referencing errors:
1. in regulation 23, “legacy scheme cash equivalent” is defined by reference to regulation 24(2)(b) but should be to 24(2)(a); and “reformed scheme cash equivalent” is defined by reference to regulation 24(2)(a) but should be to 24(2)(b);
 2. in regulation 55(1)(b), the reference to the Teachers’ Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023 should be to the Teachers’ Pensions (Remediable Service) (Scotland) Regulations 2023;
 3. in regulation 63(1)(c), the reference to regulation 623 should be to should be to regulation 62; and
 4. regulations 64(2) & (5), the reference to regulation 622 should be to regulation 62.
39. The Scottish Government confirmed these are all errors. It proposes to make corrections via the next amending instrument, as set out in detail in its response.
40. A full copy of the correspondence can be found in the **Annex**.
41. The lead committee for this instrument is the Education, Children and Young People Committee.

42. 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.

43. The Committee is content with the Scottish Government’s explanation provided for this breach of the laying requirements.

44. The Committee also draws the instrument to the attention of the Parliament on:

1. reporting ground (h) (the meaning could be clearer) in that:

- in regulation 2(1) and paragraph 1(1) of the schedule, reference is made to “deferred choice election decision” rather than to the defined term “deferred choice decision”;
- regulation 46(7) refers to “compensatable amount” whereas the defined term is “compensation amount”;
- paragraph 1(1) of the schedule, refers to “immediate choice election” whereas the defined term is “immediate choice decision”; and
- in paragraph 3 of the schedule, the eligible decision-maker is a guardian only, but it appears that this should also include a parent.

and**2. the general reporting ground, in respect of the following cross-referencing errors:**

- in regulation 23, the reference to regulation 24(2)(b);
- in regulation 55(1)(b), the reference to the Teachers’ Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023;
- in regulation 63(1)(c), the reference to regulation 623; and
- in regulations 64(2) & (5), the reference to regulation 622.

45. **The Committee notes the Scottish Government proposes to address these matters in the next amending instrument.**

Firefighters’ Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/242)

46. This instrument is made under powers in the Public Service Pensions Act 2013 and the Public Service Pensions and Judicial Offices Act 2022.
47. The instrument makes changes to Scottish firefighters’ pension schemes which are necessary following successful challenge to police and other public sector pension schemes in the Court of Appeal in 2018.
48. It forms part of a package of measures to address the age discrimination that was identified by the Court in the transitional protections afforded to some scheme members in public service pension schemes.
49. 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. The instrument breaches this requirement as it was laid on 30 August and comes into force on 1 October 2023.

50. In a letter to the Presiding Officer, the Scottish Public Pensions Agency explained that:
- as public service pensions are reserved to Westminster, legislation for Scotland was contingent on equivalent statutory instruments being introduced by other UK responsible authorities;
 - UK Government had to consider the interaction of retrospective changes to pension schemes with pensions taxation legislation. This was extremely complex matter that required changes to the Finance Act 2004 as well as subordinate legislation that came into force in two phases during 2023. This has contributed to delays to the overall remedy policy development for all UK schemes; and
 - the instruments were dependent on the completion of the public consultations, which ran variously from May 2023 and until July 2023. As Parliament entered recess before the respective mandatory consultation periods ended in July 2023, there was no opportunity to make these regulations before the recess or lay them before Parliament for the necessary period before the required coming into force date of 1 October 2023.
51. The Committee identified two drafting errors in the instrument which it considered engaged the “defective drafting” reporting ground:
1. regulation 12(11) provides (in effect) that in particular circumstances where the amount of pension benefits that have been paid out on one basis exceeds the amount to which the person was entitled, “the beneficiary must pay an amount equal to the difference to the beneficiary”. The Scottish Government has confirmed that this is an error. They advised that the payee should be the scheme manager. The Committee considered that the “defective drafting” ground is engaged because the provision is clearly wrong; it is not obvious to the reader what the provision should say; and the dubiety concerns a matter of significance, namely who must pay money to whom.
 2. the schedule of the instrument specifies who is eligible to make decisions in relation to the pension of deceased pension scheme members, in various different circumstances. Paragraph 11(2)(b)(ii) is intended to specify who the eligible person is when all of the following apply: there are multiple beneficiaries including at least one adult and at least one child, the deceased member has no personal representative, none of the beneficiaries is a “surviving adult”, and all the children are over 18. However, the provision ends without nominating a decision-maker. The Scottish Government has confirmed that this is a drafting error and that the provision should specify the scheme manager as the decision-maker. The same drafting issue arises in paragraph 7(2)(b) of the schedule.
- The Committee considered that the “defective drafting” ground is engaged because the provision does not work; it will not be obvious to the reader who the decision-maker should be; and that the error affects the operation of a significant provision which determines who can make a decision in relation to a deceased person’s pension.
52. The Committee also identified a number of other points on in the instrument which it

considered could be clearer:

1. regulation 10(c) and paragraph 1(1) of the schedule refer to an “immediate choice election”, which is not a defined term, although “immediate choice decision” and “section 6 election” are defined;
 2. the references in regulations 13(4), 16(b) and paragraph 1(1) of the schedule to a “deferred choice election decision” could be to the defined term “deferred choice decision”;
 3. regulation 54(1)(b) refers to “surviving partner”, but there is no definition of “surviving partner” or “partner” in the instrument or the parent Acts, whereas “surviving adult” appears in the schedule of the instrument, and “adult survivor” appears in one of the parent Acts (the Public Service Pensions and Judicial Offices Act 2022). The Scottish Government has proposed to clarify this by inserting a new definition of “surviving partner” at paragraph 1(1) of the schedule, as follows: “surviving partner” has the meaning given in regulation 76 of the 2015 Regulations”; and
 4. in paragraph 3 of the schedule, the eligible decision-maker is a guardian only, but it appears that this should also include a parent.
53. The Committee also identified the following errors which it considered engage the general reporting ground:
1. in the preamble, the reference to paragraph 6(a) of schedule 2 of the 2013 should be to paragraph 6(c) (paragraph 6(a) of schedule 2 of the 2013 Act provides that scheme regulations for fire and rescue workers may be made by the Secretary of State in or as regards England, it is paragraph 6(c) which provides that such regulations made be made by the Scottish Ministers in or as regards Scotland);
 2. in regulation 2(1), a cross-reference to Part 1 of schedule 2 of the 1992 Order, which the Scottish Government advised should be to Part D of that schedule;
 3. in regulation 2(1), in the definition of “immediate choice member”, the reference to a member “with remedial service”, which should be to “remediable” service in line with the defined term in the parent Act; and similarly the references to “remedial service” in regulation 18(1) and “remedial service statement” in regulation 14(2)(a)(i);
 4. In regulation 12(8)(b), the incorrect cross-reference to regulation 15;
 5. in regulation 24(1)(b)(i) the reference to “the end section of the section 6 election period” should be to “the end of the section 6 election period” in line with the defined term;
 6. in regulation 62(2), the reference to regulation 63 should be to regulation 65;
 7. in regulation 65(9), the reference to paragraph (5), which the Scottish Government has confirmed should be to paragraphs (6) and (7), and
 8. in the schedule, paragraph 1(1), in the definition of “eligible decision-maker, the references to regulations 5(2)(b), 7(2)(b) and 11(2)(b) should be references to

6(2)(b), 8(2)(b) and 12(2)(b) respectively.

54. The Scottish Government confirmed it proposes to amend all of the above issues via an amending instrument, with the exception of the error in the preamble, which it proposes to amend by correction slip.
55. A copy of the correspondence can be found in the **Annex**.
56. The lead committee for this instrument is the Health, Social Care and Sport Committee.

57. 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.

58. The Committee is content with the Scottish Government’s explanation provided for this breach of the laying requirements.

59. The Committee also draws the instrument to the attention of the Parliament on:

1. reporting ground (i) (defective drafting), in that:

- the drafting of regulation 12(11) appears to be defective given the error concerning to whom the money is to be paid; and
- the drafting of paragraphs 7(2)(b) and 11(2)(b)(ii) and 7(2)(b) of the schedule appears to be defective because these provisions fail to state who the eligible decision-maker is.

and

2. reporting ground (h) (the meaning could be clearer,) in that:

- the references in regulation 10(c) and paragraph 1(1) of the schedule to an “immediate choice election” could be to a defined term;
- the references in regulations 13(4), 16(b) and paragraph 1(1) of the schedule to a “deferred choice election decision” could be to a defined term;
- “surviving partner”, which is referred to in regulation 54(1)(b), is not defined; and
- in paragraph 3 of the schedule, the eligible decision-maker is a guardian only, but it appears that this should also include a parent.

and

3. the general reporting ground, in that:

- in the preamble, the reference to paragraph 6(a) of schedule 2 of the 2013 should be to paragraph 6(c);
- in regulation 2(1), the incorrect cross-reference to Part 1 of schedule 2 of the 1992 Order;
- in regulation 2(1) in the definition of “immediate choice member”, and in regulations 14(2)(a)(i) and 18(1), the reference to “remedial” service;
- in regulation 12(8)(b), the incorrect cross-reference to regulation 15;
- in regulation 24(1)(b)(i) the reference to “the end section of the section 6 election period”;
- in regulation 62(2), the incorrect cross-reference to regulation 63;
- in regulation 65(9), the incorrect cross-reference to paragraph (5); and
- in the schedule, paragraph 1(1), in the definition of “eligible decision-maker, the incorrect cross-references to regulations 5(2)(b), 7(2)(b) and 11(2)(b).

60. The Committee notes the Scottish Government proposes to correct the error in the preamble by correction slip, and to address these other matters by way of an amending instrument.

National Health Service Pension Schemes (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/246)

61. This instrument is made under powers in the:
- Superannuation Act 1972;
 - Public Service Pensions Act 2013; and the
 - Public Service Pensions and Judicial Offices Act 2022.
62. The instrument makes changes to the pension schemes of NHS workers in Scotland which are necessary following a successful challenge to police and other public sector pension schemes in the Court of Appeal in 2018.
63. It forms part of a package of measures to address the age discrimination that was identified by the Court in the transitional protections afforded to some scheme members in public service pension schemes.
64. 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. The instrument breaches this requirement as it was laid on 5 September and comes into force on 1 October 2023.

65. In a letter to the Presiding Officer, the Scottish Public Pensions Agency explained that:
- As public service pensions are reserved to Westminster, legislation for Scotland was contingent on equivalent statutory instruments being introduced by other UK responsible authorities;
 - UK Government had to consider the interaction of retrospective changes to pension schemes with pensions taxation legislation. This was extremely complex matter that required changes to the Finance Act 2004 as well as subordinate legislation that came into force in two phases during 2023. This has contributed to delays to the overall remedy policy development for all UK schemes; and
 - the instruments were dependent on the completion of the public consultations, which ran variously from May 2023 and until July 2023. As Parliament entered recess before the respective mandatory consultation periods ended in July 2023, there was no opportunity to make these regulations before the recess or lay them before Parliament for the necessary period before the required coming into force date of 1 October 2023.
66. The Committee identified cross referencing errors in relation to:
1. in regulation 5(4), the incorrect cross-reference to regulation 3(4);
 2. in regulation 7(2)(a), the incorrect cross reference to 8(2)(b)(ii); and
 3. in regulation 18(12)(b) the omitted cross reference to paragraph 5(a).
67. The Scottish Government confirmed it proposes to address these matters in the next amending instrument.
68. A copy of the correspondence can be found in the **Annex**.
69. The lead committee for this instrument is the Health, Social Care and Sport Committee.

70. 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.

71. The Committee is content with the Scottish Government's explanation provided for this breach of the laying requirements.

72. The Committee also draws the instrument to the attention of the Parliament on the general reporting ground, in respect of:

- **in regulation 5(4), the incorrect cross-reference to regulation 3(4);**

- in regulation 7(2)(a), the incorrect cross reference to 8(2)(b)(ii); and
- in regulation 18(12)(b) the omitted cross reference to paragraph 5(a).

73. **The Committee notes that the Scottish Government proposes to address these matters in the next amending instrument.**

No points raised

Local Government, Housing and Planning Committee

Local Government Investments (Scotland) Amendment Regulations 2023 (SSI 2023/255)

Health, Social Care and Sport Committee

Sports Grounds and Sporting Events (Designation) (Scotland) Amendment Order 2023 (SSI 2023/257)

Net Zero, Energy and Transport Committee

Parking Attendants (Wearing of Uniforms) (North Ayrshire Council) Regulations 2023 (SSI 2023/248)

Transport (Scotland) Act 2019 (Commencement No. 7) Regulations 2023 (SSI 2023/250 (C. 20))

Social Justice and Social Security Committee

Disability Assistance (Miscellaneous Amendment) (Scotland) Regulations 2023 (SSI 2023/Draft)

Annex

30 August 2023, correspondence from the Scottish Public Pensions Agency to the Presiding Officer

Police Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/239)

Local Government Pension Scheme (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/240)

Teachers' Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/241);

Firefighters' Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/242)

The above named SSIs were made by the Scottish Ministers under section 1 of the Public Service Pensions Act 2013 ("the 2013 Act") on 30 August 2023. They are being laid before the Scottish Parliament on 30 August 2023 and come into force on 1 October 2023.

National Health Service Pension Schemes (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/246)

The above named SSI is being made by the Scottish Ministers under section 1 of the Public Service Pensions Act 2013 ("the 2013 Act") on 5 September 2023. It is being laid before the Scottish Parliament on 5 September 2023 and come into force on 1 October 2023.

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.

These instruments provide the necessary regulations 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 second 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"), which received Royal Assent on 10 March 2022.

The 2022 Act requires responsible authorities for public service pension schemes – in the case of the executively devolved schemes in Scotland, the Scottish Ministers – to introduce scheme-specific legislation by 1 October 2023. Occupational pensions, including public service pensions, are reserved to Westminster. As such, remedial policy and legislative work to ensure the unlawful discrimination was removed was co-ordinated by HM Treasury and policy and legislation for Scotland was contingent on the coordinated agreement and the consistency with the drafting of the equivalent statutory instruments being introduced by other UK responsible authorities.

In addition, for 2015 remedy to be delivered required the UK Government to consider the interaction of retrospective changes to pension schemes with the pensions taxation legislation, to ensure individuals would be placed in the correct tax position following 1

October 2023. This was extremely complex matter that required changes to the Finance Act 2004 as well as subordinate legislation that came into force in two phases during 2023. This has contributed to delays to the overall remedy policy development for all UK schemes.

Lastly, the instruments were dependent on the completion of the public consultations, which ran variously from May 2023 and until July 2023. As parliament entered recess before the respective mandatory consultation periods ended in July 2023, there was no opportunity to make these regulations before the recess, or lay them before parliament for the necessary period before the required coming into force date of 1 October 2023.

Consequently I must regrettably inform you that these five instruments will breach the 28 day rule. I can confirm Tom Arthur, Minister for Community Wealth and Public Finance, has written to the Convener of the Delegated Powers and Law Reform Committee and the Minister for Parliamentary Business setting out that it would not be possible to meet the 28 day rule for these regulations.

9 September 2023, correspondence from the Scottish Public Pensions Agency to the Presiding Officer

Public Service Pensions Regulations – the 2015 Remedy

I wrote to you on 30 August in relation to a package of five Scottish Statutory Instruments (SSIs) that were made by the Scottish Ministers under section 1 of the Public Service Pensions Act 2013 (“the 2013 Act”) on 30 August 2023 and 5 September 2023. My letter offered an explanation why the instruments would not meet the 28 day rule. Unfortunately, in that letter I referred to three of the SSIs by their draft title rather than the correct final title. I am writing to you again today to clarify that the correct titles for the instruments are:

The Firefighters' Pensions (Remediable Service) (Scotland) Regulations 2023

The Teachers' Pensions (Remediable Service) (Scotland) Regulations 2023

The Local Government Pension Scheme (Remediable Service) (Scotland) Regulations 2023

The titles of the two other instruments in the package, **The Police Pensions (Remediable Service) (Scotland) Regulations 2023** and **The National Health Service Pension Schemes (Remediable Service) (Scotland) Regulations 2023**, were noted correctly in the original letter.

I apologise for any inconvenience this has caused and hope this clarification is helpful. I attach a copy of the original letter for reference.

Carer's Assistance (Carer Support Payment) (Scotland) Regulations 2023 (SSI 2023/ Draft)

On 11 September 2023, the Committee asked the Scottish Government:

1. In regulation 6(6)(b)(iii)(cc), is the reference to regulation 2B2 of the Social Security (Disability Living Allowance) Regulations (Northern Ireland) 1992 correct?
2. Again, in regulation 6(6)(b)(iii)(cc), is the reference to regulation 5 of the Social Security (Disability Living Allowance) Regulations (Northern Ireland) 1992 correct?

Regulation 5 was revoked by the Social Security (Miscellaneous Amendments No. 2) Regulations (Northern Ireland) 1997.

Please confirm whether any corrective action is proposed, and if so, what action and when.

On 14 September 2023, the Scottish Government responded:

1. No, the reference to “regulation 2B2” is not correct and we thank the DPLRC for pointing this out. This was a typographical error and should instead read “regulation 2B”.
2. Once again, we thank the DPLRC for pointing this error out. The reference to “regulation 5” should instead read “paragraph 5 of Schedule 2”.

We propose to make both of the above amendments at the earliest possible opportunity.

Police Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/239)

On 8 September 2023, the Committee asked the Scottish Government:

1. In the preamble, should the reference to paragraph 7(a) of schedule 2 of the Public Service Pensions Act 2013 (which provides that scheme regulations for members of a police force may be made by the Secretary of State in or as regards England), be to paragraph 7(b) (which provides that such regulations made be made by the Scottish Ministers in or as regards Scotland)?
2. Regulation 10(c) and paragraph 1(1) of the schedule refer to an “immediate choice election” This term is not defined, although “immediate choice decision” and “section 6 election” are defined. Would it be clearer to use a defined term?
3. Regulations 13(4), 16(b) and paragraph 1(1) of the schedule refer to a “deferred choice election decision”. Should this be a reference to the defined term “deferred choice decision”?
4. In regulation 18(2), should the reference to regulation 23(3) and (4) be a reference to regulation 22(3)?
5. In regulation 24(1)(b)(i) should “the end section of the section 6 election period” be “the end of the section 6 election period” in line with the defined term?
6. Part 8 of the equivalent English regulations (SI 2023/831) which deals with “immediate detriment cases” has not been replicated in this instrument. Could you confirm that this is not required?
7. In the definition of “eligible decision-maker” in paragraph 1(1) of the schedule, should the references to regulations 5(2)(b), 7(2)(b) and 11(2)(b) be references to regulations 6(2)(b), 8(2)(b), and 12(2)(b) respectively?
8. In paragraph 3 of the schedule, the eligible decision-maker is a “guardian” (only). Should reference also be made to a parent?

On 12 September 2023, the Scottish Government responded:

1. Yes, this should be a reference to paragraph 7(b) of schedule 2 of the Public Service

Pensions Act 2013.

2. Yes, this should refer to an “immediate choice decision”.
3. Yes, this should refer to a “deferred choice decision”.
4. Yes, this should refer to regulation 22(3).
5. Yes, this should refer to “the end of the section 6 election period”.
6. Confirm that this is not required due to Scottish policy approach.
7. Yes, this should refer to regulations 6(2)(b), 8(2)(b), and 12(2)(b).
8. Yes, this should refer to “parent or guardian”.

Following advice from the SI Registrar, we propose to amend these issues via an amending instrument.

On 19 September, the Scottish Government added:

We previously advised our intention to include this correction in an amending instrument, alongside other corrections identified in the same instrument. We now note, however, that preambles are not capable of amendment by amending instrument. Therefore, we propose to make this amendment by correction slip. The SI Registrar has already confirmed that this is acceptable.

Local Government Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/240)

On 7 September 2023, the Committee asked the Scottish Government:

1. The letter from the Scottish Public Pensions Agency to the Presiding Officer dated 30 August 2023 outlining the reasons for failure to comply with laying requirements refers to the Local Government Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023. The instrument which was laid before the Scottish Parliament alongside this letter is titled the Local Government Pensions (Remediable Service) (Scotland) Regulations 2023. We assume that the letter should refer to the instrument laid before the Scottish Parliament which is titled the Local Government Pensions (Remediable Service) (Scotland) Regulations 2023, but would be grateful if you could confirm.
2. Should the references to the Local Government Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023 in the following places be to the Local Government Pensions (Remediable Service) (Scotland) Regulations 2023?
 - regulation 2(4) of the instrument inserting regulation 4T(2) into the 2014 regulations;
 - regulation 3(13) of the instrument inserting regulation 76(A1)(b) into the 2014 regulations;
 - regulation 3(15) of the instrument inserting regulation 93(9) into the 2014 regulations; and

- regulation 13(4) of the instrument inserting regulation 41(11) into the 2014 regulations.

Please confirm whether any corrective action is proposed, and if so, what action and when.

On 12 September 2023, the Scottish Government responded:

1. The title of the draft regulations was changed shortly before the date they were made and laid, from the Local Government Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023 to the Local Government Pensions (Remediable Service) (Scotland) Regulations 2023. We confirm that the letter dated 30 August 2023 from the Scottish Public Pensions Agency to the Presiding Officer should have referred to the latter title, rather than erroneously referring to the former, original, title. This oversight is regretted.
2. We confirm that the references in the provisions specified at paragraph 2 above should be to the Local Government Pensions (Remediable Service) (Scotland) Regulations 2023.
3. The SI registrars have confirmed that the erroneous references identified at paragraph 2 above may be addressed by the issue of a correction slip. Therefore, the Scottish Government intend to issue a correction slip.

Teachers' Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/241)

On 7 September 2023, the Committee asked the Scottish Government:

1. The letter from the Scottish Public Pensions Agency to the Presiding Officer dated 30 August 2023 outlining the reasons for failure to comply with laying requirements refers to the Teachers' Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023. The instrument that was laid before the Scottish Parliament alongside this letter is titled the Teachers' Pensions (Remediable Service) (Scotland) Regulations 2023. We assume that the letter should refer to the instrument laid before the Scottish Parliament which is titled The Teachers' Pensions (Remediable Service) (Scotland) Regulations 2023, but would be grateful if you could confirm.
2. In regulation 2(1), "deferred choice decision-maker" is defined by reference to a "deferred choice election decision". Should this be a reference to the defined term "deferred choice decision"? Similarly, in schedule, paragraph 1(1), should the reference in two places to a "deferred choice election decision" be to "deferred choice decision"?
3. In regulation 23, "legacy scheme cash equivalent" is defined by reference to regulation 24(2)(b). Should this be 24(2)(a)? Similarly, "reformed scheme cash equivalent" is defined by reference to regulation 24(2)(a). Should this be 24(2)(b)?
4. In regulation 46(6) creates a defined term: "the compensation amount". In regulation 46(7) reference is made to "the compensatable amount". Should this reference be to "the compensation amount"? The does not appear to be any other reference in the Regulations to "compensation amount".
5. In regulation 55(1)(b), reference is made to regulation 4(2)(a) of the Teachers' Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023.

Should this reference be to the Teachers' Pensions (Remediable Service) (Scotland) Regulations 2023?

6. In regulation 63(1)(c) reference is made to "regulation 62~~3~~". Is this an incorrect cross-reference?
7. In regulation 64(2) & (5) reference is made to "regulation 62~~2~~". Is this an incorrect cross-reference?
8. In the schedule, paragraph 1(1), reference is made to "immediate choice election as mentioned in regulation 8(2)(b)". This term is not mentioned in regulation 8(2)(b), although regulation 8(2)(b) does mention "immediate choice decision", which is defined in section 8(1). Is this sufficiently clear?
9. In the schedule, paragraph 3, the eligible decision-maker is a "guardian" (only), should reference also be made to a parent?

Please confirm whether any corrective action is proposed, and if so, what action and when.

On 12 September 2023, the Scottish Government responded:

1. The title of the draft regulations was changed shortly before the date they were made and laid, from the Teachers' Pension Scheme (Transitional Protection Remedy) (Scotland) Regulations 2023 to the Teachers' Pensions (Remediable Service) (Scotland) Regulations 2023. We confirm that the letter dated 30 August 2023 from the Scottish Public Pensions Agency to the Presiding Officer should have referred to the latter title, rather than erroneously referring to the former, original, title. This oversight is regretted.
2. The references in regulation 2(1) and paragraph 1(1) of the schedule to a deferred choice election decision should be to a deferred choice decision. But it is considered that the intended meaning in both cases is clear, in context.
3. The references in regulation 23 should be to regulation 24(2)(a) and regulation 24(2)(b), respectively. It is considered that the intended meaning should be clear, but these references will be corrected in the next amending instrument.
4. References in regulation 46(7) to "the compensatable amount" should be to "the compensation amount". It is considered that taking into account the wording of regulation 46(7), the intended meaning is clear, but this will be corrected in the next amending instrument.
5. The reference in regulation 55(1)(b) should be to the Teachers' Pensions (Remediable Service) (Scotland) Regulations 2023. This will be corrected in the next amending instrument
6. This reference is incorrect and should be to regulation 62. It is considered that this is an obvious typographical error, the intended meaning of which should be clear in context, but it will be corrected in the next amending instrument.
7. This reference is incorrect and should be to regulation 62. It is considered that this is an obvious typographical error, the intended meaning of which should be clear in context, but it will be corrected in the next amending instrument.

8. It is considered that the intended meaning of the reference in paragraph 1(1) of the schedule should be clear, but for the avoidance of any doubt, this will be corrected in the next amending instrument.

9. It is considered that in most cases, a child's status as the sole beneficiary of death benefits, as referred to in that paragraph, would be as a result of the death of both of their parents. But to take account of circumstances where a child has a surviving parent who is not a beneficiary of death benefits, for instance due to divorce, this reference will be amended to also refer to "parent" in the next amending instrument.

10. Corrective action is proposed, as detailed above.

Firefighters' Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/242)

On 7 September 2023, the Committee asked the Scottish Government:

1. In the preamble, should the reference to paragraph 6(a) of schedule 2 of the 2013 Act (which provides that scheme regulations for fire and rescue workers may be made by the Secretary of State in or as regards England), be to paragraph 6(c) (which provides that such regulations made be made by the Scottish Ministers in or as regards Scotland)?
2. Regulation 2(1) provides that "eligible child", in relation to the 1992 scheme, has the meaning given in Part 1 of schedule 2 of the 1992 Order. There does not appear to be a Part 1 of that schedule (its parts have letters rather than numbers). Is it sufficiently clear what "eligible child" means in the instrument?
3. In regulation 2(1), the definition of "immediate choice member" states that this means a member "with remedial service". Should this be "remediable", in line with the defined term in the parent Act? The phrase "remedial service" also appears in regulation 18(1) and in the phrase "remedial service statement" in regulation 14(2)(a)(i).
4. Regulation 10(c) and paragraph 1(1) of the schedule refer to an "immediate choice election" This term is not defined, although "immediate choice decision" and "section 6 election" are defined. Would it be clearer to use a defined term?
5. In regulation 12(8)(b), is the cross-reference to regulation 15 an error? It appears that regulation 15 contains additional requirements for the provision of information whereas the provision under which a section 10 election is deemed to have been made is regulation 16.
6. Regulation 12(11) provides (in the full-out) that in certain circumstances, "the beneficiary must pay an amount... to the beneficiary". Is this an error? Should the payment instead be to the scheme?
7. Regulations 13(4), 16(b) and paragraph 1(1) of the schedule refer to a "deferred choice election decision". Should this be a reference to the defined term "deferred choice decision"?
8. In regulation 24(1)(b)(i) should "the end section of the section 6 election period" be "the end of the section 6 election period" in line with the defined term?

9. In regulation 54(1)(b) refers to “surviving partner”. In the absence of a definition of “surviving partner” or “partner” in the instrument or the parent Acts, is the reference to “surviving partner” sufficiently clear? It is noted that “surviving adult” appears in the schedule of the instrument, and that “adult survivor” appears in PSPJOA 2022.
10. The provisions of the equivalent English regulations (SI 2023/843) which govern cases in which an “immediate detriment remedy” has been obtained have not been replicated in the instrument. Could you confirm that this is not required?
11. Regulation 62 concerns the power to waive amounts owed by a person to the scheme manager. Paragraph (2) glosses a reference in direction 4(1)(c) of the PSP Directions 2022 to refer to regulation 63 of the instrument. Is the reference to regulation 63 an incorrect cross-reference, given that regulation 63 applies when the amount is owed by (rather than to) the scheme manager?
12. In regulation 65(9), should the reference to an agreement under paragraph (5) be instead to an agreement under paragraph (6) and/or (7)?
13. In the schedule, paragraph 1(1), in the definition of “eligible decision-maker, should the references to regulations 5(2)(b), 7(2)(b) and 11(2)(b) be references to 6(2)(b), 8(2)(b) and 12(2)(b) respectively?
14. the schedule, paragraph 3, the eligible decision-maker is a “guardian” (only), should reference also be made to a parent?
15. In the schedule, paragraph 11(2)(b)(ii) does not state who the eligible decision-maker is in the situation provided for (that is, where no decision has been received by the scheme manager by the relevant date). Who should this be?
16. The letter from the Scottish Public Pensions Agency to the Presiding Officer dated 30 August 2023 outlining the reasons for failure to comply with laying requirements refers to the Firefighters’ Pension Scheme (Remediable Service) (Scotland) Regulations 2023. We assume that this is intended as a reference to the Firefighters’ Pensions (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/242) but would be grateful if you could confirm.

Please confirm whether any corrective action is proposed, and if so, what action and when.

On 12 September 2023, the Scottish Government responded:

1. Yes, this should refer to paragraph 6(c) of schedule 2 of the Public Service Pensions Act 2013.
2. This cross-reference should be to Part D of Schedule 2 of the 1992 Order, which contains the relevant definition.
3. Yes, this should say “with remediable service” in the definition of immediate choice member at regulation 2(1) and “remediable service” at regulation 18(1) and “remediable service statement” at regulation 14(2)(a)(i).
4. Yes, this should refer to “immediate choice decision”.
5. Yes, this should refer to regulation 16.

6. This should read “to the scheme manager”, not “to the beneficiary”.
7. Yes, this should refer to the “deferred choice decision”.
8. Yes, this should read “the end of the section 6 election period”.
9. We agree that additional clarity would be beneficial. We propose the insertion of a new definition “surviving partner” at para 1(1) of the Schedule as follows: ““surviving partner” has the meaning given in regulation 76 of the 2015 Regulations.”
10. We confirm that immediate detriment provisions are not required due to the policy approach taken in respect of this particular scheme.
11. This should refer to regulation 65, not regulation 63.
12. Yes, this should refer to paragraphs (6) and (7), not paragraph (5).
13. Yes, this should refer to regulations 6(2)(b), 8(2)(b) and 12(2)(b).
14. Yes, this should refer to C’s “parent or guardian”, not just “guardian”.
15. This should refer to the scheme manager. There should be an additional “,the scheme manager” inserted at the end of this line.
16. Yes, we confirm that this should refer to the Firefighters’ Pensions (Remediable Service) (Scotland) Regulations 2023.

Following advice from the SI Registrar, we propose to amend these issues via an amending instrument, with the exception of point 10, which is merely a reflection of the policy position.

On 19 September, the Scottish Government added:

We previously advised our intention to include this correction in an amending instrument, alongside other corrections identified in the same instrument. We now note, however, that preambles are not capable of amendment by amending instrument. Therefore, we propose to make this amendment by correction slip. The SI Registrar has already confirmed that this is acceptable.

National Health Service Pension Schemes (Remediable Service) (Scotland) Regulations 2023 (SSI 2023/246)

On 12 September 2023, the Committee asked the Scottish Government:

1. In regulation 5(4) reference is made to regulation 3(4). Should this be regulation 3(5)?
2. Should the cross-reference at regulation 7(2)(a) to “8(2)(b)(ii)” read “8(2)(b)(i)”?
3. Regulation 18(12)(b) refers to paragraph 7(a) (only) in relation to a claim for compensation. Should this include reference to paragraph 5(a) also?
4. The provisions of the equivalent English regulations (SI 2023/985) which govern (i) cases in which an “2019/20 Pensions Annual Allowance Charge Compensation Scheme” has been obtained, and (ii) cases in which an “immediate detriment remedy” has been obtained have not been replicated in the instrument. Could you confirm that

these are not required?

Please confirm whether any corrective action is proposed, and if so, what action and when.

On 13 September 2023, the Scottish Government responded:

1. Yes. This will be corrected in the next amending instrument.
2. Yes. It has also been identified that regulation 7(2)(b) should include an additional cross-reference to “12(2)(b)(ii)”, and that the cross-references at regulations 7(2)(c) to “8(2)(b)(ii)” and “12(2)(b)(ii)” should be to “8(2)(b)(iii)” and “12(2)(b)(iii)”. These cross-references will be corrected in the next amending instrument.
3. Yes. An additional reference to paragraph (5)(a) will be inserted by the next amending instrument.
4. There was no Scottish scheme corresponding to the 2019/20 Pensions Annual Allowance Charge Compensation Scheme, which did not apply in Scotland. Therefore, no provision relating to this is required. There were no cases in Scotland corresponding to those in category (ii), so no provision relating to this is required either.
5. Corrective action in the next amending instrument is proposed, as detailed above.

