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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 31 October 2017



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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.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 31 October 2017, the Committee agreed to draw to the attention of the Parliament the following instruments—

Council Tax Reduction (Scotland) Amendment (No. 2) Regulations 2017 (SSI 2017/326)

Council Tax Reduction (Scotland) Amendment (No. 2) Amendment Regulations 2017 (SSI 2017/357)

2. The Committee's recommendations and conclusions in relation to these instruments are set out in the following chapters of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out by the relevant lead committee at the end of this report.

Points raised: Instruments subject to negative procedure

Council Tax Reduction (Scotland) Amendment (No. 2) Regulations 2017 (SSI 2017/326) (Social Security)

Purpose

4. These Regulations make further amendments to the Council Tax Reduction (Scotland) Regulations 2012 (SSI 2012/303) and the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 (SSI 2012/319) ("the principal Regulations").
5. The Regulations are subject to the negative procedure. They come into force on 20 November 2017.

Background

6. In January 2013, the Scottish Government introduced measures by way of the principal Regulations to reduce the council tax liability of people who have a low income. Following the UK Government's abolition of council tax benefit from April 2013, people who were previously in receipt of council tax benefit received an equivalent reduction in liability for council tax, provided their circumstances remained the same. The Policy Note to these Regulations states that the amendments do not alter the policy intention of the principal Regulations.
7. These Regulations make some further amendments to the scheme in the principal Regulations. Firstly, they make some changes to the scheme, so that payments from the London Emergencies Trust and the We Love Manchester Emergency Fund are not to be taken into account in the calculation of income or capital, for the purposes of the principal Regulations. This allows a person's income from those charitable funds to be disregarded.
8. Secondly, the Regulations make changes to the scheme to enable income from the new Bereavement Support Payment to be disregarded, when calculating an applicant's level of council tax reduction.
9. Thirdly, the Regulations make changes to the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012, so that persons who are members of the "work related activity group" and who are no longer entitled to the work related activity component under the Employment and Support Allowance Regulations 2008 or 2013, will still be treated in the existing way in the scheme, for the purpose of income and the calculation of earnings. These changes are consequential on the abolition of the work related activity component of Employment and Support Allowance.

Consideration

10. The Committee considers that these Regulations, which amend the principal Regulations raise a devolution issue. This is for the same reasons that the Committee considered apply to the Council Tax Reduction (Scotland) Amendment

(No. 2) Regulations 2016 (SSI 2016/253) and the Council Tax Reduction (Scotland) Amendment Regulations 2017 (SSI 2017/41). The Committee considered those instruments in September 2016 and March 2017, respectively.

11. The Committee's consideration is the same as in relation to those instruments. The question before the Committee is whether or not these Regulations relate to the reserved matter of "a scheme supported from central or local funds which provides assistance for social security purposes to or in respect of individuals by way of benefits", as defined in Section F1 (social security schemes) of Part 2 of Schedule 5 of the Scotland Act 1998.
12. These Regulations amend and further the objective of the principal Regulations. The principal Regulations had as their objective the establishment of a scheme which replicated existing entitlements to council tax benefit support for persons as far as possible, for the financial year commencing 1 April 2013 and subsequent years.
13. The Committee notes that "providing assistance for social security purposes" at the end of the Section F1 reservation is defined to expressly include providing assistance in relation to an individual's liability for local taxes. The council tax is a local tax. The Committee also notes that the term "benefits" includes any form of financial assistance. The previous reserved social security scheme, council tax benefit, provided that assistance primarily in the form of a deduction from council tax, which is the mechanism applied in the principal Regulations.ⁱ The Committee therefore concludes that there is a question as to whether the principal Regulations (and regulations which modify them) can therefore be said to fall within the F1 reservation.
14. The Committee recognises that the Scottish Government takes a contrary view. The Scottish Government contends that no question is raised as to whether the Regulations relate to matters which are reserved by Section F1 of Part 2 of Schedule 5 to the Scotland Act 1998 (social security schemes). In relation to the principal Regulations, the Scottish Government has contended that they were properly made under section 80 of the Local Government Finance Act 1992. Section 80 gives the Scottish Ministers powers to prescribe conditions under which an individual's liability for council tax may be reduced. The Scottish Government has contended that this allows the Scottish Ministers to make provision which takes into account detailed information about an individual's financial situation in order to determine entitlement to a reduced council tax liability. The Scottish Government has contended that the principal Regulations make provision for a reduction for individuals with low income and some factors indirectly related to needs arising out of disability or other needs if, as a result of that disability or need, an individual is on a low income. The Scottish Government contends that the purpose of the Regulations is as described above and is not to provide assistance for social security purposes or by way of benefits.ⁱⁱ

ⁱ The council tax benefit scheme was previously contained in the Council Tax Benefit Regulations 2006 (SI 2006/215).

ⁱⁱ See [55th Report, 2012](#) of the Subordinate Legislation Committee, which provided the Scottish Government's analysis for the principal Council Tax Reduction (Scotland) Regulations 2012 (SSI 2012/303).

15. Ultimately the question can only be resolved by the courts. The Committee's function is to consider whether or not to draw attention to any potential devolution issue.
16. Since September last year, a new Exception 10 to the social security reservation in Section F1 mentioned above has given the Scottish Parliament powers to create new benefit schemes in areas of devolved responsibility where the requirements of the exception are satisfied, including that the new scheme must be funded from the Scottish Consolidated Fund.
17. In relation to the Council Tax Reduction (Scotland) Amendment Regulations 2017 (SSI 2017/41) considered by the Committee on 7 March this year, the Committee suggested to the Scottish Government that framing a new discrete scheme could avoid the Committee's concern, were that scheme to comply with the requirements of Exception 10.ⁱⁱⁱ The Committee also highlighted that a new discrete scheme would have a further benefit of accessibility to readers, if consolidated Regulations could be produced.
18. The Committee noted (in relation to this instrument SSI 2017/326) that the Cabinet Secretary for Finance and the Constitution wrote to the Committee on 4 October and undertook to be in touch in relation to the potential to consolidate the principal Regulations.
19. **The Convener proposed that the Committee considers that the Regulations raise a devolution issue and should be drawn to the attention of the Parliament on that basis.**
20. **The proposal was agreed to by division (For 3, Against 2, Abstentions 0).**

Recommendations

21. **Accordingly, the Committee draws the Regulations to the attention of the Parliament on reporting ground (f). The Committee considers that the Regulations raise a devolution issue as they may relate to matters which are reserved by Section F1 of Part 2 of Schedule 5 of the Scotland Act 1998 (social security schemes).**
22. **The Committee also agreed to obtain an update on the potential to consolidate the principal Regulations from the Minister for Parliamentary Business when he attends the Committee in December to respond to issues raised in the Committee's Annual Report.**

Council Tax Reduction (Scotland) Amendment (No. 2) Amendment Regulations 2017 (SSI 2017/357) **(Social Security)**

Purpose

23. This instrument makes a specific amendment of the Council Tax Reduction (Scotland) Amendment (No. 2) Regulations 2017 (SSI 2017/326) considered above, to fully implement the policy intention underlying those Regulations.

ⁱⁱⁱ 13th Report, 2017 (Session 5).

24. SSI 2017/326 includes amendments to the Council Tax Reduction (Scotland) Regulations 2012, to enable income from the new bereavement support payment to be disregarded when calculating an applicant's level of council tax reduction.

Consideration

25. SSI 2017/326 was laid on 6 October 2017. The Scottish Government has explained that shortly after that date, it was identified that those Regulations did not fulfil the policy intention that income from bereavement support payments should be wholly ignored in the council tax reduction scheme, when calculating an applicant's income. Therefore, unless SSI 2017/326 was changed, it would have the effect that only £20 of someone's bereavement support payment was disregarded, rather than the full payment.
26. These Regulations address that issue. This aims to ensure that the original policy intention is met, so that income from such support payments is disregarded in full for those of working age, for 52 weeks from the date of the first payment.
27. The Committee again considered whether these Regulations raise a devolution issue, as they may relate to matters which are reserved by Section F1 of Part 2 of Schedule 5 to the Scotland Act 1998. Again, it is recognised that the Scottish Government takes a contrary view. The Committee's analysis in relation to the devolution issue is the same as for SSI 2017/326.

Breach of the "28 day rule"

28. Furthermore, these Regulations were laid before the Parliament on 25 October and come into force on 19 November 2017. They do not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument. A breach of the rule does not affect the validity of the Regulations.
29. In accordance with section 31(3) of the Interpretation and Legislative Reform (Scotland) Act 2010, the Local Government and Communities Directorate of the Scottish Government wrote to the Presiding Officer on 28 September 2017, to explain why the requirements of section 28(2) have not been met in this case. The correspondence is reproduced in the Annex.
30. The Local Government and Communities Directorate explained that SSI 2017/326 was laid on 6 October 2017. Shortly after that date it was identified that those Regulations did not completely fulfil the policy intention, that income from bereavement support payments should be ignored in the council tax reduction scheme, when calculating an applicant's income. The letter therefore acknowledges that it only came to light after SSI 2017/326 was laid that the instrument did not fully implement the intended policy.
31. As SSI 2017/326 comes into force on 20 November 2017, this amending instrument was laid on 25 October, and comes into force on 19 November 2017. This secures that SSI 2017/326 as amended is brought into force timeously. The Committee considered that the failure to comply with section 28(2) is acceptable in the circumstances.

32. **The Convener proposed that the Committee considers that the Regulations raise a devolution issue and should be drawn to the attention of the Parliament on that basis.**
33. **The proposal was agreed to by division (For 3, Against 2, Abstentions 0).**

Recommendations

34. **Accordingly, the Committee draws the Regulations to the attention of the Parliament on reporting ground (f). The Committee considers that the Regulations raise a devolution issue as they may relate to matters which are reserved by Section F1 of Part 2 of Schedule 5 of the Scotland Act 1998 (social security schemes).**
35. **The Committee also draws the Regulations to the attention of the Parliament on reporting ground (j), as they fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The Committee finds the reasons provided by the Scottish Government for the breach of section 28(2) to be acceptable in the circumstances.**

No points raised

Rural Economy and Connectivity

Road Traffic (Permitted Parking Area and Special Parking Area) (North Lanarkshire Council) Designation Order 2017 (SSI 2017/342)

Parking Attendants (Wearing of Uniforms) (North Lanarkshire Council Parking Area) Regulations 2017 (SSI 2017/343)

Road Traffic (Parking Adjudicators) (North Lanarkshire Council) Regulations 2017 (SSI 2017/344)

Annex

Council Tax Reduction (Scotland) Amendment (No. 2) Amendment Regulations 2017 (SSI 2017/357)

Breach of laying requirements: letter to the Presiding Officer

The Council Tax Reduction (Scotland) Amendment (No.2) Amendment Regulations 2017, SSI 2017/357 was made today by the Scottish Ministers under sections 80 and 113(1) and paragraph 1 of schedule 2 of the Local Government Finance Act 1992. It is being laid before the Scottish Parliament today and comes into force on 19 November.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) has not been complied with. To meet the requirements of section 31(3) that Act, this letter explains why.

This instrument amends the Council Tax Reduction (Scotland) Amendment (No.2) Regulations 2017 (SSI 2017/326). These were laid on 6th October. Shortly after being laid it was identified that SSI 2017/326 did not completely fulfil the policy intention that income from Bereavement Support Payments should be ignored in the Council Tax Reduction Scheme when calculating an applicant's income. SSI 2017/236 included an amendment that would have the effect that only £20 of someone's Bereavement Support Payment was disregarded, rather than the full payment. This instrument addresses that issue by removing the amendment made in regulation 7(b) of SSI 2017/326.

SSI 2017/326 was made with a coming into force date of 20 November, in line with Standing Orders. This amending instrument has been made with a coming into force date of the 19 November to ensure that no one is impacted by the error made in SSI 2017/326, and the policy intention will be met from the day SSI 2017/326 comes into force.

We regret the non-compliance referred to above, and hope that this letter sets out clearly the reason for breaching the 28 day rule on this occasion. I am happy to provide any further information as required.

