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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 21 April 2020



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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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Stuart McMillan
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Scottish Conservative
and Unionist Party



Gil Paterson
Scottish National Party

Introduction

1. At its meeting on 21 April 2020, the Delegated Powers and Law Reform Committee considered the following instruments subject to the negative procedure and agreed to draw them to the attention of the lead committee:
 - Council Tax Reduction (Scotland) Amendment (No. 3) (Coronavirus) Regulations 2020 (SSI 2020/108)
 - Carer’s Allowance (Coronavirus) (Breaks in Care) (Scotland) Regulations 2020 (SSI 2020/117)
 - Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020 (SSI 2020/122)
 - Electricity Works (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/123)
2. The Committee's conclusions in relation to these instruments are set out later in the report.
3. The Committee also 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.

Instruments drawn to the attention of the Lead Committee

Council Tax Reduction (Scotland) Amendment (No. 3) (Coronavirus) Regulations 2020 (SSI 2020/108)

Purpose

4. This instrument increases the amount of earnings that are to be disregarded in calculating the income of an applicant for the purposes of an award of council tax reduction.

Committee consideration

5. The instrument was laid before the Parliament on 1 April 2020 and came into force on 6 April 2020. This does 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.
6. The Committee is therefore required under standing orders to draw the instrument to the attention of the Parliament under reporting ground (j) for failing to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

7. The Committee therefore reports this instrument to the lead committee, the Social Security Committee, under reporting ground (j).

8. The Scottish Government's reasons for the breach of the 28 day rule are set out in a letter to the Presiding Officer dated 1 April 2020 (see Annex A). It explains that this instrument was made in response to a UK Government announcement on 20 March about increasing the basic rate of working tax credit as part of its response to COVID-19. The Scottish Government said that these amending regulations could not be finalised until sufficient detail of the implementation of the UK Government's announcement was known. The instrument then had to be brought into force quickly to reflect the UK Government's timing.

9. In these circumstances, the Committee is content with the reasons for the failure to comply with section 28(2).

10. The Committee also considered an update from the Scottish Government on plans to consolidate the Council Tax Reduction (Scotland) Regulations 2012 and the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012, which are being further amended by this instrument (see Annex B).

11. The Committee remains of the view that these regulations ought to be consolidated. The Committee agreed to write to the Minister for Parliamentary Business and Veterans communicating this view.

Carer's Allowance (Coronavirus) (Breaks in Care) (Scotland) Regulations 2020 (SSI 2020/117)

Purpose

12. This instrument relaxes the eligibility criteria for Carer's Allowance to take account of the effects of coronavirus. It adds to the circumstances in which a carer is to be treated as regularly and substantially engaged in caring for the purposes of entitlement to Carer's Allowance. A person will be so treated where they are temporarily unable to provide care for reasons associated with coronavirus. These reasons cover temporary cessation of care as a result of infection of the carer or cared for person with the virus, or self-isolation of either as a precautionary measure.

Committee consideration

13. The instrument was laid before the Parliament on 1 April 2020 and came into force on 2 April 2020. This does 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.
14. The Committee is required to draw the instrument to the attention of the Parliament under reporting ground (j) for failing to comply with the requirements of section 28(2).

15. The Committee therefore reports this instrument to the lead committee, the Social Security Committee, under reporting ground (j).

16. The reasons for this breach of the 28 day rule are set out in a letter to the Presiding Officer dated 2 April 2020 (see Annex C). It explains that the changes made in these Regulations are in line with corresponding changes made in England and Wales and would ease pressures on carers in response to the effects of coronavirus. The Scottish Government therefore wished to make this change as quickly as possible.

17. In these circumstances, the Committee is content with the reasons for the failure to comply with section 28(2).

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020 (SSI 2020/122)

Purpose

18. This instrument makes amendments to the Prison and Young Offenders Institutions (Scotland) Rules 2011 to provide Governors with flexibility with regard to

compliance with timescales and the provision of certain services which are not deemed to be critical to the security and health of Scottish Prison Service staff and prisoners, during the coronavirus outbreak.

Committee consideration

19. The instrument was laid before the Parliament on 7 April 2020 and came into force immediately. This does 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.
20. The Committee is required to draw the instrument to the attention of the Parliament under reporting ground (j) for failing to comply with the requirements of section 28(2).

21. The Committee therefore reports this instrument to the lead committee, the Justice Committee, under reporting ground (j).

22. The reasons for the breach are set out in a letter to the Presiding Officer dated 7 April 2020 (see Annex D). It explains that these changes to the prison rules were required quickly in order to give the prison service the flexibility it needs to manage the rapidly evolving position with respect to COVID-19 and ensure the safe and humane operation of prisons which are currently under exceptional pressures.

23. In these circumstances, the Committee is content with the reasons for the failure to comply with section 28(2).

Electricity Works (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/123)

Purpose

24. This instrument temporarily amends the following regulations:
 - Electricity (Applications for Consent) Regulations 1990;
 - Electricity Generating Stations (Applications for Variation of Consent) (Scotland) Regulations 2013; and
 - Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017.
25. The amendments alter requirements to make information or documentation available for inspection in a public place, to enable objections to applications for consent under the Electricity Act 1989 to be made by means of electronic communication, and relaxes requirements for hard copy Environmental Impact Assessments to be provided to the Scottish Ministers. These requirements are replaced by requirements to make information and relevant documentation available electronically.

Committee consideration

26. The instrument was laid before the Parliament on 14 April 2020 and comes into force on 24 April 2020. This does 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.
27. The Committee is required to draw the instrument to the attention of the Parliament under reporting ground (j) for failing to comply with the requirements of section 28(2).

28. The Committee therefore reports this instrument to the lead committee, the Economy, Energy and Fair Work Committee, under reporting ground (j).

29. The reasons for the breach are set out in a letter dated 14 April 2020 (see Annex E). It explains that the changes made by the Regulations allow for documents, that previously had to be physically available, to be electronically available instead to allow people to follow social distancing instructions. It was considered necessary to bring these modifications into force as early as possible. The letter states that this will support future economic and societal recovery, will ensure consistency of approach across the planning system and thus certainty for developers and the public, and will maintain the ability of the Energy Consents Unit to continue to process applications efficiently.

30. In these circumstances, the Committee is content with the reasons for the failure to comply with section 28(2).

No Points Raised

Justice Committee

Act of Adjournal (Criminal Procedure (Scotland) Act 1995 Amendment) (Miscellaneous) 2020 (SSI 2020/93)

- The Committee gave initial consideration to the instrument at its meeting on 1 April 2020 and agreed to write to the Lord Justice General to ask what plans there were for the provisions of the instrument to be taken out of force once the current COVID-19 pandemic situation has passed. Today the Committee considered the Lord Justice General's response. The Committee agreed that its letter, and the Lord Justice General's response, should be forwarded to the Justice Committee for its information. Both of these letters are included in Annex F.

Local Government and Communities Committee

Non-Domestic Rates (Scotland) Act 2020 (Commencement No. 1 and Transitional Provision) Regulations 2020 (SSI 2020/107 (C.11))

Equalities and Human Rights Committee

Gender Representation on Public Boards (Scotland) Act 2018 (Commencement No. 2) Regulations 2020 (SSI 2020/119 (C.12))

Gender Representation on Public Boards (Scotland) Act 2018 (Reports) Regulations 2020 (SSI 2020/120)

Lead committee to be confirmed

Coronavirus Act 2020 (Commencement No. 1) (Scotland) Regulations 2020 (SSI 202/121 (C.13))

Annex A

Letter to the Presiding Officer dated 1 April 2020

Dear Presiding Officer

The Council Tax Reduction (Scotland) Amendment (No. 3) (Coronavirus) Regulations 2020

The Council Tax Reduction (Scotland) Amendment (No. 3) (Coronavirus) Regulations 2020, SSI 2020/108 were made by the Scottish Ministers under section sections 80 and 113(1) and paragraph 1 of schedule 2 of the Local Government Finance Act 1992 on 1 April 2020. This instrument is subject to negative procedure. The Regulations are being laid before the Scottish Parliament today, 1 April 2020 and come into force on 6 April 2020.

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.

On 20 March 2020, the UK Government announced that they were increasing the basic rate of Working Tax Credit (WTC) from 6 April 2020 as part of their response to covid-19. The drafting of these amending Regulations was finalised as soon as the Scottish Government had sufficient detail of how the announcement was being implemented (the UK Regulations became available on Sunday 29 March). This is to ensure that no one who receives WTC would see a reduction in their Council Tax Reduction as a result of these changes to WTC.

Due to the time constraints between the announcement and when the Regulations need to come into force (reflecting the UK Government's timing) it has not been possible on this occasion to meet the 28 day requirement.

I am copying this letter to Bob Doris, Convenor of the Social Security Committee and Bill Bowman, Convenor of the Delegated Powers and Law Reform Committee.

Ben Haynes

Annex B

Letter to the Convener from the Minister for Parliamentary Business and Veterans dated 26 March 2020

Dear Bill,

Your predecessor as convener wrote to me on 25 February, in relation to the potential consolidation of Regulations relating to the Council Tax Reduction Scheme (the Council Tax Reduction (Scotland) Regulations 2012 and the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012).

While the Scottish Government accepts that there have been numerous amendments to both these sets of Regulations those who need to understand, apply, and interpret the Regulations are very familiar with their provisions. The Scottish Government has not received any representations from these key stakeholders pressing for the instruments to be consolidated.

Often the changes to the Regulations are to update figures used in calculations; the number of amending instruments masks that changes are often repetitive and limited. Stakeholders are familiar with such changes, and produce and use resources that reflect the changes that are relevant to their needs.

It therefore continues to be the case that the Scottish Government sees no need for a formal consolidation exercise to be carried out. Furthermore it is worth noting that any consolidated versions of these instruments would need amendment before long as part of routine maintenance of the scheme (e.g. to increase various allowances in line with inflation).

However, in light of the Committee's views on this issue the Scottish Government last year produced 'Keeling' versions of both sets of the 2012 Regulations, available online at <http://www.legislation.gov.uk/ssi/2019/29/resources>. These show the source and effect of changes made to the original text. That assists users of the Regulations to track their history and to identify where there have been amendments. The Scottish Government will consider producing further versions periodically.

Later this year the Scottish Government will lay regulations revising the working-age CTR scheme, in light of the UK Government's plan to move onto Universal Credit (UC) those who currently receive the benefits and tax credits that UC replaces. In taking forward those revisions the Scottish Government will bear in mind the Committee's wish to see the working-age Regulations consolidated.

Your sincerely,

Graeme Dey

Annex C

Letter to the Presiding Officer dated 2 April 2020

Dear Presiding Officer

The Carer's Allowance (Coronavirus) (Breaks in Care) (Scotland) Regulations 2020

Yesterday, on 01 April 2020, the Carer's Allowance (Coronavirus) (Breaks in Care) (Scotland) Regulations 2020 was made by the Scottish Ministers under section 70(8) and 175(1) of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act"). The instrument will be laid before the Scottish Parliament today and comes into force on 03 April 2020.

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.

In short, the Scottish Government has been working with the Department of Work and Pensions to identify changes to Carer's Allowance which would ease pressures on carers throughout the UK in response to the effects of coronavirus. A key change identified, relating to breaks in care, requires amendment to the current regulations. The Scottish Government wishes to make this change for carers in Scotland as quickly as possible, and in line with the corresponding change being made by the Secretary of State for Work and Pensions for carers in England and Wales.

The function of administering an allowance to carers under section 70 of the 1992 Act ("carer's allowance") transferred to the Scottish Ministers on 03 September 2018. The function of prescribing the circumstances in which a person is to be treated as regularly and substantially engaged in caring for the purpose of entitlement to this allowance also transferred to the Scottish Ministers on this date.

Since this date, the Secretary of State for Work and Pensions ("the Secretary of State") has administered Carer's Allowance on behalf of the Scottish Ministers pursuant to an agency agreement¹. The agency agreement sets out an undertaking by the Secretary of State and the Scottish Ministers to cooperate to ensure that Carer's Allowance is delivered to people resident in Scotland on the same basis as people resident in England and Wales.

On 30 March 2020, the Secretary of State laid the Social Security (Coronavirus) (Further Measures) Regulations 2020, which add to the circumstances in which a carer is to be treated as regularly and substantially engaged in caring for the purpose of entitlement to carer's allowance. A person will be so treated where they are temporarily unable to provide care, for reasons associated with coronavirus. These reasons cover temporary cessation of care as a result of infection of the carer or cared for person with the virus, or self-isolation of either as a precautionary measure, in line with guidance. The regulations apply to England and Wales only. They came into force on the day that they were laid.

The Scottish Ministers require to bring into force equivalent provision to these regulations as soon after the 30 March 2020 as possible to ensure Scottish carers benefit from the same changes and to continue to meet the terms for delivering Carer's Allowance to

people resident in Scotland under the agency agreement. The Carer's Allowance (Coronavirus) (Breaks in Care) (Scotland) Regulations 2020 make this equivalent provision.

A copy of this letter has been sent to the Convenor of the Social Security Committee.

Kind regards

SHIRLEY-ANNE SOMERVILLE

Annex D

Letter to the Presiding Officer dated 7 April 2020

Presiding Officer,

THE PRISONS AND YOUNG OFFENDERS INSTITUTIONS (SCOTLAND) AMENDMENT RULES 2020

The above instrument was made by the Scottish Ministers under sections 39 of the Prisons (Scotland) Act 1989 on 7 April 2020. It is being laid before the Scottish Parliament today and is to come into force on 7 April 2020, immediately after it is made.

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

COVID-19 is rapidly impacting across all public services, including the prison system, these changes to the Prison Rules are being taken forward to support SPS' response to the exceptional pressures facing prisons during this outbreak. These changes are designed to help SPS: (1) reduce the risks of the virus spreading within prisons; (2) to support operational stability; and finally (3) to protect the health of those living and working in our prisons.

It has not been possible to comply with the 28 day rule in these circumstances. This is due to the need to implement a change to the Prison Rules quickly in order to properly equip prison Governors and the prison service generally with the flexibility it needs in order to manage a rapidly evolving position. In particular, the SPS staff absence rate is increasing as a result of COVID-19 and there is concern that if this absence rate continues to grow over the next period of the outbreak, that, if these changes to the Prisons Rules are not in force quickly then it could place the safe and humane operation of prisons at significant risk. SPS requires these changes to the Prison Rules, which support SPS' response to the exceptional pressures facing prisons during the current COVID-19 outbreak, to be in force as soon as possible.

TERESA MEDHURST

Chief Executive (Interim), SPS

Annex E

Letter to the Presiding Officer dated 14 April 2020

Dear Presiding Officer

THE ELECTRICITY WORKS (MISCELLANEOUS TEMPORARY MODIFICATIONS) (CORONAVIRUS) (SCOTLAND) REGULATIONS 2020

The Electricity Works (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020, SSI 2020/123 was made by the Scottish Ministers under section 2(2) of the European Communities Act 1972 and sections 36(8), 36C(2), 60(2) and (3) and paragraph 1(3) of schedule 8 of the Electricity Act 1989 on 14 April 2020. It is also being laid before the Scottish Parliament today and will come into force on 24 April 2020.

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.

This instrument is required to make temporary modifications to The Electricity (Applications for Consent) (Scotland) Regulations 1990, The Electricity Generating Stations (Applications for Variation of Consent) Regulations (Scotland) 2013, and The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017. The Regulations apply to applications made to the Scottish Ministers for consent to construct or install certain large scale electricity infrastructure under the Electricity Act 1989. As such, the provisions of the Coronavirus (Scotland) Act 2020 in relation to publishing documents and making documents available for inspection do not apply, as the policy area - generation, transmission and distribution of electricity - remains reserved.

The Regulations being amended require that applicants make physically available, for inspection by the public, application documents and environmental information at named places, to allow for members of the public to make representations in respect of the developments proposed in the application. Such named places are most often public buildings such as council offices and libraries.

The Regulations being amended also require that planning authorities make physical copies of Ministerial determinations on these applications available for information and public inspection. They also require that applicants, on making the applications, lodge physical copies of documents with the Scottish Ministers.

The modifications in this instrument are necessary to ensure the continued operation of Energy Consents applications processing during the coronavirus emergency period. The Government has advised members of the public not to leave the home unless it is essential to do so and to follow social distancing instructions. As a result, most public buildings such as libraries and community centres are closed. Even where these remain open, it would not be appropriate to encourage members of the public to risk spreading the virus by attending such places. The amendments therefore require that companies making applications instead provide that all required documentation is available electronically for public inspection. The planning authorities will be required to make Ministerial determinations available electronically rather than in physical format, and applicants will not require to ensure the Scottish Ministers have hard copies of application documents.

These are temporary measures designed to ensure that the economic impact of the current emergency is minimised and that business can continue in respect of planning for electricity development. It is desirable that such information regarding development proposals is returned to its wider availability as soon as possible and the modifications will therefore expire on expiry of the Coronavirus Act 2020. The modifications to process align with similar promoted in respect of the planning system in Scotland generally, and the breach of the 28 day rule in this case will ensure that all such modifications come into effect together.

We regret this breach of the 28 day rule, but we consider that in the circumstances it is necessary to bring these modifications into force as early as possible. Doing so will support future economic and societal recovery, will ensure consistency of approach across the planning system and thus certainty for developers and the public, and will maintain the ability of the Energy Consents Unit to continue to process applications efficiently.

As we are in recess I have copied this letter to the convener of the Economy, Energy and Fair Work Committee for early sight.

Alan Brogan

Energy Consents Unit

Annex F

Letter to the Lord Justice General from the Convener dated 6 April 2020

Dear Lord Carloway,

I am writing in relation to the Act of Adjournal (Criminal Procedure (Scotland) Act 1995 Amendment) (Miscellaneous) 2020 (SSI 93/2020) which was laid on 24 March and is currently before the Delegated Powers and Law Reform Committee for consideration. The Committee gave initial consideration to the instrument at its meeting on 1 April and agreed to write to you to ask the following question.

The Committee notes that the instrument was brought in at short notice and no time limits are set within it for its operation. The Committee would be grateful to know what plans there are for provisions of the instrument to be taken out of force once the current COVID-19 pandemic situation has passed. The Committee has deferred its consideration of the instrument to its next meeting, which is likely to be on 21 April 2020. We would therefore be grateful to have your response by 5pm on Wednesday 15 April.

Yours sincerely,

Bill Bowman

Convener of the Delegated Powers and Law Reform Committee

Response from the Lord Justice General dated 9 April 2020

Dear Convener,

I thank you for your letter about the Act of Adjournal (Criminal Procedure (Scotland) Act 1995 Amendment) (Miscellaneous) 2020. In that context, may I congratulate you on your recent appointment as Convenor of the Delegated Powers and Law Reform Committee.

The Committee asks what plans there are for provisions of the instrument to be taken out of force once the current pandemic has passed. The end of the pandemic is not yet known. Its impact on the court system will continue long after the medical emergency has passed. It is therefore impossible to say when the provisions contained in the Act of Adjournal will no longer be necessary.

Having said that, can I add that the provisions were required in order to permit cases to be adjourned, and transferred between sheriff courts within a sheriffdom, in bulk during this pandemic. A jigsaw of powers already existed to adjourn cases and transfer them. They were not emergency powers. They were created to ensure the general efficient administration of court business. When attempts were made to use them to deal with the pandemic, it quickly became apparent that they were inadequate and the gaps were causing acute operational difficulties.

The provisions in the Act of Adjournal are the missing pieces of that jigsaw and permit courts to adjourn and transfer cases in order to meet any operational challenge. For example, cases could already be transferred between sheriffdoms, but not to different courts within a sheriffdom. Retaining the provisions in the Act of Adjournal may be of utility

beyond the end of the pandemic and its operational recovery period. They would remain as useful tools to ensure that the criminal justice machine operates efficiently in general.

It is the role of the Criminal Court Rules Council to keep court rules under constant review in order to ensure the efficient administration of justice. They are well placed to assess whether the provisions in the Act of Adjournment should be retained and, if so, for how long. They will be considering those issues once operations have recovered to normal. Should the Council recommend revocation, they will be revoked.

