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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 30 October 2018



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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 30 October 2018, the Committee agreed to draw to the attention of the Parliament the following instrument-

Council Tax Reduction (Scotland) Amendment (No. 3) Regulations 2018 (SSI 2018/295)

2. The Committee's recommendations and conclusions in relation to this instrument are set out in the following section of this report.

Points raised: instrument subject to negative procedure: **Council Tax Reduction (Scotland) Amendment (No. 3) Regulations 2018 (SSI 2018/295) (Social Security)**

Background and Purpose

3. The Scottish Government has introduced measures to reduce the council tax liability of persons who have a low income, following the UK Government's abolition of council tax benefit from April 2013. The Council Tax Reduction (Scotland) Regulations 2012 and the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 ("the principal Regulations") came into force on 28 January 2013.
4. The Policy Note to the principal Regulations explains that those Regulations seek to ensure that persons previously in receipt of council tax benefit will not be disadvantaged by its abolition, and will receive an equivalent reduction in liability for council tax (provided their circumstances remain the same) to the support they would have received by way of council tax benefit.
5. The Council Tax Reduction (Scotland) Amendment (No.3) Regulations 2018 (SSI 2018/295) make further amendments to the principal Regulations.
6. The Regulations provide that early years assistance and funeral expense assistance under the Social Security (Scotland) Act 2018 are disregarded in the calculation of income for council tax reduction ("CTR"). They also make provision so that payments of arrears of benefits made to rectify an error on a point of law are disregarded in the calculation of capital.
7. The Regulations come into force on 28 November 2018.

Committee Consideration

8. The Committee addressed two issues in relation to these Regulations. The first issue relates to a drafting error and the second relates to whether the Regulations raise a devolution issue. This report addresses these two issues in turn.

Drafting error

9. Paragraph 11(2)(a)(ii) of schedule 5 of the Council Tax Reduction (Scotland) Regulations 2012, inserted by regulation 4(a) of these Regulations, refers to an error on a point of law made by an officer, person or body described in regulation 1(3) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (S.I. 1999/991).
10. It is intended by the Scottish Government that the provision should refer only to errors made by those officers, persons or bodies which are referred to within the

definition of “official error” contained in regulation 1(3). Regulation 1(3) contains several definitions for the purposes of the 1999 Regulations generally, and so refers to various other persons and bodies which are not intended to be covered by the new paragraph 11(2)(a)(ii).

11. This matter was raised with the Scottish Government. It proposes to bring forward a corrective amendment in the next instrument which deals with council tax reduction, which it expects will be laid early next year. The correspondence with the Scottish Government on this issue is reproduced in the Annex to this report.

Recommendations

12. **The Committee draws the Regulations to the attention of the Parliament on reporting ground (i), as there appears to be defective drafting within regulation 4(a).**
13. **The Committee recommends that, if the Scottish Government assesses that this drafting error could have some unintended effects, it may be preferable to bring forward an amendment to correct the error promptly rather than waiting until ‘early next year’, given that the provisions will come into force on 28 November 2018.**

Devolution issue

14. The Committee previously reported SSIs 2016/253, 2017/41, 2017/326, 2018/69 and 2018/211, which amend the principal Regulations, as raising a devolution issue.ⁱ
15. The Committee decided that it should draw those SSIs to the attention of the Parliament, as they may relate to matters which are reserved by Section F1 (social security schemes) of Part 2 of schedule 5 of the Scotland Act 1998. The Committee accepts that the Scottish Government takes a different view and this is reflected in its reports on the issue.
16. Since its [report](#) on SSI 2017/41 in March 2017, the Committee suggested to the Scottish Government that framing a new scheme in consolidating Regulations could remove the Committee’s concern, were that scheme to fall within the competence conferred on the Scottish Ministers by the Scotland Act 2016, through Exception 10 made to Section F1.
17. In a letter to the Committee of 2 October 2018, the Minister for Public Finance and Digital Economy indicated that the Scottish Government has no plans to undertake the consolidation of the principal Regulations, due to an ongoing programme of amendments as new social security legislation is rolled out.ⁱⁱ

ⁱ Links to these reports are available here: SSIs 2016/253: [4th Report, 2016](#); 2017/41: [13th Report, 2017](#); 2017/326: [50th Report, 2017](#); 2018/69: [9th Report, 2018](#); and 2018/211: [35th Report, 2018](#).

ⁱⁱ The Minister's letter of 2 October 2018 is available [here](#).

18. While the option suggested by the Committee to address its concern remains open to the Scottish Government, it seems unlikely that the difference of view on the devolution issue will be resolved in the immediate future.
19. The Committee has considered separately the need to consolidate the principal Regulations in the interests of clear, accessible legislation given that these are the fifteenth set of amending Regulations. The Committee does not consider that the planning of future amendments to the existing scheme is a good reason to reject undertaking a consolidation. In the Committee's view a consolidation of the provisions to date would be in the interests of the accessibility of the legislation, and so of its end users.
20. **The Committee's position on the devolution issue concerning the principal Regulations as amended and its possible resolution is clearly stated in its previous reports to the Parliament. The Committee does not consider it necessary to repeat that view again. However, the Committee continues to encourage the Scottish Government to undertake a consolidation of the principal Regulations, within a reasonable timescale in the interests of clarity and accessibility.**

Recommendation

21. **The Committee recommends, therefore, that the Scottish Government should undertake a consolidation of the principal Regulations within a reasonable timescale in the interests of clarity and accessibility.**

Annex

Council Tax Reduction (Scotland) Amendment (No. 3) Regulations 2018 (SSI 2018/295)

On 8 October 2018, the Scottish Government was asked:

New paragraph 11(a)(ii) of schedule 5 of the Council Tax Reduction (Scotland) Regulations 2012, inserted by regulation 4(a) of this instrument, makes provision to disregard, when calculating an applicant's capital for the purposes of entitlement to council tax reduction, sums paid in order to rectify or compensate for an error on a point of law "made by an officer, person or body described in regulation 1(3)" of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

The definition of "official error" contained in that regulation 1(3) refers to certain officers, persons and bodies, and it expressly excludes any error of law shown to have been an error by virtue of a subsequent decision of the Upper Tribunal or the court.

(1) Is there any error or lack of clarity, in respect that regulation 1(3) of the 1999 Regulations (so far as applying to Scotland) contains definitions and descriptions of various persons and bodies (such as a "claimant" and a "couple")? Is there any intention to refer, in the new paragraph 11(a)(ii), to an officer, person or body as described in the definition of "official error" in regulation 1(3)?

(2) Is there any error or lack of clarity, in respect that the new paragraph 11(a)(ii) does not specify whether or not "an error of law which is shown to have been an error by virtue of a subsequent decision of the Upper Tribunal or the court" is excluded or included within the ambit of the provision?

(3) Is any corrective action proposed?

The Scottish Government responded as follows:

Question 1

The Scottish Government accepts that there is a lack of clarity in the new sub-para (2)(a)(ii) of paragraph 11 of Schedule 5 of the Council Tax Reduction (Scotland) Regulations 2012 inserted by these amending Regulations.

Sub-para (2)(a)(ii) refers to an error on a point of law made by an "officer, person or body" described in regulation 1(3) of Social Security and Child Support (Decisions and Appeals) Regulations 1999 (S.I. 1999/991).

Regulation 1(3) contains various definitions which might be classified as an "officer, person or body." The drafting of sub-para (2)(a)(ii) was intended only to cover those "officers, persons or bodies" referred to within the definition of "official error" contained in regulation 1(3).

Some of these additional definitions in regulation 1(3) (including "the board" and "designated authority") overlap with the "officers, persons or bodies" which are referred to specifically in the definition of "official error" contained in regulation 1(3). Therefore, in

relation to these definitions, the Scottish Government does not consider that the drafting of sub-para (2)(a)(ii) produces any unintended consequences.

However, some of the additional definitions (including “claimant” and “family”) may result in the unintended consequence that an “error on a point of law” by one of these categories is covered by sub-para (2)(a)(ii).

In practice, it is difficult to see how these additional “officers, persons or bodies” could make an “error on a point of law” that results in the type of substantial compensatory payment that the provision disregards. In the unlikely event of such an error, only the Scottish Government would be disadvantaged by the disregard of the compensation payment made as a result of that error.

However, the Scottish Government agrees that, in the interests of clarity, it is appropriate to amend sub-para (2)(a)(ii) to make clear that only those officers, persons or bodies referred to in the definition of “official error” in regulation 1(3) are included within its ambit.

Question 2

The new sub-para (2)(a)(ii) refers to “an error on a point of law.” This clearly will include any error of law which is found to have been an error by virtue of a subsequent tribunal or court decision.

New sub-para (2)(a)(ii) refers to the “officers, persons or bodies” in regulation 1(3). The reference contained in regulation 1(3) to “any error of law which is shown to have been an error by virtue of a subsequent decision of the Upper Tribunal or the Court” is irrelevant to the reference to “officers, persons or bodies”.

Question 3

In relation to question (1), the Scottish Government proposes bringing forward a corrective amendment in the next instrument which deals with council tax reduction. It is expected that the next instrument will be primarily concerned with annual up-rating in the council tax reduction scheme and laid early next year.

The amendment will make clear that the reference in sub-para (2)(a)(ii) to “officers, persons or bodies” covers only those “officers, persons or bodies” referred to within the definition of “official error” contained in regulation 1(3) of the 1999 Regulations and not to all “officers, persons or bodies” as defined in regulation 1(3) generally.

In relation to question (2), for the reasons described above, no corrective action is proposed. Further, the Scottish Government considers that it is not necessary to take any corrective action in relation to question (2) as a result of the corrective action which is proposed in relation to question (1).

