

DELEGATED POWERS AND LAW REFORM COMMITTEE

14th Meeting, 2021 (Session 6) 14 December 2021

Instrument Responses

Scottish Child Payment Regulations 2020 and the Disability Assistance for Children and Young People (Scotland) Regulations 2021 (Miscellaneous Amendments) Regulations 2022 (2021/Draft)

On 1 December 2021 the Scottish Government was asked:

Section 97 of the Social Security (Scotland) Act 2018 applies to any Regulations made under Chapter 2, Part 2 (sections 28 to 36) and section 79 of the 2018 Act. The present instrument is made using the Scottish Ministers' powers under sections 31, 36, 51, 52, 79 and 95 of the 2018 Act. Accordingly, it appears that the Scottish Ministers are required to comply with sections 97(2), (5), (9) and (10) when laying this instrument.

The preamble to the instrument and the Policy Note both explain that the Scottish Ministers have complied with the requirements of section 97(2). However, section 97(9) imposes a further requirement on the Scottish Ministers "when laying a draft" instrument to also lay before Parliament either:

- (a) a response to the Commission's report on the proposals for the regulations, or
- (b) a statement explaining why the Ministers consider it appropriate to lay the draft instrument before the Parliament before the Commission has submitted its report on the proposals for the regulation.

As was the case for the laying email for the draft Winter Heating Assistance for Children and Young People (Scotland) Amendment Regulations 2021, the email laying for this instrument does not appear to contain either of these.

1. Has the SCoSS prepared a report on this instrument?
2. Does the Scottish Government consider that section 97(9) applies to this instrument?
3. If so, please confirm whether this requirement has been met or, if it has not been met, how the Scottish Government intends to rectify the issue.

On 7 December 2021 the Scottish Government responded:

Section 97(9) of the Social Security (Scotland) Act 2018 requires the Scottish Ministers to lay before Parliament, if available, the response to the Commission's report on the proposals for the regulations when laying a draft Scottish statutory instrument under this section. The Commission made two reports on these Regulations both of which were published on 18 November 2021. The Scottish Government laid the responses to the reports on the proposals on 29 November 2021 which was the same date these Regulations were laid. So we confirm that the requirement under section 97(9)(a) of the 2018 Act was met in relation to the reports and responses. A third set of minor technical amendments in these Regulations were not reported on by the Commission prior to laying the Regulations. In accordance with section 97(9)(b) of the 2018 Act, the Scottish Ministers laid a statement explaining why the Scottish Ministers consider it appropriate to lay the draft instrument before the Commission has reported on the proposals. The statement was sent to the Social Justice and Social Security Committee on 1 December but due to an administrative oversight, the statement was not laid until 3 December.

We apologise for this oversight.

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2021 (2021/446)

On 2nd December 2021 the Scottish Government was asked:

This instrument was laid before the Parliament on Wednesday 1 December 2021 and will come into force on Monday 13 December 2021. It has therefore been laid in breach of the rule in 28(2) of ILRA that an instrument subject to the negative procedure should be laid before the Scottish Parliament at least 28 days before it comes into force. The instrument provides prison officers and employees with powers that will allow them to photocopy prisoner's general correspondence and retain the original correspondence, in light of concerns regarding illicit substances being introduced via the prisoner mail system.

The letter to the Presiding Officer acknowledges that this instrument implements significant amendments to the Rules, and that in light of the serious nature of the amendments it is important to give the Parliament time to scrutinise the proposals. However, the letter also explains that it has not been possible to comply with the 28 day rule in this case due to the desire to have the amendments in force before the upcoming festive period, when the volume of mail in prisons is expected to increase. The letter references deaths linked to suspected drug overdoses in the period August 2020-July 2021, and "recent information" regarding the escalation of drug use in prisons.

Please could you provide further detail as to why the instrument could not have been made in sufficient time to both respect the 28 day rule, and to be in force prior to the festive period?

The Scottish Government responded:

For this instrument to have been made in sufficient time to comply with the 28 day rule and to be in force prior to the festive period (or at least the current coming into force

date of 13 December 2021) the instrument would need to have been made on 11 November and laid on 15 November.

The data on deaths linked to suspected drug overdoses over the 12 month period between August 2020 and July 2021 and emerging evidence at that time that psychoactive substances were being introduced to prisons through the mail system, resulted in work being carried out by the Scottish Prison Service (SPS) to consider options for changing the way in which mail received into prisons is processed. This review assessed the impact and risks associated with the options, the operational requirements to implement them and the legal implications of them, as noted by the Cabinet Secretary for Justice and Veterans in his letter to Russell Findlay MSP (and copied to the Convener of the Criminal Justice Committee) dated 23 September 2021 (see [here](#)).

The decision to make a change to the Prison Rules to allow prison officers and staff to copy general correspondence and hand only the copy to the prisoner which this instrument implements was announced to Parliament by the Cabinet Secretary for Justice and Veterans on 2 November 2021.

In the run up to this decision there was a serious incident at a Scottish prison linked to illicit substances. On 25 November there was a further serious incident linked to illicit substances at another Scottish prison. Following the first of these incidents, the Prison Officers' Association (Scotland) called for urgent action to be taken to address the issue of psychoactive substances in prisons.

The Scottish Ministers are under positive obligations to protect prisoners' and prison staff's article 2 (right to life – see *Osman v UK*, 23452/94), 3 (protection from torture or inhuman or degrading treatment – see *A v UK* [1998] ECHR 85) and 8 (right to private life, specifically the right to protection of an individual's physical integrity – see *MC v Bulgaria* [2003] ECHR 651) convention rights. That applies to the prisoners at risk from taking the psychoactive substances but also to the prisoners and staff who are at risk from the unpredictable behaviour of those who have taken psychoactive substances, and those prisoners who are used by the criminal gangs to receive the impregnated mail and then face threats and intimidation to provide it to its intended recipients. SPS has taken a number of actions to address this issue including the continued testing of correspondence.

The recent escalation requires the Scottish Ministers to take quick action to provide further protection for the convention rights of those impacted.

But for operational concerns about the risk to the security and good order of the prisons of implementing this change without giving prisoners notice of it and to allow Parliament the opportunity to scrutinise this instrument before it comes into force, the coming into force date would likely have been even sooner after the instrument was made and laid.