DELEGATED POWERS AND LAW REFORM COMMITTEE

2nd Meeting, 2021 (Session 6)

Tuesday 31 August 2021

Instrument Responses

Made Affirmative Instruments

The Health Protection (Coronavirus) (International Travel etc.) (Miscellaneous Amendments) (Scotland) (No. 4) Regulations 2021 (SSI 2021/261)

On 15 July 2021, the Scottish Government was asked:

The instrument amends the Health Protection (Coronavirus) (International Travel) (Scotland) Regulations 2020 to exempt certain groups of people, including those conducting official business in the UK and their family members, inflight security officers and persons lawfully compelled to enter the UK, from various requirements to provide advance information and proof of a negative Covid19 test on arrival in Scotland, to quarantine in a specified place for ten days after arrival and, in certain circumstances, disapplies the requirement for further Covid 19 testing on the second and eighth day of the ten day period following arrival. The instrument also extends the existing exemption for elite sportspersons from the qualified requirement to remain in a specified place after arrival in order to participate in qualifying events from future Olympic, Paralympic and Commonwealth games.

The instrument is made as emergency regulations under section 122(6) of the Public Health etc. (Scotland) Act 2008 where the Scottish Ministers consider that the Regulations need to be made urgently. In a letter to the Presiding Officer dated 7 July provided with the instrument the Scottish Government explains that these Regulations have been made urgently in light of a risk presented by imported infections.

1. As the instrument disapplies restrictions and requirements in the International Travel Regulations which are designed to reduce the risk of imported infections, please explain why these measures are made urgently in response to a risk presented by imported infections.

2. More particularly, the letter to the Presiding Officer further states that the extension of the existing exemption for sportspersons from the requirement to remain in a specified place for ten days after arrival in Scotland is to allow sportspersons to compete in qualifying events for the Olympic and Paralympic Games due to take place in 2024 in Paris.

Please clarify why this measure requires to be made urgently in 2021 using the power to make emergency regulations.

On 30 July 2021, the Scottish Government responds as follows:

1.The Health Protection (Coronavirus) (International Travel) (Scotland) Regulations 2020 ("the principal Regulations") amended by the instrument impose restrictions on personal liberties and business activities. As the decision was taken in line with clinical advice that a restriction (in its current form) was no longer necessary and could be relaxed, the Scottish Ministers considered that the provision to lift that restriction needed to be made urgently.

The Scottish Government accepts that the letter to the Presiding Officer should have been clearer in describing the instrument as made "urgently in light of a risk presented by imported infections". In this case, the instrument was made urgently to ensure that the relevant restrictions continue to apply only where necessary, and to ensure that the changes take effect as quickly as possible so the underlying restrictions are in place for no longer than is considered necessary.

2.The reference in the letter to the Presiding Officer to the 2024 Paris Olympic and Paralympic games provides an example of games for which training and qualification events would not previously have been covered by the exemption in paragraph 38 of schedule 2 of the principal Regulations. Only training and qualification events for the Olympic and Paralympic games in Tokyo 2021 were previously covered. The amendments thus allow athletes to participate in training or qualification events for future Olympic, Paralympic and Commonwealth Games beyond Tokyo 2021, without being subject to the relevant restrictions.

The amendments were required by 8 July 2021 because a number of athletics events were due to take place between 8 and 16 July 2021. These included the under 20 and under 23 European Championships in Tallinn, Estonia. If the amendment was not brought forward to come into force on 8 July 2021 the relevant restrictions would have applied to athletes on their return to Scotland after travelling to take part in those events. The application of the restrictions would effectively have prevented the athletes from participating in the events. These events were considered to be significant training events in the athletes' development for future Commonwealth, Olympic and Paralympic Games (though not for the 2021 Tokyo Olympic and Paralympic games).

The amendments also allowed athletes' attendance and participation to be confirmed in advance for the Junior European Judo Cup in Prague, held on 17-18 July 2021, which was similarly an important training event for Paris 2024 and beyond.

The Scottish Government brought forward the Regulations as soon as practicable once it became aware on 24 June 2021 that athletes from the other home nations would be made exempt from isolation requirements on returning from these training events.

The Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (SSI 2021/277)

On 10 August 2021, the Scottish Government was asked:

(a) New guidance published by the Scottish Government, titled "Coronavirus (COVID-19): staying safe and protecting others", states that "Masks may be removed for dancing, as well as for eating and drinking under the allowed exemptions" in nightclubs, discos, dance halls and adult entertainment venues. Regulation 6 of these

regulations lists nightclubs, discos and dance halls as premises where face coverings must be worn in accordance with regulation 5. Regulation 5 provides exemptions for scenarios where face coverings will not be required, including when a person is eating or drinking in any of the premises listed in regulation 6. There is also a specific exemption in regulation 5(1)(e) where persons are seated at a table in hospitality premises such as nightclubs and dance halls. There is no specific exemption for dancing in any of the venues listed above. Is it intended that an exemption should be included in the list in regulation 5 for dancing? If not, please explain how the advice provided in the new guidance that face coverings are not required when dancing is consistent with the requirements and exemptions provided for by regulations 5 and 6 of these regulations.

(b) In the "Coronavirus (COVID-19): face coverings" guidance, the list of exemptions has been updated to reflect the move from 2 metre distancing to 1 metre distancing, however it does not list "dancing" as an exempted activity and it contains a link to the now revoked Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020. Will this guidance be updated?

(c) Regulation 20 revokes the Health Protection (Coronavirus) (Restriction and Requirements) (Local Levels) Scotland Regulations 2020. SSIDM states that "where a principal instrument is to be revoked, all extant instruments which have amended that instrument and which would be spent on its revocation should themselves be revoked". Please explain why it is not considered necessary to revoke amending instruments still in force, such as 2021/263, 2021/262, and 2021/252?

On 13 August 2021, the Scottish Government responds as follows:

(a) It is considered that dancing is a form of exercise which reasonably requires that the person is not wearing a face covering (regulation 5(1)(r)) and the guidance is based on this consideration.

(b) Thank you for drawing this matter to our attention. We intend to update this guidance.

(c) Thank you for drawing this oversight to our attention. The amending instruments to which you refer will be revoked at the earliest convenient opportunity.

Negative Instruments

The Age of Criminal Responsibility (Scotland) Act 2019 (Register of Child Interview Rights Practitioners) Regulations 2021 (SSI 2021/233)

On 23 June 2021, the Scottish Government was asked:

(a) Regulation 2 (recruitment and selection of child interview rights practitioners) states that the Scottish Ministers may invite applications from, or nominate, potential child interview rights practitioners. Regulation 3 then outlines the criteria that will apply to this role. Please explain why it is considered appropriate that no provision is made for notification of the decision (c.f. regulation 4 – see below), and the reasons for such a decision, to be included or not be included in the register.

(b) Further, regulation 4(3) (removal from the register) provides "if the Scottish Ministers decide to remove a person from the register in accordance with paragraph (1) or (2), they must give the person notice in writing of that decision". Please explain

why it is considered appropriate that no provision is made requiring reasons to be provided with the notice.

Regulation 3(6) provides that a "person who is included in the register must comply with— (a) the Code of Practice, and (b) any condition of registration as notified in writing to that person by the Scottish Ministers". Regulation 3(7) provides that "a person who is included in the register must, as soon as practicable, notify the Scottish Ministers in writing if they— (a) are no longer entitled to provide children's legal assistance under section 28M of the Legal Aid (Scotland) Act 1986(b), (b) are barred from regulated work with children by virtue of the Protection of Vulnerable Groups (Scotland) Act 2007, or (c) become a person as described in paragraph (5)".

The Code of Practice referred to in the Regulations* that ChIRP's must comply with states at paragraph 17 "a registered ChIRP must notify the Scottish Government in advance or, which failing, within no more than twenty working days (or longer if special reason for exceeding twenty days can be shown) of any changes to information or documentation relevant to that person's registration as a ChIRP".

* We note the link at footnote (d) on page 2 appears to be broken.

Please explain whether and why it is considered that the Code of Practice and the Regulations are sufficiently clearly aligned in terms of time frames for notification of a change in information/circumstances in relation to the requirements in regulation 3(7)?

Please explain why it is considered that the 2019 Act confers vires to make the provision in regulation 3(6) requiring compliance with the Code of Practice (which does not appear to be provided for in the 2019 Act) where no such authorisation appears to be explicitly provided for in section 56.

Regulation 8(4) provides that the Scottish Ministers must establish and publish procedures for complaints in relation to- (a) the operation and management of the register, (b) persons included in the register in the performance of their functions. The enabling power in section 56(3) of the 2019 Act is for the Scottish Minister *by regulations* to make further provision in connection with the register and child interview rights practitioners.

Please explain whether and why it is considered that the provision in regulation 8(4) is sub-delegation of the power in section 56(3), whether this is authorised in that enabling power, and why it is considered the provision is within the scope of the enabling power.

Is any corrective action proposed, and if so, please confirm what action and when?

On 2 July 2021, the Scottish Government responds as follows:

(a) The Scottish Government agrees that giving notification of a decision is an essential component of the decision-making process: it is a natural consequence of making a decision that the person(s) affected by it should be notified. Whilst there is no general rule requiring that reasons should be given for all decisions, in most cases fairness requires that they should.

The intention of the Scottish Ministers is that management of the register will primarily be done administratively. Specific provision is not needed in the regulations to govern every detail of the processes to be followed. The fact that there is no express provision in the regulations for the notification of a decision not to include a person on the register, and the giving of reasons for that decision, does not preclude Ministers from doing so. Indeed, Ministers are mindful of their common law and statutory obligations such as those to act fairly and reasonably and in a manner which is compatible with Convention rights so far as engaged. The Scottish Government does not consider that the absence of an express power of this nature will cut across the need to act in accordance with those obligations – see, for example, *South Lanarkshire Council v McKenna* 2013 S.C. 212.

Additionally, the lack of express provision would not in itself preclude an individual from challenging the actions of the Scottish Ministers, if they had not been notified of a decision, or the reasons for it.

Accordingly, the Scottish Government does not consider it to be essential that the regulations contain such provision.

(b) For the same reasons, the Scottish Government does not consider it to be essential for regulation 4(3) to make express provision for the giving of reasons. Nevertheless, it was considered appropriate to include a requirement to notify in regulation 4(3) as it is essential that a person is made aware of any decision to remove them from the register, as it would have a direct bearing on their capacity to continue or take on work as a child interview rights practitioner. It will be necessary for the effective operation of the scheme that individuals who have been removed from the register are aware of this, so they know that they are no longer able to act.

The Scottish Government is mindful of its obligations to give reasons for a decision and fully intends to meet those obligations in its management of the register. This will particularly be the case given the importance of a decision to remove a person from the register. The lack of an express requirement to do so does not change that.

Paragraph 17 of the Code of Practice is a general requirement, which will place an obligation to notify the Scottish Government of a wide range of changes which may be relevant to a person's registration. For example, this could be a change in the firm at which a solicitor is employed or a change of contact details. The fact that the Code of Practice contains this general requirement does not mean that different requirements cannot be set out for different circumstances. Regulation 3(7) creates more stringent notification requirements in respect of specific changes in circumstances which have the potential to seriously affect the lawful, safe and appropriate delivery of child interview rights practitioners to children. As such, it was felt that these particular changes in circumstances merit separate notification requirements on the face of the regulations.

The Scottish Government's position is that the Code of Practice and the Regulations will have to be read alongside each other. In the event of any perceived inconsistency between the two, it is the Regulations which will take precedence.

The Scottish Government considers that the power in section 56(3) of the Act is sufficiently broad and inclusive to permit the provision in regulation 3(6), requiring compliance with the Code of Practice. This power allows the Scottish Ministers to make provision **in connection with** "the register (including the establishment and maintenance of the register)" and with "child interview rights practitioners…". The

Scottish Government is satisfied that this is sufficiently broad enough to enable provisions requiring compliance with a Code of Practice.

The Scottish Ministers have consulted on the Code of Practice and reference is made in the regulations to a specific version of that Code. It is therefore clear that, should the Scottish Ministers wish to update the Code of Practice, the Regulations would also require to be updated to reflect the most up to date version of that Code. The standards to be met by those on the register are therefore published and transparent and are sufficiently linked to the requirements as set out in the Regulations themselves.

The Scottish Ministers have an obligation under section 56(1) of the Act to establish and maintain a register of persons who are authorised to provide advice, support and assistance to children in relation to their involvement in investigative interviews. As noted above, the power in section 56(3) to make further provision **in connection with** the register of child interview rights practitioners is sufficiently broad to include a general provision along the lines of regulation 8(4). This signposts the intention to establish, under administrative arrangements, procedures to deal with complaints. The power in section 56(3) does not prevent other things from being set up administratively. There is nothing specifically within that power that suggests an intention on the part of the Parliament that such procedures, or indeed the detail of them, would require to be set out in detail in the Regulations.

As discussed in relation to question 1 above, the Scottish Government is mindful of its wider obligations to act compatibly with administrative law. Appropriate complaints mechanisms in relation to the operation of the register, and those registered under it, will help ensure that members of the public, and those registered, have an understanding of how such the register will be managed and how complaints will be dealt with administratively. The Scottish Government does not consider that it is necessary, however, for detailed provisions to be set out in the Regulations or that regulation 8(4) amounts to unauthorised sub-delegation of the power in section 56(3) of the Act.

The Scottish Government is grateful to the Committee's legal advisers for raising these points but does not consider there to be any requirements for corrective action.

The National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Amendment Regulations 2021 (SSI 2021/241)

On 22 June 2021, the Scottish Government was asked:

The instrument amends the National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Regulations 2003 (SSI2003/460) to make free dental care available to people aged between 18 and 25 years. According to the documents accompanying the instrument, this policy began as a commitment given in the Programme for Government 2019/20 (i.e. in September 2019) to care experienced young people aged 18 to 25 inclusive and a decision was taken to extend the policy to provide free dental care to include all young people aged 18 – 25 years.

The instrument, which is subject to the negative procedure, was laid on 15 June and comes into force on 24 August. This does not allow at least 28 days between the instrument being laid before the Parliament and the provisions coming into force, not counting periods of recess of more than 4 days. The Parliament is in recess between 26 June and 29 August (inclusive). Therefore the instrument breaches the laying

requirements in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

The letter to the Presiding Officer dated 15 March 2021, sent as required under section 31(3) of the 2010 Act, states that "*due to the pandemic, resources within Dental Policy have been focussed on the sustainability and subsequent remobilisation of the Scottish Dental sector, and so this important public health undertaking has not been able to be prioritised until now*". The letter further explains that "*Furthermore, due to this year of uncertainty, the proposed policy will include all people aged 18-25 inclusive: it is hoped that such a widening will provide health benefits for all young adults at this difficult time*".

1. Please explain in further detail why it was not possible to lay the instrument approximately two and a half weeks earlier to afford the Parliament the full 28 days required under section 28(2) of the 2010 Act in circumstances where the original commitment was given in September 2019.
2. In particular, reference is made in the Business and Regulatory Impact Assessment to the proposal being raised by the Cabinet Secretary with the British Dental Association on 8 June 2021. When did it become clear that the policy was to be extended?

On 2 July 2021, the Scottish Government responds as follows:

1. There were a number of practical complexities that were being worked through with the commitment made to people with care experience in the Programme for Government 2019 / 20 immediately prior to the onset of the pandemic. When a person presents for NHS dental treatment, they are required to make a declaration regarding their entitlement to free NHS dental care. If they are entitled to the remittance of NHS dental charges, they are required to provide satisfactory evidence to prove that status. Work was ongoing to establish what appropriate evidence should be required for young people who were care experienced. The Scottish Government's aim was that satisfactory proof which is necessary to protect the NHS from potential fraud should be provided in a manner that does not create an undue evidential burden on this group of people. As noted in the letter from the Scottish Government to the Presiding Officer dated 15 June 2021, the careful work required on this issue was delayed to divert necessary resource to addressing the harms associated with the pandemic.

This work has recently resumed. Ministers were presented with further advice on how the Programme for Government 2019 / 20 commitment may be taken forward as soon as practicably possible after the formation of the new Government and the appointment of Ministers. It was decided that this delayed public health commitment should be delivered as a matter of urgency. Therefore it was unfortunately not possible to comply with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 on this occasion.

2. Once advice was offered by officials, Ministers made the decision, in the interests of young people in Scotland, to expand the offer to this wider group. The instrument was laid at the first opportunity following a discussion which the Cabinet Secretary had with British Dental Association's Scottish Committee to take their views on the policy.

The Council Tax Reduction (Scotland) Regulations 2021 (SSI 2021/249)

On 19 August 2021, the Scottish Government was asked:

1. Regulation 20(3)(h) disapplies the general exclusion of students from entitlement to Council Tax Reduction to a student who is "a single applicant with whom a child is placed by a local authority or voluntary organisation within the meaning of the Children Act 1989 or boarded out within the meaning of the Social Work (Scotland) Act 1968". The Children Act 1989 relates to children placed by English local authorities. The Social Work (Scotland) Act 1968 as originally enacted included powers under section 5(2) and (3)(b) for Scottish Ministers to make regulations relating to the boarding out of 'persons' whether adults or children.

SI 1996/3201 commenced Schedule 4, paragraph 15(4)(d) of the Children (Scotland) Act 1995, which replaces the term "boarding out" of children with "the placing of children under paragraph (a), or the making of arrangements in respect of children under paragraph (c), of section 26(1) of the Children (Scotland) Act 1995 by local authorities" in Scotland. Section 86(3) of the 1968 Act retains a reference to a child being "boarded out under this Act or under the Children and Young Persons (Scotland) Act 1937" for the purposes of identifying periods of residence in a local authority area which are disregarded when determining the ordinary residence of a child. However, there is no definition and no longer any substantive provision in respect of 'boarding out' of children in either the 1968 Act or the 1937 Act.

Is the intention that regulation 20 is to capture all the circumstances in which a single applicant who is a student is not excluded from entitlement to council tax reduction when caring for a child placed with them by a Scottish local authority? If so, should the reference properly be to "children placed under paragraph (a), or the making of arrangements in respect of children under paragraph (c), of section 26(1) of the Children (Scotland) Act 1995 by local authorities" which has superseded the reference to children being "boarded out" in the 1968 Act?

2. Regulation 77(9)(m) makes reference to "care provided by a carer under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010" (SI 2010/781) in relation to child care which attracts the child care costs deduction when calculating weekly income for assessment of entitlement to Council Tax Reduction. The 2010 regulations referred to were revoked by the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (SI/2936), Pt 6 reg.25(a), subject to savings provisions which are not relevant in this context. Given that these regulations have been revoked, is it the intention that the reference to these regulations captures a cohort of carers providing child care at certain period of time? Or should the reference be to "care provided by a carer under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. Noting that both the 2010 regulations and the 2014 regulations apply only in England and Wales, is there an alternative reference to be cited?

3. Is any corrective action proposed, and if so, what action and when?

On 24 August 2021, the Scottish Government responds as follows:

(1) Regulation 20(3)(h) is intended to capture the circumstances in which a single applicant who is a student is not excluded from entitlement to council tax reduction when caring for a child placed with them by a Scottish local authority. The reference

in this provision should link to “children placed under paragraph (a), or the making of arrangements in respect of children under paragraph (c), of section 26(1) of the Children (Scotland) Act 1995 by local authorities” which has substantively superseded the reference to children being “boarded out” in the 1968 Act. The Scottish Government is grateful to the Committee for drawing this point to its attention. The Government intends to bring forward an amendment to regulation 20(3)(h) to reflect this point.

(2) Again, the Scottish Government is grateful to the Committee for drawing this point to its attention. This is an outdated reference to revoked provision; there was no intention to capture a cohort of carers providing child care at certain period of time. If the reference were amended to “care provided by a carer under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014”, the Government considers that this would have clear meaning. The Government also intends to bring forward an amendment to regulation 77(9)(m) to address this point.

(3) The Scottish Government proposes to address these points in an amending set of Regulations which it intends to bring forward in the coming months. The intention is that these amendments will also come into force on 1 April 2022.