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Pàrlamaid na h-Alba

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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 February 2023**



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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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# Committee Membership



**Convener**  
**Stuart McMillan**  
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**Deputy Convener**  
**Bill Kidd**  
Scottish National Party



**Jeremy Balfour**  
Scottish Conservative  
and Unionist Party



**Carol Mochan**  
Scottish Labour



**Oliver Mundell**  
Scottish Conservative  
and Unionist Party

# Introduction

1. At its meeting on 21 February, the Committee considered the following instrument under its remit and agreed to draw it to the attention of the relevant lead committee:
  - Social Security (Up-rating) (Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/Draft)
2. The Committee's recommendations in relation to this instrument are set out in the next section of this report.
3. The Committee also determined that, in terms of its remit, it did not need to draw the Parliament's attention to the instruments at the end of the report.

# Scrutiny of instruments under the Committee's remit: instruments drawn to the attention of the lead committee

## Social Security (Up-rating) (Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/Draft)

4. The instrument is made under the Social Security Act 1988, the Social Security Contributions and Benefits Act 1992 and the Social Security (Scotland) Act 2018.
5. The instrument provides for an increase in various benefit payments and associated earnings thresholds.
6. In correspondence with the Scottish Government, the Committee highlighted that Scottish Ministers failed to lay their response to the Scottish Commission on Social Security's proposals with the instrument, as is required by section 97 of the Social Security (Scotland) Act 2018.
7. The Scottish Government subsequently laid the response on 3 February 2023 and apologised for this oversight.
8. A copy of the correspondence can be found in the **Annex**.
9. The lead committee for this instrument is the Social Justice and Social Security Committee.

10. **The Committee draws the instrument to the attention of the Parliament on the general reporting ground in that the response to the Scottish Commission on Social Security proposals was not laid at the same time as the instrument.**

11. **The Committee notes the apology received from the Scottish Government for this oversight .**

12. **The Committee asks the Scottish Government to ensure that all required documentation is laid at the same time as an instrument is laid before Parliament.**

# No points raised

## Economy and Fair Work Committee

Diligence against Earnings (Variation) (Scotland) Regulations 2023 (SSI 2023/27)

## Finance and Public Administration Committee

Budget (Scotland) Act 2022 Amendment (No. 2) Regulations 2023 (SSI 2023/Draft)

## Health, Social Care and Sport Committee

Public Health Scotland Amendment Order 2023 (SSI 2023/24)

Personal Injuries (NHS Charges) (Amounts) (Scotland) Amendment Regulations 2023 (SSI 2023/34)

## Local Government, Housing and Planning Committee

Non-Domestic Rates (Miscellaneous Anti-Avoidance Measures) (Scotland) Regulations 2023 (SSI 2023/Draft)

Council Tax (Discounts) (Scotland) Amendment Order 2023 (SSI 2023/25)

Non-Domestic Rating (Valuation of Sites of Reverse Vending Machines) (Scotland) Regulations 2023 (SSI 2023/26)

## Social Justice and Social Security Committee

Social Security Up-rating (Scotland) Order 2023 (SSI 2023/Draft)

# Annex

## Non-Domestic Rates (Miscellaneous Anti-Avoidance Measures) (Scotland) Regulations 2023 (SSI 2023/Draft)

On 2 February 2023, the Committee asked the Scottish Government:

Section 41 of the Non-Domestic Rates (Scotland) Act 2020 sets out the procedure for anti-avoidance regulations.

Section 41(6) requires that the Scottish Ministers, when laying a draft of an SSI containing anti-avoidance regulations, also lay before the Parliament a document which explains why the Scottish Ministers consider that it is appropriate to make the anti-avoidance regulations, and gives details of the consultation, any representations received as a result of the consultation, and the changes (if any) made to the draft anti-avoidance regulations as a result of those representations.

The regulations are accompanied with a Policy Note and an Annex titled Annex A – Summary Statement on Consultation Exercise. Given that this is the first exercise of the power, please could you clarify where the explanation of why Scottish Ministers consider it appropriate to make the avoidance regulations has been included in order to fulfil the laying requirement in 41(6)(a)?

On 7 February 2023, the Scottish Government responded:

The Scottish Ministers elected to fulfil the requirements of section 41(6) by utilising the Policy Note document that is already laid before the Parliament and expanding it to address the requirements of that section, including by the addition of Annex A. This was considered by the Scottish Ministers to be the most effective and transparent way of complying with the requirements of section 41(6) as there is already an established process for publication of policy notes alongside instruments, notably on the UK Government website [www.legislation.gov.uk](http://www.legislation.gov.uk) managed by the National Archives.

The explanation for why the Scottish Ministers consider it appropriate to make the Regulations is contained in the Policy Note section of the document, in the section entitled “Policy Background” on pages 1 and 2. This sets out the policy rationale for the Regulations and, in doing so, explains that:

*“The Scottish Government is committed to a fair and transparent non-domestic rates system, one that is not undermined by avoidance tactics, and in which local authorities are empowered to tackle known avoidance tactics.*

*The Bute House Agreement, and the Programme for Government 2021, committed to using the anti-avoidance powers in the 2020 Act to assist local authorities in tackling known non-domestic rates avoidance tactics, including when they make decisions on applying empty property relief (which will be devolved to local authorities on 1 April 2023) and charity relief.*

*Tax avoidance in the context of non-domestic rates takes place when a ratepayer seeks to reduce, delay or avoid the tax liability by taking action(s) which, although permissible within the existing legal framework, is (are) not in keeping with the spirit of non-domestic rates legislation. Tax avoidance often involves artificial mechanisms for which the main*

*reason, or one of the main reasons, is to reduce the tax due.*

*Tackling this avoidance is important because it reduces public revenues, and it is unfair to the majority of ratepayers who do not engage in avoidance. Avoidance can also undermine public confidence in the non-domestic rates system and lead to reduced rates of compliance.*

*The independent Barclay Review of Non-Domestic Rates recommended that a General Anti-Avoidance Rule be created to reduce avoidance and make it harder for loopholes to be exploited in future. The 2020 Act empowers the Scottish Ministers to make regulations with a view to preventing or minimising advantages arising from non-domestic rates avoidance arrangements that are artificial.*

*These draft regulations, made under Part 4 of the 2020 Act, seek to empower local authorities to tackle known avoidance tactics.”*

### **Social Security (Up-rating) (Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/Draft)**

On 2 February 2023, the Committee asked the Scottish Government:

The instrument is made under provisions in the Social Security Act 1988, the Social Security Contributions and Benefits Act 1992 and the Social Security (Scotland) Act 2018. Section 97 of the 2018 Act provides that certain requirements must be met when laying a draft Scottish statutory instrument that is made under Chapter 2 of Part 2. It provides the following:- SCoSS must be informed of the proposals; the Scottish Parliament must be notified; the proposals must be made publicly available and SCoSS must prepare a report setting out their observations. Further, it provides that the Scottish Ministers must also lay before the Parliament a response to the Commission's report on the proposals for the regulations. The Policy Note also refers to the response and states “The response from Scottish Ministers to the SCoSS report will be laid in the Scottish Parliament along with this policy note.”

The response to the proposals has not been laid along with this instrument.

*Please confirm whether any corrective action is proposed, and if so, what action and when.*

On 7 February 2023, the Scottish Government responded:

Where the Commission have reported, under section 97(4) of the Social Security (Scotland) Act 2018, on proposals for Regulations which are being laid in draft before Parliament, section 97(9) of that Act requires the Scottish Ministers to lay before Parliament their response to the Commission's report or, if the Commission's report is not available, then the Scottish Ministers are required to lay a statement explaining why they consider it appropriate to lay the draft instrument before the Commission submitted its report.

The Commission made a report on these Regulations which was published on 20 January 2023. The Regulations were laid on 31 January 2023. Due to an administrative oversight, the response to the Commission's proposal was not laid until 3 February 2023.

We apologise for this oversight.

**Social Security Up-rating (Scotland) Order 2023 (SSI 2023/Draft)**

On 3 February 2023, the Committee asked the Scottish Government:

The preamble states that the Order is made under sections 150(9) and 150A of the Social Security Administration Act 1988. Sections 189 (1) and (4) are not cited as an enabling powers in the preamble, however, these sections are referred to in the footnote.

Please confirm if the reference in the footnote to sections 189(1) and (4) is intentional? If so, should those sections also be cited in the preamble as an enabling power?

Please confirm whether any corrective action is proposed, and if so, what action and when.

On 7 February 2023, the Scottish Government responded:

The reference in the footnote to sections 189(1) and (4) of the Social Security Up-rating (Scotland) Order 2023 is intentional.

We submit that these provisions should not however be cited in the preamble of the Order for the following reason.

It appears to us that these provisions, properly construed, are not themselves enabling powers but rather conditions or expansions of the use of such powers. Subsection (1) clarifies that it is the Secretary of State (and therefore, as a consequence of the transfer of competence, the Scottish Ministers) who is to make regulations under the Social Security Administration Act 1992, and subsection (4) makes further provision about how powers in that Act may be exercised. As a result, we have not cited these provisions in the preamble.

However, given that these provisions relate to the exercise of the enabling powers in sections 150(9) and 150A(6) we take the view that it is appropriate to include references to sections 189(1) and (4) in the footnotes, for the assistance of the end-users of the instrument.

