

Health, Social Care and Sport Committee

3rd Meeting, 2021 (Session 6), Tuesday 7 September 2021

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following negative instruments:
 - [National Health Service \(Travelling Expenses and Remission of Charges\) \(Scotland\) \(No. 2\) Amendment Regulations 2021 \(SSI 2021/241\)](#)
 - [The Milk and Healthy Snack Scheme \(Scotland\) Amendment \(No. 2\) Regulations 2021 \(SSI 2021/274\)](#)

Procedure for negative instruments

2. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
3. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
4. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
5. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must

revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.

6. Each negative instrument appears on the Health, Social Care and Sport Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
7. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

8. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:
<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>

Recommendation

9. The Committee is invited to consider any issues which it wishes to raise on these instruments.

**Clerks to the Committee
2 September 2021**

SSI 2021/241

Title of Instrument: National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Amendment Regulations 2021

Type of Instrument: Negative

Laid Date: 15 June 2021

Meeting Date: 7 September 2021

Minister to attend meeting: No

Motion for annulment lodged: No

Drawn to the Parliament's attention by the Delegated Powers and Law Reform Committee? No/Yes

10. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 31 August 2021.

11. The Committee agreed to draw the attention of Parliament to the instrument and to report that it found the breach of s28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 acceptable with regard to the instrument. The extract from the report is below:

“The Committee draws the instrument to the attention of the Parliament under reporting ground (j) as it has been laid less than 28 days before coming into force.

The Committee was not persuaded that the Scottish Government's explanation justified this breach of the laying requirement and wishes to highlight its expectation that the Scottish Government should adhere to the 28 day rule to facilitate proper parliamentary scrutiny.”

Reporting deadline: 20 September 2021

Purpose

12. This 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.

13. 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.

14. A copy of the Scottish Government's Policy Note is included in **Annexe A**.
SSI 2021/274

Title of Instrument: The Milk and Healthy Snack Scheme (Scotland) Amendment (No. 2) Regulations 2021

Type of Instrument: Negative

Laid Date: 28 August 2021

Meeting Date: 7 September 2021

Minister to attend meeting: No

Motion for annulment lodged: No

Drawn to the Parliament's attention by the Delegated Powers and Law Reform Committee? No/Yes

Reporting deadline: 4 October 2021

Delegated Powers and Law Reform Committee Consideration

15. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 31 August 2021.

16. The Committee agreed to draw the attention of Parliament to the instrument and to report that it found the breach of s28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 acceptable with regard to the instrument. The extract from the report is below:

"The instrument makes a number of amendments to the Milk and Healthy Snack Scheme (Scotland) Regulations 2021 (SSI 2021/82).

It was laid on 28 July 2021 and came into force the following day and so is in breach of the 28 day rule. A letter from the Scottish Government to the Presiding Officer explains that laying requirements were not able to be complied with due to circumstances specific to the year of the pandemic leading to unanticipated delays and the need to bring the Regulations into force with immediate effect to enable local authorities to make payments for the launch of the Scottish Milk and Healthy Snack Scheme from 1 August 2021. The correspondence also highlights that this is the second amending instrument to these Regulations where the laying requirements have not been complied with.

The Scottish Government's correspondence with the Presiding Officer can be read in Annex B.

The Committee draws the instrument to the attention of the Parliament under reporting ground (j) as it has been laid less than 28 days before coming into force. While the Committee recognises the Scottish Government's necessity for the breach of the 28-day rule in this instance, it considers the circumstances of the breach to be unsatisfactory. This is the second amending instrument breaching the laying requirements, the basis for calculating payments under the scheme is an important aspect of the operation of the scheme itself, and an earlier amending instrument amended the regulation determining the amount payable. The Committee again emphasises that the Scottish Government should normally comply with laying requirements to facilitate timely parliamentary scrutiny of such important policy choices.”

Purpose

17. The purpose of the instrument is to amend the Milk and Healthy Snack Scheme (Scotland) Regulations 2021 [SSI 2021/82]. Its aim is to clarify and address technical issues of immediate relevance to the operation of the Milk and Healthy Snack Scheme (“the Scheme”) in the following ways:

- clarifying that it will be a specified local serving rate that will be used to determine the upfront payment to settings and not the market price as was previously included in the regulation;
- removing regulation 9(2) so that no other factors than those specified in regulation 9(1) are relevant to the determination of the upfront payment;
- removing in regulation 10(1)(c) the reference to market price and replacing it with a reference to the cost of the benefit provided;
- including a new Schedule 3 containing a table showing the combined local serving rates for milk and a healthy snack for Scheme year 1 (August 2021- July 2022).

18. A copy of the Scottish Government’s Policy Note is included in **Annexe B**.

POLICY NOTE

ANNEXE A

THE NATIONAL HEALTH SERVICE (TRAVELLING EXPENSES AND REMISSION OF CHARGES) (SCOTLAND) (NO. 2) AMENDMENT REGULATIONS 2021**SSI 2021/241**

The above instrument was made in exercise of the powers conferred by sections 75A and 105(7) of the National Health Service (Scotland) Act 1978 and all other powers enabling them to do so. The instrument is subject to negative procedure.

The purpose of this instrument is to make amendments to the National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Regulations 2003 that will enable those aged 18 to 25 inclusive to access NHS dental care with no patient charge.

Policy Objectives

To provide free at the point of use NHS dental care for young people, aged 18 to 25 inclusive:

- As people move from child dental service to young adulthood, this is often a time when this cohort loses touch with their dentist, particularly as they may be leaving home for the first time and living independently;
- The impact of moving away can have a profound effect on diet, with young people more likely to eat unhealthy foods, with a detrimental impact on oral health;
- Similarly there may be an increase or significant change in oral health damaging behaviours such as smoking and increased alcohol consumption;
- This group is also more likely to be impacted by cosmetic improvements to smile and appearance and access tooth whitening products on-line etc.;
- In summary we have a world-leading Childsmile Programme, and a general move to providing free NHS dental care for 18-25 years of age builds on the continuity of dental care throughout a person's lifetime.

At present patients pay 80% of the cost of their NHS dental treatment up to a maximum of £384 per course of treatment, unless they belong to one of the groups entitled to free NHS dental treatment or qualify for help with health costs through the NHS Low Income Scheme.

The policy is an extension of the Programme for Government (2019/20) commitment to provide free at the point of use for care experienced young people. Due to the circumstances of the pandemic, it has not been possible to take forward this commitment and Ministers are now minded to widen this to include all adults between the ages of 18 and 25.

The provisions will come into force on 24 August 2021.

Consultation

The Government made a key election pledge to provide free at the point of use NHS dental care to all adults in Scotland during the Parliamentary period.

The Cabinet Secretary for Health and Social Care met with BDA Scotland on 8 June 2021.

Impact Assessments

We have undertaken a Business Regulatory Impact Assessment, Equality Impact Assessment, Fairer Scotland Duty Assessment and Strategic Environmental Assessment (pre-screen).

The Business Regulatory Impact Assessment shows the costs for Scottish Government are likely to be £7-£10 million annually, increasing as demand and operating costs increase. Dental practices are likely to face increased demand, but will make cost savings on administration.

The Equality Impact Assessment shows that the amending regulations should have a positive impact on the oral health of young people.

The Fairer Scotland Duty Assessment shows the policy should reduce health inequalities across the whole cohort of young people.

The Strategic Environmental Assessment pre-screen suggests there are likely to be no or minimal environmental effects; the Assessment is currently with the Consultation Authorities.

We have also given consideration to a Data Protection Impact Assessment, a Children's Rights and Wellbeing Impact Assessment, and an Island Community Impact Assessment, which were considered to be unnecessary for these amending regulations.

Scottish Government Dentistry and Optometry Division

June 2021

POLICY NOTE

ANNEXE B

**THE MILK AND HEALTHY SNACK SCHEME (SCOTLAND) AMENDMENT (NO. 2)
REGULATIONS 2021****SSI 2021/274**

The above instrument was made in exercise of the powers conferred by section 13 of the Social Security Act 1988 (1988 Act) and section 175(5) of the Social Security Contributions and Benefits Act 1992 and all other powers enabling them to do so. The instrument is subject to negative procedure.

Purpose of the instrument. This instrument amends the Milk and Healthy Snack Scheme (Scotland) Regulations 2021 [SSI 2021/82]. Its aim is to clarify and address technical issues of immediate relevance to the operation of the Milk and Healthy Snack Scheme (“the Scheme”).

The Milk and Healthy Snack Scheme (Scotland) Regulations 2021 (“the Regulations”) prescribe for food benefits (being milk or a specified non – dairy alternative and a healthy snack item) to be provided to an eligible child, being a pre-school child who receives childcare services from a registered childcare provider, who is registered with the Scheme. The childcare provider, who is to be paid up-front payments by a local authority to do so, must provide the prescribed benefit in accordance with an eligible child’s entitlement when childcare services of at least two hours per day are provided to that child.

The Regulations:

- help and encourage eligible children to have access to incorporate in their diets, those prescribed food benefits;
- prescribe functions for the funding, administration and operation of the Scheme, including the lawful delegation of Ministerial functions to local authorities in its area; and
- modify the application of the Welfare Food Regulations 1996 (“the 1996 Regulations”) and UK National Milk Scheme (UK NMS) in Scotland, which the Regulations and Scheme are to replace.

This instrument amends the Regulations described above by:

- clarifying that it will be a specified local serving rate that will be used to determine the upfront payment to settings and not the market price as was previously included in the regulation;
- removing regulation 9(2) so that no other factors than those specified in regulation 9(1) are relevant to the determination of the upfront payment;
- removing in regulation 10(1)(c) the reference to market price and replacing it with a reference to the cost of the benefit provided;
- including a new Schedule 3 containing a table showing the combined local serving rates for milk and a healthy snack for Scheme year 1 (August 2021- July 2022).

Policy Objectives

The Policy Objectives remain those cited in the Policy Note accompanying the Regulations, subject to the minor modifications highlighted in bold below.

The Regulations and Scheme will replace the application of the 1996 Regulations and UK NMS in Scotland. The Regulations establish framework to deliver the purposes stated above and an upfront funding mechanism to childcare providers registered with the Scheme via local authorities.

The Scheme:

- will be delivered by local authorities who have been delegated prescribed Ministerial functions in the Regulations;
- provides that local authorities can make payments to eligible childcare providers registered with Social Work and Social Care Improvement Scotland (Care Inspectorate and who are registered with the Scheme; the amendment clarifies that these payments will be determined with reference to the table of local serving rates derived following extensive consideration of pricing structures and not to market price as previously stated;
- obligates childcare providers who provide a childcare service to an eligible pre-school child for at least two hours per day to provide prescribed benefits to that child in accordance with the child's entitlement and where that child has not already received the benefit that day;
- entitles an eligible child to the following food benefits [being prescribed volumes of infant formula, milk types or non – dairy alternative and a healthy snack item, in accordance with age of the eligible child and with regard to whether certain types of milk cannot be consumed by them because of medical, ethical or religious reasons] as follows:
 - where an eligible child is under one year of age, 189 mls of infant formula;
 - where an eligible child is one year of age and less than two years of age, 189 mls (or where the milk or non-dairy alternative is supplied in containers of 200 mls only) of the following types of milk can be provided - whole plain fresh liquid cow's milk, or where for medical, religious or ethical reasons an eligible child cannot consume cow's milk then goat's milk or sheep milk. Or where for medical, religious or ethical reasons an eligible child cannot consume cow's, goat's or sheep's milk then a non-dairy alternative (defined as "a drink which is an unsweetened, calcium enriched liquid and is commonly used as a substitute for milk");
 - where an eligible child has reached two years of age, 189 mls (or where the milk or non-dairy alternative is supplied in containers of 200 mls only) of the following types of milk can be provided – (whole/semi-skimmed) plain fresh liquid cow's milk, or where for medical, religious or ethical reasons an eligible child cannot consume cow's milk then goat's milk or sheep milk. Or where for medical, religious or ethical reasons an eligible child cannot consume cow's, goat's or sheep's milk then a non-dairy alternative defined as "a drink which is an unsweetened, calcium enriched liquid and is commonly used as a substitute for milk");

- where an eligible child has reached six months, one healthy snack item (comprising fresh fruit, vegetables or mixed fruit).
- reduces administrative burdens for day care providers and childminders by moving to an ‘upfront’ payment approach aligned with funded Early Learning and Childcare (ELC) provision rather than the claims and reimbursement model used by the UK Nursery Milk Scheme which has operated in Scotland until now.

This policy has been developed from proposals described in the Welfare Foods consultation published in 2018.

Since funding will be delivered to local authorities (to make payment to childcare providers), the Scottish Government have been working collaboratively with the Convention of Scottish Local Authorities (COSLA) and relevant governance groups to develop proposals on the design and delivery of the Scheme.

The Scheme will support the Scottish Government’s policy intentions around improving children’s health and wellbeing. It is an opportunity to improve children’s nutrition, tackle health inequalities, and integrate the policy with broader Scottish approaches. Early intervention and prevention initiatives are fundamental as a healthy start lays the foundation to a healthy future. Establishing good nutrition, healthy diet and positive eating habits in a child’s early years is important as these habits can be taken forward into adolescence and throughout adult life. This supports both physical health and mental wellbeing in the long term, including helping to prevent obesity.

The Scheme will contribute to fulfilling the Scottish Government’s National Outcomes as per the National Performance Framework: Children and Young People:

- We grow up loved, safe and respected so that we realise our full potential;
- We are healthy and active;
- We tackle poverty by sharing opportunities, wealth and power more equally.

It will also support the Scottish Government’s Sustainable Development Goals:

SDG 1 – No Poverty

SDG 2 - Zero Hunger

SDG 3 – Good Health and Wellbeing SDG 10 – Reduced Inequalities

Consultation

In developing the Regulations set out above, policy officials engaged with relevant stakeholders and consulted as required by statute, as set out in the Policy Note to the Regulations.

In bringing forward this amendment, officials continue to draw on the earlier consultation and on additional feedback offered by external stakeholders including representatives of the dairy industry and COSLA.

We have not explicitly consulted external stakeholders however, we have continued to engage with COSLA and we have drawn directly on feedback offered by industry stakeholders on the principal instrument to inform our amendments.

Impact Assessments

A Business and Regulatory Impact Assessment (BRIA), Children's Rights and Wellbeing Impact Assessment (CRWIA) and an Equalities Impact Assessment (EQIA) were completed on the Milk and Healthy Snack Scheme (Scotland) Regulations 2021.

The amending instrument makes no material changes to these. The financial and cost data referred to within the BRIA has formed part of the development of the table of Local Serving Rates, together with updated cost information including data from the Scotland Excel procurement framework.

Financial Effects

The amending instrument should have no impact on the Financial Assessment as set out in the policy note to the principal instrument. The Minister for Children and Young People has signed this impact assessment.

Scottish Government
Children and Families Directorate 28 July 2021