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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 12 November 2019



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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.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Committee Membership



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Deputy Convener
Stuart McMillan
Scottish National Party



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Scottish National Party



Jeremy Balfour
Scottish Conservative
and Unionist Party



Mary Fee
Scottish Labour

Introduction

Instruments considered under the European Union (Withdrawal) Act 2018

1. At its meeting on 12 November 2019, the Committee considered the following instrument under the protocol agreed between the Scottish Government and the Scottish Parliament in respect of SSIs made using powers under the European Union (Withdrawal) Act 2018:
 - Agriculture Market Measures (EU Exit) (Scotland) (Amendment) (No.2) Regulations 2019 (SSI 2019/347)
2. The Committee's recommendations and conclusions in relation to this instrument are set out later in the report.

Instruments drawn to the attention of the lead committee

3. The Committee also considered the following negative instruments and agreed to draw them to the attention of the lead Committee:
 - Public Health Scotland Order 2019 (SSI 2019/336)
 - Fishing Boats Designation (EU Exit) (Scotland) Order 2019 (SSI 2019/345)
4. The Committee's recommendations and conclusions in relation to these instruments are set out later in the report.

Other instruments considered

5. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out by the relevant lead Committee at the end of this report.

Instruments Considered Under the European Union (Withdrawal) Act 2018

Agriculture Market Measures (EU Exit) (Scotland) (Amendment) (No.2) Regulations 2019 (SSI 2019/347)

Purpose

6. The instrument amends the below legislation to ensure that they continue to operate effectively following the UK's exit from the EU:
 - The Registration of Establishments Keeping Laying Hens (Scotland) Regulation 2003 (regarding the registration of establishments keeping laying hens)
 - The Reporting of Prices of Milk Products (Scotland) Regulations 2005 (regarding the notification of prices of milk products to the Scottish Ministers);
 - The Eggs and Chicks (Scotland) (No.2) Regulations 2006 (regarding the production and marketing of eggs for hatching, other eggs, and farmyard poultry chicks);
 - The Poultrymeat (Scotland) Regulations 2011 (regarding the marketing of poultrymeat); and
 - The Milk and Other Products (Pupils in Educational Establishments)(Scotland) (Regulations) 2017 (regarding a scheme allowing EU and national aid in relation to milk in schools etc.).
7. The instrument also makes amendments to some of this legislation under section 2(2) of the European Communities Act 1972 to ensure it is up to date with correct EU references prior to exit day.

Committee Consideration

8. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.
9. The instrument makes minor and technical amendments to this legislation to correct deficiencies that will occur on the UK's exit from the EU. The regulations appear to make no substantive changes to policy. The Committee therefore agrees with the Minister's statement that provision in the regulations does no more than appropriate, that there are good reasons for it, and that it is a reasonable course of action.
10. The Committee agrees that the negative procedure is appropriate and that the instrument is properly categorised as low in accordance with the protocol.
11. The Committee recommends to the Rural Economy and Connectivity Committee that the negative procedure is the appropriate scrutiny procedure for this SSI and

that it is appropriately categorised as Low in terms of its significance under the SSI Protocol.

Instruments Drawn to the Attention of the Lead Committee

Public Health Scotland Order 2019 (2019/336)

Purpose

12. This instrument creates a new Special Health Board to be known as Public Health Scotland and dissolves NHS Health Scotland. It consolidates a number of health functions and confers them upon Public Health Scotland.

Committee Consideration

13. Schedule 1 modifies sections 13 and 13A of the National Health Services Scotland Act 1978 by inserting references to “Health Boards” in both sections. However, there is already reference to “health boards” in these provisions. The modification therefore has the effect of repeating the term twice in each provision.
14. When this issue was raised with the Scottish Government, it did not agree that this is an error, stating that the newly inserted reference to “Health Boards” should be read as a reference to “Public Health Scotland” (a body newly created by this instrument) by virtue of article 5 of the instrument.
15. The Committee disagrees with this interpretation of article 5 and therefore calls on the Scottish Government to take corrective action when a suitable opportunity arises. The repeated references do not have any obvious legal detriment so it is not considered that urgent corrective action is required.
16. The Committee reports the instrument to the Health and Sport Committee under the general reporting ground and calls on the Scottish Government to correct the error when a suitable opportunity arises.

Fishing Boats Designation (EU Exit) (Scotland) Order 2019 (2019/345)

Purpose

17. This instrument designates countries for the purposes of detailing the access to fisheries for vessels from those countries after the UK’s exit from the EU. In respect of each designated country, an area is designated in which boats from those countries can fish and descriptions of the sea fish that can be caught by those boats in those areas is provided.
18. The instrument also prescribes how fishing gear is to be stowed on foreign fishing boats while within British fishery limits.

Committee Consideration

19. Schedule 1 of the instrument contains a table setting out the countries designated as having special fishing access arrangements for Scottish waters. Column 1 lists the designated countries. Column 2 designates the areas in which vessels from the

designated country are permitted to fish. Column 3 provides descriptions of the sea fish that can be caught by vessels from designated countries in each of the designated areas.

20. In relation to the Republic of Ireland, column 2 of the table lists 4 designated areas. However, the third designated area does not have a corresponding description of the sea fish that could be caught in that area. It is not immediately clear from the instrument what fish it is intended to permit vessels to catch in that area.

21. The Committee reports the instrument to the Rural Economy and Connectivity Committee under reporting ground (h) as the meaning of this provision could be clearer.

22. In relation to the entries for the Netherlands and Norway in the table, the two appear to be combined. It would appear the designated areas and corresponding descriptions of sea fish applicable to vessels from the Netherlands have not been included in the schedule.

23. This is more significant than the error in the entry for the Republic of Ireland as it could cause confusion for the courts if asked to establish what access arrangements were intended to be provided to vessels from the Netherlands.

24. The Committee therefore also reports this instrument under reporting ground (i) as the drafting of this provision is defective.

25. The Committee welcomes the Scottish Government's commitment to correct both identified errors before the instrument comes into force.

No Points Raised

Education and Skills Committee

Robert Gordon University (Scotland) Order of Council 2019 (SSI 2019/375)

Environment, Climate Change and Land Reform Committee

Waste (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/356)

Equalities and Human Rights Committee

Age of Criminal Responsibility (Scotland) Act 2019 (Commencement No. 1 and Transitory Provision) Regulations 2019 (SSI 2019/349 (C.17))

Health and Sport Committee

National Health Service (Charges to Overseas Visitors) (Scotland) (Amendment) (EU Exit) Regulations 2019 (SSI 2019/333)

Justice Committee

Criminal Justice (Scotland) Act 2016 (Support for Vulnerable Persons) Regulations 2019 (SSI 2019/draft)

Firefighters' Pension Scheme (Scotland) Amendment Regulations 2019 (SSI 2019/357)

Firefighters' Pension Schemes (Scotland) Amendment Order 2019 (SSI 2019/358)

Criminal Justice (Scotland) Act 2016 (Commencement No. 6 and Transitional Provision) Order 2019 (SSI 2019/363 (C.18))

Rural Economy and Connectivity Committee

Agriculture Market Measures (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2019 (SSI 2019/347)

Social Security Committee

Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2020 (SSI 2019/draft)

Annex

The letters below were received to communicate a breach of the requirement in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force.

The instruments to which the letters relate come into force on "exit day". When the instruments were laid (on 23 and 28 October respectively) "exit day" meant 31 October 2019. They would therefore have breached the 28 day rule.

However, "exit day" was then delayed until 31 January. This means that there is no longer a breach of the 28 day rule.

The Presiding Officer

c/o The Chamber Desk

Room G10

Scottish Parliament

Edinburgh

EH99 1SP

23 October 2019

Dear Presiding Officer

THE NATIONAL HEALTH SERVICE (CHARGES TO OVERSEAS VISITORS)(SCOTLAND)(AMENDMENT) (EU EXIT) REGULATIONS 2019

The National Health Service (Charges to Overseas Visitors) (Scotland) (Amendment) (EU Exit) Regulations 2019, SSI 2019/333, was made by the Scottish Ministers under sections 98 and 105 of the National Health Service (Scotland) Act 1978. It is being laid before the Scottish Parliament today, Wednesday 23 October 2019, and comes into force on exit day.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. On this occasion, this has not been complied with and, to meet the requirements of section 31(3) of that Act, I have explained the reasons why in this letter.

Whilst we began early work on the regulations earlier this year with the aim of laying them at the beginning of September, the in-depth consideration of how best to avoid major disruption in a no-deal scenario, both for NHS Boards and visitors from the EEA or Switzerland requiring healthcare (the need for which arises during a visit to Scotland) has taken longer than anticipated.

In order to ensure that visitors from the EEA or Switzerland are able to continue to access needs-arising treatment at no charge in the event of a no-deal Brexit until such time as reciprocal healthcare agreements are entered into between the UK Government and those

countries, this SSI is set to come into force on exit day. This is unfortunately ahead of the end of the 28 day laying period set out in the 2010 Act, but such timings are considered necessary in order to minimise the risk of disruption to the NHS and are consistent with Scottish Government policy to mitigate the negative impact of a no-deal Brexit where possible.

I am copying this letter to Lewis Macdonald MSP, Convenor of the Health and Sport Committee, and Graham Simpson MSP, Convenor of the Delegated Powers and Legislative Reform Committee.

Yours sincerely

JOHN BRUNTON

The Presiding Officer

c/o The Chamber Desk

Room G10

Scottish Parliament

Edinburgh

EH99 1SP

28 October 2019

Dear Presiding Officer

THE FISHING BOATS DESIGNATION (SCOTLAND) ORDER 2019

You will be aware that the situation regarding our potential exit from the EU with the rest of the UK is currently still very uncertain. You will also be aware that the Scottish Government has been working to respond to the UK Government's preparations for a No-Deal scenario to protect Scottish interests, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal. That has included an extensive exercise involving SIs and SSIs, and in some cases, including fishing, engaging with the development of primary legislation at the UK level.

The Scottish Parliament's role in all this work has been pivotal and we have worked very hard throughout to try to ensure the UK Government and indeed, Scottish government divisions adhere to and meet the protocol established for approving such legislation. Scottish Ministers have also worked hard to ensure relevant committees are kept up to date timeously and effectively.

I am writing today to advise that the Fishing Boats Designation (Scotland) Order 2019 was signed on 28 October. It is being laid before the Scottish Parliament today, 28 October and comes into force on exit day. Exit day is 31 October 2019 (set out in section 20(1) of the European Union (Withdrawal) Act 2018).

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative SSI must be laid before the Scottish Parliament at least 28 days before the

instrument comes into force. On this occasion, this has not been complied with and to meet the requirements of section 31(3) that Act, this letter explains why.

The purpose of these SSIs is to put in place contingency measures in the event that the UK leaves the EU without a deal being in place. The Order designates countries for the purposes of section 2(1) of the Fishery Limits Act 1976. Section 2 prohibits foreign vessels from fishing within the Scottish zone unless their country is designated. The Order also designates the areas in which fishing boats registered in each of those countries may fish and the descriptions of sea fish for which they may fish.

The SSI was originally not considered necessary as it was expected that the UK Government would complete its Fisheries Bill through the UK parliamentary process. That has not happened and the new bill announced in the Queen's Speech has not yet been laid. Such a bill would be our preferred place to address these matters and would remove the requirement for such an Order. Once it became clear that such a Bill would not be in place the Scottish Government has been discussing with other fisheries administrations whether existing orders (which preceded both devolution and the current iteration of the Common Fisheries Policy) required to be updated.

It was recently agreed that it would be necessary to update these orders. This was a result of a number of considerations. Emerging consideration of the likelihood, and implications of continuity agreements being put in place to allow reciprocal access rights between the UK and the EU, and between the UK and third countries (Norway and Faroe Islands) immediately post Exit day led us to conclude that the current designation orders would need amendment to allow such an agreement to be put in place.

Specifically, the requirement to extend the designation in existing orders to all EU member states was informed by intelligence on recent foreign vessel activity from member states not currently designated. It has been necessary to work with other administrations as a designation regime will need to be coherent across UK waters to be operable in practice, this has been in keeping with our approach to authorization and licensing, which, whilst respecting devolution has required close working between administrations.

This close working, and the recent nature of these discussions has led to us unavoidably laying this instrument at this late stage. I regret that we have not been able to comply with parliamentary procedure on this occasion but I am sure you will appreciate that these matters are completely out-with my control. However, I hope you will agree with the Scottish Government assessment that it is necessary that these SSIs are in force for exit day to ensure the regulation of foreign fishing boats in the Scottish zone from day one in the event of a no deal EU exit and in order to conclude any agreements on access arrangements in UK waters that may be required.

In the event that an extension to the current article 50 period is agreed and takes effect exit day will no longer take place on 31 October. As such we expect that the Parliament will be able to observe the usual periods of time under standing orders and the Interpretation and Legislative Reform (Scotland Act) 2010 to scrutinize this legislation. We would of course update Parliament accordingly. I am available to discuss the handling of this with committee

and any other appropriate parliamentary officials.

Yours sincerely,

FERGUS EWING

