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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 30 April 2019**



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# Contents

<b>Introduction</b>	<b>1</b>
<b>Instruments considered under the SSI Protocol under the European Union (Withdrawal) Act 2018 (scrutiny procedure and categorisation)</b>	<b>2</b>
Disabled Persons (Badges for Motor Vehicles) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/128) (Rural Economy and Connectivity)	2
Public Health and Tobacco (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/142) (Health and Sport)	3
<b>Points raised: instruments subject to the negative procedure</b>	<b>4</b>
Disabled Persons (Badges for Motor Vehicles) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/128) (Rural Economy and Connectivity)	4
<b>No points raised</b>	<b>5</b>
<b>Annex A</b>	<b>6</b>

# 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



**Convener**  
**Graham Simpson**  
Scottish Conservative  
and Unionist Party



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



**Tom Arthur**  
Scottish National Party



**Mary Fee**  
Scottish Labour



**Alison Harris**  
Scottish Conservative  
and Unionist Party

# Introduction

## Instruments considered under the European Union (Withdrawal) Act 2018

1. At its meeting on 30 April 2019, the Committee considered the following instruments under the protocol agreed between the Scottish Government and the Scottish Parliament in respect of SSIs made using the powers under the European Union (Withdrawal) Act 2018-

Disabled Persons (Badges for Motor Vehicles) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/128)

Public Health and Tobacco (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/142)

2. The Committee's recommendations and conclusions in relation to these instruments are set out in the following sections of this report.

## Technical scrutiny of instruments

3. The Committee agreed to draw to the attention of the Parliament the following instrument-

Disabled Persons (Badges for Motor Vehicles) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/128)

4. The Committee's recommendations and conclusions in relation to this instrument are set out in the following sections of this report.

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 SSI Protocol under the European Union (Withdrawal) Act 2018 (scrutiny procedure and categorisation)

## Disabled Persons (Badges for Motor Vehicles) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/128) (Rural Economy and Connectivity)

### Purpose

6. These Regulations amend the Disabled Persons (Badges for Motor Vehicles) (Scotland) Regulations 2000 and the Local Authorities' Traffic Orders (Exemptions for Disabled Persons) (Scotland) Regulations 2002.
7. The instrument corrects deficiencies which would arise in relation to the UK's planned withdrawal from the EU.
8. The Regulations update references in subordinate legislation to the UK being a "member State", and amend the form of "blue badge" being issued to disabled persons for display in motor vehicles in Scotland. The changes to the form of badge came into force at 1600 hours on 1 April 2019. The references which are amended come into force on "exit day".

### Committee consideration

9. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.
10. The amendments are relatively technical, to ensure that the relevant legislation continues to operate effectively following the decision of the UK Government to change the form of disabled person's badge in light of the UK's proposed exit from the EU.
11. The Committee noted that the instrument has not been subject to the sifting process by reason of urgency. A Ministers' statement explaining the urgent circumstances has been provided, in the policy note for the SSI.
12. The Committee is content with the categorisation, given that the amendments being made are technical in nature.

### Recommendation

13. **The Committee recommends to the Rural Economy and Connectivity Committee that the Disabled Persons (Badges for Motor Vehicles) (EU Exit)**

**(Scotland) (Amendment) Regulations 2019 (SSI 2019/128) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

## **Public Health and Tobacco (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/142) (Health and Sport)**

### **Purpose**

14. These Regulations amend various pieces of legislation to correct deficiencies arising in relation to the UK's planned withdrawal from the EU. The legislation to be amended relates to sunbeds, and the sale of tobacco products, cigarette papers and nicotine vapour products.

### **Committee consideration**

15. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of medium significance under the SSI Protocol.
16. The Committee is content that the negative procedure is appropriate, given that the amendments are relatively minor and technical and affect the policy no more than is necessary to ensure the continued functioning of the legislation. Although some amendments affect primary legislation, they do not represent a substantive policy change. In addition, although the amendments adjust provisions relating to criminal offences, the scope of the offence does not change.
17. The Committee is also content with the categorisation. The Committee notes that whilst the amendments being made are minor and technical in nature, they are of some importance. Specifically, the Committee noted that if the amendments were not made legal uncertainty may be created in relation to the selling of tobacco and nicotine vapour products and in relation to selling, hiring or allowing customers to use sunbeds.

### **Recommendations**

18. **The Committee recommends to the Health and Sport Committee that the negative procedure is the appropriate scrutiny procedure for the Public Health and Tobacco (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/142).**
19. **The Committee recommends to the Health and Sport Committee that the Public Health and Tobacco (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/142) are appropriately categorised as Medium in terms of their significance under the SSI Protocol.**



# Points raised: instruments subject to the negative procedure

## Disabled Persons (Badges for Motor Vehicles) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/128) (Rural Economy and Connectivity)

### Purpose

20. As set out in paragraphs 6 to 8 above, these Regulations update references in subordinate legislation to the UK being a “member State”, and amend the form of “blue badge” being issued to disabled persons for display in motor vehicles in Scotland.
21. This instrument is subject to the negative procedure and came into force at 4pm on 1 April 2019.

### Committee consideration

22. The Committee noted that the Regulations fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. This failure does not affect the validity of the Regulations.
23. The Regulations were laid before the Parliament on 1 April 2019 and came into force on the same day at 1600 hours. This does not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.
24. Transport Scotland explained its reasons for not complying with section 28(2) in a letter to the Presiding Officer. Specifically, the instrument needed to be made and to come into force immediately to allow badges issued in Scotland from 1 April 2019 to be in the prescribed form. The badges are produced centrally and the UK Government, who control production of the badges, approved a new form of badge on 20 March 2019 to remove reference to the EU and the EU flag. This correspondence is reproduced at Annex A.

### Recommendations

25. **The Committee draws the instrument to the attention of the Parliament on reporting ground (j) as the Regulations fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
26. **The Committee finds the failure to comply with section 28 to be acceptable in the circumstances.**

# No points raised

## **Health and Sport**

Public Health and Tobacco (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/142)

## **Justice**

Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Labour Market Enforcement Orders) 2019 (SSI 2019/139)

Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules Amendment) (Labour Market Enforcement Orders) 2019 (SSI 2019/140)

# Annex A

## Disabled Persons (Badges for Motor Vehicles) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/128)

**On 04 April 2019 the Scottish Government was asked:**

1. What is the effect considered to be of the following omissions in the statements by the Scottish Ministers contained in paragraph 9 of the Policy Note, which have required to be provided before the instrument was laid? (References to “EUWA” paragraph numbers are to the paragraphs of schedule 7 of the European Union (Withdrawal) Act 2018 (“the Act”)):

- (a) the incomplete explanation of the effect of the provisions on retained EU law in the second paragraph within paragraph 9 of the Policy Note, given that EUWA paragraph 29(6)(d) requires a statement explaining the effect on retained EU law,
- (b) the omission of explanation why Ministers consider that there are good reasons for the Regulations and that this is a reasonable course of action, as required by EUWA paragraph 29(3),
- (c) the omission of a declaration (as provided for by paragraph 20 of the Protocol between the Parliament and the Scottish Government on the scrutiny of SSIs made using powers under the Act, although this is not a statutory requirement) that an instrument that would otherwise be subject to the sifting process in relation to the procedure for the instrument will not be subject to that process by reason of urgency, and including justification why?

2. The Regulations have come into force (apart from regulations 2(2) and 3) at 1600 hours on 1 April 2019. Regulation 2(3) and (4) make provision for the amended form of a disabled person’s parking badge with a date of issue on or after 1 April 2019. The letter from Transport Scotland to the Presiding Officer of 1 April submitted with the instrument includes a statement that Transport Scotland have arranged for badges with the change of design to be printed from 1 April.

- (a) Please clarify therefore whether it is intended that any badges which may have been issued/printed on 1 April up to 1600 hours should be valid by virtue of the retrospective effect of the Regulations, or whether badges with the changed design were in fact issued from 2 April?
- (b) If it is intended that the Regulations have that retrospective effect, please explain why this is permitted by the powers available to make the Regulations, given that section 21 of the Chronically Sick and Disabled Persons Act 1970 and paragraph 1(1) and (3) of schedule 2 of the Act do not appear to make provision for the retrospective effect of regulations?

3. Regulation 2(4)(f), so far as inserting paragraph 1 of Part IIIB of the schedule of the Disabled Persons (Badges for Motor Vehicles) (Scotland) Regulations 2000 includes subparagraphs (a), (b), (c) and (e). Was there an intention to include a subparagraph (d), or should (e) be (d)?

4. Is any corrective action proposed?

**The Scottish Government responds as follows:**

1. We are grateful to the Committee for pointing out the omissions in the Policy Note in respect of the statements that require to be provided by virtue of the European Union Withdrawal Act 2018 (“the Act”). A corrected Policy Note is attached which contains:

(a) a more complete explanation of the effect of the provisions on retained EU law in the second paragraph of paragraph 9 of the Policy Note as required by paragraph 29(6)(d) of schedule 7 of the Act, and

(b) an explanation of why Ministers consider that there are good reasons for the Regulations and that this is a reasonable course of action as required by paragraph 29(3) of schedule 7 of the Act,

(c) a declaration (as provided for by paragraph 20 of the Protocol between the Parliament and the Scottish Government on the scrutiny of SSIs made using powers under the Act) that this instrument, which would otherwise be subject to the sifting process in relation to the procedure for the instrument, will not be subject to that process by reason of urgency, as the instrument needs to be made and to come into force immediately to allow badges issued in Scotland from 1 April 2019 to be in the prescribed form as the badges are produced centrally and the UK Government, who control production of the badges, approved a new form of badge on 20 March 2019 to remove reference to the EU and the EU flag.

We do not consider that the earlier omissions have any effect on the validity of the regulations.

2. (a) and (b) The Regulations do not have retrospective effect. The Regulations came into force at 16.00 on 1 April 2019. The new form badges were not printed until 1 April 2019 and any badge issued in the new form will therefore not have a date of issue earlier than 1 April 2019. There is no time of issue on the badge. In addition, no applicant was in receipt of a badge in the new form on that date. The new Regulation 11(4) provides that a badge with a date of issue of 1 April 2019 or after is in the prescribed form if it is in the form as set out in the new Parts IB and IIB of the schedule to the Disabled Persons (Badges for Motor Vehicles) (Scotland) Regulations 2000. Any badge with a date of issue of 1 April 2019 will be in the prescribed form for all practical purposes from that date.

3. We are grateful to the Committee for pointing out the drafting error in paragraph 1 of the new Part IIB to be inserted into the schedule of the Disabled Persons (Badges for Motor Vehicles) (Scotland) Regulations 2000. It is not intended that there be a subparagraph (d) and it is intended that subparagraph (e) should be (d). However, we consider the meaning of the schedule is clear and that this is a minor drafting error that will be addressed at the next opportunity. The specifications for All Badges listed in the new Part IIB are the same as the specifications for All Badges included in the existing Part IIIA of the schedule to the Disabled Persons (Badges for Motor Vehicles)(Scotland) Regulations 2000 being amended. Therefore there is no indication or suggestion that there is a specification missing.

4. It is therefore intended that a new corrected Policy Note will be submitted and that the minor drafting error in Part IIB of the schedule to the Disabled Persons (Badges for Motor Vehicles) (Scotland) Regulations 2000 will be corrected at the next opportunity of these Regulations being amended.

**On 11 April 2019 the Scottish Government was further asked:**

Your response has attached a corrected Policy Note for the instrument, to adjust the explanations of (a) the effect of the provisions on retained EU law, (b) why Ministers consider that there are good reasons for the Regulations and it is a reasonable course of action, and (c) a declaration as provided for by paragraph 20 of the Protocol between the Parliament and the Scottish Government on the scrutiny of SSIs made using powers under the European Union (Withdrawal) Act 2018.

Your response states “We do not consider that the earlier omissions have any effect on the validity of the regulations”. As in relation to those explanations (a) and (b), paragraph 29(3) and (6)(d) of schedule 7 of that Act require the statements to be made before the instrument is laid, please explain the legal basis for that view?

**On 16 April 2019 the Scottish Government responds as follows:**

The statements required by paragraph 29(3) and (6)(d) of schedule 7 of the European Union (Withdrawal) Act 2018 are to be made before the instrument is laid. Paragraph 29(8) of schedule 7 states “If the Scottish Ministers fail to make a statement required by sub paragraph (2),(3),(4),(5) or (6) before the instrument or draft is laid, the Scottish Ministers must make a statement explaining why they have failed to do so.”.

The corrected Policy Note provided contained the following statement-

**“Statement as to why the Scottish Ministers failed to make the statements required by paragraph 29(3), (5) and (6)(d) of Schedule 7 of the European Union (Withdrawal) Act 2018**

The Cabinet Secretary for Transport, Infrastructure and Connectivity, Michael Matheson, has made the following statement “Due to the urgency with which these Regulations were required to be laid to ensure that they came into force on 1 April, the statements required by paragraph 29(3), (5) and (6)(d) of Schedule 7 of the European Union (Withdrawal) Act 2018 were not made to the extent required by that Act before the Regulations were laid. This was an omission, and those statements have now been made.”.

In respect of the made instrument at hand, the relevant requirements were to make certain statements before the instrument was laid, rather than before it was made. There is therefore no question of those requirements being some form of mandatory pre-condition to the making of the instrument, with failure to comply potentially calling its validity into question.

In addition, the inclusion of paragraph 29(8) in schedule 7 makes clear that Parliament anticipated that it may occur that statements required by paragraph 29(2) to (6) may not, for whatever reason, be made and makes express provision for that situation to be explained. The statements in the corrected Policy Note referred to above are made in substantial compliance with the requirements in paragraph 29 of schedule 7, accompanied by an explanation that failure to make certain statements at the earlier stage was an omission that arose inadvertently as a result of the urgency in laying the instrument.

The provisions of paragraph 29 of schedule 7 of the European Union (Withdrawal) Act 2018 have therefore now been substantially complied with overall and, for the foregoing reasons, we do not consider that the omission at the earlier stage affects the validity of the regulations.

**Breach of laying requirements: letter to the Presiding Officer**

The Disabled Persons (Badges for Motor Vehicles) (EU Exit) (Scotland) (Amendment) Regulations 2019, SSI 2019/128 was made by the Scottish Ministers under section 21 of the Chronically Sick and Disabled Persons Act 1970 and paragraph 1(1) and (3) of schedule 2 of the European Union (Withdrawal) Act 2018 on 1 April 2019. It is being laid before the Scottish Parliament today, 1 April and the main provisions come into force on 1 April also.

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 UK Department for Transport informed Scottish Government officials on 20 March 2019 that it had finally reached a decision on change of design of the UK Blue Badge. This was effective from 30 March although we have arranged that badges will not be printed until 1 April.

Blue Badges could not be validly printed until such time as the legislation came into force. If invalid badges were to be printed, then local authorities would not be complying with section 21 of the 1970 Act. This would also cause enforcement problems because there might be difficulties in taking enforcement action against persons who use these new badges incorrectly or fraudulently until the legal position is fully regularised.

The consequence of waiting 28 days is that local authorities in Scotland could not lawfully issue the new-style badges. Therefore successful applicants for a badge would have to wait to receive their badges. Two minor technical amendments are also being made to the Disabled Persons (Badges for Motor Vehicles) (Scotland) Regulations 2000 and the Local Authorities' Traffic Orders (Exemptions for Disabled Persons) (Scotland) Regulations 2002 to correct references to the United Kingdom being member States, but these will not come into force until exit day.

We apologise for breaching the Standing Orders on this occasion however it is considered that it is necessary that the images and specification of the parking badges are amended in line with the date they will be printed in this new form to protect the position of successful applicants, who would be disabled if they had to wait an extra month for their Blue Badge. Therefore we decided to make the coming into force of the order immediate.

