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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 18 June 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>



dplr.committee@parliament.scot



0131 348 5212

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

Instrument considered under the European Union (Withdrawal) Act 2018

1. At its meeting on 18 June 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 the powers under the European Union (Withdrawal) Act 2018-

Seed and Propagating Material (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2019 (SSI 2019/190)

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

Technical scrutiny of instruments

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

Welfare Foods (Best Start Foods) (Scotland) Regulations 2019 (SSI 2019/193)

Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Amendment Regulations 2019 (SSI 2019/204)

4. The Committee's recommendations and conclusions in relation to these instruments 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)

Seed and Propagating Material (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2019 (SSI 2019/190) (Rural Economy and Connectivity)

Purpose

6. The instrument amends the following marketing regulations for seed and plant propagating materials:
 - The Marketing of Fruit Plant and Propagating Material (Scotland) Regulations 2017 (the “2017 Regulations”)
 - The Vegetable Seed Regulations 1993 (the “1993 Regulations”)
 - The Cereal Seed (Scotland) Regulations 2005 (the “2005 Regulations”)
 - The Seed Potatoes (Scotland) Regulations 2015 (the “2015 Regulations”)
7. These regulations transpose EU directives prescribing processes to ensure minimum quality standards and traceability for marketed seed and plant propagating material.
8. The instrument amends the 2017 Regulations in order to implement Commission Implementing Decision (EU) 2019/120 before the UK leaves the EU. This amendment relates to a derogation that allows soft fruit growers/breeders in Scotland to import fruit plants and propagating material from third countries producing high quality root stocks/plants.
9. The instrument also corrects three errors in the Seed and Propagating Material (EU Exit) (Scotland) (Amendment) Regulations 2019 (the “2019 Regulations”) identified by the Committee in its report dated 12 March 2019 ([12th Report, 20019 \(Session 5\)](#)). In doing so, the instrument amends the 1993 Regulations, the 2005 Regulations and the 2015 Regulations and revokes the provisions of the 2019 Regulations that made the errors.

Committee consideration

10. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.
11. The Committee is content that the negative procedure is appropriate. Each of the instruments amended by this instrument is subject to the negative procedure, as are

previous Scottish statutory instruments in this policy area, and the UK equivalent SI under the European Union (Withdrawal) Act 2018.

12. The Committee is also content with the Scottish Government's categorisation of the instrument given that the amendments being made are technical in nature to ensure continuity of law and do not amount to a change in policy.

Recommendations

13. **The Committee recommends to the Rural Economy and Connectivity Committee that the negative procedure is the appropriate scrutiny procedure for the Seed and Propagating Material (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2019 (SSI 2019/190).**
14. **The Committee recommends to the Rural Economy and Connectivity Committee that the Seed and Propagating Material (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2019 (SSI 2019/190) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

Points raised: instruments subject to the negative procedure

Welfare Foods (Best Start Foods) (Scotland) Regulations 2019 (SSI 2019/193) (Social Security)

Purpose

15. The Regulations make provision for a new scheme, Best Start Foods, which will replace the UK Healthy Start Vouchers in Scotland. The aim is to help and encourage low income pregnant women and families with children under three, in receipt of certain benefits, to have access to healthy foods by providing financial support to purchase healthy foods.
16. The Regulations are subject to the negative procedure and will come into force on 12 August 2019, except for regulation 21 and schedule 2 (both of which deal with revocations) which come into force on 31 March 2020.

Committee consideration

17. The Committee noted that the meaning of regulation 18 could be clearer.
18. Regulation 18 provides that a person who fails to comply with regulations 12 or 16(2) is guilty of an offence under section 13 of the Social Security Act 1988 ("the 1988 Act"). Section 13(9) of the 1988 Act and section 113 of the Social Security Administration Act 1992, as modified by regulation 17, have effect to enable these Regulations to specify the offence in regulation 18.
19. The Committee also noted that the Scottish Government acknowledges that the way in which section 13(9) and section 113 apply, to enable this offence to be specified, could be made clearer. In particular, section 13(9) requires the scheme in the Regulations to direct that the prescribed offence is to have effect for the purpose of administering the scheme. The offence is prescribed by virtue of section 113.
20. The Government has indicated that it intends to bring forward an amending instrument to clarify the drafting of regulation 18. Correspondence with the Scottish Government on these issues is reproduced at Annex A.

Recommendations

21. **The Committee draws the Regulations to the attention of the Parliament on reporting ground (h), as the meaning of regulation 18 could be made clearer for the reasons set out in paragraphs 18 and 19 above.**
22. **The Committee welcomes the Scottish Government's undertaking to bring forward an amending instrument shortly, to clarify the drafting of regulation 18.**

Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Amendment Regulations 2019 (SSI 2019/204) (Local Government and Communities)

Purpose

23. The instrument rectifies two relatively minor errors identified by the Committee in its report dated 21 May 2019 ([25th Report, 2019 \(Session 5\)](#)) in line with the commitments to do so given by the Scottish Government. Those errors were contained in the Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/161).
24. The Regulations are subject to the negative procedure and come into force on 28 June 2019. They have effect from 1 June 2018. The retrospective effect of provisions is permitted by the Public Service Pensions Act 2013.

Committee consideration

25. 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.
26. The instrument was laid before the Parliament on 11 June 2019 and comes into force on 28 June 2019. 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.
27. The Scottish Government has explained its reasons for not complying with section 28(2) in a letter to the Presiding Officer. This correspondence is reproduced at Annex B.

Recommendations

28. **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.**
29. **The Committee finds the failure to comply with section 28 to be acceptable in the circumstances.**

No points raised

Economy, Energy and Fair Work Committee

Debt Arrangement Scheme (Scotland) Amendment Regulations 2019 (2019/Draft)

Health and Sport

National Assistance (Assessment of Resources) Amendment (Scotland) (No. 2) Regulations 2019 (SSI 2019/191)

Justice

Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 (Commencement No. 1) Regulations 2019 (SSI 2019/197)

Local Government and Communities

Private Landlord Registration (Information) (Scotland) Regulations 2019 (SSI 2019/195)

Rural Economy and Connectivity

Seed and Propagating Material (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2019 (SSI 2019/190)

Annex A

Correspondence with the Scottish Government

Welfare Foods (Best Start Foods) (Scotland) Regulations 2019 (SSI 2019/193)

On 7 June 2019 the Scottish Government was asked:

1. Section 13(3) to (5) of the Social Security Act 1988 (“the 1988 Act”) specify provisions that the scheme in the Regulations may include, but those subsections do not specify that offence provisions may be included. Section 13(9) provides that a scheme may direct that prescribed enactments relating to the administration of benefit under the Social Security Administration Act 1992 (including enactments relating to offences) are to have effect for the purpose of administering the scheme, subject to such modifications (if any) as may be prescribed.

Regulation 18 provides that a person who fails to comply with regulations 12 or 16(2) is guilty of an offence under section 13 of the 1988 Act and is liable on summary conviction to a fine not exceeding level 3 on the standard scale. Regulation 18 therefore does not direct in accordance with section 13(9).

(a) Please explain why it is considered that regulation 18 is properly enabled by section 13 of the 1988 Act and section 175(4) of the Social Security Contributions and Benefits Act 1992 (or other enabling powers)?

(b) If reliance is placed on the ancillary powers in section 175(4), please explain why it is considered that such ancillary powers properly enable the creation of the offence?

(c) Why is it considered appropriate to state in regulation 18 that a person is guilty of an offence “under section 13”, given that it appears that only subsection (9) of the section refers to offence provisions, and the regulation does not direct provision in accordance with section 13(9)?

2. The Regulations come into force on 12 August 2019, except regulation 21 and schedule 2 which come into force on 31 March 2020. Regulation 6 provides for the entitlement to benefit under these Regulations, and regulation 3 of SI 2005/3262 (revoked by schedule 2) has provided for the entitlement to benefit under the “Healthy Start foods” and “Healthy Start vitamins” scheme.

Please clarify why this staged commencement of provisions is appropriate, and why those dates have been chosen?

On 11 June 2019, The Scottish Government responded as follows:

Question 1(a), (b) and (c)

Regulation 17 directs that section 113 of the Social Security Administration Act 1992 (“the 1992 Act”) has effect, subject to modifications, for the purposes of the administration of the scheme. The modification in regulation 17(2)(b) adds section 13 of the Social Security Act 1988 (“the 1988 Act”) to section 113(1A) of the 1992 Act. Those provisions of regulation 17 and the provision in regulation 18 are enabled by section 13(9) of the 1988 Act and taken together provide that failure to comply with regulations 12 or 16(2) is an offence.

Regulation 18 makes reference to an offence “under section 13” as section 13 is the “enactment contained in the legislation in question” (see section 113(1)(b)) that underpins the making of the scheme.

In considering the questions, we have noted that during the drafting process a disconnect in the drafting between regulation 17 and regulation 18 has occurred and that the application of section 113 of the 1992 Act to regulation 18 by section 13(9) of the 1988 Act could be clearer. We consider that clarification of the drafting is desirable and therefore an amending instrument will shortly be made to that end.

Question 2

Staged commencement of the provisions is appropriate as it is being used as the vehicle for transition from the old scheme (under the 2005 Regulations) to the new scheme (under the Regulations). Section 175(4) of the Social Security Contributions and Benefits Act 1992 does not specifically provide for the power to make savings provisions. Therefore, two parallel schemes will run alongside each other allowing those who are beneficiaries of benefit under the 2005 Regulations to continue to receive benefit under that scheme until: 1) they make a successful application for Best Start Foods under the Regulations or 2) they cease to be entitled to receive benefit under the old scheme following the revocation of the 2005 Regulations on the 31 March 2020. Regulation 19 amends the 2005 Regulations to prevent new applications for benefit under the 2005 Regulations in Scotland following the coming into force of these Regulations.

12 August 2019 is the commencement date for all regulations except regulation 21 and schedule 2. This is the ‘go-live’ date of the new Best Start Foods scheme which has been arranged with Social Security Scotland and the various contractors required to deliver the benefit scheme. 31 March 2020 is the commencement date for regulation 21 and schedule 2, being the day on which the Agency Agreement between the UK Government and the Scottish Ministers comes to an end. The decision was made to revoke the 2005 Regulations within the Regulations in order to provide greater clarity for those affected by the change in provision of this benefit. It provides a clear point in time when benefit under the old scheme will come to an end for Scottish beneficiaries and will allow those affected to plan accordingly.

Annex B

Extract from a letter from the Scottish Government to the Presiding Officer

11 June 2019

Dear Presiding Officer

The Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Amendment Regulations 2019

Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Amendment Regulations 2019, SSI 2019/204 was made by the Scottish Ministers under section 3 of the Public Service Pensions Act 2013 11 June 2019. It is being laid before the Scottish Parliament today, 11 June 2019 and comes into force on 28 June 2019.

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.

This instrument amends the Local Government Pension Scheme (Miscellaneous Amendments) Regulation 2019 (SSI 2019/161), which were laid before the Scottish Parliament on 2 May 2019 and come into force on 28 June 2019. Subsequent to laying the instrument before parliament, two minor errors were identified. Officials wrote to the Delegated Powers and Law Reform Committee proposing corrective action and the Committee accepted this course of action as reasonable at its meeting of 21 May 2019.

