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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 15 December 2020



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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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Introduction

1. At its meeting on 15 December 2020, the Committee considered the following instrument under the SSI 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:
 - Social Security Co-ordination (EU Exit) (Scotland) (Amendments etc.) Regulations 2020 (SSI 2020/399)
2. The Committee also considered the following instruments and agreed to draw them to the attention of the lead committee:
 - Official Feed and Food Controls (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/398); and
 - Social Security Co-ordination (EU Exit) (Scotland) (Amendments etc.) Regulations 2020 (SSI 2020/399).
3. The Committee's recommendations in relation to the instrument considered under the SSI Protocol and the instruments drawn to Parliament's attention, are set out later in the report.
4. In relation to its scrutiny of instruments under its remit, 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

Committee consideration of the scrutiny procedure under which an instrument has been laid and the categorisation applied by the Scottish Government

Social Security Co-ordination (EU Exit) (Scotland) (Amendments etc.) Regulations 2020 (SSI 2020/399)

5. The instrument has two main purposes:
 - it repeals the EU Regulations on social security coordination insofar as relating to devolved social security matters, with effect from the end of the transition period; and
 - It amends three Scottish statutory instruments removing references to EU legislation which will no longer have effect in the UK, and makes provision to ensure continued access to the relevant benefits for persons protected under the Withdrawal Agreements.
6. This instrument has been laid under the negative procedure and has been categorised by the Scottish Government as of low significance under the SSI Protocol in relation to the European Union (Withdrawal) Act 2018.

7. The Committee is content that the use of the negative procedure is appropriate in these circumstances.

8. The Committee is also content that the instrument should be categorised as low in terms of its significance under the SSI Protocol.

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

Official Feed and Food Controls (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/398)

9. The instrument is made under the general power to implement EU law (section 2(2) of the European Communities Act 1972.
10. Principally, it provides for the execution and enforcement in Scotland of EU delegated and implementing regulations made under the “Official Controls Regulation”, Commission Regulation (EU) 2017/625, which is the principal EU Regulation on official controls (e.g. border controls) to ensure the application of food and feed law etc . It also makes amendments which were not made in the previous implementing exercise.
11. The instrument does this by making amendments to four previous instruments in the field of the official controls on food and feed, principally the Official Feed and Food (Controls) (Scotland) Regulations 2009 (“the 2009 SSI”).
12. This instrument also corrects an error previously identified by the Committee: regulation 4(8) amends regulation 32(2) of SSI 2009/446 in fulfilment of an earlier commitment made to the Committee.
13. The Committee wrote to the Scottish Government on 3 December 2020 with questions on the instrument. A copy of the correspondence between the Committee and the Scottish Government can be found in the **Annex**. This provides full details of the issues highlighted by the Committee.
14. Having considered the Scottish Government’s response, the Committee noted:
 - Article 2(1)(d) of EU Regulation 2019/2123, Article 3(2) of EU Regulation 2019/2124 and Article 5(d) of EU Regulation 2019/2126 are specified in new schedule 6 of the 2009 SSI (inserted by regulation 4(14) and schedule 4 of the instrument) in error. They do not contain obligations giving rise to criminal offences;
 - the definition of “Directive 2004/41” has been omitted from the 2009 SSI (by regulation 4(2)(a) of the instrument), but the Directive is still referred to in the 5th and 10th definitions in new schedule 1 of the 2009 SSI ; and
 - EU Regulation 2015/1375 is also referred to in error in the 10th definition in new schedule 1 of the 2009 SSI (inserted by regulation 4(11) of the instrument), defining “Regulation 2017/625”.
15. In its response, the Scottish Government advised that these errors would be corrected before the instrument comes into force.

16. **The Committee agrees to draw this instrument to the attention of the Parliament on reporting ground (i) in respect of the first of these errors, and on the general reporting ground in respect of the other two.**
17. **The Committee notes the Scottish Government's commitment to remedy these errors before the instrument comes into force.**

18. **Finally, the Committee welcomes the Scottish Government's fulfilment of its commitment to amend regulation 32(2) of SSI 2009/446 to correct an error previously identified by the Committee.**

Social Security Co-ordination (EU Exit) (Scotland) (Amendments etc.) Regulations 2020 (SSI 2020/399)

19. The instrument:
 - repeals EU Regulations on Social Security Coordination, insofar as they relate to devolved social security matters, with effect from the end of the transition period; and
 - amends Scottish statutory instruments providing for 3 benefits (early years assistance, welfare foods, and funeral expense assistance) to provide for their correct operation after the end of the transition period, in line with provision in the Withdrawal Agreements.
20. The instrument is subject to the negative procedure.
21. The Committee noted there had been a failure to lay the instrument in accordance with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2020. This section requires that negative instruments are laid at least 28 days before they come into force and this instrument would only be laid for 27 days before coming into force.
22. On 26 November 2020, the Scottish Government wrote to the Presiding Officer explaining why the 28-day rule was not complied with.
23. The Committee also noted that provision in this instrument ought to have been made to omit regulation 9(4) of the Funeral Expense Assistance (Scotland) Regulations 2019, as a consequence of other amendments made in the instrument.
24. This error was raised with the Scottish Government in correspondence dated 3 December 2020. In its response of 8 December, the Scottish Government undertook to bring forward amending regulations to omit that provision at the earliest opportunity.
25. A copy of the correspondence can be found in the **Annex**.

26. **The Committee agrees to draw this instrument to the attention of the Parliament on reporting ground (j) on the basis that it has breached the**

28-day rule. The Committee nevertheless notes that it is satisfied with the explanation that has been given for the failure to comply with the rule .

27. In relation to the failure to omit regulation 9(4) of the Funeral Expense Assistance (Scotland) Regulations 2019, the Committee reports this under the general reporting ground. The Committee nevertheless recognises that the Scottish Government has undertaken to bring forward amending regulations.

28. The Committee therefore agrees to draw this instrument to the attention of the Parliament on reporting ground (j) on the basis that the instrument has breached the 28-day rule, and under the general reporting ground.

No points raised

COVID-19 Committee

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 6) Regulations 2020 (SSI 2020/415)

Health Protection (Coronavirus) (Protection from Eviction) (Scotland) Regulations 2020 (SSI 2020/425)

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 7) Regulations 2020 (SSI 2020/427)

Economy, Energy and Fair Work Committee

Financial Assistance for Environmental Purposes (Scotland) Order 2020 (SSI 2020/409)

Education and Skills Committee

Children (Scotland) Act 2020 (Commencement No. 1 and Saving Provisions) Regulations 2020 (SSI 2020/412 (C. 37))

Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2020 (SSI 2020/draft)

Environment, Climate Change and Land Reform Committee

Conservation of Salmon (Scotland) Amendment Regulations 2020 (SSI 2020/416)

Spring Traps Approval (Scotland) Amendment Order 2020 (SSI 2020/417)

Equalities and Human Rights Committee

Civil Partnership (Scotland) Act 2020 (Commencement No. 1 and Interim Recognition of Different Sex Relationships) Regulations 2020 (SSI 2020/414 (C. 38))

Health and Sport Committee

Public Health etc. (Scotland) Act 2008 (Notifiable Organisms) Amendment Regulations 2020 (SSI 2020/408)

Justice Committee

Victims and Witnesses (Scotland) Act 2014 (Commencement No. 7 and Transitional Provisions) Order 2020 (SSI 2020/405 (C. 34))

Enforcement of Fines (Relevant Penalty) (Scotland) Order 2020 (SSI 2020/406)

Serious Crime Act 2015 (Commencement No. 3) (Scotland) Regulations 2020 (SSI 2020/407 (C. 35))

Offensive Weapons Act 2019 (Commencement No. 1) (Scotland) Regulations 2020 (SSI 2020/410 (C. 36))

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Restitution Fund (Scotland) Order 2021 (SSI 2020/draft)

Victims and Witnesses (Scotland) Act 2014 (Supplementary Provisions) Order 2021 (SSI 2020/draft)

Social Security Committee

Council Tax Reduction (Scotland) Amendment (No. 4) Regulations 2020 (SSI 2020/413)

Annex

Official Feed and Food Controls (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/398)

3 December 2020, correspondence from the Committee to the Scottish Government

1. The laying letter says that this instrument is laid under section 2(2) and also paragraph 1A of schedule 2 of the European Communities Act 1972. However, paragraph 1A and its requirements are not mentioned anywhere in the instrument or in the Policy Note. While the requirement for express provision is met by provision in the principal instruments (regulation 2(5) of SSI 2006/3, as amended by SSI 2012/75; and regulation 2(4) of SSI 2009/446), could you explain why it was not considered appropriate, in the preamble of the present instrument, to cite paragraph 1A and to recite that it appears to the Scottish Ministers that it is necessary/expedient for the new references to be ambulatory?

2. Could you explain why the power in s. 2(2) of the 1972 Act is wide enough for omitting designations of competent authorities from new schedules 4 and 5 of the 2009 Regulations (introduced by regulation 4(12) and (13) of the instrument)? This applies to the omission from new schedule 4 of Articles 15, 57, 87, 108, 116, 130 and 133 of EU Regulation 2017/625 and the omission from new schedule 5 of Articles 15, 42, 57, 87, 108, 116, 130 and 133 of that EU Regulation.

3. The instrument omits the definition of “Directive 2004/41” from the 2009 Regulations (by regulation 4(2)(a) of the instrument), but that Directive is still referred to in the 5th and 10th definitions in new schedule 1 of the 2009 Regulations. In both instances this is in the context of references to other legislation “as read with Directive 2004/41”, not only as part of the title of another EU instrument. Could you explain why a definition of that Directive is no longer required in the 2009 Regulations?

4. Also in the 10th definition in new schedule 1, defining “Regulation 2017/625”, (at the top of page 7) the definition includes reference to that Regulation “as read with Regulation 2015/1375”. Could you explain why a definition of Regulation 2015/1375 is not required in the 2009 Regulations?

5. New schedule 6 contains the “specified import requirements”, being provisions of EU legislation the contravention of which is an offence under regulation 41(1)(a), read with regulation 22, of the 2009 Regulations. However, three of the provisions of EU legislation specified in column 1 of new schedule 6 appear to impose either no requirement at all, or no definite requirement, on operators:

- Article 2(1)(d) of Regulation 2019/2123 (on page 13) does not in itself appear to create an obligation on the operator to do anything, it only sets out the circumstances in which the authorities may perform checks at a control point other than the border control post.
- Article 3(2) of Regulation 2019/2124 (on page 14) provides only that the operator responsible for a relevant consignment “may” make a request for the authorisation for onward transmission. There is no obligation on the operator to do so.
- Article 5(d) of Regulation 2019/2126 (on page 15) does not appear in itself to create an obligation on the operator to do something, it only provides that Member States

may carry out official controls under certain conditions, of which (d) is when the operator has made a relevant notification. There is no obligation on the operator to make that notification.

Could you explain why it is considered that these provisions in new schedule 6, read with regulation 41(1)(a), give the level of legal certainty, as to what operators must do to comply with the law, that is necessary for the creation of an enforceable offence?

6. New schedule 6 of the 2009 Regulations appears to create many new offences (via regulation 41(1)(a) of the 2009 Regulations) with a maximum penalty of up to 2 years' imprisonment. Could you explain why the affirmative procedure would not be more appropriate for these provisions?

7. Is any corrective action proposed, and if so, what action and when?

9 December 2020, response from the Scottish Government

1. Thank you for bringing this to our attention. We agree that paragraph 1A of schedule 2 should have been cited in the preamble. In this instance we would rely up on the words "all other powers enabling them to do so" at the end of the preamble. We also agree that it should have been recited that Ministers do consider that it is expedient for the new references to be ambulatory. We can confirm that Ministers do consider that to be the case. We would note that fortunately in this instance the ambulatory mechanism will only be in effect until IP completion day which will be a single day given the coming into force date. No further EU legislation is to be implemented in that time period.

2. The power in s.2(2) of the 1972 Act is considered wide enough as the omission of designations of competent authorities from schedules 4 and 5 is further implementation of EU Regulation 2017/625. On further review of the existing implementation in The Official Feed and Food Controls (Miscellaneous Amendments) (Scotland) Regulations 2019/407 it was considered that certain Articles of EU Regulation 2017/625 listed in schedules 4 and 5 did not properly contain 'functions' in relation to which competent authorities could be designated. As such those designations had no proper meaning in law and have been omitted in this SSI to correctly implement EU Regulation 2017/625.

3. Thank you for bringing this to our attention. This is an unintentional omission. We intend to correct this as soon as possible.

4. Thank you for bringing this to our attention. Regulation 2015/1375 should not be referenced in Schedule 1 of The Official Food and Feed Controls (Scotland) Regulations 2009. We intend to correct this as soon as possible.

5. Thank you for drawing this to our attention. On review of these three provisions in EU Regulation in new schedule 6 we consider that these do not reach the threshold required for an offence. As such we intend to correct this as soon as possible.

6. Whilst a new schedule 6 of the 2009 Regulations replaces the existing one, most entries are not new additions. The schedule was replaced in order to be helpful to the reader. The new entries are the ones for Article 6(1) and (4) of Regulation 2019/2123 and Article 6 (1),(2)(4),(5) and (6) of Regulation 2019/2124. The obligations in these provisions are closely related and build upon previous obligations in Regulation (EC) 669/2009 which were listed in schedule 6 of the 2009 Regulations prior to 14 Dec 2019 when Regulation 2017/625 was first implemented. At that time schedule 6 referred to Article 6 (as read with Article 7), Article 8(2), Article 11, Article 12 (first and second paragraphs) of Regulation

(EC) 669/2019. We consider that these are not new offences but rather relate closely to and are an expansion of those previous obligations. As such the negative procedure is considered appropriate.

7. Corrective action is proposed for queries 3, 4 and 5 as noted above and this will come into force before the principal instrument comes into force.

Social Security Co-ordination (EU Exit) (Scotland) (Amendments etc.) Regulations 2020 (SSI 2020/499)

3 December 2020, correspondence from the Committee to the Scottish Government

Regulation 5(2) substitutes a new paragraph for existing paragraph (3) of regulation 9 of the Funeral Expense Assistance (Scotland) Regulations 2019 (“the 2019 Regulations”). Regulation 9(4) of the 2019 Regulations provides that the references to Directive 2004/38/EC in regulation 9(3) are to be read as references to that Directive as it forms part of domestic law. In its substituted form, regulation 9(3) no longer contains any references to Directive 2004/38/EC. Is it considered that paragraph (4) of regulation 9 of the 2019 Regulations ought to be omitted?

Is any corrective action proposed, and if so, what action and when?

8 December 2020, response from the Scottish Government

The Scottish Government agrees that paragraph (4) of regulation 9 of the Funeral Expense Assistance (Scotland) Regulations 2019 (‘2019 Regulations’) should be omitted in consequence of the amendments to paragraph (3) and is grateful to the DPLRC Legal Advisors for pointing this out.

We intend to bring forward amending regulations to omit this provision at the earliest opportunity. We anticipate that Regulations to up-rate certain benefits payable under the Social Security (Scotland) Act 2018, including Funeral Expense Assistance, will provide a suitable vehicle for this amending provision. These Regulations are currently being prepared for laying early in the new year with a coming into force date in April 2021.

In the meantime, we are of the view that regulation 9(4) of the 2019 Regulations will have no legal effect, on the basis that regulation 9(3) no longer contains any reference to Directive 2004/38/EC.

