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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 January 2021

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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 12 January 2021, 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:
 - Seed, Plant Propagating Material and Forest Reproductive Material (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/445)
2. The Committee's recommendations in relation to this instrument are set out in the next section of the report.
3. In relation to its scrutiny of instruments under its remit, the Committee also considered the following instruments and agreed to draw them to the attention of the lead committee:
 - Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 10) Regulations 2021 (SSI 2021/1);
 - Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2021 (SSI Draft/2020);
 - Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/424); and
 - Seed, Plant Propagating Material and Forest Reproductive Material (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/445).
4. The Committee's recommendations in relation to these instruments are set out later in the report.
5. The Committee also 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

Seed, Plant Propagating Material and Forest Reproductive Material (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/445)

6. The instrument addresses failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. It amends provisions contained in four SSIs concerning the marketing of agricultural seed, fruit and vegetative plant propagating material and forest reproductive material that were made in anticipation of the UK withdrawing from the European Union in March 2019.
7. 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.

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

9. **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

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 10) Regulations 2021 (SSI 2021/1)

10. The purpose of the instrument is to make amendments to the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations.
11. This instrument implements further restrictions to SSI 2020/344, which supplements the restrictions set out in SSI 452, laid on 21 December, which moved mainland Scotland, and the Isle of Skye into Level 4 restrictions and the remaining islands to Level 3 restrictions. These further restrictions require those residing in a Level 4 area to “stay at home”, other than for essential purposes. Examples of such essential purposes are provided for in paragraph 18 of schedule 5 of the Regulations.
12. The Committee wrote to the Scottish Government on 8 January 2021 with questions on the instrument.
13. In its response, the Scottish Government agreed that:
 - the condition contained in paragraph (8) of regulation 4 should also apply where a relevant person is exercising the power in paragraph (7A) of that regulation so a cross-reference should have been made in paragraph (8) to paragraph (7A);
 - the reference to the omitted paragraph 12(1)(b) in paragraph 18(2)(cc) is a cross-referencing error; and
 - the reference to the omitted paragraph 13(1)(b)(i) in paragraph 12(2)(ff) is a cross-referencing error.
14. The Scottish Government confirmed that amendments for each of these cross-referencing errors would be brought forward in early course.
15. A copy of the correspondence can be found in the **Annex**.
16. **The Committee agrees to draw this instrument to the attention of the Parliament under the general reporting ground on the basis that there are cross-referencing errors.**
17. **The Committee welcomes the Scottish Government's commitment to undertake to bring forward amending regulations.**

18. The instrument is made under powers in the Civic Government (Scotland) Act 1982 to set up a licensing scheme to be operated by local authorities. It establishes a licensing scheme for short-term lets, defining the activity to be licensed as the use of accommodation for a short-term let on or after 1 April 2022. This means that the licensing scheme is operational across Scotland from 1 April 2022 and licensing authorities will need to have a scheme open to receive applications from that date.
19. This instrument is subject to the affirmative procedure.
20. The Committee wrote to the Scottish Government on 17 December 2020 with questions on the instrument.
21. In its response, the Scottish Government agreed that:
 - it could be clearer that paragraph 2(4) to (7) of schedule 1 of the Civic Government (Scotland) Act 1982, as modified by paragraph 4 of schedule 2 of the instrument, does not place obligations on the applicant to display a public notice at or near the premises indicating that an application for a licence has been made; and
 - the reference to “section 123(a) or (b)” of the Town and Country Planning (Scotland) Act 1997 in new paragraph 2A of schedule 1 of the 1982 Act inserted by paragraph 5 of schedule 1 of the draft Order should be to “section 123(1)(a) or (b)”.
22. The Scottish Government confirmed it intends to lay an amending instrument to correct these errors.
23. The Committee also considered that it could be clearer in paragraph 1(e) of schedule 1 of the instrument that it is the term “premises licence”, rather than “approved activity”, that is being defined by reference to the Licensing (Scotland) Act 2005.
24. A copy of the correspondence can be found in the **Annex**.

25. **The Committee agrees to draw the instrument to the attention of the Parliament on reporting ground (h) on the basis that it could be clearer:**
 1. **in paragraph 1(e) of schedule 1 of the instrument that it is the term “premises licence”, rather than “approved activity”, that is being defined by reference to the Licensing (Scotland) Act 2005; and**
 2. **that paragraph 2(4) to (7) of schedule 1 of the Civic Government (Scotland) Act 1982, as modified by paragraph 4 of schedule 2 of the instrument, does not place obligations on the applicant to display a public notice at or near the premises indicating that an application for a licence has been made.**
26. **The Committee also agrees to draw the instrument to the attention of the Parliament on the general reporting ground, on the basis that the reference to “section 123(a) or (b)” of the Town and Country Planning (Scotland) Act 1997 in new paragraph 2A of schedule 1 of the 1982 Act as modified by**

paragraph 5 of schedule 1 of the instrument should be to “section 123(1)(a) or (b)”.

27. The Committee welcomes the Scottish Government's commitment to lay an amending instrument to rectify the errors identified by the Committee at paragraphs 25b and 26 above.

28. However, the Committee also calls on the Scottish Government to include in the amending instrument provision to address the errors identified in relation to paragraph 1(e) of schedule 1 identified at paragraph 25a above.

Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2020 (2020/424)

29. The instrument amends the Advice and Assistance (Scotland) Regulations 1996, the Civil Legal Aid (Scotland) Regulations 2002 and the Children's Legal Assistance (Scotland) Regulations 2013. The purpose of the amendments is to allow for payments from, or in connection with, the Windrush Compensation Scheme and the Scottish Child Payment to be disregarded from financial assessments for legal aid eligibility.

30. This instrument is subject to the negative procedure.

31. The Committee wrote to the Scottish Government on 18 December 2020 with questions about the references in the instrument to the “Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 1996”.

32. In its response, the Scottish Government accepted that the Advice and Assistance (Scotland) Regulations 1996 had been incorrectly cited in both the title of regulation 2, and regulation 2(1), as the “Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 1996”.

33. The Scottish Government confirmed it intends to lay an amending instrument to correct these errors at the next available legislative opportunity.

34. A copy of the correspondence can be found in the **Annex**.

35. The Committee agrees to draw the instrument to the attention of the Parliament on the general reporting ground on the basis that the Advice and Assistance (Scotland) Regulations 1996 have been incorrectly cited in both the title of regulation 2, and regulation 2(1), as the “Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 1996”.

36. The Committee notes the Scottish Government's commitment to take

corrective action to amend this error at the next available legislative opportunity.

Seed, Plant Propagating Material and Forest Reproductive Material (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (2020/445)

37. The instrument is summarised in the previous section of this report under 'Instruments considered under the European Union (Withdrawal) Act 2018'.
38. On 18 December 2020, the Scottish Government wrote to the Presiding Officer explaining why the 28-day rule had not been complied with.
39. A copy of the correspondence can be found in the **Annex**.

40. **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 it is satisfied with the explanation that has been given for the failure to comply with the rule.**

No points raised

COVID-19 Committee

Health Protection (Coronavirus) (Restrictions and Requirements) (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/439)

Social Care Staff Support Fund (Coronavirus) (Scotland) Amendment Regulations 2020 (SSI 2020/469)

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 9) Regulations 2020 (SSI 2020/471)

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 11) Regulations 2021 (SSI 2021/3)

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment Regulations 2021 (SSI 2021/5)

Culture, Tourism, Europe and External Affairs Committee

Census (Scotland) Amendment Regulations 2020 (SSI 2020/450)

Community Empowerment (Scotland) Act 2015 (Commencement No. 12 and Saving Provision) Order 2020 (SSI 2020/448 (C.42))

Education and Skills Committee

Children's Hearings (Provision of Information by Principal Reporter) (Specified Persons) (Scotland) Regulations 2020 (SSI 2020/449)

Environment, Climate Change and Land Reform Committee

Environmental Protection (Disposal of Polychlorinated Biphenyls and other Dangerous Substances) (Scotland) Amendment Regulations 2020 (SSI 2020/434)

Lands Tribunal for Scotland (Amendment) (Fees) (No. 2) Rules 2020 (SSI 2020/446)

Health and Sport Committee

Health Protection (Coronavirus) (International Travel and Public Health Information) (Scotland) (No. 2) Regulations 2020 (SSI 2020/444)

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 25) Regulations 2020 (SSI 2020/474)

Justice Committee

Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (Miscellaneous) 2020 (SSI 2020/440)

Local Government and Communities Committee

Charities (Disclosure of Information to Designated Bodies) (Scotland) Order 2020 (SSI

2020/435)

Town and Country Planning (General Permitted Development and Use Classes) (Scotland)
Amendment Order 2020 (SSI 2020/437)

Rural Economy and Connectivity Committee

Fish Farming Businesses (Reporting) (Scotland) Order 2020 (SSI 2020/447)

Annex

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 10) Regulations 2021 (2021/1)

On 8 January 2021, the Scottish Government was asked:

1. New regulation 4(7A) provides that “where a relevant person considers that a person is outside the place where that person is living, the relevant person may –

a. Direct that person to return to the place where they are living, or

b. Remove that person to the place where they are living.

Regulation 4(8) provides that “a relevant person may only exercise a power in paragraph (3), (4) or (7) if the relevant person considers that it is a necessary and proportionate means of ensuring compliance with the requirements”, in relation to the enforcement of the requirements set out in paragraphs (3), (4) and (7). Is it the intention that a relevant person exercising the power in (7A) is not required to consider that it is a necessary and proportionate means of ensuring compliance with the requirements before exercising said power?

2. New paragraph 18 of schedule 5 provides examples of reasonable excuses in relation to leaving home in Level 4 areas. Paragraph 18(2)(cc) provides that it is a reasonable excuse to be outside the place where you are living to undertake exercise or recreation in a gathering within the meaning of paragraph 12(1)(a), (b) or (c). Paragraph 12(1)(b) has been omitted by regulation 4(b)(ii) of this instrument. Is this an error? If so, is corrective action proposed?

3. Similarly, paragraph 18(2)(ff) provides that it is a reasonable excuse to be outside the place where you are living to undertake exercise or recreation in a gathering within the meaning of paragraph 13(1)(b)(i) or (ii). Paragraph 13(1)(b)(i) has been omitted by regulation 4(c)(ii) of this instrument. Is this an error? If so, is corrective action proposed?

On 11 January 2021, the Scottish Government responded as follows:

1. We thank the Committee’s legal advisers for drawing this matter to our attention. The intention is that the condition contained in paragraph (8) of regulation 4 should also apply where a relevant person is exercising the power in paragraph (7A) of that regulation. A cross-reference should have been made in paragraph (8) to paragraph (7A). An amendment will be brought forward in early course.

2. The reference to the omitted paragraph 12(1)(b) in paragraph 18(2)(cc) is a cross-referencing error. An amendment will be brought forward in early course.

3. The reference to the omitted paragraph 13(1)(b)(i) in paragraph 12(2)(ff) is a cross-referencing error. An amendment will be brought forward in early course.

Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2021 (SSI Draft/2020)

On 17 December 2020, The Scottish Government was asked:

1. Paragraph 1 of schedule 1 of the draft Order defines excluded accommodation. Paragraph 1(e) includes within that definition “a premises which holds a premises licence under the Licensing (Scotland) Act 2005 where accommodation is an approved activity (as defined in the 2005 Act)”. Which particular term is being defined by reference to the 2005 Act, and is this sufficiently clear?

2. Schedule 2 of the draft Order modifies the application of Part 1 of the 1982 Act. Paragraph 4(c), (d), and (e) of schedule 2 of the draft Order substitute references to “sub-paragraph (2)” of paragraph 2 of schedule 1 of the 1982 Act with references to “sub-paragraph (2A)” (as inserted by paragraph 4(b) of schedule 2 of the draft Order).

Existing paragraph 2(2) of schedule 1 of the draft Order would have imposed an obligation on an applicant to display a notice complying with certain requirements at or near the premises for 21 days. However, modified paragraph 2 inserted by paragraph 4(b) of schedule 2 of the draft Order places the obligation to notify on the licensing authority rather than the applicant. Paragraph 2(2A) sets out how the licensing authority can give notice under paragraph 2(2).

Paragraph 66 of the Policy Note indicates that the policy intention is to give “licensing authorities, rather than the applicant, responsibility for notifying premises on neighbouring land”. Are there errors, insofar as the modifications to paragraph 2(4) to (7) of schedule 1 of the 1982 Act made by paragraph 4(c), (d), and (e) of schedule 2 of the draft Order still apply in the context of obligations on the applicant under paragraph 2(2) of schedule 1 of the 1982 Act?

3. Should the reference to section 123(a) or (b) of the Town and Country Planning (Scotland) Act 1997 in new paragraph 2A of schedule 1 of the 1982 Act inserted by paragraph 5 of schedule 1 of the draft Order be to section 123(1)(a) or (b)?

4. Paragraph 1(f) of schedule 3 of the draft Order makes it a mandatory licence condition for the holder of the licence to make a copy of the “Portable Appliance Testing Report” available within the premises in a place where it is accessible to all guests.

Is the meaning of “Portable Appliance Testing Report” sufficiently clear? By way of contrast, “Electrical Installation Condition Report” referred to in paragraph 1(e) is defined in paragraph 14 of schedule 3 of the draft Order.

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

On 5 January 2021, the Scottish Government responded as follows:

1. The term being defined by reference to the 2005 Act is “premises licence”, which is defined at section 17 of that Act. The only terms which appear in paragraph 1(e) and are defined in the 2005 Act are “premises”, on which the definition of “premises licence” relies, and “premises licence”. Although the reference to the 2005 Act appears at the end of the paragraph, and directly after “approved activity”, approved activity is not defined in the 2005 Act (it is a reference to other activities permitted to be carried on in the premises in accordance with the licence). We consider that it is sufficiently clear which term is being defined with reference to the 2005 Act.

2. Thank you for drawing this to our attention. We had made the decision not to modify paragraph 2(4) to (7) of schedule 1 of the 1982 Act on the basis that those sub-paragraphs are not engaged since the modified paragraph 2(2) places the publicity obligation on the licensing authority rather than the applicant. So for example, sub-paragraphs (4) and (6)

state “Where an application contains a declaration that the applicant is complying with sub-paragraph (2A) above”. Those paragraphs will not be engaged since the application will not contain a declaration that the applicant is complying with sub-paragraph (4) (there being no obligation remaining for the applicant to comply with). However, having reconsidered the provision in light of your comments, we accept that the modified paragraph 2 of schedule 1 of the 1982 Act would be clearer were the relevant parts of paragraph 2 of schedule 1 modified so as to remove the references to obligations on the applicant. We propose to take corrective action by way of amending instrument.

3. Thank you for drawing that to our attention. The reference should be to section 123(1)(a) or (b) of the Town and Country Planning (Scotland) Act 1997. We consider that it is clear from the context of the new paragraph 2A of schedule 1 which provision is being referred to, but we propose to deal with the error in the amending instrument referred to above.

4. We have defined “Electrical Installation Condition Report”, which is also defined at section 19A of the Housing (Scotland) Act 2006 (as part of the repairing standard for residential tenancies). The Scottish Ministers are required to publish guidance on the carrying out of electrical inspections in terms of section 19B(4) of the 2006 Act. That statutory guidance sets out requirements for Portable Appliance Testing, although the term itself is not defined in the 2006 Act. To achieve consistency between the repairing standard and the mandatory conditions, since some properties may move between the regimes, we have not included a definition of “Portable Appliance Test”, which is a commonly used and well understood term within the property industry and which we believe to be sufficiently clear. No corrective action is proposed.

Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/424)

On 18 December 2020, the Scottish Government was asked:

1. Regulation 2(1) makes amendments to “the Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 1996”. The title of regulation 2 is “Amendment of the Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 1996”. That instrument (SI 1996/2447) was amended to “the Advice and Assistance (Scotland) Regulations 1996” by regulation 3 of the Advice and Assistance (Scotland) Amendments Regulations 1997 (1997/726).

Should the references to “the Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 1996” in both the title of regulation 2 and regulation 2(1) of the instrument be to “the Advice and Assistance (Scotland) Regulations 1996”?

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

On 5 January 2021, the Scottish Government responded as follows:

The Scottish Government accepts that the references should be to “the Advice and Assistance (Scotland) Regulations 1996”. As the reference to the original title of the Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 1996 as correctly footnoted can refer to no other instrument, the Scottish Government intends to take corrective action to amend at the next available legislative opportunity.

Seed, Plant Propagating Material and Forest Reproductive Material (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/445)

On 18 December 2020, the Scottish Government wrote to the Presiding Officer as follows:

The Seed, Plant Propagating Material and Forest Reproductive Material (EU Exit) (Scotland) (Amendment etc.) Regulations 2020, SSI 2020/445 (“the 2020 Regulations”) were made by the Scottish Ministers under section 2(2) of the European Communities Act 1972 and paragraph 1(1) and (3) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018 (“the 2018 Act”) today, 18 December 2020. They are being laid before the Scottish Parliament today, 18 December 2020 with some provisions coming into force on 31 December 2020 and the remainder immediately before “IP completion day” (within the meaning of the 2018 Act).

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, that requirement has not been complied with and, in accordance with section 31(3) that Act, this letter explains why.

The principal purpose of the 2020 Regulations is to update earlier EU Exit Regulations to ensure that those Regulations (as amended by the 2020 Regulations) appropriately address deficiencies in ten separate pieces of domestic legislation on the marketing of seeds and plant propagating material (including forest reproductive material such as tree seeds, plants and cuttings) (“the marketing legislation”).

The 2020 Regulations require to come into force on 31 December 2020/immediately before IP completion day to ensure that that deficiencies in the marketing legislation arising as a result of the UK’s exit from the EU are addressed and the legislation continues to be operable after IP completion day. Updates to the earlier EU Exit Regulations were necessitated by changes in circumstance in the time since those instruments were made in 2019, including amendments to the EU legislation underpinning the marketing legislation, the effect of the Withdrawal Agreement between the UK and the EU (“the Withdrawal Agreement”) and the implications of the terms of the Protocol on Ireland / Northern Ireland (“the NI Protocol”).

There has been delay in making and laying the 2020 Regulations due to the need for extensive discussion between UK administrations in relation to the correct approach to giving effect to the terms of the Withdrawal Agreement and the NI Protocol in so far as relevant in the context of the registration of new plant varieties. Bilateral discussions between DEFRA and DAERA in Northern Ireland took several months to reach a concluded position. Discussions between administrations were a necessary precursor to this instrument being made as the agreed approach to registration of new plant varieties has to be reflected in the marketing legislation.

In addition, delay has occurred because of the need to ensure that DEFRA, the Scottish Government and the Welsh Government were consistent in their approach to drafting the necessary amendments to update deficiency fixes in relation to their own marketing legislation. Doing so was instrumental to ensuring the marketing legislation and its equivalents elsewhere in GB will be as clear and easy to use as possible for the industry marketing their seeds and plant propagating material across GB or when receiving goods from Northern Ireland.

These delays coupled with the need to bring the instrument into force in time for IP completion day have resulted in the Scottish Government, on this occasion, being unable to lay this negative instrument before the Scottish Parliament at least 28 days before it

comes into force.

