

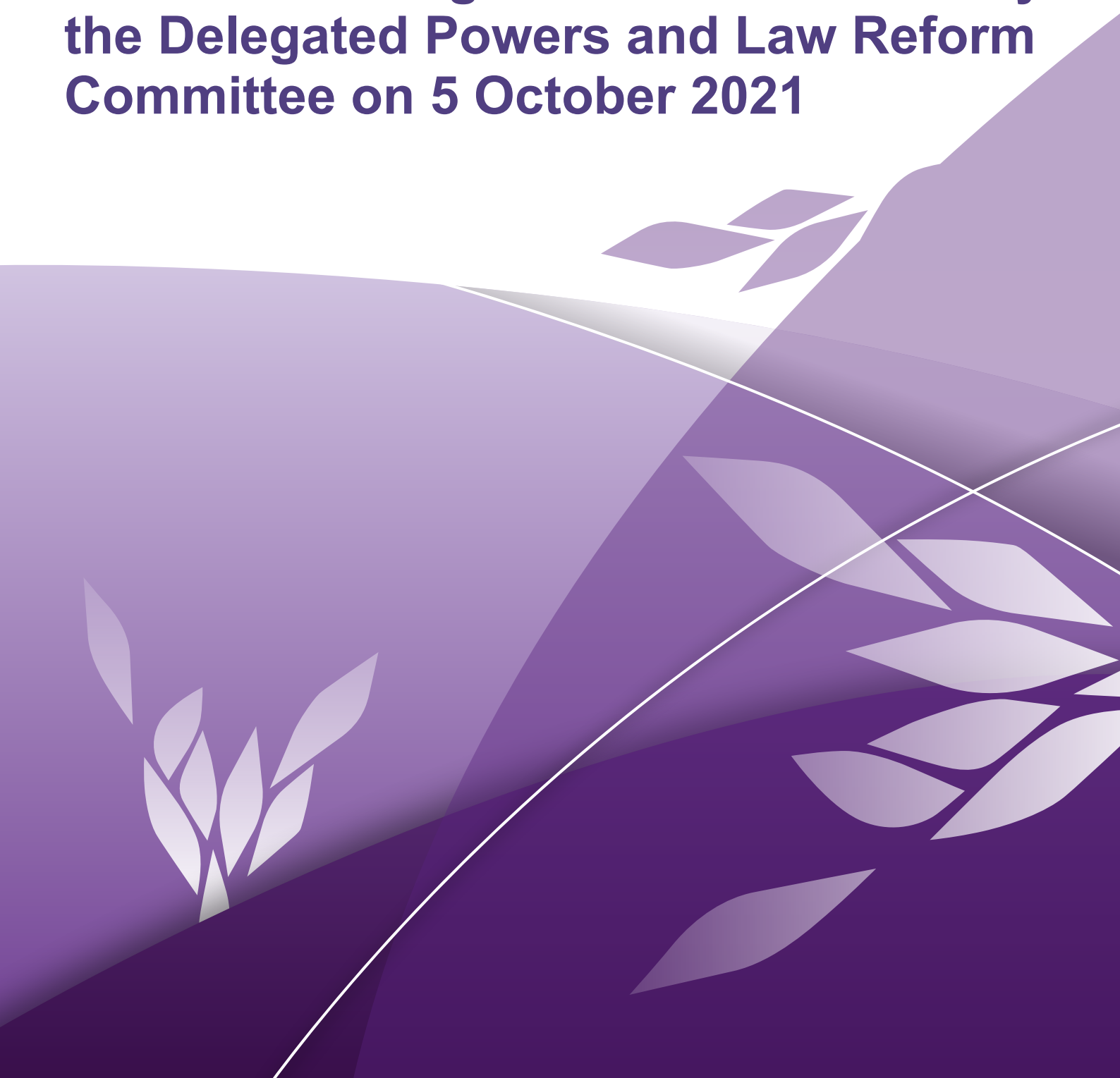


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Delegated Powers and Law Reform Committee

Subordinate Legislation Considered by the Delegated Powers and Law Reform Committee on 5 October 2021



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Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- a. matters relating to equal opportunities, and upon the observance of equal opportunities within the Parliament; and
- b. matters relating to human rights.
- c. matters relating to civil justice within the responsibility of the Cabinet Secretary for Justice and Veterans.

In these Rules

(a) “equal opportunities” includes the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds or on grounds of disability, age, sexual orientation, language or social origin or of other personal attributes, including beliefs or opinions such as religious beliefs or political opinions; and

(b) “human rights” includes Convention rights (within the meaning of section 1 of the Human Rights Act 1998) and other human rights as for example contained in any international convention, treaty or other international instrument ratified by the United Kingdom.



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Committee Membership



Convener
Stuart McMillan
Scottish National Party



Deputy Convener
Bill Kidd
Scottish National Party



Graham Simpson
Scottish Conservative
and Unionist Party



Craig Hoy
Scottish Conservative
and Unionist Party



Paul Sweeney
Scottish Labour

Introduction

1. At its meeting on 5 October 2021, the Committee considered the following instruments under its remit and agreed to draw them to the attention of the relevant lead committees:
 - Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Regulations 2021 (SSI 2021/322); and
 - Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No.2) Regulations 2021 (SSI 2021/349)
2. The Committee's recommendations in relation to these instruments are set out in the next section of this report.
3. The Committee also determined that it did not need to draw the Parliament's attention to the instruments set out at the end of this report.

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

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Regulations 2021 (SSI 2021/322)

4. This instrument revokes three previous sets of Regulations and replaces them with consolidated International Travel Regulations with the aim of improving their readability and accessibility. The instrument also makes the following changes:
 - to add the European Tour Golf - Alfred Dunhill Links Championship to the list of specified competitions in which elite sportspersons from red list countries are exempt from managed self-isolation on arrival in Scotland;
 - to exempt certain participants in COP26 from red list countries from the requirement to undergo managed self-isolation if they have completed a period of managed isolation in England; and
 - to exempt in-flight security officers from the requirement to self-isolate other than when they are not working or travelling for work.

Committee consideration

5. In correspondence with the Scottish Government (see Annex), the Committee highlighted that schedule 4 of the Regulations provides exemptions from requirements in the instrument for certain people including “members of aircraft crew” as defined in paragraph 10(2)(a)(ii).
6. The term ‘EU-OPS’ is used in paragraph 10(2)(a)(ii), which is defined in paragraph 10(2)(c) with reference to paragraph 1 of schedule 1 of the Air Navigation Order 2016. However, there is no reference to EU-OPS in that Order.
7. The Scottish Government confirmed that this is an error insofar as there is no longer such a reference in the 2016 Order and undertook to correct this at the next available opportunity.

8. **The Committee draws the instrument to the attention of the Parliament under reporting ground (h) on the basis that the instrument’s meaning could be clearer in respect of the reference to the term “EU-OPS” in paragraph 10(2)(a)(ii) of schedule 4 of the instrument, and the definition of that term in paragraph 10(2)(c) of schedule 4 by reference to paragraph 1 of schedule 1 of the Air Navigation Order 2016 where that term no longer exists.**
9. **The Committee also welcomes the Scottish Government’s commitment to clarify the position by updating the relevant reference at the next available opportunity. This has now been by the Health Protection (Coronavirus)**

(International Travel and Operator Liability) (Scotland) Amendment (No.2) Regulations 2021 (SSI 2021/343), also considered by the Committee on 5 October 2021 and with which it was content.

Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No.2) Regulations 2021 (SSI 2021/349)

10. This instrument makes amendments to the Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (“the Principal Regulations”) in order to introduce the requirement for certain premises to ensure that persons entering their premises are either fully vaccinated or exempt.
11. The instrument:
 - requires that premises have a reasonable system for checking that persons seeking to enter the premises are either fully vaccinated or exempt;
 - requires that persons who receive such information in the course of operating a system keep that information confidential;
 - requires that premises required to have such a system also prepare and maintain a compliance plan;
 - provides that a person responsible for premises who alters the course of their business in order to prevent the new requirements from applying to them does not commit a licensing offence; and
 - provides that a local authority may designate a person who may enter premises subject to the new requirements in order to prevent the continuation of an offence under the new requirements where they reasonably believe an offence is being committed.
12. This instrument was made at 11.39 am on 30 September 2021 and laid before the Parliament at 3.30 pm the same day. It is subject to the made affirmative procedure and came into force at 5.00am on 1 October 2021. The requirement to implement a reasonable system for checking a person’s vaccination status and the requirement to prepare and maintain a compliance plan will not be enforced until 5.00am on 18 October 2021.

Committee consideration

13. While it was noted that no technical points had been raised on the SSI, the focus of the Committee's discussion was on whether the affirmative procedure (where a draft SSI is laid before the Parliament and is required to be approved before it can come into force) would have been the more appropriate choice of procedure for these Regulations. Instead, the made affirmative procedure had been used (where regulations can come into force immediately but are required to be approved by the parliament within 28 days in order to remain in force).
14. During the Committee's consideration of the SSI, each Member in turn highlighted their views.

15. Graham Simpson MSP noted that while it was not for the Committee to consider the policy of the instrument, it can nevertheless "decide whether the procedure that is being used is the correct one." Highlighting that the made affirmative procedure allowed the Regulations to be in force prior to any parliamentary scrutiny, Mr Simpson said that "Committees have looked at the policy in general terms but, until today, no committee has managed to discuss it while having the regulations in front of it—and they are already in force."
16. Mr Simpson added:
 - ” For me, the question is whether that was the right procedure. The First Minister announced weeks ago that she and the Scottish Government wanted to bring in a vaccination passport scheme. The regulations came into force last Friday, but the Government has said that it will not enforce them for another two weeks. Given all that, I argue very strongly that that gives the Parliament time to properly scrutinise the regulations and therefore that the made affirmative procedure that the Government has used—which avoids scrutiny—is the wrong procedure. The Government should have put the regulations through under the affirmative procedure.
17. Craig Hoy MSP echoed Mr Simpson's concerns that the use of the made affirmative procedure was the wrong approach. Mr Hoy said that he believed the made affirmative procedure was being used "not because of urgency but because of political expediency" and that the Committee is "the arbiter and gatekeeper in respect of that and it is right that we do that."
18. Similar concerns regarding the level of parliamentary oversight were shared by Paul Sweeney MSP, noting in particular that:
 - ” In light of constituency representations that I have received regarding international compatibility, as well as the value for money of the technical solution that ministers decided upon, I say that the policy merited greater debate in the Parliament, regardless of whether we support the principle of vaccination passports. Therefore, I agree that the regulations would be better suited to the affirmative procedure than the made affirmative procedure.
19. Bill Kidd MSP also noted that the affirmative procedure should have been used in this instance. Mr Kidd said that while the nature of the current coronavirus situation has meant that "things have moved on apace", because of that "the regulations have potentially skipped some of the oversight that is required in the Parliament."
20. The Convener, Stuart McMillan MSP, said:
 - ” Notwithstanding the points that colleagues have made about whether the made affirmative procedure or the affirmative procedure should have been used, no technical points have been raised on the regulations that are in front of us and on which we have to vote. As no technical points have been raised, I will vote for them.
21. Mr McMillan also proposed that the Committee write to the Scottish Government to ask about the use of the made affirmative procedure as well as highlighting concerns that have been raised by Members.

22. In light of the above, the Committee disagreed (by division: For 2 (Bill Kidd MSP and Stuart McMillan MSP), Against 3 (Craig Hoy MSP, Graham Simpson MSP and Paul Sweeney MSP) and Abstentions 0) that it was content with the instrument.

23. The Committee agreed to highlight its views to the lead committee and to write to the Minister for Parliamentary Business to ask whether the Scottish Government might reflect on how it determines whether the made affirmative procedure is the appropriate procedure to be used in future.

No points raised

COVID-19 Recovery Committee

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/343)

Criminal Justice Committee

Legal Aid and Advice and Assistance (Miscellaneous Amendment)(Scotland) (No. 2) Regulations 2021 (SSI 2021/333)

Education, Children and Young People Committee

Children (Scotland) Act 2020 (Commencement No. 2) Regulations 2021 (SSI 2021/339 (C.24))

Equalities, Human Rights and Civil Justice Committee

First-tier Tribunal for Scotland (Chambers) Amendment Regulations 2021 (SSI 2021/draft)

Scottish Tribunals (Eligibility for Appointment) Amendment Regulations 2021 (SSI 2021/341)

Health, Social Care and Sport Committee

National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2021 (SSI 2021/335)

Net Zero, Energy and Transport Committee

Fuel Poverty (Targets, Definition and Strategy) (Scotland) Act 2019 (Commencement No. 2) Regulations 2021 (SSI 2021/332 (C.22))

Rural Affairs, Islands and Natural Environment Committee

Fish Farming Code of Practice (Scotland) Order 2021 (SSI 2021/340)

Social Justice and Social Security Committee

Winter Heating Assistance for Children and Young People (Scotland) Amendment Regulations 2021 (SSI 2021/draft)

Annex

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Regulations 2021 (SSI 2021/322)

The Scottish Government was asked:

The Delegated Powers and Law Reform Committee intends to consider SSI 2021/322 The Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Regulations 2021 at its meeting on 5 October 2021. The Committee has delegated authority to its legal advisers to ask questions directly of the Scottish Government Legal Directorate.

1. Part 9 of the Regulations deals with information sharing. Regulation 48 outlines what is 'relevant information' which may be 'used and disclosed' by a person who holds it in terms of regulation 47. Regulation 48(1)(d)(e) states "where a sample taken in respect of a day 2 test (within the meaning of regulation 11(3)) has been sequenced, the sorted BAM file relating to that sample containing all reads aligning to the SARS-CoV-2 reference genome with unaligned and human reads removed". There is no definition of a "BAM file" or "reads" to understand what these terms mean within this context, and neither term is referred to in the testing requirements outlined in regulations 11 or 14. Please explain whether, and if so why, it is considered sufficiently clear what these terms mean.

2. Schedule 4 provides for exemptions from requirements in the Regulations. Paragraph 10 exempts members of aircraft crew from compliance with Parts 3 and Part 5. Paragraph 10(2) defines 'member of aircraft crew' and includes at 10(2)(a)(ii) a person who "is carried on the flight deck and is appointed by the operator of the aircraft to give or to supervise the training, experience, practice and periodical tests required for the flight crew under article 114(2) of the Air Navigation Order 2016 or any provision of EU-OPS". Paragraph 10(2) (c) states that "EU-OPS" has the meaning given in paragraph 1 of schedule 1 of the Air Navigation Order 2016. Is there an error, insofar as there is no reference to EU-OPS in paragraph 1 of schedule 1 of the 2016 Order?

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

The Scottish Government responded:

The references to a 'BAM file' and to 'reads' in regulation 48(1)(e) are technical terms which are relevant to the processing of a day 2 test for the purposes of genomic sequencing.

The reference to 'reads' refers to information received from the sequencing of a test result. Sequencing of SARS-CoV-2 is achieved by targeted enrichment which is a technique which enables focused sequencing by targeting specific genomic regions of interest. A PCR test (i.e. a polymerase chain reaction test) amplification which is used in the process of genome sequencing would amplify human-derived genetic sequences ('human reads') as well as reads aligning to the SARS-CoV-2 reference genome. Human-derived sequences are therefore removed prior to sharing sequenced files for further analysis or reporting. This avoids the risk of unintended identification of patient/ethnicity or other human genetic identifiers.

In other words, when a sample is taken from a human to use for testing for SARS-CoV-2,

the sample does not just contain the reads (i.e. the information) for sequencing from the specimen of interest (in this case, SARS-CoV-2). The sample will also contain human reads which can pose issues with / contaminate the genome sequencing. The aim is to enrich the data for SARS-CoV-2 by identifying and discarding reads of human origin before trying to assemble the viral genome sequence.

A “BAM file” is a term which refers to the data connected with this sequencing process. That is, a laboratory which takes forward genomic sequencing will send a sorted BAM file (i.e. the data) containing all reads (gene sequences) aligning to the SARS-CoV-2 reference genome with unaligned and human reads (gene sequences) removed to the relevant body for sequencing.

These are technical and scientific terms which we consider are sufficiently clear for their intended purpose without being defined in the Regulations. This process of genome sequencing is understood by those who may hold and be required to use or disclose the relevant information in accordance with regulation 47. Craies on Legislation at 20.1.34 referring to Fry J in *Hold & Co v Collyer*, notes on the construction of technical expressions in a technical context: “If it is a word which is of a technical or scientific character then it must be construed according to that which is its primary meaning, namely, its technical or scientific meaning.”¹ We therefore consider given their technical scientific meaning there would not be a benefit in seeking to define these terms for the purposes of the regulation.

2. The Scottish Government is grateful to the Committee for drawing this point to our attention and confirm that there is an error in paragraph 10 of schedule 4, insofar as there is no longer a reference to EU-OPS in paragraph 1 of schedule 1 of the Air Navigation Order 2016. The Scottish Government intends to update this reference at the next available opportunity.

No action is proposed in relation to point 1 but corrective action is proposed as set out under point 2 above.

