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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 9 November 2021



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For information on the Scottish Parliament contact Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

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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.



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Stuart McMillan
Scottish National Party



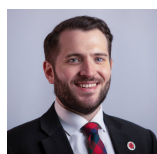
Bill Kidd
Scottish National Party



Convener
Graham Simpson
Scottish Conservative
and Unionist Party



Craig Hoy
Scottish Conservative
and Unionist Party



Paul Sweeney
Scottish Labour

Introduction

1. At its meeting on 9 November 2021, the Committee considered the following instruments under the SSI Protocol agreed between the Scottish Government and the Scottish Parliament in respect of SSIs made using powers under the European Union (Withdrawal) Act 2018:
 - Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/354);
 - Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment) Amendment Regulations 2021 (SSI 2021/383; and
 - Plant Health (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2021 (SSI 2021/Draft).
2. The Committee's recommendations in relation to these instruments under the SSI Protocol are set out in the next section of the report.
3. The Committee also considered the following instruments under its technical remit and agreed to draw them to the attention of the relevant lead committees:
 - Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 5) Regulations 2021 (SSI 2021/359); and
 - Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/354).
4. The Committee's technical recommendations in relation to these instruments are set out later in this report.
5. 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. Some broader points highlighted by the Committee are noted below the relevant instruments.

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

Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/354)

6. This instrument amends the Storage of Carbon Dioxide (Licensing etc.) (Scotland) Regulations 2011. Specifically, it amends definitions, references and expressions related to EU law which require updating or correction following the UK's withdrawal from the EU.
7. The instrument has been laid under the negative procedure and, following confirmation in correspondence between the Committee and the Scottish Government (see Annex), has been categorised by the Scottish Government as of low significance.

Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment) Amendment Regulations 2021 (SSI 2021/383)

8. This instrument corrects a technical drafting error in the Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment) Regulations 2021, which were laid on 7 October 2021. It corrects the error before it would have come into force.

9. **The Committee was content that the appropriate scrutiny procedure has been applied to SSIs 2021 354 and 383, and that they have been categorised properly as of low significance.**

Committee consideration of the categorisation applied by the Scottish Government

Plant Health (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2021 (Draft 2021/ Draft)

10. This instrument amends the Plant Health (Fees) (Forestry) (England and Scotland) Regulations 2015 to increase fees chargeable in respect of certification for export of plants and plant products and to waive phytosanitary certification export fees and charges for plants and plant products being transported from Scotland to Northern Ireland in certain circumstances. The instrument amends the Plant Health (Official Controls and Miscellaneous Provisions) (Scotland) Regulations 2019 to correct deficiencies in domestic law and retained EU law arising from the UK withdrawal from the European Union. Finally it corrects an error in the Plant Health (Import Inspection Fees) (Scotland) Regulations 2014.

1. **The Committee was content that the instrument has been categorised properly as of medium significance.**

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) Amendment (No. 5) Regulations 2021 (SSI 2021/359)

11. This instrument makes a number of changes to the Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Regulations 2021 (SSI 2021/322) including expanding the criteria for defining 'eligible vaccinated arrivals', adding requirements in respect of Passenger Locator Forms and amending exemptions in place for diplomatic personnel, their staff and dependents in relation to COP26.
12. Regulation 4(d) of the instrument, inserts paragraph (4A) into regulation 3 of the principal International Travel Regulations. As amended, regulation 3 provides that a person is an eligible vaccinated arrival if, among other things, the person is not vaccinated for medical reasons "by virtue of a determination made in accordance with (i) the Health Protection (Coronavirus) Requirements (Scotland) Regulations 2021 or (ii) the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021".
13. In correspondence with the Scottish Government, the Committee highlighted that as neither of those Regulations make explicit provision for such a determination to be made, it could be clearer how and by whom an exemption from vaccination on medical grounds is made in accordance with a determination made under either of these Regulations.
14. In its response, the Scottish Government pointed out that the position is set out in guidance to which travel operators or persons responsible for premises must have regard and as such, it considers that guidance makes clear the process for obtaining and evidencing a medical exemption in accordance with both the Scottish Requirements Regulations and the English International Travel Regulations.
15. The full correspondence between the Committee and the Scottish Government is included in the Annex.
16. **The Committee draws the instrument to the attention of the Parliament on reporting ground (h) on the basis that its meaning could be clearer in respect of how, and by whom, a determination of exemption from vaccination for medical reasons is made as there is no reference to any determination in respect of exemption from vaccination on medical grounds in either of the Regulations cited in regulation 4(d) of the instrument.**
17. **The Committee calls upon the Scottish Government to clarify this point at the next legislative opportunity.**

Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/354)

18. As noted above, this instrument amends definitions, references and expressions related to EU law in the Storage of Carbon Dioxide (Licensing etc.) (Scotland) Regulations 2011 which require updating or correction following the UK's withdrawal from the EU. The amendments are minor and technical in nature.
19. Following a question from the Committee, the Scottish Government acknowledged that regulation 8 contained a drafting error. The full correspondence between the Committee and the Scottish Government is included in the Annex.
20. In particular, the meaning of regulation 8 of the instrument could be clearer as regards what meaning certain listed terms are to have in a licence, being the terms listed in paragraph 5(2) of schedule 1 of the Storage of Carbon Dioxide (Licensing etc.) (Scotland) Regulations 2011 (SSI 2011/24) as amended by the instrument. More specifically, it should be the reference in paragraph 5(2) to Article 3 of Directive 2009/31/EC which is to apply "as it had effect immediately before IP completion day".
21. The Scottish Government has laid a correcting instrument, the Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment) Amendment Regulations 2021 (SSI 2021/383), which was made on 29 October and laid before the Parliament on 2 November 2021.

22. **The Committee draws the instrument to the attention of the Parliament on reporting ground (h) on the basis that the meaning of regulation 8 of the instrument could be clearer for the reasons set out above.**
23. **The Committee also welcomes that the Scottish Government has acknowledged the error and that a correcting instrument has been laid which will correct the error before it would have come into force.**

No points raised

COVID-19 Recovery Committee

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 6) Regulations 2021 (SSI 2021/382)

Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 3) Regulations 2021 (SSI 2021/384)

Coronavirus Act 2020 (Early Expiry of Provisions) (Scotland) Regulations 2021 (SSI 2021/Draft)

Criminal Justice

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 16) Order 2021 (SSI 2021/355)

Education, Children and Young People Committee

Redress for Survivors (Historical Child Abuse in Care) (Payments Materially Affected by Error) (Scotland) Regulations 2021 (SSI 2021/Draft)

Protection of Vulnerable Groups (Scotland) Act 2007 (Applications for Removal from List and Late Representations) Amendment Regulations 2021 (SSI 2021/379)

Disclosure (Scotland) Act 2020 (Commencement No. 1 and Transitory Provision) Regulations 2021 (SSI 2021/380 (C. 28))

Health, Social Care and Sport Committee

National Health Service (Pharmaceutical Services) (Scotland) Amendment Regulations 2021 (SSI 2021/367)

Local Government, Housing and Planning Committee

Relevant Adjustments to Common Parts (Disabled Persons) (Scotland) Amendment Regulations 2021 (SSI 2021/Draft)

Scottish Dog Control Database Order 2021 (SSI 2021/Draft)

Net Zero, Energy and Transport Committee

Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment) Amendment Regulations 2021 (SSI 2021/383)

- This instrument corrects errors highlighted by the Committee to the Scottish Government on SSI 2021/354

Lands Tribunal for Scotland (Miscellaneous Amendments) Amendment Rules 2021 (SSI 2021/386)

- This instrument fulfils a previous commitment made to the Session 5 Delegated Powers and Law Reform Committee by the Scottish Government in relation to SSI

2021/433, the Lands Tribunal for Scotland (Miscellaneous Amendments) Rules 2020, which the Session 5 Committee considered at its meeting on 19 January 2021.

Rural Affairs, Islands and Natural Environment Committee

Eggs (Amendment) (Scotland) Regulations 2021 (SSI 2021/Draft)

Plant Health (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2021 (SSI 2021/Draft)

- This instrument was originally laid on 7 October 2021 and subsequently withdrawn and re-laid following initial questions from the Committee.

Annex

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 5) Regulations 2021 (2021/359)

On 21 October 2021, the Scottish Government was asked:

The instrument amends the Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Regulations 2021 (“the Scottish International Travel Regulations”).

1. Regulation 4(d) inserts a new paragraph (4A) in regulation 3 of the Scottish International Travel Regulations which makes provision to the effect that P is a person who is not vaccinated for medical reasons “by virtue of a determination made in accordance with” either the Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (“the Requirements Regulations”) or the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021 (“the English International Travel Regulations”). Regulation 7B of the Requirements Regulations places an obligation on travel operators to keep relevant information “confidential”, which means not using it for any purpose except to determine if a person is permitted to be on certain premises. Relevant information as defined includes “information that can be used to determine if a person (ii) cannot be fully vaccinated against coronavirus for medical reasons” but whether someone cannot be fully vaccinated for medical reasons appears to be a determination made by someone other than a travel operator and not authorised directly by the Requirements Regulations. Regulation 3F of the English International Travel Regulations refers to “a person who is advised by a registered medical practitioner not to undergo vaccination for clinical reasons.” Please clarify by whom a determination that a person should not be vaccinated for medical reasons is made and why that power is ‘in accordance with’ either the Requirements Regulations or the English International Travel Regulations. Please explain why it is considered that the provision made in paragraph (4A) of regulation 3 of the Scottish International Travel Regulations as amended by the instrument makes clear where the responsibility to make that determination lies.
2. Regulation 13 amends schedule 10 (Transitional provisions) of the Scottish International Travel Regulations by inserting text in paragraph 11 after “paragraph 1(3)(d) of schedule 4”. Is there an error, insofar as regulation 10(d) of this instrument omits paragraph 1(3) of schedule 4?”

Please confirm whether any corrective action is proposed, and if so, what action and when?”

On 26 October 2021, the Scottish Government responded:

1. Regulation 7B of the Requirements Regulations involves an obligation to keep relevant information “confidential” but that obligation is placed on the person responsible for certain premises rather than, as your letter suggests, a travel operator. This duty of confidentiality is considered important for the purposes of those regulations because the responsibility for ensuring a reasonable system for checking vaccination status lies with persons responsible for premises who will have access to this information and it requires to be suitably safeguarded

There is no intention that travel operators or persons responsible for premises will be responsible for making a medical reasons determination. In accordance with regulation 7A(1) of the Requirements Regulations, a person responsible for certain premises must have in operation a reasonable system for checking vaccination status. In accordance with regulation 7A(3), a person is permitted to be on premises if they cannot be fully vaccinated against coronavirus for medical reasons. In accordance with regulation 7A(4), a person responsible for operating a system under regulation 7A(1) must have regard to any guidance issued by the Scottish Ministers. The process for obtaining a medical exemption, including how it is confirmed and may thereby be evidenced for the purposes of the Requirements Regulations, is set out in such guidance ([COVID Status: Guidance common questions | NHS inform \(nhsinform-n4.azurewebsites.net\)](https://www.nhs.uk/infocentre/articles/2021/09/20/covid-status-guidance-common-questions/)). All of this being so, the Scottish Government considers that the process for obtaining and evidencing a medical exemption in accordance with the Requirements Regulations is clear and that new regulation 3(4A) of the Scottish International Travel Regulations operates effectively in its cross reference to the Requirements Regulations. Similarly, the Scottish Government considers that regulation 3(4A) operates effectively in its cross reference to the English International Travel Regulations, where the system involves being able to evidence that a registered medical practitioner has advised against vaccination for clinical reasons.

2. There is no error in regulation 13 amending schedule 10 (transitional provisions) of the Scottish International Travel Regulations by inserting text in paragraph 11 after “paragraph 1(3)(d) of schedule 4” and that regulation 10(d) of this instrument omits paragraph 1(3) of schedule 4. The reference to schedule paragraph 1(3)(d) of schedule 4 has intentionally been left in the transitional schedule (schedule 10) to ensure that this caters for the legal effect of the earlier consolidation as this could leave a gap if omitted. If the cross reference to paragraph 1(3)(d) of schedule 4 were to be omitted, it would suggest that confirmation by the relevant Department before 20 September 2021 pursuant to paragraph 1(1A)(d) of schedule 2 of the 2020 Regulations is not to be treated as confirmation under paragraph 1(3)(d) of schedule 4 whilst that paragraph was in force (between 20 September 2021 and 15 October 2021).

In light of the conclusions set out above, we do not consider that corrective action is necessary.

Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment) Regulations 2021 (2021/354)

On 14 October, the Scottish Government was asked:

1. Regulation 8 of the instrument amends paragraph 5 of schedule 1 of the principal regulations. Paragraph 5 contains interpretation provisions that must be included in a licence. The amendment made to paragraph 5(2) appears to insert “as [it/they] had effect immediately before IP completion day” into the narration of the title of Directive 2009/31/EC, in two places. Is this an error? After the insertion of these words, paragraph 5(2) could be read as if the expressions to which it refers are to be given the meaning in each of (a) Article 3 of Directive 2009/31/EC (with no reference to point in time), (b) amending Council Directive 85/337/EEC as it had effect immediately before IP completion day, (c) European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC as they had effect immediately before IPCD, and (d) Regulation EC No 1013/2006 (with no reference to a point in

time). The intention was presumably that the expressions should have the meanings given Article 3 of Directive 2009/31/EC only. Is it sufficiently clear what meaning the terms listed in section 5(2) are to have in a licence?

2. Is any corrective action proposed, and if so, what action and when?
3. The accompanying documents do not specify whether the Protocol category for this instrument is low, medium or high. It seems most likely from what is said in the Policy Note that the Scottish Ministers consider the category to be low. Could you please confirm?

The Scottish Government responded:

1. The Scottish Government is grateful to the Committee for their observations. As identified by the Committee, the intention of the provision was that the expressions should have the meaning given in Article 3 of Directive 2009/31/EC as it had effect immediately before IP completion day. The amendment to paragraph 5(2) inserting text into the narration of the title of Directive 2009/31/EC in two places is an error.
2. The Scottish Government will bring forward an instrument to clarify this. The corrective instrument will be laid on 2nd November 2021.

The Scottish Ministers consider that Protocol category for this instrument is low.

