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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 16 February 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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# Committee Membership



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**Joe FitzPatrick**  
Scottish National Party



**Gil Paterson**  
Scottish National Party

# Introduction

1. At its meeting on 16 February 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:
  - Sea Fishing (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/draft).
2. The Committee's recommendation in relation to this instrument is 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:
  - Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 (SSI 2021/draft); and
  - Community Orders (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/draft).
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 categorisation applied by the Scottish Government

### Sea Fishing (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/draft)

6. The purpose of this instrument is to make a technical amendment to an offence provision in an existing Scottish order governing illegal, unreported or unregulated sea fishing.
7. This instrument has been categorised by the Scottish Government as of medium significance under the SSI Protocol in relation to the European Union (Withdrawal) Act 2018.

8. **The Committee is content that the instrument should be categorised as medium 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

## Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 (SSI 2021/draft)

9. Section 14 of the Criminal Justice (Scotland) Act 2003 confers regulation-making powers on the Scottish Ministers to prescribe the courts in which victim statements can be made (section 14(1)), the offences in respect of which statements can be made (section 14(2)), and the form and manner in which victim statements may be made (section 14(13)).
10. Section 23(7) of the Victims and Witnesses (Scotland) Act 2014, which inserts section 14(13) to (16) into the 2003 Act, was commenced on 10 February 2021 (by SSI 2020/405). New subsections (14) to (16) of section 14 of the 2003 Act allow the delegated power in section 14(13) to include ancillary provision, to modify an enactment (including the 2003 Act), and to have effect in specified areas for a specified period of time.
11. This instrument uses the delegated power in section 84(1) of the 2003 Act to make supplemental provision by substituting section 14(15) and (16) of the 2003 Act as amended by the 2014 Act. The instrument allows Scottish Ministers to combine exercise of the delegated powers in section 14(1), (2) and (13) to make different provision for different purposes. The Policy Note accompanying the instrument indicates that the intention is to allow the existing delegated powers to be used more flexibly to allow victim statements to be piloted in relation to specific offences being tried in a specific court and in a prescribed manner.
12. The Committee is content that the instrument appears to be within *vires* (i.e. that the Scottish Government has the power to make this instrument). Nevertheless, it has been made by what appears to be an unusual or unexpected use of the power conferred on Scottish Ministers to make supplemental provision in section 84(1) of the 2003 Act, by expanding the scope of the powers delegated to Scottish Ministers in section 14(1), (2) and (13) of that Act (as amended by the 2014 Act). This approach may be something the lead committee wishes to raise with the relevant minister when taking evidence on the instrument.
13. A copy of the correspondence with the Scottish Government on the instrument can be found in the **Annex**.
14. **The Committee agrees to draw this instrument to the attention of the Parliament on reporting ground (g) as it has been made by what appears to be an unusual or unexpected use of the powers conferred by the parent statute.**

## Community Orders (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/draft)



15. The purpose of this instrument is to reduce the overall number of hours that an offender is required to work (or spend doing another specified activity) under certain Community Payback Orders by 35%.
16. Drafting errors have been identified in regulation 4(1)(b) and (c) of the instrument. In both instances, the reference to “relevant unpaid work or other requirement” should be to “relevant unpaid work or other *activity* requirement” as defined in regulation 1.
17. A copy of the correspondence with the Scottish Government on the instrument can be found in the **Annex**.

18. **The Committee agrees to draw this instrument to the attention of the Parliament on the general reporting ground on the basis that there are drafting errors in regulation 4 of the instrument.**
19. **The Committee notes the Scottish Government's commitment to amend these errors by way of a correction slip.**

# No points raised

## COVID-19 Committee

Personal Protective Equipment (Temporary Arrangements) (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/50)

## Health and Sport Committee

Personal Injuries (NHS Charges) (Amounts) (Scotland) Amendment Regulations 2021 (SSI 2021/60)

## Local Government and Communities Committee

Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment Order 2021 (SSI 2021/59)

Non-Domestic Rate (Scotland) Order 2021 (SSI 2021/63)

Non-Domestic Rates (District Heating Relief and Renewable Energy Generation Relief) (Scotland) Amendment Regulations 2021 (SSI 2021/64)

Non-Domestic Rates (Levying and Miscellaneous Amendments) (Scotland) Regulations 2021 (SSI 2021/65)

## Rural Economy and Connectivity Committee

Sea Fishing (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/draft)

# Annex

## Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 (SSI 2021/draft)

### **On 29 January 2021 the Scottish Government was asked:**

Section 14 of the Criminal Justice (Scotland) Act 2003 provides for certain victims of certain offences to be afforded the opportunity to make a statement to the sentencing court about how and to what degree the offence has affected them. The power in section 14(1) enables the Scottish Ministers to prescribe specific courts in which victim statements must be made. Section 14(2) allows them to prescribe particular offences in respect of which victim statements must be made.

Section 23(7) of the Victims and Witnesses (Scotland) Act 2014 amends the 2003 Act to introduce new sections 14(13) to (16). Section 23(7) comes into force on 10 February 2021 by virtue of SSI 2020/405.

Article 2 of the instrument substitutes section 14(15) and (16) of the 2004 Act with new provision to expand the scope of delegated powers conferred by Parliament on Scottish Ministers in section 14(1), (2) and (13) of the 2003 Act, as amended, to make different provision for different purposes (including provision of temporary or local effect). This would allow Scottish Ministers to prescribe courts by reference to certain offences triable in those courts and to prescribe offences by reference to the courts in which they are triable. The Policy Note indicates that this will enable the Scottish Ministers to use the powers in section 14 to pilot changes to the current victim statement scheme.

The preamble cites the power to make supplemental etc. provision in section 84(1) of the 2003 Act as the enabling power. This applies where the Scottish Ministers consider such provision necessary or expedient for the purposes, or in consequence, of the 2003 Act or of any order made under it.

1. Please explain why it is considered that the provision made by this Order falls within the scope of the enabling power in section 84(1) of the 2003 Act.
2. In particular, please explain why it is considered that the application of the expanded power to make different provision for different purposes to section 14(13), which is inserted by the 2014 Act, is considered to be necessary or expedient for the purposes, or in consequence, of the 2003 Act.

### **On 2 February 2021, the Scottish Government responds as follows:**

Section 84(1) of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) enables the Scottish Ministers to make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence, of the 2003 Act or any order made under the Act. Section 84(2) clarifies that these powers can be used to amend an enactment, including the 2003 Act.

In order to fall within the scope of this power, the provisions must be at least one of; an incidental, supplemental, consequential, transitional, transitory or saving provision. In addition the provisions must be, in the reasonable consideration of Scottish Ministers, necessary or expedient, either for the purposes or in consequence of the 2003 Act. The

Scottish Government notes the effect of section 84(2) and that the power in section 84 can be used to amend the 2003 Act itself. It is therefore not an objection to an amendment made under its terms solely on the basis that it does so.

*Expedient for the purposes of the Act.*

The Scottish Government takes the view that these changes are expedient for the purpose of the Act, as discerned with regard to the purpose behind section 14. This purpose can be discerned from its general effect. The purpose of section 14 is therefore to provide that victims of prescribed offences are to be given the opportunity, in a prescribed court, in criminal proceedings relating to a prescribed offence, to make a victim statement about how the offence has affected and, as the case may be, continues to affect them. The overall purpose of section 14 is to be read inclusive of amendments made by the 2014 Act.

The Scottish Ministers have power to prescribe the courts in which statements can be made (section 14(1)) and a separate power to prescribe the offences in relation to which statements can be made (section 14(2)).

The separation of these two powers, without an express provision authorising them to be used in conjunction, or enabling different provision to be made for different purposes, restricts how those powers could be used. Section 14(1) enables the Scottish Ministers to prescribe courts or a class of courts and, once a court has been prescribed by the Scottish Ministers, a victim statement can be made in relation to any prescribed offence charged in that court. Section 14(2) enables the Scottish Ministers to prescribe the offences in relation to which a victim statement can be made. Once an offence is prescribed by the Scottish Ministers a victim statement can be made in relation to that offence whenever it is charged in any prescribed court.

The Scottish Government is of the view that the purpose in providing for a power to prescribe, rather than a universal application of the availability of victim statements, was to permit a particular approach in different courts and a particular approach to be applied to different offences. The form of the power to prescribe is the machinery for delivery of the purpose.

In terms of that machinery, there is no power in the 2003 Act to use the powers in section 14 to make different provision for different purposes. There is also no provision to enable the two powers to be used in conjunction. The addition of an express provision in section 14 of the 2003 Act, enabling different provision to be made for different purposes would enable the two powers to be used together so that prescribed offences could be limited to certain prescribed courts.

The Scottish Ministers take the view that it is reasonable to consider such changes as expedient changes for delivering upon the purpose of the Act; in that the changes further enable victim statements in prescribed courts and for prescribed offences. Ministers also take this view because the proposed provisions fall within the effect of what could have been achieved when the powers in section 14 first came into force. If no courts or offences had yet been prescribed, the current powers permit Scottish Ministers to prescribe one specific court and one specific offence (e.g. domestic abuse in Edinburgh Sheriff Court sitting as a court of summary jurisdiction) so that victim statements could only be made in those circumstances; in effect a pilot project. The only way to replicate those circumstances would be to revoke the current prescribed courts and prescribed offences orders, removing all existing rights for victims and begin the process again to allow a pilot of this type to run. Scottish Ministers are however of the view that it is more expedient in

these circumstances to make the amendments as set out in the current order, which will enable the effect of such a course of action to be taken forward, but without the need to revoke the orders currently prescribing the courts and offences to which victim statements may be made.

### *Supplemental provision*

The Scottish Government takes the view that the new proposed provisions are supplemental to the existing provisions of the section. The Scottish Government is in agreement with the textbook Craies on Legislation which provides at 3.4.10:

“Supplemental must mean more, or rather less, than simply additional: it must mean something along the lines of required to supplement the provisions of the...Act in order to make it work...In this vein, Viscount Dilhorne said of “supplemental” in Daymond v. South West Water Authority (House of Lords - 1976 AC 609, (at p644, at H)):

“supplementary” means, in my opinion, something that is added to what is in the Act to fill in the details or machinery for which the Act itself does not provide – supplementary in the sense that it is required to implement what was in the Act.”

The Scottish Government takes the view that what was ‘in the Act’ in the sense of the *Daymond* case is the effect that the Act is trying to achieve. That being (i) the generality that victims of prescribed offences are to be given the opportunity, in a prescribed court, in criminal proceedings relating to a prescribed offence, to make a victim statement about how the offence has affected and, as the case may be, continues to affect them; and, (ii) the conferral of powers on Ministers to determine by order, the circumstances in which such statements are to be used, by prescribing courts and separately, prescribing crimes for which they may be used.

The Scottish Government acknowledges in this regard that section 14(1) & (2) were intended to be quite separate powers because they are subject to different Parliamentary procedures. Further, it could be argued that the changes cannot be supplementary in the sense of being required or expedient to implement what was already in the Act because by their effect they change what was in the Act.

However, the Scottish Government does not agree that the separation of these powers, and their use being subject to different procedures, prevents the use of section 84 in this instance. The power in section 84 can be used to amend the Act itself, so it is not a sustainable objection to the amendment that it has that effect. Further, the Government takes the view that it is legitimate to distinguish between the principal purpose of the Act and matters of the machinery set out to deliver that.

In the present context, the principal purpose of the Act is to establish a scheme to enable victims of crime to make a statement in appropriate criminal proceedings. The powers to prescribe the court and the proceedings in which such statements may be made available can be regarded as the machinery which supports the delivery of that purpose. The amendments made by the draft order are supplemental to both the principal purpose and to the purpose of the delivery machinery, and do not disrupt the overall effect of the general conferral of functions on Ministers to determine the circumstances through which they will have effect. The changes are expedient in delivering upon the overall purpose of the Act.

Community Orders (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/draft)

**On 5 February 2021, the Scottish Government was asked:**

The Delegated Powers and Law Reform Committee intends to consider the draft Community Orders (Coronavirus) (Scotland) Regulations 2021 at its meeting on 16 February. The Committee has delegated authority to its legal advisers to ask questions directly of the Scottish Government Legal Directorate.

1. In regulation 4(1)(b) and (c) should “relevant unpaid work or other requirement” be “relevant unpaid work or other activity requirement” as defined in regulation 1?
2. Is any corrective action proposed, and if so, what action and when?

**On 9 February 2021, the Scottish Government responds as follows:**

The Scottish Government agrees that the reference in regulation 4(1)(b) and (c) of the draft Community Orders (Coronavirus) (Scotland) Regulations 2021 to “relevant unpaid work or other requirement” should be to “relevant unpaid work or other activity requirement” as defined in regulation 1.

The Scottish Government is of the view that corrective action is required. It is also of the view that the error is minor and self-evident and accordingly, if the regulations are approved by resolution of the Parliament, the Government will correct the reference in the SSI by way of correction slip.

The government is of the view that this action is appropriate as the error is minor and self-evident.

The error is minor in that it consists only of the missing word “activity” in both regulation 4(1)(b) and (c).

The error is self-evident for the following reason.

Regulation 4(1)(a) sets out the reference to the defined term: “relevant unpaid work or other activity requirement” in full. The reference in each of sub-paragraphs (b) and (c) can only relate to the requirement narrated in sub-paragraph (a) and must then be an error. This is because each reference in sub-paragraphs (b) and (c) is to: “that...requirement” (being the requirement narrated in sub-paragraph (a)).

Further on that point, paragraph (1) connects sub-paragraphs (a), (b) and (c) conjunctively with the use of “and”. The sub-paragraphs therefore operate cumulatively in establishing the preconditions, governing when the operative part of the transitional provision (set out in regulation 4(2)), applies. Taken together, with the use of the word ‘that’ in each of sub-paragraph (b) and (c), the reference must be to a: “relevant unpaid work or other activity requirement”.

Finally, regulation 4(2) only applies where the conditions in regulation 4(1) are met. Regulation 4(2) applies to “the variation”, and the only variation that is referred to in 4(1) is that of “a relevant unpaid work or other activity requirement” in 4(1)(a). As regulation 4(2) can only apply where the conditions in regulation 4(1)(a)-(c) are fulfilled the regulation can only make sense if the reference in 4(1)(b) and (c) is obviously an error. It must be read as including the word “activity” in order to make sense.

Accordingly as the Scottish Government is of the view that regulations 4(1)(b) and (c) can only be interpreted in a way which applies them to “a relevant unpaid work or other activity

requirement”, the error is obvious and should be corrected by correction slip.

The Scottish Government is grateful to the legal advisors to the Delegated Powers and Law Reform Committee for drawing this error to its attention.

