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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 6 December 2022**



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# Contents

<b>Introduction</b>	<b>1</b>
<b>Scrutiny of instruments under the Committee's remit: instruments drawn to the attention of the lead committee</b>	<b>2</b>
<b>No points raised</b>	<b>4</b>
<b>Annex</b>	<b>5</b>

# 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 6 December, the Committee considered the following instruments under its remit and agreed to draw them to the attention of the relevant lead committee:
  - Building (Scotland) Amendment (Amendment) (No. 2) Regulations 2022 (SSI 2022/340); and
  - Official Controls (Import of High Risk Food and Feed of Non-Animal Origin) Amendment (Scotland) Regulations 2022 (SSI 2022/341).
2. The Committee's recommendations in relation to these instrument are set out in the next section of this report.
3. The Committee also determined that in terms of its remit, it did not need to draw the Parliament's attention to the instrument at the end of the report.

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

## Building (Scotland) Amendment (Amendment) (No. 2) Regulations 2022 (SSI 2022/340)

4. The instrument amends SSI 2022 136, the Building (Scotland) Amendment Regulations 2022 by amending the date on which new mandatory energy and environmental standards for buildings and building work are introduced, from 1 December 2022 to 1 February 2023.
5. Under section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, instruments subject to the negative procedure must be laid at least 28 days before they come into force, not counting recess periods of more than 4 days. The instrument breaches this requirement as it was laid on 17 November 2022 and came into force on 30 November 2022.
6. In a letter to the Presiding Officer which can be read in the Annex, the Scottish Government explained that the instrument breached the laying requirements because the development and approval of commercial products produced by third parties in order to support developers to undertake and complete assessment of new buildings against the new standards, had taken longer than planned.
7. The result being that it affected the ability of those undertaking new development to submit full proposals for building warrant approval to their local authority.
8. In correspondence with the Scottish Government (Annex), the Committee asked for a further explanation for the breach given the laying requirements were complied with the last time the deadline was postponed.
9. In its response, the Scottish Government advised that the last round of engagement with providers was on 14 October. It advised that whilst some responses were immediate, it took longer than expected to determine the full picture and that it was aware of further changes, likely to disrupt the development process, being made over the period by the contractor managing the software approval process on its behalf.

**10. The Committee draws the instrument to the attention of the Parliament under reporting ground (j) for failure to comply with the laying requirements in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**

**11. The Committee draws, to the attention of the lead committee, the reasons given by the Scottish Government for the breach of the 28 day rule in this instance.**

Official Controls (Import of High Risk Food and Feed of Non-Animal Origin) Amendment (Scotland) Regulations 2022 (SSI 2022/341)

12. The instrument amends Commission Implementing Regulation (EU) 2019 1793 on the temporary increase of official controls and emergency measures governing entry into the Union of certain goods from certain third countries.
13. In correspondence with the Scottish Government which can be read in the Annex, the Committee highlighted the omission of reference to a consultation provision, article 144(7) of Regulation (EU) 2017 625 from the preamble of the instrument.
14. The Scottish Government explained that although the instrument does not cite Article 144(7) in the preamble there has been satisfaction of the precondition of consultation in that provision and fulfilment of the wider corresponding consultation requirements in Article 9 of Regulation (EC) 178/2002. . The Scottish Government also explained that the consultation was sent directly to interested parties likely to be affected which in their view meets the precondition requirements of both Article 9 and Article 144(7).

**15. The Committee draws the instrument to the attention of the Parliament under the general reporting ground for a failure to follow proper drafting practice in that one of the statutory consultation requirements was not referred to in the preamble.**

**16. The Committee notes that, in line with normal drafting practice, the instrument should have referred to all statutory preconditions.**



# No points raised

## Criminal Justice Committee

Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) (Amendment) 2022 (SSI 2022/355)

## Economy and Fair Work Committee

Bankruptcy and Debt Arrangement Scheme (Miscellaneous Amendment) (Scotland) Regulations 2023 (SSI 2022/Draft)

## Local Government, Housing and Planning Committee

Building (Scotland) Amendment (No. 2) Regulations 2022 (SSI 2022/349)

## Rural Affairs, Islands and Natural Environment Committee

Common Organisation of the Markets in Agricultural Products (Poultrymeat) (Miscellaneous Temporary Amendments) (Scotland) Regulations 2022 (SSI 2022/352)

# Annex

## **Building (Scotland) Amendment (Amendment) (No. 2) Regulations 2022 (SSI 2022/340**

On 17 November 2022, the Scottish Government wrote to the Presiding Officer:

The Building (Scotland) Amendment (Amendment) (No.2) Regulations 2022, SSI was made by the Scottish Ministers under sections 1 and 54(2) and schedule 1 of the Building (Scotland) Act 2003 on 16 November 2022. It is being laid before the Scottish Parliament today, 17 November 2022 and comes into force on 30 November 2022.

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, this has not been complied with and to meet the requirements of section 31(3) that Act, this letter explains why.

Scottish building regulations set national mandatory building standards for the health, safety, welfare and convenience of persons in and around buildings, furthering the conservation of fuel and power and the achievement of sustainable development. These building standards are supported by guidance contained in the Building Standards Technical Handbooks. The regulations apply to new buildings and to buildings being converted, altered or extended. The building standards system is administered by Scottish local authorities, who are appointed as verifiers of the system and also undertake a statutory enforcement role.

Building regulations were amended in April this year by The Building (Scotland) Amendment Regulations 2022, SSI 2022 No.136, with changes to energy and environmental standards set out within Part 3 of those regulations. The in-force date for Part 3 of the amendment regulations was subsequently revised in April 2022 by The Building (Scotland) Amendment (Amendment) Regulations 2022, SSI 2022 No.209.

A key change delivered by Part 3 of SSI 2022 No.136 is improved energy and emissions standards for new buildings. Compliance with these standards is demonstrated by the output from approved calculation software tools, which implements Scottish energy performance targets within an updated version of the UK calculation methodology. Such tools are needed in advance of changes to standards to enable developers to confirm buildings will meet new standards prior to submission of an application for building warrant.

Development and approval of such tools, which are commercial products produced by third parties, has taken longer than planned and this has significantly reduced the opportunity for developers to undertake and complete assessment of new buildings against the new standards. This affects the ability of those undertaking new development to submit full proposals for building warrant approval to their local authority, concerns are shared by key stakeholders in the construction sector and by our local authority verification partners.

Officials advised that deferment of the introduction of the regulations is needed to minimise disruption to the process of preparing and submitting applications for building warrants for new development and to offer assurance that the published changes to standard will be well implemented. I have agreed to this action, recognising the need to work in partnership

with the construction sector towards an effective delivery of the published changes.

Accordingly, The Building (Scotland) Amendment (Amendment) (No.2) Regulations 2022 further defers the in-force date of Part 3 of The Building (Scotland) Amendment Regulations 2022 by two calendar months. To enable this, the amended regulations must have effect prior to the in-force date of 1 December 2022 set out in The Building (Scotland) Amendment (Amendment) Regulations 2022.

The Scottish Government has sought to make, lay and bring into force this instrument as soon as possible following the latest assessment of delivery of approved software tools and supporting engagement with key stakeholders. We have investigated and discounted non-regulatory alternatives to achieve the same outcome.

On 24 November 2022, the Committee asked the Scottish Government:

The Building (Scotland) Amendment Regulations 2022, SSI 2022/136 made various changes to building standards which came into force earlier this year. Part 3 of those regulations introduced changes to energy and environmental standards, which was initially intended to come into force on 1 October 2022. The in-force date for Part 3 was subsequently revised by the Building (Scotland) Amendment (Amendment) Regulations 2022, SSI 2022/209 with the negative instrument delaying the implementation of the changes to energy and environmental standards from 1 October 2022 to 1 December 2022. The reasons for this were to provide a longer period for the development of supporting third-party resources used to demonstrate compliance with the building standards introduced.

The present negative instrument seeks to further delay the implementation of the changes to energy and environmental standards for a further 2 months to 1 February 2023. It does not comply with laying requirements as it was laid on 17 November and will come into force on 30 November, in advance of the current implementation date of 1 December. The letter to the Presiding Officer states the reasons for failing to comply with the laying requirements is due to the “development and approval of such tools, which are commercial products produced by third parties, has taken longer than planned and this has significantly reduced the opportunity for developers to undertake and complete assessment of new buildings against the new standards.” It further states that this instrument was made, laid and brought into force as soon as possible following the latest assessment of delivery of approved software tools and supporting engagement with key stakeholders.

Please can you provide further explanation as to when the latest assessment of the planned implementation took place (referred to in the letter to the PO) and why this instrument was not able to be laid in accordance with the laying requirements on this particular occasion given that the laying requirements were complied with on the previous occasion.

On 29 November 2022, the Scottish Government responded:

To gauge the risk of potential negative impact on the capacity of developers to complete design assessments of new buildings, officials monitored both the likely time table for delivery of tools and the number of tools which would be available. The last round of email engagement with providers was sent out on 14 October. Whilst some responses were immediate, it took longer than expected to determine the full picture. We were aware of further changes, likely to disrupt the development process, being made over the period by

the contractor managing the software approval process on our behalf. This indicated the likelihood of a further delay in availability of approved tools had increased and a formal submission to defer implementation was made on 4 November.

The position in May this year differed in that officials were able to confirm a level of delay in broader UK work to finalise the calculation methodology. They therefore proposed what, at that point, was considered to be a suitable adjustment to the inforce date for Part 3 of The Building (Scotland) Amendment Regulations 2022. There was no issue in breach of the 28-day rule at that time as the original in-force date was 1 October 2022. It was unfortunate that the information to inform that deferment was not available prior to laying of the original April regulations, resulting in the need for an amending SSI in June.

### **Official Controls (Import of High Risk Food and Feed of Non-Animal Origin) Amendment (Scotland) Regulations 2022 (SSI 2022/341)**

On 25 November 2022, the Committee asked the Scottish Government:

The instrument is made in exercise of powers conferred by Article 53(1)(b) of Regulation (EC) No 178/2002 of the European Parliament and of the Council (Regulation 178/2002) and Articles 47(2)(b) and 54(4)(a) and (b) of Regulation (EU) No 2017/625 of the European Parliament and of the Council (Regulation 2017/625). As noted in the laying email the instrument is laid under Article 57a (5) of Regulation 178/2002.

Both Regulations 178/2002 and 2017/625 contain consultation requirement provisions. Article 9 of Regulation 178/2002, cited in the preamble of the instrument, requires open and transparent public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law, except where urgency doesn't permit this. Article 144(7) of Regulation 2017/625 requires that before making any regulations under this Regulation, the appropriate authority must consult (a) such bodies or persons as appear to the appropriate authority to be representative of the interests likely to be substantially affected by the regulations; (b) such other bodies or persons as the appropriate authority may consider appropriate. Article 144(7) of Regulation 2017/625 is not cited in the preamble of the instrument.

1. Should the instrument have been laid under both Article 57a(5) of Regulation 178/2002 and Article 144(5) of Regulation 2017/625?
2. Should the preamble of the instrument have cited both Article 9 of Regulation 178/2002 and Article 144(7) of Regulation 2017/625 with regards to consultation?
3. Please confirm whether any corrective action is proposed, and if so, what action and when.

On 29 November 2022, the Scottish Government responded:

The instrument is laid under both Article 57a(5) of Regulation 178/2002 and Article 144(5) of Regulation 2017/625 which should have been noted on the SSI form but was not in error and is the reason it was not stated in the email to the Parliament.

A twelve-week public consultation was launched on 6 April 2022 and closed on 29 June 2022. It was sent directly to interested parties likely to be affected, which met the precondition requirements of both:

- *Article 9 of 178/2002 which states: "There shall be open and transparent public*

*consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law, except where the urgency of the matter does not allow”; and*

- *Article 144(7) of 2017/625 which states: “Before making any regulations under this Regulation, the appropriate authority must consult – (a) such bodies or persons as appear to the appropriate authority to be representative of the interests likely to be substantially affected by the regulations; (b) such other bodies or persons as the appropriate authority may consider appropriate”.*

Although the instrument does not cite Article 144(7) in the preamble there has been: (a) satisfaction of the precondition of consultation in that provision; and (b) fulfilment of the wider corresponding consultation requirement in Article 9 of 178/2002 cited in the instrument which applies in general to the preparation, evaluation and revision of food law, except where the urgency of the matter does not allow.

On that basis the Scottish Government does not propose any corrective action.

