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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 25 April 2023



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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



Jeremy Balfour
Scottish Conservative
and Unionist Party



Carol Mochan
Scottish Labour



Oliver Mundell
Scottish Conservative
and Unionist Party

Introduction

1. At its meeting on 25 Aprilⁱ, the Committee considered the following instrument under its remit and agreed to draw it to the attention of the Parliament:
 - Town and Country Planning (Development Planning) (Scotland) Regulations 2023 (SSI 2023/101)
2. The Committee's recommendations in relation to this 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 instruments at the end of the report.

ⁱ Rona Mackay MSP substituted for Stuart McMillan MSP

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

Town and Country Planning (Development Planning) (Scotland) Regulations 2023 (SSI 2023/101)

4. The instrument makes provision in connection with the preparation of local development plans under the Town and Country Planning (Scotland) Act 1997.
5. In correspondence with the Scottish Government, the Committee highlighted an apparent failure to narrate in the preamble a consultation requirement in section 16B(15) of the 1997 Act.
6. The Committee also identified a cross-referencing error in Regulation 25 of the instrument.
7. The Scottish Government confirmed that the consultation requirement had been fulfilled and acknowledged that the consultation requirement should have been narrated in the preamble of the instrument. However, it does not consider that any corrective action is required.
8. The Scottish Government also confirmed there had been a cross referencing error. Regulation 25 should refer to section 4ZA(3)(b)(ii) of the 1997 Act instead of section 4ZA(3)(b)(iii).
9. The Scottish Government has undertaken to correct the error at the next available opportunity.
10. A copy of the correspondence can be found in the **Annex**.
11. The lead committee for this instrument is the Local Government, Housing and Planning Committee.

12. The Committee draws the instrument to the attention of the Parliament under the general reporting ground for —

- **failure to follow proper drafting practice on account of the failure to narrate the consultation requirement in section 16B(15) of the Town and Country Planning (Scotland) Act 1997 in the preamble; and**
- **a cross-referencing error whereby Regulation 25 should refer to section 4ZA(3)(b)(ii) instead of section 4ZA(3)(b)(iii).**

13. The Committee notes that the Scottish Government has undertaken to correct the cross-referencing error at the next available opportunity.

No points raised

Criminal Justice Committee

Fireworks and Pyrotechnic Articles (Scotland) Act 2022 (Designation of Events and Incidental Provision) Regulations 2023 (SSI 2023/98).

- Correspondence between the Committee and the Scottish Government can be found in the **Annex**.

Net Zero, Energy and Transport Committee

Climate Change (Scotland) Act 2009 (Interim Target) Amendment Regulations 2023 (SSI 2023/Draft)

Rural Affairs and Islands Committee

Bee Diseases and Pests Control (Scotland) (Amendment) Order 2023 (SSI 2023/114)

Social Justice and Social Security Committee

Council Tax Reduction (Scotland) Amendment Regulations 2023 (SSI 2023/113)

Annex

Correspondence between the Committee and the Scottish Government in relation to SSIs considered at this meeting.

Fireworks and Pyrotechnic Articles (Scotland) Act 2022 (Designation of Events and Incidental Provision) Regulations 2023 (SSI 2023/98)

On 14 April 2023, the Committee asked the Scottish Government:

The instrument is made under the enabling powers in sections 37(1) and 52 of the Fireworks and Pyrotechnic Articles (Scotland) Act 2022. Section 37 will be commenced by SSI 2023/99 (C. 10) on 6 June 2023. The instrument is therefore made under a power that is not in force at the time of making it.

Section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that where an Act of the Scottish Parliament confers power to make a Scottish instrument, that power may be exercised during the pre-commencement period if it is necessary or expedient to do so for the purpose of bringing the Act into force or giving full effect to the Act at or after the time when the provision conferring the power comes into force. In the absence of any explanation in the supporting documentation, please explain why the anticipatory exercise of power is considered necessary or expedient under section 4 of the 2010 Act.

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

On 18 April 2023, the Scottish Government responded:

It is considered to be expedient to exercise the power in section 37 to make regulations in advance of that power coming into force in order that the provisions of Part 5 of the Fireworks and Pyrotechnic Articles (Scotland) Act 2022 may take full effect from 6 June 2023 as efficiently and as comprehensively as possible.

The provisions of section 36 (commenced by SSI 2023/99) could not operate from the date of commencement unless provision had been made under the power in section 37(1) to designate relevant events from that same date. It is therefore considered expedient to make these Regulations, designating such events, in order to enable the new offence in section 36 to take full practical effect from the date it commences. The case of *Usher v Barlow* (1952 Ch 255) provides precedent for the anticipatory use of powers for such a purpose.

Corrective action is not proposed. Consideration has been given to publication of a replacement policy note, narrating the above basis for the reliance on section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010, as it is acknowledged that this explanation was omitted from the accompanying documents provided with this instrument. However, as it is understood that the Committee's question of 14 April, and the Scottish Government's response on this point, will be recorded within the Committee's record of its consideration of the instrument, it is considered that no additional steps to clarify the position are necessary in this case. The reliance on section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010 to make the Regulations during the precommencement period is not a matter which will affect the future operation of the

instrument once it and SSI 2023/99 come into force from 6 June 2023. No further corrective action is therefore considered to be required for the purpose of assisting future users of the legislation to understand its practical effects.

Town and Country Planning (Development Planning) (Scotland) Regulations 2023 (SSI 2023/101)

On 13th April 2023, the Committee asked the Scottish Government:

The regulations are made in exercise of various powers conferred by the Town and Country Planning (Scotland) Act 1997 (“the 1997 Act”). One of the powers cited is section 16B(14) of the 1997 Act which provides: “Gypsies and Travellers” has the meaning specified in regulations made by the Scottish Ministers. Subsection (15) provides that “Before making regulations under subsection (14) specifying the meaning of “Gypsies and Travellers”, the Scottish Ministers must consult such persons as they consider appropriate”.

The Policy Note accompanying this instrument confirms that a consultation seeking views on a proposed definition of gypsies and travellers was carried out between December 2022 and February 2023: “The online consultation received 41 responses, and we also conducted four in-person consultation engagement events with Travelling community members. Responses were received from members of various Travelling communities, representative bodies and local authorities.” (paragraph 72, page 13)

Should the preamble of the instrument have set out the statutory pre-condition in section 16B(15) of the 1997 with regards to consultation? Regulation 25 of the instrument defines the ‘key agencies’ for the purposes of various sections of the 1997 Act. One of the sections cited is section 4ZA(3)(b)(iii). Should this be a reference to 4ZA(3)(b)(ii) rather than 4ZA(3)(b)(iii)?

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

On 18 April 2023, the Scottish Government responded:

The requirement to consult under section 16B(15) was fulfilled before the Regulations were made and the Scottish Government recognise that this should have been set out in the preamble to the instrument and are grateful to the Committee for bringing this to their attention. It is not considered that any corrective action is required.

The Scottish Government agree that the reference in regulation 25 to which the Committee refers should be a reference to section 4ZA(3)(b)(ii) rather than 4ZA(3)(b)(iii) and are grateful to the Committee for bringing this to their attention. Section 4ZA is not yet fully in force and the incorrect reference therefore has no immediate consequences for the operation of the consultation obligations contained in section 4ZA(3)(b). The Scottish Government will bring forward regulations to correct the reference at the next available opportunity and before section 4ZA is commenced.

