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32nd Report (Session 5)

## **Delegated Powers and Law Reform Committee**

### **Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Subordinate Legislation considered on 13 June 2017**



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# Contents

<b>Introduction</b>	<hr/> <b>1</b>
<b>Instruments subject to negative procedure</b>	<hr/> <b>2</b>
<b>No points raised</b>	<hr/> <b>5</b>
<b>Annex A</b>	<hr/> <b>6</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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# Committee Membership



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# Introduction

1. At its meeting on 13 June 2017, the Committee agreed to draw to the attention of the Parliament the following instrument—

Environmental Impact Assessment (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/168)
2. The Committee's recommendation and conclusions in relation to this instrument are set out in the next chapter of this report.
3. The Committee 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 subject to negative procedure

[Environmental Impact Assessment \(Miscellaneous Amendments\) \(Scotland\) Regulations 2017 \(SSI 2017/168\) \(Environment, Climate Change and Land Reform\)](#)

## Purpose

4. The purpose of this instrument is to amend the following instruments in light of the Committee's reports on those instruments dated 26 April 2017 and 3 May 2017:
  - the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/101);
  - the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/102);
  - the Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/113);
  - the Agriculture, Land Drainage and Irrigation Projects (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/114); and
  - the Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/115).
5. The instrument is subject to the negative procedure and comes into force on 30 June 2017.

## Comment

6. Regulation 5(2)(a) of the Environmental Impact Assessment (Miscellaneous Amendments) (Scotland) Regulations 2017 seeks to rectify an error previously identified by the Committee in relation to the definition of "project" in regulation 2(1) of the Agriculture, Land Drainage and Irrigation Projects (Environmental Impact Assessment) (Scotland) Regulations 2017.
7. The definition is:

““project” means—

  - (a) the execution of construction works or other installations or schemes; or
  - (b) other interventions in the natural surroundings and landscape involving—
    - (i) the use of uncultivated land or semi-natural areas for intensive agricultural purposes,
    - (ii) restructuring of rural land holdings on agricultural land,
    - (iii) irrigation, or

- (iv) drainage.”
8. In its report dated 3 May 2017, the Committee drew the instrument to the attention of the Parliament under reporting ground (h) on the basis that the meaning of the definition of “project” could be clearer. In particular, the Scottish Government indicated that it was intended that paragraph (a) of the definition included the execution of construction works or other installations or schemes which involve (only) the uses listed at (i) to (iv) above. However, the definition might be read as meaning the execution of construction works or other installations or schemes, in general.
  9. Regulation 5(2)(a) of the current instrument seeks to rectify this issue by inserting a comma after the word “landscape” in paragraph (b) and moving the word “involving” on to a separate line.
  10. The Committee asked the Scottish Government whether the definition of “project”, as amended, could still be read as meaning that sub-paragraphs (i) to (iv) only apply to paragraph (b) and not also paragraph (a) (see Annex A). The Scottish Government’s response argues that, while there might have been other ways of drafting the definition, the meaning is sufficiently clear. This is particularly in light of the separate line used for the word “including”.
  11. The Committee is of the view that the definition of “project” as amended could still be clearer. This is on the basis that another method of drafting could have made it clearer that sub-paragraphs (i) to (iv) apply to both paragraphs (a) and (b).
  12. The Environmental Impact Assessment (Miscellaneous Amendments) (Scotland) Regulations 2017 also provided an opportunity for the Scottish Government to rectify an error identified in the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/102) by the Committee in its report dated 26 April 2017.
  13. In that report, the Committee noted that schedule 6 of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 was incorrect insofar as it referred to the “Waste (Meaning of Hazardous Waste and European Waste Catalogue) (Miscellaneous Amendments) (Scotland) Regulations 2016”. This is incorrect because those Regulations are 2015 Regulations.
  14. The Committee therefore recommended that the Scottish Government take the opportunity afforded by the amending instrument to rectify this error in its report. However, the Scottish Government has not taken that opportunity.

## **Recommendation**

15. **The Committee welcomes that the Scottish Government has laid an amending instrument to rectify the errors identified by the Committee at its meetings of 25 April and 2 May 2017.**

16. However, the Committee draws the instrument to the attention of the Parliament under reporting ground (h) on the basis that the definition of “project” in regulation 2(1) of the Agriculture, Land Drainage and Irrigation Projects (Environmental Impact Assessment) (Scotland) Regulations 2017 could still be clearer, despite the amendment made by regulation 5(2) of the instrument. In particular, it could still be clearer that sub-paragraphs (i) to (iv) apply to paragraph (a) in addition to paragraph (b) in that definition.
17. The Committee also expresses its disappointment that the Scottish Government did not take the opportunity afforded by the amending instrument to amend schedule 6 of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017. The reference in that schedule to the “Waste (Meaning of Hazardous Waste and European Waste Catalogue) (Miscellaneous Amendments) (Scotland) Regulations 2016” remains incorrect because those Regulations are 2015 Regulations.

# No points raised

## **Education and Skills**

Police Act 1997 (Criminal Records) (Scotland) Amendment Regulations 2017 (SSI 2017/171)

## **Health and Sport**

Carers (Scotland) Act 2016 (Agreements of a Specified Kind) Regulations 2017 [draft]

Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Amendment Rules 2017 (SSI 2017/172)

Mental Health (Conflict of Interest) (Scotland) Regulations 2017 (SSI 2017/174)

Mental Health (Patient Representation) (Prescribed Persons) (Scotland) Regulations 2017 (SSI 2017/175)

Mental Health (Certificates for Medical Treatment) (Scotland) Regulations 2017 (SSI 2017/176)

## **Justice**

Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (Commencement No. 2) Regulations 2017 (SSI 2017/183 (C.15))

Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Lay Representation) 2017 (SSI 2017/186)

## **Local Government and Communities**

Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment (No. 3) Regulations 2017 (SSI 2017/187)

Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2017 (SSI 2017/189)

## **Rural Economy and Connectivity**

Milk and Other Products (Pupils in Educational Establishments) (Scotland) Regulations 2017 (SSI 2017/178)

Seed (Fees etc.) (Scotland) Regulations 2017 (SSI 2017/179)

# Annex A

## **Environmental Impact Assessment (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/168)**

**On 2 June 2017, the Scottish Government was asked:**

Regulation 5(2)(a) substitutes the definition of “project” with a new definition of that term. The only differences between the two definitions of “project” are that in the substituted definition a comma has been inserted after the word “landscape” in sub-paragraph (b) and the following word (“involving-”) has been moved to a new line.

1. Does the Scottish Government agree that, despite these minor changes, the meaning of the definition of “project” (as amended) could still be clearer insofar as it could be read as meaning that sub-sub-paragraphs (i) to (iv) still apply only to sub-paragraph (b) and not also to (a)? In other words, the use of sub-sub-paragraphs (in this case (i) to (iv)) could imply that they are structurally subordinate to a particular sub-paragraph (in this case, sub-paragraph (b)) and not to both sub-paragraphs.
2. If so, is corrective action proposed?

**The Scottish Government responded as follows:**

1. The Scottish Government considers that, while there might have been other ways of drafting the definition, the meaning is sufficiently clear. We do not consider that the full-out in this case should be considered to be any different to any other full-out purely because it incorporates numbered sub-paragraphs.
2. No corrective action is proposed.

