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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 30 January 2018



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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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Introduction

1. At its meeting on 30 January 2018, the Committee agreed to draw to the attention of the Parliament the following instruments—
 - Animal Feed (Basic Safety Standards) (Scotland) Regulations 2018 (SSI 2018/15)
 - Education (Listed Bodies) (Scotland) Order 2018 (SSI 2018/7)
2. The Committee's recommendations and conclusions in relation to these instruments are set out in the following sections 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.

Points raised: instrument subject to negative procedure

Animal Feed (Basic Safety Standards) (Scotland) Regulations 2018 (SSI 2018/15) (Rural Economy and Connectivity)

Background and Purpose

4. The main purpose of this instrument is to transpose article 21 of Directive 2013/59/ Euratom. That Directive lays down basic safety standards for protection against the dangers arising from exposure to ionising radiation. Article 21 prohibits the deliberate addition of radioactive substances in the production of animal feeding stuffs, and the import or export of such products
5. The instrument provides for an offence, where a person deliberately adds a radioactive substance in the production of animal feed (regulation 3). It is also an offence if a person imports or exports any feed to which a radioactive substance has been intentionally added during production (regulation 4).
6. The Regulations are subject to the negative procedure. They come into force on 6 February 2018.
7. The Policy Note for the instrument comments that there are no enforcement issues associated with these Regulations in Scotland. The impact to animal feed businesses is minimal, as there should be no deliberate addition of radioactive materials to animal feed at any stage of the production process.

Breach of the "28 day rule"

8. The Regulations fail to comply with the "28 day rule" contained in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA"). They were laid before the Parliament on 16 January, and come into force on 6 February 2018.
9. The "28 day rule" provides that where a Scottish statutory instrument is subject to the negative procedure, it must be laid at least 28 days before the instrument comes into force. A breach of the rule does not affect the validity of the Regulations.
10. A breach of the rule is reported by the Committee under "ground (j)" in the Standing Orders (rule 10.3.1). That ground includes where there has been a failure to lay the instrument in accordance with section 28(2) of ILRA.
11. In accordance with section 31 of ILRA, the Scottish Government Legal Services Directorate wrote to the Presiding Officer on 16 January 2018 to explain why the requirements of section 28(2) have not been met in this case. The correspondence is reproduced at Annex A.
12. The letter explains initially that the effect of Directive 2013/59 is to require these domestic Regulations to come into force on 6 February 2018. The Regulations were

laid on 16 January because the UK Government required to notify the draft provisions to the European Commission, and to allow the Commission to issue any recommendations within 3 months of that notification. The UK Government made the notification, on behalf of the UK Government and the devolved administrations, on 13 October 2017. The effect of the necessary 3 month “standstill period” was that the Regulations could not be laid until 16 January.

13. The Scottish Government has further explained, in a written response to the Committee, that Food Standards Scotland did not originally anticipate that the implementation of Directive 2013/59 in relation to animal feed would require the making of an offence relating to feed. After discussions with colleagues across UK, it was agreed that the preferred course would be to make specific statutory provisions. The time needed for those discussions across the UK meant there could not be earlier notification of the draft provisions to the Commission. This in turn led to the instrument being laid on 16 January.

Recommendation

14. **Accordingly, the Committee draws the Regulations to the attention of the Parliament on reporting ground (j) as the Regulations fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
15. **The Regulations were laid before the Parliament on 16 January and come into force on 6 February, 2018. This does not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.**
16. **The Committee finds the failure to comply with section 28 to be acceptable in the circumstances as outlined in correspondence from the Scottish Government to the Presiding Officer on 16 December 2017, supplemented by the written response to the Committee on the Regulations.**

Points raised: instrument not subject to any parliamentary procedure

Education (Listed Bodies) (Scotland) Order 2018 (SSI 2018/7) (Education and Skills)

Background and Purpose

17. The Scottish Government is required to make orders listing all UK bodies which are authorised to offer degree level programmes for validation by a recognised body, as is the UK Government and the other devolved administrations.
18. A number of bodies that were listed in the 2007 Order (as amended) have been omitted from the Order, as they no longer provide courses approved by or on behalf of a 'recognised body'. There are also a number of added bodies.
19. Section 216(3) of the Education Reform Act 1988 ("the 1988 Act") provides that, for the purposes of that section extending to Scotland, the Scottish Ministers are required to publish an up-to-date list of those bodies which either
 1. are not themselves 'recognised bodies', but are authorised to provide courses in preparation for degrees to be awarded by recognised bodies; or
 2. are a constituent college or other institution of a university which is a recognised body.
20. "Recognised bodies" are those authorised to grant recognised awards, as set out in the Education (Recognised Bodies) (Scotland) Order 2018, which the Committee considered last week.
21. This Order revokes the Education (Listed Bodies) (Scotland) Order 2007 and the Education (Listed Bodies) (Scotland) Amendment Order 2009, which together contained the previously listed bodies

Discussion

22. The Scottish Government has acknowledged that two of the bodies listed in Part 1 of the schedule are not correctly described. One is "Mary Hare Grammer School", which should be described as a limited company, "Mary Hare". Another is "St Philips's Centre", which should also be described as a limited company, "St Philip's Centre Ltd". The correspondence is reproduced at Annex B.
23. The Scottish Government considers that, despite the current description of the two bodies in the schedule being inaccurate, it is unlikely to result in either body being mistaken for a different one. They do not propose to take any corrective action at this stage, but have undertaken to correct the two entries in the "next amending instrument" – which means in the next Order which updates the list of bodies. The last amendment was made in 2009.

Recommendation

- 24. The Committee draws the Order to the attention of the Parliament on the general reporting ground, as two of the bodies listed in Part 1 of the schedule of the Order are incorrectly described. “Mary Hare Grammer School” and “St Philips’s Centre” should be described as limited companies, “Mary Hare” and “St Philip's Centre Ltd”.**
- 25. The Committee recommends that the Scottish Government should amend the description of the two bodies promptly, given that Part 1 of the schedule of the Order confirms those bodies which are authorised to provide courses in preparation for a degree.**

No points raised

Education and Skills

Continuing Care (Scotland) Amendment Order 2018 [draft]

Local Government and Communities

Representation of the People (Scotland) Amendment Regulations 2018 [draft]

Annex A

Animal Feed (Basic Safety Standards) (Scotland) Regulations 2018 (SSI 2018/15)

On 18 January 2018, the Scottish Government was asked:

1. A letter of 16th January has been sent from the Solicitors Food, Children, Education, Health and Social Care Division of the Scottish Government to the Presiding Officer, to explain why section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ('the 28 day rule') has not been complied with. The letter explains that the UK Government notified, on behalf of the UK Government and the devolved administrations, the draft transposing measures of Council Directive 2013/59/Euratom as they apply to the deliberate addition of radiological substances to animal feed, on 13 October 2017. Due to the "3 months standstill period" referred to in the letter, it also explains that regulations required to be laid on 16th January, which involved the breach of the 28 day rule given that a commencement date of 6th February 2018 was required for this instrument.

To assist the Committee, please explain why in the circumstances the UK Government required to make the notification as described above on 13 October, or whether the notification could have been made on an earlier date, which in turn could have meant that the instrument could have been laid on an earlier date, and so to comply with the 28 day rule?

2. Regulation 5 provides that a person who contravenes regulation 3 (deliberate addition of a radioactive substance in the production of feeding stuff) is guilty of an offence and liable to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 3 months. The penalty for contravening regulation 4 (import or export of feeding stuff to which a radioactive substance has been deliberately added during production) appears to be specified in section 74A(3) of the Agriculture Act 1970, but "or to both" is added in that subsection, so that both a fine and imprisonment may be imposed.

(i) Please clarify therefore whether the policy intention is that the penalty for contravening regulation 3 is the alternative of a fine or imprisonment, or otherwise whether it is intended that either or both may be imposed?

(ii) If the former, please explain the difference in approach. If the latter, is corrective action proposed?

The Scottish Government responded as follows:

1. Food Standards Scotland did not originally anticipate that implementation of Article 21 (prohibition of practices) of Council Directive 2013/59/Euratomⁱ in relation to animal feed would require the making of an explicit statutory offence relating to animal feed as it was thought that the considerable safeguards in the existing food and feed legislation law would suffice. However, following prolonged discussions with colleagues across the UK, it was agreed that the preferred course of action would be to make such specific statutory provisions. Unfortunately the matter was not resolved in sufficient time to allow for an earlier notification of the relevant technical standard which would have ensured that all

ⁱ of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, and repealing Directives 89/618/Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom and 2003/122/Euratom.

Parliamentary timetables were respected. The Scottish Government takes seriously its responsibility to make sure that the timetable for notification of a technical standard takes account of the timescales required for Scottish Parliament scrutiny and apologies that this was not possible in this case.

2. As the Committee has noted, the penalty for contravening regulation 4 (import or export of feeding stuff to which a radioactive substance has been deliberately added during production) is specified in section 74A(3) of the Agriculture Act 1970 as a fine not exceeding level 5 on the standard scale or imprisonment for a term not exceeding three months, or both.

Under section 74A(4) there are certain powers to make regulations in implementation of an EU Instrument but these powers do not extend to prohibiting the deliberate addition of radioactive substances in the production of feeding stuffs. Accordingly, regulations 3 and 5 are made under section 2(2) of the European Communities Act 1972. Paragraph 1(1)(d) of Schedule 2 to that Act provides for restrictions on the penalties applicable to new criminal offences created under section 2(2). The view taken at the time of making these Regulations was that it could not be punishable by both a fine not exceeding level 5 and a term of imprisonment not exceeding three months. On further consideration, however, it is accepted that this is an overly restrictive view. The Scottish Government will amend these Regulations at the earliest suitable opportunity.

Breach of laying requirements: letter to the Presiding Officer

The Animal Feed (Basic Safety Standards) (Scotland) Regulations 2018 are made by Scottish Ministers under sections 74A and 84 of Agriculture Act 1970 and section 2(2) of the European Communities Act 1972.

These Regulations are subject to the negative resolution procedure. Unfortunately, although these Regulations need to come into force on 6 February 2016 in order to comply with our EU obligations, they could not be delayed until today and thus breach the requirement in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 for instruments to be laid at least 28 days before they are due to come into force. As required by section 31(3) of the 2010 Act, I am writing to you to explain why the laying requirements have not been complied with.

These Regulations transpose Article 21 (prohibition of practices) of Council Directive 2013/59/Euratom^{ii [2]} in relation to animal feed. Article 106 of that Directive requires Member States to bring into force laws necessary to comply with the Directive by 6 February 2018. Article 33 of the Euratom Treaty requires Member States to communicate draft provisions to the Commission and allows the Commission to issue any recommendations on such drafts within 3 months of that date. The UK Government notified on behalf of the UK Government and the devolved administrations the draft transposing measures of Council Directive 2013/59/Euratom as they apply to the deliberate addition of radiological substances to animal feed on 13 October 2017. The effect of this 3 month standstill period in which the Commission can issue recommendations is that the Regulations cannot be laid until 15 January.

ii of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, and repealing Directives 89/618/Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom and 2003/122/Euratom.

Ideally, the Commission would have been notified earlier, thus allowing the 3 month period to expire 28 days (or indeed preferably 40 days) before the coming into force date. Given the delay, we sought to aid Scottish Parliament lawyers in considering the regulations by sharing a draft of the Instrument on 11 January 2018.

Food Standards Scotland (FSS) did not originally anticipate that implementation of this Article would require the making of an explicit statutory offence relating to animal feed as it was thought that the considerable safeguards in the existing food and feed legislation law would suffice. However, following prolonged discussions with colleagues across the UK, it was agreed that the preferred course of action would be to make such specific statutory provisions.

FSS consulted on these regulations during November 2017 and is satisfied from stakeholder responses that there will be no adverse impact.

I trust you will find this helpful.

Annex B

Education (Listed Bodies) (Scotland) Order 2018 (SSI 2018/7)

On 19 January 2018, the Scottish Government was asked:

1. Part 1 of the schedule includes "Mary Hare Grammar School" as a body authorised to provide courses in preparation for a degree. The website of the body, www.maryhare.org.uk, describes it as "Mary Hare School", comprising the Primary and Secondary schools. "Mary Hare" appears to be a limited company (03085006) and a registered charity (1048386). The Charity Commission website also describes under its "aims and activities" that Mary Hare operates the 2 schools, but it also provides training for teachers and other practitioners in deaf education. The schedule of the instrument includes various limited companies.

Accordingly, is it considered that the description of the body is properly "Mary Hare", rather than "Mary Hare Grammar School"?

2. Part 1 of the schedule also lists "St Philip's Centre". It appears that the Centre (in Leicester) is a limited company- St Philip's Centre Ltd (company number 05657062). Similarly is it considered that the description of the body is properly "St Philip's Centre Ltd"?

3. Would corrective action be proposed?

The Scottish Government responded as follows:

1. We agree that the entry for "Mary Hare Grammar School" is inaccurate and that the body is properly described as "Mary Hare".

2. We agree that the entry for "St. Philip's Centre" is inaccurate and that the body is properly described as "St. Philip's Centre Ltd".

3. We consider that, despite the current description of these two bodies in the schedule being inaccurate, the inaccuracies are unlikely to result in either body being mistaken for a different body. Consequently, we do not intend to take corrective action at this stage. We would however, undertake to correct these two entries in the next amending instrument.

