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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Statutory Instruments Considered by the Delegated Powers and Law Reform Committee on 7 January 2020



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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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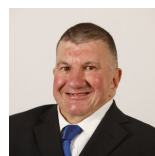
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Introduction

Instruments drawn to the attention of the lead Committee

1. At its meeting on 7 January 2020, the Delegated Powers and Law Reform Committee considered the following instruments subject to the negative procedure and agreed to draw them to the attention of the lead Committee:
 - Environmental Impact Assessment (Transport) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/415)
 - Plant Health (Official Controls and Miscellaneous Provisions) (Scotland) Regulations 2019 (SSI 2019/421)
2. The Committee's recommendations and conclusions in relation to these instruments are set out later in the report.

Other instruments considered

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 Drawn to the Attention of the Lead Committee

Environmental Impact Assessment (Transport) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/415)

Purpose

4. This instrument amends provisions that will, on exit day, become retained EU law on Environmental Impact Assessments in relation to the construction of new roads, and other road and transport works.

Committee Consideration

5. After amendment, the provision inserted by regulation 3(4) will read:

“Any non-governmental organisation promoting environmental protection... is deemed to—

 - (a) have an interest for the purposes of Article 11(1)(a) of the relevant directive, and
 - (b) rights capable of being impaired for the purposes of Article 11(1)(b) of that directive.”
6. This could be read as suggesting that rights can be derived from a provision of this particular EU Directive after the UK leaves the EU, whereas, section 4(2)(b) of the European Union (Withdrawal) Act 2018 provides expressly that rights under EU Directives do not become part of domestic law on exit day (subject to certain exceptions).
7. The Scottish Government agrees that the Directive does not have legal effect after exit day. In response to a question, the Scottish Government has made clear that the intention is simply to set out how the Directive, as an external document without legal effect, is to be read after exit day. However, the Committee is of the view that the drafting of the instrument could be clearer in this respect.
8. The Committee notes that other SSIs which regulate how provision of a Directive are to be read post-exit use a different formulation, which refers to “the purposes of” the ongoing domestic law, not the purposes of the Directive (for example using the formulation “for the purpose of paragraph [] of SSI [], Article [] of the Directive is to be read as if...”).
9. The Committee therefore reports this instrument to the Rural Economy and Connectivity Committee under reporting ground (h) as the meaning could be clearer.

Plant Health (Official Controls and Miscellaneous Provisions) (Scotland) Regulations 2019 (SSI 2019/421)

Purpose

10. This instrument implements the new EU Plant Health Regulation and the plant health elements of the new Official Controls Regulation and associated tertiary legislation.

Committee Consideration

11. The instrument was laid before the Parliament on 11 December 2019 and came into force on 14 December 2019. Accordingly, it does not comply with the requirement in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 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.
12. The Committee is therefore required under standing orders to draw the instrument to the attention of the Parliament.
13. The Committee is content with the reasons given by the Scottish Government for the failure to comply (see letter at Annex A).
14. The Committee draws this instrument to the attention of the lead Committee, the Rural Economy and Connectivity Committee, under reporting ground (j) for failing to comply with laying requirements.

No Points Raised

Justice Committee

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2020 (SSI 2020/draft)

- Note: this instrument was relaid after an error was identified in the previous draft (see correspondence at Annex B).

Environment, Climate Change and Land Reform Committee

Land Reform (Scotland) Act 2016 (Commencement No. 9) Regulations 2019 (SSI 2019/420 (C.24))

Finance and Constitution Committee

Proposed draft order - Public Services Reform (Registers of Scotland) Order 2020 (SG/2019/248)

Proposed explanatory document - Public Services Reform (Registers of Scotland) Order 2020 (SG/2019/249)

Annex A

11 December 2018

Dear Presiding Officer

THE PLANT HEALTH (OFFICIAL CONTROLS AND MISCELLANEOUS PROVISIONS) (SCOTLAND) REGULATIONS 2019

The Plant Health (Official Controls and Miscellaneous Provisions) (Scotland) Regulations 2019 (the Regulations) were made by the Scottish Ministers under section 2(2) of the European Communities Act 1972 today, 11 December 2019, and are being laid before the Scottish Parliament this afternoon with a coming into force date of 14 December 2019.

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, it has not been possible to comply with this requirement. In accordance with the requirements of section 31(3) of that Act, this letter explains why this requirement has been breached.

The Regulations partially implement the Official Controls Regulation (EU) 2017/625 (the OCR) in respect of official controls and other official activities carried out on plants and plant products and also implement the Plant Health Regulation (EU) 2016/2031 (the PHR). Both the OCR and the PHR are two of the components of the EU legislative package Smarter Rules for Safer Food (SRSF) that creates a single framework for all official controls and other official activities along the agri-food chain.

The OCR and PHR are directly applicable EU Regulations, the main date of application for which is 14 December 2019. As of that date, the existing EU Plant Health Directive 2000/29/EC will be substantially repealed and replaced.

These Regulations in particular further implement both the PHR and the OCR for plant health purposes and repeal both the Plant Health (Scotland) Order 2005 and the Plant Health (Forestry) Order 2005 for Scotland, which currently implement the EU Plant Health Directive 2000/29/EC.

Separate but parallel SSIs to implement the OCR for food and feed aspects and in relation to genetically modified organisms, animals, animal by-products and derived products have been made. The Official Feed and Food Controls (Miscellaneous Amendments) (Scotland) Regulations 2019 were made and laid before the Scottish Parliament on 28 November 2019 and the Official Controls (Agriculture etc.) (Scotland) Regulations 2019 were made and laid before the Scottish Parliament on 3 December 2019.

Implementation of the OCR and the PHR in Scotland and the rest of the UK has been complicated by the continued uncertainty related to the timing of the UK's exit from the EU. It was only following agreement to further extend Article 50 until the end of January 2020 that there was certainty that the UK would be legally required to implement the OCR and the PHR by 14 December 2019.

These complexities, coupled with the significant challenge and prioritisation of resources associated with ensuring the necessary fixes to the EU law were in place for a possible no-

deal EU Exit on 31 October 2019, have meant the necessary work to prepare for implementation in Scotland has been undertaken in shorter than normal timescales.

There has also been a need to align implementation with the equivalent legislation being prepared by the other UK administrations, who have been faced with similar challenges. This has been further complicated by the UK election, which has meant that the majority of the equivalent implementing provision for England will not be made in time for the 14 December.

Preparation of the Regulations has been further complicated by delays at EU level in agreeing and publishing some of the relevant tertiary legislation.

As a result, under these challenging circumstances, it has not been possible for us to comply with the 28-day rule.

The Scottish Government acknowledges the difficulties that breaching the 28-day rule poses in terms of Parliamentary scrutiny, and regret that on this occasion it has not been possible to comply with this requirement.

Yours faithfully Professor Gerry Saddler

FRSB Chief Plant Health Officer for Scotland and Head of SASA

Annex B

18 December 2019

Dear Presiding Officer

The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2020

The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2020 was laid in draft before the Scottish Parliament on 5 December 2019 under sections 4(4), 7(4), 10(1), 10A(1) and paragraph 6 of schedule 3 of the Rehabilitation of Offenders Act 1974 (“the 1974 Act”). The Order is subject to the affirmative procedure in accordance with section 10(2) of the 1974 Act.

In terms of Rule 10.8 of the Standing Orders of the Scottish Parliament, the Scottish Government wishes to withdraw the above named instrument in order to address issues with the instrument which have been highlighted by the legal advisers to the Delegated Powers and Law Reform Committee. The issues raised relate to drafting which could have been clearer but could not be addressed under the correction procedure. The Scottish Government wishes to withdraw the instrument and lay an amended version which will address the issues raised.

As the amendments required are minor in nature and can be made quickly, the Scottish Government is taking the opportunity to lay an amended instrument today. The Government hopes that the amended instrument will be able to be considered on the same timetable as that planned for the original instrument.

I would be grateful if you would make any necessary changes to the Business Bulletin and notify the relevant Committee as appropriate.

Please do not hesitate to contact me on 0131 244 0501 if there is any matter you wish to discuss.

Yours faithfully

Douglas Kerr

Solicitor, SGLD

on behalf of the Scottish Ministers

