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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 10 November 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.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 10 November 2020, the Committee considered the following instruments under the [SSI Protocol](#) agreed between the Scottish Government and the Scottish Parliament in respect of SSIs made using the powers under the European Union (Withdrawal) Act 2018:
 - Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/339)
 - Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/draft)
 - the Invasive Non-native Species (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/draft)
2. The Committee's recommendations in relation to these instruments is set out in the following section of this report.

Scrutiny of instruments under the Committee's remit

3. The Committee agreed to draw the following SSI to the attention of the lead committee:
 - Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (SSI 2020/344)
4. The Committee's recommendation in relation to this instrument is set out later in the report.
5. The Committee also 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 considered under the European Union (Withdrawal) Act 2018

Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/339)

Purpose

6. The Regulations make provision in relation to a number of areas of criminal justice law, to:
 - address failures of retained EU law to operate effectively and other deficiencies in retained EU law, particularly in relation to reciprocal measures which will cease to apply to the UK at the end of the implementation period; and
 - make transitional and saving provision in respect of matters begun but not completed before the end of the implementation period.

Committee consideration of the scrutiny procedure under which it has been laid and the categorisation applied by the Scottish Government.

7. The instrument has been laid under the negative procedure and has been categorised by the Scottish Government as of low significance under the SSI Protocol.

8. The Committee is content that the use of the negative procedure is appropriate in these circumstances.

9. The Committee recommends that the instrument should be categorised as medium in terms of its significance under the SSI Protocol.

Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/draft)

Purpose

10. The Regulations amend a number of pieces of primary and secondary Scottish legislation relating to EU law requirements on mediation, legal aid, recognition of civil status documents (such as birth certificates), ability to practice as a lawyer, and cross-border family law disputes.
11. A number of the changes implement provisions of the Withdrawal Agreement, which makes provision in respect of ongoing judicial cooperation in civil and commercial matters relating to certain EU measures. Some of the changes reflect the fact that reciprocity with EU Member States is no longer in place once the implementation period comes to an end.

Committee consideration on how the instrument has been categorised by the Scottish Government

12. The instrument has been categorised by the Scottish Government as of low significance under the SSI Protocol on the basis that the amendments made by the instrument are “predominantly concerned with technical detail including amendments to primary legislation to ensure the law operates after IP completion day. There is no significant policy choice involved.”
13. The Committee considers the low categorisation as insufficient, particularly in light of the revocation of the Multilingual Standard Forms (Fees) (Scotland) Regulations 2018. The 2018 Regulations make provision to allow National Records of Scotland to charge a fee of £10 for issuing multilingual standard forms to be attached to civil status documents for presentation in EU Member States. The Business and Regulatory Impact Assessment prepared for the instrument suggests the costs for translation are likely to be between £50 and £60, in comparison to the current £10 fee.

14. The Committee recommends the instrument should be categorised as medium in terms of its significance under the SSI protocol.

Invasive Non-native Species (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/draft)

Purpose

15. This instrument fixes deficiencies in the field of environmental protection and biosecurity, in what will become the retained EU law on the prevention and management of the introduction and spread of invasive non-native species animals, plants, fungi and micro-organisms. This is done under the “deficiency-fixing” power in the European Union (Withdrawal) Act 2018.
16. The instrument also introduces new provisions for the enforcement of the law on invasive alien species and for emergency measures in this regard. This is done under the general power to make regulations to implement EU law.

Committee consideration on how the instrument has been categorised by the Scottish Government

17. This instrument has been categorised by the Scottish Government as of medium significance under the SSI Protocol on the basis that it is predominantly concerned with technical fixes but allows the Scottish Government to make decisions on the listing of species and on the introduction of emergency measures.

18. The Committee recommends the instrument should be categorised as high as the instrument gives Scottish Ministers new powers to legislate.

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

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (SSI 2020/344)

Purpose

19. The purpose of this instrument is to implement a levels-based approach to the Coronavirus related restrictions and requirements across Scotland. These are numbered from level 0 to level 4. It also sets out which levels apply to different geographical areas across Scotland. The instrument revokes the instruments which previously implemented such restrictions and requirements.

Committee Consideration

20. The Committee wrote to the Scottish Government asking a number of questions on the instrument (see the Annex).

Regulation 5

21. It is intended that regulation 5(1) provides that it is an offence for a person to contravene any of the restrictions or requirements in schedules 1 to 5 and 7 other than the requirement to “take all other measures which are reasonably practicable to minimise the risk of the incident and spread of coronavirus on the premises” and the requirement to “have regard to guidance by the Scottish Ministers on minimizing exposure to coronavirus”. However, cross-referencing errors in regulations 5(1)(c) and 5(1)(d) mean that this intention is not achieved in respect of level 2 and level 3 areas.
22. The Committee considers that the effect of these cross-referencing errors in regulations 5(1)(c) and 5(1)(d), acknowledged by the Scottish Government, mean that it could be interpreted that it is not an offence under these regulations for those responsible for a place of worship, carrying on a business or providing a service in a level 2 or level 3 area to fail to take measures to ensure that a distance of 2 metres can be maintained by any persons on its premises or waiting to enter its premises. The Scottish Government confirmed that an amending instrument will be brought forward in early course.

Regulation 6

23. The Committee asked the Scottish Government about cross-referencing issues within regulation 6. It is intended that regulation 6(5) provides that a constable must reasonably suspect that there is a gathering inside a private dwelling which consists of more than 6 persons before exercising the power to enter a private dwelling. However, cross-references in relation to level 2 and level 3 areas refer the reader to the “restrictions on public gatherings outdoors” provision in the schedule. The Committee considers that this is an error as a constable does not require powers of entry in relation to public outdoor gatherings. It could therefore be interpreted that a

constable is not subject to the requirement that they must reasonably suspect that there is a gathering inside a private dwelling which consists of more than 6 persons before entering a private dwelling in level 2 and level 3 areas. However, given that the error is obvious and that the cross-references in relation to level 0, level 1 and level 4 areas achieve the policy intention, the Committee considers that this is less significant than the errors in regulations 6 and paragraph 8 of schedule 1. The Scottish Government has also confirmed that it will also address these errors in an amending instrument in early course.

Paragraph 8 of schedule 1

24. The Scottish Government confirmed that it is the policy intention that paragraph 8 of schedule 1 provides that gathering outdoors in a private dwelling is permitted in level 0 areas. This is subject to a limit of 15 persons from no more than five households, with children under 12 years of age not counting towards the number of people or households attending a gathering. However, there is no provision in paragraph 8 of schedule 1 for outdoor gatherings in a private dwelling other than for those under 18. Therefore, the Committee considers that paragraph 8(1) does not achieve the policy intention. Further, the intention is that the maximum size of gathering permitted in respect of those aged of 12-17 is 15 persons in level 0 areas. Paragraph 8(1)(b)(i) currently states the maximum size of gathering permitted in respect of this age group is 8 persons. Therefore, the Committee considers that the policy intention is also not achieved in this respect. The Scottish Government agrees that these are errors and has confirmed that an amending instrument will be brought forward in early course.

25. The Committee agreed to draw this instrument to the attention of the Parliament under reporting ground (i) - that the instrument's drafting appears to be defective – in relation to regulation 5(1) and paragraph 8(1) of schedule 1.

26. The Committee also agreed to draw this instrument to the attention of the Parliament under the general reporting ground as there are drafting errors in regulation 6(5).

27. While acknowledging that mistakes happen, given the significance of these regulations in setting the restrictions that apply in the various levels around the country, the Committee agreed to call on the Scottish Government to bring forward an amending instrument as a matter of urgency.

28. The Committee noted the Scottish Government's commitment to bring forward an amending instrument in early course.

No points raised

COVID-19 Committee

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment Regulations 2020 (SSI 2020/347)

Economy, Energy and Fair Work Committee

Companies Act 2006 (Scottish public sector companies to be audited by the Auditor General for Scotland) Order 2020 (SSI 2020/draft);

Scottish National Investment Bank p.l.c. (Miscellaneous Listings) Order 2020 (SSI 2020/draft);

Scottish National Investment Bank p.l.c. and South of Scotland Enterprise (Miscellaneous Listings) Regulations 2020 (SSI 2020/draft);

Environment, Climate Change and Land Reform Committee

Water and Sewerage Services Undertaking (Borrowing) (Scotland) Order 2020 (SSI 2020/341);

Health and Sport Committee

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 20) Regulations 2020 (SSI 2020/343);

Justice Committee

Civil and Family Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/draft);

Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/339);

Rural Economy and Connectivity Committee

Island Communities Impact Assessments (Publication and Review of Decisions) (Scotland) Regulations 2020 (SSI 2020/draft)

Islands (Scotland) Act 2018 (Commencement No. 3) Regulations 2020 (SSI 2020/346 (C.29))

Social Security Committee

Social Security (Personal Independence Payment) Amendment (Scotland) Regulations 2020 (SSI 2020/340);

Carer's Allowance (Coronavirus) (Breaks in Care) (Scotland) Amendment Regulations 2020 (SSI 2020/350)

Annex

On 3 November 2020: the Committee wrote to the Scottish Government, as follows:

1) Regulation 5 states that it is an offence for a person to contravene any of the restrictions or requirements in schedules 1 to 5 and 7 other than those specified in regulation 5(1)(a)-(e). The effect of regulation 5(1)(a), 5(1)(b) and 5(1)(e) is that contravention of the requirement to take “all other measures which are reasonably practicable to minimise the risk of the incident and spread of coronavirus on the premises” and the requirement to “have regard to guidance issued by the Scottish Ministers about measures which should be taken” does not constitute an offence.

2) Regulation 6 states that a relevant person may enter premises for the purpose of the performance of that person’s function under the Regulations. Regulation 6(2)(a) enables a relevant person to enter premises if that person reasonably suspects that an offence under regulation 5(1) is taking place on the premises. Regulation 6(5) states that for the purpose of regulation 6(2)(a), a constable must reasonably suspect that there is a gathering inside a private dwelling which consists of more than 6 persons. Regulation 6(5) refers to the contravention of specific provisions in schedules 1 to 5. Each of the provisions mentioned there for schedules 1, 2 and 5 are to corresponding “restrictions on private dwellings” in those schedules.

3) Paragraph 8 of schedule 1 refers to restrictions on gatherings in private dwellings in a Level 0 area. Paragraph 8(1) states that a person must not attend a gathering in a private dwelling unless the gathering complies with any of the descriptions in paragraph 8(1)(a) to (e). Paragraph 8(1)(a) allows a gathering which takes place indoors and consists of no more than eight persons from no more than three households. Paragraph 8(1)(b) allows a gathering to take place outdoors and, where at least one person in the gathering has attained 12 years of age but has not attained 18 years of age, consists of no more than eight persons who are all under 18 years of age, or all the persons in the gathering are under 12 years of age.

On 5 November, the Scottish Government responded, as follows:

1) (a) As regards regulation 5(1)(c), the reference to “schedule 3, paragraphs 7(b) and 8” should be a reference to “schedule 3 paragraphs 8(1)(b) and 9”. This is a cross-referencing error. An amending instrument will be brought forward in early course.

(b) As regards regulation 5(1)(d), the reference to “schedule 4, paragraphs 6(b) and 7” should be a reference to “schedule 4, paragraph 7(1)(b) and 8”. This is a cross-referencing error. An amending instrument will be brought forward in early course.

(c) As regards the references in regulation 5(1)(a), 5(1)(b), and 5(1)(e), these should be to paragraphs 3(1)(b), 4(1)(b) and 8(1)(b) respectively. This is a cross-referencing error. An amending instrument will be brought forward in early course.

2) (a) In regulation 6(5) the reference to “paragraph 12 of schedule 3” should be to “paragraph 13 of schedule 3”. This is a cross-referencing error. An amending instrument will be brought forward in early course.

(b) In regulation 6(5) the reference to “paragraph 11 of schedule 4” should be to “paragraph 12 of schedule 4”. This is a cross-referencing error. An amending instrument will be brought forward in early course.

3) (a) In relation to schedule 1, paragraph 8(1), for Level 0 areas the policy intention behind that provision was that (leaving aside the circumstances covered by paragraph 8(1)(b) to (e)) a gathering outdoors in a private dwelling should be permitted, subject to a limit of 15 persons from no more than five households, with children under 12 years of age not counting towards the number of people or households attending a gathering. Paragraph 8(1) does not achieve that intention. The Scottish Government thanks the Committee for drawing this to its attention. An amending instrument will be brought forward in early course.

(b) In relation to schedule 1, paragraph 8(1)(b)(i), the policy intention behind the provision was that the maximum size of gathering permitted by it should be 15 persons. These provisions are under review and an amending instrument will be brought forward in early course. Paragraph 8(1)(b)(i) contains no reference to number of households. That accurately reflects the policy intention for the instrument that the maximum size for a gathering of the kind mentioned in that provision should be determined by the number of individuals participating in the gathering rather than the number of households represented.

