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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 19 January 2021



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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 19 January 2021, the Committee considered the following instrument 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:
 - Animals, Food and Feed (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/455).
2. The Committee's recommendations in relation to this instrument are set out in the next section of the report.
3. In relation to its scrutiny of instruments under its remit, the Committee considered the following instruments and agreed to draw them to the attention of the lead committee:
 - Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Amendment Rules 2021 (SSI 2020/draft);
 - Crofting Community Right to Buy (Procedure, Ballots and Forms) (Scotland) Regulations 2020 (SSI 2020/451);
 - Animals, Food and Feed (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/455);
 - Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020 (SI 2020/1557); and
 - Lands Tribunal for Scotland (Miscellaneous Amendments) Rules 2020 (SSI 2020/433).
4. The Committee's recommendations in relation to these instruments are 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

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

Animals, Food and Feed (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/455)

6. The instrument amends retained EU law, to provide for the effective operation following the implementation period ending on 31 December 2020 of retained EU law relating to official controls in relation to food and feed law, and rules on animal health and welfare.
7. This instrument has been laid under the negative procedure and has been categorised by the Scottish Government as of low significance under the SSI Protocol in relation to the European Union (Withdrawal) Act 2018.

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

9. The Committee is also content that the instrument should be categorised as low in terms of its significance under the SSI Protocol.

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

Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Amendment Rules 2021 (SSI 2020/draft)

10. The purpose of the instrument is to make amendments to the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules following the introduction of an opportunity for certain persons to participate in Children's Hearings. Those persons are those who have a relationship akin to that of a sibling relationship to the child at the centre of the hearing (whether they share a parent or not), who do not fall within the definition for 'deemed' relevant person status.
11. This instrument is subject to the affirmative procedure.
12. The Committee wrote to the Scottish Government on 7 January 2021 with questions on a cross-referencing error identified in new rule 26(8) of the instrument.
13. In its response, the Scottish Government agreed that the cross-reference in rule 26(8) should be to paragraph (7) not paragraph (6). It therefore committed to correct this error prior to the instrument being made.
14. A copy of the correspondence can be found in the **Annex**.

15. **The Committee agrees to draw this instrument to the attention of the Parliament on the general reporting ground in relation to new rule 26(8) on account of a cross-referencing error.**
16. **The Committee welcomes the Scottish Government's commitment to undertake to correct this error by correction slip prior to the instrument being made.**

Crofting Community Right to Buy (Procedure, Ballots and Forms) (Scotland) Regulations 2020 (SSI 2020/451)

17. The instrument sets out the procedure to be followed by crofting communities which wish to exercise their right to buy the land they occupy under Part 3 of the Land Reform (Scotland) Act 2003.
18. This instrument is subject to the negative procedure.
19. The Committee wrote to the Scottish Government on 11 January 2021 with questions regarding the date adopted as the cut-off date in the saving and transitional provisions in regulations 19 and 20.
20. In its response, the Scottish Government agreed that the dates should refer to 24 February 2021, rather than 1 December 2020 as currently provided. It confirmed it will amend the instrument before it comes into force.

21. A copy of the correspondence can be found in the **Annex**.

22. **The Committee agrees to draw this instrument to the attention of the Parliament on the general reporting ground on the basis that there is an error in the date referred to in the savings and transitional provision.**

23. **The Committee welcomes the Scottish Government's commitment to prepare an amending instrument to rectify this error before the instruments comes into force.**

Animals, Food and Feed (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/455)

24. The instrument is summarised in the previous section of this report under 'Instruments considered under the European Union (Withdrawal) Act 2018'.

25. This instrument is subject to the negative procedure.

26. Firstly, the Committee noted that there had been a failure to lay the instrument in accordance with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. This section requires that negative instruments are laid at least 28 days before they come into force, not counting recess periods of more than 4 days. This instrument was laid on 21 December 2020 and came into force on 29 and 31 December.

27. On 21 December 2020, the Scottish Government wrote to the Presiding Officer explaining why the 28-day rule had not been complied with.

28. Secondly, the Committee noted that the words "in the table in schedule 6 (specified import provisions) in column 2" had been included in error in regulation 5(2)(c) of the instrument. The error was raised with the Scottish Government in correspondence. In its letter of 12 January 2021, the Scottish Government undertook to correct this error in an upcoming Scottish statutory instrument.

29. Finally, the Committee welcomed the fact that regulation 4 of the instrument amends the Official Feed and Food Controls (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/398), in fulfilment of an earlier commitment by the Scottish Government to address errors identified by the Committee in a previous instrument.

30. A copy of all correspondence can be found in the **Annex**.

31. **The Committee agrees to draw the instrument to the attention of the Parliament under reporting ground (j) on the basis that it has breached the 28-day rule. The Committee nevertheless notes it is satisfied with the explanation that has been given for the failure to comply with the rule.**

32. **The Committee also agrees to draw the instrument to the attention of the Parliament under the general reporting ground, on the basis that the Scottish Government has confirmed that some text has been included in error in regulation 5(2)(c) of the instrument.**
33. **The Committee welcomes the Scottish Government's commitment to undertake to amend the instrument in an upcoming SSI.**
34. **The Committee also notes that regulation 4 amends the Official Feed and Food Controls (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/398). This fulfils an earlier commitment by the Scottish Government to address errors identified by the Committee in a previous instrument.**

Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020 (SI 2020/1557)

35. The instrument is made under powers in Part 3 of the Climate Change Act 2008 that are capable of being exercised by Scottish Ministers and Ministers from the other three administrations (UK, Welsh and Northern Irish governments).
36. This joint instrument between the four administrations amends SI 2020/1265, which establishes the structure of the UK Emissions Trading Scheme with the design closely replicating the EU Emissions Trading Scheme. This instrument provides for two operational matters: establishing the UK Emissions Trading Scheme Registry and the free allocation of allowances.
37. This instrument is subject to the negative procedure.
38. The Committee noted that there had been a failure to lay the instrument in accordance with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The instrument was laid on 17 December and came into force on 31 December 2020, thus breaching the 28-day rule.
39. On 17 December 2020, the Scottish Government wrote to the Presiding Officer explaining why the 28-day rule had been breached, indicating that the UK Government's decision to proceed with the UK Emissions Trading Scheme was not announced until 14 December 2020.
40. A copy of the correspondence can be found in the **Annex**.

41. **The Committee agrees to draw the instrument to the attention of the Parliament under reporting ground (j) on the basis that it has breached the 28-day rule.**
42. **The Committee notes that this instrument, which forms part of the UK Emissions Trading Scheme, was laid without time for adequate scrutiny before coming into force on 31 December 2020.**

Lands Tribunal for Scotland (Miscellaneous Amendments) Rules 2020 (SSI 2020/433)

43. This laid-only instrument amends the Lands Tribunal for Scotland Rules 1971 and the Lands Tribunal for Scotland Rules 2003. It adds a new fee in respect of an application to the Lands Tribunal for Scotland made under the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021. It also makes provision for proceedings to be held in private where an application to the Lands Tribunal for Scotland has been made under regulation 18 of the 2021 Regulations.
44. The Committee wrote to the Scottish Government on 8 January 2021 with questions around the numbering reference in the Schedule of the instrument.
45. In its response, the Scottish Government confirmed that an amending instrument would be prepared to correct the reference to the numbering (and taking into account any further amendments to the 1971 Rules) as at the time of the provision coming into force in April 2022.
46. A copy of the correspondence can be found in the **Annex**.

47. **The Committee agrees to draw the instrument to the attention of the Parliament under the general reporting ground, on the basis that the reference to item “41” in the Schedule of the instrument, which is to be inserted into Schedule 2 of the Lands Tribunal for Scotland Rules 1971 by rule 2 of the instrument, is incorrect as there is already an item numbered “41” in Schedule 2 of the 1971 Rules.**
48. **The Committee welcomes the Scottish Government's commitment to prepare an amending instrument to rectify this error and take account of any further numbering changes for the time of coming into force on 1 April 2022.**

No points raised

Education and Skills Committee

Repayment of Student Loans (Scotland) Amendment Regulations 2021 (SSI 2021/8)

Environment, Climate Change and Land Reform Committee

Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021 (SSI 2020/draft) - withdrawn and relaid

Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021 (SSI 2020/draft)

Single Use Carrier Bags Charge (Scotland) Amendment Regulations 2021 (SSI 2021/draft)

Animal Health and Welfare (Scotland) Act 2006 (Commencement No. 3 and Saving Provisions) Order 2020 (SSI 2020/464 (C.44))

Equalities and Human Rights Committee

Civil Partnership (Scotland) Act 2020 (Commencement No. 2) Regulations 2020 (SSI 2020/457 (C.43))

Health and Sport Committee

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/6)

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 3) Regulations 2021 (SSI 2021/7)

Justice Committee

Police Appeals Tribunals (Scotland) Amendment Rules 2020 (SSI 2020/454)

Parole Board (Scotland) Amendment Rules 2021 (SSI 2021/4)

Act of Adjournal (Challenges to Validity of EU Instruments (EU Exit)) (Amendment) 2020 (SSI 2020/470)

Act of Sederunt (Challenges to Validity of EU Instruments (EU Exit)) (Amendment) 2020 (SSI 2020/472)

Annex

Children’s Hearings (Scotland) Act 2011 (Rules of Procedure in Children’s Hearings) Amendment Rules 2021 (2020/draft)

On 7 January 2021, The Scottish Government was asked:

New rule 26(8) of the Children’s Hearings (Scotland) Act 2011 (Rules of Procedure in Children’s Hearings) Amendment Rules 2021 as inserted by rule 2(8) of this instrument, provides that “paragraph (6) does not require the Reporter to give the chief social work officer of an authority a copy of a report or other document prepared, or given to the Reporter, by the authority”. Paragraph (6) provides that “but paragraph 5(b) does not require the Reporter to give an individual the statement of grounds prepared by the Reporter under section 89 of the Act (Principal Reporter’s duty to prepare statement of grounds)”. Should the reference in rule 26(8) be to paragraph (7)? If so, is any corrective action proposed?

On 12 January 2021, the Scottish Government responded as follows:

We agree that the cross-reference in rule 26(8) should be to paragraph (7) not paragraph (6). Thank you for drawing this to our attention.

Subject to the approval of the instrument by the lead committee, we propose to amend this by correction slip prior to the instrument being made.

Crofting Community Right to Buy (Procedure, Ballots and Forms) (Scotland) Regulations 2020 (SSI 2020/451)

On 11 January 2021, the Scottish Government was asked:

The saving and transitional provisions in regulations 19 and 20 both adopt 1st December 2020 as a cut-off date. Should that date, in fact, be 24th February 2021, to coincide with the coming into force of the regulations? If so, is any corrective action proposed?

On 13 January 2021, the Scottish Government responded as follows:

1. The Scottish Government is grateful to the Committee for identifying this point. The cut-off date is intended to coincide with the coming into force date of the instrument and should be the 24th February.
2. The Scottish Government can confirm that no applications have been lodged nor are any anticipated which might be subject to the savings and transitional provisions. Nonetheless, for the avoidance of doubt and to ensure consistency, the Scottish Government will prepare an amending instrument, to be laid on 19 January 2021, to alter the date so that it coincides with the coming into force of the regulations on 24 February 2020.

Animals, Food and Feed (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/455)

On 8 December 2020, the Scottish Government was asked:

The Delegated Powers and Law Reform Committee intends to consider The Animals,

Food and Feed (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/455) at its meeting on Tuesday 19 January 2021. The Committee has delegated authority to its legal advisers to ask questions directly of the Scottish Government Legal Directorate.

Regulation 5(2)(c) of the instrument omits subparagraphs (b), (c), (d) and (h) “in paragraph (7) *in the table in schedule 6 (specified import provisions) in column 2*” (emphasis added) of the Food and Feed (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/372). There is no schedule 6 in SSI 2020/372. Rather this would appear to be a reference to schedule 6 of the Official Feed and Food Controls (Scotland) Regulations 2009 (SSI 2009/446), which SSI 2020/372 amends.

Have the words “in the table in schedule 6 (specified import provisions) in column 2” been included in error in regulation 5(2)(c) of the instrument?

Is any corrective action proposed, and if so, what action and when?

On 12 December 2020, the Scottish Government responded as follows:

Thank you for bringing this to our attention. This text has been included in error. We do not consider it to affect the meaning of the provision or lead to the wrong provisions being omitted but to make the provision clear we will omit this text shortly in an upcoming SSI.

On 21 December 2020, the Scottish Government wrote to the Presiding Officer as follows:

The Animals, Food and Feed (EU Exit) (Scotland) (Amendment) Regulations 2020 were made by the Scottish Ministers under section 2(2) and paragraph 1A of schedule 2 of the European Communities Act 1972 and paragraphs 1(1) and (3) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018 (“the 2018 Act”) today, 21 December 2020. They are being laid before the Scottish Parliament today, 21 December 2020. Parts 1 and 2 come into force on 29 December and Part 3 immediately before “IP completion day” (within the meaning of the 2018 Act). Part 4 comes into force on IP completion day.

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, this has not been complied with and to meet the requirements of section 31(3) that Act, this letter explains why.

The Regulations require to come into force before the Regulations they are amending come into effect on 30 December 2020 and on 31 December 2020/IP completion day. This is to ensure that deficiencies in the official controls legislation arising as a result of the UK’s exit from the EU are addressed and the legislation continues to be operable after IP completion day. A commitment has also been made to the Delegated Powers and Law Reform Committee (DPLRC) that amendments will be made to the Official Feed and Food Controls (Scotland) (Amendment) Regulations 2020 to remove offences before they come into effect.

In order to bring the instrument into force in time for the dates described above, Food Standards Scotland (FSS) and the Scottish Government have, on this occasion, been unable to lay this negative instrument before the Scottish Parliament at least 28 days before it comes into force.

FSS and the Scottish Government are cognisant of the difficulties that breaching the 28

day rule poses in terms of Parliamentary scrutiny, and regret that on this occasion it has been impossible to comply with this requirement. The Scottish Government has been reliant on timely completion of UK Government's legislative programme and delays have impacted upon the Scottish Government's own programme where there are legislative interdependencies. Also, a high volume of legislation has been prepared in a short time for IP completion day and a small number of inaccuracies or deficiencies in retained EU law to be dealt with before IP completion day became apparent whilst processing the last technical fixes for the associated legislation.

Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020 (SI 2020/1557)

On 8 January 2021, the Scottish Government was asked:

1. Paragraph 6 of new Schedule 5A of the Greenhouse Gas Emissions Trading Scheme Order 2020 (SI 2020/1265), inserted by Article 37 of the instrument, provides that the "registry administrator must operate the registry and for that purpose may, in particular – (a) establish administrative arrangements and rules for the operation of the registry". See also the reference to these rules at paragraph 16(9) of new Schedule 5A.

Please explain whether, and if so how, it is considered that this delegation of the power to make rules is authorised by the enabling powers for this instrument (for example, with reference to the provision in Schedule 2 of the Climate Change Act 2008).

2. Is any corrective action proposed, and if so, what action and when?

On 12 January 2021, the Scottish Government responded as follows:

Paragraphs 21(2) and 23(1) of schedule 2 of the Climate Change Act 2008 ("the 2008 Act") confer power for provision to be made to "confer or impose functions on the administrator for the purposes of the scheme" and "for the creation and maintenance of a register or registers of information relating to a scheme". Section 90(3) provides that an order under that Act may include supplementary, incidental and consequential provision.

These powers are broad and, when read together, enable provision to give registry administrators appropriate discretion to develop administrative arrangements and rules in relation to the operation of the registry. This discretion is necessary given the wide range of possibilities which may be faced when operating the registry and the impossibility of catering for all of those possibilities in an instrument prepared in advance. Therefore it is considered that the provision made is within the powers conferred by section 90(3) and schedule 2 of the 2008 Act and does not amount to unauthorised delegation.

The reference to "rules" in paragraphs 6(1)(a) and 16(9) of schedule 5A of the Greenhouse Gas Emissions Trading Scheme Order 2020 (as amended by S.I. 2020/1557) relate to rules of an administrative, rather than legislative, nature and are exercisable only within the general framework for the registry provided by schedule 5A.

No corrective action is proposed.

On 17 December 2020, the Scottish Government wrote to the Presiding Officer as follows:

The above Order in Council, which is subject to negative procedure, was made by the

Privy Council at its meeting on 16 December 2020. This instrument is in connection with a UK Emissions Trading System (UK ETS). It is made under sections 44, 46(3), 54 and 90(3), schedule 2 and paragraph 9 of schedule 3 of the Climate Change Act 2008. It was laid before the Scottish Parliament on the day after it was made by the Privy Council, and comes into force on 31 December 2020.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative instrument must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. On this occasion, regrettably, this has not been complied with and to meet the requirements of section 31(3) that Act, this letter explains why.

This Order amends the Greenhouse Gas Emissions Trading Scheme Order 2020, which establishes a UK ETS and was approved by the Scottish Parliament on 18 September 2020. The additional provisions remain part of the overall policy approach agreed by all four administrations in June 2020, but which could not be provide for in the first SI. The Order makes provision for Free Allocation of allowances and the UK ETS Registry (the “bank” for allowances and transactions).

The Order was originally intended to go to Privy Council to be made in November, but difficulties in the technical drafting – and the ongoing indecision by the UK Government about proceeding with a UK ETS or an alternative Carbon Emission Tax – meant this would lead to unacceptable risk of inaccuracies. Therefore the Order was delayed until the Privy Council on 16 December 2020 to allow the UK Government to reach its decision on an alternative Carbon Emission Tax and whether or not to lay the UK ETS Order. The UK Government announced its decision to proceed with the UK ETS on 14 December.

The Order has to come into force before the end of the EU transition period at 11pm on 31 December 2020 in order to make amendments to EU Regulations that were made subsequent to the EU Withdrawal Act 2018 (i.e. have not yet been retained in domestic law). If this Order does not come into force before the end of the transition period, these EU Regulations will automatically be revoked and it will not be possible to use them with amendments for domestic purposes. Equivalent domestic provisions would need to be drafted from scratch. It would be technically difficult to make equivalent domestic provision and would mean these further elements provided in this second SI for the UK ETS Registry and Free Allocation would not in place from outset of the scheme (which begins on 1 January 2021 following the end of the transition period).

In order to provide the Scottish Parliament with as much time as possible to scrutinise the Order, we have agreed with the other three administrations that a draft of this Order can be shared informally with our respective legislatures before it is made at the Privy Council. The draft SI will be shared simultaneously, and in confidence due to market sensitivities, until it is made public at the Privy Council. Officials will engage with the lead policy Committee ECCLR regarding this.

I am sure that you will appreciate that the Scottish Government is working in exceptional circumstances at present due to the UK Government’s decision on proceeding with the UK ETS being left until this very late hour. I ask for your forbearance and understanding of the position in which this has left us in attempting to implement these arrangements on a UK wide basis as already agreed by the Scottish Parliament when it approved the first Order in September.

Lands Tribunal for Scotland (Miscellaneous Amendments) Rules 2020 (SSI 2020/433)

On 8 January 2021, the Scottish Government was asked:

1. Rule 2 of the instrument inserts the item and corresponding fee set out in the table in the schedule of this instrument into Schedule 2 of the Lands Tribunal for Scotland Rules 1971. The item to be inserted by this instrument is numbered “41”. The existing Schedule 2 of the 1971 Rules already contains an item numbered “41” and is followed by a further item numbered “42”. The instrument is not due to come into force until 1 April 2022. The Lands Tribunal for Scotland (Amendment) (Fees) (No. 2) Rules 2020 (SSI 2020/446) also inserts an item and corresponding fee into Schedule 2 of the 1971 Rules. This instrument was laid on 21 December 2020 and is to come into force before SSI 2020/443 on 24 February 2021. The item to be inserted by 2020/446 is numbered “43” which would follow on from the numbering of Schedule 2 of the 1971 Rules as existing. Is the proposed numbering of the item to be inserted by this instrument (2020/433) correct?
2. Is any corrective action proposed, and if so, what action and when?

On 12 January 2021, the Scottish Government responded as follows:

1. The Scottish Government is grateful to the Committee for identifying this point. We accept that this should be corrected.
2. The Scottish Government will prepare an amending instrument to alter the reference to the numbering so that it is correct (and up to date with any further amendments to the 1971 rules) as at the time of coming into force in April 2022.

