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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 7 December 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 7 December, 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:
 - Animal Products (Transitional Import Conditions) (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/432).
2. The Committee's recommendations in relation to this instrument, under the SSI Protocol, are set out in the next section of the report.
3. The Committee also considered the following instrument under its technical remit and agreed to draw it to the attention of the relevant lead committee:
 - Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment (No. 2) Regulations 2021 (SSI 2021/438)
4. The Committee's recommendations in relation to this instrument are set out later in the report.
5. The Committee also determined that in terms of its technical remit it did not need to draw the Parliament's attention to the instruments at the end of the report. Although, some broader points, highlighted by the Committee, are noted below the relevant instruments.

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

Animal Products (Transitional Import Conditions) (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/432)

6. The instrument makes changes to “grace periods” which have been put in place for imports from the European Economic Area in the period following the UK’s exit from the EU. It does two things:-
 - it postpones the import condition that meat preparations must be deep frozen at the production plant or plants of origin, so that this condition will not apply until 1 July 2022; and
 - it removes the requirement for products of animal origin and animal by-products to be accompanied health certificates.
7. This section of the report only deals with the second bullet point above because it is the only aspect of the instrument that is made under powers in the European Union (Withdrawal) Act 2018. The instrument has been laid under the negative procedure and is considered by the Scottish Government to be of low significance.
8. However, Members noted that the instrument removes the requirement for products of animal origin and animal by-products to be accompanied by health certificates due to be implemented from 1 January 2022. This differs from previous instruments that have postponed the implementation of border control measures.

9. **The Committee is content that the use of the negative procedure is appropriate for the European Union Withdrawal Act 2018 element of the instrument.**
10. **The Committee considers that the approach taken appears to constitute a policy choice. Accordingly, it recommends that the categorisation should be of medium, rather than low, significance.**
11. **The Committee also agrees to write to the lead committee to highlight its recommendation that the categorisation should be changed from low to medium.**

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

Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment (No. 2) Regulations 2021 (SSI 2021/438)

12. The instrument amends the Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Regulations 2003 in light of changes made to the Code of Conduct for Councillors and the Model Code of Conduct for Members of Devolved Public Bodies.
13. At its meeting on 23 November 2021, the Committee considered the Ethical Standards in Public Life etc (Scotland) Act 2000 (Register of Interests) Amendment Regulations 2021 (SSI 2021/397), which was laid before Parliament on 8 November 2021. The Committee resolved to report the instrument under reporting ground (i) due to a failure in the instrument to make provision for all registrable interests as set out in the revised Model Code contrary to the policy intention. It would have come into force on 8 December.
14. The current instrument (SSI 2021/438) was laid on 25 November 2021 and came into force on 7 December 2021 to rectify the errors in SSI 2021/397 and make further provision. As a result, it is in breach of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, which requires that instruments subject to the negative procedure are laid at least 28 days before they come into force, not counting recess periods of more than 4 days.
15. The Scottish Government has written to the Presiding Officer to explain why the 28-day rule has not been complied with (the letter can be read in the Annex).
16. **The Committee draws the instrument to the attention of the Parliament under reporting ground (j) on the basis that there was a failure to lay the instrument in accordance with laying requirements under the Interpretation and Legislative Reform (Scotland) Act 2010.**
17. **The Committee is nevertheless content with the explanation provided by the Scottish Government for the breach of the laying requirements.**
18. **The Committee also welcomes that the Scottish Government laid the instrument timeously to rectify an error previously identified by the Committee at its meeting on 23 November 2021.**

No points raised

COVID-19 Recovery Committee

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 7) Regulations 2021 (SSI 2021/425)

- The Committee agreed to highlight to the lead committee the Scottish Government's response to the Committee's questions regarding eligible vaccinated arrivals status to consider from a policy perspective (see Annex), in particular:
 - the policy intention as implemented by the instrument regarding proof of vaccination status under new regulation 3B of SSI 2021/322 inserted by regulation 4 of the instrument;
 - that clinical exemption under new regulation 3F of SSI 2021/322 should apply in practice only to UK residents and that guidance issued by the Department for Transport on behalf of the four nations is relevant in determining acceptable proof of clinical exemption; and
 - that this instrument addresses an issue in regulation 4(d) of SSI 2021/359 which was drawn to the attention of the Parliament by the Committee at its meeting on 9 November 2021.

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 8) Regulations 2021 (SSI 2021/440)

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 9) Regulations 2021 (SSI 2021/441)

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 10) Regulations 2021 (SSI 2021/443)

Local Government, Housing and Planning Committee

Town and Country Planning (Short-term Let Control Areas) (Scotland) Amendment Regulations 2022 (SSI 2021/Draft)

Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022 (re-laid) (SSI 2021/Draft)

- The Committee welcomed that this re-laid draft Order addresses issues reported by the Session 5 Committee at its meeting on 12 January 2021 in respect of the draft Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2021.

Net Zero, Energy and Transport Committee

Scottish Road Works Commissioner (Imposition of Penalties) Amendment Regulations 2021 (SSI 2021/431)

Transport (Scotland) Act 2019 (Commencement No. 4) Regulations 2021 (SSI 2021/428 (C.30))

Delegated Powers and Law Reform Committee

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Rural Affairs, Islands and Natural Environment Committee

Animal Products (Transitional Import Conditions) (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/432)

Social Justice and Social Security Committee

Social Security Administration and Tribunal Membership (Scotland) Act 2020 (Commencement No. 5 and Transitional Provisions) Regulations 2021 (SSI 2021/442 (C.31))

Annex

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 7) Regulations 2021 (SSI 2021/425)

On 25 November 2021, the Committee asked the Scottish Government:

The consolidated International Travel Regulations, commenced on 20 September in SSI 2021/322, were amended by SSI 2021/350 to introduce a coronavirus testing and quarantine system based on an individual's vaccination status rather than which country they have travelled from, for everyone other than arrivals from a 'red list' country. This instrument further amends the principal International Travel Regulations in SSI 2021/322 and inserts a new Part 1A (Eligible vaccinated arrivals) which substitutes regulation 3 with interpretation provisions for Part 1A and inserts new regulations 3A – 3H. Regulation 3A defines an eligible vaccinated arrival as a person who is not a red list arrival and who meets any of the descriptions in regulations 3B to 3H. Regulation 3B provides vaccination conditions which a person must meet to be an eligible vaccination arrival and regulations 3C to 3H provide eligibility conditions for participants in clinical vaccination trials, those who are exempt from vaccination on medical grounds or by virtue of their age, or who have received vaccination as part of a UK vaccine rollout overseas.

A person meets the vaccination conditions in regulation 3B if they have completed a course of vaccination using doses of an authorised vaccine or a WHO List vaccine more than fourteen days before their arrival in Scotland, and they can provide proof of their vaccination status and they have confirmed that they meet defined COVID-19 vaccination eligibility criteria on a Passenger Locator Form. An authorised vaccine is defined as a medicinal product for vaccination against coronavirus authorised in the UK or in other countries in ways specified in regulation 3(1)(a), (b) or (c). Regulation 3(1)(c) provides that an authorised vaccine may include doses received in any country or territory including, but not limited to, a relevant country listed in schedule 1A of the principal Regulations if it is authorised for use in the United Kingdom in terms of regulation 3(1)(a). This would appear to have the effect that a person may receive an authorised vaccine in any country in the world and therefore potentially be an eligible vaccinated arrival.

However, regulation 3B(1)(b) provides that the necessary proof of vaccination is restricted to certification issued only in the UK, the EU, EFTA and EU microstates, the USA and North America, or by relevant countries listed in table 2 of regulation 3(2) or schedule 1A or by a country listed in a new category of 'approved third countries' in regulation 3(5). This would appear to have the effect that a fully vaccinated person who completed their course of vaccination in a country which is neither a relevant country nor an approved third country, for example Mexico, and declares that they have done so on a Passenger Locator Form will, nevertheless be unable to provide proof of their vaccination status which is acceptable in terms of regulation 3B. They could therefore not be treated as an eligible vaccinated arrival. However, in terms of regulation 3F if a person is unable to be vaccinated on medical grounds and has proof of their clinical status and declares that on a Passenger Locator Form, or is under eighteen years of age, they shall be treated as an eligible vaccinated arrival irrespective of their country of origin, even if that is Mexico.

1. Is this considered to be the legal effect of the new provisions in Part 1A?
2. If so, is the policy intention to exclude people who have completed a course of

authorised vaccination in a country which is not listed as a relevant country or an approved third country such as, for example, Mexico, from the definition of eligible vaccinated arrival? Is it also the policy intention to deem people exempt from vaccination on medical grounds and children and young people travelling from countries such as Mexico, to be eligible vaccinated arrivals in terms of new regulations 3F and 3G?

3. If not, please confirm whether any corrective action is proposed, and if so, what action and when.

On 30 November 2021 the Scottish Government responded:

It is correct that the effect of regulation 3(1) of the principal International Travel Regulations is that a person may receive an authorised vaccine or a WHO List vaccine in any country in the world and therefore potentially be an eligible vaccinated arrival. The effect of regulation 3(1), read with regulation 3B, is that any such person who has received a recognised vaccine will only be able to benefit from eligible vaccinated arrival status if they are able to provide proof of that, eg. through a vaccine certificate from a relevant country or certification from NHS Scotland, the NHS Covid Pass, EU DCC Card, or CDC Card where appropriate (per regulation 3B(1)(b)).

To take the example of a person who has completed a course of authorised vaccination in a country which is not listed as a relevant country or an approved third country such as Mexico, the changes remove the requirement for such a person to have actually *received* the vaccine in a relevant country or the UK, but the requirements in terms of how that can be *evidenced* are maintained.

There is a regular process of engagement with international partners led by the Foreign, Commonwealth and Development Office and the Department for Transport to assess other countries' vaccine certificates against the data and security requirements agreed among the four nations, and to add those that meet the standard as relevant countries in the regulations. The certificate issued by the Government of Mexico does not meet UK data requirements, and so is not a valid proof of vaccination. A resident of Mexico who has been vaccinated with an authorised vaccine and can access certification as per regulation 3B(1)(b) can now present it in order to travel to the UK as an eligible vaccinated arrival.

In relation to regulation 3F, the policy intention is that the clinical exemption should apply in practice to UK residents (as indicated by the title of that regulation, "Eligible vaccinated arrivals: UK clinical exemptions conditions"). In practice, guidance issued by the Department for Transport on behalf of the four nations is relevant to what evidence will be accepted as proof that a person cannot be vaccinated for clinical reasons. For residents of Scotland, proof in the form of a secure paper certificate from NHS Scotland or an exempt status in the NHS Scotland COVID Status app will be accepted. Residents of other parts of the UK may be able to access paper or digital certification demonstrating medical exemption from vaccination in line with clinical guidance there. There is no established international protocol for verifying medical exemption certification from other countries, and at this time the policy is limited to official certification from the NHS issued to UK residents in order to mitigate the risk of fraud.

In relation to regulation 3G, the policy intention is that any arrival into Scotland under the age of 18 will fall into the category of an eligible vaccinated arrival. The traveller's passport provides proof of age and no further documentation or certification needs to be verified to demonstrate this

Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment (No. 2) Regulations 2021 (SSI 2021/438)

On 25 November 2021, the Scottish Government wrote to the Presiding Officer:

The Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment (No. 2) Regulations 2021 (“the Second Amendment Regulations”) were made by the Scottish Ministers under section 7(2) of the Ethical Standards etc. in Public Life (Scotland) Act 2000 on 25th November 2021 and were laid before Parliament on the same day. The Second Amendment Regulations will come into force on 7th December in breach of the 28 day rule in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. This letter sets out why it is necessary to lay the above instrument less than 28 days before it is brought into force.

Under sections 1 and 2 of the 2000 Act the Scottish Ministers are required to produce a Councillors’ Code of Conduct (“the Councillors’ Code”) along with a Model Code of Conduct for members of devolved public bodies (“the Model Code”). The Codes must be approved by Parliament before being issued and new Codes were approved by Parliament on 27 October 2021. Devolved public bodies must prepare a code of conduct for their members (“the Members’ Code”) which must be based on the Model Code and must revise their Members’ Code on being directed by the Scottish Ministers – the Scottish Ministers can provide a period of time within which devolved public bodies must revise their Members’ Code. As a result there will be a period of time where Members’ Codes issued under the previous Model Code will remain in effect until they are revised under the new Model Code.

Section 7 of the 2000 Act requires every local authority and public body to set up a register of the interests that their councillors or members are obliged to register under the relevant Code. The duty to set up the register is to be carried out in accordance with Regulations made by the Scottish Ministers. The current Regulations made under this power are the Ethical Standards in Public Life etc (Scotland) Act 2000 (Register of Interests) Regulations 2003 (SSI 2003/135) (“the 2003 Regulations”) and they set out the notices which must be given by councillors or members on any interests they may have. As the 2003 Regulations cross-refer to the Codes it is necessary to amend those Regulations so that they reflect the Codes as amended.

The Ethical Standards in Public Life etc (Scotland) Act 2000 (Register of Interests) Amendment Regulations 2021 (SSI 2021/397) (“the First Amendment Regulations”) were laid before Parliament on 8th November 2021 and, if not otherwise revoked, would come into force on 8th December 2021. The First Amendment Regulations amend the 2003 Regulations in consequence of the new Codes. The Delegated Powers and Law Reform Committee noted that the First Amendment Regulations omitted an entry in one of the tables being inserted into the 2003 Regulations and that they did not provide for the continuing operation of existing members’ codes after 8th December 2021.

The Scottish Ministers noted that these issues would require to be addressed via further Amendment Regulations. Accordingly, the Second Amendment Regulations revoke the First Amendment Regulations and make more detailed changes to the 2003 Regulations in order to:

- update the references to the Codes in the 2003 Regulations so they reflect the new Codes;

- provide for the continuing operation of existing members' codes which were issued under the old model code; and
- make consequential changes in light of those amendments.

The Second Amendment Regulations require to be in force on 7th December 2021 in order to revoke the First Amendment Regulations before they came into force. This will prevent a gap in the law which would otherwise be created by the First Amendment Regulations. The First Amendment Regulations would remove all provision in the 2003 Regulations for existing Members' Codes from 8th December 2021 (the date on which the new Model Code will be issued). If the Second Amendment Regulations came into force 28 days after they were laid, there would be a period where there would be no provision in the 2003 Regulations for Members' Codes made under the old Model Code which remain in operation.

Accordingly, the Scottish Ministers consider it necessary to breach the 28-day rule and bring the Second Amendment Regulations into force on 7th December 2021.

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

