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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 9 March 2021



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Contents

Introduction	1
Instruments considered under the European Union (Withdrawal) Act 2018	2
Scrutiny of instruments under the Committee’s remit: instruments drawn to the attention of the lead committee	4
No points raised	7
Annex	8

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 9 March 2021, 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:
 - Food, Natural Mineral Water, Spring Water and Bottled Drinking Water (EU Exit) (Scotland) (Amendment) Amendment Regulations 2021 (SSI 2021/109);
 - Plant Health (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/draft); and
 - Plant Health and Plant Propagating Material (Miscellaneous Amendments) (Scotland) Regulations (SSI 2021/87).
2. The Committee's recommendations in relation to these instruments are set out in the next sections of the report.
3. In relation to scrutiny of instruments under its remit, the Committee also considered the following instruments and agreed to draw them to the attention of the lead committee:
 - Milk and Healthy Snack Scheme (Scotland) Regulations 2021 (SSI 2021/82);
 - Town and Country Planning (Emergency Period and Extended Period) (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/100);
 - Food, Natural Mineral Water, Spring Water and Bottled Drinking Water (EU Exit) (Scotland) (Amendment) Amendment Regulations 2021 (SSI 2021/109); and
 - Zoonoses Amendment (Coronavirus) (Scotland) Order 2021 (SSI 2021/83).
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 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

Food, Natural Mineral Water, Spring Water and Bottled Drinking Water (EU Exit) (Scotland) (Amendment) Amendment Regulations 2021 (SSI 2021/109)

6. This instrument makes amendments to the commencement date of regulations 3 and 4 of the Food, Natural Mineral Water, Spring Water and Bottled Drinking Water (EU Exit) (Scotland) (Amendment) Regulations 2021 which relate to domestic food labelling provisions.
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 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 is of low significance under the SSI Protocol.**

Committee consideration of the categorisation applied by the Scottish Government

Plant Health (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/draft)

10. The purpose of this instrument is to make provision for an extension to the existing plant health import inspection charging regime to cover import of goods from the EU.
11. This instrument has been categorised by the Scottish Government as of medium significance under the SSI Protocol in relation to the European Union (Withdrawal) Act 2018.

12. **The Committee is content that the instrument is of medium significance under the SSI Protocol.**

Plant Health and Plant Propagating Material (Miscellaneous Amendments) (Scotland) Regulations (SSI 2021/87)

13. The purpose of this instrument is twofold:
 - it makes minor amendments in consequence of changes to the Northern Ireland Protocol that have been agreed between the UK Government and the EU; and

- it makes provision relating to the enforcement of certain derogations from the normal official controls (border checks) in the field of plant health, for a transitional period.
14. The provisions of the instrument that are made under the European Union (Withdrawal) Act 2018 have been categorised by the Scottish Government as of low significance under the SSI Protocol.

15. **The Committee is content that the provisions of the instrument that are made under the European Union (Withdrawal) Act 2018 are of low significance under the SSI Protocol.**

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

Milk and Healthy Snack Scheme (Scotland) Regulations 2021 (SSI 2021/82)

16. This instrument establishes the Milk and Healthy Snack Scheme as a food benefit in Scotland for pre-school children who receive childcare services from a registered childcare provider.
17. The childcare provider, who is to be paid by a local authority, must provide the prescribed benefit in accordance with an eligible child's entitlement when childcare services of at least two hours per day are provided to that child.
18. The Committee wrote to the Scottish Government on 26 February 2021 with various questions on the instrument.
19. In its response, the Scottish Government confirmed it did not propose to take corrective action in relation to any of the points raised by the Committee.
20. A copy of the correspondence with the Scottish Government can be found in the **Annex**.

21. **The Committee agrees to draw this instrument to the attention of the Parliament on the general reporting ground in respect of the following errors:**
 1. **the reference to "Social Work Improvement Scotland" in paragraph (j) of schedule 2 fails to attract the definition of "SCSWIS" in regulation 2 of the instrument;**
 2. **a definition of "childcare provider" is missing from regulation 2; and**
 3. **the word "and" should be included at the start of the words inserted by regulation 23 of the instrument into subparagraph b(i) and (ii) of the definition of "Healthy Start food" in regulation 2(1) of the Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005.**
22. **The Committee also calls on the Scottish Government to amend the instrument at the next legislative opportunity to rectify the error in paragraph (j) of schedule 2, at which time the opportunity should be taken to rectify the other errors identified.**

Town and Country Planning (Emergency Period and Extended Period) (Coronavirus) (Scotland) Regulations 2021 (2021/100)

23. The main purpose of this instrument is to extend until 31 March 2022 the period for which planning consents remain valid during the coronavirus pandemic.

24. The provision will be subject to the requirement that the Scottish Government review and report on the provision every two months, while the Coronavirus Acts remain in force.
25. The Committee wrote to the Scottish Government on 26 February 2021 highlighting what appeared to be drafting errors in regulations 4 and 5.
26. In its response, the Scottish Government agreed that regulation 4(2)(b), which modifies the effect of section 59 of the Town and Country Planning (Scotland) Act 1997, refers to section 58(3A) when it should refer to section 59(8) of that Act. It also agrees that when identifying subsections to be treated as retained or omitted in section 59, there has been a failure to refer to subsection (8C), which defines terms in retained subsections (8A) and (8B).
27. The Scottish Government also acknowledged in its response that regulation 5(1) should refer to the “relevant date” rather than refer to “that date” in order to attract the definition of “relevant date” in regulation 5(2).
28. A copy of the correspondence with the Scottish Government can be found in the **Annex**.

29. **The Committee agrees to draw this instrument to the attention of the Parliament under the general reporting ground in respect of the following errors:**
 1. **In regulation 4(2)(b):**
 - a. **the reference to section 58(3A) of the Town and Country Planning (Scotland) Act 1997 should be to section 59(8) of that Act; and**
 - b. **the reference to subsections (8A) and (8B) of section 59 of the 1997 Act should be extended to include subsection (8C).**
 2. **Regulation 5(1) of the instrument should refer to “the relevant date” rather than “that date”.**
30. **The Committee welcomes the Scottish Government's commitment to bring forward an amending instrument to correct these errors before the instrument comes into force on 30 March 2021.**

Food, Natural Mineral Water, Spring Water and Bottled Drinking Water (EU Exit) (Scotland) (Amendment) Amendment Regulations 2021 (2021/109)

31. The purpose of this instrument is summarised in the previous section of this report 'Instruments considered under the European Union (Withdrawal) Act 2018'.
32. Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 requires that negative instruments are laid at least 28 days before they come into force, not counting recess periods of more than 4 days. As this instrument was laid on 25 February 2021 and comes into force on 21 March 2021, it has breached this rule.
33. The Scottish Government wrote to the Presiding Officer explaining why the 28-day

rule has not been complied with.

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

35. **The Committee agrees to draw this instrument to the attention of the Parliament on reporting ground (j) in that it has been laid less than 28 days before coming into force and therefore has breached the laying requirements under section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**

36. **The Committee is content with the explanation provided by the Scottish Government for failure to comply with the laying requirements.**

Zoonoses Amendment (Coronavirus) (Scotland) Order 2021 (2021/83)

37. This instrument amends the Zoonoses Order 1989 to designate SARS-CoV-2 as a zoonotic organism which requires notification under section 29 of the Animal Health Act 1981 to assist monitoring and control of virus mutations.

38. The main purpose of this instrument is to make provision for a reason relating to coronavirus. It has no expiry provision. The continuing need for the provision will be subject to the requirement, under section 14 of the Coronavirus (Scotland) (No.2) Act 2020, to review the provision and report on it every two months.

39. The Committee wrote to the Scottish Government on 26 February 2021 highlighting what appeared to be a drafting error in regulation 2(3)(c) of the Order. Regulation 2 amends article 4 (designation of organisms for the purposes of section 29) of the Zoonoses Order 1989, inserting paragraph (3) which applies to animals infected with SARS-CoV-2 provisions of the Animal Health Act 1981 which are specified in schedule 1 of the Zoonoses Order 1989, other than sections 31(e), 64 and paragraph 3 of schedule 5. The reference should be to paragraph 5 of schedule 3, as specified in schedule 1 of the 1989 Order.

40. In its response, the Scottish Government acknowledged there had been a drafting error and that the reference should be to paragraph 5 of schedule 3. It committed to correcting this error when further amendments are made by order to the Zoonoses Order 1989, expected later in March 2021.

41. A copy of the correspondence with the Scottish Government can be found in the **Annex**.

42. **The Committee agrees to draw this instrument to the attention of the Parliament under the general reporting ground as there is an error in the drafting of regulation 2(3)(c) in the Order.**

43. **The Committee welcomes the Scottish Government's commitment to correct this error when making further planned amendments to the Zoonoses Order 1989 later in March 2021.**

No points raised

Education and Skills Committee

Looked After Children (Scotland) Amendment Regulations 2021 (SSI 2021/103)

Finance and Constitution Committee

Budget (Scotland) Act 2020 Amendment Regulations 2021 (SSI 2021/draft)

Health and Sport Committee

Health Protection (Coronavirus) (International Travel) (Managed Accommodation and Testing etc.) (Scotland) Amendment Regulations 2021 (SSI 2021/107)

Human Tissue (Authorisation) (Scotland) Act 2019 (Commencement No. 2) Regulations 2021 (SSI 2021/108 (C.6))

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 7) Regulations 2021 (SSI 2021/111)

Local Government and Communities Committee

Town and Country Planning (Pre-Application Consultation) (Scotland) Amendment Regulations 2021 (SSI 2021/99)

Period Products (Free Provision) (Scotland) Act 2021 (Commencement No. 1) Regulations 2021 (SSI 2021/104 (C.5))

Rural Economy and Connectivity Committee

Plant Health and Plant Propagating Material (Miscellaneous Amendments) (Scotland) Regulations (SSI 2021/87)

Plant Health (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/draft)

Annex

Milk and Healthy Snack Scheme (Scotland) Regulations 2021 (SSI 2021/82)

On 26 February 2021, the Scottish Government was asked:

1. In regulation 2, should there be definitions of “childcare provider” and “childcare service” cross-referring to regulation 4(1) and (2) (c.f. the meaning of “eligible child” in regulations 2 and 3)?

2. In regulation 23:

a. Reference is made to the “Healthy Start Scheme and Welfare Food Amendment Regulations 2005”. Should this be to the “Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005?”

b. The Explanatory Note indicates in the last paragraph that regulation 23 (cited there as regulation 22) provides for an amendment to the 2005 Regulations to clarify that the food benefit prescribed by regulation 5 of the instrument is not a Healthy Start food under the 2005 Regulations.

As amended by regulation 23 of the instrument, it appears that the definition of “Healthy Start food” in regulation 2(1) would read (with the inserted text in bold):

“[...] “(b) in relation to the operation of a scheme in Scotland means—

(i) until the coming into force of the first regulations to prescribe a description of food (other than Healthy Start vitamins the food benefit prescribed in regulation 5 of the Milk and Healthy Snack Scheme (Scotland) Regulations 2021) in or as regards Scotland made by the Scottish Ministers under section 13(1) of the Act, the food prescribed in regulation 5(1), and

(ii) thereafter means the description of food (other than Healthy Start vitamins the food benefit prescribed in regulation 5 of the Milk and Healthy Snack Scheme (Scotland) Regulations 2021) prescribed in regulations made by the Scottish Ministers under that section; and”

Please explain whether and why this is the intended result and whether it achieves the intention set out in the Explanatory Note. Is there a missing “and”?

3. Please explain what provisions of the instrument rely on the power to make ancillary provision in section 175(4) of the Social Security Contributions and Benefits Act 1992, which is cited in the preamble as an enabling power, and why it is considered the provision falls within the terms of that enabling power.

4. Regulations 17 and 18 of the instrument provide that a local authority and a childcare provider (respectively) must have regard to any guidance issued by the Scottish Ministers with respect to the operation of the Scheme. Section 13 of the Social Security Act 1988 explicitly authorises the giving of directions, but not guidance. If the ancillary power is relied on to require regard to be had to guidance issued by the Scottish Ministers in terms of regulations 17 and 18, please explain why such provision is considered to fall within the scope of this power. Otherwise, please explain the vires of this provision.

5. In paragraph (j) of schedule 2, should the reference to “Social Work Improvement Scotland” be to “SCSWIS”, to obtain the definition of that term in regulation 2 of the instrument.

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

On 2 March 2021, the Scottish Government responds as follows:

1. Whilst inserting a definition of “childcare provider” cross referring to regulation 4(1) would arguably assist the reader, the definition in regulation 4(1) stands on its own and an internal reference is not required. The term “child care service” is only used in regulation 4(1) and it is considered that the placing of the definition in regulation 4(2) is appropriate and most useful to the reader.

2 In regulation 23:-

a. The reference should, as indicated in the heading of the regulation, be to the Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005 (“the 2005 Regulations”). Although the brackets around “Amendment” were omitted, the reference to the regulations is sufficiently clear and is aided by the footnote containing the S.S.I. number 2005/3262.

b. The intention is that this scheme will sit separately from the Health Start food scheme formed under the 2005 Regulations. The amendments exclude from the definition of “Healthy Start food” the food benefit prescribed in regulation 5. The benefit that an eligible child is entitled to under regulation 5 is not to be counted as a benefit under the 2005 Regulations. We agree that there is a missing “and” but we think the intention of the amendment is clear.

3. The broad enabling power in section 13(1) of the Social Security Act 1988 covers the majority of the provisions in this instrument. It permits the administration of a scheme by a body other than the Scottish Ministers. Section 13(4)(f) specifically enables the delegation of prescribed functions under the scheme (see regulation 15). The power under section 175(4) of the Social Security Contributions and Benefits Act 1992 is cited to ensure that there is no doubt that the duties placed on a local authority under regulations 19 and 20, which follow on from that delegation, are within vires.

4. The Scottish Ministers do not require a statutory power to issue guidance. Some of the administrative framework of this scheme will be contained in guidance. The regulations point to this fact and require a local authority and a childcare provider to have regard to that guidance. It is considered that these duties relate to the establishment of the scheme and as such fall within the power of section 13(1) of the Social Security Act 1988.

5. The reference in paragraph (j) of schedule 2 to “Social Work Improvement Scotland” should be to “SCSWIS”. However the name is sufficient to identify the body.

6. No corrective action is proposed in relation to any of the points.

Town and Country Planning (Emergency Period and Extended Period) (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/100)

On 25 February 2021, the Scottish Government was asked:

1. Regulation 4 (Saving provisions – planning permission) modifies sections 58 and 59 of the Town and Country Planning (Scotland) Act 1997. Paragraph (2)(b) states that “section

59 of the Act is to have effect as if only subsections (8A) and (8B), as set out in paragraph 10 of schedule 7 of the Coronavirus (Scotland) Act 2020, were inserted after section 58(3A), and subsections (8D) and (8E), as set out in that paragraph, were omitted.”

(a) Should the reference be to section 59(8), as set out in paragraph 10 of schedule 7, rather than section 58(3A)?

(b) As subsection (8C) in paragraph 10 of schedule 7 defines terms used in subsections (8A) and (8B) which still apply, should section 59 be read as if subsection (8C) were also inserted? This would be consistent with the retention in regulation 4(2)(a) of section 58(3C) which has an equivalent function, as set out in paragraph 9 of schedule 7 of the Coronavirus (Scotland) Act 2020.

2. Regulation 5 (Saving provisions – listed building consent) provides a definition of “relevant date” for the purposes of this regulation at paragraph (2). Should regulation 5(1) say “the relevant date” at the end of the paragraph, instead of “that date”, to attract the definition in regulation 5(2)?

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

On 2 March 2021, the Scottish Government responds as follows:

1(a) and (b) – The Scottish Government agrees that the reference in regulation 4(2)(b) of the Regulations to section 58(3A) should be a reference to section 59(8) and that the reference in regulation 4(2)(b) to subsections (8A) and (8B) should be extended to include a reference to subsection (8C).

2 – The Scottish Government agrees that regulation 5(1) of the Regulations should refer to “the relevant date” rather than “that date”.

3 – The Scottish Government are grateful to the Committee for bringing these points to their attention and intend to bring forward a corrective instrument to amend the Regulations before they come into force on 30 March

Food, Natural Mineral Water, Spring Water and Bottled Drinking Water (EU Exit) (Scotland) (Amendment) Amendment Regulations 2021(2021/109)

25 February 2021, Scottish Government wrote to the Presiding Officer

The Food, Natural Mineral Water, Spring Water and Bottled Drinking Water (EU Exit) (Scotland) (Amendment) Amendment Regulations 2021 (“the instrument”) is due to be made and laid by the Scottish Ministers today in exercise of the powers conferred by paragraph 1(1) and (3) of schedule 2, and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018, and will come into force on 21 March 2021.

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 instrument provides for the amendment of The Food, Natural Mineral Water, Spring Water and Bottled Drinking Water (EU Exit) (Scotland) (Amendment) Regulations 2021(the amended “SSI”), which were laid on 10 February 2021 and are due to come into force on 22 March 2021. The amended SSI makes amendments to food the information and

country of origin labelling provisions contained within The Food Information (Scotland) Regulations 2014 and The Country of Origin of Certain Meats (Scotland) Regulations 2016, for which Food Standards Scotland (FSS) has policy responsibility for in Scotland.

The need for these changes arise from the UK Government's Statutory Instrument, the Food and Drink (Miscellaneous Amendments relating to Food and Wine Composition, Information and Labelling) Regulations 2021 (UKSI). The UKSI, which extends to Scotland, includes amendments to retained EU law on food information and country of origin information and FSS received assurances from the UK Government this was due to come into force on 15 April 2021.

FSS were subsequently only made aware that the UKSI will in fact not come into force until 27 May 2021, after the amended SSI was laid in Parliament.

Consequently, we need to amend the commencement date for the food information and country of origin element of the amended SSI because they are wholly dependent on the UKSI coming into force and without amendment the SSI will no longer be valid.

The instrument only changes the commencement date for these specific areas and does not alter the substance of the provisions nor the time available for scrutiny of these provisions contained within the SSI laid in the Scottish Parliament on 10 February 2021.

However, as a result of the occurrence and timing of this change, it has not been possible for us to comply with the 28 day rule.

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, due to timetabling changes at Westminster, it has been impossible to comply with this requirement.

Zoonoses Amendment (Coronavirus) (Scotland) Order 2021 (SSI 2021/83)

On 26 February 2021, the Scottish Government was asked:

Regulation 2(3)(c) amends article 4 (designation of organisms for the purposes of section 29) of the Zoonoses Order 1989 by inserting text to apply to SARS-CoV-2 the provisions of the Animal Health Act 1981 listed in schedule 1 of the 1989 Order under exception of sections 31(e), 64 and paragraph 3 of schedule 5 of the Act.

1. Is there an error, insofar as schedule 1 of the Order refers to paragraph 5 of schedule 3 of the 1981 Act, rather than paragraph 3 of schedule 5?
2. Is any corrective action proposed, and if so, what action and when?

On 2 March 2021, the Scottish Government responds as follows:

1. Yes. The reference should be to paragraph 5 of schedule 3 of the 1981 Act.

Further amendments are planned to be made by order to the Zoonoses Order 1989 later this month. The incorrect reference will be corrected at that time.

