

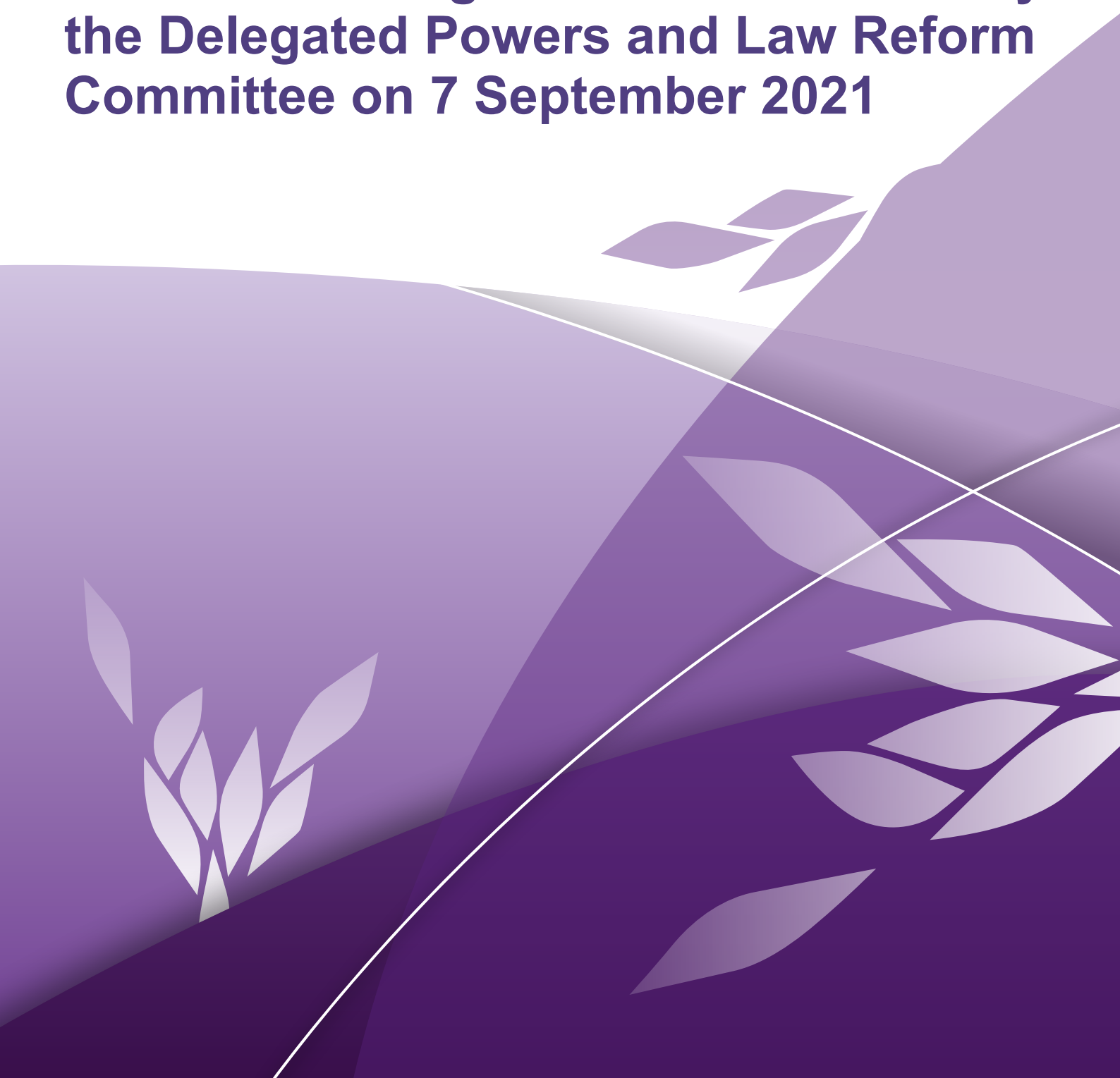


The Scottish Parliament
Pàrlamaid na h-Alba

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Delegated Powers and Law Reform Committee

Subordinate Legislation Considered by the Delegated Powers and Law Reform Committee on 7 September 2021



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Delegated Powers and Law Reform Committee

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;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(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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Committee Membership



Convener
Stuart McMillan
Scottish National Party



Deputy Convener
Bill Kidd
Scottish National Party



Graham Simpson
Scottish Conservative
and Unionist Party



Craig Hoy
Scottish Conservative
and Unionist Party



Paul Sweeney
Scottish Labour

Scrutiny of instruments

1. At its meeting on 7 September 2021, the Committee determined that under its remit it did not need to draw the Parliament's attention to the instruments set out at the end of this report.

Additional points

2. The Committee nevertheless agreed to highlight a number of additional points to the relevant lead committees on the following instruments.

Coronavirus (Extension and Expiry) (Scotland) Act 2021 (Evidence) (Saving Provision) Regulations 2021 (SSI 2021/280)

3. The Committee agreed to highlight that no Policy Note was included with SSI 2021/280. It is accepted practice that in order to assist Parliament's consideration of an SSI, a Policy Note should normally be prepared for every SSI, other than for simple commencement Orders. The Committee's correspondence with the Scottish Government on these Regulations can be read in the Annex.

Planning (Scotland) Act 2019 (Commencement No. 6 and Transitional Provision) Amendment Regulations 2021 (SSI 2021/291 (C.16))

Town and Country Planning (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/292)

4. In SSI 2021/292, suspension of the requirement to hold public consultation events about proposed building developments during the coronavirus pandemic is continued to 31 March 2022. Similar provision is made in SSI 2021/291 (C.16) which also defers to 31 March 2022 implementation of changes to pre-application consultations to require that at least two public consultation events must be held. As other coronavirus restrictions have been removed or relaxed in recent months, and it was not clear why these particular suspensions remained necessary, the Committee queried the delay in re-introducing the requirement to have public consultation events. The Committee noted that the move to online consultations appeared to have been a helpful additional means of reaching the public and questioned whether the effectiveness of online consultations has been evaluated.
5. While these are policy issues and so do not fall within the Committee's remit, it nevertheless agreed to make the lead committee aware of the queries raised, and write to the Minister for Public Finance, Planning and Community Wealth, Tom Arthur MSP to highlight its discussion.

Town and Country Planning (Cairnryan Border Control Posts) (EU Exit) (Scotland) Special Development Amendment Order 2021 (SSI 2021/293)

6. The Session 5 Delegated Powers and Law Reform Committee considered the principal order, the Town and Country Planning (Cairnryan Border Control Posts) (EU Exit) (Scotland) Special Development Order 2021 (SSI 2021/98), in March 2021. The Committee agreed to highlight that the Scottish Government has rectified 4 minor formatting and typographical points raised by its predecessor Committee when it considered the principal Order. Three of those points were rectified by this

amending instrument and one by way of a correction slip.

No points raised

COVID-19 Recovery Committee

Coronavirus (Extension and Expiry) (Scotland) Act 2021 (Evidence) (Saving Provision) Regulations 2021 (SSI 2021/280)

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 16) Regulations 2021 (SSI 2021/290)

Criminal Justice Committee

Sexual Offences Act 2003 (Prescribed Police Stations) (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/282)

Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment (No. 2) Rules 2021 (SSI 2021/289)

Equalities, Human Rights and Civil Justice Committee

Children's Legal Assistance (Miscellaneous Amendments and Consequential Provisions) (Scotland) Regulations 2021 (SSI 2021/draft)

Act of Sederunt (Simple Procedure Amendment) (Civil Online) 2021 (SSI 2021/295)

Local Government, Housing and Planning Committee

Argyll and Bute (Electoral Arrangements) Regulations 2021 (SSI 2021/draft)

Highland (Electoral Arrangements) Regulations 2021 (SSI 2021/draft)

North Ayrshire (Electoral Arrangements) Regulations 2021 (SSI 2021/draft)

Na h-Eileanan an Iar (Electoral Arrangements) Regulations 2021 (SSI 2021/draft)

Orkney Islands (Electoral Arrangements) Regulations 2021 (SSI 2021/draft)

Shetland Islands (Electoral Arrangements) Regulations 2021 (SSI 2021/draft)

Planning (Scotland) Act 2019 (Commencement No. 6 and Transitional Provision) Amendment Regulations 2021 (SSI 2021/291 (C. 16))

Town and Country Planning (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/292)

Town and Country Planning (Cairnryan Border Control Posts) (EU Exit) (Scotland) Special Development Amendment Order 2021 (SSI 2021/293)

Rural Affairs, Islands and Natural Environment Committee

Meat Preparations (Import Conditions) (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/288)

Social Justice and Social Security Committee

Social Security (Advocacy Service Standards) (Scotland) Amendment Regulations 2021
(SSI 2021/draft)

Annex

Coronavirus (Extension and Expiry) (Scotland) Act 2021 (Evidence) (Saving Provision) Regulations 2021 (SSI 2021/280)

The Scottish Government was asked:

Schedule 4 of the Coronavirus (Scotland) Act 2020 contains temporary modifications to the criminal justice system. Paragraph 11 modifies section 259 of the Criminal Procedure (Scotland) Act 1995 to introduce additional exceptions to the inadmissibility of hearsay evidence in criminal court proceedings where oral evidence from the person who made the statement in question cannot be taken for a reason related to coronavirus. Section 2(4)(a) of the Coronavirus (Extension and Expiry) (Scotland) Act 2021 provides that paragraph 11 of Schedule 4 expires on 30 September 2021.

Regulation 2 of this instrument provides that, despite the expiry of paragraph 11 on 30 September 2021, evidence of a hearsay statement which has been introduced in court proceedings before that date shall remain admissible for the purposes of those proceedings. This means that a person who has already given a statement in evidence before 30 September 2021 will not thereafter be required to go to court to give their evidence directly if the case is not concluded by that date. However the expiry of paragraph 11 means that irrespective of whether physical attendance at a trial would involve a particular risk to a witness because of COVID-19 or there is a risk that person may transmit the virus to others and the person cannot give the evidence directly to the court in any other way, after 30 September that person will be required to come to court.

The instrument was laid before the Parliament without a policy note. The explanatory note to the instrument states that regulation 2 “makes clear that the rules contained in section 259, as modified, continue to apply in proceedings where a statement has been introduced in evidence prior to the expiry of the relevant modifications”. However the Coronavirus (Extension and Expiry) (Scotland) Act 2021 made explicit provision for the expiry of these rules in paragraph 11 and also made transitional and saving provisions in the Schedule which did not include saving provision for paragraph 11. In the absence of a policy note setting out why it is necessary to continue to apply the rules contained in section 259, as modified, after their expiry, please explain why this saving provision is introduced now, and why a distinction is made between witnesses who cannot give evidence directly for a reason related to coronavirus before and after 30 September 2021.

The Scottish Government responded:

In order to provide some context with regard to the timing of this instrument and why the saving provision was not contained in the Coronavirus (Extension and Expiry) (Scotland) Act 2021, the provision in section 2(4)(a) of that Act was inserted by way of a non-Government amendment at stage 2. The Scottish Government opposed the amendment, but Parliament decided to support the amendment. In light of this development, which was unexpected from the perspective of the Scottish Government, we wished to take some limited time to consider the full ramifications of the expiry of the provision. With the deadline for Stage 3 amendments being within hours of the end of Stage 2, a decision was taken to rely on the power at section 10(1) of the Act, if required, in order to allow for full consideration of the ramifications of expiry, including consideration of whether any saving provision was required. This approach was determined to be the prudent approach that

would minimise the risk of any error or confusion in law being created with development of a rushed Stage 3 amendment.

Following the passage of the Bill, the Government continued to give consideration to the effect of the expiry of paragraph 11 of schedule 4 of the Coronavirus (Scotland) Act 2020 which modifies section 259 of the Criminal Procedure (Scotland) Act 1995.

When a judge permits the admission of evidence by statement under section 259, the making of the statement still requires to be proved by direct evidence during the course of the trial. It is our view that, even in the absence of a saving provision, a statement which is admitted in evidence (by which we mean led/introduced in evidence rather than the point at which the judge makes a decision to grant the section 259 application and permit the admission of the statement) before the end of 30 September 2021 would remain admitted in evidence. Our interpretation is aided by section 15 of the Interpretation and Legislative Reform (Scotland) Act 2010 which provides that repeal or revocation does not affect the validity, invalidity, effect or consequences of anything done under the repealed Act or revoked instrument. For that reason, if a statement is admitted in evidence prior to the end of 30 September 2021 then we are of the view that the judge would not need to subsequently disregard that evidence or direct the jury to disregard that evidence. It would be evidence which was lawfully admitted at the time it was admitted and therefore would not need to later be disregarded solely by virtue of the subsequent expiry of the modifications to section 259. However, the judge (as in any case where evidence is admitted under section 259) will still be under a continuing duty to consider the evidence in the context of the overall fairness of the trial as it progresses and so may ultimately have to disregard the evidence or direct the jury to disregard it if it becomes clear that the evidence is unfair to the party against whom it is led.

Although we are of the view that the expiry of the modifications will not affect the validity or effect of evidence led prior to the end of 30 September, we also considered the other rules which flow from the admission of evidence of a statement under section 259(2A). Section 259 contains rules which explain what should happen in consequence of evidence of a statement being admitted. We are of the view that it is important to clarify that these rules (as modified) continue to operate after 30 September where evidence of a statement is admitted prior to the end of 30 September in order to ensure that section 259 continues to work in its entirety, with all of the relevant safeguards. By way of example, paragraph 11 of schedule 4 of the Coronavirus (Scotland) Act 2020 modifies section 259(4) of the Criminal Procedure (Scotland) Act 1995 which makes provision about what other evidence may be led as a consequence of evidence admitted under subsection (2A). This allows, for instance, the other party to lead any evidence which is relevant to the credibility of the witness whose statement was led in evidence. We wished to provide clarity that this rule would continue to apply after 30 September (if the trial is still ongoing and evidence of a statement was led under section 259(2A) before the expiry of the provision).

In the view of the Scottish Government, it is not new policy in the instrument, but rather provision which clarifies that section 259 will continue to operate in its entirety where evidence of a statement has been lawfully admitted prior to the date of expiry. The inclusion of explicit provision will aid understanding and reduce the risk of error or confusion arising in any given relevant criminal proceedings.

