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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 18 January 2022



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Contents

Introduction	1
Instruments considered under the European Union (Withdrawal) Act 2018	2
Scrutiny of instruments under the Committee’s technical remit: instruments drawn to the attention of the lead committee	3
No technical points raised	8
Annex	9

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 18 January, 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:
 - Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 (SSI 2021/493)
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 instruments under its technical remit and agreed to draw them to the attention of the relevant lead committee:
 - Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment Regulations 2022 (SSI 2022/2)
 - Disability Assistance for Working Age People (Scotland) Regulations 2022 (SSI 2021/Draft)
 - Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 (SI SI 2021/1455)
 - Nutritional Requirements for Food and Drink in Schools (Scotland) Amendment Regulations 2021 (SSI 2021/481)
 - Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 (SSI 2021/493)
4. The Committee's recommendations in relation to these instruments 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.

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

Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 (SSI 2021/493)

6. The instrument relates to the start date from which imports of animal products and certain plants, plant products and other objects to Scotland from EU/EEA and related countries will be subject to additional requirements. It does several things:
1. appoints 30 June 2022 as the end date for the transitional staging period in all cases;
 2. from 1 January 2022 it requires pre-notification of the import of animal by-products from 1 January 2022, which are not already subject to pre-notification requirements;
 3. exempts products of animal origin and other objects intended for personal consumption or use forming passengers' personal luggage and not for sale on the market from prior notification requirements; and
 4. postpones the requirements for phytosanitary certificates for certain plants, plant products and other objects to 30 June 2022.

Points 2, 3 and 4 above are the amendments made under the relevant European Union (Withdrawal) Act 2018 power.

7. The Policy Note states that the instrument enables the continued functioning of SPS (sanitary and phytosanitary) controls between the EU and Scotland following the end of the transitional staging period. The end of the transitional staging period is amended to 30 June 2022, after which Official Controls Regulation checks will apply to SPS goods entering GB from the EU.
8. The transitional staging period was due to come to an end initially on 1 April 2021, but was then postponed to 31 July 2021, then to 1 October 2021 and then to 1 January 2022. The Policy Note states that previous instruments gave effect to the UK Government's decision to introduce checks on EU SPS imports in phases during this transitional staging period.

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 is also content that the categorisation should be of low significance.**

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

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment Regulations 2022 (SSI 2022/2)

11. The instrument amends the Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Regulations 2021 (SSI 2021/322), referred to here as the “International Travel Regulations”).
12. The instrument is subject to the made affirmative procedure. It was made on 6 January 2022 and laid before the Parliament at 9.30am on 7 January 2022. Regulations 1 – 5, 8, 9, 12 and 13 came into force at 4:00 am on 7 January, regulations 6, 7 and 10 came into force at 4:00 am on 9 January and regulation 11 came into force at 4:00 am on 10 January, all 2022.
13. Regulation 7 of the instrument amends the International Travel Regulations to insert:
 - regulation 16A, requiring eligible vaccinated arrivals to report the outcome of a day 2 Lateral Flow Device (LFD) test; and
 - regulation 16B, requiring them to take a confirmatory test from a public provider if their LFD test result is positive.
14. In correspondence with the Scottish Government, the Committee highlighted that neither the principal Regulations nor this instrument specifies that the confirmatory test should be a PCR test, although the Regulation's Policy Note and Scottish Government guidance indicates that the confirmatory test should be a PCR test.
15. The Committee also pointed out that both the Policy Note and the letter to the Presiding Officer stated that the change to the definition of WHO vaccines in regulation 3 came into force at 4:00 am on 10 January, alongside the changes to the list of relevant countries which may provide acceptable vaccine certification in schedule 1A. However, regulation 1 provides that regulation 3 came into force at 4:00 am on 7 January.
16. In addition, the Committee noted that the instrument is in breach of laying requirements in section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, which provides that an instrument not subject to the negative or affirmative procedure must be laid before the Scottish Parliament as soon as practicable after the legislation is made, and in any event before the legislation is due to come into force. The instrument was made on 6 January, regulations 1 – 5, 8, 9, 12 and 13 came into force at 4:00 am on 7 January and the instrument was laid at 9.30am on 7 January. Regulations 6, 7 and 10 came into force at 4:00 am on 9 January and regulation 11 came into force at 4:00 am on 10 January, all 2022.

17. The Scottish Government wrote to the Presiding officer explaining why the instrument had been made using the power to make emergency regulations.
18. All correspondence can be found in the annex.

19. **The Committee draws the instrument to the attention of the Parliament on:**
 1. **Reporting ground (h) on the basis that the meaning of regulation 7 could be clearer that the confirmatory test taken by an eligible vaccinated arrival following a positive day 2 Lateral Flow Device test must be a PCR test;**
 2. **Reporting ground (i) on the basis that its drafting appears to be defective. The change in the definition of “WHO List vaccine” in regulation 3 was intended to come into force on 10 January 2022 at the same time as the equivalent change was made in England and Wales by the UK Government, rather than on 7 January 2022 as provided for in regulation 1 of the instrument; and**
 3. **Reporting ground (j) on the basis that the instrument is in breach of laying requirements in section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, having been laid after the majority of its provisions came into force.**
20. **The Committee also calls on the Scottish Government to amend the Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Regulations 2021, in light of the insertion by regulation 7 of the instrument, to define the term “confirmatory test” at the next legislative opportunity.**

Disability Assistance for Working Age People (Scotland) Regulations 2022 (SSI 2022/ Draft)

21. The instrument makes provision for Adult Disability Payment ("ADP") as a type of disability assistance given by the Scottish Ministers under section 31 of the Social Security (Scotland) Act 2018. ADP replaces Personal Independence Payment ("PIP") in Scotland to provide support to disabled individuals between the age of 16 and (subject to certain exceptions) state pension age.
22. In correspondence with the Scottish Government, the Committee highlighted a number of drafting issues. The correspondence between the Committee and the Scottish Government can be found in the annex.

23. **The Committee draws the instrument to the attention of the Parliament on:**
 1. **the general reporting ground, for the following errors:**
 - a. **the definition of “EU withdrawal agreement” in regulation 2 is unnecessary given that a definition of this term contained in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 already applies;**

England, Wales and Northern Ireland.

27. This joint procedure instrument between the four administrations (Scottish, UK, Welsh and Northern Irish governments) makes various technical and operational amendments to a number of aspects of the UK Emissions Trading Scheme ("UK ETS") by further amending the Greenhouse Gas Emissions Trading Scheme Order 2020 (SI 2020/1265) ("the 2020 Order") and Commission Delegated Regulation (EU) 2019/331 of 19 December 2018 ("the Free Allocation Regulation").
28. In correspondence with the Scottish Government, the Committee highlighted an inconsistency in the cross referencing in Article 27 of the instrument.
29. In its response, the Scottish Government confirmed this was an error and it committed to liaising with the other UK administrations with a view to correcting this error at the next available opportunity.
30. Correspondence between the Committee and the Scottish Government can be found in the annex.

31. **The Committee draws the instrument to the attention of the Parliament on the general reporting ground in respect of the incorrect reference in paragraph 4(3) of new schedule 8A of the 2020 Order, inserted by Article 27 of the instrument, to Article 18(11) of the Free Allocation Regulation, which should have been to Article 18a(11) of that Regulation.**
32. **The Committee nevertheless welcomes that the Scottish Government is liaising with the other UK administrations with a view to correcting this error at the next available opportunity.**

Nutritional Requirements for Food and Drink in Schools (Scotland) Amendment Regulations 2021 (SSI 2021/481)

33. The instrument amends the Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2020 (SSI 2020/153) to provide an exception to the statutory duties on education authorities or managers of grant aided schools to provide food and drink that complies with nutritional requirements specified by the Scottish Ministers. This exemption provides education authorities or managers of grant aided schools with relief from compliance with this duty where they cannot, due to disruption in the school food supply chain, procure food and drink which complies with the requirements of the 2020 Regulations.
34. The instrument was laid on 20 December 2021 and came into force on 21 December 2021. As it was laid less than 28 days before it came into force, 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.
35. The Scottish Government wrote to the Presiding Officer explaining why the 28-day rule had not been complied with.
36. A copy of the correspondence can be found in the annex.

37. **The Committee draws the instrument to the attention of the Parliament on reporting ground (j) for failure to comply with laying requirements.**
38. **The Committee is nevertheless content with the explanation provided by the Scottish Government for failure to comply with the laying requirements.**

Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 (SSI 2021/493)

39. As noted earlier in the report, this instrument postpones the start date from which imports of animal products and certain plants, plant products and other objects to Scotland from EU/EEA and related countries will be subject to additional requirements and makes other amendments relating to official controls on such imports.
40. The instrument was laid on 22 December 2021 and came into force on 1 January 2022, during a recess period. As it was laid less than 28 days before it came into force, it is in breach of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, which provides that a Scottish statutory instrument, subject to negative procedure, must be laid before Parliament at least 28 days before it comes into force (not counting recess periods of more than 4 days)..
41. The Scottish Government wrote to the Presiding Officer explaining why the 28-day rule had not been complied with and also responded to a letter from the Committee on this point. A copy of the correspondence can be found in the annex.

42. **The Committee agrees to draw this instrument to the attention of the Parliament on reporting ground (j) for failure to comply with laying requirements. The instrument has not been laid at least 28 days before it came into force as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
43. **Given the issue between the Scottish and UK Governments in this regard which was highlighted in the correspondence, the Committee is unable to take a view on whether or not it is content with the explanation provided by the Scottish Government for failure to comply with the laying requirements. It highlights this correspondence to the lead committee for its consideration.**

No technical points raised

COVID-19 Recovery Committee

Health Protection (Coronavirus) (Requirements) (Scotland) Amendment Regulations 2022 (SSI 2022/6)

Economy and Fair Work Committee

Registers of Scotland (Digital Registration, etc.) Regulations 2022 (SSI 2021/Draft)

Local Government, Housing and Planning Committee

Council Tax (Dwellings and Part Residential Subjects) (Scotland) Amendment Regulations 2021 (SSI 2021/489)

Net Zero, Energy and Transport Committee

Deposit and Return Scheme for Scotland Amendment Regulations 2022 (SSI 2021/Draft)

Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2022 (SI 2021/Draft)

Rural Affairs, Islands and Natural Environment Committee

Aquaculture and Fisheries etc. (Scheme for Financial Assistance) (Scotland) Regulations 2022 (SSI 2022/Draft)

Annex

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment Regulations 2022 (SSI 2022/2)

On 10 January 2022, the Scottish Government was asked:

1. The instrument amends the Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment Regulations 2022 (“the principal Regulations”). Regulation 6 reintroduces the option for eligible vaccinated arrivals to take the Covid 19 test required on day 2 after their arrival in Scotland using a Lateral Flow Device (LFD) test as an alternative to a Polymerase Chain Reaction (PCR) test. Regulation 7 inserts regulation 16A into the principal regulations which sets out how the result of that test should be reported, including the requirement to provide an address at which the person is able to receive a confirmatory test. Regulation 7 also inserts regulation 16B which requires that if the LFD test result is positive the person must take a confirmatory test from a public provider. “Public provider” is defined in regulation 14(10). Neither the principal Regulations nor this instrument defines a “confirmatory test.” The accompanying Policy Note and information on booking a Covid-19 day 2 test in Scottish Government guidance entitled ‘Planning foreign travel and information on testing for people entering Scotland’ indicate that the confirmatory test should be a PCR test, but this is not specified in the legislation. Regulation 30 of the principal Regulations provides that it is an offence to contravene the requirement to take a confirmatory test. Is it sufficiently clear in law that a confirmatory test should be a PCR test as defined in regulation 14(9A), or should such provision have been made by the instrument?”
2. The Policy Note and the letter to the Presiding Officer accompanying the instrument state that the change to the definition of WHO vaccines made by regulation 3 of the instrument comes into force at 4am today, 10 January, alongside the changes to the list of relevant countries which are able to provide acceptable vaccine certification in schedule 1A. Regulation 1 provides that regulation 3 came into force at 4am on 7 January. Please confirm which is the date on which that change was intended to come into force and whether there is an error in the instrument.
3. Please confirm whether any corrective action is proposed and, if so, what action and when.

On 12 January 2022, the Scottish Government responded:

1. As noted, “confirmatory test” is not defined in the principal or amending regulations. However, new regulation 16B(1)(b) provides that a confirmatory test must be taken where a traveller has received a positive result from a day 2 test which does not comply with regulation 14(9A), that is, a PCR test. On that basis, it is considered that the natural reading of “confirmatory test” would not be a second test which does not comply with regulation 14(9A), but one that does comply with regulation 14(9A).

Additionally, as confirmatory tests may only be provided by public providers, as defined in regulation 14(10) of the principal regulations, it is considered that only appropriate tests consistent with the updated guidance at [Coronavirus \(COVID-19\): international travel and quarantine - gov.scot \(www.gov.scot\)](https://www.gov.scot/Topics/Health/Coronavirus/COVID-19/international-travel-and-quarantine) would be provided by such public providers under regulation 16B.

Finally, the drafting of new regulation 16B follows the drafting of previous regulation 16B, which was inserted by regulation 4 of SSI 2021/382 on 1 November 2021 and omitted by SSI 2021/443 on 30 November 2021. As set out in the Policy Note to SSI 2021/382, the policy intention was for a confirmatory test under previous regulation 16B to be a PCR test. On these bases, it is considered that the requirement for a confirmatory test to be a PCR test is clear, but amendment of new regulation 16B to include express provision that a confirmatory test must comply with regulation 14(9A) of the principal regulations will be carefully considered.

2. The change in the definition of “WHO List vaccine” in regulation 3 was intended to come into force on 10 January, as referred to in the Policy Note and letter to the Presiding Officer, rather than on 7 January as provided in regulation 1. The intention was for this change to come into force at the same time as the corresponding change made by the UK Government in regulation 6(2) of SI 2022/11. The effect of the change is to include in the definition of “WHO List vaccine” two additional vaccines added by the WHO to their list of approved vaccines on 23 December 2021. As a result of the inconsistency between coming into force dates of the Scottish and English provisions, it is considered possible that a limited number of travellers vaccinated with recently approved vaccines may have been classed as eligible vaccinated arrivals in Scotland during the period between 0400 on 7 January and 0400 on 10 January, when they would not have been classed as eligible vaccinated arrivals in England. From 0400 onwards on 10 January, such travellers may have been classed as eligible vaccinated arrivals in Scotland or England. The inconsistency in drafting is regretted.

3. In relation to point 1, amendments to new regulation 16B may be included in a future amending instrument to SSI 2021/322. In relation to point 2, no corrective action is proposed.

On 6 January 2022, the Scottish Government wrote to the Presiding Officer:

I am writing to advise you that the Scottish Ministers have made the Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment Regulations 2022 (“the Regulations”) today, under sections 94(1) and 122(2) of the Public Health etc. (Scotland) Act 2008 (“the 2008 Act”).

The amendments made by these Regulations come into force at:- 0400 on 07 January 2022 save as regards those on introduction of LFD for day 2 (and provisions associated to that) which come into force at 0400 on 9 January 2022 and those for expansion to list of countries and amendment of definition of “WHO List Vaccine” which come into force on 0400 on 10 January 2022.

They will be laid before the Scottish Parliament on 7 January 2022.

Section 122(5) of the 2008 Act states that regulations under section 94(1) are subject to the affirmative procedure. However, section 122(6) provides that the affirmative procedure will not apply if the Scottish Ministers consider that the regulations need to be made urgently. In such situations, section 122(7) applies. Section 122(7) sets out that “emergency regulations” must be laid before the Scottish Parliament and cease to have effect on the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Parliament. In accordance with section 122(6) of that 2008 Act, the Scottish Ministers consider that these Regulations need to be made urgently, without a draft having been laid before, and approved by resolution of, the Scottish

Parliament.

Policy changes

This instrument makes amendments to the Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Regulations 2021 (“the International Travel Regulations”) to:

- expand the list of countries from where a person vaccinated with an authorised vaccine may be an eligible vaccinated arrival and the proof needed for this.
- amend the definition of “WHO List vaccine” to include additional vaccines (Covovax and Novovax).
- remove the requirement for eligible vaccinated travellers and under 18s to take a pre-departure test. These passengers will still be required to undertake a day 2 test, but are no longer required to isolate pending receipt of a negative test result.
- introduce a further option for eligible travellers, arriving from non-red list countries and territories, to allow them to complete their day 2 test using a Lateral Flow Device (“LFD”) test, as an alternative to a Polymerase Chain Reaction (“PCR”) test.

The overarching policy aim of this instrument is to update Scotland’s approach to international travel by, in this case, removing and lessening the emergency restrictions introduced as a direct result of the emergence of the Omicron variant of COVID-19. These changes are made in recognition of the fact that maintaining them would no longer be a proportionate response.

We continue to work on a Four Nations basis where possible and appropriate as regards the border measures.

The International Travel Regulations require the Scottish Ministers to keep the necessity for these measures under regular review, and we will do so and keep Parliament updated. As part of the Scottish Government’s commitment to keeping the Scottish Parliament up to date, we wished to inform you as soon as possible of these changes.

If your officials would like to discuss any matters arising from these Regulations, I would be happy to engage with them.

I am copying this letter to the Conveners of the Delegated Powers and Law Reform Committee and the Covid-19 Recovery Committee.

Disability Assistance for Working Age People (Scotland) Regulations 2022 (SSI 2022/Draft)

On 7 January 2022, the Scottish Government was asked:

1. Please explain why a definition of “EU withdrawal agreement” is provided in regulation 2 given the inclusion of that term in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.
2. Regulation 7(2) provides that “An individual’s ability to carry out an activity is to be determined – (a) by reference to the descriptors for the activity set out in column 2 of the table in Part 2 of schedule 1, [...]”.

- a. Is it intended that regulation 7(2) is limited to daily living activities, or is it also intended to cover mobility activities?
 - b. Is this sufficiently clear, or should either:
 - i. the lead in text in regulation 7(2) be limited specifically daily living activities, or
 - ii. regulation 7(2)(a) also refer in the alternative to the activity set out in column 2 of the table in Part 3 of schedule 1?
3. Regulation 2 provides a definition of medical treatment for the purposes of the Regulations as follows: “*medical treatment*” means *medical, surgical or rehabilitative treatment (including any course or diet or other regimen) and references to a person receiving or submitting to medical treatment are to be construed accordingly*. Regulation 16(2) also contains a definition of “medical treatment” for the purposes of regulation 16(1) as follows: “*medical treatment*” means *medical, surgical, psychological or rehabilitative treatment (including any course or diet regimen)*. These appear to be the only places where the term medical treatment is used.
- a. Please explain why there is a need for a separate definition of medical treatment in regulation 16.
 - b. Please explain why psychological treatment is excluded from the primary definition in regulation 2.
 - c. The parentheses in the definitions are different. Is this intentional, and if so, why?
4. Regulation 17(4)(b) refers to “a child in respect of whom a person listed in paragraph (2)(a) has a relationship equivalent to those listed under the law of Scotland”. Paragraph (2) does not contain a sub-paragraph (a). Should the reference be to “a relevant individual listed in paragraph (3)(a)”?
5. Regulation 17(4) includes a definition of “civil partnership” and states that this must be read as including a reference to marriage of a same sex couple. Regulation 17(4) also includes a definition of “person living with another person as if they were in a civil partnership” which must be read as including a reference to a person who is living with another person of the same sex as if they were married. As legislation now provides for same sex couples to be married and for mixed sex couples to enter into civil partnerships, please explain why it is considered necessary to highlight that interpretation of these terms applies specifically to same sex couples, rather than couples comprising persons of any gender?
6. Regulations 27(4) and (5)(b) and 32(3) and (4)(b) make provision in relation to entitlement to Adult Disability Payment where a person is resident in a care home which depends on how the costs of any “qualifying services” are met. Likewise, regulation 2 states that a “residential educational establishment” means a care home which provides education or training except for one where the costs of any “qualifying services” are borne wholly or partly out of public or local funds by virtue of education legislation. In the absence of any definition in the instrument, is it sufficiently clear what services the term “qualifying services” encompasses?
7. Regulation 48(c)(iv) and 48(d)(iv) refer to a “re-consideration”. This should instead refer to a “redetermination” in line with the wording in section 13 of the Social Security

Act 1998 (referred to in those regulations).

8. Is it the intention, and if so please explain why, that paragraph 1(5) of Part 1 of Schedule 2 refers specifically and only to regulation 48(b) as opposed to regulation 48 more generally?
9. Please confirm whether any corrective action is proposed, and if so, what action and when.

On 11 January 2022, the Scottish Government responded:

1. We consider that the definition at regulation 2 was included in error and is not necessary, given that the definition is contained in the Interpretation and Legislative Reform (Scotland) Act 2010.
2. Regulation 7(2) relates to how an individual's ability to carry out both daily living and mobility activities is to be determined. As a result, regulation 7(2)(a) should refer to both the tables at part 2 and part 3 of schedule 1.
3. We agree that the definition in regulation 2 is not required, as regulation 16 is the only place where defined term appears. The definition provided at regulation 16 is the one that we intend to apply. The correct definition is therefore the one which is included in regulation 16. This is consistent with the definition used in the Disability Assistance for Children and Young People (Scotland) Regulations 2021 too. It is considered that both definitions would have the same legal effect, as in the absence of explicit reference to 'psychological', psychological treatment would be caught by the reference to 'medical' treatment. The reference to psychological treatment is included for clarity only and does not alter the legal effect. Similarly, the parenthesis acts to be clear that any course or diet regimen is included within the definition of medical treatment. Specifying only these elements does not exclude any other kind of course or regimen. Whilst therefore the definition at regulation 2 refers to an 'other regimen', the exclusion of these words at regulation 16 does not prevent anything from being included. It is not anticipated that any further regimens beyond courses or diet regimens are likely to arise in practice.
4. The reference in Regulation 17(4)(b) should be to a relevant individual listed in paragraph (3)(a).
5. The definitions of "civil partnership" and "person living with another person as if they were in a civil partnership" were included for the avoidance of any doubt that these terms include same sex couples. However, on reflection we agree that these references are not necessary on the basis that both marriages and civil partnerships can both be entered by same sex and mix sex couples.
6. The definition of "qualifying services" is intended to mean accommodation, board and personal care. This will be clearly set out in guidance for the decision makers. However, we agree that it will be helpful to also include this definition within the regulations.
7. Regulation 48(c)(iv) and 48(d)(iv) expressly relate to a decision made pursuant to a re-consideration under section 13 of the Social Security Act 1998. It is that decision, rather than the re-consideration referred to in regulations 48(c)(iv) and 48(d)(iv), that is the re-determination referred to in section 13 of the 1998 Act. The action taken under section 13 of the 1998 Act is not itself a re-determination – rather, it is a

decision made by the First-tier Tribunal to set aside a previous decision and refer the case to a differently constituted First-tier Tribunal for a new decision. We therefore consider it appropriate to use the term ‘re-consideration’ to describe the action taken by the First-tier Tribunal under section 13.

8. It is the intention that paragraph 1(5) of Part 1 of Schedule 2 refers to regulation 48(b) rather than regulation 48 as a whole. Regulation 48(b) makes provision for a determination without application to occur when the individual has died. In all instances where such a determination occurs, the individual’s assistance will come to an end. The provision at paragraph 1(5) of Part 1 of Schedule 2 is to make clear that in those instances, there cannot be a claim for Short-term Assistance. In the other instances where a determination without an application can occur under regulation 48, if the individual were to have a reduction in their Adult Disability Payment, or their entitlement were to cease, then subject to satisfying the other eligibility criteria for Short-term Assistance, the individuals should in those instances be able to apply for short-term assistance.
9. In response to question 1, it is not proposed that an amendment will be made at this time. Whilst the definition of ‘EU withdrawal agreement’ is not necessary, it does not have any adverse legal effect. We intend to bring forward amending regulations to remove this definition when a suitable opportunity arises.

In terms of question 2, it is proposed that there can be a purposive reading of regulation 7(2)(a), taken in the context of regulation 7 as a whole, so that it will in practice be applied to both daily living and mobility activities for the duration of the pilot period. An amendment will be made to include a reference to column 2 of the schedule at part 3 of schedule 1 within regulations to be laid ahead of national roll-out of Adult Disability Payment.

For question 3, the correct definition of “medical treatment” is that included within regulation 16, and as this regulation is the only place at which the term is used, we consider it to be sufficiently clear that this is the definition to be applied in interpreting regulation 16. We do not therefore think that an amendment requires to be made at this point and will make an amendment to remove the definition at regulation 2 within regulations to be laid ahead of national roll-out of Adult Disability Payment.

For question 4, it is proposed that this amendment will be made with a correction slip.

For question 5, we do not consider that the reference to same sex couples has adverse legal effect and so do not propose to amend it at this point. We will consider amending this at the next opportunity.

For question 6, we consider that guidance will allow “qualifying services” to be correctly interpreted during the pilot period of Adult Disability Payment, and propose that we will make an amendment to add the definition within regulations to be laid ahead of national roll-out of Adult Disability Payment.

For question 7, we do not consider that any amendment is needed.

For question 8, we also do not consider that any amendment is needed.

On 5 January 2022 the Scottish Government was asked:

Article 27 of the Order inserts a new Schedule 8A into The Greenhouse Gas Emissions Trading Scheme Order 2020 (S.I. 2020/1265). Paragraph 4(3) of Schedule 8A makes reference to Commission Delegated Regulation (EU) 2019/331 of 19 December 2018 (the 'Free Allocation Regulation' as defined by Article 4(1) of the 2020 Order). Paragraph 4(3) provides:

"The final annual number of allowances to be allocated in respect of a sub-installation for an eligible scheme year is the preliminary annual number of allowances to be allocated for the scheme year calculated under Article 16 of the Free Allocation Regulation (including any corrections required under Article 16(11)) multiplied by the reduction factor for the scheme year (as defined in Article 18(11) of the Free Allocation Regulation)."
[emphasis added in bold]

We note the reduction factor for the scheme year is not defined in Article 18 of the Free Allocation Regulation. However, Article 18a(11) does define the reduction factor for the scheme year by reference to the table in that paragraph.

1. Please confirm whether the reference to Article 18(11) in paragraph 4(3) of Schedule 8A should be to Article 18a(11)?
2. If so, please confirm what corrective action is proposed and by when.

On 12 January 2022 the Scottish Government responded:

1. The reference to Article 18(11) of the Free Allocation Regulation in paragraph 4(3) of schedule 8A (inserted by article 27 of the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 (S.I. 2021/1455)) is a typographical error. We are grateful to the Scottish Parliament for raising this point. The reference should be to Article 18a(11).
2. Policy for the Greenhouse Gas Emissions Trading Scheme Order 2020, and any amendments to that Order, are developed in conjunction with the UK Government, Welsh Government and Northern Ireland Executive. The Scottish Government is liaising with colleagues in those administrations with a view to correcting this error at the next available opportunity.

Nutritional Requirements for Food and Drink in Schools (Scotland) Amendment Regulations 2021 (SSI 2021/481)

On 20 December 2021, the Scottish Government wrote to the Presiding Officer:

The Nutritional Requirements for Food and Drink in Schools (Scotland) Amendment Regulations 2021, SSI 2021/481 was made by the Scottish Ministers under sections 56A, 56B and 56D of the Education (Scotland) Act 1980 on 20 December 2021. It is being laid before the Scottish Parliament today, 20 December 2021 and comes into force on 21 December 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) of that Act, this letter explains why.

All education authorities and managers of grant-aided schools are required to comply with the Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2020 (“the 2020 Regulations”). On April 2021, the 2020 Regulations came into effect replacing the previous 2008 Regulations of the same name. The 2020 Regulations specify the food and drink standards and lunch nutrient standards for schools and are therefore very specific about what food and drink can and cannot be provided.

Education authorities have raised concerns at being unable to procure certain food and drinks as a result of current disruption to the school food supply chain and the effect this would have on their ability to meet their duties under the 2020 Regulations. For example, the 2020 Regulations prescribe a minimum fibre content for bread and in the event that only bread with a lower fibre content could be provided to pupils, that would result in a breach of the statutory requirements.

The SSI amends the 2020 Regulations to make provision for the circumstances where an education authority or the managers of a grant aided school, despite their best endeavours, are unable to provide food or drink that complies with a requirement in the 2020 Regulations because of local or national disruptions to the supply of food that are outwith their control. In such circumstances, food or drink that is not compliant with the 2020 Regulations may be provided.

Education authorities are already experiencing difficulties in procuring compliant products and as such the risk of them failing to comply with one or more of the requirements in the 2020 Regulations is significant. Ministers consider that it is necessary to take proactive steps to address and manage this risk and that, consequently, this SSI should be brought into force as soon as possible rather than waiting for the 28 day period to elapse.

Statutory guidance, published today, has been developed to assist education authorities and managers of grant aided schools with the implementation of the provision created by the Nutritional Requirements for Food and Drink in Schools (Scotland) Amendment Regulations 2021.

Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 (SSI 2021/493)

On 7 January 2022 the Scottish Government was asked:

1. The instrument was laid on 22 December 2021 and came into force on 1 January 2022 during a recess period. The instrument breaches the laying requirements in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 which sets out that an instrument subject to negative procedure must be laid before the Scottish Parliament at least 28 days before the instrument comes into force.

The letter to the Presiding Officer dated 22 December 2021 indicates that the original intention was that these measures would have been incorporated into a UK SI and that a Type 1 consent notification was sent to the Scottish Parliament on this basis on 6 December 2021. As part of explaining why the measures are now made instead by this SSI, it states:

“However since the terms of the original notification were submitted, the UK Government decided on 10 December 2021 - without any engagement with Scottish Ministers whatsoever – to make a number of significant changes to border policy due to come into force from the 1 January 2022. This fundamentally changed the terms of the instrument, and is yet further evidence of the wholly unsatisfactory way in which

the UK Government continues to approach development and implementation of legislation needed to ensure that there is an appropriate border operating model after EU exit.”

a) Please outline what the significant changes to border policy referred to above are.

b) As the accompanying Policy Note indicates, it has been known to both the Scottish and UK Governments since at least 14 September 2021, when the UK Government announced the most recent changes to its Border Operating Model, that changes to the end of the transition period would need to be made by the end of December 2021. Please explain why the policy could not have been clarified much earlier to allow the laying requirements to be complied with.

c) Please provide further details of the “way in which the UK Government continues to approach development and implementation of legislation needed to ensure that there is an appropriate border operating model after EU exit”.

2. Regulation 2 of the instrument substitutes regulation 2 of the Official Controls (Extension of Transitional Periods) Regulations 2021 (SI 2021/809) with new provision. Regulation 1(2) of SI 2021/809 provides that regulation 2 (among others) of that SI extends to England and Wales, and Scotland. Please explain why it is not considered necessary to include an extent provision.
3. Please explain whether any corrective action is proposed and, if so, what action and by when.

On 11 January 2022 the Scottish Government responded:

1. a) The original notification was in respect of provisions in relation to Scotland replacing the dates for the ending of the transitional staging period as set out in the Official Controls (Extension of Transitional Periods) Regulations 2021 with 30 June 2022, and making an amendment to regulation 52 of the Plant Health (Amendment etc.) (EU Exit) Regulations 2020 to provide for the change to the end date of the transitional staging period to be reflected in that transitional provision. The additional changes to border policy which were decided by the UK Government on 10 December 2021 and were made, for England and Wales, on 15 December 2021 in the Official Controls (Extension of Transitional Periods) (England and Wales) (Amendment) (No. 2) Regulations 2021 are:

- a requirement from 1 January 2022 for pre-notification of the import of animal by-products which were not already subject to pre-notification requirements;
- an exemption from the requirement to give prior notification of the arrival of certain animal products, plants, plant products and other objects which form part of passengers’ personal luggage and are intended for personal consumption or use, and small consignments of such goods sent to natural persons and which are not intended to be placed on the market;
- an exemption from the requirement to give prior notification of the arrival of certain animal products, plants, plant products and other objects imported from the Republic of Ireland.

1. b) The UK Government did not engage in discussions with the Scottish Government at an earlier stage on these additional changes which would have allowed the laying requirements to be complied with. The Scottish Government therefore withdrew consent to

the SI to allow a short period of consideration of the appropriateness of the further changes. This meant that the SI no longer covered either (i) the changes that the Scottish Government was already considering consenting to or (ii) the additional changes. Where the Scottish Government was aware of legislative changes which needed to be made before the end of December 2021 to give effect to changes to the Border Operating Model announced on 14 September 2021, and was not considering consenting to the Secretary of State legislating in relation to Scotland, the Scottish Government complied with the laying requirements for SSIs: see the Animal Products (Transitional Import Conditions) (Miscellaneous Amendment) (Scotland) Regulations 2021.

1. c) Before the end of the Implementation Period, the Scottish Government consented to the UK Government legislating for a transitional staging period for sanitary and phytosanitary measures on imports which would come to an end on 31 July 2021 (or such other date as the appropriate authority may by regulations appoint) and with certain requirements to be phased in from 1 April 2021 in the Official Controls (Animals, Feed and Food, Plant Health etc) (Amendment) (EU Exit) Regulations 2020. A notification was sent to the Parliament on 20 October 2020 in accordance with the protocol, and legislation (the Trade in Animals and Related Products (EU Exit) (Scotland) (Amendment) Regulations 2020) which also included provision for the phasing of certain requirements from 1 April 2021 complied with laying requirements for a draft affirmative instrument. Legislation specific to phytosanitary import measures which came into force for the end of the Implementation Period was introduced in the Plant Health (Amendment) (EU Exit) Regulations 2020 which was notified to the Parliament on 28 September 2020 in accordance with the protocol.

The Scottish Government was informed on 11 March 2021, shortly before the Scottish Parliament entered recess, of a decision of the UK Government to amend the end date of the transitional staging period and delay the sanitary and phytosanitary measures which were to apply from 1 April 2021. Given the Parliamentary recess dates there was no scope to bring forward an SSI which would have complied with laying requirements, or for the Scottish Parliament to have 28 days to consider under the Protocol whether the changes should be consented to. The legislative changes were given effect to by the UK Government in the Trade and Official Controls (Transitional Arrangements for Prior Notification) (Amendment) Regulations 2021 which was made on 30 March, and came into force and was laid the next day, in breach of laying requirements in the UK Parliament, and the Official Controls (Extension of Transitional Periods) Regulations 2021. These instruments provided that the end date of the transitional staging period would, in certain cases be on 30 September 2021 or 31 December 2021 and in all other cases would be on 28 February 2022, and amended the phased introduction of certain requirements

In discussion with the UK Government, the Scottish Government made preparations to deliver, from 1 October 2021 the measures required for animal products, in line with the UK Government announcement of 11 March 2021. The legislative changes necessary to deliver these in Scotland were made by SSI, the Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) Regulations 2021, which were laid on 2 September 2021 and came into force 1 October 2021 in compliance with laying requirements.

On 14 September 2021 the UK Government, without collaboration or discussion with the Scottish Government, announced further changes to the transitional staging period and the phasing of requirements within it. In order to prevent the disruption of imports into Scotland, the Scottish Government found it necessary to legislate in the Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 2) Regulations

2021 to postpone measures which were due to come into effect on 1 October 2021. Because of the date on which this unilateral decision of the UK Government was taken, regrettably this instrument could not and did not comply with the laying requirements.

As above, the Scottish Government legislated in compliance with the laying requirements for some of the remaining legislative changes necessary before the end of December 2021 to give effect to the UK Government's announcement of 14 September 2021 in the Animal Products (Transitional Import Conditions) (Miscellaneous Amendment) (Scotland) Regulations 2021.

The changes announced by the UK Government on 10 December 2021 are a further example of a decision taken by the UK Government without collaboration or discussion sufficiently in advance with the Scottish Government to allow the laying requirements for a SSI, or the time periods for a notification under the Protocol for a SI, to be complied with. The instrument made by the UK Government (the Official Controls (Extension of Transitional Periods) (England and Wales) (Amendment) (No. 2) Regulations 2021) also did not comply with laying requirements in the UK Parliament.

2. It is not considered necessary to include an extent provision because the enabling power being exercised is expressly only exercisable in relation to Scotland by the Scottish Ministers: see paragraph 2 of Annex 6 to, and Article 3(2A)(c) of, Regulation (EU) 2017/625.

3. No corrective action is proposed in relation to the Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021.

On 22 December 2021, the Scottish Government wrote to the Presiding Officer:

The Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No.3) Regulations 2021, were made by the Scottish Ministers under Article 144(6) of, and paragraph 2 of annex 6 to Regulation (EU) 2017/625 and paragraph 1(1) and (3) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union Withdrawal Act 2018 on Tuesday 21 December 2021, and will be laid before the Scottish Parliament on Wednesday 22 December. The Regulations have a coming into force date of 1 January 2022.

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. To meet the requirements of section 31(3) of that Act, this letter provides an explanation.

The policy intent of these Regulations relates to controls on imports to Scotland known collectively as sanitary/phytosanitary measures (SPS) and replaces the dates for the ending of the transitional staging period (TSP), as set out in the Official Controls (Extension of Transitional Periods) Regulations 2021^[1] with a single date – 30 June 2022 – so that the Official Controls Regulation^[2] will apply fully to all SPS goods entering Great Britain from 1 July 2022. In particular it is necessary for these Regulations to come into force on 1 January 2022 in order to extend, along with England and Wales, transitional measures which were due to end on that date.

It had been the original intention that these measures would have been incorporated into a UK Statutory Instrument, “the Official Controls (Extension of Transitional Periods) (England and Wales) (Amendment) (No.2) Regulations 2021”^[3] that was made on 15 December 2021 and I wrote to the Rural Affairs, Islands and Natural Environment Committee on that

basis on 6 December 2021.

However since the terms of the original notification were submitted, the UK Government decided on 10 December 2021 - without any engagement with Scottish Ministers whatsoever – to make a number of significant changes to border policy due to come into force from the 1 January 2022. This fundamentally changed the terms of the instrument, and is yet further evidence of the wholly unsatisfactory way in which the UK Government continues to approach development and implementation of legislation needed to ensure that there is an appropriate border operating model after EU exit.

Against this background the Scottish Government could no longer consent to the Secretary of State legislating in relation to Scotland for these changes and I indicated to the Committee on 15 December 2021 that the notification that was submitted on 6 December 2021 was to be withdrawn. In that letter I outlined to the Committee that this separate Scottish statutory instrument would be forthcoming, thereby giving effect from 1 January 2022 to changes that the Scottish Government considers appropriate.

[1] S.I. 2021/809

[2] Regulation (EU) 2017/625

[3] S.I 2021/1443

