DELEGATED POWERS AND LAW REFORM COMMITTEE

2nd Meeting, 2022 (Session 6)
Tuesday, 18 January 2022

Instrument Responses

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) 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.

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

On 17 December 2021 the Scottish Government was asked:

1. Regulation 5(a) of the instrument inserts a definition of "non-Scottish article" into regulation 3(2) of the principal regulations. Could the term "non-Scottish article" be confusing for the reader given that the key feature of the articles which are identified by this term appears not to be their lack of Scottishness but that they are sold wholesale rather than retail? The definition is used only for one purpose,

namely creating the new offence in regulation 5(3A) of the principal regulations (inserted by regulation 6(b) of the instrument). That offence only applies to

articles which a person "markets, offers for sale or sells… in Scotland" to a purchaser other than a consumer, so it would be helpful if an explanation could be provided as to why "non-Scottish article" is an appropriate and sufficiently clear definition.

2. Regulation 11(d) of the instrument inserts a new paragraph (11) into regulation 30 of the principal regulations. Paragraph (11) provides that information obtained as a result of the exercise of an enforcement power under paragraph (4) is admissible in evidence against that or any person in any proceedings. The provision is not caveated by reference to the standard rules on the admissibility of evidence, so would appear to mean that any information obtained under paragraph (4) is admissible even if it would be inadmissible at common law or under another statutory rule. The provision makes such information admissible in "any proceedings", not just proceedings connected with these regulations. The enforcement powers are wide, and include not just the gathering of documentary information but also (among other things) answers provided to such questions as the authorised person thinks fit to ask. It appears that the provision could, for example, render hearsay evidence admissible in proceedings (for example proceedings for an unconnected offence) in which it would not otherwise be admissible. Could further information be provided on the compatibility of this provision with Convention rights?

3. Regulation 14 of the instrument substitutes paragraph 6 of schedule 4 of the principal regulations. New regulation 6(b) restates the wording that was in brackets in regulation 6 of the principal regulations, which provided: "(or in the case of producers registered through a scheme administrator, that scheme administrator on their behalf)". The original drafting appeared to require the scheme administrator to be in agreement that the applicant will operate a return point on behalf of the relevant producers, whereas the restated requirement is simply confirmation of agreement to the applicant operating a return point (without specifying on whose behalf that return point will be operated). Is that the intention? In new regulation 6(c), similarly is the intention that the scheme administrator being in agreement that the application may operate a return point is enough, without specifying on whose behalf the return point will be operated?

On 11 January 2022 the Scottish Government responded:

1. The Scottish Government does not consider that the term "non-Scottish article" will be confusing for a reader. The issue is not simply about whether there is a wholesale or retail sale of an article in Scotland. As is mentioned in the question, these articles will be being sold in Scotland, but the key issue is not where they are sold, but is rather the fact these articles are not part of the Scottish DRS scheme because they are not intended (at any time) for placing on the market in Scotland for retail sale. Producers and wholesalers operating in Scotland will have articles which are part of the Scottish DRS scheme and articles which are not part of that scheme given the ultimate sale destination of those articles. They may even choose to use labelling to distinguish between articles which are to be part of the Scottish scheme and those which are not to be part of it. We therefore consider that for operators in the market in Scotland, this term will not be confusing and they will clearly understand what a non-Scottish article is. During the drafting of the

amending regulations, the Scottish Government consulted the Scottish Wholesale Association (whose members represent a sizeable proportion of the persons who will be dealing with this obligation day to day); they were aware of the likely terminology of "non-Scottish article" and they did not express any concerns.

2. The Scottish Government does not consider that the new paragraph (11) inserted into regulation 30 of the principal regulations would mean that any information obtained under paragraph (4) of regulation 30 is admissible even if it would be inadmissible at common law or under another statutory rule. The enforcement powers given to SEPA under the principal regulations are very similar to the existing powers available to SEPA under section 108 of the Environment Act 1995 in relation to the enforcement of a variety of environmental legislation; paragraph 4 of schedule 18 of that Act makes similar provision to the new paragraph (11) with no caveat regarding standard rules. We consider that clear provision would be required to displace the standard rules of evidence; it would be for the judge or sheriff in any particular case to determine on the standard rules of evidence what is admissible or not. The specific rules of admissibility would not cede to general provision in the regulations making the evidence admissible. It is necessary for the provision to refer to "any proceedings" since the proceedings might be for another offence, such as fraud or attempting to pervert the course of justice. It should also be noted that regulation 30(9) of the principal regulations provides that nothing in paragraph (4) is to be construed as requiring any person to answer a question which might incriminate themselves; the new paragraph (11) applies to information obtained as a result of the exercise of a power under paragraph (4) and therefore the protection of paragraph (9) from self-incrimination also applies.

3. As noted in the question, the original drafting of paragraph 6 of schedule 4 of the principal regulations required the scheme administrator to be in agreement that the applicant will operate a return point on behalf of the producers – those would be the producers who are registered with that scheme administrator. It is not correct that the restated requirement is that there should simply be confirmation of agreement to the applicant operating a return point without specifying on whose behalf that return point will be operated. The new wording in paragraph 6(b) makes clear, in the case of producers registered through a scheme administrator, that the requirement is that the scheme administrator *on behalf of the producers* has agreed that the applicant may operate a return point. Again, those are the producers registered with that scheme administrator, and the scheme administrator can only agree on behalf of producers registered with it.

   In the new paragraph 6(c), the intention is that it is enough for the scheme administrator simply to agree to the operation of return point, precisely because at that point there can be no agreement about acting on behalf of certain producers since no producers are registered (whether directly with SEPA or via the scheme administrator). The provision will only apply in the preparatory stages of the DRS scheme during which the scheme administrator has already been appointed and no producers have yet registered (whether directly with SEPA or via the scheme administrator). The intention behind the provision is to allow applications for voluntary return points to be submitted during 2022 even though producer registration and the go-live date for the DRS scheme have been delayed. As soon as any producers are registered (whether directly with SEPA or via the scheme administrator) then only paragraph 6(a) or (b) can apply.

Disability Assistance for Working Age People (Scotland) Regulations 2022 (2021/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.

<u>On 11 January 2022, the Scottish Government responded:</u>

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.

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

<u>On 24 December 2020 the Scottish Government was asked:</u>

It is noted that regulation 1(3) which provides for the commencement of regulations 2 and 3 is tied to a future event of the Scottish Parliament passing legislation that re-enacts paragraph 12 of schedule 7 of the Coronavirus (Scotland) Act 2020. The accompanying policy note explains that the legislative basis for digital submission was introduced in paragraphs 11 to 14 of schedule 7 of the Coronavirus (Scotland) Act 2020 and paragraph 3 of schedule 4 of the Coronavirus (Scotland) (No. 2) Act 2020.

Paragraphs 11-14 modify the Land Registration etc. (Scotland) Act 2012 and the Land Registers (Scotland) Act 1868 for the duration of the 2020 Act, to make provision for registration in the Land Register and recording in the Register of Sasines to proceed on a copy of a deed submitted to the Keeper by electronic means.

Paragraphs 11 and 12 of Schedule 7 make provision for the Land Register and paragraphs 13 and 14 make provision for the Register of Sasines. More specifically paragraph 12 modifies Section 21 of the 2012 Act and paragraph 14 modifies section 6A of the 1868 Act.

(1) In absence of an explanation in the policy note, which refers to paragraphs 11-14 of Schedule 7 of the 2020 Act, why does the commencement provision in regulation 1(3) of the instrument only cite the re-enactment of paragraph 12 of Schedule 7 of the Coronavirus (Scotland) Act 2020?
(2) What is the effect on the regulations if paragraph 12 of schedule 7 of the Coronavirus (Scotland) Act 2020 is not re-enacted by an Act of the Scottish Parliament (with or without modification)?

(3) Is it appropriate to have regulations on the statute book that are in part dependent upon the Scottish Parliament passing primary legislation in a particular way?
(4) Is the operation of regulation 1(3) sufficiently clear to a reader of the regulations that may not be familiar with the referenced provisions of the 2020 Act?
(5) Is it sufficiently clear how the commencement of regulations 2 and 3 will be determined when the legislation upon which commencement is directly linked is not known or referred to in these regulations?

(6) Please confirm whether any corrective action is proposed, and if so, what action and when.

<u>On 11 January 2022 the Scottish Government responded:</u>

(1) The intention behind the commencement provision in regulation 1(3) citing only the re-enactment of paragraph 12 of schedule 7 of the Coronavirus (Scotland) Act 2020 was to avoid uncertainty if more than one provision re-enacted were referred to in the commencement provision.
(2) If paragraph 12 of schedule 7 is not re-enacted by Act of the Scottish Parliament, regulations 2 and 3 will not come into force. In those circumstances, those regulations can be revoked.
(3) In this case, it is considered that it is appropriate to place regulations on the statute book dependent upon the Scottish Parliament passing primary legislation in a particular way. That is because the effect of the commencement provision is sufficiently certain for the reasons noted at (2) above and (5) below, and because if Parliament passes the Bill provisions, and approves this instrument under the affirmative procedure, Parliament will have agreed both the provisions in the regulations and in the Bill.
(4) We consider the operation of regulation 1(3) will be clear from the terms of regulation 1(3), together with the provisions of the primary legislation should paragraph 12 of schedule 7 be re-enacted by the forthcoming Bill Regulation 1(3) cross-refers to one of the run of provisions in paragraphs 11 to 14 of that schedule in particular, which are available to the reader, and the intention is mentioned in the Explanatory Note which refers to the schedule. This can be read with the Policy Note to make the context and intention clear to a reader who may not be familiar with the referenced provisions of the 2020 Act. The intention is that the forthcoming Bill will re-enact provisions in very similar terms to paragraphs 11 to 14 of schedule 7 of the Coronavirus (Scotland) Act 2000.
(5) We consider it will be sufficiently clear how the commencement of regulations 2 and 3 will be determined, because the Bill provision will re-enact the provision made by paragraph 12 specifically (with or without modification, following the words used to describe re-enactment in the Interpretation and Legislative Reform (Scotland) Act 2010 and the Interpretation Act 1978 etc.), or it will not, in which case the provision will not come into effect as noted above. Accordingly, the matter will be put beyond doubt in due course in accordance with the relevant provisions, if the Parliament is content to agree to the provisions of the Regulations and to pass re-enacting Bill provisions.
(6) We would be happy to add a more specific reference to paragraphs 11 to 14 of schedule 7 of the Coronavirus (Scotland) Act 2020 to the Explanatory Note if the Committee considers that would be helpful. Once Bill provisions are before the Parliament, which is planned shortly, greater specification could also be

provided in the Policy Note of the proposed re-enacting Bill provisions, as well as of the provisions to be re-enacted.

Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 (SI 2021/1455)

On 5 January 2022 the Committee asked the Scottish Government:

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.

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

<u>On 11 January 2022 the Scottish Government responded:</u>

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.