

Delegated Powers and Law Reform Committee

30th Meeting, 2023 (Session 6), Tuesday, 7
November 2023

Instrument Responses

Retained EU Law (Revocation and Reform) Act 2023 (Consequential Amendments) (Scotland) Regulations 2023 (SSI 2023/Draft)

On 27 October 2023, the Committee asked the Scottish Government

The explanatory note states that the instrument makes amendments to domestic legislation in consequence of the renaming of retained EU law (and related terms) as assimilated law (and related terms) as set out in section 5(1) of the Retained EU Law (Revocation and Reform) Act 2023. This instrument updates terminology used in sections 26 and 45 of the Freedom of Information Act 2002.

It appears that those terms were not updated from “EU obligation” to “retained EU obligation” but are now being updated to “assimilated obligation”. Please could you confirm whether those terms were updated to “retained EU obligation” by virtue of another piece of legislation?

If not, please could you explain why you consider that the power in section 19 of the 2023 Act enables the Scottish Ministers to make this amendment by virtue of these regulations?

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

On 31 October 2023, the Scottish Government responded:

Sections 26(b) and 45(2)(c)(ii) of the Freedom of Information (Scotland) Act 2002 (“FOISA”) have not been updated from “EU obligation” to “retained EU obligation”. This change could have been made following enactment of the European Union (Withdrawal) Act 2018, but the Scottish Government’s view is that the power in section 19 of the Retained EU Law (Revocation and Reform) Act 2023 (“the REUL Act”) is sufficient to amend “EU obligation” to assimilated obligation”.

Section 5(1) of the REUL Act establishes “assimilated obligation” as a legislative term given a meaning in the statute book by that section and schedule 2 of the REUL Act (which takes effect at the end of 2023). Paragraph 2 of that schedule inserts the term “assimilated obligation” into schedule 1 of the Interpretation Act 1978, and paragraph 7(4) inserts it into schedule 1 of the Interpretation and Legislative Reform

(Scotland) Act 2010¹. Section 19 of the REUL Act enables the Scottish Ministers (as a “relevant national authority”) to “*make such provision as the relevant national authority considers appropriate in consequence of this Act*”.

In consequence of the establishment of “assimilated obligation” as a defined term within the body of assimilated law by section 5 and schedule 2 of the REUL Act, it is the Scottish Government’s view that it is appropriate that the amendments to FOISA are to be made by this instrument.

Section 19(2) also confirms that the consequential power in section 19(1) includes power to make provision modifying any enactment, including an Act of the Scottish Parliament (by virtue of the definitions of “enactment” and “primary legislation” in section 21(1) of the REUL Act).

¹ “assimilated obligation” means an obligation that-

- (a) was created or arose by or under the EU Treaties before IP completion day, and
- (b) forms part of assimilated law,

as modified from time to time.