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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate Legislation considered on 27 June 2017



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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.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 27 June 2017, the Committee agreed to draw to the attention of the Parliament the following instruments—
 - Loch Carron Urgent Marine Conservation (No. 2) Order 2017 (SSI 2017/205)
 - Building (Miscellaneous Amendments) (Scotland) Amendment Regulations 2017 (SSI 2017/214)
 - Act of Sederunt (Summary Application Rules 1999 Amendment) (Trafficking and Exploitation Orders) 2017 (SSI 2017/211)
2. The Committee's recommendations and conclusions in relation to these instruments are set out in the following chapters of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out by the relevant lead committee at the end of this report.

Instruments subject to negative procedure

[Loch Carron Urgent Marine Conservation \(No. 2\) Order 2017 \(SSI 2017/205\)](#) (Environment, Climate Change and Land Reform)

Purpose

4. This Order urgently revokes and replaces the Loch Carron Urgent Marine Conservation Order 2017 (SSI 2017/158). This is due to the Loch Carron Marine Protected Area being re-designated by the Loch Carron Nature Conservation Marine Protected Area (No. 2) Order 2017 (*“the MPA Order”*).
5. The MPA Order has re-designated Loch Carron as a nature conservation marine protected area (the Loch Carron MPA), with effect from 15 June. The MPA Order provides that the flame shell beds within Loch Carron are protected features.
6. The Order is subject to the negative procedure and came into force on 15 June 2017.

Breach of the "28 day rule"

7. The Order fails to comply with the “28 day rule” contained in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”). It was made and laid before the Parliament on 14 June 2017 and came into force on 15 June 2017.
8. The “28 day rule” provides that where a Scottish statutory instrument is subject to the negative procedure, it must be laid at least 28 days before the instrument comes into force. A breach of the rule does not affect the validity of the Order.
9. In accordance with section 31 of ILRA, the Head of Marine Conservation, Marine Scotland, wrote to the Presiding Officer on 14 June 2017 to explain why the requirements of section 28(2) have not been met in this case. The correspondence has been reproduced at Annex A.
10. The letter explains that the original Order (SSI 2017/158) was brought into force on 20 May 2017. As a consequence of the revoking and re-making of the MPA Order, this Order is required to revoke and replace SSI 2017/158, to make reference to the corrected MPA Order.
11. The Committee accepts that in these circumstances, it has been necessary to bring this Order into immediate effect, to ensure there is continuity of effect of the protective measures for the Loch Carron MPA contained in the Order. The letter explains that the only way to have ensured continuity was for both the re-made MPA Order and this Order to have taken effect on the same day.

Recommendation

12. **Accordingly, the Committee draws the Order to the attention of the Parliament under reporting ground (j), as there has been a failure to lay it in accordance with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**

The Order was made and laid before the Parliament on 14 June 2017 and came into force on 15 June 2017. It does not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.

13. **The Committee finds the failure to comply with section 28 to be acceptable in the circumstances as outlined in correspondence received from the Scottish Government to the Presiding Officer on 14 June 2017.**

[Building \(Miscellaneous Amendments\) \(Scotland\) Amendment Regulations 2017 \(SSI 2017/214\) \(Local Government and Communities\)](#)

Purpose

14. These Regulations amend the Building (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/188) which the Committee considered at its meeting on 20 June 2017.
15. They urgently correct the drafting error which the Committee reported for SSI 2017/188 and also make a change to implement the desired policy.
16. The Regulations are subject to the negative procedure and come into force on 30 June 2017.

Breach of the "28 day rule"

17. Similar to the Loch Carron Urgent Marine Conservation (No. 2) Order 2017 (SSI 2017/205) already mentioned in this report, the Order fails to comply with the "28 day rule" contained in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA"). It therefore fails to comply with the requirements of section 28(2) of ILRA.
18. The Regulations were made and laid before the Parliament on 20 June 2017 and come into force on 30 June. They therefore fail to comply with the requirements of section 28(2) of ILRA.
19. The Committee considered the reasons provided in the letter to the Presiding Officer of 20 June 2017 for the Scottish Government's decision to breach the "28 day rule" (See Annex B). The letter from the Building Standards Division of the Scottish Government explains that there is an urgent (but not emergency) need to bring the instrument into force for public safety reasons. Accordingly it is brought into force timeously for the coming into force of SSI 2017/188 on 1 July.
20. The Committee therefore accepts the urgent requirement in this instance to bring the Regulations into force in breach of the "28 day rule".

Recommendation

21. **The Committee draws the Regulations to the attention of the Parliament under reporting ground (j), as there has been a failure to lay them in accordance with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**

The Regulations were made and laid before the Parliament on 20 June 2017 and come into force on 30 June 2017. They do not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.

22. **The Committee finds the failure to comply with section 28 to be acceptable in the circumstances as outlined in correspondence received from the Scottish Government to the Presiding Officer on 20 June 2017.**

Instruments not subject to any parliamentary procedure

Act of Sederunt (Summary Application Rules 1999 Amendment) (Trafficking and Exploitation Orders) 2017 (SSI 2017/211) (Justice)

Purpose

23. This Act of Sederunt amends the Summary Applications, Statutory Applications and Appeals etc. Rules 1999 in consequence of the Human Trafficking and Exploitation (Scotland) Act 2015.
24. The instrument is laid but not subject to any parliamentary procedure under section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.
25. The provisions generally, including those relating to trafficking and exploitation prevention orders, come into force on 30 June 2017. The provisions relating to trafficking and exploitation risk orders come into force on 31 October 2017.

Comment

Timing

26. The instrument was laid on 20 June 2017. As a result, there was no time available for formal questions and a response to be issued and received in time for the Committee's final meeting before the summer recess.
27. It is appropriate for the Committee to consider this instrument before the recess because an error has been identified in relation to a provision which commences on 30 June 2017 (with an error of the same nature being identified in relation a provision commencing on 31 October 2017). This affords the Committee an opportunity to comment on the drafting error in respect of the provision commencing on 30 June 2017 before it comes into force, rather than waiting until its first meeting following recess on 5 September 2017.

Issue

28. Paragraph 2(2)(a)(ii) and (iii) of the instrument insert definitions of "*interim trafficking and exploitation prevention order*" and "*interim trafficking and exploitation risk order*" respectively into rule 3.45.1 (interpretation) of the court rules contained in the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 (SI 1999/929).
29. Paragraph 2(2)(b)(i) and (ii) of the instrument insert references to a "*trafficking and exploitation prevention order*" and a "*trafficking and exploitation risk order*" respectively at the end of paragraph (a)(ii) of rule 3.45.2 of SI 1999/929.
30. Rule 3.45.2(a) applies rules 3.45.3 to 3.45.9 of SI 1999/929 for the purpose of a certificate under article 5 of Regulation (EU) 606/2013 where the protection measure in respect of which the certificate is sought is certain types of order. An "Article 5 certificate" is one which relates to a "protection measure" ordered in a

Member State. The effect is that the order shall be recognised in the other EU Member States without any special procedure being required and shall be enforceable without a declaration of enforceability being required.

31. The issue that has been identified is that references to “*interim trafficking and exploitation prevention order*” and “*interim trafficking and exploitation risk order*” are not inserted into rule 3.45.2 of SI 1999/929 by the instrument. This is despite the fact that paragraph (a)(i) of rule 3.45.2 refers to “*a sexual offences prevention order or an **interim** sexual offences prevention order*” and paragraph (a)(ii) refers to “*a risk of sexual harm order or an **interim** risk of sexual harm order*” (emphasis added in bold).
32. It is notable that paragraph 5 of the instrument inserts references to an “*interim trafficking and exploitation prevention order*” and “*interim trafficking and exploitation risk order*” into Form 61 (application for a certificate under article 5 of regulation (EU) 606/2013), which is based on rule 3.45.3.
33. The Committee liaised informally with the Lord President’s Private Office on this issue. It is agreed that paragraph 2(2)(b)(i) and (ii) of the instrument should also refer to an “***interim** trafficking and exploitation prevention order*” and an “***interim** trafficking and exploitation risk order*” respectively (emphasis added in bold).

Recommendation

34. **Accordingly, the Committee draws the instrument to the attention of the Parliament under the general reporting ground.**

Paragraph 2(2)(b)(i) and (ii) insert references to a “trafficking and exploitation prevention order” and a “trafficking and exploitation risk order” respectively into rule 3.45.2 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999. However, references to the equivalent interim orders, being an “interim trafficking and exploitation prevention order” and an “interim trafficking and exploitation risk order”, have not been inserted.

35. **The Committee welcomes that the Lord President’s Private Office has agreed informally to correct these omissions. It proposes to correct the omission in relation to an “interim trafficking and exploitation prevention order” at the next available opportunity, which it anticipates will be within the next few weeks, in light of such orders coming into force on 30 June 2017. It proposes to correct the omission in relation to an “interim trafficking and exploitation risk order” prior to such orders coming into force on 31 October 2017.**

No points raised

Health and Sport

Carers (Scotland) Act 2016 (Prescribed Days) Regulations 2017 (SSI 2017/207)

Mental Health (Scotland) Act 2015 (Commencement No. 4 and Transitional and Savings Provisions) Order 2017 (SSI 2017/197 (C.17))

Justice

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Withdrawal of Agents and Judicial Review) 2017 (SSI 2017/200)

Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (Regulation (EU) 2015/848) 2017 (SSI 2017/202)

Annex A

Loch Carron Urgent Marine Conservation (No. 2) Order 2017 (SSI 2017/205)

Breach of laying requirements: letter to the Presiding Officer

The Loch Carron Urgent Marine Conservation (No. 2) Order 2017 has been laid before the Scottish Parliament today, and will come into force on 15 June 2017. As a consequence of this action it has not been possible to follow Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10). In accordance with section 31(3) of that Act this letter explains why the laying requirements set out in section 28(2) of that Act have not been complied with.

Reasons for non-compliance

The Loch Carron Nature Conservation Marine Protected Area Order 2017 (“the Designation Order”) took effect on 19 May 2017 using the powers in sections 67(1)(a), 68, 69 and 79(1) of the Marine (Scotland) Act 2010 (“the Act”). An error was discovered in the Designation Order which necessitated the revoking and re-making of that Designation Order, as corrected.

I wrote to you on 18 May to advise that the Loch Carron Urgent Marine Conservation Order 2017 (SSI 2017/158) had been laid in Parliament to take effect on 20 May 2017. As a consequence of the revoking and re-making of the Designation Order, as corrected, this Order is required to be made to revoke and replace SSI 2017/158 to make reference to the corrected Designation Order.

As the Loch Carron Urgent Marine Conservation Order 2017 is already in force it is necessary to bring this replacement Order into immediate effect under the powers available in section 88 of the Act. This is to ensure that there is continuity of effect of the protective measures to meet the purpose outlined in my letter of 18 May 2017. The only way to ensure continuity is for both the re-made Designation Order and this Urgent Marine Conservation Order to take effect at the same time.

Therefore, the procedure at Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 is not being followed on this occasion.

We will endeavour to follow the procedure at Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 for other MPA management proposals.

Annex B

Building (Miscellaneous Amendments) (Scotland) Amendment Regulations 2017 (SSI 2017/214)

Breach of laying requirements: letter to the Presiding Officer

The Building (Miscellaneous Amendments) (Scotland) Amendment Regulations 2017 (“the Amendment Regulations”), were made by the Scottish Ministers under sections 1, 8, 33 and 54 of the Building (Scotland) Act 2003 on 20 June 2017. The instrument is being laid before the Scottish Parliament today, 20 June 2017 and comes into force on 30 June 2017.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) has not been complied with. To meet the requirements of section 31(3) of that Act, this letter explains why.

The Amendment Regulations are required to correct an error in the Building (Miscellaneous Amendments) (Scotland) Amendment Regulations 2017 (SSI 2017/188). SSI 2017/188 was laid before the Parliament on 2 June 2017 and comes into force on 1st July 2017. This SSI is required to bring a change into force before SSI 2017/188 comes into force because there is an urgent (but not emergency) need to bring the SSI into force for public safety reasons.

One of the purposes of SSI 2017/188 is to provide that a detached single storey building used for shelter or sleeping in connection with recreation will not require a building warrant, subject to exceptions. It was intended that SSI 2017/188 should except buildings constructed within 6 metres of another building and buildings constructed within 6 metres of a boundary (“boundary” being defined in regulation 2 of the Building (Scotland) Regulations 2004 (SSI 2004/406) as meaning a boundary between land on which the building is situated and land in different occupation).

However, SSI 2017/188 excepts only buildings within 6 metres of a boundary of another building. The Regulations do not make provision to except buildings constructed within 6 metres of each other within the same boundary.

The Amendment Regulations will cure this defect by providing that both (a) buildings constructed within 6 metres of another building and (b) buildings constructed within 6 metres of a boundary fall within the exceptions and therefore require a building warrant.

The distance between buildings is a key safeguard to reduce the risk of the spread of fire to other buildings within the same boundary.

If the Amendment Regulations are to achieve the purpose of ensuring that SSI 2017/188 has the intended effect, it is necessary that the coming into force of the Amendment Regulations coincide with that of SSI 2017/188.

The Amendment Regulations make one other change to SSI 2017/188 in respect of an omission drawn to the Government’s attention by the Delegated Powers and Legislative Reform Committee.

