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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 26 May 2020**



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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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# Committee Membership



**Convener**  
**Bill Bowman**  
Scottish Conservative  
and Unionist Party



**Deputy Convener**  
**Stuart McMillan**  
Scottish National Party



**Mary Fee**  
Scottish Labour



**Gordon Lindhurst**  
Scottish Conservative  
and Unionist Party



**Gil Paterson**  
Scottish National Party

# Introduction

1. At its meeting on 26 May 2020, the Delegated Powers and Law Reform Committee considered the following instruments subject to the negative procedure and agreed to draw them to the attention of the lead committee:
  - Education (Deemed Decisions) (Coronavirus) (Scotland) Amendment Regulations 2020 (SSI 2020/149)
  - Adults with Incapacity (Ethics Committee) (Scotland) (Coronavirus) Amendment Regulations 2020 (SSI 2020/151)
2. The Committee's conclusions in relation to these instruments are set out later in the report.
3. The Committee also 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 drawn to the attention of the lead committee

## Education (Deemed Decisions) (Coronavirus) (Scotland) Amendment Regulations 2020 (SSI 2020/149)

### Purpose

4. This instrument amends regulation 5 of the Education (Placing in Schools Etc) (Deemed Decisions) (Scotland) Regulations 1982. Regulation 5 applies where an education authority has decided to exclude a pupil from school. An appeal from that decision is heard by an education appeal committee. Where the committee fails to hold a hearing within a set period of time, it is deemed to have confirmed the original decision to exclude the pupil. The amendment made by this instrument is to increase that period of time from 1 month to 4 months.

### Committee Consideration

5. The instrument was laid before the Parliament on 14 May 2020 and came into force on 15 May 2020. This 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.
6. The Committee is therefore required under standing orders to draw the instrument to the attention of the Parliament under reporting ground (j) for failing to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

7. The Committee therefore reports this instrument to the lead committee, the Education and Skills Committee, under reporting ground (j).

8. The Committee also considers the reasons for the breach of the 28 day rule, which in this case are set out in a letter to the Presiding Officer dated 14 May 2020 (see Annex A).
9. The letter explains that as a result of the current Coronavirus outbreak, education authorities are reporting significant difficulties in providing the necessary resources needed to successfully carry out the exclusion appeal process. The Scottish Government considers that it is necessary to bring the modifications made by the instrument into force as early as possible to provide sufficient flexibility in timescales to successfully support the process for education authorities to convene appeal committees to hear such appeals.

10. The Committee is content with the reasons for the breach of the 28 day rule in these circumstances.

## Adults with Incapacity (Ethics Committee) (Scotland) (Coronavirus) Amendment Regulations 2020 (SSI 2020/151)

## Purpose

11. This instrument amends the Adults with Incapacity (Ethics Committee) (Scotland) Regulations 2002 as a consequence of Covid-19 in order to improve the capacity of the Ethics Committee that considers research involving adults with incapacity in Scotland, and introduce some flexibilities into its working practices.

## Committee Consideration

12. The instrument was laid before the Parliament on 15 May 2020 and came into force on 21 May 2020. This 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. As with the previous instrument, the Committee is therefore required to draw the instrument to the attention of the Parliament for breaching the 28 day rule.

14. The Committee therefore reports this instrument to the lead committee, the Justice Committee, under reporting ground (j).

15. The reasons for the breach of the 28 day rule in this case are set out in a letter to the Presiding Officer dated 15 May 2020 (see Annex B).
16. This letter sets out that the Scottish Government considers that there is an urgent need to bring the instrument into force to address a significant increase in the Ethics Committee's workload due to high volumes of Covid-19 research being commissioned.

17. The Committee is content with the reasons for the breach of the 28 day rule in these circumstances.



# No Points Raised

## Culture, Tourism, Europe and External Affairs Committee

Census (Scotland) Regulations 2020 (SSI 2020/143)

## Environment, Climate Change and Land Reform Committee

Freedom of Information (Scotland) Act 2002 (Scottish Public Authorities) Amendment Order 2020 (SSI 2020/146)

## Rural Economy and Connectivity Committee

South of Scotland Enterprise (Transfer of Property and Liabilities) (Scotland) Regulations 2020 (SSI 2020/147)

Seed (Fees) (Scotland) Amendment Regulations 2020 (SSI 2020/148)

Plant Health (Official Controls and Miscellaneous Provisions) (Scotland) (Amendment) Regulations 2020 (SSI 2020/152)

## Education and Skills Committee

Education (Scotland) Act 1980 (Modification) Regulations 2020 (SSI 2020/150)

Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2020 (SSI 2020/153)

Registration of Independent Schools (Prescribed Person) (Coronavirus) (Scotland) Amendment Regulations 2020 (SSI 2020/draft)

# Annex A

## Letter to the Presiding Officer dated 14 May 2020

Dear Presiding Officer

### **The Education (Deemed Decisions) (Coronavirus) (Scotland) Amendment Regulations 2020**

The Education (Deemed Decisions) (Coronavirus) (Scotland) Amendment Regulations 2020, SSI 2020/149, were made by the Scottish Ministers under sections 28D(3)(b) and 28H(5)(b) of the Education (Scotland) Act 1980. The Regulations are being laid before the Scottish Parliament today, 14 May 2020, and come into force on 15 May 2020.

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) that Act, this letter explains why.

These regulations amend regulation 5 of the Education (Placing in Schools Etc-Deemed Decisions) (Scotland) Regulations 1982 (“the Deemed Decision Regulations”), to extend the time period after which the failure of an education appeal committee to hold a hearing on an exclusion appeal is deemed to be a decision confirming the original exclusion decision of the education authority. That time period is extended from one month to four months.

Under regulation 4 of the Schools General (Scotland) Regulations 1975, education authorities have the power to exclude a pupil from a school within their management. In practice, this is used to exclude pupils from school temporarily or to remove them from the Register (“permanent exclusion”). Temporary exclusion is where the pupil returns to school within a set period of days. In Scotland, in 2018/19, 97.8% of temporary exclusions were for a period of up to 5 days, of those 68.6% were for one or two days. Permanent exclusion is where the pupil is excluded from the school. Permanent exclusion does not prevent the pupil from accessing education permanently, as the education authority duty to provide education remains, as does the duty to provide education elsewhere than at a school during periods of exclusion. In 2018/19, there were three permanent exclusions.

As a result of the current Coronavirus outbreak, education authorities are reporting significant difficulties in providing the necessary resources needed to successfully carry out the exclusion appeal process. Principally, it will be very difficult for education authorities to allocate staff to this task given that many are currently engaged in “life and limb” activities in response to the current outbreak. Social distancing also prevents hearings from taking place in person.

In light of these concerns, the Education (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/128) made amendments that are intended to be temporary, to the Education (Appeal Committee Procedures) (Scotland) Regulations 1982 and the Deemed Decisions Regulations, which provide for the statutory timescales relating to the procedures and decisions of Education Authority appeal committees. These statutory timescales apply to placing request appeals and to exclusion appeals.

The Deemed Decision Regulations make provision for deemed decisions of an education authority appeal committee where it has failed to hold a hearing within a certain period of time. In these circumstances, the appeal committee is deemed to have confirmed the education authority's decision. SSI 2020/128 extended this time period to four months for appeals relating to placing requests. Unfortunately, due to an error, the period for deemed decisions relating to exclusion appeals was not similarly extended.

I should be very clear that the effect of this amendment is to extend the period of time after which a failure of an education appeal committee to hold a hearing in relation to an exclusion becomes a deemed decision, which can then be appealed. It does not extend in any way the length of time that a pupil is excluded from school. As I indicated above, the period of exclusion in the case of temporary exclusion would only have lasted a matter of days. In such cases, the pupil is already back in school and a successful appeal would result in the exclusion being effectively cleared from the pupil's record. In the relatively rare case of a permanent exclusion, alternative arrangements would have been made for the pupil's continued education, prior to an appeal being made.

We regret this breach of the 28 day rule, but we consider that in the circumstances it is necessary to bring these modifications into force as early as possible. While pupils, young people and parents will remain entitled to appeal exclusion decisions, these measures will provide sufficient flexibility in timescales to successfully support the process for education authorities to convene appeal committees to hear such appeals.

Yours sincerely,

**Graeme Logan**

**Director of Learning**

# Annex B

## Letter to the Presiding Officer dated 15 May 2020

Dear Presiding Officer

### **THE Adults with Incapacity (Ethics Committee) (Scotland) (Coronavirus) Amendment Regulations 2020**

The Adults with Incapacity (Ethics Committee) (Scotland) (Coronavirus) Amendment Regulations 2020, SSI 2020/151 was made by the Scottish Ministers under section 51(6) of the Adults with Incapacity (Scotland) Act 2000 on 14<sup>th</sup> May 2020. It is being laid before the Scottish Parliament today, 15<sup>th</sup> May 2020 and comes into force on 21<sup>st</sup> May 2020

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) that Act, this letter explains why.

There is an urgent need to bring the SSI into force for public health reasons, due to the COVID-19 pandemic.

Where research involves patients in the NHS, studies must obtain an ethical opinion prior to opening. Where an NHS Research Ethics Committee (REC) gives an opinion, it has an ongoing role where amendments might be required to the original design or scope of the activity. In regard to Covid-19 research much of it will be adaptive in nature and we anticipate the number of amendments may be significant. In the context of intensive care, many of the patients involved with these studies and trials will lack mental capacity, or may lose capacity soon after being recruited. This means that an opinion must be sought from the REC ("Scotland A") constituted under section 51 of the Adults with Incapacity (Scotland) Act 2000, the only one of Scotland's 12 RECs which is able to consider such matters.

The legislation which underpins Scotland A gives the committee a quite different structure to other RECs in the UK. The committee is therefore unable to operate in ways which other RECs across the UK may do.

For example, other committees have alternate Vice Chairs to assist in convening the committee in the absence of the chair/ vice chair, they may deal with amendments using a quoracy of only 3 members and their appointing authorities have discretion to appoint members for up to 12 years. Scotland A is not in such a position.

In summary, in the context of this public health emergency Scotland A faces a significant increased workload as significant volumes of Covid-19 research are being commissioned in Scotland. These new research applications will require amendment as studies adapt to new learning and findings. Clinician members of Scotland A are also contributing to patient care on a day-to-day basis and against this backdrop face particular time pressures whatever happens with the outbreak in Scotland. Amending this legislation without delay is therefore essential.

It should be noted, that while this amending legislation would provide for more flexible ways of working and increase capacity, it does not change the policy or principles on research involving adults with incapacity in Scotland.

Yours sincerely

**Gordon Watt**

Senior Research Policy Manager

