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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 21 December 2021



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For information on the Scottish Parliament contact
Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Introduction	1
Scrutiny of instruments under the Committee's remit: instruments drawn to the attention of the lead committee	2
No points raised	5
Annex	6

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.



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Stuart McMillan
Scottish National Party



Bill Kidd
Scottish National Party



Convener
Graham Simpson
Scottish Conservative
and Unionist Party



Craig Hoy
Scottish Conservative
and Unionist Party



Paul Sweeney
Scottish Labour

Introduction

1. At its meeting on 21 December, the Committee considered the following instruments under its remit and agreed to draw them to the attention of the relevant lead committee:
 - Public Health (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021 (SSI 2021/470)
 - Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021 (SSI 2021/463)
 - Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules 1999 and Sheriff Appeal Court Rules Amendment) (Age of Criminal Responsibility (Scotland) Act 2019) 2021 (SSI 2021/452)
2. The Committee's recommendations in relation to these instruments are set out in the next section of the report.
3. The Committee also determined that it did not need to draw the Parliament's attention to the instruments at the end of the report.

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

Public Health (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021 (SSI 2021/470)

4. The instrument is one of a series of instruments which amend the Health Protection (Coronavirus) (International Travel and Operator Liability) Regulations 2021. Usual drafting practice requires that each amending instrument in a series should reflect the title of the principal Regulations which it amends and include a number indicating the number of SSIs amending the principal instrument in that year. However, the title of this instrument refers to 'Public Health' rather than 'Health Protection'.
 5. In a written response to a question from the Committee (please see the annex), the Scottish Government confirmed that this was an error. The Scottish Government noted that the error "does not bear on the instrument's legal effect", but acknowledged that the different title of this amending instrument may make it more difficult for users of the legislation to locate the amendments which it makes. The Committee noted that the next correctly designated instrument amending the consolidated International Travel Regulations is also numbered (No. 13). The number in the title of further amending instruments will therefore not accurately reflect the number of instruments which have amended these International Travel Regulations in 2021.
 6. The Scottish Government does not propose to amend the citation provision in regulation 1 of the instrument because it considers that could cause more confusion for readers. Instead, it will draw attention to this instrument in footnotes in subsequent amending instruments where appropriate.
 7. The Committee is aware that the SSI number allocated by the Queen's Printer to every statutory instrument is a fixed and reliable identifier of any instrument. Accordingly, this instrument can be properly identified by reference to the SSI number 2021/470 in other instruments.
 8. The Committee acknowledged these mitigations and the significant demands that the coronavirus pandemic is placing on the Scottish Government, but was nevertheless concerned about what appears to be an avoidable error and the difficulty this might cause for the general reader.
9. The Committee draws the instrument to the attention of Parliament under the general reporting ground in respect of a failure to follow proper drafting practice in the title of the instrument.
 10. The Committee notes the Scottish Government's commitment to undertake to clarify the anomaly in footnotes to subsequent amending instruments.

11. The Committee also agreed to write to the Minister for Parliamentary Business to highlight its concerns in relation to the drafting error.

Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021 (SSI 2021/463)

12. The instrument revokes and replaces the Red Rocks and Longay Urgent Marine Conservation Order 2021 (SSI 2021/131) due to the extension of the boundary of the designated Red Rocks and Longay area of the Inner Sound of Skye Marine Protected Area. This instrument was brought into force urgently to further the stated conservation objectives for the Marine Protected Area to protect flapper skate and their eggs.
13. The instrument was laid before the Parliament on 9 December 2021 and came into force on 16 December 2021 (and will remain in force until the end of 16 March 2022). Accordingly, it does not respect the requirement in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 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.
14. The Scottish Government wrote to the Presiding Officer outlining the reasons for breaching the 28-day requirements (please see the annex).

15. The Committee draws the instrument to the attention of the Parliament under reporting ground (j), on the basis that there has been a failure to lay the instrument in accordance with laying requirements under the Interpretation and Legislative Reform (Scotland) Act 2010.
16. The Committee is nevertheless content with the explanation provided by the Scottish Government for failure to comply with the laying requirements under the 2010 Act.

Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules 1999 and Sheriff Appeal Court Rules Amendment) (Age of Criminal Responsibility (Scotland) Act 2019) 2021 (SSI 2021/452)

17. The instrument amends the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 and the Act of Sederunt (Sheriff Appeal Court Rules) 2015.
18. The instrument was made on 2 December, laid on 3 December, and came into force on 17 December 2021. In the covering letter to the instrument, the Lord President's Private Office expressed its apologies for the short laying time and explained this was necessary to respond urgently to the Scottish Government's announcement that it intends to commence the relevant provisions of the 2019 Act on 17 December 2021.
19. Paragraph 3(2) and (3) insert new rules into the Sheriff Appeal Court Rules referring to an appeal under section 38(3), 44(3) and 67(3) of the Age of Criminal Responsibility (Scotland) Act 2019.

20. Following questions from the Committee on an inconsistency identified in the cross referencing in paragraph 3(2) and (3) of the instrument, the Lord President's Private Office explained that the reference to section 44(3) of the 2019 Act should instead be to section 46(3) of that Act and it has committed to rectifying the error at the earliest appropriate opportunity.
 21. Correspondence between the Committee and the Lord President's Private Office can be found in the annex.
22. The Committee draws the instrument to the attention of the Parliament on the general reporting ground in respect of the incorrect references in paragraph 3(2) and (3) to section 44(3) of the Age of Criminal Responsibility (Scotland) Act 2019, which should have been to section 46(3) of that Act.
 23. The Committee welcomes that the Lord President's Private Office has committed to rectifying the error at the earliest appropriate opportunity.
 24. The Committee also agreed to write to both the Lord President's Private Office and the Scottish Government to request further clarification in relation to the circumstances which caused the instrument to be laid urgently.

No points raised

Education, Children and Young People Committee

Education (Miscellaneous Amendments) (Coronavirus) (Scotland) (No. 2) Regulations 2021 (SSI 2021/462)

Equalities, Human Rights and Civil Justice Committee

Maximum Number of Judges (Scotland) Order 2022 (SSI 2021/Draft)

Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Separations) (Scotland) Amendment Regulations 2021 (SSI 2021/461)

Health, Social Care and Sport Committee

Abortion (Scotland) Amendment Regulations 2021 (SSI 2021/457)

Net Zero, Energy and Transport Committee

Climate Change (Nitrogen Balance Sheet) (Scotland) Regulations 2022 (SSI 2021/Draft)

Rural Affairs, Islands and Natural Environment Committee

Animal Health (Notification and Control Measures) (Miscellaneous Amendments) (Scotland) (No. 2) Order 2021 (SSI 2021/456)

Conservation of Salmon (Scotland) Amendment Regulations 2021 (SSI 2021/466)

Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2021 (SSI 2021/467)

Standards, Procedures and Public Appointments Committee

Scottish Local Government Elections Amendment Order 2022 (SSI 2021/Draft)

Social Justice and Social Security Committee

Social Security (Period for Re-determination Requests) (Miscellaneous Amendments) (Scotland) Regulations 2021 (SSI 2021/469)

Annex

Public Health (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021 (SSI 2021/470)

On 16 December 2021 the Scottish Government was asked:

The instrument is the thirteenth in a series of instruments which amend the Health Protection (Coronavirus) (International Travel and Operator Liability) Regulations 2021. Each amending instrument in a series should reflect the title of the principal Regulations which it amends. The title of this instrument uses the term ‘Public Health’ rather than ‘Health Protection’ when referring to the principal Regulations.

1. Is the inconsistency in the title of this amending instrument intentional?
2. If not, please confirm what corrective action is proposed, and when.

On 16 December 2021, the Scottish Government responded:

Many thanks for drawing this point to our attention.

1. We can confirm that the inconsistency in the title of the amending instrument was not intentional, and apologise for the oversight. We note that in this case it does not bear on the instrument’s legal effect, though we accept that the inconsistency will make the relevant amendments harder to trace for users of the legislation.
2. We have considered amending the citation provision of the instrument to amend the title, but having checked with the SI Registrar, they do not consider it appropriate in this case to obtain a correction slip. In these circumstances, we consider amending the citation provision is likely to cause more confusion for readers of the instrument in this case. For that reason we would not propose to amend the citation provision. We will footnote the instrument where appropriate in future amendments.

Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021 (SSI 2021/463)

On 9 December 2021, the Scottish Government wrote to the Presiding Officer:

The Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021, SSI 2021/463 was made by the Scottish Ministers under sections sections 85(1)(a), (2) and (4), 86(1) and (3), 92(1) and 93(1) of the Marine (Scotland) Act 2010 (“the 2010 Act”) on 09 December 2021. It is being laid before the Scottish Parliament today and will come into force on 16 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) that Act, this letter explains why.

Under section 3 of the 2010 Act, when exercising any function under the Act that affects the Scottish marine area the Scottish Ministers and public authorities must act in the way best calculated to further the achievement of sustainable development, including the protection and, where appropriate, the enhancement of the health of the area. Scottish

Ministers consider that this Marine Conservation Order (MCO), made on an urgent basis, is necessary to further the conservation objectives, namely to conserve flapper skate, within the extended Red Rocks and Longay Marine Protected Area (MPA).

Flapper skate, along with blue skate, make up the common skate complex and are on the OSPAR Threatened and/or Declining Species and Habitats List and the list of Priority Marine Features. Furthermore they are considered 'Critically Endangered' globally and in European waters by the International Union for Conservation of Nature (IUCN). Little is known about the breeding habits of flapper skate due to their rarity, however it is thought their eggs take around 18 months to hatch and are sensitive to disturbance from a number of marine activities.

The Red Rocks and Longay MPA was first designated urgently on 10 March 2021, following provision of advice from NatureScot regarding the discovery of flapper skate eggs in the Inner Sound of Skye. This urgent site can be in place for up to 2 years, and stakeholder consultation is required before the site can be made permanent. An urgent MCO was made on 10th March 2021 to further the conservation objectives within the Red Rocks and Longay MPA.

Further surveys as part of the work to ensure there is sufficient evidence to support the scientific case for making the MPA permanent has discovered flapper skate egg laying habitat outside the original site boundary with an estimated 725 eggs being observed.

Due to the high number of eggs being observed and the vulnerability of the egg laying habitat NatureScot has advised the site boundary should be extended in the interim as soon as possible. Scottish Ministers have therefore taken the decision to extend the original site boundary by urgently re-designating the extended site as a Marine Protected Area,ⁱ and applying interim measures to the extended area from that date by The Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021 which revokes and replaces The Red Rocks and Longay Urgent Marine Conservation Order 2021ⁱⁱ. This is to make reference to the MPA as designated under the new designation order instead of the original order.

This is of an urgent nature as this is the first flapper skate nursery area of this scale to be identified in Scotland and is of national importance for conservation of this species. This new Urgent MCO restricts activities which may adversely affect the area in the same manner as the original urgent MCO including all bottom contacting fishing gear, sea angling, aquaculture, anchorages & moorings, deposits on the seabed, recreational & commercial diving and marine infrastructure within the MPA. These measures will apply to the larger, extended site from 16 December 2021. This would provide protection whilst proposals are drafted for permanent protection measures.

Where the Scottish Ministers consider that there is an urgent need to protect an area in respect of which a Marine Conservation Order may be made then section 88 of the Act allows the Ministers to make a Marine Conservation Order on an urgent basis. In such cases the procedure set down for prior consultation under section 87 of the Act does not apply.

ⁱ By The Red Rocks and Longay Nature Conservation Marine Protected Area (No. 2) Order 2021, which will come into force on 16 December 2021 and is available at <https://www.gov.scot/policies/marine-environment/marine-protected-areas/>.

ⁱⁱ (SSI 2021/131)

As the disturbance or removal of flapper skate eggs presents a significant risk of the conservation objective in respect of flapper skate not being achieved there is a legal duty on the Scottish Ministers to intervene as soon as possible. Therefore, we have not been able to follow the procedure at section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 on this occasion. Our reasoning for not doing so is to remove the risk of further impacts on the flapper skate nursery area as soon as possible.

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.

Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules 1999 and Sheriff Appeal Court Rules Amendment) (Age of Criminal Responsibility (Scotland) Act 2019) 2021 (SSI 2021/452)

On 10 December 2021 the Committee asked the Lord President's Private Office:

Paragraph 3(3) inserts a new Chapter 31 into the Sheriff Appeal Court Rules 2015. Rule 31.1 provides that Chapter 31 “applies to an appeal against the decision of a sheriff under section 38(3), 44(3) and 67(3) of the Age of Criminal Responsibility (Scotland) Act 2019”. Similar references are contained in the text inserted by paragraph 3(2) of the instrument.

Sections 38(3) and 68(3) of the 2019 Act make provision for the permitted timescales for appeals to be taken against an order by a sheriff, respectively, under sections 36(2) and 63(2). However, section 44(3) relates to the principal decision by a sheriff to make an order under section 44(2) rather than the appeal itself. Section 46(3) appears to make the equivalent provision to sections 38(3) and 68(3) in respect of appealing orders made under section 44(2).

1. Is the inconsistency in the references to the mechanism for appeal and the principal decision intentional?
2. If not, please confirm if the reference to section 44(3) should in fact be to section 46(3).
3. Please confirm whether any corrective action is proposed, and if so, what action and when

On 14 December 2021, the Lord President's Private Office responded:

1. The inconsistency in the references to the mechanism for appeal is unintentional. The Lord President's Private Office is grateful to the Committee for identifying this error and apologises for it.
2. The correct reference should be to section 46(3).
3. A correction slip has been requested from TSO but they advise that they are very busy and, at time of writing, have not had time to confirm whether they would permit one or not. While an amending instrument has already been drafted to correct the error, as the Committee is yet to consider Act of Sederunt (Sheriff Appeal Court Rules) 2021, we consider it premature for the Court to make it now. Were the Committee to identify any other errors in that 112 page instrument, a further instrument would then be necessary. We therefore conclude that the only prudent way to proceed is to undertake to correct the error at the earliest possible opportunity rather than risk having two amending instruments brought forward in quick

succession. Further, due to the emergency nature of Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules 1999 and Sheriff Appeal Court Rules Amendment) (Age of Criminal Responsibility (Scotland) Act 2019) 2021, the Scottish Civil Justice Council may elect to amend them at some point in the New Year. Separately, amendments to the Sheriff Appeal Court Rules are also anticipated in the New Year in consequence of other legislation. We therefore intend to cover all such amendments in one amending instrument.

