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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 11 January 2022



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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.



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Committee Membership



Stuart McMillan
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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 11 January, the Committee considered the following instruments under its remit and agreed to draw them to the attention of the relevant lead committee:
 - Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 5) Regulations 2021 (SSI 2021/475)
 - Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 6) Regulations 2021 (SSI 2021/496)
 - Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 7) Regulations 2021 (SSI 2021/497)
 - Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 8) Regulations 2021 (SSI 2021/498)
 - Act of Sederunt (Sheriff Appeal Court Rules) 2021 (SSI 2021/468)
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

Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 5) Regulations 2021 (SSI 2021/475)

4. The instrument amends the Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021. It expands the existing requirement to have regard to guidance issued by the Scottish Ministers about measures to minimise risk of exposure to coronavirus. The new provision also requires the taking of such of the measures as are reasonably practicable. In addition, the instrument extends the distance from 1 metre to 2 metres where an exemption from wearing a face covering applies in certain indoor settings. This includes in the workplace, when leading an act of worship, rehearsing or performing, or in certain parts of a marriage ceremony.
5. The instrument is subject to the made affirmative procedure. It was made at 11.36 am on 16 December 2021, laid before the Parliament at 2.30 pm on 16 December 2021 and came into force on 17 December 2021.

Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 6) Regulations 2021 (SSI 2021/496)

6. The instrument amends the Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021. Regulation 4 inserts regulations 4A and 4B into the 2021 Regulations. It makes provision that those who are responsible for specified leisure premises must take measures to ensure, where reasonably practicable, that a distance of one metre is maintained between people either on, or waiting to enter, the premises. It also requires that sufficiently small numbers of people are admitted to the premises to allow the one metre distance to be maintained, subject to specified exceptions.
7. New regulation 4B makes provision to require that table service is in operation in premises where alcohol is sold for consumption on the premises, and that the customer must remain seated whilst consuming food and drink on the premises. Regulation 5 makes provision for capacity limits for live events held indoors and outdoors - 100 people at indoor standing events, 200 people at indoor seated events, and 500 people at outdoor events (whether seated or standing).
8. The instrument is subject to the made affirmative procedure. It was made at 11.48 am on 23 December 2021, laid before the Parliament at 2.30 pm on 23 December 2021 and came into force at 5 am on 26 December 2021 except regulation 4 of the instrument which came into force at 5 am on 27 December 2021.

Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 7) Regulations 2021 (SSI 2021/497)

9. The instrument amends the Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 to require the closure of premises operated as

nightclubs, dance halls or discotheque premises, subject to certain exceptions.

10. The instrument is subject to the made affirmative procedure. It was made at 11.49 am on 23 December 2021, laid before the Parliament at 2.45 pm on 23 December 2021 and came into force at 5 am on 27 December 2021.

Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 8) Regulations 2021 (SSI 2021/498)

11. The instrument amends the Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 so that premises operated as nightclubs, dance halls or discotheques can adjust their operations so as to remain open in line with the regulations with table service and social distancing without committing a licensing offence.
12. The instrument is subject to the made affirmative procedure. It was made on 23 December 2021, came into force at 5 am on 27 December 2021 and was laid before the Parliament on 29 December 2021.

Committee consideration of SSIs 2021 475, 496, 497 and 498

13. The Committee firstly noted that no technical points under its remit had been raised on these four instruments.
14. Instead, the focus of its discussion was whether the affirmative procedure (where a draft SSI is laid before the Parliament and is required to be approved before it can come into force) would have been the more appropriate choice of procedure for each set of regulations. The made affirmative procedure was used in each case (where regulations can come into force immediately but are required to be approved by the Parliament within 28 days of being made in order to remain in force, not taking into account any period of dissolution or recess of more than 4 days during that period).
15. Graham Simpson MSP noted his concerns of the effect of these instruments on the leisure sector, such as sporting events, theatres, pubs and night club. Mr Simpson considered that the use of the made affirmative was not appropriate. Instead, he suggested they would have benefited from some scrutiny and that, "Parliament could have made time for the use of the affirmative procedure."
16. Paul Sweeney MSP said he was also minded to express dissatisfaction with the use of the made affirmative procedure. Mr Sweeney said he had reflected on "the real-life implications of some of the measures" as he had heard from constituents such as representatives of the Ambassador Theatre Group. He considered that the made affirmative procedure did not allow "true scrutiny to ensure that the regulations were watertight and that the potential negative effects on the public were avoided."
17. Likewise, Craig Hoy MSP considered that the affirmative procedure would have been the better one to use in the circumstances and that there was not sufficient "justification from the Government for why it [the regulations] had to be implemented the next day and not the next week or 10 days later."
18. Jenni Minto MSP acknowledged some of Mr Sweeney's comments. However, Ms Minto considered that, in light of the evidence heard earlier in the meeting from the Deputy First Minister on the omicron variant and "the huge increase in cases of the

virus”, she was content that the use of the made affirmative procedure “was the correct one to use.”

19. The full transcript of the discussion can be read in the [Official Report](#) for the meeting.

20. **In light of the above, the Committee disagreed (by division: For 2 (Bill Kidd MSP and Jenni Minto MSP), Against 3 (Graham Simpson MSP, Craig Hoy MSP and Paul Sweeney MSP) and Abstentions 0) that it was content with the instruments.**

Act of Sederunt (Sheriff Appeal Court Rules) 2021 (SSI 2021/468)

21. The instrument makes provision for the procedure and forms to be used for appeals in the Sheriff Appeal Court. The instrument will replace the current Sheriff Appeal Court rules.
22. Following questions from the Committee on the reference in rule 33.1 to section 44(3) of the Age of Criminal Responsibility (Scotland) Act 2019, which the Lord President’s Private Office accepted should have been to section 46(3) of that Act, the Lord President’s Private Office committed to rectifying the error at the earliest appropriate opportunity.
23. Correspondence between the Committee and the Lord President’s Private Office can be found in the annex.

24. **The Committee draws the instrument to the attention of the Parliament on the general reporting in respect of the incorrect reference in rule 33.1 to section 44(3) of the Age of Criminal Responsibility (Scotland) Act 2019, which should have been to section 46(3) of that Act.**
25. **The Committee welcomes that the Lord President’s Private Office has committed to rectifying the error at the earliest appropriate opportunity.**

No points raised

COVID-19 Recovery Committee

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021 (SSI 2021/478)

Economy and Fair Work Committee

Consumer Scotland (Designated Regulators) Regulations 2021 (SSI 2021/465)

Consumer Scotland Act 2020 (Commencement) Regulations 2021 (SSI 2021/464 (C.33))

Land Registration etc. (Scotland) Act 2012 (Commencement No. 3) Order 2021 (SSI 2021/472 (C.34))

Local Government, Housing and Planning Committee

Planning (Scotland) Act 2019 (Commencement No. 8) Regulations 2021 (SSI 2021/480 (C.36))

Health, Social Care and Sport Committee

Food (Withdrawal of Recognition) (Miscellaneous Amendments) (Scotland) Regulations 2021 (SSI 2021/477)

Social Justice and Social Security Committee

Social Security Information-sharing (Scotland) Amendment Regulations 2022 (SSI 2021/Draft)

Social Security (Scotland) Act 2018 (Commencement No. 9) Regulations 2021 (SSI 2021/474 (C.35))

Annex

Act of Sederunt (Sheriff Appeal Court Rules) 2021 (2021/468)

On 17 December 2021 the Committee asked the Lord Presidents Private Office:

1. Rule 5.7 provides that where the rules require a party to lodge a document, it is to be lodged with the Clerk and can be lodged with them in the ways listed within this rule. Rule 5.7(2)(e) further provides that the documents can be lodged with the Clerk by electronic means, provided that parties have provided an email address in terms of rule 13.5. Is the intention that a party is permitted to lodge a document with the Clerk by electronic means as long as an email address has been provided in terms of rule 13.5 by all parties to the proceedings? Is it sufficiently clear which “parties” must have provided an email address in order for it to be competent under rule 5.7(2)(e) to lodge a document with the Clerk by electronic means?

2. Part 3 of the rules is titled “Initiation and progress of an appeal”. Chapter 6 is the first chapter in this part of the rules and is also titled “Initiation and progress of an appeal”. Is it potentially confusing for the reader that the title of Chapter 6 is identical to the title of Part 3?

3. Chapter 7 is titled “Procedure before three appeal sheriffs”. Chapter 8 separately is titled “Procedure before one appeal sheriff”. Throughout chapter 7 reference is made to what the procedural appeal sheriff may do in accordance with the rules, despite the title of the chapter. Schedule 1 of the instrument sets out “Administrative provisions” with paragraph 1(1) providing the quorum of the Court for the types of business specified in sub-paragraph (3) is one appeal sheriff but more than one appeal sheriff may sit where the Court considers that to be appropriate. Paragraph 1(2) of the Schedule further provides the quorum of the Court for any other business is three appeal sheriffs but more than three appeal sheriffs may sit where the Court considers that to be appropriate and paragraph 1(3) listing the type of business referred to.

a) Should the references throughout chapter 7 be to the appeal sheriffs?

b) If not, is it the intention that one appeal sheriff may carry out the functions provided for in chapter 7?

c) If that is the intention, is it sufficiently clear in what circumstances three appeal sheriffs will perform their functions in accordance with these rules and is the title suitable?

4. Chapter 30 is titled “Appeals from summary causes”. Rule 30.4 is headed “Hearing of appeal” and it has been amended to now provide that any party may apply by motion for the question of liability for expenses to be heard after the Court gives its decision on the appeal. The rule previously provided that the Court is to hear parties orally on all matters connected with the appeal, including liability for expenses and this set the context for the other provisions of the rule as applying to all hearings of the appeal. In the absence of that wording, new paragraph (1) relates to hearings on expenses only, and new paragraph (2) begins “At the hearing....”, which, in that context, could be taken to mean the hearing on expenses only.

a) Is it intended that this rule applies to hearings on expenses only?

b) If so it is sufficiently clear given the title of the heading? And should that rule be contained in chapter 20 expenses?

5. Chapter 33 sets out the rules for appeals under part 4 of the Age of Criminal Responsibility (Scotland) Act 2019. Other such Court rules are to be implemented through SSI 2021/452 where an issue was identified in that in those rules the reference to section 44(3) of the 2019 Act should be to section 46(3). Rule 33.1 of these Court rules also makes reference to section 44(3) of the 2019 Act which should be to section 46(3). This error was confirmed on 14 Dec 2021, in response to a question by the Committee's legal advisers where it was further advised that same point that arises in this instrument. Is it still intended to correct the error in this instrument by amending instrument in the new year?

6. Is any corrective action proposed? If so, what action and when?

On 21 December 2021 the Lord President's Private Office responded:

1. You are correct in your understanding of the intention of rule 5.7(2)(e). A document may be lodged by electronic means as long as an email address has been provided in terms of rule 13.5 by all parties to the proceedings. The Lord President's Private Office considers that it is sufficiently clear when rule 5.7(2)(e) is read with rule 13.5 that all parties must have provided an email address in order that it is competent to lodge a document with the Clerk by electronic means. Further, this is in keeping with the operation of rules 5.2 and 5.3 providing for electronic intimation upon other parties.

2. The Lord President's Private Office considers it appropriate that the title of Chapter 6 is "Initiation and progress of an appeal" as it provides an accurate description of the content of the Chapter. We consider that the names of the Part and the Chapter being identical will not lead to confusion for the reader of the Rules.

3. a. The references to "procedural appeal sheriff" in Chapter 7 are correct;

b. It is the intention that one appeal sheriff may carry out the functions provided for in Chapter 7;

c. We consider that it is sufficiently clear that the appeal hearing will be before three appeal sheriffs but that the procedural appeal sheriffs may perform procedural and case management functions. The title is considered suitable as when it is read together with the title of Chapter 8 ("Procedure before one appeal sheriff") it best describes for readers of the Rules the difference between the two Chapters and the number of appeal sheriffs who will hear the appeal.

4. a. It is intended that rule 30.4 applies also to the hearing of the appeal;

b. We consider that it is sufficiently clear given the title of the rule and reading the rule, and Chapter, as a whole. The Lord President's Private Office considers it appropriate for this rule to be located in this Chapter for ease of the readers of the Rules. This Chapter is where the provisions about appeals from summary causes are located and the structure is consistent with the structure of other Chapters dealing with special appeals. It is easier for the reader to find those specialties located in the Chapter making provision for them (cf Chapter 32; appeals to the Court of Session etc.).

5. The Lord President's Office would refer you to our Andrew Campbell's email of 14 December 2021 in relation to 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). Mr Campbell advised that the Lord President's Private Office undertakes to correct this error at the earliest possible opportunity in 2022.

6. Except in relation to the matter mentioned in paragraph 5 (for which an undertaking was provided before this instrument was scrutinised), no further action will be taken as there are no other errors.

