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

## **Subordinate Legislation considered on 30 May 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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# Committee Membership



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# Introduction

1. At its meeting on 30 May 2017, the Committee agreed to draw to the attention of the Parliament the following instruments—

Loch Carron Urgent Marine Conservation Order 2017 (SSI 2017/158)

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016  
(Commencement No. 3, Transitional and Saving Provisions) Regulations 2017  
(SSI 2017/155 (C.13))

2. The Committee's recommendations in relation to these instruments is set out in the following chapters of this report—

- Instruments subject to negative procedure
- Instruments not subject to any parliamentary procedure

3. The Committee also identified minor drafting errors in the following instruments—

Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2017 [draft]

Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Amendment Regulations 2017 [draft]

4. The Committee's recommendation in relation to these drafting errors is outlined in more detail in the chapter titled Drafting matters.
5. 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 Order 2017 \(SSI 2017/158\)](#) (Environment, Climate Change and Land Reform)

### Purpose

6. The Loch Carron Nature Conservation Marine Protected Area Order 2017 (“the MPA Order”) has designated Loch Carron as a nature conservation marine protected area (the Loch Carron MPA), with effect from 19 May 2017. The MPA Order provides that the flame shell beds within Loch Carron are protected features. The MPA Order is a Scottish Ministerial Order which is not in the form of an SSI.
7. The Loch Carron Urgent Marine Conservation Order 2017 has been brought into force urgently, to further the stated conservation objectives for the Loch Carron MPA.
8. The Order is subject to the negative procedure and came into force on 20 May 2017.

### Comment

9. The Order fails to comply with the “28 day rule”, in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”). Section 28(2) provides that an instrument subject to the negative procedure must be laid before the Parliament as soon as practicable after it is made, and in any event at least 28 days before it comes into force.
10. This instrument was made and laid before the Parliament on 18 May 2017 and came into force on 20 May 2017. It fails to comply with section 28(2). Breach of the rule does not affect the validity of the Order.
11. In accordance with section 31 of ILRA, the Scottish Government wrote to the Presiding Officer, to explain why the requirements of section 28(2) have not been met in this case. (See Annex A for further information).
12. The letter sets out that the MPA Order (a Scottish Ministerial Order) was made on 18 May 2017 and came into force on 19 May 2017. To urgently put in place the restrictions contained in this Order following the designation of the MPA, the Order was made and laid on 18 May 2017 and came into force on 20 May 2017.
13. It appears that the Order required to come into force subsequent to (a day after) the MPA Order came into force, because the prohibited and regulated activities set out in the Order further the stated conservation objectives of the Loch Carron MPA. It appears that the urgent commencement of the Order aims to remove the risk of further impacts on the flame shell bed habitat as soon as possible.

### Recommendation

14. **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 Regulations were made and laid before the Parliament on 18 May 2017 and came into force on 20 May 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.**

15. **The Committee finds the failure to comply with section 28(2) to be acceptable in the circumstances as set out in the letter from the Head of Marine Conservation on behalf of the Scottish Ministers to the Presiding Officer dated 18 May 2017.**

# Instruments not subject to any parliamentary procedure

[Inquiries into Fatal Accidents and Sudden Deaths etc. \(Scotland\) Act 2016 \(Commencement No. 3, Transitional and Saving Provisions\) Regulations 2017 \(SSI 2017/155 \(C.13\)\) \(Justice\)](#)

## Purpose

16. The instrument commences provisions of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 on 15 June 2017 in so far as not already in force.
17. It saves the old regime under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 and the Fatal Accident and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977 for inquiries applied for prior to 15 June 2017.
18. It also seeks to clarify that any further inquiry proceedings in respect of a death in relation to which inquiry proceedings were previously closed would always be conducted under the 2016 Act on or after 15 June 2017.
19. As a commencement instrument, the Regulations are laid only and not subject to any Parliamentary procedure in terms of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. It comes into force on 15 June 2017.

## Comment

20. The Committee asked the Scottish Government whether the drafting in regulation 3 was sufficiently clear (see Annex B for further information). Regulation 3 provides that references to an “inquiry” in sections 30 to 35 of the 2016 Act include reference to an inquiry under the 1976 Act. Sections 30 to 35 set out when further inquiry proceedings (whether in the form of a fresh inquiry or a re-opened inquiry) can be initiated into the death of a person which has been the subject of an inquiry that has ended.
21. In its response, the Scottish Government confirmed that the policy intention is that the reference to “inquiry” in regulation 3 is restricted to the original inquiry conducted under the 1976 Act. This has the result that the further inquiry proceedings would always be conducted under the 2016 Act on or after 15 June 2017.
22. The Committee considers that the terms of regulation 3 could be clearer that it does not also save the 1976 Act regime from 15 June 2017 onwards in respect of the further inquiry proceedings held following the closure of the original inquiry.
23. However, in this particular instance, the Committee accepts the reasons provided by the Scottish Government as to why it is unnecessary to lay an amending instrument, particularly when viewed in the context of regulations 2 and 4 (see Annex B).

24. **Accordingly, the Committee draws the instrument to the attention of the Parliament under reporting ground (h) on the basis that the meaning of regulation 3 could be clearer.**

**The terms of regulation 3 could have been clearer so that the references to an “inquiry” in sections 30 to 35 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 are only to the original inquiry conducted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976.**

## Drafting matters

[Mental Health \(Cross-border transfer: patients subject to requirements other than detention\) \(Scotland\) Regulations 2017 \[draft\] \(Health and Sport\)](#)

[Mental Health \(Cross-border transfer: patients subject to detention requirement or otherwise in hospital\) \(Scotland\) Amendment Regulations 2017 \[draft\] \(Health and Sport\)](#)

25. The instruments above are part of a package of Scottish statutory instruments related to mental health which are planned to come into force on 30 June 2017.
26. Both instruments contain minor drafting errors. In relation to the Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2017 [draft], there is a highly self-evident, minor error in regulation 16. Initially the heading of the regulation states “New regulation 25A”. The first line of the regulation then states “After regulation 25 of the principal Regulations insert...” However in the text of the new regulation which follows, it is numbered “1”.
27. In relation to the Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Amendment Regulations 2017 [draft], regulation 16 inserts regulation 13A of the Mental Health (Cross border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005. Regulation 13A(3) provides that in paragraph (1)(b), “incapable” has the same meaning as in section 250 of the Mental Health (Care and Treatment) (Scotland) Act 2003.
28. It is self-evident that “incapable” is used in paragraph (1)(c) and not (b). The reference to paragraph (1) can refer to no other provision apart from regulation 13A(1).
29. Where an instrument is laid in draft but a drafting error has been identified, the Committee has to date tended to recommend that the instrument should be withdrawn and re-laid with the error corrected. If there is no time for re-laying, then there is the option of laying an amending instrument. That is, in the Committee's view, the normally correct approach.
30. The Scottish Government has acknowledged these manifest errors and decided that the errors should be corrected on the signing copy. Any risk involved in making these minor changes on the signing copy of the instrument is a matter for the Scottish Government.
31. As the numbering and cross referencing errors are highly evident, the Committee is of the opinion that in this particular instance, it would be disproportionate to withdraw and relay the instruments or to lay an amending instrument.
32. Accordingly, as a very limited exception to the Committee's normal approach, the Committee accepts the Scottish Government's proposed approach of correcting the highly evident errors on the signing copy of these two mental health instruments.

# No points raised

## Health and Sport

Criminal Justice and Licensing (Scotland) Act 2010 (Consequential Provisions) Order 2017 [draft]

Mental Health (Cross-border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2017 [draft]

Mental Health (Cross-border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Amendment Regulations 2017 [draft]

# Annex A

## **Breach of laying requirements: letter to the Presiding Officer**

18 May 2017

Presiding Officer

### **Loch Carron Urgent Marine Conservation Order 2017 (SSI 2017/158)**

The Loch Carron Urgent Marine Conservation Order 2017 has been laid before the Scottish Parliament today, and will come into force on 20 May 2017, in order to remove the risk of further potential impacts on the flame shell bed habitat as soon as possible. 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) on this occasion.

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 Marine Protected Area (“MPA”) Designation Order was made today, to take 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”). Under section 3 of the 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, made on an urgent basis, is necessary to further the conservation objective, namely the recovery of the flame shell beds within the Loch Carron MPA.

It has come to the attention of the Scottish Government that the flame shell beds in Loch Carron were damaged by scallop dredging activity twice during April 2017. The flame shell beds of Loch Carron are the most significant example outside of the MPA network. To facilitate recovery of the area Scottish Ministers have designated Loch Carron as a MPA as noted above. Flame shell beds are a Priority Marine Feature and are protected by the National Marine Plan. This states that development and use of the marine environment must not have a significant impact on the national status of a Priority Marine Feature.

This is of an urgent nature as scientific studies have shown that mobile fishing gears, such as scallop dredging, can destroy significant proportions of this habitat type with just one pass. A scientific study in Scottish Waters estimated that flame shell beds recovery from a pass of scallop dredge gear could take over 100 years. Therefore, there is a need to remove the risk of another impact as soon as possible.

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.

As the act of demersal mobile fishing presents a significant risk of the conservation objective in respect of flame shell beds not being achieved there is a legal duty on the Scottish Ministers to intervene. Therefore, the procedure at Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 is not being followed on this occasion. This is to remove the risk of further impacts on the flame shell bed habitat 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.

# Annex B

## **Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (Commencement No. 3, Transitional and Saving Provisions) Regulations 2017 (SSI 2017/155 (C.13))**

### **On 18 May 2017, the Scottish Government was asked:**

1. Is it intended that the reference to “inquiry” in regulation 3 is restricted to the original inquiry, with the result that the further inquiry proceedings (whether in the form of a fresh inquiry or a re-opened inquiry) would always be conducted under the 2016 Act on or after 15 June 2017? That appears to be the policy intention from the second paragraph of the Explanatory Note.

Alternatively, could regulation 3 be read as saving the 1976 Act regime in respect of further “inquiry” proceedings under sections 30-35, so that such proceedings can be conducted under the 2016 Act or the 1976 Act, even on or after 15 June 2017? If so, what determines which regime applies?

2. Could regulation 3 be expressed more clearly?

3. If so, is corrective action proposed?

### **The Scottish Government responded as follows:**

#### **Question 1:**

1. The policy intention is as per the Committee’s first reading – that further inquiry proceedings will always be held under the 2016 Act. This is consistent with the wider policy objective set out in the Policy Note that, “the benefits of the 2016 Act and the new Fatal Accident Inquiry Rules ought to apply to as many FAIs as possible”.

#### **Question 2:**

1. The Scottish Government considers that it is clear from the overall context that regulation 3 is directed at enabling the provisions to operate in relation to inquiries that have been held under the 1976 Act. The 1976 Act is repealed by virtue of regulation 2 and it and the associated 1977 Rules only remain in force in relation to inquiries that were applied for before the date of commencement (regulation 4).
1. We consider that it is clear that references in sections 30 to 35 setting out the further procedure that may take place are to be read as meaning proceedings under the 2016 Act given that the 1976 Act is repealed. For example, the concept of “further inquiry proceedings” is defined in section 30(5). Similarly the notion of “re-opened” proceedings, as opposed to “fresh” proceedings requires to be read in the context of the repeal of the 1976 Act so that re-opened proceedings and fresh proceedings must take place under the 2016 Act. The requirement to read “inquiry” as meaning a 1976 Act inquiry is relevant for ensuring that the provisions operate in relation to the inquiry that took place under the 1976 Act. For example, in establishing what the determination was in terms of section 30(2)(b)(i) and what the relevant sheriffdom is in terms of section 34(4).

1. We remain satisfied that the drafting approach employed is sufficiently clear to deliver the policy outcome wanted.

**Question 3:**

1. We do not propose to amend the Commencement No. 3 Regulations for the reasons given.

