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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 14 January 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.



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Introduction

Instruments drawn to the attention of the lead Committee

1. At its meeting on 14 January 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:
 - Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2019 (SSI 2019/419)
 - Restriction of Liberty Order etc. (Scotland) Amendment Regulations 2019 (SSI 2019/423)
2. The Committee's recommendations and conclusions in relation to these instruments are set out later in the report.

Other instruments considered

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 Drawn to the Attention of the Lead Committee

Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2019 (SSI 2019/419)

Purpose

4. The Order prohibits, subject to certain exceptions, all methods of fishing within specified areas of the Firth of Clyde from 14th February until 30th April, during both 2020 and 2021. It applies only to British fishing boats.
5. The purpose of the Order is to protect cod in the Firth of Clyde from fishing mortality during the spawning period in a recognised spawning ground. The decision to implement the closure in the Firth of Clyde has been implemented since 2002 by means of a number of SSIs.

Committee Consideration

6. The instrument is laid subject to negative procedure under section 20(5) of the Sea Fish (Conservation) Act 1967. A question arose as to the proper interpretation of that provision. The Committee acknowledges the Scottish Government's position that, as modified by section 22A(11)(b) of the 1967 Act, section 20(5) should be read as providing that any reference to the approval or annulment of an instrument by resolution of each or either House of Parliament shall be construed as a reference to approval or annulment of the instrument by resolution of the Scottish Parliament.
7. Full correspondence on this issue can be found in Annex A.
8. While the Committee agrees that the negative procedure applies to this instrument, it notes that this could be more clearly expressed in section 20(5) as modified by section 22A(11)(b) of the 1967 Act.
9. The Committee therefore reports this instrument to the Rural Economy and Connectivity Committee under the general reporting ground.
10. The Committee welcomes the Scottish Government's commitment to identify an early opportunity to expressly clarify the parliamentary procedure that applies in the Scottish Parliament to instruments laid under section 20(5) of the 1967 Act.

Restriction of Liberty Order etc. (Scotland) Amendment Regulations 2019 (SSI 2019/423)

Purpose

11. This instrument updates the list of specified equipment that can be used for the purposes of electronic monitoring in Scotland.

Committee Consideration

12. The Order was laid before the Parliament on 17 December 2019 and came into force on 20 December 2019. Accordingly, it does not comply with 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 is therefore required by Standing Orders to draw this instrument to the attention of the Parliament.
14. The Committee therefore reports this instrument under reporting ground (j) for failing to comply with laying requirements.
15. When failing to meet laying requirements, the Scottish Government are required to write to the Presiding Officer to explain why. This letter (at Annex B) explains that there had been a significant increase in the numbers of community sentences which were to be electronically monitored which placed pressure on the availability of electronic tags for G4S. G4S accumulated new stock of electronic monitoring tags in anticipation of a new contract taking effect from April 2020, and it was intended that the list of specified equipment would be updated by regulations in January or February 2020 to allow the new stock to be used. The Scottish Government therefore acted to enable G4S to use the new electronic tags now, rather than wait until April 2020.
16. At its meeting on 7 January, the Committee agreed to write to the Cabinet Secretary for Justice seeking further information about the reasons for breaching the 28 day rule. This letter and the response from the Cabinet Secretary are in Annex B.
17. The Committee welcomes the commitment given by the Cabinet Secretary to consider how any similar risks may be mitigated in future so that laying requirements can be met and appropriate parliamentary scrutiny maintained.
18. However, the Committee still consider it to be unclear when exactly the Government were made aware of the potential shortage of monitoring equipment - the Cabinet Secretary's response states this was "a few weeks before Parliamentary recess". While it may still have been necessary to breach the 28 day rule, the Committee consider that it may have been possible to provide more than 3 days between the laying of the instrument and its coming into force.
19. The Committee therefore wishes to highlight the Cabinet Secretary's response to the lead committee, the Justice Committee, and make clear the importance this Committee places on parliamentary scrutiny and the Scottish Government's statutory obligations.
20. While breaching the 28 day rule may at times be unavoidable, it should only be done when no alternatives exist. The reasoning provided to the Parliament by the Government should clearly state the reason for the breach, provide details of when the Government was made aware of the issue as well as what other options were explored.

No Points Raised

Local Government and Communities Committee

Fuel Poverty (Additional Amount in respect of Remote Rural Area, Remote Small Town and Island Area) (Scotland) Regulations 2020 (SSI 2020/draft)

Environment, Climate Change and Land Reform Committee

Conservation of Salmon (Scotland) Amendment (No. 2) Regulations 2019 (SSI 2019/426)

Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2019 (SSI 2019/427)

Rural Economy and Connectivity Committee

Plant Health (Import Inspection Fees) (Scotland) Amendment (No. 2) Regulations 2019 (SSI 2019/425)

Transport (Scotland) Act 2019 (Commencement No. 1) Regulations 2019 (SSI 2019/428 (C. 25))

Annex A

Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2019 (SSI 2019/419)

On 16 December 2019 the legal adviser asked for an explanation of this matter:

The instrument is laid subject to negative procedure under section 20(5) of the Sea Fish (Conservation) Act 1967.

Section 22A(11)(b) of the 1967 Act modifies the effect of section 20 of that Act insofar as it provides that “any reference to the approval or annulment of an instrument by resolution of each or either House of Parliament shall be construed as a reference to approval of the instrument by resolution of the Scottish Parliament”.

Please explain why it is considered that the negative rather than the affirmative procedure applies to this instrument.

On 9 January 2020 the Scottish Government responded as follows:

Without the modifications applied by section 22A(11)(b), section 20(5) of the 1967 Act provides that a “statutory instrument containing an order made under section 4, 4A, 5 or 6 of this Act, and a statutory instrument containing an order made under section 15 thereof in relation to any of those sections or an order thereunder, except a statutory instrument to which subsection (5A) or (6) below applies, shall be subject to annulment in pursuance of a resolution of either House of Parliament.”. That provision (which remains in effect in that form in England and Wales) provides for negative procedure, subject to limited exceptions where affirmative procedure applies.

Section 22A was inserted into the 1967 Act by SI 1999/1820. Section 22A sets out various glosses that are applied to the 1967 Act in relation to Scotland as a result of the transfer of functions to the Scottish Ministers on devolution. The principal enabling power for SI 1999/1820 is section 105 of the Scotland Act 1998. Section 105 provides that “subordinate legislation may make such modifications in any pre-commencement enactment or prerogative instrument or any other instrument or document as appear to the person making the legislation necessary or expedient in consequence of this Act.”. It follows that the modifications set out in section 22A of the 1967 Act would be expected to be modifications considered “necessary or expedient” as a result of devolution. In the Scottish Government’s view, the purpose of section 22A(11) of the 1967 Act (as inserted by SI 1999/1820) is clearly and simply to apply modifications in consequence of devolution; in particular in the case of section 20 of the 1967 Act, to change references to the UK Parliament to the Scottish Parliament.

Section 22A(11)(b) ostensibly applies a gloss to the whole of section 20, so that “any reference to the approval or annulment of an instrument by resolution of each or either House of Parliament shall be construed as a reference to approval of the instrument by resolution of the Scottish Parliament”. In the Scottish Government’s view, this is clearly an error as regards the gloss to the section 20(5) procedure that was intended to be made. On a literal reading of section 20(5), as ostensibly modified by section 22A(11)(b), an affirmative type parliamentary procedure that is unknown in Scots law and to the Scottish Parliament, in that it is not recognised by schedule 3 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”), would be created for instruments of the type in view. The literal reading of the procedure would be as follows: “a statutory instrument containing

an order made under section 4, 4A, 5 or 6 of this Act, and a statutory instrument containing an order made under section 15 thereof in relation to any of those sections or an order thereunder, except a statutory instrument to which subsection (5A) or (6) below applies, shall be subject to approval by resolution of the Scottish Parliament.” The exceptions as regards subsections (5A) and (6) are, notably, affirmative procedure exceptions to what is plainly intended to be a provision otherwise requiring negative procedure. Incidentally, subsection (6) is in practical terms no longer operable as it was linked to a statement given under the now repealed section 5(3) of the 1967 Act.

The new section 20(5) approval procedure purportedly created by SI 1999/1820 (in addition to the affirmative procedure exceptions) is not one used in Acts of the Scottish Parliament or Westminster Acts where affirmative type procedure applies. There is no reference to a requirement for the instrument to be laid, whether or not in draft, nor any reference to any period of time during which the instrument must be approved after making. The purported approval requirement is not, either on its own terms or by virtue of ILRA, a pre-condition to the making of an instrument of the type in view.

It is also worth noting that no policy statement or other evidence has been found to suggest that a change of procedure in section 20(5) was intended or was considered necessary or expedient as a consequence of devolution.

For those reasons, it is considered evident that the words “or annulment” ought to have appeared after the second appearance of “approval” in section 22A(11)(b). The inclusion of those words has the effect of retaining the existing procedures in section 20(5), to be undertaken in the Scottish Parliament rather than at Westminster. The Scottish Government considers that to meaningfully interpret the provisions it is necessary to read “or annulment” into section 22A(11)(b), so that the section reads as follows: “any reference to the approval or annulment of an instrument by resolution of each or either House of Parliament shall be construed as a reference to approval or annulment of the instrument by resolution of the Scottish Parliament”. This approach gives meaning to a provision that would otherwise fail to achieve its intended purpose of continuing the application of the section 20(5) negative procedure subject to limited affirmative procedure exceptions and would also fail to create a meaningful and recognisable affirmative/approval procedure for instruments of the type in view. The Scottish Government considers that the negative procedure applies to this instrument.

The Scottish Government is grateful to the Committee for drawing its attention to this issue with section 22A(11)(b) and intends to look for an early opportunity to expressly clarify the parliamentary procedure that applies to instruments laid under section 20(5) of the 1967 Act.

Annex B

Restriction of Liberty Order etc. (Scotland) Amendment Regulations 2019 (SSI 2019/423)

Letter from the Scottish Government to the Presiding Officer

The Restriction of Liberty Order etc. (Scotland) Amendment Regulations 2019 (“the Regulations”) have been laid before the Scottish Parliament under section 245C of the Criminal Procedure (Scotland) Act 1995. The Regulations are subject to the negative procedure in accordance with section 245C(4) of the 1995 Act.

The Regulations are to come into force on 20th December 2019 which is less than 28 days after they were laid before Parliament. It is recognised that this does not comply with Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. This letter sets out why it is necessary to lay the above instrument less than 28 days before it is brought into force.

The Regulations specify a number of devices that may be used for the purpose of electronically monitoring those who are serving a community sentence or subject to electronic monitoring licence conditions following release from prison. This is achieved via an amendment to the Restriction of Liberty Order etc. (Scotland) Regulations 2013 (SSI 2013/6).

In recent weeks there has been a significant increase in the numbers of community sentences which are to be electronically monitored. The number of electronically monitored community sentences is now at the highest level ever seen in Scotland. This has placed considerable pressure on the availability of electronic tags for G4S, the company which delivers electronic monitoring for the Scottish Government.

The new electronic monitoring contract between the Scottish Government and G4S takes effect in April 2020. In anticipation of the new contract taking effect G4S have accumulated stock of new electronic monitoring tags which the Scottish Government intended to add to the list of specified devices next year. Given the pressure on the current stock of electronic tags, the Scottish Government are taking action to enable G4S to use the new electronic tags now rather than wait until April 2020.

The Scottish Government believes that acting to specify this new equipment in the 2013 Regulations is a prudent contingency arrangement which will ensure that G4S have sufficient numbers of specified devices to deliver their contractual obligations. This is particularly the case in light of the proposed administrative changes to Home Detention Curfew (HDC) in the coming weeks which may lead to some increase in the overall numbers of those released and electronically monitored.

Letter from the Convener to the Cabinet Secretary for Justice

Dear Cabinet Secretary,

At its meeting earlier today, the Committee considered the Restriction of Liberty Order etc. (Scotland) Amendment Regulations 2019 (SSI 2019/423).

As you are no doubt aware, standing orders provide that any breach of the 28 day laying requirement must be reported under reporting ground (j) (“failure to comply with laying

requirements”). The Committee also considers whether it is content with the reasons provided by the Scottish Government for the failure to comply.

The reasons for the failure to comply are set out in a letter to the Presiding Officer, annexed below. The Committee would be grateful for further information on this matter.

The letter to the Presiding Officer states that the need for this Order was due to “the significant increase in the numbers of community sentences which are to be electronically monitored” in the weeks before the Order was laid. Have the reasons for this increase been identified? Furthermore, could the pressure on the supply of electronic tags have been predicted earlier, to allow regulations to have been laid in enough time to respect the 28 day requirement?

I would be grateful for a response to these questions by 5pm on Thursday 9 January.

Yours sincerely,

Graham Simpson

Convener of the Delegated Powers and Law Reform Committee

Response from the Cabinet Secretary for Justice to the Convener

Thank you for your letter of 7 January 2020 regarding the Restriction of Liberty Order etc. (Scotland) Amendment Regulations 2019. You asked for further information about the laying of these Regulations to inform your consideration of the breach of the 28 day laying requirement.

I would like to put on the record that I would wish wherever possible to fulfil all the obligations within Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. That these Regulations were laid in breach of that requirement was a consequence of our assessment of the need to put in place a prudent contingency arrangement, in light of unexpected changes we were seeing in a demand-led service.

The increase in the number of electronically monitored orders was driven in particular by increases in the number of Restriction of Liberty Orders (RLOs). RLOs are imposed by the courts, and individual sentencing decisions are, of course, a matter for the court in each case. However, I have asked my officials to explore whether there may be any underlying drivers for the increase and I would be happy to provide an update on this in due course if that would be helpful.

With regard to the possibility of having predicted the increased pressure earlier, we do regularly review management information in relation to the electronic monitoring service. However, as can be seen in the table below, the increases in the number of those electronically monitored in November 2019 and, in particular, December 2019 were significantly outwith the level of increases we had previously seen.

Month	Month to month change in total number of individuals electronically monitored
April 2019	1.6% increase
May 2019	1.9% increase
June 2019	1.2% increase
July 2019	3.2% decrease
August 2019	0.8% increase
September 2019	2.2% increase
October 2019	1.3% increase
November 2019	4.1% increase
December 2019	7.4% increase

The electronic monitoring service provider does have equipment stock levels that allow it to cope with variations in the level of demand, and despite the increases in late 2019 being greater than are routinely experienced, it was able to supply equipment as required. However, given the trend from October to December 2019, we did have concerns that – should this trend continue or increase – issues could arise around the availability of equipment, particularly over the festive period. This risk was increased by the fact that, as outlined in our previous letter, there was a possibility that administrative changes to Home Detention Curfew (HDC) in December would have an impact on the number of electronically monitored individuals.

Given that the provider already had additional new equipment on hand - beyond its supply of existing equipment and which would fulfil exactly the same function – in preparation for the start of the new contract in April 2020, we considered it prudent to take steps to enable this readily available equipment to be used if necessary. As there is a legislative requirement that all equipment is prescribed in Regulations before it can be used, this required the laying of the Restriction of Liberty Order etc. (Scotland) Amendment Regulations 2019.

Predicting future demand with certainty is challenging, and it was only when a further significant increase became apparent a few weeks before Parliamentary recess that we considered it necessary to act swiftly to make sure all the existing stock of equipment could be used as and when needed, and to ensure there was no interruption in the continuity of delivery of this important service. Given when this information was received, the need to be responsive to the emerging demand on the service, and the time required to prepare the Regulations, we did not consider there to be any reasonable option but to lay these in breach of the 28 day requirement.

When the relevant sections of the Management of Offenders (Scotland) Act 2019 are commenced, prescription of individual pieces of equipment will no longer be required in this way so this specific issue is unlikely to reoccur. However, notwithstanding that change, nor the specific circumstance that required us to act swiftly in this case, I have asked my officials to consider how any similar risks may be mitigated in future, in order to ensure that the laying requirements can be met and appropriate Parliamentary scrutiny maintained.

I hope that this information is helpful and I am, of course, happy to provide any further details to the Committee if there are outstanding questions about this matter.

Humza Yousaf

