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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 28 April 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 28 April 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:
  - Town and Country Planning (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/124)
  - Education (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/128)
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 Parliament

## Town and Country Planning (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/124)

### Purpose

4. This instrument makes temporary amendments to the following regulations:
  - Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013,
  - Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013 and
  - Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017.
5. These modifications alter requirements to hold public events or hearings or to make information or documentation available for inspection in a public place.

### Committee Consideration

6. The instrument was laid before the Parliament on 14 April 2020 and came into force on 24 April 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.
7. 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.

8. The Committee therefore reports this instrument to the lead committee, the Local Government and Communities Committee under reporting ground (j).

9. The Committee also looks at the Scottish Government's reasons for the breach, which in this case are set out in a letter to the Presiding Officer dated 14 April 2020 (see Annex A). It explains that this is to allow the planning system to continue to function during the emergency period, in order to support future economic and societal recovery and avoid delays to necessary infrastructure and other developments.

10. In these circumstances, the Committee is content with the reasons for the failure to comply with section 28(2).

## Education (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/128)

### Purpose

11. This instrument makes amendments to timescales set out the following regulations:
  - Education (Appeal Committee Procedures) (Scotland) Regulations 1982,
  - Education (Placing in Schools Etc. Deemed Decisions) (Scotland) Regulations 1982 and
  - Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005.
12. The amendments provide education authorities and education appeal committees with greater flexibility in how they carry out their statutory responsibilities in relation to education placing requests and school exclusion decisions.

### Committee Consideration

13. The instrument was laid before the Parliament on 22 April 2020 and came into force on 23 April 2020. As with the preceding instrument, 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.

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

15. The Scottish Government's reasons for the breach are set out in a letter to the Presiding Officer dated 22 April 2020 (see Annex B). The letter explains that at present, 30 April is the deadline for considering placing requests made before 15 March. If these requests are not processed by the deadline they would be deemed to be refusals which would trigger a right of appeal.

16. 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 "placing request" process and the consequent appeal hearings. It was considered important to amend the timescales before the 30 April deadline to give parents and education authorities certainty about the entire process as soon as possible.

17. In these circumstances, the Committee is content with the reasons for the failure to comply with section 28(2).

# No points raised

## COVID-19 Committee

Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 2) Regulations  
2020 (SSI 2020/126)

# Annex A

## Letter to the Presiding Officer dated 14 April 2020

Dear Presiding Officer

### TOWN AND COUNTRY PLANNING (MISCELLANEOUS TEMPORARY MODIFICATIONS) (CORONAVIRUS) (SCOTLAND) REGULATIONS 2020

The Town and Country Planning (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020, SSI 2020/124 was made by the Scottish Ministers under section 2(2) of the European Communities Act 1972, sections 35B(5), 40, 43A(10) and (11) and 275 of the Town and Country Planning (Scotland) Act 1997 today, 14 April 2020. It is also being laid before the Scottish Parliament today and comes into force on 24 April 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.

The Regulations remove certain requirements within the planning system that cannot be implemented due to the restrictions in place to reduce the transmission of coronavirus. If these requirements are not complied with, a relevant application for planning permission cannot proceed through the system to approval, or could be deemed to be refused.

- Regulation 2 removes the need for a public event to be undertaken as part of Pre-Application Consultation for proposals for major or national developments. An application for planning permission for the development cannot be made to the planning authority until the Pre-Application Consultation requirements have been met.
- Regulation 3 removes the requirement for Local Review Bodies to hold meetings “in public”. While paragraph 13 of schedule 6 of the Coronavirus (Scotland) Act 2020 allows local authorities to exclude the public from local authority meetings on public health grounds, separate provision is needed to amend the requirements on Local Review Bodies. The function of these bodies is to review decisions on applications for planning permission which have been delegated to planning officers. If this requirement was not removed for the duration of the end of the emergency period, any reviews on the grounds of a refusal by a delegated officer would remain undetermined until the Local Review Body could again meet in public.
- Regulation 4 removes a requirement for an environmental impact assessment to be made available at a place or address (normally the developer’s office). Paragraph 9 of schedule 6 of the Coronavirus (Scotland) Act 2020 amends requirements for the Scottish Ministers or Scottish public authorities to make certain documents available in a particular manner, but for environmental impact assessments there is also a duty in this respect falling to the applicant. Failure to remove this requirement could increase the risk of legal challenge to applications requiring environmental impact assessment.

It is important that the planning system continues to function during the emergency period, in order to support future economic and societal recovery and avoid delays to necessary

infrastructure and other developments. Without the provisions in these Regulations, applications would be paused until the end of the emergency period, and then further delayed while they implement the requirements. There is an urgent need to give planning authorities and applicants certainty as soon as possible so that applications can progress. We intend to issue guidance in particular on pre-application consultation using online alternatives to public events.

Yours faithfully,

JOHN MCNAIRNEY,

Chief Planner

# Annex B

## Letter to the Presiding Officer dated 22 April 2020

Dear Presiding Officer

### THE EDUCATION (MISCELLANEOUS AMENDMENTS) (CORONAVIRUS) (SCOTLAND) REGULATIONS 2020

The Education (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020, SSI 2020/128 were made by the Scottish Ministers under sections 28A(5) and 28D(3) of the Education (Scotland) Act 1980 (“the 1980 Act”) and section 22 of, and paragraphs 4(3) and 6(6) of schedule 2 of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”) on 22 April 2020. The Regulations are being laid before the Scottish Parliament today, 22 April 2020, and come into force on 23 April 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.

Under the 1980 Act and the 2004 Act parents can submit a placing request to apply for a place in a school other than their catchment school. Education authorities have to follow statutory criteria when assessing placing requests and making decisions about whether to grant a placing request. If a parent disagrees with an education authority’s decision to refuse a placing request they can appeal to the education authority convened Education Appeal Committee (“EAC”).

Statutory timescales, which are set out in the regulations being amended by this instrument, apply to the stages of this process with most appeals taking place in May and June, so that the bulk of the decisions are made before the end of the summer term and parents have certainty about which school their child will attend in August. If parents are unhappy with the EACs decision, they have a right of appeal to the Sheriff Court though only relatively few will opt to do this.

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 “placing request” process and the consequent appeal hearings . 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.

If education authorities fail to meet the imminent 30 April deadline for processing placing requests for this year’s admissions round (which applies to placing requests received by 15 March, which are the great majority of placing requests received each year), such a failure would result in the local authority being deemed to have refused these placing requests and that the parent could request an appeal hearing.

In addition, education authorities are likely to find it very difficult to convene (and ultimately resource sufficiently) any appeal hearings that are required to be set up within 28 days of notification of a refusal of a placing request. If they fail to meet this deadline, education

authorities will be regarded to have confirmed the education authority's decision refusing the appeal and parents will be able to take legal action via an appeal to the Sheriff Court.

This instrument is required to make temporary amendments to the Education (Appeal Committee Procedures) (Scotland) Regulations 1982, the Education (Placing in Schools Etc. Deemed Decisions) (Scotland) Regulations 1982 and the Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005.

This instrument will amend the 30 April deadline for considering placing requests made before 15 March and mitigate the risk that an education authority's failure to process placing requests will result in them being deemed as refusals, automatically prompting an appeal hearing. Similarly, the instrument makes changes to the subsequent deadlines that apply to appeals to the EAC and give sufficient time for appeal hearings to be held and mitigate the risk that a failure to hold a hearing will result in legal action via the Sheriff Court.

The instrument will also give education authorities greater flexibility in how appeal hearings are convened so that hearings can be held remotely, via telephone or video conference or, if the appellant is content, solely in writing. This is to provide local flexibility for how references to the Committee are to be determined, enabling video or audio as options so that hearings can take place in line as far as possible with the current process to ensure that they remain fair and transparent. Parents' right to appeal a decision of the EAC to the Sheriff Court remains in place, albeit within a longer timeframe.

As the 30 April deadline is in 8 days it will not be possible to follow the normal 28 day rule for bringing these regulations into force. While it might be possible to implement the additional changes to the appeal hearing process to a slower timeframe, we believe it is important to give parents and education authorities certainty about the entire process as soon as possible.

These measures are not expressly time limited but are intended to be temporary. We intend to revoke the instrument once the current outbreak is over and this would be effected by 28 February 2021, an undertaking which I will write to the Education and Skills Committee to place on the record. However, if there was to be a further Coronavirus wave either prior to or subsequent to revocation of these changes, and social distancing measures were reintroduced, we would have to consider retaining the changed timescales or introducing similar measures again, depending on the circumstances.

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 parents will remain entitled to make placing requests under the 1980 Act and the 2004 Act, these measures will provide sufficient flexibility to successfully support the process for education authorities to make decisions on these requests and for EACs to consider appeals against such decisions.

Yours sincerely,

Graeme Logan

Director of Learning

