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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 8 February 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



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**Graham Simpson**  
Scottish Conservative  
and Unionist Party



**Craig Hoy**  
Scottish Conservative  
and Unionist Party



**Paul Sweeney**  
Scottish Labour

# Introduction

1. At its meeting on 8 February, the Committee considered the following instrument under its remit and agreed to draw it to the attention of the relevant lead committee:
  - Sea Fish (Prohibition on Fishing) (Firth of Clyde) (No. 2) Order 2022 (SSI 2022/35)
2. The Committee's recommendations in relation to this instrument are set out in the next section of the report.
3. The Committee also determined that in terms of its remit it did not need to draw the Parliament's attention to the instruments at the end of the report. Some broader points highlighted by the Committee are noted below the relevant instrument.

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

## Sea Fish (Prohibition on Fishing) (Firth of Clyde) (No. 2) Order 2022 (SSI 2022/35)

4. The Sea Fish (Conservation) Act 1967 allows Scottish Ministers to prohibit, by order, sea fishing in specified waters. This instrument reduces the size of the cod spawning closure areas in which fishing by any method is prohibited, within two areas of the Firth of Clyde mapped in the schedule to the instrument. The aim is to protect cod in the Firth of Clyde from fishing mortality during the spawning period in a recognised spawning ground. The prohibition applies to British fishing boats from 14 February until 30 April, during both 2022 and 2023.
5. The instrument was laid on 1 February 2022 and comes into force on 12 February 2022. As it was laid less than 28 days before it came into force, it is in breach of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. This rule requires 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.
6. In correspondence with the Presiding Officer, the Scottish Government explained that they had recently reconsidered and reduced the extent of the areas for closure. As the cod closure begins on 14 February, it was therefore necessary for the amendments to come into force on 12 February, resulting in the 28 day rule being breached.
7. A copy of all correspondence can be found in the **Annex**.

8. **The Committee draws the instrument to the attention of the Parliament on reporting ground (j) for failure to lay the instrument in accordance with the laying requirements in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
9. **The Committee is nevertheless content with the explanation provided by the Scottish Government for failure to comply with the laying requirements.**

# No technical points raised

## Criminal Justice Committee

- Legal Aid and Advice and Assistance (Financial Limit) (Scotland) Amendment Regulations 2022 (2022/Draft)
- Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2022 (SSI 2022/30)

## Economy and Fair Work Committee

- Digital Government (Scottish Bodies) Regulations 2022 (2022/Draft)

## Education, Children and Young People Committee

- Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 (Fees) (Coronavirus) Amendment Regulations 2022 (SSI 2022/34)

## Health, Social Care and Sport Committee

- Community Care (Personal Care and Nursing Care) (Scotland) Amendment Regulations 2022 (2022/Draft)

## Local Government, Housing and Planning Committee

- Local Authority (Capital Finance and Accounting) (Scotland) (Coronavirus) Amendment Regulations 2022 (2022/Draft)
- Non-Domestic Rates (Valuation Roll) (Modification) (Scotland) Regulations 2022 (2022/Draft)
- Non-Domestic Rates (Scotland) Act 2020 (Commencement No. 2, Transitional and Saving Provisions (Amendment) and Commencement No. 3 and Saving Provision) Regulations 2022 (SSI 2022/23 (C. 2))

## Net Zero, Energy and Transport Committee

- M8/M73/M74 Motorways (30mph, 40mph and 50mph Speed Limit) Regulations 2022 (SSI 2022/26)
  - The Committee noted in its discussions that due to the potential effects of the speed limit adjustments on the general public, such as noise pollution, the instrument may have benefited from wider public consultation. The Committee agreed to highlight this to the lead committee.

## Social Justice and Social Security Committee

- Social Security Up-rating (Scotland) Order 2022 (2022/Draft)
- Social Security (Up-rating) (Miscellaneous Amendment) (Scotland) Regulations 2022 (2022/Draft)
- Carer's Allowance Up-rating (Miscellaneous Amendment) (Scotland) Regulations



2022 (SSI 2022/28)

# Annex

## **Sea Fish (Prohibition on Fishing) (Firth of Clyde) (No. 2) Order 2022 (SSI 2022/35)**

### **On 1 February 2022, the Scottish Government wrote to the Presiding Officer:**

Since 2002, SSIs have provided for a closure in the Firth of Clyde to provide an area to protect cod during their spawning season (14 February – 30 April). Since its introduction, the closure has included exemptions to allow Nephrops trawlers, creels and scallop dredgers to continue to fish in the closure area, due to the low numbers of cod they catch.

The Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2021 was laid on 10 December 2021 with the exemptions in place for Nephrops trawlers, creels and scallop dredgers. The intention, at that time, was to review these exemptions in 2022.

However, upon reconsideration of the responses from the stakeholder consultation, the scientific evidence, the advantages of having a uniform approach with other sea fisheries management measures, and the precautionary principle we decided to revoke the Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2021 and replace it with the Sea Fish (Prohibition on Fishing) (Firth of Clyde) Order 2022 which provides for the same spawning closure areas but without any exemptions. The Sea Fish (Prohibition on Fishing) (Firth of Clyde) Order 2022 was laid on 13 January 2022.

Given the vulnerability of cod to any disturbance during the spawning season, we were of the view that the measures contained in this SSI would provide a higher chance of stock recovery and contribute to a more sustainable cod fishery in the West of Scotland in the medium-longer term. It would also create consistency with fisheries management in other respects, including the UK National North Sea Cod Avoidance Plan, which covers closure areas for all gear types (excluding pelagic), and the recent emergency Marine Protected Area (MPA) designation in the Inner Sound and the related Marine Conservation Order, which includes a prohibition on creeling in order to protect the critically endangered flapper skate nursery area.

However, such an approach would clearly impact on fishers, even though the impact would be short term. Again, we reviewed the available scientific evidence to reassure ourselves that this approach was the most appropriate and proportionate. Following further discussions with scientists and stakeholders we believe that we can mitigate the impacts of the seasonal closure while maintaining the policy objective of protecting the spawning cod in the Firth of Clyde.

To that end, the Sea Fish (Prohibition On Fishing) (Firth Of Clyde) (No. 2) Order 2022 provides for reduced spawning closure areas without any exemptions. The provisions in this SSI take into account additional scientific and compliance-related data, particularly about the seabed and vessel activities, which means that we can be more precise in locating where the cod are spawning and identifying the habitats that could be used for spawning. This is a pragmatic and evidence-based solution to ensure that the spawning cod are protected whilst also mitigating the socio-economic impacts on our vulnerable coastal communities. Compared to the original closure with exemptions this provides for increased protection for spawning cod.

The Sea Fish (Prohibition On Fishing) (Firth Of Clyde) (No. 2) Order 2022, (SSI 2022/35) was made by the Scottish Ministers under sections 5(1)(a), 15(3), 20(1), 22(2) and 22A of

the Sea Fish (Conservation) Act 1967 (“the 1967 Act”) and laid before the Scottish Parliament today. The Sea Fish (Prohibition On Fishing) (Firth Of Clyde) (No. 2) Order 2022 comes into force on 12 February 2022.

Section 20(5) of the 1967 Act states that a statutory instrument containing an order made under section 5 of that Act shall be subject to the negative procedure.

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 requirement has not been complied with and to meet the requirements of section 31(3) of that Act, this letter sets out the reasons why.

It is essential that the closure be in place when the spawning period begins on 14 February. To achieve this will mean that there is now insufficient time remaining to meet the 28 day requirement.

To ensure that the Sea Fish (Prohibited Methods of Fishing) (Firth Of Clyde) Order 2021 and the Sea Fish (Prohibition on Fishing) (Firth of Clyde) Order 2022 are revoked and, the Sea Fish (Prohibition on Fishing) (Firth of Clyde) (No. 2) Order 2022 is in place for the beginning of the spawning period, the Sea Fish (Prohibition on Fishing) (Firth of Clyde) (No. 2) Order 2022 must come into force on 12 February.

I appreciate that the process in this case has been far from ideal and that the revoking and replacing of the regulations takes up valuable parliamentary time and resource. This is not how I would have wanted this to happen. But it has been a complex issue to balance, and we will be looking to learn lessons from this. It is, however, important to remain flexible and responsive to new evidence, data and perspectives that emerge and to ensure that the approach we put in place to this closure achieves the right balance of objectives. We will continue to work closely with local stakeholders and their representatives this year to ensure that the closure continues to meet its intended policy purpose and will monitor its implementation.

I trust that this explanation will be sufficient to ensure Parliamentary support for this SSI to come into force on 12 February, i.e. in time for the spawning season. I and officials will of course be happy to continue to liaise with, provide evidence on and speak to the Sea Fish (Prohibition on Fishing) (Firth of Clyde) (No. 2) Order 2022 at the RAINE committee which had already been planned for the previous order. If your officials would like to discuss any matters arising from this order, government officials would also be happy to engage with them.

I am copying this letter to the Delegated Powers and Law Reform Committee.

