

Delegated Powers and Law Reform Committee
Tuesday, 21st January 2025
3rd Meeting, 2025 (Session 6)

Instrument Response

Ardersier Port Limited (Pilotage Powers) Order 2024 (SSI 2024/382)

On Wednesday 8th January 2025, the Committee asked the Scottish Government:

1. The parent Act contains preconditions for the making of the Order, and the Policy Note makes clear that they were fulfilled. However, the preconditions are not narrated in the preamble of the instrument. Is this in line with standard drafting practice?
2. Please advise whether any corrective action is proposed, and if so, what action and when.

On 14th January 2025, the Scottish Government responded:

Question 1

The general practice is that preambles should recite certain matters on which the validity of an instrument depends. While this will vary from case to case and in line with the enabling legislation, this may include, among other things, the narration of conditions in the enabling legislation which require to be fulfilled before the Scottish Ministers may exercise the power.

In this case, there are various procedural steps associated with the making of an Order under section 1(4) of the Pilotage Act 1987. These include the making of an application by a harbour authority under section 1(4) and the publication of a notice by the applicant harbour authority under section 1A(2). These procedural steps were carried out and this is explained in the policy note.

So far as the preamble is concerned, the view was taken that it was not necessary to narrate these procedural steps. Orders under section 1(4) may only be made on an application by a harbour authority and it was therefore considered to be implicit that such an application had been made in this case.

As regards the requirement in section 1A(2), the view was taken that it was not clear that this was a condition affecting the validity of the Order or restricting the Scottish Ministers' power to make it (particularly given that it does not impose any obligation on the Scottish Ministers themselves). It is accepted that there may be alternative views on these matters and the Scottish Government will reflect on this in the event of future Orders being required under section 1(4) of the 1987 Act.

Question 2

Given that the preamble is a matter of form and does not form part of the operative provisions of the instrument, there is no doubt as to whether the procedural requirements were met in this case, and that the meeting of those requirements is set out in the policy note, no corrective action is proposed in respect of this instrument.