Subordinate Legislation Committee

14th Report, 2011 (Session 4)

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Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(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; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

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James Dornan (Deputy Convener)  
Kezia Dugdale  
Mike MacKenzie  
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Subordinate Legislation Committee

14th Report, 2011 (Session 4)

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The Committee reports to the Parliament as follows—

1. At its meeting on 8 November 2011, the Committee agreed to draw the attention of the Parliament to the following instruments—

   National Health Service Superannuation Scheme etc. (Miscellaneous Amendments) (Scotland) Regulations 2011 (SSI 2011/364);

   Pigs (Records, Identification and Movement) (Scotland) Amendment Order 2011 (SSI 2011/351); and


2. The Committee’s recommendations in relation to these instruments are set out below. Those instruments that the Committee determined it did not need to draw the Parliament’s attention to are set out at the end of this report.
NEGATIVE PROCEDURE

National Health Service Superannuation Scheme etc. (Miscellaneous Amendments) (Scotland) Regulations 2011 (SSI 2011/364) (Health and Sport Committee)

3. These Regulations make various amendments to five sets of NHS instruments, covering the subject areas of the NHS Superannuation Scheme, Pension Scheme, Injury Benefits, Additional Voluntary Contributions, and Compensation for Premature Retirement.

4. They make miscellaneous adjustments in the nature of updates to references etc. and minor corrections. They also make amendments to take account of changes made to pensions rules and to tax rules contained within previous Finance Acts.

5. On 28 October the Scottish Government was asked for its comments on three drafting errors in the Regulations. This correspondence is reproduced at Appendix 1.

6. The first error relates to an incomplete reference to the National Health Service Superannuation Scheme (Scotland) Regulations 2011, at regulation 17(b), where the word “Service” has been omitted from the title of that instrument. The Scottish Government acknowledged this error, but takes the view that a court would construe the incomplete reference as referring to those Regulations since it could not reasonably refer to any other Regulations. The Committee accepts that assessment, having regard to the circumstances and context for this error.

7. This instrument updates references relating to the “1995 Regulations” (ie, the National Health Service Superannuation Scheme (Scotland) Regulations 1995) in other legislation so that these are replaced with reference to the “2011 Regulations” (ie the National Health Service Superannuation Scheme (Scotland) Regulations 2011.) The second error occurs in regulation 41(e) where the outcome of the update is unclear. It provides that in paragraph (4)(a) of regulation 2.K.4, “1995” is substituted by “2011”. However, paragraph (4)(a) contains two references to 1995, firstly with respect to “the 1995 Section”, an expression which continues to be relevant, and secondly with respect to “the 1995 Regulations”. It is not clear that it is the second of these references, only, which is being amended.

8. The Scottish Government acknowledged this error. Having regard to the context, and there being no meaning for the term “2011 Section” which is substituted in error, the Scottish Government considers that a court would be likely to construe this as a reference to the “1995 Section”. Again, the Committee accepts that assessment.

9. The third error occurs in regulation 104(n) which amends definitions in regulation 2 of the National Health Service (Scotland) (Injury Benefits) Regulations 1998. The reference which is made there to the definition of the “section 17 agreement provider” should instead refer to the “section 17C agreement provider”. The 1998 Regulations do not contain a definition of a “section 17 agreement provider”. In acknowledging this error the Scottish
Government considers that a court would construe this provision as amending the definition of “section 17C agreement provider” in that regulation since it cannot refer to anything else. Again, the Committee accepts that assessment.

10. In relation to all of these errors the Committee notes that there may be a need ultimately to rely upon court interpretation to resolve these drafting errors.

11. The Committee draws the instrument to the attention of the Parliament on the general reporting ground as it contains drafting errors at regulation 17(b), 41(e), and 104(n). The nature of these errors is not however considered to be likely to affect the operation of this instrument.

12. The Committee welcomes the Scottish Government’s commitment to rectify these errors at the next available opportunity.
INSTRUMENTS NOT SUBJECT TO ANY PROCEDURE

Pigs (Records, Identification and Movement) (Scotland) Amendment Order 2011 (SSI 2011/351) (Rural Affairs, Climate Change and Environment Committee)

13. This instrument substitutes a new article 3 into the Pigs (Records, Identification and Movement) (Scotland) Order 2011 (“the principal Order”) in order to correct a defect in the principal Order, which the Committee considered on 27 September 2011.

14. In considering the principal Order, the Committee drew it to the attention of the Parliament on ground (e), in that there appeared to be a doubt as to whether article 3(2) was *intra vires* so far as it related to notices. Article 3(2) of the principal Order provides that notices may be issued other than in writing in some circumstances, whereas section 83(1) of the Animal Health Act 1981 (“the 1981 Act”) requires that all notices under any order made under that Act be in writing.

15. The Scottish Ministers, in their response to the Committee on the principal Order, conceded that article 3(2) was *ultra vires*, and undertook to lay an amending instrument as quickly as possible.

16. The Scottish Government was asked two questions about the drafting of this Order. This correspondence is reproduced at Appendix 2.

17. The preamble to an instrument should cite all of the powers which have been relied upon in making the instrument. However, section 83(2), which gives power to “…prescribe and regulate the form […] of notices and other documents.” has not been cited. The Scottish Ministers accept that it would have been preferable to have cited section 83(2). They argue, however, that the reference to “all other powers enabling them to do so” in the preamble is capable of referring to that section. On balance, the Committee considers that this is correct. The operative provisions of this Order substitute a new article 3 into the principal Order which prescribes the form of notices and other documents. It accordingly appears to be clear that the Ministers were invoking the power in section 83(2) to do so.

18. The Committee accordingly draws the instrument to the attention of the Parliament on the general reporting ground. There has been a failure to follow proper drafting practice, as section 83(2) of the Animal Health Act 1981 has not been cited as an enabling power in the preamble. However this does not appear to affect the validity or operation of the instrument, as the words “and of all other powers enabling them to do so” may be construed so as to include a reference to that section.

19. The Scottish Government was asked why the substituted article 3 provides that notices must be in writing, when provision to that effect is already made by section 83(1) of the Animal Health Act 1981.

20. The Scottish Government accepts that the reference to notices in article 3 is otiose. However, it argues that it is clearer for the reader of the Order for the terms of section 83(1) to be repeated in article 3. The Committee observes that the Government issues guidance on these matters to pig keepers. It appears to the
Committee that guidance might well be the appropriate place for such explanations and clarifications to be contained. By contrast, it is presumed that Parliament does not legislate needlessly. It might well be that a court would feel obliged to seek to give meaning to the repetition of the provisions of section 83(1) within article 3, although it does not appear that there is an obvious interpretation which could derive anything of substance from the repetition. Overall, the Committee does not consider that this error affects the validity or operation of the Order.

21. The Committee therefore draws the instrument to the attention of the Parliament on the general reporting ground. There has been a failure to follow proper drafting practice, as article 3 of the Pigs (Records, Identification and Movement) (Scotland) Order 2011, as substituted by article 2 of this Order, provides that notices must be in writing when provision to that effect is already made in section 83(1) of the Animal Health Act 1981. Article 3 as substituted, so far as it refers to notices, is accordingly superfluous.
Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No.9, Transitional and Savings Provisions) Order 2011 (SSI 2011/354) (Justice Committee)

22. This order brings into force certain provisions of the Criminal Justice and Licensing (Scotland) Act 2010, as detailed in the Schedule, on 1st November 2011. Such provisions are brought into force either in full or for the specific purposes laid out in column 4 of the Schedule. The Order also makes certain transitional and savings provisions.

23. Section 109(3) inserts a new section 9B in the Rehabilitation of Offenders Act 1974. It creates a new offence of unauthorised disclosure of certain information which a person (A) holds in the course of their official duties. The information which must not be disclosed relates to offences which another person (B) has committed and either been prosecuted for or given an alternative to prosecution. Where the offence which is the subject of the information is treated as spent then that information should not be disclosed.

24. The order commences section 109(3) (and therefore section 9B of the 1974 Act) “in respect of offences committed on or after [1st November 2011]”. The Committee considers that the reference to “offences committed” could have two different meanings in the context of section 109(3). The effect of the commencement order will be different depending on which meaning you take.

25. If the reference to offences means the new offence under section 109(3) then the offence will only be committed by person A where that person’s conduct occurs on or after 1 November. If the reference to offences is to the offence committed by person B and which is the subject of the information held by person A, then section 109(3) will only apply to acts by person A in relation to information about offences by person B which were committed after 1 November.

26. The Scottish Government was asked why it was thought the commencement provision was sufficiently clear given this possible ambiguity. The Scottish Government indicated that it considered that the first interpretation is to be preferred to the second. It did not however explain why it took that view. This correspondence is reproduced at Appendix 3.

27. The Committee considers that the provision is open to interpretation in the way the Government intended since it would be most unlikely that it was intended to punish conduct retrospectively which would have been lawful at the time. The Committee agrees that only conduct by person A after 1st November could be prosecuted. However, it is less clear whether prosecution is limited by reference to the time at which the conduct by person B which is the subject of the information took place.

28. The Committee therefore draws the instrument to the Parliament’s attention on ground (h). Section 109(3) is commenced “in respect of offences committed on or after 1st November 2011”. Section 109(3) creates a new offence of unauthorised disclosure of information about certain offences. It could have been made clearer whether the reference to “offences” for the purposes of commencement related to the offence
created by section 109(3) or the offences which are the subject of the information to which the new offence relates.
29. At its meeting on 8 November 2011, the Committee also considered the following instruments and determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

**Education and Culture Committee**

Ancient Monuments and Archaeological Areas (Compensation) (Scotland) Regulations 2011 (SSI 2011/373)

Planning (Listed Buildings) (Prescribed Form of Notices) (Scotland) Regulations 2011 (SSI 2011/374)

Ancient Monuments and Archaeological Areas (Applications for Scheduled Monument Consent) (Scotland) Regulations 2011 (SSI 2011/375)


Historic Environment (Amendment) (Scotland) Act 2011 (Commencement No. 2) Order 2011 (SSI 2011/372);

**Infrastructure and Capital Investment Committee**

Highlands and Islands Air Services (Scotland) Act 1980 Amendment Regulations 2011 (SSI 2011/367)

**Justice Committee**

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 9, Transitional and Savings Provisions) Amendment Order 2011 (SSI 2011/366)

**Local Government and Regeneration Committee**

Town and Country Planning (Appeals) (Scotland) Amendment Regulations 2011 (SSI 2011/378)

Town and Country Planning (Inquiries Procedure) (Scotland) Amendment Rules 2011 (SSI 2011/379)

Town and Country Planning (Appeals) (Written Submissions Procedure) (Scotland) Revocation Regulations 2011 (SSI 2011/380)

Planning etc. (Scotland) Act 2006 (Listed Buildings) (Saving Provisions) Order 2011 (SSI 2011/381)

Town and Country Planning (Enforcement of Control) (No. 2) (Scotland) Amendment Regulations 2011 (SSI 2011/383)

Planning etc. (Scotland) Act 2006 (Commencement No. 12) Order 2011 (SSI 2011/382).
Rural Affairs, Climate Change and Environment Committee

Water Environment (Relevant Enactments and Designation of Responsible Authorities and Functions) (Scotland) Order 2011 (SSI 2011/368)
INSTRUMENTS SUBJECT TO THE NEGATIVE PROCEDURE

APPENDIX 1

The National Health Service Superannuation Scheme etc. (Miscellaneous Amendments) (Scotland) Regulations 2011 (SSI 2011/364)

On 28 October 2011 the Scottish Government was asked:

1. What is considered to be the effect of the incomplete reference which is made to the title of the National Health Service Superannuation Scheme (Scotland) Regulations 2011 within the amendment to the definition of “the 1995 Section” set out at regulation 17(b) and relating to regulation 2.A.1(1) of the National Health Service Pension Scheme (Scotland) Regulations 2008 (“the 2008 Regulations”)?

2. What is considered to be the effect of the amendment to regulation 2.K.4 of the 2008 Regulations, at regulation 41(e), which provides that in paragraph (4)(a) of regulation 2.K.4, “1995” is substituted by “2011”, given that paragraph (4)(a) contains two references to 1995, firstly with respect to “the 1995 Section” and secondly with respect to “the 1995 Regulations”, there being no distinction as to which of these references is being amended?

3. At regulation 104(m), which amends definitions in regulation 2 of the National Health Service (Scotland) (Injury Benefits) Regulations 1998, should the reference which is made to the definition of the “section 17 agreement provider” refer to the “section 17C agreement provider”? If so, what is considered to be the effect of reference having been made to a definition which is not currently detailed within the 1998 Regulations?

The Scottish Government responded as follows:

1. We agree that the reference to the National Health Service Superannuation Scheme (Scotland) Regulations 2011 is incomplete because it omits the word “Service”. However, we think that the effect is the same because a court would construe the incomplete reference as referring to those Regulations since it cannot reasonably refer to any other Regulations.

2. We agree that regulation 41(e) ought to have substituted only the second reference to “2011” but that it actually amends both such references. Regulation 2.K.4(4)(a) will therefore refer to additional pension purchased in “the 2011 Section” (rather than “the 1995 Section”) under regulation Q13 of the 2011 Regulations. However, we think that the effect is the same because a court would construe “the 2011 Section” as referring to the 1995 Section since the expression is undefined and must, in this context, refer to that Section of the scheme.

3. We assume that point 3 refers to regulation 104(n). We agree that this provision refers in error to “17” instead of “17C”. In the absence of a definition of “section 17 agreement provider” in regulation 2 of the National
Health Service (Scotland) (Injury Benefits) Regulations 1998, we think that a court will construe that this provision amends the definition of “section 17C agreement provider” in that regulation since it cannot refer to anything else.

4. We regret that these drafting errors have occurred. We will rectify these errors at the next available opportunity.
INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

APPENDIX 2

The Pigs (Records, Identification and Movement) (Scotland) Amendment Order 2011 (SSI 2011/351)

On 27 October 2011 the Scottish Government was asked:

1. To explain why section 83(2) of the Animal Health Act 1981 is not cited as an enabling power, and why section 8(1) is cited as an enabling power for this Order. The only substantive provision is article 2, which bears to substitute a new article 3 into the Pigs (Records, Identification and Movement) (Scotland) Order 2011. The substituted article 3 prescribes the form of walking licences, notifications, authorisations and approvals. Section 83(2) provides a specific power so to prescribe. The Scottish Government is accordingly asked to explain the effect of omitting any reference to it in the preamble.

2. To explain why the substituted article 3 bears to provide that notices must be in writing, when provision to that effect is already made by section 83(1) of the Animal Health Act 1981, and to explain the effect of so doing.

The Scottish Government responded as follows:

1. The substituted article 3 prescribes that notices, licences, notifications, authorisations and approvals under the Order must be in writing. Section 83(2) was omitted from the recital because it had been thought that the reference in Section 83(2) to the words “the form” of notices and other instruments refers to things other than simply prescribing that the notice must be in writing. This is because Section 83(1) already provides that notices under the Order must be in writing.

   We accept, however, that Section 83(2) might be read as meaning that, at least in relation to other instruments, prescribing the form includes prescribing that it is to be in writing. To the extent that Section 83(2) is to that effect, it would have been preferable to have cited Section 83(2).

   We do not think that the omission of Section 83(2) from the recital has any effect on the Order because the Scottish Ministers have the powers and, to the extent that they have been exercised, the reference in the recital to all other powers enabling Ministers to make the Order is capable of referring to Section 83(2).

   Section 8(1) of the 1981 Act was cited because the notices and other documents relate either directly or indirectly to movement and removal of animals.

2. The substituted article 3 provides that a number of documents require to be in writing, including any notice. The Scottish Government is aware that
section 83(1) of the Act states that notices must be in writing; therefore, notices could have been excepted from this requirement in the substituted article 3. However, the Scottish Government considers that it is clearer for the reader for this requirement to be stated in relation to all documents. The equivalent statutory instruments for England (SI 2011/2154) and Wales (SI 2008/1742) also take a similar drafting approach.

The inclusion of notices is otiose but has no other effect.
APPENDIX 3

The Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 9, Transitional and Savings Provisions) Order 2011 (SSI 2011/354 (C. 33))

On 28 October 2011 the Scottish Government was asked:

1. To explain why it is considered that the restriction placed on the purpose of the commencement of section 109(3), as specified in column 4 of the relevant entry in the Schedule, is sufficiently clear. Section 109(3) refers to two offences, namely the offence which is the subject of the official record or relevant information, defined in the new section 9B(1), and the new offences of unauthorised disclosure or fraud, which are created by the new section 9B(3) and (8). Any lack of clarity regarding which offence is being referred to will affect the operation of the provision. The latter interpretation seeks to restrict application of the new offences to conduct of record holders which takes place after 1 November whereas the former interpretation means that the new offence is commenced only in relation to conduct concerning official records or relevant information which relate to offences committed after 1 November.

2. To explain why article 5 provides that the saving provisions in paragraphs (a), (b) and (c) apply to applications received before 13 December 2011, taking into account the fact that the prevention of crime licensing objective is repealed from 1 November 2011.

The Scottish Government responded as follows:

1. Section 109(3) of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act") inserts a new section 9B into the Rehabilitation of Offenders Act 1974. The new section 9B creates two new offences:

- subsection (3) provides that an individual found guilty of disclosing information which relates to a person being given an alternative to prosecution which has become spent outwith the course of their official duties will be liable on summary conviction to a fine not exceeding level 4 on the standard scale;

- subsection (8) provides that a person improperly obtaining information which concerns a person being given an alternative to prosecution will be liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both.

The Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 9, Transitional and Savings Provisions ) Order 2011 (SSI 2011/354) ("the Order") provides that section 109(3) is commenced on 1 November 2011 for all purposes in respect of offences committed on or after 1 November 2011. In relation to section 109(3), the Order has the effect that that the new offences created by section 9B of the Rehabilitation of Offenders Act 1974 can only relate to conduct occurring on or after 1
November 2011. Article 2 of the Order provides for the commencement of section 109(3) and so the reference to “offences” in column 4 of the entry in the schedule relating to section 109(3) can be interpreted as a reference to the new offences created by the commencement of section 109(3). We do not consider that the Order has the effect of providing that section 109(3) is only commenced in relation to alternatives to prosecution given in respect of offences where those offences are committed on or after 1 November 2011.

2. Schedule 6 to the 2010 Act makes amendments to the Licensing (Scotland) Act 2005 and the amendments include extensions to the powers of the police to object to various licensing applications.

The Order provides that paragraphs 2 and 17 of schedule 6 to the 2010 Act are commenced on 1 November 2011. These paragraphs repeal the definition of “crime prevention objective” in the Licensing (Scotland) Act 2005. The purpose of Article 5 of the Order is to ensure that the definition of “crime prevention objective” is saved in respect of any outstanding applications to which the definition may still be relevant.

The Order also provides that paragraphs 9 and 10 of schedule 6 are commenced on 1 November 2011 for the purposes of occasional licence applications received by a Licensing Board on or after that date. The purpose of Article 5(a) is to ensure that the definition of “crime prevention objective” is saved in relation to occasional licence applications received before 1 November 2010.

SSI 2010/413 provides that:

- paragraphs 5 and 6(3) of schedule 6 to the 2010 Act are commenced in respect of applications for a premises licence made to a Licensing Board on or after 13 December 2011;

- paragraph 7 of schedule 6 to the 2010 Act is commenced in respect of applications for the transfer of a premises licence made to a Licensing Board on or after 13 December 2011;

- paragraph 12 of schedule 6 to the 2010 Act is commenced in respect of any notice given by a Licensing Board to the appropriate chief constable under section 73(1) of the 2005 Act in respect of an application for a personal licence made on or after 13 December 2011;

- paragraphs 13 to 15 of schedule 6 to the 2010 Act are commenced in respect of applications for a personal licence under section 72 of the 2005 Act made on or after 13 December 2011.

So to ensure that the provisions relating to the “crime prevention objective” can still function in relation to certain applications received by a Licensing Board prior to 13 December 2011 then the definition of “crime prevention objective” needs to be saved in relation to these applications. This is what article 5(b), (c) and (d) of the Order does.
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