Subordinate Legislation Committee

7th Report, 2011 (Session 4)

Subordinate Legislation
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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:

Chic Brodie
Nigel Don (Convener)
James Dornan (Deputy Convener)
Kezia Dugdale
Mike MacKenzie
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Subordinate Legislation Committee

7th Report, 2011 (Session 4)

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 27 September 2011, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Scottish Local Government Elections Order 2011 [draft];

   Marketing of Horticultural Produce (Scotland) Amendment Regulations 2011 (SSI 2011/324);

   Planning etc. (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Amendment Order 2011 (SSI 2011/336); and

   Pigs (Records, Identification and Movement) (Scotland) Order 2011 (SSI 2011/327).

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.
AFFIRMATIVE PROCEDURE

Scottish Local Government Elections Order 2011
(Local Government and Regeneration Committee)

3. This instrument is subject to the affirmative procedure. The general purpose of the Order is to replace the Scottish Local Government Elections Order 2007 (SSI 2007/42), which provides rules governing the conduct of elections of members of the Scottish local authorities.

4. As stated in article 1(1) of the Order, it would come into force on 10 November 2011, except for the purposes of any election to be held on or before 2 May 2012 (by-elections). The next local government elections are scheduled to be held on 3 May 2012.

5. On 20 September 2011 the Committee wrote to the Scottish Government, asking why the approach had been taken of excepting any elections held on or before 2 May 2012 from the commencement date provision of 10 November 2011, rather than making an application provision, that the Order shall not apply for the purposes of any such election. With regard to article 1(1), the Scottish Government was also asked if the article gives effect to the intended policy, since to the extent that a commencement provision does not specify a commencement date, the general rule is that the provisions commence on the date of making the order. This correspondence is reproduced at Appendix 1.

6. In responding to that first point, the Scottish Government explained that the approach taken has replicated article 1 of the Scottish Local Government Elections Order 2007 (SSI 2007/42), and that no difficulties had arisen in practice with that approach.

7. On the second point, the Scottish Government explained that the policy intention is that the 2011 Order should not apply to elections on or before 2 May 2012, and that the 2007 Order should continue to apply to such elections. It is also explained that in its view, article 1 taken together with the saving provision in article 6(2), achieves that end.

8. The Committee accepted the Government's view on the effect of the commencement provision, having regard to article 1 combined with article 6(2). The Committee also noted, however, that the Scottish Parliament Elections etc. Order 2010 takes a different approach, as a matter of drafting practice. Article 1(2) of that Order provides that the Order has no effect for the purposes of any election for which the date of poll is on or before 4 April 2011.

9. While taking account of the Scottish Government response, the Committee considers that the commencement provision in article 1(1) does not follow proper drafting practice. It is considered that it would have been proper practice to have made provision, that the Order has no effect for the purposes of any election to be held on or before 2 May 2012, rather than making an exception from the provision for the commencement date of the Order. The Committee therefore draws the instrument to the Parliament’s attention on the general reporting ground.
10. In the letter of 20 September 2011, the Scottish Government was also asked whether in article 5(3)(a), the reference to paragraph (1) (of regulation 2 of SSI 2007/264) should instead refer to paragraph (2).

11. In its response, the Scottish Government agreed that the reference in article 5(3)(a) of the 2011 Order to Regulation 2(1) of SSI 2007/264 should be to Regulation 2(2). The Scottish Government intimated that it would propose to deal with this error as a printing point before publication of the Order, or by amendment at the first suitable opportunity if it is not possible to deal with the error as a printing point.

12. The Committee again draws the Parliament’s attention to the instrument on the general reporting ground as in article 5(3)(a), the reference to paragraph (1) of regulation 2 of SSI 2007/264 should be to paragraph (2). The Committee welcomes the Government’s commitment that this drafting error should be appropriately corrected, and recommends that this is done as early as possible.

13. The final matter raised with the Scottish Government was in the view of the Committee the most significant matter in relation to the instrument. In the letter of 20 September 2011, the Scottish Government was also asked what powers are being relied on to make the offence provision in Schedule 1 rule 27(8)(voting secrecy requirements), given that sections 3, 3A and 16 of the Local Governance (S) Act 2004 cited in the preamble as the enabling powers to make the instrument do not appear to specify a power to create offences.

14. The Scottish Government noted in response that paragraph 27 in Schedule 1 to the 2011 Order (Requirement of Secrecy) differs from the equivalent provision in the 2007 Order. The policy intention behind the change was to bring the 2011 Order into line with the Scottish Parliament Elections Order 2010 and the rules on requirement of secrecy contained there (see SI 2010/2999, article 31).

15. The Scottish Government explain in their response that the effect of the provisions of paragraph 27 is to apply sections 66 and 66A of the Representation of the People Act 1983 (“the 1983 Act”) by repeating its provisions (including the offence provision contained in section 66(6)) with some modifications.

16. It is further explained that the enabling power in the 2004 Act which is relied on to make the offence provision in rule 27(8) is in section 3(3). That subsection provides that an enactment may be applied (with or without modifications) to an order providing for the conduct of councillor elections. The Scottish Government contends that this provides a power to apply the provisions of the Representation of the People Act 1983 within this Order, including the application of offence provisions, with modifications.

17. The Committee notes that this matter is similar to a point which was reported on by the Committee in Session 3, in relation to regulation 2(2) of the Health Board Elections (S) Amendment Regulations 2010.¹

¹ 5th Report of 2010 of the Subordinate Legislation Committee
18. The Committee considers that, despite the comments in the Government response on the application of provisions from the 1983 Act (with modifications) in this Order, there is a strong legal presumption that there must be an express authorisation of an offence provision in the enabling Act, or by clear inference. The power in section 3(3) of the 2004 Act, while a general and supplemental power for the order to provide that an enactment may apply with or without modifications, is in the nature of a supplemental power. This power is described after the provision in section 3(2), which sets out under 5 heads what content the Order must include, none of which provide for the creation or specification of offences or penalties. The Committee is not satisfied that the enabling powers cited in the preamble to the instrument clearly authorise the offence provision in Schedule 1, rule 27(8).

19. The Committee also noted that rule 27(8) provides for a substantive reduction of the maximum term of imprisonment that may be imposed for an offence, compared with section 66(6) of the 1983 Act. That subsection provides that the maximum term is 6 months, while rule 27(8) provides for a maximum of 3 months. The Government response explains that the Scottish Parliament Elections Order 2010 (article 31) provides for a maximum term of 3 months, but this arises from limitations placed on the powers under which that particular Order is made (in section 113 of the Scotland Act 1998).

20. The Committee has also noted in this respect that, the Westminster Joint Committee on Statutory Instruments (for example in its Session 1997/98, 34th Report) has also reported to the effect that supplemental or incidental powers in primary legislation should not be used as the authority to create or specify criminal offences in subordinate legislation, and that Parliament reserves for itself the power generally to specify or authorise criminal offences, in primary legislation.

21. The Committee therefore concludes that there appears to be a doubt whether the offence provision in Schedule 1, Rule 27(8) is intra vires given that there is a strong presumption against the creation of offences by subordinate legislation, rebuttable only by express provision or clear inference, neither of which appear to the Committee to have been satisfied in this case. The Committee draws the instrument to the Parliament's attention on reporting ground (e).
NEGATIVE PROCEDURE

**Marketing of Horticultural Produce (Scotland) Amendment Regulations 2011 (SSI 2011/324)**
*(Rural Affairs, Climate Change and Environment Committee)*

22. This instrument is subject to the negative procedure. It implements Commission Implementing Regulation (EU) 543/2011 which lays down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sector. In doing so, this instrument provides a new statutory framework for the enforcement of marketing rules in that sector.

23. The Scottish Government was asked three related questions, concerning the use of the term “operator” in these Regulations. This arises in the context of provisions relating to a right of review, and specifically who is to be informed of that right. This correspondence is reproduced at Appendix 2.

24. Firstly, the Scottish Government was asked to explain whether it was intended that it is the operator who is to be informed of the right of review (as is provided for within substituted regulation 10(3)), given that when initially prohibiting movement this is to be done by notice served on the person appearing to be in charge of the horticultural produce concerned. Secondly, it was asked what is meant by the term “operator”, given the absence of a definition of that term. And finally, it was asked why, in setting out who may request that a review be arranged, within substituted regulation 11, there is no explicit reference made to the operator, given the earlier reference to the operator as being the person who must be informed of the right of review.

25. The Scottish Government acknowledged that the reference to “operator” at regulation 6, which substitutes a new regulation 10(3) into the Marketing of Horticultural Produce (Scotland) Regulations 2009 (“the principal Regulations”) is a drafting error. Instead, the reference should have been to the person on whom the notice is served under regulation 10(1) of the principal Regulations. The Scottish Government intimated that it would amend the instrument at the earliest available opportunity.

26. The Scottish Government considered however that the provision concerned had to be taken in context. It considered that on a construction of regulation 10(3) read with regulation 10(1) and (2) and, in turn, with the substituted regulation 11 of the principal Regulations it is reasonably clear as to the person to be informed of the new right of review provided for under substituted regulation 11.

27. The Committee considered that it was important there be clarity where matters such as rights of review are concerned, and that it should not be necessary to have to consider this provision in wider context in order to achieve a satisfactory construction. It did however take the view that, on doing so, it is reasonably clear as to who is actually to be informed of the new right of review.
28. The Committee draws the instrument to the Parliament’s attention under reference to reporting ground (h), in respect of the erroneous reference to “operator” at regulation 6, where it inserts a new regulation 10(3) to the Marketing of Horticultural Produce (Scotland) Regulations 2009, in the context of a right of review, it being considered that the form or meaning of the provision concerned could be clearer. In drawing the instrument to the Parliament’s attention the Committee also welcomes the Scottish Government’s intention to amend the instrument at the earliest opportunity.
Planning etc. (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Amendment Order 2011 (SSI 2011/336) (Local Government and Regeneration Committee)

29. This instrument is subject to the negative procedure. The Order makes a technical, urgent amendm ent of the Planning etc. (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Order 2008 (“the 2008 Order”). The amendment will apply to any local plans adopted by planning authorities on or after 17 September. It applies to those plans the appeal provisions of sections 237 and 238 of the Town and Country Planning (Scotland) Act 1997 (as those sections are amended by the Planning etc. (S) Act 2006). This is in place of applying those sections in their form before they were amended. This relates to how a challenge to a local plan may be made to the Court of Session.

30. The Order was laid on 16 September, and came into force on 17 September. This breaches the “28-day rule” for negative procedure instruments.

31. Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out the rule that an SSI which is subject to negative procedure must be laid before Parliament as soon as practicable after it is made, and in any event at least 28 days before the instrument comes into force.

32. A failure to comply with section 28(2) does not render the instrument invalid, but the Scottish Government must explain to the Presiding Officer why the laying requirements have not been complied with.

33. In its letter to the Presiding Officer, the Scottish Government stated that the need for the amendment in this Order only recently came to their attention after a query raised by a planning authority on 2 September. Further investigation established that there are 3 local plans likely to be adopted in the near future, and one of these is expected to be adopted in the week starting 19 September.

34. Against that background, the Scottish Government indicated it was required to bring the Order into force on 17 September. From 3 September to the making of the Order on 14 September, it appears there was an informal consultation process with some planning authorities affected by the Order.

35. It appears to the Committee that this breach of the 28-day rule resulted from an oversight on the part of the Scottish Government, rather than from a failure in planning the procedures so the Order would comply with the rule.

36. However, the Committee draws the instrument to the Parliament’s attention on reporting ground (j) as the instrument has not been laid at least 28 days before it came into force as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.
INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Pigs (Record, Identification and Movement) (Scotland) Order 2011 (SSI 2011/327 (Rural Affairs, Climate Change and Environment Committee)

37. This instrument is not subject to any parliamentary procedure. This Order makes provision for the identification and registration of pigs. It implements Council Directive 2008/71/EC on the identification and registration of pigs.

38. This Order, together with the Pigs (Records, Identification and Movement) Order 1995 (“the 1995 Order”), sets out the requirements which pig keepers must comply with. Among other things, it requires the keeper to maintain records, makes provision about the marking of pigs with ear tags, tattoos or temporary marks, and specifies the documentation necessary when pigs are to be moved.

39. It appears from the Executive Note that the 1995 Order has not been revoked in its entirety because the Scottish Ministers intend to bring forward a separate Animal Movements and Gatherings Order which will incorporate the movement provisions presently contained in the 1995 Order.

40. On 16 September 2011, the Scottish Government was asked to explain the vires for making article 3(2) so far as it relates to notices, given that section 83(1) of the Animal Health Act 1981 (“the 1981 Act”) provides that “Every notice... under any order... made under this Act must be in writing.” This correspondence is reproduced at Appendix 3.

41. Article 3(2) of the Order provides that, where it is necessary to prevent suffering to a pig, a notice, notification, authorisation or approval may be issued otherwise than in writing. However, section 83(1) of the 1981 Act requires that all notices under any order made under that Act (such as this one) be in writing. Article 3(2) accordingly contradicts the terms of section 83, which is the relevant enabling power.

42. The Scottish Government explained that this provision was included in order to allow for circumstances in which a pig required to be moved for emergency veterinary treatment. It conceded section 83(1) had been overlooked in the preparation of this provision. The Scottish Government therefore accepted that article 3(2) of the order is ultra vires in so far as it relates to notices, and is of no effect. It has undertaken to make an amending instrument as quickly as possible and to clarify matters in guidance meantime.

43. The Committee therefore draws the instrument to the attention of the Parliament on reporting ground (e). There appears to be a doubt as to whether article 3(2) of the Order is intra vires so far as it relates to notices, as it provides that notices may be issued other than in writing in some circumstances, whereas section 83(1) of the Animal Health Act 1981 requires that all notices under any order made under that Act be in writing.

44. Given the serious nature of this reporting ground, and considering the Scottish Government’s commitment to make an amending instrument as quickly as possible, the Committee agrees that its legal advisers should
seek an update from the Scottish Government in a fortnight’s time as to the timescale for the amendment, so that the Committee may monitor implementation of this commitment.
45. At its meeting on 27 September 2011, the Committee also considered the following instruments and determined that it not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

**Infrastructure and Capital Investment Committee**

Local Democracy, Economic Development and Construction Act 2009 (Commencement No.3) (Scotland) Order 2011 (SSI 2011/337 (C.30))

**Justice Committee**

Criminal Legal Assistance (Fees) (Scotland) Regulations 2011 (SSI 2011/333)

**Local Government and Regeneration Committee**

West Lothian (Electoral Arrangements) Councillor Numbers Order 2011 (SSI 2011/332)

**Rural Affairs, Climate Change and Environment Committee**

Poultrymeat (Scotland) Regulations 2011 (SSI 2011/318)
INSTRUMENTS SUBJECT TO THE AFFIRMATIVE PROCEDURE

APPENDIX 1

The Scottish Local Government Elections Order 2011 [draft]

On 16 September 2011 the Scottish Government was asked:

1. (a) Why is the approach taken in article 1(1) of excepting any elections held on or before 2 May 2012 from the commencement date provision of 10 November 2011, rather than making an application provision, that the Order shall not apply for the purposes of any such election?

   (b) Does article 1(1) give effect to the intended policy, since to the extent the paragraph does not specify a commencement date, the rule is that the provisions commence on the date of making the order?

2. What powers are being relied on to make the offences provision in Schedule 1 rule 27(8)(voting secrecy requirements), given that sections 3, 3A and 16 of the Local Governance (S) Act 2004 cited in the preamble do not appear to specify a power to create offences?

3. In article 5(3)(a), should the reference to paragraph (1) (of regulation 2 of SSI 2007/264) refer to paragraph (2)?

The Scottish Government responded as follows:

1. (a) The approach taken in article 1 follows that taken in article 1 of the Local Government Elections Order 2007 (SSI 2007/42). To the Scottish Government’s knowledge, no issue was raised by the Subordinate Legislation Committee (SLC) when it considered the 2007 Order and no difficulties have arisen in practice with that approach.

   (b) The policy intention is that the 2011 Order should not apply to elections on or before 2 May 2012, and that the 2007 Order should continue to apply to such elections.

   It is the Scottish Government’s position that article 1, taken together with the saving provision in article 6(2) achieves that end. Though other approaches are possible, the position is that the result would be the same and that this approach works.

   Although not directly relevant to the point raised in question (1), it is worth noting that the possibility of an election in the period from 10 November to 2 May 2012 is very low, as section 37 of the Local Government in Scotland Act 1973, provides that a by-election would not be held in the 6 month period before the ordinary election of councillors, unless on the occurrence of the vacancy (or the occurrence of simultaneous vacancies) the total
number of unfilled vacancies in the membership of the council exceeds one third of the whole number of members.

It should also be noted for the sake of completeness that the Scottish Government does not agree with the proposition stated above that “to the extent the paragraph does not specify a commencement date, the rule is that the provisions commence on the date of making the order”. If the provision were unclear, we consider that there would be some doubt about that, especially since there is nothing in the Interpretation and Legislative Reform (Scotland) Act 2010 to that effect. Consequently, we do not see that it is generally accepted that there is a rule to that effect.

2. Paragraph 27 in Schedule 1 to the 2011 Order (Requirement of Secrecy) differs from the equivalent provision in the 2007 Order. The policy intention behind the change was to bring the 2011 Order into line with the Scottish Parliament Elections Order 2010 and the rules on requirement of secrecy contained there (see SI 2010/2999, article 31).

The Scottish Government notes however that the effect of the provisions of paragraph 27 is to apply section 66 of the Representation of the People Act 1983 (the 1983 Act) by repeating its provisions (including the offence provision contained in s66(6)) with some modifications. The 2011 Order does not, of itself, create a novel offence.

The modifications made to the wording of section 66 are, in the main, minor changes to wording which do not alter the effect of the provisions. There is however one modification of substance. This is the reduction of the maximum term of imprisonment that may be imposed for an offence. Section 66(6) provides that the maximum term is 6 months. However, the Scottish Parliament Elections Order 2010 (article 31) provides for a maximum term of three months. This is due to limitations placed on the powers under which that Order is made in s113 of the Scotland Act 1998. It would not be desirable to have a greater sanction available for such an offence in the context of local government elections than was available in Scottish Parliament elections and therefore this modification was made in order to achieve consistency between these elections in this respect.

It should also be noted that s66A of the 1983 Act has been applied with some minor modifications (see paragraph 27(7) of Schedule 1 to the 2011 Order).

Although this could have been done by reference to these provisions, with modifications, the Scottish Government considers that it is clearer to the reader to set out the intended provisions at length.

The Scottish Government’s position is that the application of sections 66 and 66A with modifications is covered by section 3(3) of the Local Governance (Scotland) Act 2004 which states that;

“(3) Such an order may, in particular-
(a)………………
(b) apply, with or without modifications or exceptions, any provision made by or under any enactment.

The 1983 Act is such an enactment and consequently the provisions of the Order fall within the scope of the powers cited in the preamble.

3. The Scottish Government agrees that the reference in article 5(3)(a) of the 2011 Order to Regulation 2(1) of SSI 2007/264 should be Regulation 2(2). The intended amendment is obvious to the reader. This is a typographical error which the Scottish Government would propose to deal with as a printing point before publication of the Order, or by amendment at the first suitable opportunity if it is not possible to deal with the error as a printing point.
INSTRUMENTS SUBJECT TO THE NEGATIVE PROCEDURE

APPENDIX 2

The Marketing of Horticultural Produce (Scotland) Amendment Regulations 2011 (SSI 2011/324)

On 16 September 2011 the Scottish Government was asked:

1. Can the Scottish Government explain whether it is intended that it is the operator who is to be informed of the right of review, albeit that when initially prohibiting movement this is to be done by notice served on the person appearing to be in charge of the horticultural produce concerned.

2. What is meant by the term “operator”, and in the absence of a definition, does the Scottish Government consider that it is plain, by virtue of the provision made by substituted regulation 10(3), as to who is to be informed of the right of review?

3. In setting out who may request that a review be arranged, within substituted regulation 11, why is no explicit reference made to the operator, given that the operator is the person who must be informed of the right of review in terms of substituted regulation 10(3)?

The Scottish Government responded as follows:

Question 1

The reference to “operator” in the new Regulation 10(3) of the Marketing of Horticultural Produce (Scotland) Regulations 2009 (“the principal Regulations”) is a drafting error. Instead, the reference should have been to the person on whom the notice is served under regulation 10(1) of the principal Regulations. We are grateful for the Committee’s comments and will amend the instrument at the earliest available opportunity.

Questions 2 and 3

In light of the answer given to question 1, it is considered appropriate to deal with questions 2 and 3 together.

We think however that, in context, regulation 10(3) must still be read with regulation 10(1) and (2) and, in turn, with the substituted regulation 11 of the principal Regulations (as inserted by regulation 7 of this instrument).

In particular, regulation 10(2) of the principal Regulations makes it clear that the written notice under regulation 10(1) must be served on “the person appearing to the authorised officer to be in charge of the horticultural produce concerned”. Moreover, substituted regulation 11(1) of the principal Regulations refers to the relevant person who may request a review of the decision of an authorised officer to serve a notice under regulation 10(1) of those Regulations.
That being the case, we think it is reasonably clear from the overall context of these provisions who is the person which authorised officers, on service of a notice under regulation 10(1) of the principal Regulations, should inform for the purposes of the new right of review under regulation 11 of those Regulations.
INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

APPENDIX 3

The Pigs (Records, Identification and Movement) (Scotland) Order 2011 (SSI 2011/327)

On 16 September 2011 the Scottish Government was asked:

To explain the vires for making article 3(2) so far as it relates to notices, standing section 83(1) of the Animal Health Act 1981 which provides that “Every notice…under any order…made under this Act must be in writing.”

The Scottish Government responded as follows:

The Scottish Government thanks the SLC legal advisers for their question on the article 3(2) of the Pigs (Records, Identification and Movement) (Scotland) Order 2011. Article 3(2) provides that a notice, notification, authorisation or approval under the Order which would otherwise require to be in writing may be issued otherwise than in writing where this is necessary to prevent suffering to a pig. This provision was included in order to allow for circumstances in which a pig required to be moved for emergency veterinary treatment. Unfortunately, section 83(1) of the 1981 Act, which requires all notices under orders made under it to be in writing, was overlooked in the preparation of this provision. It is therefore accepted that article 3(2) of the order is ultra vires in so far as it relates to notices. Legally, this means of course that it is of no effect. The Scottish Government will however make an amending instrument as quickly as possible in order to amend article 3 in order that it does not mislead those who need to be informed about the law in this area. In the meantime, the Scottish Government is issuing guidance to all pig keepers on the new order and will make this point clear in the guidance.
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.