Subordinate Legislation Committee

15th 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  
John Scott  
Drew Smith

Committee Clerking Team:

Clerk to the Committee  
Irene Fleming

Assistant Clerk  
Euan Donald

Support Manager  
Lori Gray
The Committee reports to the Parliament as follows—

1. At its meeting on 15 November 2011, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Double Jeopardy (Scotland) Act 2011 (Commencement and Transitional Provisions) Order 2011 (SSI 2011/365); 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

Double Jeopardy (Scotland) Act 2011 (Commencement and Transitional Provisions) Order 2011 (SSI 2011/365) (Justice Committee)

3. This instrument brings into force the Double Jeopardy (Scotland) Act 2011 (“the 2011 Act”) on 28 November 2011.

4. It also makes transitional provision relating to the disclosure of information in connection with proceedings brought for authority to bring a second prosecution under the exceptions to the rule against double jeopardy set out in the 2011 Act.

5. Unusually for a commencement order this instrument is subject to negative procedure. It has been combined with a transitional provision which is subject to negative procedure and so, by virtue of section 33 of the Interpretation and Legislative Reform (Scotland) Act 2010, the whole instrument is subject to negative procedure.

6. Clarification was sought and received from the Scottish Government on the intention of the transitional provision. This correspondence is reproduced at Appendix 1.

7. The power given to ministers to make transitional provision was limited in the Act to provision in connection with the rules on disclosure of evidence set out in the Criminal Justice and Licensing (Scotland) Act 2010 in connection with applications under the 2011 Act.

8. The disclosure rules do not require the prosecutor to disclose evidence which has been disclosed before. However, article 5 of the order makes special provision about the rules on disclosure of evidence to the defence in applications for authority for a retrial under the 2011 Act where the original trial took place prior to the double jeopardy regime coming into force. The Scottish Government considered this approach to be appropriate as the original trial would have taken place under a different disclosure regime and at a time where subsequent applications for a retrial would not have been contemplated.

9. In these particular cases the Scottish Government’s intention is that the prosecutor ensures that the respondent has a fair hearing on the application for a retrial. If it is considered necessary to achieve a fair hearing then evidence which has previously been disclosed should be disclosed again.

10. The Committee considers that the wording of the transitional provision in article 5 could have been clearer. What the provision actually says is:

   “the prosecutor need not disclose information already disclosed only where to do so would be consistent with the respondent receiving a fair hearing”.

11. The Committee considers that the combination of expressions which exempt action with expressions suggesting positive action is confusing and lacks transparency of meaning. The rules on disclosure of evidence are important, and
may be considered particularly so in the context of an application for authority to bring a second prosecution.

12. The Committee considers that the meaning of article 5 could be more clearly expressed. Article 5 modifies the statutory rules on disclosure of evidence to the defence in relation to applications for a retrial under the 2011 Act where the original trial took place before 28 November 2011. The relevant rules exempt the prosecutor from being required to disclose evidence which has already been disclosed to the respondent. It is intended that article 5 modifies these rules by providing that the exemption from disclosure for a second time will only apply where not disclosing the evidence again would be consistent with the respondent getting a fair hearing.

13. The Committee considers that the combination of words indicating exemption from action with words indicating there is a requirement for action makes the effect of the provision less clear and inhibits the transparency of the application of an important rule of criminal procedure.

14. Given this lack of clarity, the Committee draws the instrument to the attention of Parliament under reporting ground (h).
The general purpose of these technical Regulations is to amend the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Regulations 1987. The instrument removes provisions on applications for appeal against decisions relating to listed building consent. The procedures for such appeals will in future be governed by the same procedures as for planning appeals, under the Town and Country Planning (Appeals) (Scotland) Regulations 2008.

The Regulations also make some changes to procedures for making claims for compensation following the issue of listed building “stop notices”, for example, resulting from the introduction of new “stop notice” provisions for unauthorised works in the Historic Environment (Amendment) (Scotland) Act 2011.

The Regulations will come into force on 1 December 2011.

The Regulations follow on from certain powers enabling them, contained in the Historic Environment (Amendment) (Scotland) Act 2011, which has amended the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.

A new regulation 9(4) of S.I. 1987/1529 is inserted by regulation 2(4) of the Regulations. This prescribes the time for serving a listed building purchase notice on a local authority. It amends the earlier provision.

The Scottish Government was asked which particular powers were being relied on to make this new regulation. Specifically, the Scottish Government was asked if section 28 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 was being relied on and if so whether this should have been cited in the preamble to the regulations. This correspondence is reproduced at Appendix 2.

The Scottish Government confirmed that regulation 2(4) is made in exercise of powers under section 28 of the 1997 Act and accepted that it should have been cited in the preamble to the regulations. They intimated that the reference in the preamble to “all other powers” should be interpreted as including reference to section 28, and contended that the lack of a specific reference to section 28 in the preamble did not alter the effect of the Regulations.

The Committee agrees that the reference in the preamble to “all other powers” can be interpreted as referring to section 28, in this instance. The Committee further agrees that this should not affect the validity or operation of the Regulations.

The preamble to an instrument should cite all of the powers which have been relied upon in making the instrument. However, the form of words “and all other powers enabling them to do so” which is usually added to the end of the preamble, may include powers which are wrongly omitted or incorrectly cited. This has been done in this case.
24. The Committee concludes that there has been a failure to follow proper drafting practice, as section 28 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 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 all other powers enabling them to do so” may be construed so as to include a reference to that section.

25. Given the failure to follow proper drafting practice, the Committee draws this instrument to the attention of the Parliament on the general reporting ground.
26. At its meeting on 15 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:

**Justice Committee**

Act of Sederunt (Rules of the Court of Session Amendment No.6) (Miscellaneous) 2011 (SSI 2011/385)

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

Climate Change (Limit on Carbon Units) (Scotland) Order 2011 [draft]

Enzootic Bovine Leukosis (Scotland) Amendment Regulations 2011 (SSI 2011/390)

Scottish Natural Heritage Code of Practice on Deer Management (SG 2011/242)
INSTRUMENTS SUBJECT TO THE NEGATIVE PROCEDURE

APPENDIX 1


On 4 November 2011 the Scottish Government was asked:

1. Can the Scottish Government explain the intended effect of article 5(2)?

2. That article makes provision about where the prosecutor need not do something. The circumstances in which the omission to do something is permitted is described by reference to a positive action to do something. Is it considered that the wording of this article is sufficiently clear to avoid confusion?

The Scottish Government responded as follows:

1. There is a general duty on the prosecutor to disclose certain information to the respondent in 2011 Act proceedings (where this information falls within the definition in section 140B(3) of the 2010 Act (as amended by section 13 of the 2011 Act)). The provisions specified in article 5(2) of the Order provide an exception to this general rule, namely that the prosecutor is not required to disclose anything that the prosecutor has already disclosed to the respondent. Generally these provisions will apply, so that the prosecutor does not have to disclose information again in every case. However, we consider it is appropriate that the application of the provisions specified in article 5(2) is expressly qualified where the original proceedings were concluded prior to the 2011 Act fully coming into effect. The intention is to modify the ability not to disclose information again in situations where that non-disclosure would be unfair. Article 5(2) provides that these exceptions will only apply where it is consistent with the respondent receiving a fair hearing. The prosecutor would not be able to withhold information on the grounds of previous disclosure where withholding that information would prejudice the prospects of a fair hearing.

2. The Scottish Government considers that the provision is sufficiently clear and the wording ensures coherence and accessibility of the legislation. We have made specific reference to the terms of the sections of the 2010 Act referred to. The Order provides that the modification of the general duty to disclose information, as contained in these subsections, will only apply in the specified circumstances.
APPENDIX 2

The Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Amendment Regulations 2011 (SSI 2011/376)

On 4 November the Scottish Government was asked:

Which enabling power is being relied on to make the new regulation 9(4) of S.I. 1987/1529, inserted by regulation 2(4), which prescribes the time for serving a listed building purchase notice (and which appears to amend the provision in the substituted regulation 9(3))? Is it considered to be section 28 of the 1997 Act? If this power is not cited in the preamble, what is the effect?

The Scottish Government responded as follows:

The Scottish Government accepts that section 28 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 should have been cited in the preamble to the Regulations. New regulation 9(4) of the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Regulations 1987 (inserted by regulation 2(4)) prescribes the time within which a listed buildings purchase notice is to be served. It is clear that new regulation 9(4) is made in exercise of powers contained in section 28, which enable the Scottish Ministers to prescribe such time. The reference in the preamble to the Regulations to “all other powers” should therefore be interpreted as referring to section 28. It is not considered that the lack of a specific reference to section 28 in the preamble alters the effect of the instrument.
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