Subordinate Legislation Committee

5th Report, 2012 (Session 4)

Subordinate Legislation

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Subordinate Legislation Committee

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)
Mike MacKenzie
Michael McMahon
John Pentland
John Scott

**Committee Clerking Team:**

Clerk to the Committee
Irene Fleming

Assistant Clerk
Euan Donald
Subordinate Legislation Committee

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The Committee reports to the Parliament as follows—

1. At its meeting on 24 January 2012, the Committee agreed to draw the attention of the Parliament to the following instruments—

- Specified Products from China (Restriction on First Placing on the Market) (Scotland) Amendment Regulations 2012 (SSI 2012/3); and
- Children’s Hearings (Scotland) Act 2011 (Commencement No.3) Order 2012 (SSI 2012/1);

2. The Committee’s recommendations in relation to these instruments are set out below. The 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.
3. This instrument implements an urgent EU Decision regulating the import and marketing of rice products from China (Commission Implementing Decision 2011/884/EU).

4. The Decision amends an earlier measure from 2008. The purpose of the Decision is to require compulsory checks on imports of rice products from China to ensure that they do not contain unauthorised forms of genetically modified rice. This applies whether the products are to be used as food or animal feed. All imports must be accompanied by documentation confirming certain standards are met as set out in the Decision.

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

6. The Committee notes that the instrument came into force at the beginning of the day on 12 January (immediately after midnight) and it was not laid until 10.40 am. There was therefore a short period of time when it was in force but had not been laid or published. The instrument therefore does not comply with section 28(2) (“the 28-day rule”).

7. The Committee considered the letter from the Food Standards Agency (which provides advice to the Scottish Ministers on implementing food and feed law) to the Presiding Officer explaining the reasons for non-compliance with the 28-day rule.

8. In its letter to the Presiding Officer, the Food Standards Agency explained that it was not possible to comply with the 28-day rule as the terms of the EU Decision were only agreed on 14 November and officially published on 23 December 2011. The Agency considered it was imperative to implement the Decision on time to avoid infraction proceedings. The Committee accepts that implementation within the timetable agreed at EU level did not allow sufficient time for the regulations to comply with the 28-day rule.

9. The Committee also considered whether the Food Standards Agency could have ensured that the instrument was laid and published before it came into force. In doing so, the Committee notes that the instrument implements a feed and food safety measure. It imposes new compulsory enforcement controls to ensure that rice products imported from China do not contain unauthorised genetically modified organisms. In relation to import controls of this kind, the Committee also
notes the importance in practical terms of ensuring that the controls were imposed contemporaneously across the United Kingdom.

10. One of the purposes of requiring instruments to be laid before they come into force is to allow for public notice to be given that the law has changed. However, in this case, the importance of ensuring that the Decision was implemented on time is evident to the Committee. The Committee also notes that the time period during which the instrument was in force but was neither published nor laid is very short. Accordingly, in these circumstances the Committee accepts the reasons for the instrument being brought into force before it was laid or published.

11. The Committee therefore draws the instrument to the Parliament’s attention under reporting ground (j) as there has been a failure to lay the instrument at least 28 days before it comes into force as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

12. However, in doing so, it finds the explanation provided by the Food Standards Agency for this failure to be acceptable as urgent action was required to implement an emergency EU food and feed safety measure published on 23 December 2011 by 12 January 2012.
INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Children’s Hearings (Scotland) Act 2011 (Commencement No.3) Order 2012 (SSI 2012/1) (Education and Culture Committee)

13. This instrument brings into force further provisions in the Children’s Hearings (Scotland) Act 2011 (“the 2011 Act”). These enable the Scottish Legal Aid Board to undertake preparatory works in relation to setting up a register of solicitors and firms eligible to provide children’s legal assistance.

14. In commencing part of the 2011 Act, the Committee notes that article 2(2) in the instrument incorrectly refers to commencing paragraph 8(a) and (b) of schedule 5 to the 2011 Act, when the correct reference is paragraph 1(8)(a) and (b) of that schedule.

15. Given that there is no such paragraph within schedule 5, the Scottish Government was asked to explain whether it was plain which amendments were being referred to within article 2(2) and, in consequence, what was being brought into force. The correspondence is reproduced in the Appendix.

16. In its response, the Scottish Government stated that it “regrets this minor error”, but that taking account of other matters it is clear what is being commenced.

17. The Committee considers that an instrument which brings into force provisions in primary legislation should be clear what is being commenced. However, while making that observation, the Committee acknowledges that in this instance assistance can be taken from other matters in identifying what is actually being brought into force. As is stated in the response, there is no paragraph 8 in schedule 5 to which the text could be applied, and it can reasonably be ascertained from the detail provided within article 2(2) that the intended reference concerns paragraphs 1(8)(a) and (b). The Committee accepts that on that basis it can be ascertained what is being brought into force. The Committee therefore reports this as a “drafting error”, rather than a case of “defective drafting” such as to prevent or impede the operation of the instrument.

18. In reaching that view, the Committee considers that because the sole purpose of this instrument is to commence legislative provisions, it is not satisfactory for users of the legislation to have to take account of the wider context in determining what is being brought into force. While the Committee accepts that it may reasonably be concluded that the amendments referred to are indeed made by paragraph 1(8)(a) and (b) of schedule 5 to the 2011 Act, the Committee draws the instrument to the Parliament’s attention under the general reporting ground as it contains a drafting error in article 2(2).
19. At its meeting on 24 January 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**

Scottish Public Services Ombudsman Act 2002 Amendment (No. 2) Order 2012 [draft];

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

Forestry Commissioners (Climate Change Functions) (Scotland) Order 2012 [draft];

Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2012 (SSI 2012/4);

Fodder Plant Seed (Scotland) Amendment Regulations 2012 (SSI 2012/5);

Conservation of Salmon (River Annan Salmon Fishery District) (Scotland) Regulations 2012 (SSI 2012/6)

**Justice Committee**

Advice and Assistance (Assistance By Way of Representation) (Scotland) Amendment Regulations 2012 [draft];

**Local Government and Regeneration Committee**

Representation of the People (Post-Local Government Elections Supply and Inspection of Documents) (Scotland) Amendment Regulations 2012 [draft];

Scottish Local Government Elections Amendment Order 2012 [draft]

**Health and Sport Committee**

National Health Service (Travelling Expenses and Remission Charges) (Scotland) (No. 2) Amendment Regulations 2011 (SSI 2011/449);

**Infrastructure and Capital Investment Committee**

Private Rented Housing (Scotland) Act 2011 (Commencement No. 2 and Transitional Provision) Order 2012 (SSI 2012/2)
INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

APPENDIX

Children’s Hearings (Scotland) Act 2011 (Commencement No. 3) Order 2012

On 13 January 2012, the Scottish Government was asked:

Article 2(2) of this Order states that section 203(1) of the Children’s Hearings (Scotland) Act 2011 is to come into force on 31 January 2012 for the purpose of bringing into force the amendments to the Legal Aid (Scotland) Act 1986 made by paragraph 8(a) and (b) of schedule 5 to the 2011 Act.

Given that there is no such paragraph within schedule 5 (the appropriate reference being apparently paragraph 1(8)(a) and (b) of schedule 5), is it plain which amendments are being referred to within article 2(2), and, in consequence, what is being brought into force?

The Scottish Government responded as follows:

The relevant text, as referred to in the question to the Scottish Government, should indeed refer to paragraph 1(8)(a) and (b) of schedule 5 to the Children’s Hearings (Scotland) Act 2011. The omission of the “1” does not, however, in the Scottish Government’s view render the SSI defective for the following reasons:

The schedule contains only 3 paragraphs. There is, as a result, no paragraph 8 in schedule 5 to which the text could be applied.

The text of article 2(2) refers to the amendments made by schedule 5 to the Legal Aid (Scotland) Act 1986. Paragraph 1 of schedule 5 has as its title “Legal Aid (Scotland) Act 1986 (c.47)”.

The Scottish Government regrets this minor error but takes the view that for the reasons given above, it is plain what amendments are being referred to in article 2(2) of the order, and, therefore, in consequence paragraph 1(8)(a) and (b) of schedule 5 will be brought into force on 31st January.
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