Delegated Powers and Law Reform Committee

48th Report, 2014 (Session 4)

Subordinate Legislation

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Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (a) any—
   (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   (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.
   (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
   (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth Anderson

Support Manager
Daren Pratt
The Committee reports to the Parliament as follows—

1. At its meeting on 12 August 2014, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Marriage and Civil Partnership (Scotland) Act 2014 (Commencement No. 2 and Saving Provisions) Order 2014 (SSI 2014/212 (C.18))

   Victims and Witnesses (Scotland) Act 2014 (Commencement No. 2 and Transitional Provision) Order 2014 (SSI 2014/210 (C.17))

2. The Committee’s recommendations in relation to the above instruments are set out below.

3. The Committee determined that it did not need to draw the Parliament’s attention to the instruments which are set out at the end of this report.
POUN TS RAISED: INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Marriage and Civil Partnership (Scotland) Act 2014 (Commencement No. 2 and Saving Provisions) Order 2014 (SSI 2014/212 (C.18))
(Equal Opportunities Committee)

4. The purpose of this Order is to appoint a day for the coming into force of sections 4(8) to (10), 9, 10, 11(5) and (6), 17, 18(2)(a), 21, 25, 28, 30 and 33 of the Marriage and Civil Partnership (Scotland) Act 2014 ("the 2014 Act").

5. The Order also appoints a day for the coming into force of sections 6, 12(2)(a) and (b), 13(2)(e), 14(2), 24(13) and (15) and 29 of and paragraph 1(4) of schedule 1 and paragraphs 7, 9(2)(b), 15 and 17 of schedule 2 to the 2014 Act, for the limited purpose of making secondary legislation.

6. The day appointed for the commencement of these provisions is 1 September 2014.

7. In considering the instrument, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at Annex A.

8. The Scottish Government also indicated to the Committee’s legal advisers that there was an error in article 3(2)(a) of the instrument, where the word “on” had been omitted between “commence” and “after that date”. The Committee considers that, as a result, there is a lack of clarity in the meaning of article 3(2)(a). The Scottish Government has offered to bring forward an amending instrument to correct the error.

9. The Committee asked the Scottish Government why the instrument brings into force certain amendments made by the Marriage and Civil Partnership (Scotland) Act 2014 (“the 2014 Act”), without at the same time bringing into force the provisions of the 2014 Act which introduce those amendments and which specify the Act which is being amended. The Committee considers that a potential effect of bringing the provisions into force in this way is to create uncertainty for users of the legislation. The Scottish Government does not consider this drafting approach to be fatal to the effect of the instrument but considers it appropriate, given that an amending instrument is being prepared to correct article 3(2)(a), to address this point in that amending instrument.

10. Accordingly the Committee reports as follows.

11. Firstly, the Committee draws this instrument to the attention of the Parliament under the reporting ground (h), as the word “on” has been omitted between “commence” and “or after that date” in article 3(2)(a). The effect is that the provision makes a saving in respect of any marriages or purported marriages entered into before 1 September 2014, and any prosecution in relation to such marriages or purported marriages “where proceedings commence or after that date” rather than “where proceedings...
commence on or after that date”. There is accordingly a lack of clarity in the meaning of the provision.

12. Secondly, the Committee draws the instrument to the attention of the Parliament under the general reporting ground, as it fails to bring into force for a limited purpose sections 12(1), 13(1), 14(1) and 24(1) of the Marriage and Civil Partnership (Scotland) Act 2014 and paragraph 1(1) of schedule 1 and paragraph 1 of schedule 2 to that Act. These provisions introduce the various amendments which the Order seeks to bring into force, and specify which Act is being amended. In commencing the amendments without the introductory provisions, the instrument may create uncertainty for users of the legislation.

13. However the Committee also notes that the Scottish Government has offered to lay an amending instrument before the Parliament shortly, in order to remedy both points referred to above.
Victims and Witnesses (Scotland) Act 2014 (Commencement No. 2 and Transitional Provision) Order 2014 (SSI 2014/210(C.17)) (Justice Committee)


15. It also makes transitional provisions in respect of the commencement of some provisions of the 2014 Act.

16. In considering the instrument, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at Annex B. The Committee accepted that the Government’s response clarified certain matters in relation to the effects of the transitional provisions in article 3. An explanation of these matters was required, as the Committee considered that a more detailed explanation of the various effects of article 3, and the effects and purpose of the existing legislation affected by the article, would have been useful in the Policy Note or the Explanatory Note to the instrument. The Committee considers that this would have been useful for this particular instrument, given the complexity and length of the provisions in article 3.

17. The Scottish Government aims where possible to allow a period of 40 days between the date of laying a commencement order before the Parliament and the date when the provisions commenced by the order will come into force, where the order contains complex transitional provisions. This instrument was laid on 24 July and came into force on 13 August. Nineteen calendar days have therefore been allowed for scrutiny of the instrument before the date when the relevant provisions came into force. The Committee was only in a position to consider the instrument on the day prior to 13 August, owing to the different summer Parliamentary recess dates this year. The timing has also meant that the Justice Committee has not been able to consider the instrument before the provisions have come into force.

18. The Scottish Government has explained in the correspondence that, although the intention was to lay this instrument earlier, laying had to be delayed to address certain operational concerns which arose in the course of finalising the necessary arrangements.

19. The Committee therefore notes that article 3 of the Order contains complex transitional provisions, which enable persons with rights prior to 13 August to receive information in relation to offenders under the Criminal Justice (Scotland) Act 2003 as amended, to benefit from the enhanced information and representation provisions commenced by the Order.

20. Given the complexity and length of those provisions, it would have been useful to the scrutiny of the Order had the Policy Note or the Explanatory Note contained more detail as to the effects and purpose of the existing legislation affected by article 3, and the effects of the article.

21. It might also have been useful, had the planned timing of this instrument allowed a longer period than 19 days between the date when it was laid before the Parliament and the date when the provisions are brought into force, given that the Scottish Government aims where possible to allow
a period of 40 days, where an instrument contains complex transitional provisions.

22. In light of the matters set out above, the Committee agreed to write to the Scottish Government and the Standards, Procedures and Public Appointments Committee regarding the procedure relating to the laying of Commencement Orders containing complex transitional provisions.
NO POINTS RAISED

23. At its meeting on 12 August 2014, the Committee 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:

**Health and Sport**

Food Hygiene and Official Feed and Food Controls (Scotland) Amendment Regulations 2014 (SSI 2014/213).

**Local Government and Regeneration**

Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment Regulations 2014 (SSI 2014/214).
ANNEX A

Marriage and Civil Partnership (Scotland) Act 2014 (Commencement No. 2 and Saving Provisions) Order 2014 (SSI 2014/212 (C.18))

On 29 July 2014, the Scottish Government was asked:

1. Article 2 and the Schedule to the order commence various provisions of the 2014 Act, including sections 12(2)(a) and (b), 13(2)(e), 14(2), 24(13) and (15) of and paragraph 1(4) of schedule 1 and paragraphs 7, 9(2)(b), 15 and 17 of schedule 2. The order does not however commence sections 12(1), 13(1), 14(1), 24(1) of the 2014 Act or paragraph 1(1) of schedule 1 or paragraph 1 of schedule 2 to that Act. These latter provisions set out in each case which Act is being amended by the provisions listed in column 1. Usual drafting practice would be to commence sections 12(1), 13(1), 14(1) and 24(1) of the Act and paragraphs 1(1) of schedule 1 and 1 of schedule 2 to the Act for the purposes of the amendments being brought into force by the commencement order.

What does the Scottish Government consider is the effect of failing to commence sections 12(1), 13(1), 14(1) and 24(1) of the Act and paragraphs 1(1) of schedule 1 and 1 of schedule 2 to the Act? Is any corrective action considered necessary?

2. Article 2 and the Schedule commence section 12(2)(a) and (b) of the 2014 Act for the purpose of making regulations under section 8(1)(a)(ii), (1B)(a)(i) and (1E) to (1G) of the 1977 Act. However sections 8(1F) and (1G) are not powers to make regulations. Instead they make provision relating to the regulations which may be made under subsection (1E). It would appear therefore that it would be sufficient to commence section 12(2)(a) and (b) for the purpose of making regulations under section 8(1)(a)(ii), (1B)(a)(i) and (1E), and that this would bring into force the ancillary provision in subsections (1F) and (1G). That is the approach which has been taken elsewhere in the order – for example, paragraph 15 of schedule 2 of the 2014 Act is commenced for the purpose of making an order under section 3C(5)(b)(ii) of the GRA 2004. There is no reference to section 3C(7) or 3C(8) of the GRA 2004 as none is required.

The same point applies in respect of the commencement of section 13(2)(e) for the purpose of making regulations under section 9(2A) to (2C) of the 1977 Act, where the references to subsections (2B) and (2C) appear to be unnecessary. It also applies in respect of the commencement of section 14(2) for the purpose of making regulations under section 12(1D) to (1F) of the 1977 Act, where the references to subsections (1E) and (1F) appear to be unnecessary.

Does the Scottish Government propose to take any corrective action in relation to the commencement of sections 12(2)(a) and (b), 13(2)(e) and 14(2) of the 2014 Act in this manner, for the purposes of achieving consistency?

The Scottish Government responded as follows:

As noted in the DPLRC’s correspondence with the Scottish Government, we had already identified an error in article 3(2)(a) of the Order which requires to be
corrected by an amending Order. In the same Order these points identified by the DPLRC will be addressed. Whilst none appears fatal to the effect of the Order, we consider it is appropriate, in the context of an amending Order already being prepared, to address these points at the same time.
Victims and Witnesses (Scotland) Act 2014 (Commencement No. 2 and Transitional Provision) Order 2014 (SSI 2014/210 (C.17))

On 4 August 2014, the Scottish Government was asked:

(1) Article 3(1) and (2) makes transitional provision to preserve the entitlement of those already registered to receive information, on behalf of a child under 14 years old, under the provisions of section 16(1) of the 2003 Act (by virtue of section 16(5)(b)(ii) of that Act) despite “specified amendments” set out in Article 3(8). The “specified amendments” include those made by section 23(1) and (4) of the 2014 Act, and so do not include those made by section 23(2) or (3). Sections 23(2) to (4) all contain amendments to section 14 of the 2003 Act in relation to the provision of victim statements, subsection (1) introducing those amendments.

(a) As it does not appear to be explained in the explanatory note or the policy note, could the Scottish Government explain why the definition of “specified amendments” in article 3(8) does not include reference to the amendments made by section 23(2) and (3) of the 2014 Act, but does include reference to section 23(1) and (4). Why is the effect of the provision appropriate, or could there be any omission?

(b) Could you also clarify why article 3(8)(a) limits the application of the provision as only in relation to section 16(5)(a) of the 2003 Act, but does not extend the application to also include section 16(5)(b), as again this does not appear to be explained by the explanatory note or policy note?

(2) The Scottish Government has undertaken informally to the Committee that where a commencement order contains complex transitional provisions, or such provisions with significant effects, then if possible it will seek to allow a period of 40 days between the date of laying and the date when the provisions will come into force. In this case, a 40 day period has not been implemented. (The instrument was laid on 24 July and will come into force on 13 August, and so 9 clear Parliamentary sitting days have been allowed for scrutiny of the instrument before the date when the instrument comes into force).

Accordingly could the Scottish Government explain why in this instance a period of 40 days has not been allowed for between the laying date and the coming into force date of the instrument?

The Scottish Government responded as follows:

(1)(a) The definition of “specified amendments” in article 3(8) is intended to include reference only to the amendments made by section 23 of the 2014 Act which affect a person’s current entitlement to receive information on behalf of a child under 14 years of age, either under section 16(1) (by virtue of subsection (5)(b)(ii)) or (7) of the 2003 Act.
Accordingly, the definition of "specified amendments" in article 3(8) does not include reference to the amendments made by section 23(2) and (3) of the 2014 Act, as they do not fall into this category. Section 23(2) amends section 14(5) of the 2003 Act, to extend the time within which victim statements must be laid before the court. This has no bearing on the right to receive information under section 16 of the 2003 Act. Section 23(3) amends section 14(6)(b) of the 2003 Act. Only the amendment to section 14(6)(b)(i) applies in relation to section 16 of the 2003 Act, by virtue of a cross-reference to that provision in section 16(5)(b)(i). Section 16(5)(b)(i) of the 2003 Act provides for a qualifying person to receive information on behalf of a person who is incapable by reason of mental disorder or inability to communicate. The amendment excepts from that provision qualifying persons who have not attained the age of 12 years. However, at present, a qualifying person does not include a child under 14 years of age by virtue of section 14(8) of the 2003 Act. The amendments made by section 23(3) of the 2014 Act, therefore, do not relate to a person’s right to receive information under section 16 of the 2003 Act on behalf of a child under 14 years of age.

Section 23(1) and (4) of the 2014 Act amends the definition of “qualifying person” in section 14(8) of the 2003 Act. The definition of "specified amendments" in article 3(8) includes reference to these amendments because the “qualifying person” definition applies also in relation to section 16(5)(a) of the 2003 Act (by virtue of section 16(6) of that Act). Together with the amendments made by section 23(9) and (11) of the 2014 Act in particular, they affect a person’s existing right to receive information under section 16(7) (as read with section 16(5)(a)) of the 2003 Act on behalf of a child under 14 years of age.

(1)(b) Sub-paragraph (a) of the definition of "specified amendments" in article 3(8) limits the application of the amendments made by section 23(1) and (4) of the 2014 Act, so as to specify only those which affect existing rights to receive information under section 16 of the 2003 Act on behalf of a child under 14 years of age. In so far as the amendments to the “qualifying person” definition apply in relation to section 16(5)(b)(i) of the 2003 Act (by virtue of section 16(6) of that Act, as amended), they have no bearing on such rights. As mentioned, this is because the “qualifying person” definition currently exempts children under 14 years of age from the right to receive information on behalf of an incapable person by virtue of section 16(5)(b)(i) of the 2003 Act.

(2) The Scottish Government endeavours, so far as possible, to maximise the time available for parliamentary scrutiny. Regrettably, it was not possible to allow for a period of 40 days between the date of laying this instrument and the date when the provisions come into force. A period of 19 days has been allowed on this occasion. To assist the various justice partners responsible for implementing the 2014 Act, and ensure a smooth transition, a programme of phased implementation was negotiated. An initial commencement date of 13 August 2014 was agreed with those partners, and welcomed by relevant interest groups. Practical arrangements, including arrangements to revise IT systems, have been made accordingly. It is therefore important that the provisions come into force as planned. However, although the intention was to lay this instrument earlier, laying had to be delayed to address certain operational concerns which arose in the course of finalising the necessary arrangements. Accordingly, the Scottish
Government prepared a detailed Policy Note to explain the purpose and effect of the transitional provision in article 3, in order to help with the scrutiny of this instrument.
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.