Subordinate Legislation Committee

6th 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)
Subordinate Legislation Committee

6th Report, 2011 (Session 4)

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 20 September 2011, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Storage of Carbon Dioxide (Inspections) (Scotland) Regulations 2011 [draft];

   Extraction Solvents in Food Amendment (Scotland) Regulations 2011 (SSI 2011/306); and

   Inshore Fishing (Prohibition of Fishing for Cockles) (Solway Firth) (Scotland) Order 2011 (SSI 2011/319).

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

Storage of Carbon Dioxide (Inspections) (Scotland) Regulations 2011 [draft]
(Economy, Energy and Tourism Committee)

3. These Regulations are subject to the affirmative procedure. They insert provisions into the Storage of Carbon Dioxide (Licensing etc.) (Scotland) Regulations 2011 ("the principal Regulations"), so as to create an inspection regime in relation to carbon dioxide storage complexes. They also create related offence provisions.


5. On 9 September 2011 the Committee wrote to the Scottish Government highlighting concerns about the title of the instrument and about an offence inserted into the principal Regulations by regulation 4 of these Regulations. This correspondence is reproduced at Appendix 1.

6. These Regulations amend the principal Regulations and do not contain any other substantive provision. The normal drafting practice is for amending instruments of this type to contain the word “Amendment” in their titles. The Scottish Government acknowledges this practice and concedes that these Regulations are not in accordance with it. It considers that, as these Regulations deal only with inspection of carbon dioxide storage sites, the title sufficiently and more helpfully describes the content and nature of the provisions. However, the Regulations themselves simply specify the textual amendments to be made to the principal Regulations, rather than containing a separate inspection regime.

7. The Committee considers that it is important that an instrument which amends another instrument is clearly indicated as doing so, and that the title should make that plain. This is of considerable assistance so far as the user of such legislation is concerned.

8. There has been a failure to follow proper drafting practice, as the title of the instrument does not indicate that it amends the Storage of Carbon Dioxide (Licensing etc.) (Scotland) Regulations 2011 (SSI 2011/24) and implies instead that the instrument makes standalone provision for inspections. The Committee therefore draws the attention of the Parliament to the Regulations on the general reporting ground.

9. Regulation 4 of these Regulations inserts a new regulation 18 into the principal Regulations. It contains offence provisions. Regulation 18(1)(c) makes it an offence for a person knowingly or recklessly to make a statement which that person knows to be false or misleading in a material particular where the statement is made for the purposes of supplying information to an inspector as required under Schedule 3. The offence is accordingly dependent on the knowledge of the person who is alleged to have made the statement. If it is not proved that the person knew that the statement was false or misleading in a material particular, the offence is not made out. However, it is provided that the
offence may be committed knowingly or recklessly. The Scottish Government was asked to explain how a person might recklessly make a statement which that person knew to be false or misleading in a material particular. Its response asserts that it is possible for this to occur, but does not provide any further specification. It is accordingly unclear how a person who makes a statement which that person knows to be false or misleading might do so other than knowingly.

10. The Committee is not persuaded by the Scottish Government's explanation. It appears that it was intended that persons should be penalised for recklessly making a statement which is false or misleading in a material particular. However, the inclusion of the requirement that the person know the statement to be false or misleading in a material particular defeats the intention to create an offence which may be committed recklessly. The Scottish Government has not been able to offer any convincing explanation as to how these apparently contradictory requirements may be reconciled. This does not affect the operation of the instrument as a whole. However, it is considered to be doubtful whether proceedings could successfully be brought against a person on the basis that they had committed the regulation 18(1)(c) offence recklessly.

11. The Committee therefore concludes that the drafting of the instrument appears to be defective. Regulation 18(1)(c) of the principal Regulations, which is inserted by these Regulations, creates an offence which may be committed either knowingly or recklessly. However, the offence is committed by making a statement which the maker of that statement knows to be false or misleading in a material particular, and it appears to be impossible recklessly to make a statement which one knows to be false or misleading in a material particular, thereby defeating the apparent intention that recklessly making such a statement be penalised. The Committee therefore draws this instrument to the attention of the Parliament on reporting ground (i).

12. In addition, the Committee impresses upon the Scottish Government the importance of clarity where the creation of offences is concerned.

13. The Committee also notes that this instrument is subject to the affirmative procedure. Accordingly, it is subject to a high level of scrutiny. It is therefore incumbent on the Scottish Government in drafting the instrument to be mindful of this. As this is a draft instrument, the Committee invites the Scottish Government to reflect on the uncertainty created by regulation 4 of these Regulations and to give consideration to laying a new draft in order to clarify the intention.
NEGATIVE PROCEDURE

Extraction Solvents in Food Amendment (Scotland) Regulations 2011 (SSI 2011/306) (Health and Sport Committee)

14. This instrument is subject to the negative procedure. The Regulations provide for the implementation in Scotland of Commission Directive 2010/59/EU. That Directive permits the use of a newly approved extraction solvent (dimethyl ether) in the preparation of defatted animal protein products at a maximum limit of 0.009 mg/kg. It also clarifies the limits for 2 existing extraction solvents (methanol and propan-2-ol) in the preparation of flavourings.

15. These Regulations were laid on 18 August 2011 and came into force on 15 September 2011 and as such, section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 has not been complied with.

16. The Scottish Government’s letter to the Presiding Officer explaining the reason for the non compliance with section 28(2) noted that a consultation was carried out on the draft Regulations in May to June 2011. However, the Commission Directive 2010/59/EU, which these Regulations implement, was published in the Official Journal on 27 August 2010, and in effect required the coming into force date of this instrument of 15 September 2011.

17. On 9 September 2011, the Committee asked the Scottish Government why there had been such a delay between the publication of the Directive and the consultation. This correspondence is reproduced at Appendix 2. The Scottish Government explained that—

“It is normal to start the implementation process only after the EU instrument has been cleared and scrutinised by the European Council of Ministers. However, Directive 2010/59/EU was published in the Official Journal in advance of being scrutinised by the European Council. Member States were not made aware of this and so the UK project-planning process was affected since publication was expected much later in the year. As a consequence the implementation process started much later than normal.

It is important to coordinate implementation in a consistent manner when amending UK-wide Regulations. The need to accommodate the differing administrative processes across the four UK administrations led to a further delay in issuing the consultation.”

18. The Committee is not persuaded by this explanation. It does not follow the reasoning that a combination of an unawareness of the expected publication date of the EU Directive, and the need to co-ordinate the terms of these Regulations with the remainder of the UK, required the breach of the 28-day rule in the Scottish Parliament. It is clear that the Directive was published in the Official Journal at the end of August 2010. Article 2 of the Directive requires Member States to bring into force laws to implement it by 15 September 2011. So there was in this case some 10 months available, to lay the Scottish Regulations after the publication of the Directive, and also ensure that the 28 day rule was complied with.
19. The Committee also noted that the corresponding English Regulations (SI 2011/1738) were laid and brought into force about a month prior to these Regulations. (They were laid on 19 July and brought into force on 15 August). It appears from the Executive Note that the Scottish consultation and completion of the Regulations followed on from an initial informal UK consultation, and after completion of the English Regulations.

20. It appears clear to the Committee that the selection of a consultation period of May to June 2011 for the Scottish draft Regulations meant that (with the summer recess covering July and August), there was little or no prospect that the 28-day rule would be adhered to. With a Directive publication date of August 2010, it appears to the Committee that this could have been avoided by better advance planning.

21. The Committee therefore firstly draws the instrument to the Parliament’s attention on reporting ground (j) as it 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.

22. Secondly, the Committee draws the Scottish Government’s explanation for the breach of the 28-day rule to the attention of the lead Committee. The Committee considers that better advance planning of these Regulations could have avoided this breach, taking into account that Directive 2010/59/EU implemented by the Regulations was published in the Official Journal at the end of August 2010, and that the period of May-June 2011 was chosen for a Scottish consultation on the draft Regulations.

23. Thirdly, the Committee concludes that the explanation provided is in this instance unacceptable and impresses upon the Scottish Government the importance of effective forward planning to ensure compliance with the 28-day rule.

24. Finally, the Committee expressed its concern about the implementation of EU Directives and agreed to pursue the matter with the Food Standards Agency.
Inshore Fishing (Prohibition of Fishing for Cockles) (Solway Firth) (Scotland) Order 2011 (SSI 2011/319)

25. This Order is subject to the negative procedure. It prohibits fishing for cockles by any method or means in the Solway Firth. Fishing for cockles in the Solway Firth has been regulated for some time. In 2006, the Scottish Ministers made the Solway Firth Regulated Fishery (Scotland) Order 2006 (“the 2006 Order”), which gave the Solway Shellfish Management Association the right to regulate fishing for cockles in the Solway Firth until 14 September 2011.

26. The Order was made on 5 September 2011, laid before the Parliament on 7 September and comes into force on 15 September 2011 so that the Solway Firth cockle fishery remains closed. It accordingly does not comply with the 28-day rule, as it was only laid 8 days prior to its coming into force. As a result, the Scottish Ministers wrote to the Presiding Officer to explain this failure when the instrument was laid.

27. The letter to the Presiding Officer explained that the reason for this failure to comply with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 was that prior to the making of the Order various options had to be explored for the management of cockle fishing in the Solway Firth. On 9 September 2011, the Committee asked why, however, it was necessary for those options to be pursued past the point at which this Order might have been made while complying with the requirements of section 28(2). This correspondence is reproduced at Appendix 3.

28. The Scottish Government, in its response, concedes that the Order should have been laid timeously and that it should have taken steps to reassess the position. It apologises for failing to comply with the laying requirements and states that it will ensure that future projects are managed more efficiently. The Committee further notes and takes into account that, in relation to this instrument, the Scottish Government had been focused on securing a solution by means of the most appropriate legislative option.

29. This instrument has not been laid at least 28 days before coming into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 and as such, the Committee draws the instrument to the attention of the Parliament under reporting ground (j). However, in so doing the Committee notes the Government’s apology and commitment to ensure that future projects are managed more efficiently.

30. Furthermore, the Committee notes that the letter to the Presiding Officer and the Executive Note both indicate that the Order is intended to be a temporary measure. It replaces the 2006 Order which itself was time-limited. However, there is nothing in this Order which imposes a time limit or expiry date. The Order will continue to be in force until it is revoked.

31. The Committee therefore draws the attention of the lead committee to the instrument as, although the accompanying documents indicate that the instrument is to be a temporary measure, there is nothing in the instrument itself which achieves that policy objective.
32. At its meeting on 20 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:

**Education and Culture Committee**

Curators Ad Litem and Reporting Officers (Panels) and the Panels of Persons to Safeguard the Interests of Children (Scotland) Amendment Regulations 2011 (SSI 2011/320)

**Infrastructure and Capital Investment Committee**

Road Traffic (Permitted Parking Area and Special Parking Area) (City of Edinburgh) Designation Amendment Order 2011 (SSI 2011/323); and

Property Factors (Scotland) Act 2011 (Commencement No 1) Order 2011 (SSI 2011/328)

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

Bananas (Enforcement of Quality Standards) (Scotland) Regulations 2011 (SSI 2011/325); and

Bee Diseases and Pests Control (Scotland) Amendment Order 2011 (SSI 2011/326)
INSTRUMENTS SUBJECT TO THE AFFIRMATIVE PROCEDURE

APPENDIX 1

The Storage of Carbon Dioxide (Inspections) (Scotland) Regulations 2011

On 9 September 2011 the Scottish Government was asked:

1. To explain why the title of these Regulations, which amend the Storage of Carbon Dioxide (Licensing etc.) (Scotland) Regulations 2011 (SSI 2011/24) and do not contain any other substantive provision, does not make it clear that they amend the principal Regulations in accordance with normal drafting practice; and

2. To explain, in relation to the offence in regulation 18(1)(c) of the principal Regulations as inserted by regulation 4 of these Regulations:
   a) how a person may recklessly make a statement which that person knows to be false or misleading; and
   b) what the effect is of providing that it is an offence knowingly to make a statement which one knows to be false or misleading.

The Scottish Government responded as follows:

1. The Scottish Government recognise that it is normal drafting practice to include “Amendment” in the title of an instrument which amends an earlier instrument. However, in this case the Regulations operate to insert additional provisions into the principal Regulations which deal only with inspections of carbon storage complex. Therefore it is considered that in these circumstances the title sufficiently, and more helpfully, describes the content and nature of the provisions it contains.

2. A person may be required to supply information to an inspector under Schedule Regulation 18(1)(c) would make it an offence for a person supplying such information to an inspector to knowingly or recklessly make a statement which that person knows to be false or misleading in a material particular. It would be possible for a person to make a statement in the knowledge that it was false in a material respect and it would also be possible for a person acting in a reckless manner to make such a statement. It is not sufficient under regulation 18(1)(c) that the statement is false or misleading in some material particular. That is merely the first part of the test, the person making the statement must also make the statement knowing it to be so. The provision mirrors other existing offence provisions contained in other inspection regimes, for example in regulation 18 of the Offshore Combustion Installation (Prevention and Control of Pollution) Regulations 2001 (SI 2001/1091), regulation 18 of the Offshore Chemicals Regulations 2002 (SI 2002/1355) and regulation 16 of the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005 (SI 2005/2055).
INSTRUMENTS SUBJECT TO THE NEGATIVE PROCEDURE

APPENDIX 2

The Extraction Solvents in Food Amendment (Scotland) Regulations 2011 (SSI 2011/306)

On 9 September 2011, the Scottish Government was asked:

In relation to the breach of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 how was it planned to implement the 28 day rule, as the FSA consultation on the draft Regulations was scheduled for May – June 2011, and why was there a delay from the publication of the Commission Directive 2010/59/EU in the Official Journal in August 2010 until the start of the consultation in May 2011?

The Scottish Government responded as follows:

The Extraction Solvents in Food Amendment (Scotland) Regulations 2011 were laid before the Scottish Parliament on 18 August 2011. The instrument comes into force on 15 September 2011. The Scottish Government accepts that Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 has not been complied with.

The Regulations implement Directive 2010/59/EU. This Directive was published in the Official Journal of the European Union in August 2010. During the negotiations about this Directive the Food Standards Agency ("the FSA") informally consulted industry, who did not raise any objections and gave no indication that implementation would give rise to any incremental costs. In accordance with Article 9 of EC Regulation No. 178/2002 the FSA in Scotland consulted with approximately 235 Scottish stakeholders between May and June 2011, who made no comments and did not report any anticipated costs or benefits. The FSA have identified no extraction solvents or flavourings manufacturers based in Scotland.

It is normal to start the implementation process only after the EU instrument has been cleared and scrutinised by the European Council of Ministers. However, Directive 2010/59/EU was published in the Official Journal in advance of being scrutinised by the European Council. Member States were not made aware of this and so the UK project-planning process was affected since publication was expected much later in the year. As a consequence the implementation process started much later than normal.

It is important to coordinate implementation in a consistent manner when amending UK-wide Regulations. The need to accommodate the differing administrative processes across the four UK administrations led to a further delay in issuing the consultation.

The FSA consultation closed on 20 June. The last parliamentary day before the summer recess began was 1 July. The EU Directive requires member states to
implement the Directive by 15 September. The complication of the UK coordination of this regulation combined with the lack of parliamentary time available before the recess meant that if the date of implementation under the Directive was to be complied with, the 28-day rule would require to be breached.

The Regulations implement a non-contentious EU Directive which does not affect industry in Scotland. Nevertheless, late domestic implementation would run the risk of infraction proceedings being raised against the UK by the Commission. Accordingly, the decision to breach the 28-day rule was considered necessary in this instance.
APPENDIX 3

The Inshore Fishing (Prohibition of Fishing for Cockles) (Solway Firth) (Scotland) Order 2011 (SSI 2011/319)

On 9 September 2011, the Scottish Government was asked:

We observe that the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 have not been complied with, and that accordingly a letter to the Presiding Officer explaining the reasons for that non-compliance has been provided, in accordance with section 31(3) of that Act. In that letter, the Scottish Government makes reference to the existing regime under which cockle fishing in the Solway Firth is regulated, the Solway Firth Regulated Fishery (Scotland) Order 2006 (“the 2006 Order”), and notes that the 2006 Order will expire on 14 September 2011. We note that article 3 of the 2006 Order makes provision to this effect. We further note that Marine Scotland has been in the process of exploring new management options over recent months, and has considered different legislative means to achieve the desired regulation of cockle fishing in the Solway Firth. The letter explains that “it was important to pursue these options so far as possible before making this Order.”

The letter does not, however, explain why it was necessary for those options to be pursued past the point at which this Order might have been made while complying with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The Scottish Government is asked to explain why this was the case.

The Scottish Government responded as follows:

Whilst exploring new management options for cockle fishing in the Solway Firth, the Scottish Government was optimistic that an alternative suite of management measures could be introduced relatively quickly. In recognising this, it escalated discussions with local parties to try and agree alternative measures to take effect from 15 September 2011. The Scottish Government’s intention in pursuing these measures, so far as possible before making this Order, was to secure the most appropriate legislative option and avoid wasting parliamentary time. It was keen to avoid making an Order that would potentially be replaced within a very short time. The Scottish Government now recognises that this aim was overly ambitious as, unfortunately, it has not been achieved.

Regrettably, the Scottish Government focused its resources and effort on progressing the discussions to achieve the desired outcome, rather than execute its contingency plan timeously. Given the clear parliamentary deadlines, the Scottish Government acknowledges that it should have reassessed its position earlier and laid this Order in sufficient time to meet the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The Scottish Government apologises for this, and will ensure that future projects of this kind are managed more effectively to comply with statutory laying requirements.
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