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
Rob Littlejohn

Support Manager
Daren Pratt
Subordinate Legislation Committee

39th Report, 2012 (Session 4)

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 26 June 2012, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Parole Board (Scotland) Amendment (No. 2) Rules 2012 (SSI 2012/197);

   Trade in Animals and Related Products (Scotland) Amendment Order 2012 (SSI 2012/198);

   Wildlife and Countryside Act 1981 (Exceptions to section 14) (Scotland) Amendment Order 2012 (SSI 2012/205);

   Wildlife and Countryside Act 1981 (Keeping and Release and Notification Requirements) (Scotland) Amendment Order 2012 (SSI 2012/206);

   Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2012 (SSI 2012/188); and

   Act of Sederunt (Rules of the Court of Session Amendment No. 3) (Miscellaneous) 2012 (SSI 2012/189).

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

3. The instruments that the Committee determined that it did not need to draw the Parliament’s attention to are set out at the end of this report.
4. This instrument amends the Parole Board (Scotland) Rules 2001 (“the principal Rules”) in order to make fresh provision about the composition of the Board in dealing with certain cases. In doing so, the instrument revokes parts of the Parole Board (Scotland) Amendment Rules 2012 (SSI 2012/167) (“the amendment Rules”) to address defective drafting that the Committee identified in its scrutiny of that instrument on 12 June 2012.

5. The instrument is subject to the negative procedure and came into force on 26 June 2012. It was laid before the Parliament on 20 June 2012.

6. The Committee notes that, as the instrument came into force on the same day as the amendment Rules, there has been a failure to lay it at least 28 days before it comes into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

7. As part of its scrutiny of the instrument, the Committee considered the explanation that the Scottish Government provided in its letter to the Presiding Officer for this failure. The correspondence is reproduced in Appendix 1.

8. The letter narrates the need to make a new instrument to deal with the defects in the amendment Rules identified by the Committee. By coming into force on the same day as the amendment Rules, it ensures that the defective provision does not have effect, and gives effect to the Scottish Government's policy intention.

9. The Committee observes that, as there appears to have been a failure to lay the instrument in accordance with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, reporting ground (j) is engaged. However, the Committee finds the Scottish Government’s explanation for that failure to be acceptable.

10. The Committee therefore draws the instrument to the attention of the Parliament on 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.

11. In doing so, the Committee finds the explanation provided by the Scottish Government for this failure to be acceptable. It also welcomes the prompt action taken by the Scottish Government to make this amending instrument to correct defects in the Parole Board (Scotland) Amendment Rules 2012 which were identified by the Committee at its meeting on 12 June 2012, so that the amending instrument will come into force at the same time as that instrument.
Trade in Animals and Related Products (Scotland) Amendment Order 2012 (SSI 2012/198) (Rural Affairs, Climate Change and Environment Committee)

12. This instrument corrects defects in the Trade in Animals and Related Products (Scotland) Regulations 2012 (SSI 2012/177) (“the 2012 regulations”) that the Committee identified in its scrutiny of that instrument at its meeting on 19 June 2012.

13. Specifically this instrument:
   • provides that the failure to comply with regulation 25(4) of the 2012 regulations is now correctly specified as an offence;
   • removes the incorrect reference to failure to comply with regulation 25(5) being an offence;
   • provides that there is no defence of reasonable excuse available to the offence of knowingly signing a false certificate;
   • provides that persons who do not comply with article 18A(1) of the Bluetongue (Scotland) Order 2008 or with a notice served on them under article 18A(2) of that order commit an offence under the Animal Health Act 1981;
   • clarifies that the requirement in article 18A(1) to comply with Commission Regulation 1266/2007 requires compliance with that regulation as it applies from time to time; and
   • clarifies the scope of the offences of failing to comply with regulation 23(3)(b) or paragraph 5(2) of Schedule 2.

14. The instrument is subject to the negative procedure and comes into force on 1 July 2012. It was laid before the Parliament on 22 June 2012.

15. The Committee notes that there has been a failure to lay it at least 28 days before it comes into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

16. As part of its scrutiny of the instrument, the Committee considered the explanation that the Scottish Government provided in its letter to the Presiding Officer for this failure. The correspondence is reproduced in Appendix 2.

17. The letter narrates that the order makes amendments to the 2012 Regulations which require legislative amendment and that these amendments are being made now so that the 2012 regulations are correct when they come into force on 1 July 2012.

18. As the instrument was required to correct defects in the offence provisions in the 2012 regulations, the Committee considers that these are matters which ought to be corrected before the 2012 regulations come into force. As a result, it was not possible to comply with the 28-day rule and reporting ground (j) is engaged, but
the Committee is content with the Scottish Government’s explanation for the failure to comply with the rule.

19. The Committee therefore draws the instrument to the attention of the Parliament on 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.

20. In doing so, the Committee finds the explanation provided by the Scottish Government for this failure to be acceptable. It also welcomes the prompt action taken by the Scottish Government to make this amending instrument to correct defects in the Trade in Animals and Related Products (Scotland) Regulations 2012 which were identified by the Committee at its meeting on 19 June 2012, so that this order will come into force at the same time as that instrument.
Wildlife and Countryside Act 1981 (Exceptions to section 14) (Scotland) Amendment Order 2012 (SSI 2012/205) (Rural Affairs, Climate Change and Environment Committee)

21. This instrument corrects defects in the Wildlife and Countryside Act 1981 (Exceptions to Section 14) (Scotland) Order 2012 (“the principal Order”), which the Committee identified in its scrutiny of that instrument at its meeting on 19 June 2012.

22. The instrument is subject to the negative procedure and comes into force on 2 July 2012. It was laid before the Parliament on 25 June 2012.

23. The Committee notes that, as the instrument comes into force on the same day as the principal Order, there has been a failure to lay it at least 28 days before it comes into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

24. As part of its scrutiny of the instrument, the Committee considered the explanation that the Scottish Government provided in its letter to the Presiding Officer for this failure. The correspondence is reproduced in Appendix 3.

25. The letter narrates the need to make a new instrument to deal with the defects in the principal Order identified by the Committee. By coming into force at the same time as the principal Order, this instrument ensures that the Scottish Government’s policy intentions in relation to the creation of exceptions to criminal offences under section 14 of the Wildlife and Countryside Act 1981 are delivered.

26. The Committee observes that, as there appears to have been a failure to lay the instrument in accordance with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, reporting ground (j) is engaged. However, the Committee finds the Scottish Government’s explanation for that failure to be acceptable.

27. The Committee draws the instrument to the attention of the Parliament on 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.

28. In doing so, the Committee finds the explanation provided by the Scottish Government for this failure to be acceptable. It also welcomes the prompt action taken by the Scottish Government to make this amending instrument to correct defects in the Wildlife and Countryside Act 1981 (Exceptions to Section 14) (Scotland) Order 2012 which were identified by the Committee at its meeting on 19 June 2012, so that the amending instrument will come into force at the same time as that instrument.
Wildlife and Countryside Act 1981 (Keeping and Release and Notification Requirements) (Scotland) Amendment Order 2012 (SSI 2012/206) (Rural Affairs, Climate Change and Environment Committee)

29. This instrument corrects defects in the Wildlife and Countryside Act 1981 (Keeping and Release and Notification Requirements) (Scotland) Order 2012 (“the principal Order”), which the Committee identified in its scrutiny of that instrument at its meeting on 19 June 2012.

30. The instrument is subject to the negative procedure and comes into force on 2 July 2012. It was laid before the Parliament on 25 June 2012.

31. The Committee notes that, as the instrument comes into force on the same day as the 2012 regulations, there has been a failure to lay it at least 28 days before it comes into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

32. As part of its scrutiny of the instrument, the Committee considered the explanation that the Scottish Government provided in its letter to the Presiding Officer for this failure. The correspondence is reproduced in Appendix 4.

33. The letter narrates the need to make a new instrument to deal with the defects in the principal Order identified by the Committee. By coming into force at the same time as the principal Order, this instrument ensures that the Scottish Government’s policy intentions in relation to maintaining restrictions on the keeping of invasive animals are delivered.

34. The Committee observes that, as there appears to have been a failure to lay the instrument in accordance with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, reporting ground (j) is engaged. However, the Committee finds the Scottish Government’s explanation for that failure to be acceptable.

35. The Committee therefore To draw the instrument to the attention of the Parliament on 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.

36. In doing so, the Committee finds the explanation provided by the Scottish Government for this failure to be acceptable. It also welcomes the prompt action taken by the Scottish Government to make this amending instrument to correct defects in the Wildlife and Countryside Act 1981 (Keeping and Release and Notification Requirements) (Scotland) Order 2012 which were identified by the Committee at its meeting on 19 June 2012, so that the amending instrument will come into force at the same time as that instrument.
POINTS RAISED: INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2012 (SSI 2012/188) (Justice Committee)

37. These Rules amend the Ordinary Cause Rules, principally to insert new provision about Admiralty actions. They also amend the existing rules in relation to family actions, the way in which judgments are given, and the availability of summary decree.

38. The Rules also make minor amendments to the Summary Cause Rules, the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999, the Act of Sederunt (Child Care and Maintenance Rules) 1997 and the Act of Sederunt (Summary Cause Rules Amendment) (Personal Injuries Actions) 2012.

39. The instrument is not subject to any parliamentary procedure and comes into force on 1 August.

40. As part of its scrutiny of the Rules, the Committee asked for clarification of various points from the Lord President’s Private Office. The correspondence is reproduced in Appendix 5.

41. It appears to the Committee that some confusion has arisen from the manner in which rule 33.7(1)(a)(i) of the Ordinary Cause Rules is amended by this instrument. The rule originally referred to “a child of the marriage between the parties who has reached the age of 16 years”. This instrument amends it so that it instead reads “every person who is a child of the family (as defined in section 12(4)(a) of the Act of 1995) between the parties who has reached the age of 16 years”.

42. Marriage, in the law of Scotland, is contracted between two parties. In that context, it is easy to ascertain the persons who may be “a child of the marriage between the parties”. Families, on the other hand, may be created in a wide range of ways, and it does not appear to the Committee that this is capable of being categorised, as marriage is, as a discrete legal event occurring between person A and person B. Nor does the Committee consider that the expression “the family between the parties” is one ordinarily encountered or readily understandable in everyday English usage.

43. The Committee is fortified in that view by considering similar provisions elsewhere in the Ordinary Cause Rules, in particular rule 33A.66(1)(d) and 33A.70(1)(b)(i). Both of these provisions use the “child of the family” formulation and, indeed, are amended by paragraph 9 of these Rules to refer to the same statutory provision, i.e. section 12(4)(a) of the Children (Scotland) Act 1995. Neither of those provisions, however, attempts to qualify “family” as being one “between the parties”. Considering the similar nature of the provisions, the Committee thinks it possible that a court might, in interpreting rule 33.7(1)(a)(i), attempt to give some meaning to the words “between the parties” on the basis that
words are not included needlessly in legislation. However, it appears that the words “between the parties” in this provision are superfluous.

44. The Committee therefore draws the instrument to the attention of the Parliament on reporting ground (h) as the meaning could be clearer. The meaning of rule 33.7(1)(a)(i) of the Ordinary Cause Rules, as amended by paragraph 5(4)(a) of these Rules, could be clearer in respect that the words “between the parties” appear to be superfluous and to be capable of causing confusion in construing the provision.
45. This instrument amends the Rules of the Court of Session by inserting a new Chapter 12B which makes provision for lay representation before the court. It also revokes the Parts of Chapter 41 which relate to applications for permission to appeal against decisions of the Upper Tribunal.

46. The instrument is not subject to any parliamentary procedure and comes into force on 9 July 2012.

47. As part of its scrutiny of the instrument the Committee asked for clarification of various points from the Lord President’s Private Office (“the LPPO”). The correspondence is reproduced in Appendix 5.

48. The Court of Session (“the Court”) has power to make rules regulating the procedure and practice to be followed in that Court, in terms of section 5 of the Court of Session Act 1988 (“the 1988 Act”). These Rules are made under that power and they modify the Act of Sederunt (Rules of the Court of Session 1994) 1994 (“the Rules of the Court of Session”).

49. This instrument makes two separate amendments to the Rules of the Court of Session: paragraph 2 inserts the new Chapter 12B on lay representation, and paragraph 3 revokes certain of the Parts of Chapter 41 which the Court declared to be ultra vires in the case of KP and MRK v Secretary of State for the Home Department. This report is concerned with new Chapter 12B only.

50. Section 126 of the Legal Services (Scotland) Act 2010 amended section 5 of the 1988 Act to insert section 5(ef) which confers power on the Court to make rules “to permit a lay representative, when appearing at a hearing in any category of cause along with a party to the cause, to make oral submissions to the Court on the party’s behalf”.

51. Chapter 12B prescribes that the party who wishes to have a lay representative make oral submissions must enrol a motion accompanied by Form 12B.2. This form must be completed by the party and by the prospective lay representative. It requires the prospective lay representative to make five different declarations relating to financial interests, confidentiality, convictions and whether or not the prospective lay representative has been declared a vexatious litigant. It is then within the discretion of the Court to decide whether the lay representative may appear. It may permit that appearance only if it is of the opinion that it would assist the Court. It appears that the Court, in exercising that discretion, will take into account the declarations made on Form 12B.2.

52. In its response of 21 June 2012, the LPPO confirmed that the requirement on a prospective lay representative to declare previous convictions on Form 12B.2 was intended to require the disclosure of all convictions, including those which are spent for the purposes of the Rehabilitation of Offenders Act 1974 (“the 1974 Act”).

53. The Committee observes that section 4 of the 1974 Act relieves persons whose convictions are spent from the ongoing consequences of having to declare
a conviction. It notes in particular that section 4(1)(b) of the 1974 Act provides that such a person must not, in any proceedings before a judicial authority, be asked or required to answer any question relating to his or her past “which cannot be answered without acknowledging or referring to a spent conviction or spent convictions”. It further notes that section 4 of the 1974 Act is subject to the limitations on rehabilitation set out in section 7 of that Act, and to the exclusions set out in the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003, which is made by the Scottish Ministers in exercise of the powers conferred by section 7(4) of the 1974 Act.

54. It accordingly appears to the Committee that Form 12B.2, in so far as it requires persons to declare convictions which are otherwise spent, purports to disapply section 4(1) of the 1974 Act. The LPPO was asked to explain the basis on which such provision might lawfully be made. The LPPO takes the view that the rule-making powers of the Court in section 5(a), (b) and (ef) of the 1988 Act, when read in conjunction with section 7(3) of the 1974 Act, confer power upon the Court to make provision of this nature.

55. The Committee observes that the Parliament expressly conferred the power to make rules permitting lay representation before the Court when it enacted section 126 of the Legal Services (Scotland) Act 2010, inserting section 5(ef) of the 1988 Act. The Court, in its judicial capacity, has held that section 5(a) of the 1988 Act cannot be relied on to supplement any of the specific powers otherwise conferred in that section. As the Lord President (Hope) commented in Taylor v Marshalls Food Group, “[h]ad Parliament taken the view that para. (a) was as general as counsel suggested, then it would not have found it necessary to insert the new paragraph […] to allow the court to make acts of sederunt in relation to expenses.” In light of this judgment of the Court the Committee takes the view that neither paragraph (a) nor (b) of section 5 enables the Court to make provision which, properly construed, is ancillary to the power to make rules permitting lay representation conferred by paragraph (ef).

56. Furthermore, in the Committee’s view there is nothing in paragraph (ef) which permits the Court to make rules which override primary legislation, in particular the prohibition on requirements to disclose spent convictions established by section 4(1) of the 1974 Act. It appears to the Committee that the Court is seeking, in its legislative capacity, to specifically override provision enacted by the UK Parliament in a manner which is not subject to the Parliament’s supervision. It observes that such a power exists but that it is a power exercisable, post-devolution, by the Scottish Ministers and only with the express approval of the Parliament.

57. So far as the LPPO seeks to rely on section 7(3) of the 1974 Act, the Committee accepts that this is a power exercisable by a “judicial authority” (a term which includes the Court) to require the disclosure of spent convictions. However, it notes that this power is subject to significant restrictions. First, and fundamentally, there is nothing in section 7(3) to suggest that it may be exercised by the Court in its legislative capacity. In the Committee’s view, it is quite clear from the reference to that power being exercisable “at any stage in any proceedings” that it is exercisable by the Court in its judicial capacity when dealing with individual cases. It is unpersuaded by the suggestion that the exercise of the Court’s legislative functions could be taken to constitute a stage in proceedings:
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the very nature of the rule-making function is that the resulting rules apply in all
cases, and there would be no exercise of the section 7(3) power in each individual
case. The Committee also notes that this power is exercisable only where the
authority, in relation to the proceedings, considers that justice cannot be done
without admitting evidence of spent convictions. The LPPO has not identified why
it would invariably be the case that justice could not be done, where a lay
representative is involved, unless that lay representative discloses spent
convictions.

58. The Committee accordingly considers that the LPPO has not been able
satisfactorily to explain how the Court may, by Act of Sederunt, disapply the
provisions of section 4 of the 1974 Act. It does not consider that section 5 of the
1988 Act confers any such power. Furthermore, it is unpersuaded that section 7(3)
of the 1974 Act is capable of being exercised in a blanket fashion by the Court in
its legislative capacity. It appears to the Committee that section 7(3) is intended for
use by any court when exercising its judicial functions on a case-by-case basis in
individual court proceedings.

59. For these reasons, the Committee considers that it is doubtful whether this
instrument is *intra vires* in so far as it inserts Form 12B.2 into the Rules of the
Court of Session when that form is intended to require prospective lay
representatives to disclose spent convictions. That provision appears to be of
doubtful *vires* because it purports to disapply the effect of section 4(1) of the 1974
Act in the absence of any power enabling the Court of Session to make rules to
that effect.

60. The Committee therefore draws the instrument to the attention of the
Parliament on reporting ground (e) as there appears to be a doubt about the
*vires*. There appears to be a doubt whether the instrument is *intra vires* in so
far as it inserts Form 12B.2 into the Rules of the Court of Session, when the
purported effect of that form is to require a prospective lay representative to
make a declaration disclosing spent convictions. That provision appears to be of
doubtful *vires* because it purports to disapply the effect of section 4(1) of the Rehabilitation of Offenders Act 1974 in the absence of any identifiable
power enabling the Court of Session to make provision to that effect.

61. Furthermore, the Committee draws this matter to the attention of the
Justice Committee as lead committee on the instrument. This instrument is
not subject to any further parliamentary procedure but purports to make
substantive provision which modifies the rights and protections of
individuals and disappplies primary legislation. The Committee accordingly
considers that this raises an important constitutional point about the
respective functions of the Parliament and the rule-making authority, and
recommends that the Justice Committee consider the matter further.
NO POINTS RAISED

62. At its meeting on 26 June 2012, the Committee also considered the following instrument and determined that it did not need to draw the attention of the Parliament to it on any ground within its remit:

Local Government and Regeneration Committee

Town and Country Planning (Continuation in force of South Lanarkshire Local Plan) (Scotland) Order 2012 (SSI 2012/194)
APPENDIX 1

Parole Board (Scotland) Amendment (No. 2) Rules 2012 (SSI 2012/197)

Breach of laying requirements: letter to Presiding Officer

The above instrument was made by the Scottish Ministers under section 20(4) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 on Monday 18 June 2012. It is being laid before the Scottish Parliament today and is to come into force on 26 June 2012.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 has not been complied with. In accordance with section 31(3) of that Act, this letter explains why.

S.S.I. 2012/197 is required to correct a drafting defect contained in rule 7 of S.S.I. 2012/167, which was identified by the Subordinate Legislation Committee at their meeting of 12 June 2012.

S.S.I. 2012/167 made a number of amendments to the Parole Board (Scotland) Rules 2001 (S.S.I. 2001/315) (“the principal rules”). Rule 7 of S.S.I 2012/167 amended rule 14 of the principal rules to allow the Parole Board to appoint 2 members to deal with certain cases, instead of 3 while preserving the power of the chairman of the Board to appoint 3 members to deal with cases by oral hearing under rule 15A.

As drafted, rule 7 of S.S.I. 2012/167 would not have achieved the intended policy objective, because it did not preserve the chairman of the Board’s ability to appoint 3 members in cases determined to be dealt with by way of an oral hearing. Given that that instrument is due to come into force on 26 June 2012, the Scottish Government’s view was that it was necessary to breach the 28 day rule in order to ensure that the error identified by the SLC was rectified as quickly as possible, so as to ensure that the policy objective is achieved. We are grateful to the Committee for drawing the error to our attention.
APPENDIX 2

Trade in Animals and Related Products (Scotland) Amendment Order 2012 (SSI 2012/198)

Breach of laying requirements: letter to Presiding Officer

The Trade in Animals and Related Products (Scotland) Amendment Order 2012 SSI 2012/198 was made by the Scottish Ministers under section 2(2) of and paragraph 1A of Schedule 2 to, the European Communities Act 1972 and section 72 of the Animal Health Act 1981 on 20 June 2012. It will come into force on 30 June 2012 and is being laid before the Scottish Parliament today, 22 June 2012.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) (“the 2010 Act”) has not been complied with. In accordance with section 31(3) of the 2010 Act, this letter explains why.

The Order makes minor amendments to the Trade in Animals and Related Products (Scotland) Regulations 2012 (“TARP Regulations”) which were made on 29 May and are due to come into force on 1 July. During review by the legal advisers to the Subordinate Legislation Committee a number of technical points were raised which require to be addressed by legislative amendment. Those amendments are being made now so that the TARP Regulations are correct when they come into force.
APPENDIX 3

Wildlife and Countryside Act 1981 (Exceptions to section 14) (Scotland) Amendment Order 2012 (SSI 2012/205)

Breach of laying requirements: letter to Presiding Officer

The above instrument (the Amendment Order) was made by the Scottish Ministers under section 14(2B) and (2D)(a) and (e) of the Wildlife and Countryside Act 1981 on Thursday 21 June 2012. It is being laid before the Scottish Parliament today and is to come into force on 2 July 2012.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 has not been complied with. In accordance with section 31(3) of that Act, this letter explains why.

S.S.I. 2012/205 is required to amend the Wildlife and Countryside Act 1981 (Exceptions to section 14) (Scotland) Order 2012 (S.S.I. 2012/173), (the 2012 Order). The Amendment Order clarifies article 2(1), corrects some typographical errors and updates the nomenclature of the species listed following queries raised by the Subordinate Legislation Committee.

The policy objective of the 2012 Order is to create exceptions to offences created by the Wildlife and Natural Environment (Scotland) Act 2011 which offences are commenced on 2 July 2012 by the Wildlife and Natural Environment (Scotland) Act (Commencement No.4, Savings and Transitional Provisions) Order 2012 (SSI 2012/175). The exceptions created by the 2012 Order are required to allow activities, such as planting to deliver the aims of the Scottish Forestry Strategy, to continue and therefore require to come into force on 2 July 2012 when the new offences come into force. It is the Scottish Government’s view that it is necessary for this Amendment Order to come into force on the same day as the 2012 Order to deliver that policy objective.
APPENDIX 4

Wildlife and Countryside Act 1981 (Keeping and Release and Notification Requirements) (Scotland) Amendment Order 2012 (SSI 2012/206)

Breach of laying requirements: letter to Presiding Officer

The above instrument (the Amending Order) was made by the Scottish Ministers under sections 14(1)(a)(ii), (2D)(a) and (e) and 14ZC(1)(a) and (2)(a) of the Wildlife and Countryside Act 1981 on Thursday 21 June 2012. It is being laid before the Scottish Parliament today and is to come into force on 2 July 2012.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 has not been complied with. In accordance with section 31(3) of that Act, this letter explains why.

S.S.I. 2012/206 is required to amend the Wildlife and Countryside Act 1981 (Keeping and Release and Notification Requirements) (Scotland) Order 2012 (S.S.I. 2012/174) (the 2012 Order). It corrects typographical errors and updates the nomenclature of the species listed following queries raised by the Subordinate Legislation Committee.

The policy objective of the 2012 Order is to maintain certain necessary restrictions that are being repealed by the Wildlife and Natural Environment (Scotland) Act 2011. Those repeals are commenced on 2 July by the Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No.4, Savings and Transitional Provisions) Order 2012 (SSI 2012/175). The 2012 Order will also come into force on 2 July 2012. It the Scottish Government’s view that it is necessary for the Amendment Order to come into force on the same day to deliver that policy objective.
APPENDIX 5

Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2012 (SSI 2012/188)

On 15 June 2012, the Lord President’s Private Office was asked:

1. Paragraph 5(4)(a) amends rule 33.7(1)(a)(i) of the Ordinary Cause Rules so that the text of that rule, as amended, reads: “every person who is a child of the family (as defined in section 12(4)(a) of the Act of 1995) between the parties who has reached the age of 16 years”, the words in italics being newly-inserted. The unamended provision referred to “a child of the marriage between the parties…”, which expression is readily understandable. However, the amended provision refers to “a child of the family… between the parties”. By analogy with the provisions in rule 33A.66(1)(d) and rule 33A.70(1)(b)(i), as amended by paragraph 9 of this instrument, does the Lord President’s Private Office accept that the words “between the parties” have been retained in rule 33.7(1)(a)(i) in error? If it does not, it is asked to explain the meaning of the expression “a child of the family… between the parties”.

2. Paragraph 10(2) amends rule 5.1 of the Ordinary Cause Rules. In particular, in relation to warrants which must be signed by the sheriff, rule 5.1(2)(b) is amended so that it reads: “a warrant for arrestment to found jurisdiction (including the arrestment of a ship)” and a new rule 5.1(2)(e) is inserted which reads “a warrant for arrestment of a ship to found jurisdiction”. Given that rule 5.1(2)(b) is being expressly amended so that it refers to warrants for arrestment to found jurisdiction where the subject of the arrestment is a ship, the Lord President’s Private Office is asked to explain what purpose the provision in rule 5.1(2)(e) serves, as it appears only to make a duplicate reference to a type of warrant which is already provided for in rule 5.1(2)(b) as amended.

The Lord President’s Private Office responded as follows:

1. In relation to the first point, the Lord President’s Private Office takes the view that by referring specifically to “between the parties” in rule 33.7(1)(a)(i) of the Ordinary Cause Rules, when that rule is read with section 12(4)(a) of the Children (Scotland) Act 1995 it is tolerably clear that the relevant persons are the children of the family constituted by the parties to the marriage.

2. With regard to the second point, the purpose of rule 5.1(2)(e) is to be consistent with new Rule 49.11(1)(a)(iii) in so far as it provides that, in an admiralty action, the execution of a warrant for the arrestment of a ship to found jurisdiction is to be in Form 49.11-AA; Rule 49.11 also states that where two or more of the arrestments mentioned are to be executed they may be combined in one schedule. In terms of mixed property (including the arrestment of a ship) then Form 49.11-AA would, given Rule 49.11(1)(a)(i), serve as the “primary” Form. This is different from non-admiralty actions where there are no particular Forms in relation to the arrestment of a ship; though it can occur hence the amendment of Rule 5.1.(2)(b) to make this clear.
APPENDIX 6

Act of Sederunt (Rules of the Court of Session Amendment No. 3) (Miscellaneous) 2012 (SSI 2012/189)

On 19 June 2012, the Lord President’s Private Office was asked:

Form 12B.2, as inserted by the Schedule to this instrument, requires the prospective lay representative to make certain declarations. In particular, paragraph (d) requires that person to declare that he or she has no previous convictions, or alternatively to list those previous convictions. However, section 4 of the Rehabilitation of Offenders Act 1974 provides, inter alia, that a person who has become a rehabilitated person “…shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction…” and in particular that such a person shall not, in any proceedings before a judicial authority, be asked or required to answer any question relating to his or her past “…which cannot be answered without acknowledging or referring to a spent conviction or spent convictions…”. The Lord President’s Private Office is asked:

(a) Is it intended that a person who has become a rehabilitated person (and whose convictions are spent) should be required to disclose those convictions notwithstanding section 4 of the Rehabilitation of Offenders Act 1974?

(b) If that is the case, to identify the power which is relied upon to make such provision; or

(c) If that is not the case, to explain why it is considered that Form 12B.2 makes it sufficiently clear (in particular having regard to the likelihood that the form will be completed by those who are not legally qualified) that the prospective lay representative need not declare spent convictions.

The Lord President’s Private Office responded as follows:

(a) Yes.

(b) The powers to make the court rules are contained in sections 5 and 5A of the Court of Session Act 1988. In particular, paragraphs (a), (b) and (ef) of section 5 are relevant for these purposes. The Lord President’s Private Office takes the view that the court’s rule-making powers also require to be read against the background of section 7(3) of the Rehabilitation of Offenders Act 1974, which enables the court, at any stage in any proceedings, to require evidence relating to a person’s spent convictions, notwithstanding the terms of section 4(1) of the 1974 Act, where the court is satisfied in the light of any considerations which appear to it to be relevant that justice cannot be done except by admitting or requiring the evidence relating to those spent convictions. Other exclusions of section 4(1) of the 1974 Act (including exclusions relating to certain types of proceedings in the Court of Session) are set out in the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003.

(c) In light of the answer to question (a), question (c) does not require to be answered.
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