EXECUTIVE NOTE

THE SCOTTISH STATUTORY INSTRUMENTS REGULATIONS 2011

SSI 2011/XXX

The Scottish Statutory Instruments Regulations 2011 ("the SSI Regulations") are made in exercise of the powers conferred by section 42 of the Interpretation and Legislative Reform (Scotland) Act 2010 ("the 2010 Act"). By virtue of section 42(4) of the 2010 Act the Regulations are subject to the affirmative procedure as defined by section 29 of that Act.

Policy Objectives

Overview

Section 42 of the 2010 Act provides that the Scottish Ministers must make regulations providing for the publication, numbering and citation of Scottish statutory instruments ("SSIs").

Provision in relation to those matters was previously made by the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 ("the SI Transitional Order"). The principal policy change from the framework of provision contained in that Order is the move to give increased prominence to accessing SSIs online to better reflect modern practice.

The SSI Regulations will come into force on 6th April 2011, in parallel with the commencement of those provisions of the 2010 Act that did not come into force on 4th June 2010.

Regulation 3: Numbering of instruments

Regulation 3 sets out the manner in which the Queen's Printer for Scotland ("QPS") is to number SSIs. It provides that SSIs should be numbered sequentially based on the order in which they are received in each calendar year. The Government has decided, informed by the views of respondents to its consultation, to depart from the approach taken in the SI Transitional Order, which provided for an exception to the usual numbering rule in limited circumstances. This will deliver a clearer and more straightforward approach to the numbering of SSIs.

Regulation 4: Citation of instruments

Regulation 4 is concerned with how SSIs are referred to in legislation. The SI Transitional Order (article 5(3)) provided that an SSI could be cited by reference to the calendar series and number assigned to it by the QPS. Regulation 4 perpetuates that but differs from the SI Transitional Order's provision in two respects. Firstly, regulation 4(1)(a) provides that SSIs may be cited by their title. All SSIs contain a citation provision, but arguably that provision does not come into force until the date specified in the SSI's commencement provision. Regulation 4(1)(a) removes

ambiguity by ensuring that an SSI may be competently cited by its title from the moment it is made.

Secondly, regulation 4(2) provides that an SSI may continue to be cited by the title authorised in any enactment (including itself) despite the revocation of that enactment. This mirrors section 9(3) of the 2010 Act which provides that an Act of the Scottish Parliament may continue to be referred to by its short title notwithstanding the Act's repeal.

Regulation 5: Form of instruments

Regulation 5 sets out requirements as to the form in which SSIs must be published by the QPS. It does not significantly depart from its predecessor provisions in the SI Transitional Order.

Regulation 6: Publishing copies of instruments on a website

Section 41(1) of the 2010 Act requires the authority responsible for an SSI to send a certified copy of it to the QPS as soon as practicable after it is made. Regulation 6 requires the QPS to publish the SSI on its website as soon as practicable after the certified copy is received.

Regulation 6 also requires the QPS to publish any document related to the SSI that the responsible authority requests the QPS to publish. The QPS already routinely publishes material related to SSIs on its website (e.g. Executive Notes). Regulation 6 provides a legislative foundation for this practice.

Regulation 7: Printing copies of instruments for the National Library of Scotland

Although the internet is considered to be the principal point of reference for SSIs, there is a continuing need to ensure the preservation of SSIs. In light of concerns about the longevity of electronic formats there is perceived to be a need to ensure that SSIs are officially printed for preservation purposes. To a considerable extent this concern is addressed by section 43 of the 2010 Act, which requires the authority responsible for each instrument to send the signed copy of it to the Keeper of the Records of Scotland for preservation. Regulation 7 makes further provision for this purpose. It requires the QPS to print copies of the SSIs it receives and send them to the National Library of Scotland. In meeting its obligation to print SSIs under regulation 7, the QPS will in turn trigger a requirement upon it under the Legal Deposit Libraries Act 2003 to provide print copies to the other Deposit Libraries specified in that Act.

Not all SSIs are to be printed and sent to the National Library of Scotland under regulation 7. SSIs that are not laid, or not laid in draft, before the Scottish Parliament are not to be printed and sent to the National Library of Scotland unless the Parliament's Presiding Officer or the responsible authority requests the QPS to do so.

Regulation 8: Lists of instruments

Regulation 8 makes provision for the QPS to prepare and publish Scottish Statutory Instrument Lists ("SSI Lists"). SSI Lists are to be prepared periodically and contain entries relating to every SSI published online by the QPS under regulation 6 in the period to which the list relates. The entry for each SSI in a list is to indicate the SSI's title, number and the date on which the QPS published it online.

Regulation 9: Annual editions of instruments

Regulation 9 makes provision for the QPS to prepare annual editions. The annual edition is to include a copy of every SSI allocated to the series of the calendar year to which the annual edition relates that was printed and sent to the National Library under regulation 7. This means that annual editions will not contain copies of those SSIs that are not printed under regulation 7. Those instruments will be available online but the Government considers it would make the annual edition unnecessarily cumbersome to require that they be included. This is consistent with the approach taken to what should be included in annual editions in the SI Transitional Order, which similarly excluded those SSIs that there was no requirement to print. The annual edition is also to include a copy of every SSI List pertaining to the SSIs assigned to the calendar year to which the annual edition relates.

Regulation 9 only requires the QPS to prepare an annual edition, it does not make any express provision for its publication. Publishing the annual edition online is unnecessary given that it reproduces material already available through the QPS's website. Traditionally the annual edition has been a bound, hard copy library reference tool and it is envisaged that it will continue in that capacity. Regulation 12 makes provision empowering the QPS to print and sell copies of annual editions of its own volition and requires it to send a copy to anyone who requests (and pays for) one.

Regulation 10: Evidential status of lists and annual editions of instruments and entries in them

Regulation 10 gives presumptive evidential validity to SSI Lists and annual editions printed by the QPS and provides that the entries in SSI Lists and annual editions are to be treated as conclusive evidence of the date on which SSIs were first published by the QPS.

Regulation 11: Draft instruments: publishing and printing

The Government's consultation gave rise to a suggestion that the QPS should be required to publish the drafts of SSIs that are laid before the Parliament. The QPS currently does so, but only on an informal basis. The Government saw value in legislating for this both to guard against any move to discontinue current practice and create a formal link between the drafts of SSIs that are laid before the Parliament and the SSIs subsequently made. This increases transparency as it will ensure that any member of the public can compare the two versions.

The Government discussed the proposal with the QPS who is wholly supportive of the policy. The QPS views the formalisation of its role in publishing draft instruments as consistent with its aims of maximising the public accessibility of legislation.

Regulation 11 requires the authority responsible for draft SSIs laid before the Parliament to provide the QPS with a copy of any draft SSI as soon as practicable after laying it before the Parliament. The QPS is required to publish the draft SSI and any related document on its website, and provide a print copy of the draft SSI to the National Library of Scotland.

While the publishing requirements for draft SSIs essentially mirror the publishing requirements for SSIs, draft SSIs are not to be included in SSI Lists or annual editions. Once made the SSI will appear in those documents - to require a separate entry for the draft version of the SSI seems unnecessary and potentially confusing.

Regulation 12: Printing and selling

Regulation 12 enables the QPS to print and sell SSIs, draft SSIs, SSI Lists and annual editions on request. This caters for the need to maintain a mechanism in legislation for members of the public to continue to have access to print copies of legislation, despite the emphasis now being given to publication of, and access to, legislation online.

Consultation

On 21st September 2010 the Government launched a consultation on the implementation of those provisions of the 2010 Act that had not come into force immediately after the Bill for the Act received Royal Assent (i.e. on 4th June 2010). A draft of the SSI Regulations formed part of the consultation package.

The majority of respondents' comments were concerned with the detail of the SSI Regulations. A number of technical issues were raised on specific aspects of the regulatory framework. However respondents were generally supportive of the overall policy approach.

The Government has worked closely with the QPS (as one of the key stakeholders) in determining the policy approach set out in the SSI Regulations.

Impact Assessments

The matters dealt with by the 2010 Act are technical in nature. Part 3 (Publication of Acts and Instruments) of the 2010 Act, insofar as it relates to SSIs, impacts principally on the internal operations of the authorities responsible for making, confirming and approving SSIs and of the QPS.

Nevertheless, the publication and printing of SSIs does have a direct impact on the wider public. However, as explained at paragraphs 18 and 19 of the Government's consultation paper, none of the legislative reforms will result in any negative impact on the existing practices which ensure the public accessibility of legislation. In fact, the SSI Regulations take steps to ensure the accessibility of the statute book by

formalising the publication of documents related to SSIs (e.g. Executive Notes) and draft SSIs (regulations 6 and 11 respectively).

Financial Effects

The SSI Regulations have no financial effects on the Scottish Government, local government or on business.

Scottish Government
2nd February 2011