Subordinate Legislation Committee

3rd Report, 2011 (Session 4)

Subordinate Legislation
Subordinate Legislation Committee

3rd Report, 2011 (Session 4)

Subordinate Legislation

Published by the Scottish Parliament on 8 September 2011
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)
Kezia Dugdale
Mike MacKenzie
John Scott
Drew Smith

Committee Clerking Team:

Clerk to the Committee
Irene Fleming

Assistant Clerk
Euan Donald

Support Manager
Lori Gray
The Committee reports to the Parliament as follows—

1. At its meeting on 6 September 2011, the Committee agreed to draw the attention of the Parliament to the following instruments:
   
   - Construction Contracts (Scotland) Exclusion Order 2011 [draft];
   - Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 [draft];
   - Plastic Kitchenware (Conditions of Imports from China) (Scotland) Regulations 2011 (SSI 2011/282);
   - Local Democracy, Economic Development and Construction Act 2009 (Commencement No.1) (Scotland) Order 2011 (SSI 2011/269);
   - Local Electoral Administration (Scotland) Act 2011 (Commencement) Order 2011 (2011/277);
   - Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No.1) Order 2011 (SSI 2011/279) (C.25))
   - Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No.1) Amendment Order 2011 (SSI 2011/287 (C.26));
   - The Local Democracy, Economic Development and Construction Act 2009 (Commencement No.2) ) (Scotland) Order 2011 (SSI 2011/291); and
   - The International Criminal Court (Libya) Order 2011 (SI 2011/1696)

2. The Committee also agreed to draw the attention of the Parliament to the Consultation on the Draft Student Fees (Specification) (Scotland) Order 2011.

3. The Committee’s recommendations in relation to these instruments and the aforementioned consultation are set out in turn 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

Construction Contracts (Scotland) Exclusion Order 2011 [draft]

(Infrastrucure and Capital Investment Committee)

4. This draft Order is subject to the affirmative procedure. It disapplies section 110(1A) of the Housing Grants, Construction and Regeneration Act 1996 (“the 1996 Act”) in relation to certain Private Finance Initiative (“PFI”) sub-contracts.

5. Section 110 is within Part II of the 1996 Act which makes provision about construction contracts, and in particular provides for access to adjudication (a type of dispute resolution) and for payment mechanisms.

6. Construction contracts are required to provide an adequate mechanism for determining payments due under the contract. However, section 142 of the Local Democracy, Economic Development and Construction Act 2009 (“the 2009 Act”) inserts a new section 110(1A) of the 1996 Act which provides that this requirement is not satisfied if the contract makes payment conditional on obligations under another contract being performed.

7. Section 106A enables the Scottish Ministers to make an order disapplying all or part of Part II of the 1996 Act in relation to specified types of construction contract. The Construction Contracts (Scotland) Exclusion Order 1998 already excludes PFI contracts from the whole of Part II. The new section 110(1A) would prevent the present payment structure in relation to PFI sub-contracts, as typically staged payments are not due under those contracts until a technical adviser certifies that a stage of construction has been completed. It is intended that this system be preserved for PFI sub-contracts, and so this Order excludes them from the operation of section 110(1A).

8. On 19 July 2011 the Committee commented to the Scottish Government on the instrument, highlighting two particular concerns with the drafting. Correspondence between the Committee and the Government is reproduced at Appendix 1.

9. Firstly, it was noted that the usual style had not been followed in the headnote in that the words “resolution of” had been omitted from the phrase “for approval by resolution of the Scottish Parliament.” The Scottish Ministers accepted that these words had been omitted in error.

10. Secondly, it was highlighted that the Order contained an unnecessary extent provision. The Scottish Ministers accepted that this provision was unnecessary.

11. While recognising these errors, the Scottish Government did not consider that the errors affected the validity of the instrument and as such did not consider it necessary to amend it.
12. The Committee considers there has been a failure to follow proper drafting practice with regard to the headnote and the extent provision and as such the Committee draws the order to the attention of the Parliament on the general reporting ground.

Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 [draft]
(Infrastructure and Capital Investment Committee)

13. These draft Regulations are subject to the affirmative procedure. They amend the Scheme for Construction Contracts (Scotland) Regulations 1998 (“the principal Regulations”) so as to ensure consistency with Part II of the Housing Grants, Construction and Regeneration Act 1996 (“the 1996 Act”) as amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (“the 2009 Act”).

14. As previously noted, Part II of the 1996 Act makes provision about construction contracts, and in particular provides for access to adjudication (a type of dispute resolution) and for payment mechanisms. It also requires Ministers to make a statutory scheme in relation to those matters, and that scheme applies when parties have failed to make provision for them in their construction contract.

15. Part II of the 1996 Act is amended by Part 8 of the 2009 Act. The principal Regulations accordingly fall to be updated to reflect those amendments.

16. On 19 July 2011 the Committee commented to the Scottish Government on the instrument, highlighting four specific concerns with the drafting. Correspondence between the Committee and the Government is reproduced at Appendix 2.

17. Firstly, as in relation to the Construction Contracts (Scotland) Exclusion Order 2011 [draft], it was noted that the words “resolution of” had been omitted from the headnote. The Scottish Ministers accepted that these words had been omitted in error.

18. Secondly, and again like the Construction Contracts (Scotland) Exclusion Order 2011 [draft], it was highlighted that an unnecessary extent provision is contained within the Regulations. The Scottish Ministers accepted that this provision was unnecessary.

19. Thirdly, in regulation 2, the word “In” has been omitted immediately before the words “Regulation 4(b)”. The Scottish Ministers accepted that the word “In” had been omitted, but took the view that the omission was minor and did create any ambiguity or uncertainty in interpreting the provision.

20. Finally, the instrument and its Explanatory Note both contain a definition of “the Scheme”. However, these definitions differ from each other. The Scottish Ministers accepted that the definitions differed, but considered that as the readers of the instrument would be those in the construction industry who were familiar with the use of the term and as such, they were not concerned that the conflicting definitions might create any confusion.
21. The Committee observes that the draft Regulations contain four points at which they have failed to follow proper drafting practice. With these failures in mind, the Committee draws the Regulations to the attention of the Parliament on the general reporting ground.
NEGATIVE PROCEDURE

Plastic Kitchenware (Conditions of Imports from China) (Scotland) Regulations 2011 (SSI 2011/282) (Health and Sport Committee)

22. This instrument is subject to the negative procedure. Its purpose is to give effect in Scotland to Commission Regulation (EU) No. 284/2011 (the “Commission Regulation”) laying down specific conditions and detailed procedures for the import of plastic kitchenware originating in or consigned from China.

23. The Commission Regulation followed a significant number of notifications and alerts concerning food contact materials imported from China into the EU, releasing into food or food stimulant amounts of chemicals that are not in compliance with the EU legal limits.

24. The instrument 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 (“the 2010 Act”).

25. Section 28 of the 2010 Act relates to instruments which are subject to negative procedure. Section 28(2) sets out the rule that a Scottish statutory instrument which is subject to negative procedure must be laid before Parliament as soon as practicable after it is made, and in any event at least 28 days before the instrument comes into force. This is known as the “28 day rule”.

26. A failure to comply with section 28(2) does not render the instrument invalid, but the Scottish Government must explain to the Presiding Officer why the laying requirements have not been complied with.

27. This instrument came into force four days after having been laid and consequently does not comply with section 28(2).

28. In a letter of 27 June 2011 to the Presiding Officer, the Food Standards Agency explained that in order to give effect to the Commission Regulation from the date that it applied and to do so concurrently with equivalent legislation in the rest of the United Kingdom, it was necessary to bring the instrument into force on 1 July 2011. Following a public consultation in Scotland which ended on 10 June 2011, a short period was required to finalise the instrument and associated documents.

29. In a supplementary letter of 5 August 2011, the Agency explained that between the date that the Commission Regulation was published (23 March 2011) and the commencement of the consultation (20 May 2011), the Agency needed time to consider the Commission Regulation and its domestic implementation, liaise with administrations in the rest of the UK, consider the impact on stakeholders, set up the consultation and manage implementing other EU obligations. “In particular, time was needed to carefully consider the most appropriate, consistent and proportionate and enforceable method of import control.”
30. Given that the instrument does not comply with section 28(2) of the 2010 Act the Committee draws the instrument to the Parliament’s attention on the relevant reporting ground which reporting ground (j). At the same time, however, the Committee notes the explanation provided by the Scottish Government for not complying with section 28(2) and in this instance is satisfied with the reasons provided.
INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Local Democracy, Economic Development and Construction Act 2009 (Commencement No.1) (Scotland) Order 2011 (SSI 2011/269) (Infrastructure and Capital Investment Committee)

31. This instrument was laid before the Parliament, but is not subject to any Parliamentary procedure. The instrument brings section 138 of Local Democracy, Economic Development and Construction Act 2009 (“the 2009 Act”) into force in relation to Scotland on 24 June 2011. Section 138 inserts a new section 106A into the Housing Grants, Construction and Regeneration Act 1996 (“the 1996 Act”). Section 106A gives the Scottish Ministers the power to disapply Part II of the 1996 Act to such description of construction contracts relating to Scotland as they prescribe by order.

32. Section 138(2) also repeals section 106(1)(b) of the 1996 Act, which made similar provision.

33. This is one of four instruments considered the Committee on 6 September which together bring into force and give effect to the changes made by the 2009 Act to the 1996 Act. Section 138 of the 2009 Act required to be brought into force in order that the Scottish Ministers might exercise the powers in section 106A of the 1996 Act to lay the draft Construction Contracts (Scotland) Exclusion Order 2011.

34. On 19 July 2011, the Committee wrote to the Scottish Government noting concerns about the drafting of the instrument. Correspondence between the Committee and the Government is reproduced at Appendix 3.

35. Sections 138(2) of the 2009 Act repeals a provision of the 1996 Act. This repeal is repeated in Part 5 of Schedule 7 to the 2009 Act. This is an example of a drafting practice known as “double” repeal. The Scottish Ministers acknowledge that they ought to have brought into force the relevant provisions of Part 5 of Schedule 7 when making this Order, as a matter of good drafting practice. The Scottish Ministers propose to bring forward a further commencement order to bring Part 5 of Schedule 7 into force.

36. Given this failure to follow proper drafting practice, the Committee draws the instrument to the attention of the Parliament on the general reporting ground.

Local Electoral Administration (Scotland) Act 2011 (Commencement) Order 2011 (SSI 2011/277) (Local Government and Regeneration Committee)

37. This commencement order was laid before the Parliament, but is not subject to any Parliamentary procedure. The order brings into force, on 29 June 2011, the remaining provisions of the Local Electoral Administration (Scotland) Act 2011,
apart from the general provisions in Part 3. (Those provisions came into force when the Act obtained Royal Assent, on 21 April 2011).

38. The commencement order was signed on 21 June and laid before Parliament on 23 June 2011. The remaining provisions of the 2011 Act were brought into force on 29 June 2011. This does not follow the usual convention followed by the Scottish Government that a period of at least 10 days (and preferably at least 14 days) should be allowed between the laying of the order, and the date when the Act provisions are brought into force. A breach of the convention is a matter of legislative practice, not affecting the validity of an order.

39. The main reason for the convention is that a sufficient minimum time should be allowed between the publication of a commencement order, and when the provisions brought into force have legal effect, so that those affected by the order have adequate time to become aware of the order and comply with it.

40. On 24 August the Committee wrote to the Scottish Government seeking an explanation as to why this convention had not been adhered to. This correspondence is reproduced at Appendix 4.

41. In its response, the Scottish Government explained that it wished to commence the Act before the Parliamentary recess so that it could begin the recruitment procedure for the Convener of the EMB and initiate discussions with the Commission, about funding for the functions being conferred. In the process of drafting the Order, the convention was overlooked.

42. Furthermore, the response explained that those principally affected were aware of these provisions and the intention to commence them before recess. The response also noted that the Government had not been notified of any concerns about the breach of the convention, nor of any difficulty that the breach might cause.

43. The Committee notes the explanation provided, but is not satisfied with the reasons given. With this in mind, the Committee draws the instrument to the Parliament's attention on the general reporting ground as normal legislative practice has not been followed with regard to the 10 day period between the laying of the order, and the date when the Act provisions are brought into force. Furthermore, the Committee notes its intention to write to the Scottish Government in order to highlight the importance of the 10 day convention and express its concern that it has not been adhered to in this instance.

Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No.1) Order 2011 (SSI 2011/279 (C.25))
(Rural Affairs, Climate Change and Environment Committee)

44. This commencement order was laid before the Parliament, but is not subject to any Parliamentary procedure. The order brings into force various provisions of the Wildlife and Natural Environment (Scotland) Act 2011, on 29 June 2011.
45. Article 2(1)(l)(ii) of the Order was defectively drafted. It should have referred to the first to 13th, 15th to 18th, and the last entry of Part 2 of the schedule to the 2011 Act. In effect, the error meant that the Finance Act 1924 and the Game Act 1970 were not repealed and the Destructive Imported Animals Act 1932 was repealed, on the appointed day of 29 June 2011.

46. As a result, the Scottish Government urgently made an amending commencement order, SSI 2011/287, which is also reported on in this Report. That order corrects the error, with effect from the same coming into force date of this order, 29 June 2011.

47. **The Committee draws the instrument to the Parliament’s attention on reporting ground (i), in respect that the drafting of article 2(1)(l) appears to be defective, but in so doing, notes that the error has been corrected by the laying of SSI/2011/287.**

**Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No.1) Amendment Order 2011 (SSI 2011/287 (C.26))**

(Rural Affairs, Climate Change and Environment Committee)

48. As noted previously, this instrument was laid to correct an error in SSI 2011/279. It is brought into force on the same day as that Order (29 June 2011) so that the error in that Order does not have effect.

49. The effect is that the Finance Act 1924 and the Game Act 1970 are repealed, and the Destructive Imported Animals Act 1932 is not repealed, by the proper commencement of provisions of the 2011 Act.

50. The instrument was not laid before it came into force, as required by section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“the 2010 Act”).

51. Section 30(2) sets out the rule that such a Scottish statutory instrument must be laid before Parliament as soon as practicable after it is made, and in any event before the instrument is due to come into force.

52. A failure to comply with section 30(2) does not render the instrument invalid, but the Scottish Government must explain to the Presiding Officer why the laying requirements have not been complied with.

53. In its letter to the Presiding Officer, the Scottish Government explained that the reason for the breach of section 30(2) was that the drafting error in the commencement order 2011/279 required this instrument also to come into force on the appointed day of 29 June 2011, so that the commencement order had the intended effects.

54. This required the Order to be laid on the same day, 29 June 2011. The Order came into force at the start of that day, in breach of section 30(2). The Scottish Government further stated that had this order not been made urgently, the commencement order would have had the unintended effects of repealing the...

55. **A failure to comply with section 30(2) of the 2010 Act automatically engages reporting ground (j) and on that basis the Committee draws the instrument to the Parliament's attention. However, in doing so, the Committee notes the Scottish Government's explanation of why it did not comply with section 30(2) and intimates its satisfaction in this instance with the reasons given.**

**Local Democracy, Economic Development and Construction Act 2009 (Commencement No.2) (Scotland) Order 2011 (SSI 2011/291)**  
(*Infrastructure and Capital Investment Committee*)


57. Along with SSI 2011/269, the Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 and the Construction Contracts (Scotland) Exclusion Order 2011, this instrument brings into force and gives effect to the changes made by the 2009 Act to the 1996 Act.

58. On 19 July 2011, the Committee wrote to the Scottish Government noting concerns about the drafting of the instrument. Correspondence between the Committee and the Government is reproduced at Appendix 3.

59. Sections 139(1) and 143(2) of the 2009 Act repeal provisions of the 1996 Act. Those repeals are repeated in Part 5 of Schedule 7 to the 2009 Act. This is an example of a drafting practice known as “double” repeal. The Scottish Ministers acknowledge in their response that they ought to have brought into force the relevant provisions of Part 5 of Schedule 7 when making this Order, as a matter of good drafting practice. The Scottish Ministers propose to bring forward a further commencement order to bring Part 5 of Schedule 7 into force.

60. As a matter of good drafting practice, the wording of commencement provisions should reflect the power under which they have been made. Section 149(2) of the 2009 Act gives the Scottish Ministers power to appoint a day for the coming into force of Part 8 of that Act. However, this Order bears to provide that sections 139 to 145 come into force on 1 November 2011, rather than appointing a day for their coming into force. It accordingly fails to reflect accurately the power under which it was made.

61. **Given these failures to follow proper drafting practice, the Committee draws the instrument to the attention of the Parliament on the general reporting ground.**
International Criminal Court (Libya) Order 2011 (SI 2011/1696)  
(Justice Committee)

62. The purpose of this Order in Council is to ensure that the UK can comply with its obligations under the Statute of the International Criminal Court ("ICC") and Security Council Resolution 1970.

63. It is to ensure that, if any of the 3 Libyans against whom arrest warrants have been issued enters the UK, proceedings under Part 2 of the ICC Act 2011 cannot be defeated by a plea of State or diplomatic immunity. (The 3 Libyans are Col. Muammar Gaddafi, his son Saif al-Islam, and intelligence chief Abdullah al-Sanussi.)

64. The Order in Council was made and came into force on 13 July 2011. It was laid before the Westminster Parliament on 18 July, and the Scottish Parliament on 5 August 2011. The Order only requires to be laid, and is not subject to further procedure.

65. On 24 August 2011 the Committee wrote to the Scottish Government asking for an explanation for the delay between the laying of the Order in the Westminster Parliament and the Scottish Parliament. In addition, a letter had been sent to the Presiding Officer by the Scottish Government explaining why the terms of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 had been breached. In this regard, the Committee queried whether as an SI rather than an SSI, the terms of section 30(2) applied to the instrument. Correspondence between the Committee and the Government is reproduced at Appendix 5.

66. In its response, the Scottish Government, noted that due to the urgent nature of the Order, consideration of whether the Order should be laid before the Scottish Parliament only took place after the Order had been laid with both UK Houses of Parliament. Furthermore, the response related that the Scottish Government had no involvement in the earlier aspects of the process.

67. In terms of the engagement of section 30(2), the response noted that it applied “if any provision made by the Order would, if it were included in an Act of the Scottish Parliament, be within the legislative competence of that Parliament”.

68. The Committee was minded to accept that section 30(2) is engaged, and on that basis considered the reasons provided by the Scottish Government for its breach. The Committee also noted, first, that it appears the delay in laying here had no effect on the time when the contents of the Order were publicised. (The Order was publicised by the Queen’s Printer on laying in the UK Parliament on 18 July 2011. Once the Order was laid in the Scottish Parliament, a corrective instrument was published on or shortly after 5 August.)

69. Second, the Committee noted that it appears the delay in laying had no effect in terms of the ability of Parliament to approve or reject the Order, because it is not subject to Parliament procedure. Third, it appears the delay had no effect on the timing when the Committee considered the instrument, owing to the summer recess period.
70. Given this information, the Committee draws the instrument to the Parliament’s attention on reporting ground (j), due to the breach of section 30(2). However, in so doing, the Committee notes its satisfaction with the reasons given for the breach. At the same time, the Committee underlined the importance of UK Government departments being aware of the requirements of the Interpretation and Legislative Reform (Scotland) Act 2010 and agreed to write to the Scottish Government seeking assurance on this matter.

Consultation on the Draft Student Fees (Specification) (Scotland) Order 2011 (Education and Culture Committee)

71. This proposed draft Order is laid for consultation and Parliament consideration, under a “super-affirmative” form of procedure set out in section 9(13) and (14) of the Further and Higher Education (Scotland) Act 2005.

72. Before laying a draft of the Order under affirmative procedure, the Government must lay this proposed copy of the draft, and the statement of reasons for proposing to make the order. The Scottish Ministers must also have regard to written representations about the proposed draft Order, which are made within 60 days after the invitation of representations.

73. The main reason for making both this proposed draft Order and the Education Fees (Scotland) Regulations 2011 is that students who usually live in another part of the UK outside of Scotland will be excluded, with effect from the academic year 2012-13, from arrangements in terms of which Scottish Ministers set tuition fee levels in connection with higher education fundable bodies, leaving institutions to set their own tuition fee levels for this cohort. The Education Fees (Scotland) Regulations 2011 are yet to be laid in Parliament.

74. This Order will, under the powers in section 9 of the 2005 Act, set levels of tuition fees for higher level courses of education for full time students. The draft Order specifies the annual tuition fees for academic year 2012-13 as follows –

- For a full time new student studying an honours or ordinary degree course - £1820;
- For a full time new student studying a Postgraduate Certification of Education or Professional Graduate Diploma in Education - £1820;
- For a full time new student studying any other higher level course of education - £1285.

75. Those fee levels will not apply, in relation to any fees which are payable in accordance with the forthcoming Education (Fees) (Scotland) Regulations 2011. These will relate to students who do not have a “relevant connection with Scotland” and are not “excepted students”, as these terms shall be defined in those Regulations.
76. There are particular arrangements for medical students and students who have deferred entry to a course between August 2005 and July 2011. The Order will also not apply to students who have commenced course prior to 31 July 2012.

77. On 24 August 2011, the Committee wrote to the Scottish Government in order to raise the following points (this correspondence is reproduced at Appendix 6)—

- Firstly, Page 2 of the Executive Note explains that a policy intention of the draft Order is that “the 2006 Order will also govern the level of higher education tuition fees for a “new deferred student” with the meaning of the 2006 Order. That term covers any student who starts a course of education on or after 1 August 2012, having already agreed between 1 August 2005 and 31 July 2011, to defer entry to their course”.

However, article 5(3)(a) of the draft proposes to effect this by amending article 2(2) of the 2006 Order to specify the fee levels for courses for “full time new deferred students” who are studying at fundable bodies for the 2006/07 academic year. By article 3 of the 2006 Order, the effect also seems to be that Ministers may determine the same fees in each case, or higher fees in any case only to maintain the value in real terms of the fees, for years after 2006/07.

(a) It was queried if that is the intended effect of the provision. If so, it was asked on what grounds it would be claimed that this Order can specify fee levels for course attendance from the 2006/07 and later academic years, as section 9 of the 2005 Act does not state that retrospective provisions may be made.

(b) It was queried if the intended effect would be secured, if this Order specified the fee levels for “new deferred students” (as defined) attending courses on or after 1 August 2012, with the provision for future years that Scottish Ministers can determine the fees at same or higher level, as above.

- Secondly, it was queried why the Scottish Government had been unable to submit draft Education (Fees) (Scotland) Regulations 2011 and to whom these regulations would apply.

- And thirdly, the Scottish Government was invited to note and amend Article 1 where there is a duplication of the words – “and comes come into force....”.

78. In relation to the first point, the Scottish Government intimated that it did not intend article 5(3)(a) to have retrospective effect and would consider alternative drafting. In terms of the second point, the Scottish Government intimated its regret that the Regulations had not been laid and undertook to lay the Regulations at the same time as the Order, for scrutiny. The Government’s response also clarified that the Regulations will allow fundable bodies to charge higher fees for students
who fall outwith two categories specified in the 2011 Regulations. Those categories will be –

- students who have a “relevant connection” with Scotland, and
- “excepted students”.

79. Finally, the Committee undertook to correct the error identified in Article 1.

80. In light of this response, the Committee notes that the Scottish Government has undertaken to re-consider the drafting of article 5(3)(a) in the finalised draft Order to be laid, to avoid retrospective effect.

81. In addition, the Committee notes that it has been unable to use the period for consultation to consider the proposals for fees applicable to “remainder of UK” students, because the draft Education (Fees) (Scotland) Regulations were not produced. The Committee will expect the proposed Regulations to be laid at the same time as the finalised draft Order is laid. The Committee notes that the Scottish Government has confirmed in its response to the Committee that this is the intention.

82. Finally, the Committee notes the Scottish Government’s commitment to correct the error identified in Article 1.
83. At its meeting on 6 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**

Consultation on the draft Student Fees (Specification) (Scotland) Order 2011

**Infrastructure and Capital Investment Committee**

Private Rented Housing (Scotland) Act 2011 (Commencement No. 1 and Saving Provision) Order 2011 (SSI 2011/270 (C.22)); and

Public Services Reform (Scotland) Act 2010 (Commencement No.5) Order 2011 (SSI 2011/278 (C.24)).

**Justice Committee**


Act of Sederunt Rules of Court of Session Amendment No 4) (Miscellaneous) 2011 (SSI 2011/288);

Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No 2) 2011 (SSI 2011/289);

Act of Adjournal (Criminal Procedure Rules Amendment No 5) (Miscellaneous) 2011 (SSI 2011/290);

Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Causes in the Inner House) 2011 (SSI 2011/303); and

Act of Sederunt (Regulation of Advocates) 2011 (SSI 2011/312).

**Local Government and Regeneration Committee**

Local Government (Allowances and Expenses) (Scotland) Amendment Regulations 2011 (SSI 2011/304)

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

Pollution Prevention and Control (Scotland) Amendment Regulations 2011 (SSI 2011/285)
INSTRUMENTS SUBJECT TO THE AFFIRMATIVE PROCEDURE

APPENDIX 1

The Construction Contracts (Scotland) Exclusion Order 2011 (draft)

On 19 July 2011 the Scottish Government was asked:

1. Headnote: the usual style, as indicated in the Scottish Statutory Instrument Practice (SSIP) and the draft Scottish Statutory Instrument Drafting Manual (SSIDM), states that the instrument has been laid “for approval by resolution of the Scottish Parliament.” The highlighted words are omitted.

2. Extent provision: this Order is made in terms of section 106A(3) of the Housing Grants, Construction and Regeneration Act 1996, which was inserted by section 138(3) of the Local Democracy, Economic Development and Construction Act 2009. Section 106A(3) replaces section 106(1)(b), which is repealed. Section 106A(3) confers power directly on the Scottish Ministers. The power enables the Scottish Ministers to make orders, so far as extending to Scotland, providing that all or part of Part II of the 1996 Act is not to apply to specified descriptions of construction contracts. This appears to fall within the second category of Westminster Act enabling powers mentioned in para. 3.73 of SSIP. As the power is conferred on Ministers so far as extending to Scotland, it appears that an extent provision in the Order itself is not required.

The Scottish Government responded as follows:

The explanations and comments in relation to the omission of “resolution of” in the headnote and inclusion of an extent provision as outlined for the Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 apply also in relation to this instrument.
APPENDIX 2

The Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 (draft)

On 19 July 2011 the Scottish Government was asked:

1. Headnote: the usual style, as indicated in the Scottish Statutory Instrument Practice (SSIP) and the draft Scottish Statutory Instrument Drafting Manual (SSIDM), states that the instrument has been laid “for approval by resolution of the Scottish Parliament.” The highlighted words are omitted.

2. Extent provision: regulation 1(3) provides that the Regulations extend to Scotland only. However, the principal Regulations (the Scheme for Construction Contracts (Scotland) Regulations 1998) already contain an extent provision at regulation 1(2). Paragraph 3.75 of SSIP indicates that an extent provision in the amending Regulations is accordingly not required.

3. Regulation 2: the word “In” appears to have been omitted immediately before “Regulation 4(b)”.

4. Explanatory Note: the Scheme for Construction Contracts (Scotland) Regulations 1998 are given the shorthand reference “the Scheme”. However, regulation 5 of those Regulations provides that the provisions in the Schedule to those Regulations are to be the Scheme for Construction Contracts (Scotland). This is reflected in regulation 1(4) of the amending Regulations, where “the Scheme” is defined as being the Scheme contained in the Schedule to the principal Regulations. The references to “the Scheme” in the Explanatory Note are accordingly confusing, in that they suggest that the principal Regulations themselves (rather than the Schedule to those Regulations) constitute the Scheme. They are also inconsistent with the definitions in the principal and in the amending Regulations.

The Scottish Government responded as follows:

1. We accept that the words “resolution of” should have been included in the headnote to the instrument and that as a result of this omission the headnote does not strictly accord with the terms set out in SSIP. This was, of course, an error and not a deliberate omission. Whilst ideally the text should have complied fully with SSIP we do not consider that this error affects the validity of the instrument and do not consider it necessary to withdraw the instrument as a result.

2. We have considered and agree with your observation in relation to the extent provision in this case and thank you for drawing this to our attention. Its inclusion though, whilst unnecessary, does not alter the legal effect of the instrument and we do not consider amendment to be necessary.

3. We note and agree that regulation 2 should have commenced with the word “In”. We consider the omission to be minor and that in the interpretation of this provision there is no ambiguity or uncertainty of meaning. Accordingly we do
not consider it necessary to withdraw the instrument but will investigate whether this can be addressed as a matter of printing.

4. In relation to the references to “the Scheme” in the explanatory note to this instrument; although “the Scheme” is strictly the Schedule to the Scheme for Construction Contracts (Scotland) Regulations 1998 and not, as you identify, the Regulations themselves, the readers of this instrument will be those in the construction industry who are familiar with “the Scheme” and who will readily understand the nature and effect of the instrument as set out in the Explanatory Note. As a result we do not consider that any confusion would be caused.
LAID ONLY INSTRUMENTS, NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

APPENDIX 3


On 19 July the Scottish Government was asked:

1. To explain why no day has been appointed for the coming into force of Part 5 of Schedule 7 to the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act"), when the Orders do so for the relative repeal provisions found in section 138(2), section 139(1) and section 143(2).

2. To explain how it intends to bring Part 5 of Schedule 7 to the 2009 Act into force.

3. Given that section 149(2) of the 2009 Act enables the Scottish Ministers to appoint a day for the coming into force of Part 8 of that Act so far as extending to Scotland, to explain why article 2 of the No. 2 Order instead provides for the coming into force of sections 139 to 145 of the 2009 Act, rather than appointing a day as article 2 of the No. 1 Order does in relation to section 138.

The Scottish Government responded as follows:

Questions 1 and 2

The Scottish Government notes the repeal provisions provided for in Part 5 of Schedule 7 to the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act") and thanks the Committee for drawing this to its attention. Whilst commencement of the identified sections of Part 8 the 2009 Act (namely section 138(2), section 139(1) and section 143(2)) secure the repeal of the provisions set out in Part 5 of Schedule 7 the Scottish Government considers that as a matter of good practice it should commence Part 5 of Schedule 7 to the 2009 Act. Accordingly the Scottish Government proposes to make a further commencement order for this purpose.

Question 3

The Scottish Government notes the difference in style between these two Commencement Orders and thanks the Committee for its observation. The Scottish Government appreciates the benefit of consistency in these matters, however, the Scottish Government considers that the legal effect is the same in each case.
APPENDIX 4

The Local Electoral Administration (Scotland) Act 2011 (Commencement) Order 2011 (SSI 2011/277)

On 24 August 2011 the Scottish Government was asked:

Why does this commencement order not follow the normal convention that the provisions brought into force by it should be so brought in force at least 10 days, and preferably at least 14 days, after laying the instrument in Parliament and its publication?

The Scottish Government responded as follows:

The commencement order was made on 21 June 2011, laid two days later and came into force on 29 June 2011. The Scottish Government accepts that in this case the normal convention was not followed.

The Order commences Parts 1 and 2 of the Act, being the parts that did not come into force on the day after the Bill received Royal Assent. The effect of Part I is to establish an Electoral Management Board for Scotland, to co-ordinate the administration of local government elections. The effect of Part 2 is to confer statutory functions on the Electoral Commission in relation to those elections.

The Scottish Government wished to commence the Act before the Parliamentary recess so that it could begin the recruitment procedure for the Convener of the EMB and initiate discussions with the Commission about funding for the functions being conferred. In the process of drafting the Order, the convention was overlooked.

The Order simply commences provisions of the Act in a non-contentious way. Those principally affected were aware of these provisions and the intention to commence them before recess. The Scottish Government has not had any concerns expressed to it about the breach of the convention, nor has it identified any difficulty that the breach might cause.
APPENDIX 5

The International Criminal Court (Libya) Order 2011 (SI 2011/1696)

On 24 August 2011 the Scottish Government was asked:

1. Section 1(4) of the United Nations Act 1946 requires the Order in Council forthwith after it is made, to be laid before this Parliament, if any provision made by the Order would (if it were included in an Act of the Scottish Parliament) be within the legislative competence of the Parliament.

Can it be explained why the apparent breach of that statutory requirement (in respect that the Order was laid at Westminster on 18 July and the Scottish Parliament on 5 August) does not affect the validity or operation of the instrument?

2. The letter of 5 August to the Presiding Officer submitted with the Order explains how the delay in laying before the Parliament occurred, as reasons for non-compliance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

Would the Scottish Government take the view, despite that explanation, that the laying requirements in section 30(2) do not apply to this Order, because by section 27(3) of the 2010 Act, a function of making an Order in Council which is laid before each House of Parliament as well as the Scottish Parliament is not a “Scottish statutory instrument”?

The Scottish Government responded as follows:

1. We would refer you to our letter to the Presiding Officer which explains the reason for lodging the Order within these timescales. Due to the urgent nature of the Order, consideration of whether the Order should be laid before the Scottish Parliament only took place after the Order had been laid with both UK Houses of Parliament. It will be appreciated that the Scottish Government had no involvement in the earlier aspects of the process. We do not think anything turns on the fact there was a short delay in laying the Order with the Scottish Parliament. It is not unusual for an Order made under this section to be prepared within a very short timescale. Under the Act the Order made is laid before Parliament for information purposes. There is no prescriptive timescale for laying any Order with the Parliament and we consider the wording of the provision reflects the need for some degree of flexibility given the nature of the Orders made under the Act. The Scottish Government therefore considers that the timescales for lodging this Order with the Scottish Parliament would fall within the timescales in section 1(4) and in the circumstances there has been no violation of the prescribed procedure. Even if there was a breach of the statutory requirement, this breach would have no effect in light of the provisions in Part 2 of the Interpretation and Legislative Reform (Scotland) Act 2010 which provides that failure to lay in accordance with the 2010 Act or the 1946 Act does not affect the validity of the instrument.
2. We agree that section 27 does not apply to this instrument because section 27(3)(b) is applicable. That is so because the function of making the Order is a function of making an Order which is to be laid before each House of Parliament as well as the Scottish Parliament. Therefore Section 30(2) would not apply to the Order by virtue of section 27.

It is a separate question whether Schedule 4 ILRA has the effect of applying Section 30 of ILRA in relation to the Order. The question of whether of Schedule 4 makes provision in this case depends on whether statutory instrument is in terms of Section 36 “subject to procedure in the Scottish Parliament”.

The question whether the statutory instrument is subject to procedure in the Scottish Parliament is determined by Section 1(4)(b) of the 1946 Act. By virtue of that provision the Order must be laid before the Scottish Parliament “if any provision made by the Order would, if it were included in an Act of the Scottish Parliament, be within the legislative competence of that Parliament”.

As there is provision in the Order which would, if it were included in an Act of the Scottish Parliament, be within the legislative competence of that Parliament, then Section 1(4)(b) of the 1946 Act makes the Order “subject to procedure in the Scottish Parliament” . Accordingly Section 36 ILRA has the effect that Schedule 4 is relevant and this brings in paragraph 4 of Schedule 4 which applies in this case. As paragraph 4 applies then Section 30 applies in relation to the statutory instrument as it applies in relation to devolved subordinate legislation which is not subject to the negative procedure or the affirmative procedure, but as if the references in them to a Scottish statutory instrument were references to a statutory instrument.
Consultation on the Draft Student Fees (Specification) (Scotland) Order 2011

On 24 August 2011 the Scottish Government was asked:

1. Page 2 of the Executive Note explains that a policy intention of the draft Order is that “the 2006 Order will also govern the level of higher education tuition fees for a “new deferred student” with the meaning of the 2006 Order. That term covers any student who starts a course of education on or after 1 August 2012, having already agreed between 1 August 2005 and 31 July 2011, to defer entry to their course”.

However, article 5(3)(a) of the draft proposes to effect this by amending article 2(2) of the 2006 Order to specify the fee levels for courses for “full time new deferred students” who are studying at fundable bodies for the 2006/07 academic year. By article 3 of the 2006 Order, the effect also seems to be that Ministers may determine the same fees in each case, or higher fees in any case only to maintain the value in real terms of the fees, for years after 2006/07.

(a) Is that the intended effect of the provision? If so, on what grounds would it be claimed that this Order can specify fee levels for course attendance from the 2006/07 and later academic years, as section 9 of the 2005 Act does not state that retrospective provisions may be made?

(b) Would the intended effect be secured, if this Order specified the fee levels for “new deferred students” (as defined) attending courses on or after 1 August 2012, with the provision for future years that Scottish Ministers can determine the fees at same or higher level, as above?

2. The draft Order refers in articles 3(3) and 5(2)(a) to the draft Education (Fees) (Scotland) Regulations 2011, which are yet to be laid.

(a) Would you explain why the Scottish Government has not been able to submit a proposed draft of these Regulations (for the Committee to consider in relation to the draft Order) given that they shall define the students who shall not pay fees in terms of articles 3 and 4, and shall specify any fees payable by those students?

(b) Could you explain to the Committee which categories of students those draft Regulations will apply to, and what fees shall be payable under them?

3. Article 1 contains a duplication of words – “and comes come into force....” Would you propose to correct this when the finalised draft is laid?

The Scottish Government responded as follows:
1. It is not the Government’s intention that provisions on “new deferred students” should be capable of being interpreted as having retrospective effect. The Government intends to ensure only that such students, who have already accepted a university place prior to July 2011 (at the levels of tuition fees currently set in legislation) but who agree to defer entry until the academic year 2012/2013, do not suffer any disadvantage as a result of the introduction of the new tuition fee arrangements. The Government will consider whether an alternative drafting solution can be used, possibly along the lines suggested in point (b) of the question.

2. The Government regrets that it has not been able to provide a draft of the Education (Fees) (Scotland) Regulations 2011 (“the 2011 Regulations”) to which the draft Order refers. It was not possible for the 2011 Regulations to be in a final draft form in time to be provided to the Committee at the same time as the draft Order was laid in Parliament since aspects both of the policy and of the drafting were still being finalised. The Government is, however, intending to lay the final Regulations at the same time as the draft Order later in the year and the Committee will therefore have the opportunity to consider both instruments together at that time. Specifically in relation to point (b) of the question, it is currently anticipated that the 2011 Regulations will allow universities to charge higher fees for students who fall outwith two categories specified in the 2011 Regulations. Those categories will be –

- students who have a relevant connection with Scotland, and
- excepted students.

The 2011 Regulations will set out the criteria which a student must meet in order to establish a relevant connection with Scotland. As stated in the consultation paper (page 13) the Government intended that those criteria would include requirements that the student must have been ordinarily resident in Scotland for three years immediately prior to the start of the course and that the student must be settled in the UK within the meaning of the Immigration Act 1971. As is also stated in the consultation paper (again on page 13), the Government intended that the categories of excepted students would remain broadly the same as under the Education (Fees) (Scotland) Regulations 2007, although there will be some changes to ensure that they are aligned with the requirements relating to establishing a relevant connection with Scotland. The draft Order specifies the tuition fees which will be payable by those two categories of students. The Regulations will, however, not specify what fees are payable by those students who fall outwith these two categories; universities will be free to set higher fees for such students, but only if they wish to do so.

3. The Government thanks the Committee for drawing attention to the duplicated words in article 1 and undertakes to correct the wording before the finalised draft Order is laid.
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.

---

**PRICES AND SUBSCRIPTION RATE**

**OFFICIAL REPORT** daily editions

*Single copies:* £5.00  
*Meetings of the Parliament annual subscription:* £350.00

**WRITTEN ANSWERS TO PARLIAMENT QUESTIONS** weekly compilation

*Single copies:* £3.75  
*Annual subscriptions:* £150.00

Printed and published in Edinburgh by RR Donnelley and available from:

Blackwell’s Bookshop
53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell’s Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell’s Edinburgh

And through other good booksellers

---

Scottish Parliament
All documents are available on the Scottish Parliament website at:  
www.Scottish.Parliament.uk

For more information on the Parliament, or if you have an inquiry about information in languages other than English or in alternative formats (for example, Braille, large print or audio), please contact:

Public Information Service  
The Scottish Parliament  
Edinburgh EH9 1SP  

Telephone: 0131 348 5000  
Fôn: 0131 348 5395 (Gàidhlig)  
Textphone users may contact us on 0800 092 7100.  
We also welcome calls using the RNID TypeTalk service.  
Fax: 0131 248 5601  
E-mail: sp.info@scottish.parliament.uk

We welcome written correspondence in any language.