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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

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Introduction

1. At its meeting on 21 April 2015, the Committee agreed to draw the attention of the Parliament to the following instruments—
   
   Firemen’s Pension Scheme (Amendment) (Scotland) Order 2015 (SSI 2015/140);
   
   Firefighters’ Compensation Scheme and Pension Scheme (Amendment) (Scotland) Order 2015 (SSI 2015/143);
   
   Act of Adjournal (Criminal Procedure Rules Amendment No. 2) (European Protection Orders) 2015 (SSI 2015/121).

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

3. The Committee determined that it did not need to draw the Parliament’s attention to the instruments which are set out at the end of this report.
Points raised: instruments subject to negative procedure

Firemen’s Pension Scheme (Amendment) (Scotland) Order 2015 (SSI 2015/140) (Justice Committee)

4. This instrument amends the Firemen’s Pension Scheme (“the 1992 Scheme”) as contained in the Firemen’s Pension Scheme Order 1992 (“the 1992 Order”).

5. The Order was laid before Parliament on 26 March 2015 and came into force on 1 April 2015. The Scottish Government has provided a letter to the Presiding Officer, to explain the failure to comply with the “28 day rule”, as set out in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”). The correspondence (which also relates to SSI 2015/143) is reproduced at Annexe A.

6. The Committee draws the instrument to the attention of the Parliament under reporting ground (j) as it fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The instrument was laid on 26 March 2015 and came into force on 1 April 2015. The very short period of time between laying the instrument and it coming into force has meant that there was no opportunity for scrutiny of the instrument to take place prior to it coming into force.

7. The Committee considers that the breach of the 28-day rule in this case raises a broader issue about the timetabling of instruments which are prepared and laid in parallel with UK instruments which make similar provision. The Committee considers that there is a clear need for projects of this nature to be planned in a way which allows for the procedural requirements of both Parliaments to be met. The Committee considers it to be unsatisfactory that this has not been achieved in the present case.

8. The Committee welcomes, however, the fact that the Minister for Parliamentary Business has undertaken in recent correspondence with the Committee to review the processes for laying instruments in these circumstances and to take steps to improve awareness within the UK Government of the challenges involved. The Committee considers that this work should be progressed in early course, in order to avoid similar issues arising in the future.
9. This instrument amends the Firefighters’ Compensation Scheme (Scotland) Order 2006 (“the 2006 Order”) and the Firefighters’ Pension Scheme (Scotland) Order 2007 (“the 2007 Order”). The changes are consequential upon the new Firefighters’ Pension Scheme, as set out in the Firefighters’ Pension Scheme (Scotland) Regulations 2015 (“the 2015 Regulations”).

10. In considering the instrument, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at Annexe B.

11. As was the case with SSI 2015/140, this Order was laid before Parliament on 26 March 2015 and came into force on 1 April 2015. The Scottish Government has provided a letter to the Presiding Officer, to explain the failure to comply with the “28 day rule”, as set out in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”). The correspondence (which also relates to SSI 2015/143) is reproduced at Annexe A.

12. The Scottish Government has acknowledged in correspondence that the instrument also contains two drafting errors. The first is a patent cross-referencing error as described in paragraph 15 below. The Scottish Government has agreed to bring forward a further instrument to correct this error with appropriate retrospective effect.

13. The second error occurs at Article 18. This inserts a new sub-paragraph (11) into rule 1 of Part 2 of the Schedule to the Firefighters’ Pension Scheme (Scotland) Order 2007. The new sub-paragraph sets out the circumstances in which a person will be a provisionally enrolled member of the scheme. It refers to a person being a provisionally enrolled member if he or she is “not eligible” to become such a member. The words “not eligible” should read “not ineligible”. The error changes the meaning of the provision with the effect that it does not achieve the intended policy. Article 18 is accordingly defectively drafted. The Scottish Government intends to bring forward a further instrument to correct this error, again with appropriate retrospective effect.

14. The Committee accordingly draws the instrument to the Parliament’s attention on the following reporting grounds:

**General ground**

15. Article 11(2)(b)(iii) inserts a reference to “regulation 166” of the Firefighters’ Pension Scheme (Scotland) Regulations 2015 into rule 3(2)(c) of Part 10 of the Schedule to the Firefighters’ Compensation Scheme (Scotland) Order 2006. The correct reference should be to “regulation 156” of the 2015 Regulations. The Scottish Government has undertaken to bring forward a further instrument to correct this error, with retrospective effect.
Ground (i)

Article 18, in inserting a new sub-paragraph (11) into rule 1 of Part 2 of the Schedule to the Firefighters’ Pension Scheme (Scotland) Order 2007, is defectively drafted. The new sub-paragraph provides that a person is a provisionally enrolled member of the Scheme if the person is “not eligible” to become a provisionally enrolled member pursuant to rule 6C(3) of Part 11. The reference to “not eligible” should be a reference to “not ineligible”. The effect of the error is that the provision does not achieve its policy objective. The Scottish Government has undertaken to bring forward a further instrument to correct this error with retrospective effect.

Ground (j)

16. The instrument fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The instrument was laid on 26 March 2015 and came into force on 1 April 2015. The very short period of time between laying the instrument and it coming into force has meant that there was no opportunity for scrutiny of the instrument to take place prior to it coming into force.

17. The Committee considers that the breach of the 28-day rule in this case raises a broader issue about the timetabling of instruments which are prepared and laid in parallel with UK instruments which make similar provision. The Committee considers that there is a clear need for projects of this nature to be planned in a way which allows for the procedural requirements of both Parliaments to be met. The Committee considers it to be unsatisfactory that this has not been achieved in the present case. The Committee welcomes, however, the fact that the Minister for Parliamentary Business has undertaken in recent correspondence with the Committee to review the processes for laying instruments in these circumstances and to take steps to improve awareness within the UK Government of the challenges involved. The Committee considers that this work should be undertaken in early course, in order to avoid similar issues arising in the future.
Points raised: instruments not subject to any parliamentary procedure

Act of Adjournal (Criminal Procedure Rules Amendment No. 2) (European Protection Orders) 2015 (Justice Committee)

18. This instrument adds a new Chapter 61 (European Protection Orders) into the Criminal Procedure Rules 1996. This is to make provision in consequence of Directive 2011/99/EU on the European Protection Order (“EPO”).

19. The rules also make procedural provisions in respect of the recognition and implementation of a European Protection Order made in another member State.

20. The instrument came into force on 1 April 2015. It is laid, but not subject to further Parliament procedure.

21. In considering the instrument, the Committee asked the Lord President’s Private Office for an explanation of certain matters. The correspondence is reproduced at Annexe C. The Private Office has acknowledged that there are drafting errors in the instrument, in two places. One drafting error is comparatively minor, as set out at paragraph 30 below.

22. In relation to the other error, a new rule 61.6(1) of the Criminal Procedure Rules 1996 is inserted by paragraph 2(2) of this instrument. That sub-paragraph of the new rule provides that a non-harassment order made under section 245D of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) is to be made in a Form 61.6-A, which is appended in the Schedule to the instrument. The new rule 61.6(3) provides that where the sheriff must provide information on the order under section 254D(6) of the 1995 Act, it must be done in a Form 61.6-B. Again that Form is appended in the Schedule.

23. The Form 61.6-B notifies the offender, the person who is protected by the non-harassment order, and the “competent authority” of the member State which has issued a European Protection Order under Directive 2011/99/EU, that the order has been made and that breach of the order is an offence. The Form also notifies the maximum penalties for that offence under section 234A(4) of the 1995 Act (as modified).

24. The Lord President’s Private Office has acknowledged that paragraph (b) of the Form 61.6-B states the incorrect maximum penalties for the offence, where it is prosecuted on summary conviction rather than on indictment. The paragraph should have specified the maximum penalties as 12 months’ imprisonment or a fine not exceeding the statutory maximum (or both), instead of 3 months imprisonment or a fine not exceeding level 5 on the standard scale (or both).
25. The response from the Lord President’s Private Office (reproduced at Annexe C) provides a detailed explanation as to how the appropriate maximum penalty levels are arrived at, this being a matter of some complexity.

26. The Committee therefore draws the instrument to the attention of the Parliament on the Committee’s reporting ground (i) and on the general ground:

27. Firstly, paragraph (b) of Form 61.6–B in the Schedule to the instrument appears to be defectively drafted. Paragraph (b) specifies the incorrect maximum penalties on summary conviction which are applicable for an offence under section 234A(4) of the Criminal Procedure (Scotland) Act 1995 as modified by section 254D(2). (Reporting ground (i)).

28. Paragraph (b) should have specified the maximum penalties as 12 months’ imprisonment or a fine not exceeding the statutory maximum (or both), instead of 3 months imprisonment or a fine not exceeding level 5 on the standard scale (or both).

29. Secondly, there is a minor drafting error in the new rule 61.9(1) of the Criminal Procedure Rules 1996, as inserted by paragraph 2(2) of this instrument. Rule 61.9(1) provides that the rule applies where the court has to send information to the competent authority of an issuing state under (among other provisions) rule 61.3(4), but this should refer to rule 61.3(3). (General reporting ground).

30. The Lord President’s Private Office has confirmed that the errors will be corrected by laying an amending instrument before Parliament at the earliest possible opportunity.
No points raised

31. At its meeting on 21 April 2015, the Committee also considered the following instruments. The Committee determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

*Infrastructure and Capital Investment*

Housing (Scotland) Act 2006 (Repayment Charge and Discharge) Amendment Order 2015 (SSI 2015/144);

Housing (Scotland) Act 2014 (Commencement No. 2) Order 2015 (SSI 2015/122 (C.26)).

*Health and Sport*

National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2015 (SSI 2015/160).

*Justice*

Act of Sederunt (Rules of the Court of Session and Sheriff Court Bankruptcy Rules Amendment) (Bankruptcy and Debt Advice (Scotland) Act 2014) 2015 (SSI 2015/119).

*Rural Affairs, Climate Change and Environment*

Climate Change (Additional Greenhouse Gas) (Scotland) Order 2015 [draft];

Welfare of Animals at the Time of Killing (Scotland) Amendment Regulations 2015 (SSI 2015/161).
Firemen’s Pension Scheme (Amendment) (Scotland) Order 2015 (SSI 2015/140); and Firefighters’ Compensation Scheme and Pension Scheme (Amendment) (Scotland) Order 2015 (SSI 2015/143)

Letter to Presiding Officer: breach of laying requirements

The above instruments were made on 24 March 2015 under the powers cited in the preamble in each case. They are being laid before the Scottish Parliament on 26 March 2015 and will come into force on 1 April 2015 as part of the public service pension reforms applicable from that date.

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 sets out why it is necessary to lay the instruments less than 28 days before they are brought into force.

These instruments provide for the reform of Scotland’s police pension scheme and complete reform of Scotland’s firefighter pension scheme (all as required by the Public Service Pensions Act 2013). Occupational pensions policy is reserved and the requirements of the 2013 Act were set out and determined by the UK Government which took no account of Scotland’s circumstances in meeting that imposed timetable. The terms of the devolved public service pension schemes in Scotland broadly mirror those being introduced for the counterpart schemes in England and Wales. This has meant that Scottish Government officials could not complete the above instruments until final copies of the counterpart instruments were received. The counterpart regulations for the police scheme were laid at Westminster on 5 March and the firefighters set on 10 March. As a consequence, the above instruments could not be finalised and laid by 3 March – the date required to avoid breaching the 28-day rule.

On 9 March Mr Swinney, Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy, wrote to the Convener of the Delegated Powers and Law Reform Committee setting out that it would not be possible to meet the 28 day rule for certain instruments. I attach a copy of that letter for information. It has been necessary to seek further confirmation on a number of queries regarding the police scheme regulations, which unfortunately meant that those regulations could not be finalised for 19 March as originally estimated. In addition subsequent to Mr Swinney’s letter, the Department of Communities and Local Government, who have responsibility for the firefighters scheme in England, identified that a further short instrument was needed. That additional instrument is amongst those listed in the heading of this letter.

Reforming the five devolved public service pension schemes to a programme and timetable set by the UK Government has required 19 separate instruments and I can confirm that despite those constraints fifteen of those instruments complied with the 28-day rule.
Annexe B

Firefighters’ Compensation Scheme and Pension Scheme (Amendment) (Scotland) Order 2015 (SSI 2015/143)

On 1 April 2015, the Scottish Government was asked:

1. Article 11 amends Part 10 of the Schedule to the Firefighters’ Compensation Scheme (Scotland) Order 2006. Article 11(2)(b)(iii) amends paragraph (2)(c) of rule 3 of Part 10 by inserting a reference to “regulation 166 (guaranteed minimum pension) of the 2015 Regulations”. Should that reference be to regulation 156 of the 2015 Regulations? If so, is corrective action proposed?

2. Article 18 amends Part 2 of the Schedule to the Firefighters’ Pension Scheme (Scotland) Order 2007. It inserts a new sub-paragraph (11) into rule 1 of that Part. The new sub-paragraph sets out the circumstances in which a person is a provisionally enrolled member of the Scheme. Those circumstances are: (a) that the person satisfies the conditions in rule 6C(2) of Part 11; and (b) that the person is not eligible to become a provisionally enrolled member pursuant to rule 6C(3) of Part 11. Rule 6C(3) of Part 11 is concerned with ineligibility to become a provisionally enrolled member rather than eligibility, in that a person cannot become a provisionally enrolled member if any one of sub-paragraphs 6C(3)(a) to (c) apply. Does the Scottish Government consider that the reference to a person being “not eligible” in the terms of rule 1(11) to Part 2 of the Schedule to the 2007 Order should be a reference to “not ineligible”? Is the new rule 1(11) considered to be sufficiently clear in its current form?

The Scottish Government responded as follows:

The Scottish Government is grateful to the Committee for raising these points. We agree that the references should respectively be “regulation 156” and “not ineligible”. The errors will be corrected by an amending instrument (with appropriate retrospective effect).
Annexe C

Act of Adjournal (Criminal Procedure Rules Amendment No. 2) (European Protection Orders) 2015 (SSI 2015/121)

On 25 March 2015, the Lord President’s Private Office was asked:

1. The new rule 61.9(1) of the Criminal Procedure Rules 1996 (procedure where competent authority not known), inserted by paragraph 2(2) of this instrument, provides that the rule applies where the court has to send information to the competent authority of an issuing state under (among other provisions) rule 61.3(4).

Is the reference to rule 61.3(4) an error as that sub-paragraph provides that an application may be granted in chambers; and is it intended to refer to 61.3.(3)? If this is agreed to be an error, would corrective action be proposed?

2. Form 61.6-B in the Schedule to the instrument (Form of information regarding a non-harassment order to an offender, protected person or competent authority) provides that conviction of an offence under section 234A(4) of the Criminal Procedure (Scotland) Act 1995 (as modified) may attract the following penalties-

(a) “on conviction on indictment, to imprisonment for a term not exceeding 2 years….“ and

(b) “on summary conviction, to imprisonment for a period not exceeding 3 months or to a fine not exceeding level 5 on the standard scale…..”

It appears however that section 234A(4) of the 1995 Act as amended by section 49 of the Criminal Justice (Scotland) Act 2003 provides in terms that the penalty is-

(a) “on conviction on indictment, to imprisonment for a term not exceeding 5 years….“ and

(b) “on summary conviction to imprisonment for a period not exceeding 6 months or to a fine not exceeding the statutory maximum…”

Accordingly—

(i) Given the discrepancy between the terms of the Form and the apparent terms of section 234A(4) as amended in respect of the maximum penalties, would you agree that the Form contains errors? Otherwise please explain why the terms of the Form are considered appropriate?

(ii) Is it considered that, in relation to the maximum period of imprisonment on summary conviction stated in section 234A(4), that section 45 of the Criminal Proceedings etc. Reform (Scotland) Act 2007 has the effect that this is to be read (as a result of a glossing modification) as a reference to 12 months? If so, should that maximum period have been specified in the Form?

(iii) If there is error, would corrective action be proposed?
The Lord President’s Private Office responded as follows:

**Question 1**

We are grateful to the Committee and its legal advisers for drawing this matter to our attention. We agree that there is a cross-referencing error in new rule 61.9(1) where it refers to rule 61.3(4) – as indicated, that reference should properly be to rule 61.3(3). This will be corrected by amendment at the next available opportunity which, standing our response to question 2, is likely to be in the near future.

**Question 2**

Section 254D(1) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), as inserted by the European Protection Order (Scotland) Regulations 2015, provides that the sheriff must make a non-harassment order on recognising a European Protection Order under section 254C(2). Our interpretation is that this is a new species of non-harassment order, distinct from those imposed under section 234A, and this view is bolstered by the fact that, while subsections (4), (4A) and (4B) are applied to section 254D non-harassment orders, the other provisions of section 234A are not – bespoke provision is instead made in subsections (4) to (8) of section 254D.

Section 254D(3) applies section 234A(4A) and (4B) (powers of arrest) without modification. However, section 254D(2) applies section 234(4) (the offence and penalty provision) subject to the restrictions in paragraph 1(1)(d) of Schedule 2 to the European Communities Act 1972 ("the 1972 Act"). As section 254D(2) was inserted into the 1995 Act by regulations made under section 2(2) of the 1972 Act, we understand that the restrictions in paragraph 1(1)(d) operate so as to limit the maximum penalties that may be imposed following conviction under section 234A(4) as modified by section 254D(2). Accordingly, this explains why the maximum penalties mentioned in Form 61.6–B do not mirror those in section 234A(4) as amended by section 49 of the Criminal Justice (Scotland) Act 2003 – those penalties are higher than the maxima permitted by the 1972 Act. In particular, the maximum period of imprisonment on conviction on indictment is, in our view, restricted from 5 years (section 234A(4)) to 2 years.

Initially, we had thought that the penalties on summary conviction were similarly limited to the maxima specified in paragraph 1(1)(d). Regrettably, however, this office had not identified the effect of sections 45 and 47 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 on a) section 234A(4) of the 1995 Act or b) section 2(2) of the 1972 Act. We are grateful to the Committee and its legal advisers for drawing section 45 to our attention. Following further analysis, our view is now that the maximum penalties that may be imposed following summary conviction under section 234A(4) as applied by section 254D(2) of the 1995 Act are 12 months’ imprisonment or a fine not exceeding the statutory maximum, or both.

This office accepts that Form 61.6–B is accordingly incorrect insofar as it purports to specify the maximum penalties applicable on summary conviction. We propose to correct the error by amendment at the earliest possible opportunity, and will therefore lay an amending instrument as soon as is practicable.