Subordinate Legislation Committee

8th Report, 2011 (Session 4)

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Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

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

(c) general questions relating to powers to make subordinate legislation;

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

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

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

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

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Clerk to the Committee
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The Committee reports to the Parliament as follows—

1. At its meeting on 4 October 2011, the Committee agreed to draw the attention of the Parliament to the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (SSI 2011/331).

2. The Committee’s recommendations in relation to that instrument are set out below. Those instruments that the Committee determined it did not need to draw the Parliament’s attention to are set out at the end of this report.
NEGATIVE PROCEDURE

Prisons and Young Offenders Institutions (Scotland) Rules 2011 (SSI 2011/331) (Justice Committee)

3. These Rules contain provisions relating to the management and regulation of prisons and young offenders institutions ("YOIs"). They make provision in sixteen distinct areas, including accommodation, healthcare, communications by prisoners, security and discipline.

4. These Rules replace the Prisons and Young Offenders Institutions (Scotland) Rules 2006 ("the 2006 Rules"), and are intended to modernise the language of the 2006 Rules. They also update the complaints procedure to reflect the Scottish Public Services Ombudsman's best practice model and implement changes as a result of the transfer of responsibility for prisoners' healthcare from the Scottish Ministers to Health Boards.

5. These Rules are subject to the negative procedure, and come into force on 1 November 2011.

6. On 23 and 26 September, the Committee wrote to the Scottish Government seeking responses on 14 questions. This correspondence and the responses to it are reproduced at the appendix. The Committee also took evidence on the Rules, specifically focussing on questions 7 and 8, as it was felt the responses to these questions were not answered in such a way as to allow the Committee to form a view on the issues raised.

7. Each of the 14 questions raised (with the exception of questions 9 and 10, to which the Committee received an acceptable explanation), the responses to them and the Committee’s conclusions thereon are considered in turn below.

Questions 1 and 2

8. The Scottish Government explained that the reference to section 3A of the Prisons (Scotland) Act 1989 ("the 1989 Act") is to section 3A as substituted by section 110 of the Criminal Justice & Licensing (Scotland) Act 2010 ("the 2010 Act"). Section 110 is not yet in force, although the Scottish Government advises that it intends to commence section 110 for certain (unspecified) purposes on 1 November 2011.

9. The Scottish Ministers’ reliance on section 3A as substituted is competent only if it can be said to be an anticipatory use of powers under section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010. An anticipatory use of powers involves the exercise of a power before it is commenced, and may only be done in the circumstances laid out in section 4. Section 3A(5) as substituted confers power to make rules about searching persons entering prisons to provide medical services. The Scottish Ministers consider that section 110 accordingly confers powers to make rules, and that exercise of those powers prior to the coming into force of that section is necessary and expedient for the purpose of giving full effect to the 2010 Act.
10. The Committee is not convinced by this analysis. It proceeds on the basis that section 110 of the 2010 Act confers powers to make subordinate legislation which are necessary to be exercised in anticipation of the 2010 Act having full effect. However, section 110 modifies existing provisions of primary legislation which are already in force. It is necessary to exercise the powers conferred by section 3A as inserted by section 110 to give effect to the Prisons (Scotland) Act 1989, not the 2010 Act.

11. The Committee considers that there is doubt as to whether the anticipatory exercise of those powers is permitted in terms of section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010. This appears to be consistent with the view which has previously been expressed by the Westminster Joint Committee on Statutory Instruments where the “new provisions” contained only the powers themselves.

12. The Committee therefore considers that there is a doubt whether the instrument is *intra vires* so far as it relies upon section 3A of the Prisons (Scotland) Act 1989 as prospectively inserted by section 110 of the Criminal Justice and Licensing (Scotland) Act 2010 as an enabling power. That provision is not yet in force. It is doubtful whether the exercise of power conferred by section 3A(5) can be necessary or expedient for the purpose of giving full effect to the provision in the 2010 Act which inserts that power into existing legislation. This appears to fall outwith the scope of section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010 which permits the exercise of powers before commencement and on which the Scottish Government seeks to rely. As such, the Committee draws the instrument to the attention of the Parliament on reporting ground (e).

**Question 3**

13. The Scottish Government accepts that the Court Martial Appeals Act 1968 (“the 1968 Act”) is incorrectly referred to as the Courts-Martial (Appeals) Act 1968 and that there is a similarly erroneous reference to the Courts-Martial Appeal Court. These errors appear to have arisen from a failure to take into account the amendments made to the 1968 Act by section 272 of and Schedule 8 to the Armed Forces Act 2006.

14. Rule 2(3) sets out the circumstances in which a prisoner is deemed to be an “appellant”. Under rule 2(3), a military prisoner becomes an appellant from the time when the prisoner presents a petition to the Defence Council in terms of section 8(2) of the 1968 Act. However, section 8(2) has been repealed. As a result, it appears that military prisoners will be unable to satisfy that requirement and cannot be deemed to be appellants, because the procedural step which they required to take to acquire that status has been abolished. The Scottish Ministers concede that rule 2(3)(e) erroneously refers to a repealed provision.

15. The Scottish Government intends to amend the Rules to correct these matters.

16. The Committee considers that the drafting of rule 2(3)(e) appears to be defective, as it erroneously refers to a procedure which has been abolished and so the condition which requires to be met cannot be met. This defeats
the intention that a prisoner who appeals against conviction or sentence under section 8 of the Court Martial Appeals Act 1968 is deemed to be an appellant from the time when the prisoner takes steps to commence appeal proceedings. Mindful of this, the Committee draws the instrument to the attention of the Parliament on reporting ground (i).

17. There has also been a failure to follow proper drafting practice, as the instrument refers to the Courts-Martial (Appeals) Act 1968 when that Act has been renamed the Courts Martial Appeals Act 1968 by section 272 of and Schedule 8 to the Armed Forces Act 2006. There is a similar error in respect that the instrument refers to the Courts-Martial Appeal Court, which has been renamed the Court Martial Appeal Court. The Committee accordingly draws the instrument to the attention of the Parliament on the general reporting ground.

**Question 4**

18. Rule 2(1) defines the term “healthcare professional” as having the same meaning as in section 17CA of the National Health Service (Scotland) Act 1978. However, that provision defines the term “health care professional”. The Scottish Government accepts that this is inconsistent, but considers that the intention of rule 2(1) is still sufficiently clear.

19. The Committee considers that end users of the Rules would be able to ascertain the intended meaning of the term “healthcare professional”. While this inconsistency does not appear to affect the operation of the rule, it does constitute a failure to follow proper drafting practice.

20. There has been a failure to follow proper drafting practice, as rule 2(1) provides that the term “healthcare professional” has the same meaning as in section 17CA of the National Health Service (Scotland) Act 1978, when that section instead provides a definition of the alternative term “health care professional”. As such the Committee draws the instrument to the attention of the Parliament on the general reporting ground.

**Questions 5 and 6**

21. The Rules confer a wide variety of functions on the Governors of prisons and YOIs. Rule 2(1) sets out a definition of “Governor” which applies differently depending on the rule in which the term is used. There are three categories:

   a) “Governor” means the Governor in Charge, i.e. the officer in overall charge of a prison;

   b) “Governor” means the Governor in Charge, the Deputy Governor, any authorised Unit Manager or (in the absence of those persons) the most senior officer present;

   c) “Governor” means any officer.

22. Shortly put, some functions conferred on the Governor may only be exercised by the Governor in Charge, some may be exercised by specified senior officers, and others may be exercised by any officer. In order to understand who
may exercise the functions of the Governor in relation to a particular rule, the end user of the Rules will need to consider and apply rule 2(1).

23. The equality impact assessment and consultation on the draft Rules highlighted as a key issue prisoners’ ability to understand the Rules given poor prison literacy levels. The Scottish Ministers were accordingly asked to explain how end users of these Rules (particularly prisoners) were to be made aware of the person or persons who might exercise the Governor’s functions under any given rule.

24. The Scottish Ministers advise that the terms “Governor” (in the sense of “any officer”) and “an officer” are used, on occasion within the same rule, to reflect the importance of the decision being taken by the officer. The Committee does not consider that this response assists in explaining how prisoners are to be made aware of the person or persons who may exercise functions conferred on the Governor by any particular rule. The Committee considers that it is misleading to suggest in one part of a rule that something may be done by the Governor and in another part of the same rule to provide that something else may be done by an officer, when the effect of the two provisions is identical: either function may be exercised by the same officer, who need not be the Governor.

25. On balance, the Committee considers that the correct interpretation of the term “the Governor” may be arrived at in relation to individual rules, but it requires careful reading of the relevant rule together with the definition provided in rule 2(1). Accordingly, the Committee does not consider that the intended meaning would be clear to the end users of these Rules, particularly considering the literacy issues among the prison population which the Scottish Government’s equality impact assessment and consultation have highlighted. The Committee observes that this problem is exacerbated in rules where “the Governor” is used in the sense of “any officer” and the same rule also confers functions on “an officer”. The reader of these Rules might reasonably expect that, in having used two different terms, a different effect was intended. That is not, however, the result.

26. The Committee therefore concludes that the meaning of the definition of “the Governor” in rule 2(1) could be clearer. The rule provides for Governor to have three different meanings – Governor in Charge, specified senior officers, or any officer – and specifies the rules to which each sense applies. It is not clear how end users of the Rules, particularly prisoners, are to be made aware of the person or persons who may exercise functions conferred on the Governor in any given rule.

27. Further to this, the meaning of rules 9 and 34 could be clearer, as in those rules the term “the Governor” (meaning “any officer”) is used in one paragraph, only for the term “an officer” to be used in the following paragraph. The drafting of these rules suggests that there is a distinction between the functions conferred on the Governor and those conferred on an officer, when in fact any officer may exercise either function.

28. Given this lack of clarity, the Committee draws the instrument to the attention of the Parliament on ground (h).
Question 7

29. Previously, untried and civil prisoners were entitled to keep tobacco in their possession, under rule 48 of the Prisons and Young Offenders Institutions (Scotland) Rules 2006, but no such provision is included in these Rules. Instead, rule 45(3)(d) provides that a system of privileges may include provision as to the arrangements whereby a prisoner may have tobacco in his or her possession. The Rules appear to remove a right previously enjoyed by untried and civil prisoners. This change accordingly appears to affect untried and civil prisoners’ right to peaceful enjoyment of their possessions, as guaranteed by Article 1 of the First Protocol to the European Convention on Human Rights. The Scottish Government was asked to explain how the removal of these prisoners’ entitlement to keep tobacco in their possession was compatible with their Article 1 Protocol 1 rights.

30. The Scottish Government asserts that it is satisfied that the Rules and relevant directions made under them will ensure respect for untried and civil prisoners’ Article 1 Protocol 1 rights. It explains that every Governor must have a system of privileges for their prison and that the Scottish Ministers may make directions specifying what property can be kept in a prisoner’s cell. The Scottish Government also comments that removal of the absolute right given by rule 48 of the 2006 Rules is done in response to changes brought about by the Tobacco and Primary Medical Services (Scotland) Act 2010.

31. However, the Scottish Government provided no analysis or explanation to support these conclusions. In the circumstances, it was difficult for the Committee to assess the risk of this change being found incompatible with prisoners’ Convention rights. Accordingly, officials were invited to attend the Committee in order that members might seek further information to enable the Committee properly to discharge its role in respect of these Rules.

32. In oral evidence to the Committee Craig McGuffie, of the Scottish Government Legal Directorate, explained that the directions to be made under rule 47 would permit all prisoners to keep tobacco in their cells—

“In the 2006 prison rules, rule 48 set out the right of civil and untried prisoners to possess tobacco. The 2011 rules remove that, but the removal of the right was not intended to equate to a prohibition on the possession of tobacco. There are two direction-making powers with which we intend to tackle the issue of giving prisoners the right to possess tobacco. First, rule 45, which deals with privileges, sets out that ministers may make a direction to deal with the arrangements by which prisoners can possess tobacco. Secondly, rule 47 allows ministers to specify items of property that prisoners may store in their cell.

I have already received instructions to draft a direction under rule 47 to provide that all prisoners, not just civil and untried prisoners, can possess tobacco and cigarettes in their cell. Although the removal of the rule might appear to remove a right, it is certainly not intended in that way. The right will be established in directions.”

1 Scottish Parliament Subordinate Legislation Committee. Official Report, 4 October 2011, Col 82
33. Rona Sweeney, Director of Prisons, informed the Committee that this change from the 2006 Rules reflected current practice, whereby no distinction is made between civil and untried prisoners and other prisoners in terms of possession of tobacco.²

34. Craig McGuffie further explained that the change had also been made in response to the Tobacco and Primary Medical Services (Scotland) Act 2010—

“...part of the problem is that the Tobacco and Primary Medical Services (Scotland) Act 2010 restates the age limits for purchase and sale of tobacco. Although purchase by and sale to under-18s are an offence, possession is not. To prohibit possession for under-18s on the face of the rules may have been going beyond what was in the 2010 act—that was the difficulty in leaving the rule in the rules. We thought that it was better to treat tobacco like every other product that prisoners can possess, such as toiletries, and newspapers and magazines, and deal with it in the direction on storage of property.”³

35. The Committee found the explanations provided acceptable.

36. The Committee therefore notes that rule 48 of the Prisons and Young Offenders Institution (Scotland) Rules 2006 presently entitles untried and civil prisoners to keep tobacco in their possession. These Rules will remove that entitlement and will put those prisoners in the same position as convicted prisoners: all prisoners will now have to earn the right to keep tobacco as a privilege under rule 45(3)(d). The removal of this entitlement appears to interfere with untried and civil prisoners’ rights under Article 1 of the First Protocol to the European Convention on Human Rights.

37. However, the Scottish Government explained that directions made under the Rules would permit all prisoners to keep tobacco in their cells. These directions are expected to be made on 1 November when the Rules come into force. Taken together, the Scottish Government considers that the Rules and directions address the Article 1 Protocol 1 issue. The Committee accepts this explanation, but would welcome sight of the draft directions to inform its scrutiny, and that of the Justice Committee, further.

Question 8

38. Rule 60 provides that, where a person requests that the Governor prevent a prisoner from communicating with that person, the Governor must take all reasonable steps to prevent any communication from the prisoner to that person. On the face of it, this rule appears to interfere with prisoners’ right to respect for private and family life, as guaranteed by Article 8 of the Convention.

39. The Scottish Government acknowledges that prisoners have Article 8 rights and asserts that others, such as victims of crime, also have Article 8 rights. The Scottish Government goes on to comment that the rationale for rule 60 is to

achieve adequate respect for victims’ Article 8 rights, on the basis that they ought to be able to prevent threatening or abusive correspondence from prisoners. The Scottish Government’s response appeared to show a recognition that a balance requires to be struck. However, it did not explain how this rule might be operated compatibly with prisoners’ Convention rights.

40. The Scottish Government appears to consider that in “almost all cases” where legal proceedings are in train a prisoner could correspond with a person who has made a rule 60 request via an agent – either the prisoner’s solicitor or the court. The Committee does not accept the suggestion that nearly all prisoners (or persons generally) who litigate do so with the assistance of a solicitor, and doubts whether rule 60 could operate to oblige clerks of court to act as a conduit for correspondence between parties. It accordingly appeared to the Committee that rule 60 had the potential to operate to prevent access to justice by prisoners. As such, the Committee would have expected the Scottish Government to provide an explanation as to how prisoners’ Article 6 right to a fair trial is respected. It did not do so in its written response.

41. The Scottish Government did not respond to the Committee’s question about the operation of the rule in relation to the children of prisoners.

42. Again, the Scottish Government did not provide the information necessary for the Committee to form a view on this rule. Officials were therefore invited to provide information in order to enable the Committee to properly discharge its role in respect of these Rules.

43. In oral evidence to the Committee Craig McGuffie recognised that this rule interferes with prisoners’ article 8 rights and intimated that the Scottish Government would seek to balance these rights—

“The rule certainly interferes with prisoners’ article 8 rights, but we appreciate that there are arguments both ways whether that interference is justified. To be on the safe side, the Government intends to amend rule 60 to relax the absolute ban. That amendment will be brought forward as soon as possible.”

44. In committing to bring forward an amending instrument, officials were not able to confirm what the precise nature of the amendment would be, but noted that it would have to involve giving some discretion to the Governor.

45. Furthermore, the officials confirmed that the intention was that an amending instrument would be laid before these Rules come into force and would come into force at the same time as these Rules.

46. Rule 60 of these Rules provides that, where a person requests that the Governor prevent a prisoner from communicating with that person, the Governor must take all reasonable steps to prevent any communication from the prisoner to that person. This duty is absolute and not subject to any discretion. In addition, the prisoner has no right to make representations or

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to appeal. This Rule accordingly appears to interfere with prisoners’ right to respect for private and family life under Article 8 of the European Convention on Human Rights. It may also have the affect of restricting prisoner’ right to a fair trial under Article 6, by limiting or excluding access to justice.

47. The Scottish Government accepts that this rule may engage Article 8 and so has given a commitment to bring forward an amendment which will provide flexibility to balance competing Convention rights appropriately. The Committee welcomes this and will scrutinise the terms of the amendment in due course. The Committee also welcomes the Scottish Government’s commitment to consider the Article 6 compatibility of this rule.

48. However, as it stands, the Committee considers that rule 60 raises a devolution issue.

49. As rule 60 raises a devolution issue, the Committee draws the instrument to the attention of the Parliament on reporting ground (f).

50. As the Scottish Government proposes to bring forward an amendment to rule 60 by 1 November 2011, the Committee recommends that the Scottish Government take this opportunity to correct the other errors identified in the instrument at the same time.

Question 11

51. The Scottish Government was asked to explain how rule 100(4) delivered the apparent policy intention stated in the Executive Note, as the Note narrates that the restriction on eligibility for special escorted leave found in rule 111(3)(d) of the 2006 Rules has been deleted. While this is the case, special escorted leave under the 2006 Rules was available to prisoners serving a sentence of more than one year who had served at least one-third of their sentence. It is the serving of one-third of the sentence requirement which has been omitted. However, rule 100 at the same time restricts the availability of special escorted leave to long term prisoners (i.e. serving more than 4 years).

52. The Scottish Government advised that there has been an oversight in failing to explain this additional change to eligibility in the Executive Note. However, it appears that rule 100 adequately delivers the Ministers’ policy intention: that intention was simply not set out fully in the Executive Note.

53. The Committee therefore concludes that there is an error in the Executive Note, so far as it relates to rule 100, as it suggests that restrictions on eligibility for special escorted leave have been removed from these Rules. While rule 100 removes one restriction on eligibility, it also imposes a new restriction in that prisoners must now be serving sentences of four years or more to be eligible, instead of one year or more under the previous Rules. The Executive Note omits to mention this new restriction, so a reader of the Executive Note will be unaware of the full extent of the changes to rule 100. The Committee draws the instrument to the attention of the Parliament on the general reporting ground.
Question 12
54. Rule 113(5) provides that an adjourned disciplinary hearing may continue before any Governor provided that the prisoner has made no submissions, but must continue before the Governor who granted the adjournment if submissions have been made. The Scottish Government was asked to explain how this provision might be operated compatibly with prisoners’ right to a fair trial under Article 6 of the European Convention on Human Rights. It was also asked how the second Governor could comply with the duty to consider all relevant evidence before determining the charge.

55. The Scottish Ministers appear to consider that the Governor’s duty to consider all relevant evidence before determining the charge can be discharged if the charge and any evidence led against the prisoner is restated at the beginning of the continued hearing. Given that the second Governor will not have had the benefit of seeing the witnesses giving evidence (and potentially being cross-examined), the Committee considers it doubtful whether that Governor could properly form a view as to the reliability and credibility of those witnesses.

56. The Scottish Ministers also argue that “submissions” has to be given a wide meaning. They consider that it should encompass every stage of a prisoner’s defence to a charge. Presumably submissions must then be taken to include a prisoner’s “not guilty” plea. If this is the case, then it is difficult to envisage circumstances where a hearing might commence and be adjourned without a prisoner having made submissions.

57. The Committee observes that, under the 2006 Rules, the relevant test was whether evidence had been led. These disciplinary proceedings are quasi-criminal in their nature. The Governor is required to be satisfied beyond reasonable doubt as to the guilt of a prisoner charged with a breach of discipline. If found guilty, the Governor has power to impose a range of punishments specified in rule 114. In Scottish criminal proceedings, there is no practice of making opening statements. They commence with the leading of the first prosecution witness. The Scottish Government does not suggest that such a practice exists in prison disciplinary hearings. The ordinary meaning of “submissions”, in legal proceedings, is submissions on the law which follow from and build on evidence which has been led in the course of proceedings.

58. The Committee considers that it is quite clear, in the context of a hearing, when evidence is first led. However, it does not appear to be clear exactly what is to be considered as “submissions” for the purposes of rule 113. The ordinary meaning entails legal argument, which tends to be heard at the very end of a hearing. The Scottish Government contend for a very wide reading which will “capture every stage of the prisoner’s defence to the charge”.

59. Despite this lack of clarity, the Committee is persuaded that, on balance, rule 113 is not necessarily incompatible with prisoners’ Article 6 rights. Prison governors are public authorities for the purposes of the Human Rights Act 1998. Accordingly, it would be unlawful for a Governor to act incompatibly with prisoners’ Article 6 rights. Where it is possible to do so, subordinate legislation like these Rules must be read and given effect in a way which is compatible with Convention rights. As a result, Governors are obliged to operate rule 113 in a manner which is
Convention-compliant; they must accordingly interpret the rule in general, and “submissions” in particular, in a way which protects prisoners’ Article 6 rights.

60. **The Committee therefore draws the instrument to the attention of the Parliament on reporting ground (h) as the meaning of rule 113(5) could be clearer. It is not clear what will constitute “submissions” for the purposes of this rule, although Governors will have to interpret it compatibly with prisoners’ rights under Article 6 of the European Convention on Human Rights so far as it is possible to do so.**

*Question 13*

61. The Scottish Government accepts that the reference to “voluntary work” in rule 136 is unnecessary, but observes that in any event it is not inconsistent with rule 84 as all work outside prison is voluntary.

62. The Committee considers that the reference is erroneous, but it has no effect on the meaning or operation of the definition of “temporary release for work”. Every prisoner undertaking work outside prison will be doing so as part of a work placement and so will be eligible for temporary release under paragraph (a) of the definition.

63. **The Committee therefore concludes that rule 136 contains a superfluous reference to “voluntary work”, when this is no longer a type of work as defined by rule 84. The Committee accordingly draws the instrument to the attention of the Parliament on the general reporting ground.**

*Question 14*

64. Rule 118 concerns disciplinary appeals. Rule 118(4) provides that a disciplinary appeal may be made to the Scottish Ministers if the disciplinary hearing took place in a contracted out prison (HM Prisons Addiewell and Kilmarnock), but rule 4(1)(f) provides that rule 118 does not apply to contracted out prisons. Rules 4(1)(f) and 118 are accordingly contradictory.

65. The Scottish Government confirms that rule 118 ought to apply to contracted out prisons, and that its inclusion in rule 4(1)(f) is an error. It intends to amend the Rules to address this issue.

66. While the Committee welcomes the Scottish Government’s commitment to remedy this error, the Committee notes that it is a serious error. As matters stand, the Scottish Ministers have, from 1 November 2011, inadvertently deprived prisoners in two prisons of any right to appeal against a finding that they are guilty of a breach of discipline. The Committee considers that a prisoner in that situation could challenge his conviction by way of judicial review, so he is not entirely deprived of recourse to an independent tribunal established by law. As such, the Committee does not consider that this error necessarily breaches prisoners’ Article 6 rights. However, it appears to be an example of defective drafting.

67. **The Committee considers that the drafting of rule 4(1)(f) appears to be defective, as it provides that rule 118 (disciplinary appeals) does not apply to contracted out prisons, when rule 118 makes specific provision for appeals from those prisons. It is accordingly doubtful whether prisoners in those**
prisons have a right of appeal under these Rules against a finding of breach of discipline. The Committee therefore draws the instrument to the attention of the Parliament on reporting ground (i).
68. At its meeting on 4 October 2011, the Committee also considered the following instruments and determined that it not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

**Education and Culture Committee**

- Planning (Listed Buildings) (Amount of Fixed Penalty) (Scotland) Regulations 2011 [draft]

**Infrastructure and Capital Investment Committee**

- Housing (Scotland) Act 2010 (Commencement No.4) Order 2011 (SSI 2011/339 (c.31))

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


**Subordinate Legislation Committee**

- Interpretation and Legislative Reform (Scotland) Act 2010 (Consequential, Savings and Transitional Provisions) Order 2011 [draft]
INSTRUMENTS SUBJECT TO THE NEGATIVE PROCEDURE

APPENDIX

Prisons and Young Offenders (Scotland) Rules 2011 (SSI 2011/331)

1. To explain whether the reference to section 3A of the Prisons (Scotland) Act 1989 ("the 1989 Act") in the preamble and relative footnote is to section 3A as inserted by the Crime and Punishment (Scotland) Act 1997 and subsequently amended by the Scotland Act 1998, or to section 3A as prospectively substituted by the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act") as the footnote appears to suggest.

2. Should the reference mentioned in question 1 be to section 3A as substituted by the 2010 Act, to explain the basis on which this is considered to be an anticipatory exercise of powers under section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010, given that the new powers conferred by section 3A do not appear to relate to giving full effect to the 2010 Act, but rather to giving full effect to provisions of the 1989 Act which are already in force.

3. In respect that the Courts-Martial (Appeals) Act 1968 was amended by section 272 of and Schedule 8 to the Armed Forces Act 2006, to explain:
   a. the effect of referring to that Act by its previous title when section 61 of the Act has been amended so as to provide that its short title is now the Court Martial Appeals Act 1968;
   b. the effect of referring to the Courts-Martial Appeal Court in the definition of “appellant” in rule 2(1) when that court is now named the Court Martial Appeal Court;
   c. the effect of deeming a prisoner to be an appellant, in rule 2(3)(e), from the time when the prisoner presents a petition in terms of section 8(2) of the Courts-Martial (Appeals) Act 1968, standing the repeal of section 8(2) and consequent abolition of the petition procedure.

4. To explain the meaning of “healthcare professional” as, while rule 2(1) provides that it is to have the same meaning as in section 17CA of the National Health Service (Scotland) Act 1978, the term is not defined by that provision (section 17CA(8) instead providing a definition, for the purposes of that section, of “health care professional”).

5. Given that “Governor” is given a complex definition in rule 2(1)(d), and in cases where no other provision is made may mean any officer, to explain how end users of these Rules (principally prisoners) are to be made aware, in relation to any particular rule, of the person or persons who may exercise the functions conferred on the Governor. Reference is made, for example, to rule 9, where in paragraph (3) “Governor” is deemed to mean any officer, yet the subsequent paragraph refers to “an officer”. A similar issue arises in rule 34.
6. Further to question 5, to explain whether it is intended throughout Part 5 that “Governor” mean “any officer”, particularly in relation to the power in rule 41 which appears to be analogous to the power in rule 95 (in which rule “Governor” means specified senior officers).

7. Rule 45(3)(d) provides that a system of privileges may include provision as to the arrangements whereby a prisoner may have tobacco in his or her possession. Previously, untried and civil prisoners were entitled to keep tobacco in their possession (rule 48 of the Prisons and Young Offenders Institutions (Scotland) Rules 2006, but no such provision is included in these Rules. Is the intention that untried and civil prisoners are no longer to be entitled to keep tobacco in their possession, unless permitted by way of privilege? If this is the case, how is the removal of this entitlement compatible with those prisoners’ rights under Article 1 of the First Protocol to the European Convention on Human Rights?

8. Rule 60 provides that, where a person requests that the Governor prevent a prisoner from communicating with that person, the Governor must take all reasonable steps to prevent any communication from the prisoner to that person. The provision appears to be absolute in its terms and does not require the Governor to make any inquiry into the reasonableness of the request or permit the prisoner to make any representations in relation to it. The Scottish Government is asked:
   a. how a prisoner might commence, or indeed defend, legal proceedings against a person who has made such a request;
   b. whether it is intended that a person having parental rights and responsibilities for a child may make such a request in respect of that child, even in relation to a prisoner who also has parental rights and responsibilities for that child;
   c. generally, how this rule may be operated compatibly with prisoners’ Convention rights, in particular their Article 8 rights, given the terms in which it is framed.

9. Under rule 85(1), an untried or civil prisoner may undertake work or an educational class arranged in terms of rule 84. Rule 85(2) provides that such a prisoner who undertakes work will be entitled to be paid earnings in accordance with rule 86. However, rule 86 provides without qualification that “a prisoner” is entitled to be paid earnings where that prisoner undertakes work in terms of rules 82 or 85, or an educational class or counselling arranged in terms of rule 84. Standing this general provision, which provides for any prisoner undertaking work or educational classes to be entitled to be paid earnings, what is the purpose of the specific provision in rule 85(2)? If the intention is that untried or civil prisoners should not be entitled to earnings for attending classes (as was the case under the 2006 Rules), is this intention achieved given the terms of rule 86?

10. In rule 95(10), reference is made to an “officer or other official” transcribing a statement. “Officer” and “employee” are both defined in rule 2(1), but
“official” is not. What is the meaning of “other official” in this context? We note that the analogous provision in rule 41(9) refers simply to an officer.

11. The Executive Note, in relation to section 100, narrates that the restriction on eligibility for special escorted leave found in section 111(3)(d) of the 2006 Rules has been deleted. Under that rule, however, special escorted leave was available to life prisoners and prisoners serving a sentence for a term of more than one year who had served at least one-third of their sentence. Under section 100, it appears that special escorted leave is available to life prisoners and long-term prisoners, i.e. those serving a term of four years or more. The effect of this appears to be to restrict eligibility for special escorted leave rather than to remove restrictions on it, and the Scottish Government is accordingly asked to explain how section 100(4) delivers the apparent policy intention as stated in the Executive Note.

12. Rule 113(5) provides that an adjourned disciplinary hearing may continue before any Governor provided that the prisoner has made no submissions, but must continue before the Governor who granted the adjournment if submissions have been made. The equivalent provision under the 2006 Rules, however, depended on the leading of evidence rather than the making of submissions by the prisoner, so that proceedings had to continue before the same Governor if evidence had been led. It appears, under rule 113(5), that evidence might be led before Governor A, who could grant an adjournment, and that proceedings then might competently be resumed before Governor B, either for further evidence to be led or for submissions to be made. Governor B would, however, be under a duty to consider all the relevant evidence in terms of rule 113(13). The Scottish Government is asked to explain:

   a. how Governor B could comply with the duty imposed in terms of rule 113(13) when a hearing has been part heard before another Governor and adjourned in terms of rule 113(5); and
   b. how rule 113(5) may be operated compatibly with prisoners’ Convention rights, in particular their Article 6 rights.

13. To explain why rule 136, in the definition of “temporary release for work”, refers to undertaking voluntary work outside the prison in terms of rule 84, when rule 84 appears not to provide for such a class of work.

14. Given that rule 4(1)(f) provides that rule 118 does not apply to contracted out prisons, whereas rule 118(4)(c) provides that a disciplinary appeal may be made to the Scottish Ministers if the disciplinary hearing took place in a contracted out prison, to explain how these provisions may be reconciled, and whether the rights of appeal available to prisoners in contracted out prisons are sufficiently clear.
The Scottish Government responds as follows:

1. The reference to section 3A of the Prisons (Scotland) Act 1989 in the preamble is to section 3A as will be substituted into the 1989 Act by section 110 of the Criminal Justice & Licensing (Scotland) Act 2011.

2. The Scottish Government's position is that this is an anticipatory use of powers under section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010. Section 110 of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act") inserts a power in the Prisons (Scotland) Act 1989 to make rules for the searching of any person who is in, or is seeking to enter, the prison for the purpose of providing medical services for any prisoner at the prison. Making rules under that power is necessary and expedient for the purpose of giving full effect to the 2010 Act. The 2010 Act amends a number of enactments and an inability to use the powers conferred by these amendments being used in anticipation of their coming into force would greatly inhibit the operation of the 2010 Act. The Scottish Government’s view is that section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010 does apply in this case and these Rules are an anticipatory use of the powers conferred by section 110 of the 2010 Act. It is intended that section 110 will be commenced, for certain purposes, on 1st November 2011.

3. Rule 2(3)(e) provides that a prisoner who appeals under section 8 or 39 of the Courts-Martial (Appeals) Act 1968 is deemed to be an appellant from the time a petition is lodged under section 8(2) of the 1968 Act. The Scottish Government accepts that there are incorrect references to the title of the 1968 Act and to Courts-Martial Appeals Court and that rule 2(3)(e) erroneously refers to a repealed provision. The Scottish Government intends to correct these matters by way of an amendment to the Rules under section 39 of the 1989 Act.

4. Section 17CA of the 1978 Act defines “health care professional” as opposed to a “healthcare professional” which is defined in rule 2(1). The Scottish Government’s position is that despite this minor inconsistency, the intention of the definition in rule 2(1) is sufficiently clear.

5. There are three definitions of the term “Governor” and these definitions are applied to various different Parts of the Rules or individual rules. In certain rules, the term “Governor” means any officer and, in other rules, the term “officer” is used. The reason for using two separate terms is to reflect the importance of the decision being taken by the officer. There are certain decisions which, although taken by prison officers, deal with more serious matters. To reflect that these decisions have a heightened level of importance the term “Governor” is used. In practice there is an expectation that the Governor will be involved in or will pay close attention to how these decisions are being taken.

6. It is intended that Governor should mean "any officer" in Part 5. The accommodation in specified conditions rule allows action to be taken only
on the advice of a healthcare professional. The order is essentially a healthcare order made by the officer on the advice of a healthcare professional. The use of the term “Governor” as opposed to “officer” reflects the greater importance attached to this decision.

7. Every Governor must have a system of privileges for their prison and there is also a direction making power under rule 47 where Ministers can specify what property can be kept in a prisoner's cell. It is intended to address this issue in these directions. The removal of the absolute right (in the Rules) for untried and civil prisoners which featured in rule 48 of the 2006 Rules is in response to changes brought about by the Tobacco and Primary Medical Services (Scotland) Act 2010. The Scottish Government is satisfied that the Rules and relevant directions will ensure that civil and untried prisoners' Article 1, Protocol 1 rights are respected.

8. The Scottish Government recognises that prisoners have rights under the European Convention on Human Rights particularly, in this context, Article 8. It also recognises that other persons, such as those who are the victims of prisoners' offending, have Article 8 ECHR rights. Such victims ought to be able to take steps to prevent threatening or abusive correspondence from prisoners and the Scottish Government wishes to take steps to ensure that such victims’ Article 8 rights are adequately respected. That is the primary rationale for Rule 60. The Scottish Government considers that in almost all cases where a prisoner is involved in legal proceedings, and where steps have been taken under Rule 60, the prisoner will be able to correspond via an agent (normally their solicitor or the Court). The Scottish Government recognises the potential difficulties in some circumstances given the terms in which Rule 60 is framed and will consider whether a more flexible provision might provide a better balance between prisoners’ rights and the rights of others.

9. There is no intention to prevent civil or untried prisoners from being paid for attending educational classes or counselling. Rule 85(2) is intended to clarify that, although civil and untried prisoners only undertake work if they so choose, they are entitled to be paid for that work. Rule 86 is a catch-all provision that entitles all prisoners undertaking work, education or counselling to be paid.

10. The word “official” was used in this rule in order to allow people (other than prisoners) who are neither officers nor employees to assist the prisoner in transcribing representations about an order for removal from association. This includes persons such as members of visiting committees and prison ministers and not just officers and employees.

11. The statement in the Executive Note is accurate but there has been an oversight in explaining the additional change to the eligibility criteria in rule 100(4)(a).

12. “Submissions” is not necessarily, in this context, limited to legal submissions of the type a lawyer might make to a court following the
leading of evidence. The reference to “submissions” in rule 113(5) is intended to ensure that disciplinary proceedings which have been commenced are not prejudiced by the lack of availability of the Governor who adjourned the proceedings. It is intended that any adjourned proceedings would commence with a restatement of the charge and evidence against the prisoner. It is not considered to prejudice a prisoner’s defence to a charge where the officer presenting the charge has to restate their case before a different Governor. Rule 113(5) avoids a situation whereby a prisoner who has made submissions to a Governor requires to restate his or her case before a different Governor. Prisoners almost invariably present their own defence to a disciplinary charge and the use of the word “submissions” is intended to capture every stage of the prisoner’s defence to the charge.

13. Rule 84 has been amended to remove the distinction between work placements and voluntary work which appeared in rule 84 of the 2006 Rules. All work undertaken outside prison is voluntary so this distinction was superfluous. Paragraph (c) of the definition of “temporary release for work” in rule 136 reflects the previous distinction and is therefore unnecessary. However, the definition in rule 136 is not inconsistent with rule 84 as all work undertaken by prisoners outside prison is voluntary.

14. Rule 4(1)(f) provides that rule 118 does not apply to contracted out prisons but rule 118 makes specific provisions for contracted out prisons. The inclusion of rule 118 within rule 4(1)(f) has been made in error and the Scottish Government intends to correct this via an amendment to the Rules under section 39 of the 1989 Act.
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