Subordinate Legislation Committee

10th Report, 2011 (Session 4)

Subordinate Legislation
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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:

Chic Brodie
Nigel Don (Convener)
James Dornan (Deputy Convener)
Kezia Dugdale
Mike MacKenzie
John Scott
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Subordinate Legislation Committee

10th Report, 2011 (Session 4)

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 25 October 2011, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2011 (SSI 2011/356);
   Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Regulations 2011 (SSI 2011/349); and

2. The Committee’s recommendations in relation to these instruments 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) Amendment Rules 2011 (SSI 2011/356) (Justice Committee)

3. This instrument amends the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (“the principal Rules”) to correct defects identified in them by the Committee at its meeting on 4 October 2011. In particular, it will substitute a new rule 60 so that prison Governors may exercise a discretion in relation to requests to prevent communication from a prisoner to another person.

4. The principal Rules provide the basis for the management and operation of Scottish prisons and young offenders institutions. They replace previous Rules made in 2006, modernise the language of those Rules, update the complaints procedure and implement changes as a result of the transfer of responsibility for prisoners’ healthcare from the Scottish Ministers to Health Boards.

5. On 4 October 2011, the Committee considered the principal Rules and took evidence from Scottish Government officials in relation to certain aspects of them. The Committee then drew the principal Rules to the attention of the Parliament on the following reporting grounds:

- ground (e) (there appears to be a doubt whether the instrument is intra vires);
- ground (f) (the instrument raises a devolution issue);
- twice on ground (i) (the instrument appears to be defectively drafted);
- twice on ground (h) (the form or meaning of the instrument could be clearer);
- four times on the general ground (in respect of failures to follow proper drafting practice, an error in the Executive Note and a drafting error).

6. At that meeting, officials gave a commitment to bring forward an amendment to rule 60 to address the Committee’s concerns that, in its present form, it raised a devolution issue. The Scottish Government, in its written response to the Committee’s questions, had already undertaken to amend the principal Rules to correct certain other errors which had been identified.

7. In subsequent informal discussions it became clear that the Government intended to address more of the matters raised by the Committee and errors identified by the Government itself by way of these amending Rules.

8. As noted at paragraph 5, the Committee reported the principal Rules to the Parliament on a variety of reporting grounds. This report details the steps taken in this instrument to address those issues by reference to the reporting ground raised.

Ground (f) – the instrument raises a devolution issue

9. The Committee took evidence from the Scottish Government on the operation of rule 60 of the principal Rules, which imposes an absolute duty on prison Governors to prevent communication between a prisoner and a person who
makes a request to the Governor to prevent such communication. The Committee took the view that this appeared to interfere with prisoners’ Article 8 Convention right to respect for private and family life, and potentially also interfered with their Article 6 right to a fair trial by restricting access to justice, and as such raised a devolution issue.

10. Rule 2(7) substitutes a new rule 60 which gives the Governor discretion to take such steps as he or she considers necessary to prevent or restrict communication following a request. In addition, the Scottish Ministers may make directions in relation to the operation of rule 60. It appears to the Committee that, as a result of these changes, rule 60 is capable of being operated in a manner which is compliant with prisoners’ Convention rights. Prison Governors are public authorities for the purposes of the Human Rights Act 1998 and are obliged to operate rule 60 in a manner which is Convention-compliant.

11. The Committee considers therefore that, as the replacement rule 60 is capable of being operated in a Convention-compliant manner, rule 2(7) resolves this issue.

Ground (i) – the drafting appears to be defective

12. The Committee reported that the drafting of rule 2(3)(e) of the principal Rules appeared to be defective. Rule 2(3) of these Rules accordingly substitutes a new rule 2(3)(e) which takes account of the present procedure in military appeals. This appears to the Committee to achieve the intended policy intention, and to cure the defect reported on in the principal Rules.

13. The Committee also reported that rule 4(1)(f) appeared to be defectively drafted. Rule 2(5) substitutes a new rule 4(1)(f) which makes it clear that prisoners in contracted out prisons may appeal to the Scottish Ministers against a finding of breach of discipline. The defect reported on has been cured as a result.

14. The substituted rule 4(1)(f) also disappplies certain search powers in relation to contracted out prisons, as the power in primary legislation to provide for such searches does not extend to contracted out prisons.

The general ground

15. The Committee reported a failure to follow proper drafting practice, in that the principal Rules referred to the Courts-Martial (Appeals) Act 1968 and to the Courts-Martial Appeal Court, when they had respectively been renamed the Court Martial Appeals Act 1968 and the Court Martial Appeal Court by the Armed Forces Act 2006. Rules 2(2) and (4) correct these errors by substituting the correct names in the principal Rules.

16. The Committee also reported a drafting error in rule 136, as it contained a superfluous reference to “voluntary work” in the definition of “temporary release for work”. Rule 2(13) substitutes a definition of “temporary release for work” which omits that reference, and so corrects the error.
Other amendments

17. The Scottish Government has taken the opportunity to clarify rules 85 and 95(10) of the principal Rules, although the Committee was content with the responses it received to its questions on these rules. These amendments are in rule 2(8), (9) and (10).

18. Rule 2(12) corrects a minor point raised in relation to rule 125(2)(d), where “SPSO” was used without being defined. Rule 2(12) substitutes the term “Scottish Public Services Ombudsman”, which clarifies the meaning of this provision.

19. Rule 2(6) and (11) correct cross-referencing errors within the principal Rules identified by the Scottish Government.

28 Day Rule

20. As mentioned above, Scottish Government officials gave a commitment on 4 October 2011 to make amendments to the principal Rules to address the Committee’s concerns, principally in relation to rule 60. Given the seriousness of those concerns, they committed to bring the amendments into force at the same time as the principal Rules came into force on 1 November 2011. As officials acknowledged before the Committee, this would necessitate breaching the 28 day rule.

21. Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out the rule that an SSI 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.

22. 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.

23. In its letter to the Presiding Officer, the Scottish Government narrates the need to amend the principal Rules to deal with the matters raised by the Committee. It comments that, in view of the arrangements which have been made for the transfer of responsibility for prisoners’ healthcare from the Scottish Ministers to Health Boards on 1 November, it is necessary that the principal Rules and these amending Rules come into force on that date.

24. These Rules were laid before the Parliament on 13 October 2011, during a recess period, and come into force on 1 November 2011, 8 days after laying once the recess period is discounted in accordance with section 28(8). A failure to comply with section 28(2) automatically engages reporting ground (j).

25. The Committee therefore draws the instrument to the attention of the Parliament on reporting ground (j).

26. 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.
27. However, in so doing, the Committee welcomes the prompt action taken by the Scottish Government to lay this amending instrument to correct defects in the Prisons and Young Offenders Institutions (Scotland) Rules 2011 which were identified by the Committee at its meeting on 4 October 2011, so that the amending instrument will come into force at the same time as that instrument.
Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Regulations 2011 (SSI 2011/349) (Local Government and Regeneration Committee)

28. The Regulations make various miscellaneous and technical amendments to 5 sets of Regulations which in part regulate the Local Government Pensions Scheme.

29. The Regulations provide in general for the protection of certain pension rights of staff who have transferred to the Local Government Pension Scheme. The amendments cover the transfers of staff between the following bodies—

(a) The Scottish Legal Services Ombudsman and the Scottish Legal Complaints Commission;

(b) The Scottish Administration and Learning and Teaching Scotland;

(c) The Scottish Administration and Social Care and Social Work Improvement Scotland, and

(d) The Skills Development Scotland Co. Limited Retirement Benefit Scheme, and the Local Government Pension Scheme.

30. The Committee considers that regulation 39(b) includes a failure to follow proper drafting practice, where gender neutral drafting should have been used.

31. The Committee considers that the reference to “he” in the changes made by regulation 39(b) is a failure to follow proper drafting practice, as it appears obviously inconsistent with the reference to “the person” being entitled by notice in writing to elect that regulation 3 applies. It also appears to be inconsistent with the whole context of SSI 2008/229, which otherwise refers to “persons” in the pension scheme, throughout.

32. The Committee therefore draws the instrument to the Parliament’s attention on the general reporting ground on the basis that there has been a failure to follow the proper drafting practice in regulation 39(b), where gender neutral drafting should have been used (instead of referring to “he”).
INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

International Criminal Court (Darfur) Order 2009 (SI 2009/699) (Justice Committee)

33. The purpose of this Order in Council is to ensure that the UK has complied with its obligations under the Statute of the International Criminal Court (“ICC”) and Security Council Resolution 1593.

34. More specifically, it is to ensure that, if any of the 3 Sudanese nationals 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.

35. The Order in Council was made and came into force on 18 March 2009. It is not subject to Parliamentary procedure, apart from laying. It was laid before Westminster on 19 March 2009.

36. The Committee recently considered and reported on the International Criminal Court (Libya) Order 2009. The letter to the Presiding Officer submitted with this Order explains that, as a result of that Order raising a similar issue of delay in laying, it was observed this Order was of similar nature, involving devolved functions. This Order was therefore laid in the Parliament on 29 September (2011).

37. 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. A period of some 2 and a half years has passed between this instrument being laid at Westminster and being laid at the Scottish Parliament. The Scottish Government was therefore asked why this breach did not affect the validity of the instrument. This correspondence is reproduced at the appendix.

38. In its response the Scottish Government noted that the UK Government had not considered laying the instrument in the Scottish Parliament until some time after it had been made and laid in both houses of the UK Parliament. The Scottish Government noted, however, that the public have not been deprived of notice of the Order, as the Order was published in 2009. Moreover, it noted that although the Scottish Parliament had not been given notice, even if notice had been given at the same time as the UK Parliament, the Scottish Parliament would have been unable to take any action which would have directly affected the validity of the instrument (as it is not subject to procedure apart from laying).

39. The Committee accepted the Scottish Government’s explanation in relation to why the breach of section 1(4) of the United Nations Act 1946 does not affect the validity of this instrument.

40. The Foreign and Commonwealth Office conceded that the order ought to have been laid earlier, and offers its apologies for the delay. It indicates steps are
being taken to ensure the timely observance of Scottish procedural requirements in future, and confirms it will ensure that this situation will not recur.

41. This Order was made on 18 March 2009, and so in relation to laying in Parliament, the procedural requirements of article 10 of the “transitional SI Order” (SI 1999/1096) apply, and not the new arrangements set out in the Interpretation and Legislative Reform (Scotland) Act 2010.

42. Article 10(1) provides for a “bare laying” requirement. Where an Act provides that an SSI is to be laid before the Parliament after being made, the instrument requires to be laid before the instrument is due to come into force. By article 10(3), where it is necessary that the instrument “should come into force at any time before” laying, the SSI can so come into force, but an explanation must be provided to the Presiding Officer why the 10(1) requirement must be complied with.

43. The Scottish Government has explained why it was necessary here for the instrument to come into force prior to laying (even at Westminster). It explains that this was required to urgently implement international law, under the powers in the United Nations Act 1946. The Order ensures that any arrest warrant issued by the ICC which the United Kingdom is obliged to implement, for the Sudanese affected, cannot be defeated by a plea of diplomatic immunity. This would not have been satisfactorily achieved, had there been a delay between making the Order and it coming into force.

44. The Committee accepts the explanation of why it was necessary for the instrument to be brought into force before it was laid.

45. However, there appears to have been unjustifiable delay in the laying of this Order before the Parliament. In this instance, the delay is considerable. The Order was made on 18 March 2009, but not laid in the Parliament until 29 September 2011 due to oversight by the Foreign and Commonwealth Office. The Committee therefore draws the instrument to the Parliament's attention on reporting ground (d).

46. The Committee also draws to the attention of Parliament that in the letter to the Presiding Officer, the Scottish Government has explained that the Foreign and Commonwealth Office accepts the Order ought to have been laid earlier, apologises for the delay, and confirms they will ensure that this situation will not recur.
47. At its meeting on 25 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:

**Economy, Energy and Tourism Committee**

Home Energy Assistance Scheme (Scotland) Amendment (No. 2) Regulations

**Local Government and Regeneration Committee**

Planning etc. (Scotland) Act 2006 (Saving and Transitional Provisions) Amendment Order 2011 (SSI 2011/348)

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

Aquatic Animal Health (Miscellaneous Modifications) (Scotland) Regulations 2011 [draft]
INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

APPENDIX

International Criminal Court (Darfur) Order 2009 (SI 2009/699)

On 7 October 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 to the Committee why the apparent breach of that statutory requirement through a considerable delay, of some 2 and a half years, between laying the Order at Westminster and the Scottish Parliament does not affect the validity or operation of the instrument?

2. There has been a delay in laying before the Parliament, in breach of article 10(1) of the 1999 “transitional SI Order”. The “transitional SI Order” has no provision specifying that a delay in laying does not affect the validity of the instrument. In contrast, section 31(2) of the Interpretation and Legislative Reform (S) Act 2010 makes such provision, in relation to the instruments to which that subsection applies.
   
   Can it also be explained why this breach of article 10 has no affect on the validity or operation of this instrument (and given that the letter to the Presiding Office does not appear to offer explanation why in this instance the breach was “necessary” under article 10(3))?

The Scottish Government responded as follows:

1. We would refer you to our letter to the Presiding Officer which explains the reason for laying the Order within these timescales. Consideration of whether the Order should be laid before the Scottish Parliament only took place some time after the Order was made and laid with both UK Houses of Parliament, following the laying of a related Order: the International Criminal Court (Libya) Order 2011. The UK Government accepts there has been a delay in laying the Order before the Scottish Parliament and that it has not been laid “forthwith” in terms of section 1(4) of the United Nations Act 1946 (“the 1946 Act”). The Scottish Government had no involvement in the earlier aspects of the process. However, we agree with the UK Government that this breach does not affect the validity or operation of the Order. The instrument is made by executive order to implement a UN Security Council resolution. The laying requirement is a bare laying requirement, namely it is not subject to any procedure and there is no restriction which provides that the Order will not come into force until it is laid. The public have not been deprived of notice of the Order, as the Order was published in 2009. The Scottish Parliament has not been given notice of the Order until now, however even if notice had been given at the same time as the UK Parliament, the Scottish Parliament would have been unable to take any action which would have directly affected the validity of the instrument. We
consider this situation is somewhat analogous to the case of Hepburn v Wilson (1901) 4F (J) 18. In that case the High Court of Justiciary held that the failure to lay a set of regulations, to which the bare laying requirement applied, did not prevent somebody being prosecuted for an offence under those regulations.

2. It is acknowledged that there is no express provision in the transitional SI Order stating that a delay in laying does not affect the validity of the Order. This Order is silent on this issue: there is no express provision stating that failure to lay affects its validity. In the absence of any such express provision, in our view a delay in laying does not affect validity.

In response to the second issue you raise, this Order has been laid pursuant to section 10(3) of the transitional SI Order. Our letter to the Presiding Officer makes clear why it was considered necessary to bring the Order into force as soon as possible and before laying. The Order ensures that any arrest warrant issued by the ICC which the United Kingdom is obliged to implement cannot be defeated by a plea of immunity. If this process was not followed and the Order laid before it came into effect, this would potentially be counter-productive. Although the risk of those against whom arrest warrants were issued entering the United Kingdom was slight, this could have given any of the 3 Sudanese nationals the opportunity to leave the United Kingdom before the Order came into force and thereby avoid arrest. A person subject to an arrest warrant could visit the UK unhindered as long as they left the country before the Order came into effect. It would not be acceptable for those accused of extremely grave offences to escape justice in this way. This would be embarrassing and inconsistent with the UK Government’s policy of ensuring that there should be no impunity and would also be in serious breach of the UK’s obligations under the Rome Statute on the ICC. The individuals who would be affected by the Order were already aware that they are the subject of arrest warrants, so there would be no prejudice to them in bringing the Order into force immediately.
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