The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 4 October 2011

Session 4

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SUBORDINATE LEGISLATION COMMITTEE
7th Meeting 2011, Session 4

CONVENER

Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*James Dornan (Glasgow Cathcart) (SNP)

COMMITTEE MEMBERS

*Chic Brodie (South Scotland) (SNP)
*Kezia Dugdale (Lothian) (Lab)
*Mike MacKenzie (Highlands and Islands) (SNP)
*John Scott (Ayr) (Con)
Drew Smith (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Marco Biagi (Edinburgh Central) (SNP) (Committee Substitute)
Margaret McCulloch (Central Scotland) (Lab) (Committee Substitute)
Craig McGuffie (Scottish Government)
Jim O'Neill (Scottish Prison Service)
Rona Sweeney (Scottish Prison Service)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 4 October 2011

[The Deputy Convener *opened the meeting at 14:45*]

Interests

The Deputy Convener (James Dornan): I welcome members to the seventh meeting of the Subordinate Legislation Committee in session 4. As usual, I ask members to turn off their mobile phones, as they interfere with the sound system. I have received apologies from Nigel Don and Drew Smith. I ask Marco Biagi to confirm that he is attending as a substitute for Nigel Don.

Marco Biagi (Edinburgh Central) (SNP): That is confirmed.

The Deputy Convener: I ask Margaret McCulloch to confirm that she is attending as a substitute for Drew Smith and to declare any interests that are relevant to the committee's remit.

Margaret McCulloch (Central Scotland) (Lab): That is confirmed. I have no interests.

The Deputy Convener: Thank you. I welcome Margaret McCulloch to the committee for the first time.

Decision on Taking Business in Private

14:45

The Deputy Convener: Item 1 is a decision on taking business in private. It is proposed that the committee discuss items 3 and 4 in private. Item 3 is consideration of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (SSI 2011/331), and in particular the evidence taken on the instrument. Item 4 is consideration of a draft report on Scottish statutory instruments laid in 2010. It should be noted that the committee will return to public session to confirm its conclusions on the Prisons and Young Offenders Institutions (Scotland) Rules 2011 once it has considered the evidence presented to it.

Do members agree to consider items 3 and 4 in private?

Members *indicated agreement.*

Instrument subject to Negative Procedure

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

14:46

The Deputy Convener: Item 2 is an opportunity for members to ask questions of officials on the Prisons and Young Offenders Institutions (Scotland) Rules 2011. Questions were put in writing to the Scottish Government on the instrument, but two of the questions were not answered in a way that enabled the committee to form a view. Today's session provides an opportunity to seek further information so that the committee may exercise its scrutiny functions effectively. Those questions concern the entitlement of untried and civil prisoners to possess tobacco, and the duty on prison governors to prevent prisoners from communicating with persons who notify the governor that they do not wish to receive communications from that prisoner.

I welcome Rona Sweeney, director of prisons; Jim O'Neill, senior legal services manager in the Scottish Prison Service; and Craig McGuffie, solicitor in the criminal justice, police and fire division of the Scottish Government legal directorate. I invite Rona Sweeney to make an opening statement.

Rona Sweeney (Scottish Prison Service): Thank you—I will be brief. I will give the committee a bit of context and background to the rules which, as members would expect, are very important to all of us in the SPS. The rules are an important safeguard for prisoners and are used daily, so they are very much a live document. They are referred to frequently by staff and prisoners throughout the working day.

The rules were last comprehensively reviewed in 1994, and this review aims, as members would expect, to ensure that we comply with both domestic and European law. We have aimed to write the rules clearly so that they are accessible to prisoners.

There are two important areas of change for us in the rules with regard to prison practice. The first relates to complaints, and the second relates to healthcare. Last October, our complaints system changed so that the Scottish Public Services Ombudsman took over responsibility from the Scottish prisons complaints commissioner. The rules change our process for dealing with complaints to reflect SPSO best practice.

From 1 November, there will be a change in healthcare provision. Healthcare in prisons will be provided by the national health service, instead of under the current arrangements whereby the SPS or a private provider provides healthcare to prisoners. That has been subject to a large project led by health.

We have consulted on the changes to the rules, as members would expect. Our public consultation ran from 21 March to 10 June, and we received more than 60 responses from a number of interested organisations. An analysis of those responses is available on our website, and we have written to each individual or organisation who responded to us to follow up on the individual issues that they raised.

We will change the rules again next year. Changes will be required to accommodate the opening of a new prison, Low Moss, in spring next year, for example in relation to the establishment of a visiting committee. Those changes are likely to happen early next year, in advance of the prison opening in spring.

John Scott (Ayr) (Con): I thank the witnesses for appearing before us. As you will be aware, our questions relate to our concerns about compatibility with the European convention on human rights. In particular, we are not necessarily happy with the response to questions 7 and 8 that we asked of you. Do you agree that the removal of untried and civil prisoners' entitlement to possess tobacco appears to affect their right to peaceful enjoyment of their possessions, as guaranteed by article 1 of protocol 1 to the ECHR?

Craig McGuffie (Scottish Government): 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.

John Scott: You are telling me that all prisoners, whether tried or untried, will have a right to possess tobacco.

Craig McGuffie: Yes.

John Scott: Why could you not have said that in your written response, although perhaps you did?

Craig McGuffie: Some of the difficulties arise because of the Tobacco and Primary Medical Services (Scotland) Act 2010.

The Deputy Convener: What you said suggests that prisoners will have more access to tobacco than they do at present, because all prisoners will have tobacco in their cell—or at least all prisoners who want it, as I am sure that it will not be forced on them. However, that is not the case now, because for some prisoners it is a privilege to get tobacco, is it not?

Rona Sweeney: No, it is not. What has been described reflects current practice. No distinction is made between untried and civil prisoners and other prisoners in relation to access to tobacco. That will continue.

The Deputy Convener: Margaret McCulloch has the next question.

Margaret McCulloch: It seems to have been answered, convener, but shall I proceed?

The Deputy Convener: Will you ask it, anyway, just for clarification?

Margaret McCulloch: The Government's letter to the committee notes that it is

"satisfied that the Rules and relevant directions will ensure that civil and untried prisoners' Article 1, Protocol 1 rights are respected"

in relation to the possession of tobacco. However, the letter does not explain why the Government believes that to be the case. Will you explain the public or general interest in interfering with those prisoners' rights?

Craig McGuffie: It is not the intention to do that. To answer that point and John Scott's question, 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. The instructions that I have to draft that direction include that all prisoners, whether civil, untried or otherwise, will be allowed to possess tobacco in their cell.

Kezia Dugdale (Lothian) (Lab): That may very well be the intention, but it is not clear to us that the law says that. Can I ask you again to comment on the convention? As I understand it, in order that an interference with article 1 protocol 1 rights may be justified, it must be proportionate and strike a fair balance between the public or general interest and individuals' fundamental rights and freedoms as secured by the convention. Do you think that that fair balance is achieved with the perceived removal of untried and civil prisoners' entitlement to possess tobacco?

Craig McGuffie: Yes, because the directions will come into force at the same time. I appreciate that the committee has not seen the directions yet, but I can confirm that the instructions are to proceed to give all prisoners the right. The position would be different if we were facing a prohibition from which exceptions could be made, but we are not. All that we have is the removal of the right from the face of the rules. We have not prohibited possession of tobacco. It is just that the right will no longer be on the face of the rules; it will be alongside other property rights in the direction on storage of property. The directions and rules, taken together, will ensure that article 1 protocol 1 rights are respected.

Kezia Dugdale: Is this going to be a seamless transition? Is the timing going to work so that there will not be a day or even a minute when the law is unclear?

Craig McGuffie: The transition may be a matter of minutes because we cannot make directions under the rules until the rules are in force. Once midnight strikes on 1 November, the directions can be signed to come into force as soon as they are signed. Practically, it may be a matter of minutes if the rules are signed at midnight, but that should not cause a problem.

The Deputy Convener: When did you say the directions would be in force?

Craig McGuffie: They are intended to come into force on 1 November along with the prison rules.

The Deputy Convener: Okay. Given your clear responses, why was this not given to us in writing?

Craig McGuffie: In hindsight, it probably should have been, convener—sorry. The key point is that the removal of the rule was not intended to be a prohibition. The instructions came to me only recently. I am quite sure that they were discussed in light of the committee's response as well.

Marco Biagi: You said that one of the intentions in drafting all this was to make it clear and accessible to the prisoners. Does putting the right in directions that are separate from the rules that are supposed to be accessible to the prisoners

and explain their rights to them cause any practical difficulty?

Craig McGuffie: I do not think so.

Rona Sweeney: I do not think so. Prisoners are less likely to refer to the rules on this particular matter than they are about other things—for example, orderly room procedures or complaints. If we were trying to change practice, we would have had to communicate it before now; otherwise we would have difficulties on our hands. Given that the rule in question just applies the status quo, I do not think that the prisoners will refer to it.

When prisoners refer to the rules, they do not always pick up on differences between different categories of prisoner. It is quite likely that they have to have things pointed out to them—for example, if something applied to untried rather than convicted prisoners. The fact that this rule is generic and applies to all prisoners is helpful in that regard.

The Deputy Convener: Thank you very much.

Mike MacKenzie (Highlands and Islands) (SNP): I appreciate that all this was designed to make things clearer, but I am not quite sure that it is having that effect on me. However, I will move on and ask about rule 60, which appears to impose an absolute duty on a governor to prevent a prisoner from communicating with a person where that person has requested that communication be prevented. Is it correct to say that this is an absolute duty on the governor, or is any discretion allowed?

15:00

Craig McGuffie: The duty is absolute. The governor has to take reasonable steps to prevent communication. In the light of the committee's concerns, we have looked at the rule again. 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.

Mike MacKenzie: Thank you.

Chic Brodie (South Scotland) (SNP): The rules refer to "the Governor", yet the definition of "the Governor" needs to be clearer, as it could mean a governor or it could mean any officer. The Government's response states that, in some cases,

"The reason for using two separate terms"—

"Governor" and "officer"—

"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."

Given that we have some difficulty understanding the definition of who is responsible, because of the lack of clarity in the definition of "the Governor", how would you ensure consistency and compatibility with article 8 of ECHR in this scenario about preventing communication and ensure that the rule is applied fairly across all prisons?

Craig McGuffie: That will become a question of practice. In part 8 of the rules, "the Governor" means

"the Governor in Charge ... the Deputy Governor ... any authorised Unit Manager"

or the most senior officer present. It then becomes a question of practice across prisons to ensure that the matter is handled by a senior officer or an officer who has suitable experience of dealing with such matters.

Chic Brodie: But should we not be trying to ensure that it is very clear what the instruction is and who can give it? I suggest that leaving it to practice could be very dangerous if a prisoner decides to challenge how he has been treated if he has been unable to communicate with his children but the matter is treated differently in another prison. How is that scenario handled?

Rona Sweeney: We have yet to explore what the amendment will look like. We come across the scenario that you describe in relation to a number of decisions made in prisons and we deal with it in a number of ways. We will sometimes specify that either the governor or the deputy governor has to sign off or scrutinise the decision-making process.

Chic Brodie: Forgive me, but it is not clear who "the Governor" is. Am I right in thinking that it could be any officer?

Rona Sweeney: No. In this context, we would stipulate that it is the governor in charge or the deputy governor. We sometimes put that into guidance—in the case of progression decisions, for example—so that we are satisfied that the governor, although they are not necessarily doing all the work, is bringing together all the information. We have been doing a lot of work with managers throughout the system to assist in ensuring that their decisions are proportionate and defensible. We would expect a decision on this matter to be recorded in the same way.

I accept the challenge. For the amendment, we will have to work through who it is in a prison that can make such a decision. We try to restrict that, because it is not possible for the governor to do everything or sign off everything but, when it comes to critical decisions, we expect the

governor in charge or, in his or her absence, the deputy governor, to sign things off. We would put something like that in guidance, but we have still to work through the amendment.

Marco Biagi: I have two questions. First, how would the amended rule 60 be operated compatibly with article 8 of the ECHR? Secondly, if the amended rule still constitutes an interference with article 8 rights, that would need to be clearly justifiable and in pursuit of a legitimate aim. Which legitimate aim would underpin the interference in the amended rule 60—or are you not yet confident enough of what amendment will be made to answer that?

Rona Sweeney: I am a practitioner so I will answer the question according to my understanding. I am not a lawyer, so forgive me if I do not get the language correct.

As I understand the issues that we face, there are two potentially competing sets of rights: the rights of the prisoner and the rights of the person who does not want to receive communication from the prisoner. The Prison Service is often criticised for not taking sufficient account of victims, who are usually the ones to write to the governor asking that they not receive any correspondence from a prisoner.

It is a matter of striking a balance and I accept that, on this occasion, we may have tilted the balance too much in favour of the victim and not recognised the prisoner's rights sufficiently. Usually, we are criticised for getting it the other way round. It is quite unusual for someone to request that they not receive any communication from a prisoner. We have also been criticised for not communicating well enough to the community that people are able to make such a request.

That is how I understand the situation. It involves two sets of individual rights, and an assessment of how we balance them.

Marco Biagi: Does the Scottish Government have anything to add?

Craig McGuffie: We have not explored to the required degree how the possible amendment would look. Possible approaches could include giving the governor the right to assess the reasonableness of the request, giving the prisoner a right of appeal if a request is granted, and giving the governor a right to review his decision on request. Those are ways round the issue. The way to get round an absolute ban is to relax the absolute ban, and there are a number of ways to do that.

Marco Biagi: As it is, there appears to be an article 8 issue.

Craig McGuffie: There is an article 8 issue, but I would not go so far as to say that it is an article 8 breach. There are arguments both ways but, as Rona Sweeney said, there is a balance to be struck and it may be that, on this occasion, the balance has tipped too far in favour of the victim or the person who writes in with the request. It seems sensible to address that point by making the amendment now, rather than leaving it and having to make the arguments.

Kezia Dugdale: If there is an imbalance that leans one way more than the other, or if there are two competing sets of rights, it places a hell of a duty on the governor to make the right call and not be subject to some sort of legal challenge for it. How does the Prison Service feel about potentially being open to such litigation? Does it feel prepared? Has the Government given it the security blanket that it needs to deal with any ramifications?

Rona Sweeney: Prison governors and managers in prisons work hard to strike a balance. It is a judgment, and I am not saying that we always get it right. Yes, that can leave us subject to legal challenge. We need people to be able to make those judgments, so the advice that I give governors and senior staff is that, if they follow our procedures and if there is an audit trail of sensible decision making, we will support them in every way that we can through the legal challenge. People believe us on that.

It is not only legal challenges. Sometimes, it is the way that the media pick up on some of the issues and the decisions that are made. We work hard to protect our staff if we believe that they have recorded the issues and provided a defensible audit trail. Does that help?

Kezia Dugdale: Your job is to do what the law says.

Rona Sweeney: Yes.

Kezia Dugdale: That requires the Scottish Government to ensure that the law is right. Are the law and your job in any way competing? Do you have any differing positions that you need to iron out behind the scenes?

Rona Sweeney: No, I do not think so. As the practitioners who run prisons, we fully understand victims' sensitivities. We understand how difficult it is for victims if prisoners write to them and do so in ways that cause harm. We do not want that. We would want to be able to protect an individual from that, albeit that that might result in our having to have a difficult conversation with the prisoner. We would do that and would put in place the necessary measures. We share the same interest as anyone would. We see that as being part of our job rather than as a particular difficulty.

John Scott: I think that the committee will welcome the fact that you propose to bring forward

an amendment. I think that you have already answered this, but will you give us a final assurance, on the record, that the amended rule 60 will be proportionate to all parties involved?

Craig McGuffie: Yes.

The Deputy Convener: The amendment notwithstanding, which of the article 8 legitimate aims were you pursuing?

Craig McGuffie: The protection of others.

Margaret McCulloch: You have recognised that a balance needs to be struck, but what happens when a person who makes a request to the governor—this is the other side of the coin—can show that he or she has been the recipient of threatening or abusive correspondence, or has reasonable fears that they might receive such correspondence? How do you see that the respective article 8 rights have been balanced in that instance?

Jim O'Neill (Scottish Prison Service): I suspect that it is just a question of current practice. The current practice is that the governor would engage with the person who sought that assistance and, in turn, with the prisoner, whose views they would seek. Although we recognise that rule 60 raises arguments either way, at the moment a balance is achieved by engaging with both parties to seek agreement on a way forward.

As my colleague mentioned, such instances are not so frequent. In our practice, I think that we recognise the competing interests—and certainly the article 8 interests—of the parties concerned. I do not know whether that helps.

Kezia Dugdale: I would be grateful if the panel could explain to me what happens when the mother of a child asks the governor to stop the father, who is in jail, corresponding with the child. Surely the mother and the father have competing rights as regards access to and communication with the child.

Rona Sweeney: In that setting, in my experience, the interests of the child would be predominant. We would engage social work in the prison, which, in turn, would, most likely, go to social work in the community in an effort to establish what the best solution would be. There is not an easy answer. We would engage other professionals.

Kezia Dugdale: That is great. We want to hear that the child's interests are put first, but I see there being a conflict in the law between the convention rights of the father and the convention rights of the mother. Surely you cannot work in the interests of the child on a case-by-case basis if the law is not clear in supporting you.

Craig McGuffie: I think that it would be difficult to set in the rules how such a situation should be dealt with.

Rona Sweeney: It is very much a case of achieving a balance. I do not know that we could prescribe that in law because it would depend on the nature of the father's offence and on a number of issues in which others would have to be involved.

Kezia Dugdale: The difficulty that I have is that we are talking about convention rights. You cannot operate on a case-by-case basis in the interests of the child and at the same time allow one party to hold absolute rights over the other. Do you see the conflict there?

Rona Sweeney: I see that both parents and the child have rights that are potentially competing. In practice, we pay particular attention to the rights of the child, but we do that with other professionals round the table.

15:15

The Deputy Convener: Will the Government commit to look at how the rule affects prisoners' ability to raise and defend legal proceedings?

Craig McGuffie: Yes. If the absolute ban is causing the problem, relaxation of the ban will allow the governor discretion to take into account situations such as those that the previous speaker suggested. In that situation, prisoners will have the right to raise and defend legal proceedings.

The Deputy Convener: Do you have any idea of the timescale for the amendments?

Craig McGuffie: The intention is that the amendments will come into force along with the rules, so it might mean a breach of the 28-day rule.

The Deputy Convener: So we will be hearing from you again on the matter.

Craig McGuffie: Yes.

The Deputy Convener: In your response to the committee, you undertook to correct the errors in rule 4(1)(f) and the errors relating to the Court Martial Appeals Act 1968. Do you intend to meet that commitment before the instrument comes into force on 1 November?

Craig McGuffie: I do not think that that is strictly necessary. There will be another amendment instrument coming through in January. Both amendments are required, but they do not cause a problem for the instrument, if I can put it in that way.

The Deputy Convener: All right. Unless we have any last-minute questions, I thank you all for your time.

Chic Brodie: Just one point, convener—

The Deputy Convener: Very briefly, Chic.

Chic Brodie: I will try to be brief, convener.

The Deputy Convener: That would be nice.

Chic Brodie: I return to my earlier question about consistency and compatibility. What is the catch-all beyond the governors stage? Who makes the consistency decision? Is there a higher court of authority if there is any doubt?

Rona Sweeney: I am not sure what the amendment will look like. I am line manager for the governors of the large establishments and I have a colleague who line manages those of the smaller establishments. We have monthly operational meetings at which we talk about consistency of practice. If governors are uncertain about an area of practice or there is something new, we offer briefing, training or advice sessions, and they phone and ask.

Chic Brodie: Thank you.

The Deputy Convener: Thank you for your time.

15:18

Meeting continued in private.

15:49

On resuming—

The Deputy Convener: I reconvene the meeting to resume consideration of SSI 2011/331. The legal brief notes a doubt as to whether the instrument is intra vires in so far as it relies on 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 that will be 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. It 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. Given the doubt about whether the instrument is intra vires, does the committee agree to draw the rules to the Parliament's attention on reporting ground (e)?

Members *indicated agreement.*

The Deputy Convener: Two concerns about defective drafting have also been expressed. First, the drafting of rule 2(3)(e) appears to be defective, in that it erroneously refers to a procedure that has been abolished. That means that the condition that requires to be met cannot be met, which 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.

Secondly, the drafting of rule 4(1)(f) appears to be defective, in that it provides that rule 118, which relates to 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, under the rules, a right of appeal against a finding of breach of discipline.

In the light of those two examples of defective drafting, does the committee agree to draw the instrument to the Parliament's attention on reporting ground (i)?

Members *indicated agreement.*

Chic Brodie: The legal brief suggests that the drafting "appears to be defective". It does not appear to be defective—it is defective.

The Deputy Convener: That is a matter of judgment, Mr Brodie.

Furthermore, given the serious nature of the errors and the consequences that might arise, the committee recommends that the amending rules that the Scottish ministers have undertaken to make be brought forward as quickly as possible.

The legal brief also highlights two separate matters relating to the clarity of the meaning of the rules. First, the meaning of the definition of "the Governor" in rule 2(1) could be clearer. The rule sets out three different meanings for "Governor"—"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, in particular prisoners, are to be made aware of the person or persons who may exercise functions that are conferred on the governor in any given rule.

The meaning of rules 9 and 34 could also be clearer; in those rules the term "the Governor", meaning "any officer", is used in one paragraph, while the term "an officer" is used in the following paragraph. The drafting of the rules suggests that there is a distinction between the functions that are conferred on the governor and those that are conferred on an officer when, in fact, any officer may exercise either function.

Secondly, the meaning of rule 113(5) could be clearer. It is not clear what will constitute "submissions" for the purposes of the rule, even though governors will have to interpret it compatibly with prisoners' rights under article 6 of

the European convention on human rights, in so far as it is possible to do so.

Given the lack of clarity on those two matters, does the committee agree to draw the instrument to the Parliament's attention on reporting ground (h)?

Members *indicated agreement.*

The Deputy Convener: The legal brief also notes four matters that the committee might wish to draw to the Parliament's attention on the general reporting ground.

First, there has been a failure to follow proper drafting practice, as the rules refer to the "Courts-Martial (Appeals) Act 1968" when the act has been renamed the Court Martial Appeals Act 1968 by section 272 of and schedule 8 to the Armed Forces Act 2006. There is a similar error in that the rules refer to the "Courts-Martial Appeal Court", which has been renamed the Court Martial Appeal Court.

Secondly, 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, which instead provides a definition of the alternative term "health care professional".

Thirdly, there is an error in the Executive note in so far as it relates to rule 100, in that it suggests that restrictions on eligibility for special escorted leave have been removed from the rules. Although rule 100 would remove one restriction on eligibility, it would also impose 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, as under the previous rules. The Executive note omits to mention that new restriction; therefore, a reader of the Executive note will be unaware of the full extent of the changes to rule 100.

Fourthly, rule 136 contains a superfluous reference to "voluntary work", which is no longer a type of work that is defined by rule 84.

Given those four errors, does the committee agree to draw the instrument to the attention of the Parliament on the general reporting ground?

Members *indicated agreement.*

The Deputy Convener: As the Scottish Government proposes to produce an amendment to rule 60 by 1 November 2011, does the committee agree to recommend that the Scottish Government take the opportunity to correct the other errors in the instrument at the same time?

Members *indicated agreement.*

The Deputy Convener: Rule 48 of the Prisons and Young Offenders Institutions (Scotland) Rules 2006 (SSI 2006/94) currently entitles untried and civil prisoners to keep tobacco in their possession. The new 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 the entitlement appears to interfere with untried and civil prisoners' rights under article 1 of the first protocol to the European convention on human rights. However, the Scottish Government has explained that the directions that are made under the rules will permit all prisoners to keep tobacco in their cells. Those directions are expected to be made on 1 November 2011, when the rules will come into force. Taken together, the Scottish Government considers that the rules and directions address the issue with article 1 of the first protocol to the ECHR. The committee accepts that explanation, but would welcome sight of the draft directions to inform its scrutiny further.

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 duty is absolute and is not subject to any discretion. In addition, the prisoner has no right to make representations or to appeal. The rule appears to interfere with prisoners' rights to respect for private and family life under article 8 of the European convention on human rights. It may also have the effect of restricting prisoners' rights to a fair trial under article 6 of the ECHR by limiting or excluding access to justice. The Scottish Government accepts that rule 60 may engage article 8 and so has given a commitment to produce an amendment that will provide flexibility to balance competing convention rights appropriately. The committee welcomes that 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 rule 60. The committee accordingly considers that rule 60 raises a devolution issue. As rule 60 raises a devolution issue, does the committee agree to draw the instrument to the attention of the Parliament on reporting ground (f)?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

Interpretation and Legislative Reform (Scotland) Act 2010 (Consequential, Savings and Transitional Provisions) Order 2011 [Draft]

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

15:58

The committee agreed that no points arose on the instruments.

The Deputy Convener: In relation to the Interpretation and Legislative Reform (Scotland) Act 2010 (Consequential Savings and Transitional Provisions) Order 2011 [draft], members should note that the Subordinate Legislation Committee has been designated as the lead committee. The Minister for Parliamentary Business and Government Strategy will attend the committee's next meeting in order that the committee can debate the motion to approve the instrument.

Instruments not subject to Parliamentary Procedure

Crofting Reform (Scotland) Act 2010 (Commencement No 2, Transitory, Transitional and Savings Provisions) Order 2011 (SSI 2011/334)

Housing (Scotland) Act 2010 (Commencement No 4) Order 2011 (SSI 2011/339)

15:59

The committee agreed that no points arose on the instruments.

The Deputy Convener: Our next meeting will be held on Tuesday 25 October. Thank you very much for your attendance and forbearance.

Meeting closed at 15:59.

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