



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Subordinate Legislation Committee**

**11th Report, 2012 (Session 4)**

### **Subordinate Legislation**

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## **Subordinate Legislation Committee**

### **Remit and membership**

#### **Remit:**

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

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

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

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

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

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

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

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

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

(Standing Orders of the Scottish Parliament, Rule 6.11)

#### **Membership:**

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### **11th Report, 2012 (Session 4)**

#### **Subordinate Legislation**

The Committee reports to the Parliament as follows—

1. At its meeting on 28 February 2012, the Committee agreed to draw the attention of the Parliament to the following instruments—

- Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2012 (SSI 2012/26);
- Bus Service Operators Grant (Scotland) Amendment Regulations 2012 (SSI 2012/33); and
- Housing (Scotland) Act 2010 (Commencement No. 6, Transitional and Savings Provisions) Order 2012 (SSI 2012/39).

2. The Committee's recommendations in relation to these instruments are set out below. The 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.

**Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2012 (SSI 2012/26) (Justice Committee)**

3. These Rules make a number of amendments to the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (“the principal Rules”). They also make provision about visiting committees for the new HM Prison Low Moss, and amend the visiting committee arrangements for HM Prison Open Estate in consequence of the closure of its site at Noranside, Angus.

4. The Rules are subject to the negative procedure and come into force on 19 March 2012.

5. In considering the Rules, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in Appendix 1. Where no further comment is made on a question, the Committee is content with the Government’s response.

6. These Rules provide for the establishment of a visiting committee for HM Prison Low Moss. They also make a number of amendments which have come to light in the operation of the principal Rules as a result of their interaction with the Directions made under the principal Rules. The Committee notes that at least one of the amendments addresses an issue which it raised in relation to the principal Rules: rule 2(10) and (11) of these Rules clarify rules 85 and 86 of the principal Rules.

7. The Committee notes that there appears to have been a failure to follow proper drafting practice, as rule 2(14) duplicates precisely the terms of rule 2(13). In its response, the Scottish Government concedes that this duplication is a typographical error and proposes to correct it by way of correction slip.

**8. The Committee draws the instrument to the attention of the Parliament on the general reporting ground. There has been a failure to follow proper drafting practice, as rule 2(14) duplicates precisely the terms of rule 2(13).**

**Bus Service Operators Grant (Scotland) Amendment Regulations 2012 (SSI 2012/33)** (*Infrastructure and Capital Investment Committee*)

9. These Regulations amend the Bus Service Operators Grant (Scotland) Regulations 2002 to extend the provisions for Bus Service Operator Grant, to operators of “flexible” bus services which are registered as a local, public bus service. “Flexible services” are defined in the Public Service Vehicles (Registration of Local Services) (Scotland) Amendment Regulations 2012 (SSI 2012/32), which the Committee also considered at its meeting on 28 February 2012.

10. The Regulations are subject to negative procedure, and will come into force on 1 April 2012.

11. In considering the Regulations, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in Appendix 2.

12. Section 38 of the Transport (Scotland) Act 2001 provides for Bus Service Operators Grant, payable by the Scottish Ministers to such eligible bus services as are prescribed by regulations.

13. The Committee notes that the extension of the grant provision in these Regulations is made by taking account of the different stopping arrangements applying in the case of such “flexible services”.

14. The Scottish Government was asked whether, in relation to the definition of “flexible service” in regulation 2(2)(a), the meaning and effect could have been made clearer. The Scottish Government has accepted that the definition of “flexible service” would have been clearer, had it referred to the meaning given in regulation 2(2A)(a) of the Public Service Vehicles (Registration of Local Services) (Scotland) Regulations 2001, rather than regulation 2(2A). It is accepted that the word “meanings” should not have been pluralised, in the definition of “flexible service”.

15. The Committee considers that the definition of “flexible service” in regulation 2(2)(a) is a central definition for the purposes of these Regulations. It notes that there is a patent drafting error in the definition.

**16. Although it is not considered likely that this error will affect the operation of the instrument, the Committee draws this instrument to the Parliament’s attention on the general reporting ground as it contains a drafting error.**

**17. The Committee also notes that the response from the Scottish Government does not indicate that it intends to correct this drafting error by bringing forward an amendment. The Committee indicates that the definition of “flexible service” is significant to the Regulations and that the Government should consider bringing forward an amendment to correct this error.**

**Housing (Scotland) Act 2010 (Commencement No. 6, Transitional and Savings Provisions) Order 2012 (SSI 2012/39)** (*Infrastructure and Capital Investment Committee*)

18. This Order brings into force various provisions of the Housing (Scotland) Act 2010 to commence the new regime under the 2010 Act for the regulation of social housing. The provisions commenced are listed in Schedule 1 to the Order.

19. Schedule 2 to the Order contains various, complex transitional and savings provisions. Generally, these provisions are to facilitate an effective transition to the new regulatory regime under the 2010 Act.

20. The Committee notes that matters in progress under the Housing (Scotland) Act 2001 as at 1 April 2012 will generally be concluded by the new Scottish Housing Regulator under the provisions of the 2010 Act. However, there are certain cases where matters remain to be concluded under the 2001 Act regime. In those cases, responsibility for concluding the matter under the 2001 Act is transferred from the Scottish Ministers to the new Regulator.

21. The Order is not subject to parliamentary procedure, and comes into force on 1 April 2012.

22. In considering the Order, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in Appendix 3. Where no further comment is made on a question, the Committee is content with the Government's response.

23. First, the Scottish Government was asked whether, in paragraph 18(f) of Schedule 2, the reference to schedule 7 to the 2001 Act is an error and whether it should actually refer to schedule 8.

24. In response, the Scottish Government agreed that there is a typographical error and that the reference to "schedule 7 to the 2001 Act" should be to "schedule 8". It committed to bringing forward an amending commencement order in advance of the coming into force of this Order on 1 April 2012, to correct the reference to ensure that the transitional provision operates in relation to the intended schedule.

25. The Scottish Government was also asked about the transitional provision made by paragraph 4(2) of Schedule 2.

26. This provision relates to the right of appeal which a social landlord has against a decision of the Scottish Ministers on registration in, or removal from, the Register as contained in section 62 of the Housing (Scotland) Act 2001. The section 62 right of appeal continues to have effect in relation to undetermined appeals on 1 April 2012, as if the decision appealed is treated as made by the Scottish Housing Regulator, in relation to the Register kept by the Regulator under section 20 of the 2010 Act.

27. The Committee pointed out that the transitional provision does not modify the effects of section 62(2) and (3) of the 2001 Act, in relation to such undetermined



appeals, on or after 1 April 2012. This appeared to require some explanation. Section 62(2) places an obligation on the Scottish Ministers not to remove bodies from the Register while the appeal is pending. Section 62(3) provides, for a proposal to remove an industrial and provident society from the Register, that the Scottish Ministers, rather than the Regulator, shall give notice of appeal to the Financial Services Authority.

28. It was not evident why the effect of section 62(2) and (3) of the 2001 Act should not be modified, as part of the transitional arrangements. The legislative background, as between the 2001 and 2010 Acts, is complex. The Committee therefore asked for an explanation.

29. The Scottish Government response offers a clarification and explanation of why the effects of section 62(2) and (3) of the 2001 Act are not modified by the transitional provision.

30. In relation to section 62(2), after 1 April 2012, the Scottish Ministers' "pre-commencement" Register under the 2001 Act will no longer be in force. The body appealing under section 62 will have moved to the new Register, by virtue of section 21(1) of the 2010 Act. The Regulator could not then simply remove the body from that new register without complying with the 2010 Act regime. There will be no pre-commencement register from which the Scottish Ministers could remove the body, and the Regulator will only have the power to remove it from the new Register in accordance with the 2010 Act provisions.

31. As regards section 62(3), the response clarifies that, in relation to notice of certain appeals to the Financial Services Authority, the transitional provision concerns appeals brought prior to the appointed day. The likelihood is that any appeal would already have been notified prior to 1 April 2012. The duty is to notify "as soon as may be after an appeal is brought". The duty to notify will have attached to the Scottish Ministers and they are in a position to fulfil that duty, even though they may require to notify shortly after the responsibility for the conduct of the appeal has passed to the new Regulator. It was therefore considered not necessary for the notification provision to be transferred to the new Regulator, though that would have been a possible course of action.

32. Although the Committee accepts the clarification provided in the response, it notes that this matter highlights the need for sufficient explanation, in either the Explanatory or Executive Notes with the instrument, to enable proper parliamentary scrutiny of complex transitional arrangements. Such explanation also assists readers generally in understanding the provisions.

**33. The Committee therefore draws this instrument to the Parliament's attention on reporting ground (i) as the drafting of the instrument appears to be defective, in respect that, in the transitional provision in paragraph 18(f) of Schedule 2, the reference to schedule 7 to the Housing (Scotland) Act 2001 should refer to schedule 8.**

**34. The Committee welcomes that the Scottish Government has undertaken to bring forward an amending commencement order in advance of the coming into force of this Order on 1 April 2012. This is to correct the reference to ensure that the transitional provision operates in relation to the intended schedule.**

**35. The Committee is also content with the transitional provision made by paragraph 4(2) of Schedule 2, but it notes that it would have been useful to its scrutiny if either the Explanatory or Executive Notes had explained why the transitional arrangement does not require any modification of the effects of section 62(2) and (3) of the Housing (Scotland) Act 2001.**

**36. As a general observation, the Committee welcomes the detail of the Explanatory Note to this Order, which helped the Committee to identify the drafting error in Schedule 2. It also welcomes the fact that 40 days have been allowed from the laying of the instrument to the coming into force date, which will allow for the error to be corrected before the provision comes into force.**

**No points raised**

37. At its meeting on 28 February 2012, the Committee also considered the following instruments and determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

***Health and Sport Committee***

Community Care (Personal Care and Nursing Care) (Scotland) Amendment Regulations 2012 [draft]

***Infrastructure and Capital Investment Committee***

Public Service Vehicles (Registration of Local Services) (Scotland) Amendment Regulations 2012 (SSI 2012/32)

Housing (Scotland) Act 2010 (Consequential Modifications) Order 2012 (SSI 2012/38)

Water Services Charges (Billing and Collection) (Scotland) Order 2012 (SSI 2012/53)

Scottish Social Housing Charter (SG 2012/20) [draft]

***Justice Committee***

Evidence in Civil Partnership and Divorce Actions (Scotland) Order 2012 [draft]

Police Grant and Variation (Scotland) Order 2012 (SSI 2012/49)

Sexual Offences Act 2003 (Prescribed Police Stations) (Scotland) Amendment Regulations 2012 (SSI 2012/50)

## **APPENDIX 1**

### **The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2012 (SSI 2012/26)**

#### **On 17 February 2012, the Scottish Government was asked:**

- 1) Section 12 of the Prisons (Scotland) Act 1989 provides for the making of rules in connection with the “photographing and measuring” of prisoners. Rule 2(4) of these Rules inserts a replacement rule 12 into the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (“the principal Rules”), which provides for inter alia the recording of prisoners’ biometric data, details of their next of kin and “any other personal particulars of the prisoner that are relevant”. The Scottish Government is asked to explain:
  - a) whether “biometric data” may only constitute data which arises from the photographing and measuring of prisoners, standing its definition as “fingerprints and any other data specified by direction”, or whether prisoners may, for example, be required to give samples of any kind should data of that nature be specified by direction? If this is the case, what power is to be relied upon so to provide?
  - b) whether it is sufficiently clear to the end-user of the principal Rules what may be required under this provision, given that the definition of biometric data is almost wholly postponed to a direction which is not subject to the same scrutiny or publication requirements as these Rules?
  - c) what power is being relied upon to make provision for the recording of details of next of kin and (unspecified) other personal particulars which the Governor deems to be relevant.
- 2) The Executive Note in relation to rule 2(7) indicates that the amendment “...restricts the Governor’s ability to refuse to allow civil or untried prisoners to wear their own clothes.” Before being amended, rule 32 provided (read short) that that the Governor might order a prisoner to wear other appropriate clothing for any of the reasons in paragraph (4), one of which was that a direction under paragraph (5) had been made. The amendment has deleted that reason from paragraph (4), but it now reappears in sub-paragraph (2)(c). The net result appears to be that the Governor may still order a prisoner to wear other appropriate clothing so as to comply with a paragraph (5) direction. The Scottish Government is accordingly asked to explain how the amendments to rule 32 deliver a restriction on the Governor’s ability to refuse to allow prisoners to wear their own clothes, as the Executive Note claims.
- 3) Rule 2(14) appears to duplicate exactly the terms of rule 2(13). Is this simply a typographical error, and does the Scottish Government consider that it has any effect on the construction of these Rules or the principal Rules?

**The Scottish Government responded as follows:**

- 1) (a) The definition of “biometric data” in rule 2 of the Principal Rules has been amended in these Rules so as to, inter alia, remove the words “or other physical measurements”. This was to avoid any confusion in rule 12 of the Principal Rules whereby biometric data and certain other specified physical measurements were, and are still, referred to separately. Biometric data now means only fingerprints with the direction making power being retained from the previous definition of “biometric data” as enacted in November 2011. The intention behind the new wording of the definition of “biometric data” is that fingerprints will be the only form of biometric data taken from prisoners with Ministers being able to specify other forms of data, fitting the description of biometric data, to be taken from prisoners should that ever be required in the future. At present the only forms of data that can be taken from prisoners are those specified in rule 12(1). Section 12 of the Prisons (Scotland) Act 1989 allows rules under section 39 of that Act to provide for the measuring and photographing of prisoners. Section 39 provides that rules may be made for, inter alia, the classification and treatment of prisoners. The Scottish Ministers position is that section 12 of the 1989 Act permits the photographing and measuring of prisoners and section 39 permits other rules to be made for the classification and treatment of prisoners including the taking of fingerprints and other data from a prisoner.

(b) The Scottish Ministers’ position is that the definition of biometric data is merely complemented by the direction-making power. The only form of biometric data which is taken from prisoners at present is fingerprints. The Scottish Ministers consider that retaining the direction making power in the definition of “biometric data” is necessary to enable other forms of data, fitting the description of biometric data, to be taken from prisoners should that ever be required in the future. Directions under the Prison Rules are published on the Scottish Prison Service website and copies are made available to prisoners in the accommodation blocks and the prison library in compliance with rule 7 of the Principal Rules. Any changes brought about by a direction made under the Prison Rules are clearly communicated to end users by the Scottish Ministers.

(c) Section 39 of the 1989 Act permits other rules to be made for the classification, treatment, discipline and control of prisoners. The Scottish Ministers position is that rules providing for the recording of a prisoner’s family details and a general description of the prisoner are therefore permitted under section 39. Recording data about a prisoner enables the quick identification of the prisoner for the purposes of discipline and control. It also allows for the classification of prisoners and the identification of any special requirements that prisoner may have. The details of next of kin and other emergency contacts are necessary to enable the Governor to comply with the obligation in rule 42 of the Principal Rules to notify friends and relatives if a prisoner suffers serious illness or injury.

- 2) As enacted in November 2011, rule 32 of the Principal Rules permitted civil and untried prisoners to wear their own clothing but also enabled a Governor to order the prisoner to wear other clothing for any of the reasons specified in rule

32(4). One of the reasons in rule 32(4), as enacted in November 2011, was that a direction was in force under paragraph (5). On one interpretation, those provisions would have enabled the Governor to remove the rights of civil and untried prisoners to wear their own clothing if a direction, in any terms, was in force. A direction prohibiting, for example, the wearing of football tops could have been used by the Governor to restrict the right of untried and civil prisoners to wear their own clothing in other ways as all that was previously required was that a direction had to be in force. The amendments to Rule 32 ensure that Governors can now only restrict the right of untried and civil prisoners to wear their own clothing in accordance with the terms of a rule 32(5) direction.

- 3) The duplicate paragraph at rule 2(14) is a typographical error but the Scottish Ministers' position is that this does not affect the construction of these Rules or the Principal Rules. The Scottish Ministers intend to correct this error by way of a correction slip.

**APPENDIX 2**

**The Bus Service Operators Grant (Scotland) Amendment Regulations 2012 (SSI 2012/33)**

**On 15 February 2012 the Scottish Government was asked:**

In relation to the definition of “flexible service” in regulation 2(2)(a), could the meaning and effect have been made clearer, as-

(i) such a service is defined as having the meanings given in regulation 2(2A) of the 2001 Regulations, but that paragraph (2A) contains 2 meanings, both for a flexible service and a standard service, and

(ii) “flexible service” in the 2001 Regulations is only given one meaning, though it is set out in 5 sub-paragraphs?

**The Scottish Government responded as follows:**

(i) The Scottish Government accepts that the definition of “flexible service” would have been clearer had it referred to the meaning given in regulation 2(2A)(a) of the Public Service Vehicles (Registration of Local Services) (Scotland) Regulations 2001. However, the view of Scottish Government is that there is unlikely to be any confusion for the reader.

(ii) The Scottish Government accepts that the word ‘meanings’ should not have been pluralised in the definition of “flexible service”. However, the view of Scottish Government is that again there is unlikely to be any confusion for the reader.

### APPENDIX 3

#### **The Housing (Scotland) Act 2010 (Commencement No. 6, Transitional and Savings Provisions) Order 2012 (SSI 2012/39 (C. 8))**

##### **On 17 February 2012 the Scottish Government was asked:**

(1) Please explain why the provision made in column 3 of Schedule 1 is considered a usual and competent use of the power in section 161(2)(c) of the Housing (Scotland) Act 2010 to commence different provisions for different purposes. This provision commences section 110 on 1 April 2012 for certain purposes, but paragraph 4 of the Executive Note states that the Scottish Government has no intention to bring that section into force for all purposes. It therefore appears that the commencement of section 110 for restricted purposes is intended to continue indefinitely. This does not appear to have been the intention of the Parliament given the terms of the Act as passed and in particular the definition of “disposal” provided in section 165.

(2) In paragraph 18(f) of Schedule 2, would you agree that the reference to schedule 7 to the 2001 Act appears to be an error and should refer to schedule 8? If so would the Scottish Government propose to correct this error, so that the transitional provision can operate in relation to schedule 8?

(3) The transitional provision made by paragraph 4(2) of Schedule 2 (providing that the right of appeal against a decision of the Scottish Ministers on registration or removal as contained in section 62 of the 2001 Act continues to have effect in relation to undetermined appeals on the appointed day, as if the decision appealed is treated as made by the Scottish Housing Regulator in relation to the register kept by the Regulator under section 20 of the 2010 Act) does not modify the effects of section 62(2) and (3) of the 2001 Act in relation to such undetermined appeals, on or after the appointed day.

Those subsections place an obligation on the *Scottish Ministers* not to remove bodies from the register while the appeal is pending, and for a proposal to remove an industrial and provident society, to give notice of appeal to the Financial Services Authority.

Could you explain why it is not considered necessary or appropriate to modify the effects of section 62(2) and (3) for the purposes of this transitional provision, as it appears the effect of the provision is that after the appointed day, appeals are treated as relating to the decision of the *Scottish Housing Regulator* in relation to the Regulator’s register, and yet those subsections provide that the *Scottish Ministers* have the requirements not remove a body from the register, and to give notice where applicable to the FSA?



**The Scottish Government responded as follows:**

(1) The policy rationale for the provision made in column 3 of Schedule 1 is fully set out in the Executive Note. The Scottish Government considers that there is a problem with the breadth of the requirement for tenant consultation as set out in section 110 of the Housing (Scotland) Act 2010. To commence it in full would, in the Scottish Government's view, place unreasonable and impractical restrictions on the ability of Registered Social Landlords to manage their businesses.

The Scottish Government therefore intends to bring forward legislation to amend section 110 when a suitable opportunity arises and will consider further the commencement of the section when the Parliament has had the opportunity to consider the position. It is incorrect to say that the Executive Note states that "*the Scottish Government has no intention to bring that section into force for all purposes*"; the Note contains no such statement.

The Scottish Government does not consider this an unusual use of the commencement power. The powers to commence provisions and to make different provision for different purposes are part of a normal and prudent scheme for commencement of a lengthy and detailed set of statutory provisions. The Scottish Ministers are expected to use them to achieve an appropriate and workable introduction of what has been enacted. Where a difficulty in a provision has been identified, it is entirely appropriate that the power is used to commence only the unproblematic element of the provision, pending further Parliamentary consideration of the problematic element.

(2) The SGLD thanks the Subordinate Legislation Committee for its question. This is indeed a typographical error; the reference to "schedule 7 to the 2001 Act" should refer to "schedule 8".

An amending commencement order will be brought forward in advance of the coming into force of this Order on 1 April 2012 to correct the reference to ensure the transitional provision operates in relation to the intended schedule.

(3) The transitional provision made by paragraph 4(2) of Schedule 2 is intended to enable the Scottish Housing Regulator (SHR) to progress any appeal that is taken against a pre-commencement Ministerial decision. The Scottish Ministers consider that it achieves that purpose.

In relation to section 62(2), the Scottish Government does not consider it necessary to modify this provision. After commencement, the pre-commencement register under the 2001 Act will no longer be in force. The body appealing under section 62 will have moved to the new register, by virtue of section 21(1) of the 2010 Act. The Regulator could not then simply remove the body from that new register without complying with the 2010 Act regime. So in practice it appears to the Scottish Government to be of no consequence that section 62(2) ceases to operate. There will be no pre-commencement register from which Ministers could remove the body, and the Regulator will only have power to remove it from the new register in accordance with the 2010 Act.

As regards section 62(3), to give notice of certain appeals to the Financial Services Authority, the likelihood is that any appeal would already have been notified pre-commencement. The duty is to notify “as soon as may be after an appeal is brought”, and the transitional provision only applies where an appeal is brought before the appointed day. The duty to notify will have attached to Ministers and there is no reason why they cannot fulfil that duty, even if particular timings might mean they have to notify very shortly after the responsibility for the conduct of the appeal has passed to the SHR. The Scottish Government therefore saw no need to provide for transfer of the duty, though it agrees that such an approach would have been possible if wished.

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