Subordinate Legislation Committee

Remit and membership

Remit:

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

(a) 
   (i) subordinate legislation laid before the Parliament;
   
   (ii) any Scottish Statutory Instrument not laid before the Parliament but classed as general according to its subject matter;

and, in particular, to determine whether the attention of 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;

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Christian Allard  
Nigel Don (Convener)  
Mike MacKenzie  
Hanzala Malik  
John Pentland  
John Scott  
Stewart Stevenson (Deputy Convener)

Committee Clerking Team:

Clerk to the Committee  
Euan Donald
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Subordinate Legislation Committee

30th Report, 2013 (Session 4)

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 21 May 2013, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Children’s Legal Assistance (Scotland) Regulations 2013 [draft]

   Children’s Hearings (Scotland) Act 2011 (Movement Restriction Conditions) Regulations 2013 [draft]

   Secure Accommodation (Scotland) Regulations 2013 [draft]

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

3. The instruments that the Committee determined that it did not need to draw the Parliament’s attention to are set out at the end of this report.
CHILDREN’S LEGAL ASSISTANCE (SCOTLAND) REGULATIONS 2013 [DRAFT]

(Justice Committee)

4. The overall purpose of these Regulations is to provide a permanent, sustainable national scheme for the provision of state-funded legal representation in children’s hearings, and their associated court proceedings. The Regulations provide the details of how children’s legal aid will operate, and make assistance by way of representation (“ABWOR”) available to certain persons in certain circumstances.

5. The Regulations are scheduled by the Scottish Government to come into force on 24 June 2013 (subject to the approval of the Parliament).

6. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced at Appendix 1.

7. The Scottish Government has acknowledged that the title of the Regulations which are referred to in the heading to, and the opening text of, regulation 3 is not cited in accordance with the Scottish Statutory Instrument Regulations 2011. Regulation 3 makes various amendments to the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003. However the title is partly abbreviated to “(ABWOR)”.

8. The Government contends that the provision is not defective, taking into account that the footnote reference in regulation 3 gives “S.S.I. 2003/179” as the year and number of the instrument. The Scottish Statutory Instrument Regulations 2011 provide that a Scottish statutory instrument may either be cited by the full title, or by such a reference to the SSI year and number, without prejudice to any other valid mode of citation. The 2011 Regulations do not state that a failure to cite the full title or “S.S.I. 2003/179”, for example, affects the validity of an instrument.

9. The Committee accepted that this particular error should not be reported on the more serious reporting ground that there appears to be defective drafting of the instrument. However the Committee does consider this to be a drafting error, and that the full titles of other Scottish statutory instruments which are referred to in an instrument should not be abbreviated in this way.

10. The Committee draws the Regulations to the attention of the Parliament on the general reporting ground.

11. There is a drafting error in paragraph (1) of regulation 3, which provides that the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 are amended in accordance with the remainder of the regulation. The Scottish Government accepts that regulation 3 does not cite the title in accordance with regulation 4 of the Scottish Statutory Instrument Regulations 2011, as it abbreviates “(Assistance by Way of Representation)” to “(ABWOR)”.

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12. The Committee notes, however, that the Scottish Government considers it is clear which instrument is being referred to, as the footnote to regulation 3(1) states the year and the SSI number of the 2003 Regulations.
13. The Regulations make provision for the arrangements for monitoring compliance with a movement restriction condition (“MRC”) within a compulsory supervision order or interim compulsory supervision order, to implement provisions in the Children’s Hearings (Scotland) Act 2011 (“the 2011 Act”).

14. The Regulations are scheduled to come into force on 24 June, with other instruments under the 2011 Act. (They come into force, technically, on the date when the powers to make the Regulations in section 150 of the Act will be brought into force).

15. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced at Appendix 2.

16. Regulation 5(1) provides that a children’s hearing or a sheriff (as the case may be) which has designated a person to monitor compliance with a compulsory supervision order or an interim compulsory supervision order which contains a movement restriction condition (“MRC”) must, where the person “is no longer within the provision made under regulation 4”, vary the designation accordingly.

17. Regulation 4(1)(c) requires a hearing or a sheriff when imposing an MRC to designate, in relation to monitoring compliance, any person “whose services may, by contract or otherwise, be secured.”

18. The Committee sought clarification of the intended meaning of those provisions. The Scottish Government has confirmed that the intention is that where a children’s hearing or a sheriff has designated a person under regulation 4(1)(c) to monitor compliance in accordance with regulation 7, and that person no longer monitors compliance, the requirement to vary the designation would be triggered. (The remainder of the response to the Committee gives further information as to the practical circumstances in which that could happen.)

19. The Committee considers that it is not entirely made clear by regulation 5(1) that the designation of the person must be varied, when the person designated ceases to do the compliance monitoring. First, it is accepted that the words “no longer within the provision made under regulation 4” must be intended to indicate the designation by the hearing or sheriff of any person in relation to monitoring compliance in terms of regulation 4(1)(c) specifically, as regulation 5(1) refers to the person who monitors compliance. This could have been made wholly clear to readers, however, by referring to regulation 4(1)(c) rather than the whole of regulation 4.

20. Second, regulation 5(1) requires that the “person is no longer within the provision made under regulation 4”, for the requirement to vary the designation to apply. Regulation 4(1)(c) does not specify a provision which the designated person may no longer comply with (such that the person, having been authorised to start the monitoring, then ceases to do so). Regulation 4(1)(c) provides that the children’s hearing or the sheriff must designate, in relation to monitoring compliance in accordance with regulation 7, any person whose services may, by
contract or otherwise, be secured (to then carry out the monitoring of the child, as the designated person). This sets out, in effect, an authorisation to carry out the monitoring, provided that the services of the person are secured by a contract or otherwise.

21. The Committee draws the attention of the Parliament to the Regulations on reporting ground (h) as the meaning of regulation 5(1) could be clearer. That paragraph provides that a children’s hearing or a sheriff which has designated a person to monitor compliance with a compulsory supervision order or an interim compulsory supervision order which contains a movement restriction condition must “where that person is no longer within the provision made under regulation 4”, vary the designation accordingly.

22. The Scottish Government intends that the requirement to vary the designation applies when the person designated in relation to monitoring compliance in terms of paragraph (1)(c) of regulation 4 has commenced the monitoring, but subsequently no longer carries it out. Regulation 5(1) could be clearer in implementing that intention.
Secure Accommodation (Scotland) Regulations 2013 [draft] (Education and Culture Committee)

23. The main purpose of the Regulations is to largely restate previous legislation (the Secure Accommodation (Scotland) Regulations 1996 (S.I. 1996/3255)), and revoke those Regulations.

24. The Regulations are scheduled to come into force on 24 June 2013, subject to the approval of the Parliament.

25. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced at Appendix 3.

26. The Committee raised a matter in relation to the use of section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010. That section sought to make clearer how certain powers, including the power to make a Scottish instrument, conferred by provisions in an Act of the Scottish Parliament (ASP) can be exercised in the “pre-commencement period”. That period starts with the day after the Bill for the ASP receives Royal Assent, and ends immediately before the enabling power in the ASP comes into force.

27. Section 4 provides that where an ASP confers power to make a Scottish instrument, the power can be used during that “pre-commencement period” if it is necessary or expedient to do so for the purpose of bringing the ASP into force, or giving full effect to the ASP, at or after the time when the provision conferring the power comes into force.

28. Regulation 9 of these Regulations is made under powers in section 75(1) to (4) of the Children (Scotland) Act 1995, which have been substantially amended by provisions in the Children’s Hearings (Scotland) Act 2011 (“the 2011 Act”). Regulation 9 provides for the circumstances in which a child may be placed in secure accommodation where they are looked after by a local authority, but are not subject to a compulsory supervision order, an interim such order, medical examination order or a warrant to secure attendance, in accordance with the 2011 Act. The provisions in the 2011 Act which amend section 75 of the 1995 Act have yet to be brought into force.

29. The Committee queried whether those powers in section 75 as amended by the 2011 Act can validly be used to make regulation 9, assuming that this draft instrument is approved by the Parliament. (The response did not comment on question 1 in the Annex, as to precisely which provisions are made under section 75 as amended. It appears to the Committee that only regulation 9 is made under the powers in section 75 which are amended by certain provisions in the 2011 Act).

30. The Committee considers that a doubt might properly be raised as to whether section 4 can be relied upon to use the powers in section 75 of the 1995 Act as amended, prior to the relevant amendments in the 2011 Act being brought into force. In terms of section 4(1), the section expressly applies where the Act of the Scottish Parliament confers power to make a Scottish instrument.
31. The Committee doubts whether it is the 2011 Act provisions which “confer power” to make the provisions in relation to looked after children in regulation 9. Rather the 2011 Act provisions substantially amend the power which has been conferred by the 1995 Act. In particular, the already conferred powers are substantially amended so that they no longer relate to supervision and other requirements which may be placed on children in terms of the 1995 Act, but so that they apply to make provision with respect to placing children in secure accommodation, where they are not subject to a compulsory supervision order or other types of order or warrant within the meaning of the 2011 Act.

32. The Scottish Government contends that the power being exercised here is conferred by the 2011 Act. The power is scheduled to come into force on 24 June 2013, at the same time as the rest of the 2011 Act is scheduled to come into force. The Scottish Government is of the view that section 4 of the 2010 Act applies to the exercise of the powers under section 75.

33. However on consideration, the Scottish Government intends to commence the amendments to the powers in section 75 before these Regulations are made, but only for the purpose of making these Regulations. (The Regulations would be made after the approval of the instrument by the Parliament.) A commencement order will be prepared for these purposes and laid soon. The Committee is content that such action would remedy the Committee’s concerns.

34. The Committee draws the Regulations to the attention of the Parliament on reporting ground (e). There appears to be a doubt whether regulation 9 is intra vires. There appears to be a doubt whether that regulation can validly be made, in the exercise of powers which have been conferred by section 75 of the Children (Scotland) Act 1995 but which have been substantially amended by Schedule 5, paragraph 2(8) and Schedule 6, paragraph 1 of the Children’s Hearings (Scotland) Act 2011, during the period before those provisions of the 2011 Act are commenced for the purpose of making these Regulations.

35. The Committee notes however that the Scottish Government intends to commence the amendments to section 75 of the 1995 Act before these Regulations are made (following the approval of the Parliament), but only for the purpose of making these Regulations. If that is properly done, the doubt as to the vires should be removed.
NO POINTS RAISED

36. At its meeting on 21 May 2013, the Committee 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:

**Education and Culture**

Regulation of Care (Social Service Workers) (Scotland) Amendment Order 2013 (SSI 2013/141)

Children’s Hearings (Scotland) Act 2011 (Modification of Subordinate Legislation) Order 2013 (SSI 2013/147)

Children’s Hearings (Scotland) Act 2011 (Compulsory Supervision Orders etc.: Further Provision) Regulations 2013 (SSI 2013/149)

**Justice**

Children’s Legal Assistance (Fees) (Miscellaneous Amendments) (Scotland) Regulations 2013 (SSI 2013/144)

**Local Government and Regeneration**

Building (Miscellaneous Amendments) (Scotland) Regulations 2013 (SSI 2013/143)

**Welfare Reform**

Welfare Reform (Consequential Amendments) (Scotland) (No. 3) Regulations 2013 (SSI 2013/142)
APPENDIX 1

Children’s Legal Assistance (Scotland) Regulations 2013 [draft]

On 9 May 2013, the Scottish Government was asked:

1. Section 31(1) of the Legal Aid (Scotland) Act 1986 provides that a person to whom legal aid or advice and assistance is made available may select the solicitor to advise or act for them, and the person is entitled to make the selection themselves.

Regulation 35(1) requires the Scottish Legal Aid Board to arrange for a duty solicitor for the purposes of providing to any child, children’s legal aid under section 28C of the 1986 Act in relation to any proceedings as listed in that section. Regulation 35(2) provides for that purpose that section 31(1) does not apply, and the legal aid must be provided only by the solicitor made available.

Please clarify which power is relied on to make regulation 35 and why the provision is within that power, given that—

(i) subsection (9) of section 31 (cited in the preamble) enables Ministers by regulations to provide that subsection (1) shall not apply and the legal aid shall only be provided by the solicitor so made available, where a solicitor is available as mentioned in subsection (8). That subsection provides that the Board may arrange that in such circumstances as it may specify (at its discretion) a solicitor shall be available to provide legal aid; but

(ii) the powers in section 31 do not include a power to modify subsection (8) and regulation 35 places a duty on the Board to arrange for a solicitor solely to provide the legal aid?

2. Regulation 3(1) provides that the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 are amended in accordance with the following provisions. Regulation 4 of the Scottish Statutory Instrument Regulations 2011 provides that an instrument may be cited by its title or by S.S.I. 1999/1 (for example).

The title of the 2003 Regulations is the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003. On what basis is it contended that the abbreviation of part of the title to “(ABWOR)” is a proper and valid citation of the instrument amended by regulation 3?

The Scottish Government responded as follows:

1. In answer to the first question, regulation 35 is made in exercise of the powers under sections 36(2)(a) and 31(9). Under section 36(2)(a) the Scottish Ministers can make provision as to the exercise by the Board of its functions under the Act. In this case the section 36(2)(a) power is being used to provide that the exercise by the Board of the section 31(8) function is to apply in the circumstances set out in the Regulations. In other words, that the circumstances in which a solicitor shall be made available by the Board are those set out in regulation 35(1). These are
then cases where a solicitor is available as is mentioned in section 31(8) which enables the section 31(9) power to be used to disapply section 31(1).

In this respect, regulation 35 takes the same approach as the duty solicitor scheme set out in the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 made under equivalent powers, which in itself was partly a re-enactment of the previous duty solicitor schemes under the Criminal Legal Aid (Scotland) Regulations 1996 and the Criminal Legal Aid (Scotland) Regulations 1987.

2. In answer to the second question, the Scottish Government accepts that the title of the Regulations referred to in the heading to, and the opening text of, regulation 3 is not cited in accordance with regulation 4 of the Scottish Statutory Instrument Regulations 2011. The Scottish Government apologises for this and notes that the correct SSI number for the Regulations is cited in the footnote to which that opening text relates and no confusion should therefore be caused for the user by the abbreviation.
APPENDIX 2

Children’s Hearings (Scotland) Act 2011 (Movement Restriction Conditions) Regulations 2013 [draft]

On 8 May 2013, the Scottish Government was asked:

1. Regulation 5(1) provides that a children’s hearing or a sheriff, as the case may be, which has designated a person to monitor compliance with a compulsory supervision order (CSO) or an interim CSO which contains a movement restriction condition (MRC) must, where the person “is no longer within the provision made under regulation 4”, vary the designation accordingly.

Regulation 4(1)(c) requires a hearing or a sheriff when imposing a MRC to designate, in relation to monitoring compliance, any person “whose services may, by contract or otherwise, be secured.”

(a) Please clarify what provision made under regulation 4 is intended to be referred to, which in terms of regulation 5(1) will trigger the requirement to vary the designation of the person for the purposes of regulation 4(1)(c)?

(b) Supplemental to that, as regulation 4(1)(c) designates a person whose services may be secured to monitor the compliance, and this permits services to be secured rather than specifying any conditions which the person may no longer comply with, could this be clearer? (The enabling power in section 150(2)(e) appears to envisage that regulations could set out provision that the designation will be varied, if the person designated ceases to be prescribed, or fall within a specified class of person who may be designated under the regulations; but regulation 4(1)(c) permits a person to perform the compliance monitoring, rather than taking that approach?)

2. In relation to regulation 4(1)(a) and (b), is it intended that the words “to carry out the functions set out in paragraph (2)” are applicable both to a designated local authority officer or any person employed or instructed by the authority? If so, should those words properly be contained in a full out paragraph after “the implementation authority” in (b)?

The Scottish Government responded as follows:

1. It is intended that where a children’s hearing or a sheriff has designated a person under regulation 4(1)(c) to monitor compliance in accordance with regulation 7 and that person no longer monitors compliance, the requirement to vary the designation would be triggered. This would happen where the person designated is no longer employed by the monitoring company or ceases to carry out monitoring work if self-employed. It might also happen where the person designated moves and stops working in the area where the child resides making monitoring of that child impractical. These circumstances would necessitate another person being designated to carry out the monitoring functions in accordance with regulation 7. The intention is that the requirement to vary the designation would be triggered when the person is no longer within the original
designation for whatever reason. The Scottish Government considers that the provision made here, between regulations 4(1)(c) and 5, is clear on this point.

2. It is intended that where a responsible local authority officer is designated under regulation 4(1)(a), that person is to carry out the monitoring and reviewing functions at regulation 4(2). This is made clear in regulation 4(2) itself. This is also the case with a person designated under regulation 4(1)(b) as set out in regulation 4(2). The difference between these 2 categories of person is that a person designated under paragraph (1)(b) will be employed or instructed by the implementation authority specifically for the purposes of carrying out the monitoring and reviewing functions specified at paragraph (2). A local authority employee will not be engaged solely for that purpose. This function will be part of their role within the local authority.
APPENDIX 3

Secure Accommodation (Scotland) Regulations 2013 [draft]

On 10 May 2013, the Scottish Government was asked:

1. To clarify which provisions in the Regulations are made under section 75 of the Children (Scotland) Act 1995 (“the 1995 Act”). Are they regulations 9 and 10; regulation 15 so far as relating to a child placed in secure accommodation in accordance with regulations 9 and 10; and regulation 16 so far as revoking the 1996 Regulations in relation to “looked after children” placed in secure accommodation?

2. To explain the vires to make the regulations under that section 75, as amended by Schedule 5, paragraph 2(8) and schedule 6, paragraph 1 of the Children’s Hearings (S.) Act 2011, when neither of those provisions of the 2011 Act are yet in force.

3. To the extent that this is considered to be an anticipatory exercise of powers under section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010, to explain the basis for this view. It is not clear that the 2011 Act provisions “confer power” in the context of section 4, rather they appear to restrict or alter an existing power that is already in force.

The Scottish Government responded as follows:

These questions concern the use of section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010. The Scottish Government is of the view that the power being exercised here, to make provision with respect to the placing in secure accommodation of a child who is not subject to a compulsory supervision order, interim compulsory supervision order, medical examination order or warrant to secure attendance but who is being looked after by a local authority is conferred by the 2011 Act. This power will come into force on 24 June 2013, at the same time as the rest of the 2011 Act comes into force. To this extent the Scottish Government is of the view that section 4 of the 2010 Act applies to the exercise of the power here. However, in light of the question raised by the Committee’s legal advisors and in order to put the matter beyond any doubt, the Scottish Government intends commencing the amendments to section 75 before these Regulations are made, but only for the purpose of making these regulations. A commencement order will be prepared for these purposes which the Scottish Government can let the Committee’s legal advisors see as soon it is available.
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