



The Scottish Parliament  
Pàrlamaid na h-Alba

## SUBORDINATE LEGISLATION COMMITTEE

### AGENDA

16th Meeting, 2013 (Session 4)

Tuesday 21 May 2013

The Committee will meet at 10.00 am in Committee Room 5.

1. **Declaration of interests:** Christian Allard will be invited to declare any relevant interests.
2. **Decision on taking business in private:** The Committee will decide whether to take items 7 and 8 in private.
3. **Instruments subject to affirmative procedure:** The Committee will consider the following—

[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 \[draft\].](#)

4. **Instruments subject to negative procedure:** The Committee will consider the following—

[Welfare Reform \(Consequential Amendments\) \(Scotland\) \(No. 3\) Regulations 2013 \(SSI 2013/142\);](#)  
[Regulation of Care \(Social Service Workers\) \(Scotland\) Amendment Order 2013 \(SSI 2013/141\);](#)  
[Building \(Miscellaneous Amendments\) \(Scotland\) Regulations 2013 \(SSI 2013/143\);](#)  
[Children's Legal Assistance \(Fees\) \(Miscellaneous Amendments\) \(Scotland\) Regulations 2013 \(SSI 2013/144\);](#)  
[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 \(SSI 2013/149\).](#)

5. **Landfill Tax (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

6. **Annual report:** The Committee will consider a draft annual report for the parliamentary year from 11 May 2012 to 10 May 2013.
7. **Annual report 2012-13:** The Committee will consider a draft of its fourth quarterly report for the parliamentary year 2012-13.
8. **Subordinate Legislation:** The Committee will consider its approach to the scrutiny of the [Children's Hearings \(Scotland\) Act 2011 \(Rehabilitation of Offenders\) \(Transitory Provisions\) Order 2013 \(SSI 2013/146\)](#).

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The papers for this meeting are as follows—

**Agenda Items 3 and 4**

Legal Brief (private)

SL/S4/13/16/1 (P)

**Agenda Item 3**

Instrument Responses

SL/S4/13/16/2

**Agenda Item 5**

[Landfill Tax \(Scotland\) Bill - as introduced](#)

[Landfill Tax \(Scotland\) Bill - Delegated Powers Memorandum](#)

Briefing Paper (private)

SL/S4/13/16/3 (P)

**Agenda Item 6**

Annual Report

SL/S4/13/16/4

**Agenda Item 7**

4th Quarterly Report (private)

SL/S4/13/16/5 (P)

**Agenda Item 8**

Briefing Paper (private)

SL/S4/13/16/6 (P)

**SUBORDINATE LEGISLATION COMMITTEE**

**16th Meeting, 2013 (Session 4)**

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**Instrument Responses**

**INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE**

**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.

## 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.

**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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## **SUBORDINATE LEGISLATION COMMITTEE**

**16th Meeting, 2013 (Session 4)**

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### **Annual Report**

#### **Background**

1. Under rule 12.9 of Standing Orders, the Committee is obliged to report to the Parliament at the end of each parliamentary year on its activities during that year.
2. These activities include details of its meetings, the number of times it has met in private and how the Committee has taken into account equal opportunities in its work.
3. The attached report sets out the Committee's draft annual report for 2012-13, covering the reporting year 11 May 2012 to 10 May 2013. The report will be published next month to coincide with the publication of all other Committee annual reports.
4. Encompassing the work of the Subordinate Legislation Committee during the parliamentary year, the report comprises data relating to Scottish statutory instruments, Bills, legislative consent memorandums and public body consent memorandums, but Members are asked to note that more in-depth analysis of this work will be outlined in the Scottish Statutory Instruments Annual Report which is due for publication in advance of summer recess.

#### **Recommendation**

5. **Members are invited to consider and agree the contents of the draft annual report for 2012-13.**

**Euan Donald**  
**Clerk to the Committee**



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## Subordinate Legislation Committee

### Draft Report on Annual Report 2012-13

The Committee reports to the Parliament as follows—

#### Introduction

1. This Report covers the work of the Subordinate Legislation Committee during the parliamentary year from 11 May 2012 to 10 May 2013. The Committee has scrutinised a number of Bills and Scottish statutory instruments this year, reporting to subject Committees and the Parliament on issues such as the scope of delegated powers and whether delegated powers are within vires, as well as on detailed drafting issues.

#### Bills

2. The Committee considers delegated powers provisions in Scottish Government, Members', Committee and Private Bills. Over the reporting period, the Committee has considered and reported on the following thirteen Bills at Stage 1:

Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill;  
 Social Care (Self-directed Support) (Scotland) Bill;  
 Scottish Civil Justice Council and Criminal Legal Assistance Bill;  
 Freedom of Information (Amendment) (Scotland) Bill;  
 Water Resources (Scotland) Bill;  
 High Hedges (Scotland) Bill;  
 Aquaculture and Fisheries (Scotland) Bill;  
 Post-16 Education (Scotland) Bill;  
 Forth Road Bridge Bill;  
 Budget (Scotland) (No.2) Bill;  
 Land and Buildings Transaction Tax (Scotland) Bill;  
 Scottish Independence Referendum (Franchise) Bill;  
 Victims and Witnesses (Scotland) Bill.

3. The Committee also considered and reported on the following nine Bills as amended at Stage 2:

Alcohol (Minimum Pricing) (Scotland) Bill;  
 Land Registration etc. (Scotland) Bill;  
 Police and Fire Reform (Scotland) Bill;

Social Care (Self-directed Support) (Scotland) Bill;  
 Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill;  
 Freedom of Information (Amendment) (Scotland) Bill;  
 Water Resources (Scotland) Bill;  
 High Hedges (Scotland) Bill;  
 Aquaculture and Fisheries (Scotland) Bill.

4. With the exception of the High Hedges (Scotland) Bill, all of the Bills were Scottish Government Bills and, as with previous years, the recommendations of the Committee on Bills have led to a number of changes by the Scottish Government to relevant provisions. Through its scrutiny process, the Committee also aims to ensure that the correct balance between primary and secondary legislation is maintained.

5. The Committee has also considered eight Legislative Consent Memorandums (LCMs). These are Westminster Bills which seek to change the law or alter Scottish Ministers' or the Scottish Parliament's powers in relation to devolved matters. The eight LCMs considered by the Committee were on:

Electoral Registration and Administration Bill (UK Parliament legislation);  
 Local Government Finance Bill (UK Parliament legislation);  
 Crime and Courts Bill (UK Parliament legislation);  
 Prisons (Interference with Wireless Telegraphy) Bill (UK Parliament legislation);  
 Growth and Infrastructure Bill (UK Parliament legislation);  
 Marine Navigation (No 2) Bill (UK Parliament legislation);  
 Energy Bill 2012-13 (UK Parliament legislation); and  
 Public Service Pensions Bill (UK Parliament legislation).

6. The Committee also gave consideration to three Public Body Consent Memorandums (PBCMs). These relate to draft orders made under sections 1 to 5 of the Public Bodies Act 2011 which would fall within the Scottish Parliament's legislative competence. The three PBCMs considered by the Committee were on:

Public Bodies (Abolition of British Shipbuilders) Order [2013] [draft];  
 Public Bodies (Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order [2013] [draft];  
 Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order [2013] [draft].

### **Subordinate Legislation**

7. The Committee has continued to work to tight timescales in its consideration of subordinate legislation, producing 66 reports over the reporting year. During the parliamentary year, the Committee published 32 statutory instrument reports, reporting on 284 Scottish statutory instruments in total.

8. Of the instruments considered, 47 were subject to affirmative procedure, 175 to negative procedure, and 58 were not subject to any Parliamentary procedure.

9. In addition to the instruments outlined above, the Committee also considered two super-affirmative instruments and two draft instruments not subject to any parliamentary procedure.

10. The Committee published three quarterly reports which recorded the Committee's scrutiny of instruments during the first three quarters of this parliamentary year.

### **Equalities**

11. The Committee considers equalities issues which can arise under the European Convention on Human Rights and under Community law. It is part of the Committee's remit to draw the attention of lead committees and the Parliament to any instrument that, in its opinion, fails to comply with any such requirement.

12. It is also within the Committee's remit to report any instrument on the grounds of an unusual or unexpected use of a power which raises equalities issues.

13. The Committee also scrutinises drafting practice and so points out, for example, failure to use gender neutral language in instruments. This the Committee did when reporting the National Health Service Superannuation Scheme etc. (Miscellaneous Amendments) (Scotland) Regulations 2013 for an inadvertent use of non-gender neutral drafting.

### **Meetings**

14. The Committee met 32 times during the parliamentary year. Of these meetings, none were entirely in private and 15 included items in private.

15. The main reason for taking business in private was to consider draft reports.

16. All the Committee's meetings have been held in Edinburgh.