



The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

13th Meeting, 2012 (Session 4)

Tuesday 15 May 2012

The Committee will meet at 2.30 pm in Committee Room 6.

1. **Decision on taking business in private:** The Committee will decide whether to take items 7 and 8 in private.
2. **Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Sam Baker, Policy Manager, Housing Supply Division, Colin Brown, Senior Principal Legal Officer, and Marianne Cook, Policy Manager, Local Government Division, Scottish Government.
3. **Social Care (Self-directed Support) (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Bette Francis, Head of Self-directed Support Team, Craig Flunkert, SDS Bill Team Leader, and Chris Birt, Scottish Government Legal Directorate, Scottish Government.
4. **Instrument subject to approval:** The Committee will consider the following—

[Food Protection \(Emergency Prohibitions\) \(Dalgety Bay\) \(Scotland\) Order 2012 \(SSI 2012/135\).](#)
5. **Instruments subject to negative procedure:** The Committee will consider the following—

[Education \(School and Placing Information\) \(Scotland\) Regulations 2012 \(SSI 2012/130\);](#)
[Mental Health Tribunal for Scotland \(Practice and Procedure\) \(No. 2\) Amendment Rules 2012 \(SSI 2012/132\).](#)
6. **Alcohol (Minimum Pricing) (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

7. **Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill:** The Committee will consider the evidence it heard earlier in the meeting.
8. **Social Care (Self-directed Support) (Scotland) Bill:** The Committee will consider the evidence it heard earlier in the meeting.

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The papers for this meeting are as follows—

Agenda Item 2

[Local Government Finance \(Unoccupied Properties etc.\) \(Scotland\) Bill - DPM](#)

Briefing Paper (private) SL/S4/12/13/1 (P)

Agenda Item 3

[Social Care \(Self-directed Support\) \(Scotland\) Bill - DPM](#)

Briefing Paper (private) SL/S4/12/13/2 (P)

Agenda Items 4 and 5

Legal Brief (private) SL/S4/12/13/3 (P)

Agenda Items 4 and 5

Instrument Responses SL/S4/12/13/4

Agenda Item 6

[Alcohol \(Minimum Pricing\) \(Scotland\) Bill - Supplementary DPM](#)

Briefing Paper (private) SL/S4/12/13/5 (P)

SUBORDINATE LEGISLATION COMMITTEE

13th Meeting, 2012 (Session 4)

Tuesday 15 May 2012

Instrument Responses

INSTRUMENTS SUBJECT TO THE NEGATIVE PROCEDURE

**Education (School and Placing Information) (Scotland) Regulations 2012
(SSI 2012/130)**

On 4 May 2012, the Scottish Government was asked:

1. To explain why these Regulations have been made in the exercise of the general powers contained in sections 2 and 28B(1)(a)(ii) and (3) of the Education (Scotland) Act 1980, when it appears that sections 28I to 28K of that Act contain more specific powers which might have been exercised for that purpose, and in particular to explain what provision is being made in exercise of the section 2 power;
2. Regulation 17(3)(a) requires that a notification include “the information to be given in terms of paragraph 2 of schedule 2 to the 2004 Act”. Standing the terms of paragraph 2 of schedule 2, which does not appear to oblige an education authority to provide any information, the Scottish Government is asked to explain what information is to be given to meet the requirements of regulation 17(3)(a).

The Scottish Government responded as follows:

1. The Scottish Government has made these Regulations under sections 2 and 28B(1)(a)(ii) and (3) of the Education (Scotland) Act 1980 (“the 1980 Act”) in preference to using the enabling powers set out in sections 28I to 28K of that Act because sections 2 and 28B(1)(a)(ii) and (3) are considered to be more specifically tailored to the purposes of the instrument for the reasons set out below.

The scope of **section 28I** of the 1980 Act is too narrow to enable all aspects of these Regulations to be prescribed for the following three reasons.

Firstly, section 28B(3) of the 1980 Act enables Scottish Ministers to prescribe the procedure in accordance with which education authorities are to carry out the duties imposed on them by section 28B(1). (Those duties relate to the publishing or otherwise making available information relating to the matters set out in section 28B(1), informing parents of the school in which the authority intends to place the parent’s child, the formulation of guidelines and the supply of any prescribed or determined information about any school to parents on request). This aspect of the enabling power has been relied upon in these Regulations in connection with information to be provided to parents about placing requests. In particular, regulations 15 to 18 prescribe the procedure to be followed by authorities in

advertising certain matters relating to placing requests, notifying parents of the right to make placing requests in respect of certain children and children having additional support needs and in giving information on receipt of a placing request. Such provision about the procedure for placing requests could not have been made within the scope of the enabling powers set out in section 28I.

Secondly, section 28B(3)(c) enables the Scottish Ministers to make provision for the determining of the kind of information which is to be published or which is to comprise the information made available or supplied to parents. This aspect of the enabling power has been relied upon in regulations 7(2), 8(2)(b), 8(5), 10(1)(b) and 15(3)(e) to make provision to allow an education authority to determine any other information to be made available or supplied. The enabling powers set out in section 28I are not wide enough to enable provision of this nature to be made.

Thirdly, section 28I(10) of the 1980 Act provides that section 28I does not apply to nursery schools. Whilst provision is made at the end of Part I of Schedule 1 to these Regulations to disapply that Part to nursery schools, provision is made in paragraphs 13(k) and 13(s) of Part III of Schedule 1 to these Regulations requiring information to be provided in relation to nursery schools. The enabling powers set out in section 28B apply to all schools under the management of education authorities. Section 135 of the 1980 Act makes it clear that the term “school” where used without any qualification includes any such school or all such schools as the context may require. Accordingly, making available information about nursery schools falls within the scope of the powers in section 28B but out-with the scope of the enabling powers in section 28I.

The powers in section 28I have been used to make one set of regulations, the Education (Provision of Information as to Schools) (Scotland) Regulations 1993 (no. 1605).¹ Those regulations, which will be revoked on 30 May 2012, require education authorities and the managers of independent schools and grant-aided schools to provide the Scottish Ministers with statistical information about schools.² These powers have never been used in relation to provision of information to parents. Section 28I(8) makes it clear that nothing in sections 28I to 28K restrict or otherwise affect any other powers which the Scottish Ministers may have to make regulations with respect to, or otherwise require, the provision of information by any person. It is clear from section 28I(8) therefore that sections 28I to 28K were not intended to affect the enabling powers in section 28B in so far as they enable provision to be made for information to be provided to parents.

Section 28J of the 1980 Act is concerned with information or documents relating to school education and enables the form, manner and when the information or documents are to be provided to be prescribed. As is the case with section 28I of the 1980 Act, this section does not provide the power to prescribe the procedure by which the information or documents are to be published or made available. It is accordingly also too narrow for the purposes of these Regulations.

¹ They are also cited in the Self-Governing Schools (Application and Amendment of Regulations) (Scotland) Regulations 1994 (no. 351) because those regulations amended the Education (Provision of Information as to Schools) (Scotland) Regulations 1993 to apply them to self-governing schools.

² To be revoked by the Education (Provision of Information as to Schools) (Scotland) Revocation Regulations 2012 (no. 129).

Section 28K of the 1980 Act is only concerned with information regarding pupils attending schools. This would not cover all of the types of information required to be provided under these Regulations.

Section 2 of the 1980 Act has been relied upon for the following reasons. Regulation 8(4)(b) of these Regulations includes a requirement to make school information available to a pupil over school age in attendance at the school who requests it. The enabling powers in section 28B(3) enable the Scottish Ministers to make provision about publishing or making information available and the kind of information to be published or made available to parents only. Section 2 of the 1980 Act is therefore relied upon as the enabling power to provide for authorities to make information available to pupils. Section 2 enables regulations to *"prescribe standards and requirements to which every education authority shall conform in discharging their functions under section 1"*. Section 1 of the 1980 Act imposes the duty on every education authority *"to secure that there is made for their area adequate and efficient provision of school education and further education"*. Section 2 is therefore being relied upon to require education authorities, as part of their general duty to secure adequate and efficient school education, to provide information to pupils upon request.

The original provision which regulation 8(4)(b) replicates is regulation 9(3) of the Education (School and Placing Information) (Scotland) Regulations 1982 (No. 950). This was inserted into those regulations by the Education (School and Placing Information) (Scotland) Amendment, Etc., Regulations 1993 (No.1604) ("the 1993 Regulations") by virtue of the enabling power in section 2. (It is noted that the powers set out in section 28I of the 1980 Act were available at the time the 1993 Regulations were made but weren't relied upon.)

It is considered that section 28I of the 1980 Act would not have been suitable to make provision allowing information to be provided to pupils because it would have been too narrow to enable regulation 8(5) to have been made for the purposes of making available such other information to pupils as an authority thinks fit.

2. Regulation 17(3)(a) requires the notification of a parent's right to make a placing request relating to a child with additional support needs to include *'the information required to be given in terms of paragraph 2 of schedule 2 to the 2004 Act'*. This, in effect, requires the education authority to inform parents of the fact that it is the authority's duty to place the child in the school specified in the request, (that being a special school, willing to admit the child, in England, Wales or Northern Ireland or a school which would provide education for children under school age or pre-school by arrangement by the authority) subject to paragraph 3 of schedule 2 of the 2004 Act (which sets out the circumstances in which the duty does not apply) and that it will be the education authority's duty, subject also to paragraph 3, to meet the fees and other necessary costs of the child's attendance at the specified school. Finally, where the placing request relates to two or more schools, the education authority are required to advise the parent that the duty applies to the first mentioned school, which is to be treated as the specified school for the purposes of the placing request.

Food Protection (Emergency Prohibitions) (Dalgety Bay) (Scotland) Order 2012 (SSI 2012/135)

Breach of laying requirements: letter to Presiding Officer

The above instrument was made under sections 1(1) and (2) and 24(3) of the Food and Environment Protection Act 1985, on 8th May 2012. It was laid before the Scottish Parliament on 9th May and came into force at 15:00 hours the same day.

In relation to section 31(3) of the Interpretation and Legislative Reform (Scotland) Act 2010, this letter explains why it was appropriate to bring this instrument into force on the same day as it was laid in accordance with laying requirements.

It was appropriate because this instrument needed to be brought into force expediently in the interests of protecting public health. To delay commencement would have meant that the enforcement measures needed to protect public health would not have been in place. There was a short period of public notice before the instrument came into force; however, warning signs and other precautions have been in place at Dalgety Bay in Fife for some time and given the high public profile of the dangers of radioactivity in this area, the benefits of bringing this instrument into force on the same day as it was laid outweighed the need for a longer notice period.

Given the Food Standards Agency's initial dose assessment, which indicates a potential food chain risk to consumers, the priority was to bring this instrument into force expediently in the interests of protecting public health.