



The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

32nd Report, 2013 (Session 4)

Subordinate Legislation

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Pàrlamaid na h-Alba

Subordinate Legislation Committee

Remit and membership

Remit:

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

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(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.

Membership:

Christian Allard

Nigel Don (Convener)

Mike MacKenzie

Hanzala Malik

John Pentland

John Scott

Stewart Stevenson (Deputy Convener)

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The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

32nd Report, 2013 (Session 4)

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 4 June 2013, the Committee agreed to draw the attention of the Parliament to the following instruments—

Children's Hearings (Scotland) Act 2011 (Rehabilitation of Offenders) (Transitory Provisions) Order 2013 (SSI 2013/146)

Children's Hearings (Scotland) Act 2011 (Transitional, Savings and Supplementary Provisions) Order 2013 (SSI 2013/150)

Animal Health (Miscellaneous Fees and Amendments) (Scotland) Regulations 2013 (SSI 2013/151)

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.

POINTS RAISED: INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Children's Hearings (Scotland) Act 2011 (Rehabilitation of Offenders) (Transitory Provisions) Order 2013 (SSI 2013/146) (*Education and Culture Committee*)

4. The general purpose of the Order is to make transitory provisions which modify certain provisions in the Rehabilitation of Offenders Act 1974 ("the 1974 Act") for Scotland.

5. The Order is transitory (temporary). It is scheduled to come into force on 24 June 2013. It ceases to have effect on the day when section 187 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") is brought into force.

6. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced at Annex 1. [Officials from the Scottish Government also attended the Committee at its meeting on 28 May 2013, and provided oral evidence in connection with the background to the Order, its purpose, and in connection with the following matter.]¹

7. The Scottish Government has acknowledged in response to the Committee that two references to provisions within the 2011 Act, in article 2(4)(a)(ii) of the Order, are considered to have no effect. Those references are to sections 94(2)(b) and 114(3)(b) of the Children's Hearings (Scotland) Act 2011. The Scottish Government has undertaken to amend the Order to remove these references "at the next available opportunity". At the Committee's meeting on 28 May, the officials attending could not confirm a specific date when an amendment would be laid. It was indicated that the officials would do some further work, to establish whether article 2(4)(a)(ii) will cause confusion or any other detrimental effects, in practice.

8. As part of the provisions are considered to have no effect, the Committee considers that this may confuse readers of the Order. Prior to the Order, section 5(3) of the 1974 Act provides for a rehabilitation period which applies to the discharge by a children's hearing under certain provisions of the Children (Scotland) Act 1995 of the referral of a child's case. That provision is extended by article 2(4)(a)(ii) to certain disposals of a child's case under the 2011 Act. It appears that the reference to the provisions with no effect might initially infer to readers of the Order that the rehabilitation period applies to certain disposals of a case under the 2011 Act, when on more detailed examination of the provisions, it has no such effects.

¹ Scottish Parliament Subordinate Legislation Committee *Official Report* 28 May 2013 available here: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8175&mode=pdf>

The Committee considers that a corrective amendment should be made as soon as possible.

9. The Committee draws the Order to the attention of the Parliament on the general reporting ground, as certain provisions in article 2(4)(ii) have no effect.

10. Article 2(4)(ii) modifies the effect of section 5(3) of the Rehabilitation of Offenders Act 1974, to apply it to cases where there is the discharge by a children's hearing or (as the case may be) the sheriff, of the referral of the child's case to a hearing under sections 94(2)(b) and 114(3)(b) of the Children's Hearings (Scotland) Act 2011.

11. The Scottish Government has confirmed that the reference to those provisions of the 2011 Act has no effect, as none of the outcomes which are possible in terms of those provisions engage the rehabilitation scheme set out in the 1974 Act. It has also undertaken to amend the Order to remove the reference to those provisions at the next opportunity.

12. However the Committee considers that these erroneous references in a highly complex instrument could cause confusion to those operating the provisions of this Order, or could lead to other detrimental effects. The Committee therefore wishes the Scottish Government to make a corrective amendment as soon as possible, to avoid this occurring.

Children's Hearings (Scotland) Act 2011 (Transitional, Savings and Supplementary Provisions) Order 2013 (SSI 2013/150) (Education and Culture Committee)

13. The general purpose of the Order is to make various transitional, savings, and supplemental provisions, to facilitate a smooth transition from the children's hearings processes and structures under the Children (S) Act 1995, to the new arrangements established by the Children's Hearings (Scotland) Act 2011 ("the 2011 Act").

14. The Order is scheduled to come into force with other instruments under the 2011 Act, on 24 June.

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

16. *Article 2(5) of the Order.* The Committee queried the effects of article 2(5). Article 2 broadly applies the provisions of relevant legislation, as they exist before the scheduled commencement date of the instrument on 24 June, to children's hearings or appeal proceedings under the Children (Scotland) Act 1995 which are already in progress as at that date. These are defined as "relevant proceedings".

17. Article 2(5) provides that "where any enactment that contains provision applicable to relevant proceedings is repealed or modified, such repeal or modification does not have effect for the purposes of those relevant proceedings until those proceedings have concluded." So far as appeals may possibly be made from the decision of a hearing to the sheriff, and possibly on to the Court of Session, it is possible in particular circumstances for "relevant proceedings" to conclude a substantial period of time after 24 June.

18. The Committee asked how article 2(5) can validly have effect to prevent any later repeal or modification of any enactment which contains provisions applicable to "relevant proceedings" having effect until those proceedings have concluded. Any such later enactment would have effect in relation to "relevant proceedings" as that enactment would determine. The Committee considers that this Order cannot "entrench" the position to prevent changes by later enactment. (An enactment may be a piece of primary or subordinate legislation).

19. The Scottish Government confirmed in response to the Committee that the intention underlying the provision is to make a general saving of *other* enactments (beyond the specific enactments saved in terms of article 2(2)), which are also applicable in some way to relevant proceedings, and which will be either repealed or modified *on the date of commencement of the Order*.

20. Article 2(5) is not framed to provide that any other enactments will apply to "relevant proceedings" in their unmodified form as at the date of commencement of this Order. It therefore contrasts with the terms of article 2(1), which provides that the "core" enactments including the 1995 Act and subordinate legislation under that Act "continue to apply for all purposes on and after the relevant date as they would have applied immediately before the relevant date [24 June] to relevant

proceedings...until those proceedings have concluded.” That is a more specific savings provision, with reference to the commencement date of this order.

21. The Committee considers that, on one possible interpretation of article 2(5), it means that:

- (1) it will have effect for any period of time until the “relevant proceedings” in question have concluded, and
- (2) for that period, it purports to provide that where any enactment which contains provision applicable to the “relevant proceedings” could (in future) be repealed or modified, that will not have effect for the purposes of the proceedings, until such time as they have concluded.

22. The difficulty with that possible interpretation of the provision is that, as the Scottish Government has acknowledged, it cannot validly “entrench” the position to prevent any changes determined by later enactments.

Article 2(1) of the Order

23. Article 27 of the Order revokes the Legal Aid (Scotland) (Children) Regulations 1997 with effect from the date of commencement of the Order. Articles 2(1) and (2) continue to apply those Regulations for all purposes in relation to “relevant proceedings” in progress under the 1995 Act as at the commencement date, and express provision is made in article 2(1) that that is “subject to...the following provisions of this Order”.

24. The Committee queried whether that provision could be inconsistent, in stating that the 1997 Regulations remain in effect for particular purposes, but that is subject to the following provisions, which include the entire revocation of those Regulations.

25. The Scottish Government has confirmed to the Committee that the intention is that, notwithstanding the revocation of the 1997 Regulations, they shall continue to apply as regards “relevant proceedings”. It is accepted that the drafting might have been clearer in this respect, but the Scottish Government considers that the intention of article 2, as it affects article 27, can still be understood.

26. The Committee considers that the approach taken of making the provisions in article 2 “subject to the following provisions of this Order” means that on a plain reading, that article is subject to article 27, which wholly revokes the 1997 Regulations. The result is that there are two contrary directions as to how the 1997 Regulations are to be read. The Committee considers therefore that article 2(1) could have been more clearly drafted in order to achieve the Government’s intended outcome.

27. The Committee draws the Order to the attention of the Parliament on reporting ground (h), as the meaning of the instrument could be clearer in respect to the reasons outlined below.

28. The meaning of article 2(5) could be clearer in two respects. First, the provision purports to apply to “any enactment”, when the Scottish Government has confirmed that it is intended only to apply to enactments other than those set out in article 2(2), and for which different provision is made in article 2(1).

29. Second, the Scottish Government has confirmed that the intention underlying article 2(5) is to make a general saving of those other enactments, as they apply before the commencement date of this Order to “relevant proceedings” which are in progress on the date of commencement of this Order. Some such enactments will either be repealed or modified, on the date of commencement of this Order, by virtue of provision made in other legislation implementing the Children’s Hearings (Scotland) Act 2011.

30. The meaning of article 2(5) could be clearer to implement that intention. On one interpretation, it purports to prevent any enactment which might be passed during the period until the “relevant proceedings” have concluded, from modifying or repealing any existing enactment which applies to the proceedings. That period might end on a date later than the commencement date of this Order. This Order cannot “entrench” the position to prevent change by such a later enactment.

31. (2) The meaning of article 2(1) could be clearer. It provides that the reference to the Legal Aid (Scotland) (Children) Regulations 1997 made in article 2(2)(d) is “subject to the following provisions of this Order”. Those provisions include article 27(1) and (2)(a), which revoke the 1997 Regulations. So confusion could be caused by the two incompatible directions- the direction that the 1997 Regulations continue to have effect and the direction that they are revoked.

32. It could have been made clearer that that revocation is intended to be subject to the provision in article 2, which saves the application of the 1997 Regulations to proceedings which are in progress under the Children (Scotland) Act 1995, as at the commencement date of this Order.

Animal Health (Miscellaneous Fees and Amendments) (Scotland) Regulations 2013 (SSI 2013/151) *(Rural Affairs, Climate Change and Environment Committee)*

33. This instrument makes provision for the fees payable in respect of certain animal health services required under the regulation of animal welfare and animal health. These services are provided by the Animal Health and Veterinary Laboratories Agency (an executive agency of DEFRA) on behalf of the Scottish Ministers. The regulations allow the Ministers to collect fees for these services.

34. The Policy note explains that the fees are being increased so that the fee more accurately reflects the cost of the services provided.

35. The Order is due to come into force on 24 June 2013.

36. In considering the instrument, the Committee asked the Scottish Government for clarification of various minor drafting errors. The correspondence is reproduced at Annex 3.

37. The Committee draws the instrument to the attention of the Parliament under the general reporting ground as it contains the following minor drafting errors.

38. The references to EU collection centre, EU quarantine centre and EU storage centre in Schedule 3 should be to EC collection centre, EC quarantine centre and EC storage centre to reflect the services provided under the Bovine Semen (Scotland) Regulations 2007 in respect of which fees are to be charged.

39. The Committee considers that this lack of clarity is unlikely to cause confusion and notes that the Scottish Government will amend these references to provide clarity at the next available opportunity.

NO POINTS RAISED

40. At its meeting on 4 June 2013, the Committee considered the following instruments and determined that it did not need to draw the attention of the Parliament to it on any grounds within its remit:

Economy, Energy and Tourism

Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 [draft]

Health and Sport

Public Services Reform (Functions of the Common Services Agency for the Scottish Health Service) (Scotland) Order 2013 [draft]

Certification of Death (Scotland) Act 2011 (Commencement No. 1) Order 2013 (SSI 2013/159 (C.11))

Infrastructure and Capital Investment

Water Resources (Scotland) Act 2013 (Commencement No. 1) Order 2013 (SSI 2013/163 (C.12))

Justice

Sheriff Court Districts Amendment Order 2013 (SSI 2013/152)

Justice of the Peace Courts (Scotland) Amendment Order 2013 (SSI 2013/153)

Act of Sederunt (Lands Valuation Appeal Court) 2013 (SSI 2013/161)

Local Government and Regeneration

Town and Country Planning (Control of Advertisements) (Scotland) Amendment Regulations 2013 (SSI 2013/154)

Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 (SSI 2013/155)

ANNEX 1

Children's Hearings (Scotland) Act 2011 (Rehabilitation of Offenders) (Transitory Provisions) Order 2013 (SSI 2013/146)

On 16 May 2013, the Scottish Government was asked:

1. The Order makes transitory provisions under section 205 of the 2011 Act in connection with the coming into force of provisions of the Act.

As in our view it is not explained in the policy note or the explanatory note to the instrument, please explain to assist the Committee how the provisions are in connection with provisions of the Act coming into force; which provisions those are; and when they are planned to come into force.

2. Article 2(2) of this Order modifies the effect of section 1(4) of the Rehabilitation of Offenders Act 1974 ("the 1974 Act"). The reference to "criminal proceedings" is to be read, for a temporary period, as if it includes proceedings in which a ground of referral in a children's hearing under the 2011 Act in relation to the commission of an offence is under consideration.

This means that the text of section 1(4) is to be read in relation to those proceedings under the 2011 Act as: "In this Act, references to a conviction, however expressed, include references—....(b) to any finding....in any proceedings in which a ground of referral under section 67(2)(j) of the Children's Hearings (Scotland) Act 2011, is under consideration".

Please explain how the provision gives effect to the policy intentions? Why does it specify that a "conviction" includes any finding in any proceedings under the 2011 Act in which an offence ground under consideration, rather than specifying that it is a finding that the section 67(2)(j) ground has been determined to apply in relation to a child; or that the reference to "conviction" includes a finding as to the section 67(2)(j) ground, rather than "any finding" (as a hearing or the sheriff, as the case may be, could be considering more than one ground in the proceedings)?

3. Article 2(4)(a)(ii) modifies the effect of section 5(3) of the Rehabilitation of Offenders Act 1974, to extend the provision in that subsection to where there is the discharge by a children's hearings or, as the case may be, the sheriff of the referral of a child's case to a hearing under section 91(3)(b), 93(2)(b), 94(2)(b), 108(3)(b), 114(3)(b) or 119(3)(b) of the 2011 Act.

Section 5(3) provides that in any of those circumstances, "the rehabilitation period applicable.....shall be 6 months from the date of conviction." Article 2(2) of this Order modifies the effect of section 1(4) of the 1974 Act as outlined at the start of question (2) above. Paragraph 2 of the Explanatory Note plainly states that the Order relates to disposals under the 2011 Act where a child has committed an offence, or where an "offence-based ground of referral is established".

Please explain therefore—

(a) Why article 2(4)(a)(ii) implements the policy intentions, given that the provision extends to any discharge of the referral of a child's case, rather than a discharge where the offence ground of referral under section 67(2)(j) applies or is established in relation to a child?

(b) Why it implements the policy intentions to refer in article 2(4)(a)(ii) to—

(i) section 93(2)(b), so far as that provision includes where a hearing discharges the referral where none of the grounds in the statement of grounds is accepted, and there will be an application to the sheriff in terms of section 93(2)(a)?

(ii) section 94(2)(b), so far as that provision applies where the hearing is discharged because the child or a relevant person would not be capable of understanding, or has not understood, an explanation given in relation to a ground, and the hearing must in terms of section 94(2)(a) direct an application to sheriff to determine whether the ground is established?

(iii) section 114(3)(b), so far as that provision applies where the sheriff determines the ground is not established, and the sheriff discharges the referral?

(iv) section 119(3)(b), so far as that provision applies where the hearing discharges the referral because it is not satisfied that it is necessary for the protection etc. of the child to make a compulsory supervision order (which does not refer to where a section 67(2)(j) ground applies to the child)?

The Scottish Government responded as follows:

1. This Order makes transitory provisions to deal with disposals by children's hearings under the Children's Hearings (Scotland) Act 2011, which is largely scheduled to come into force on 24 June 2013. In terms of this Order, certain disposals by a children's hearing in respect of an 'offence-based ground' – the ground under section 67(2)(j) of the 2011 Act – will be treated as convictions for the purposes of the Rehabilitation of Offenders Act 1974, just as the equivalent disposals under the Children (Scotland) Act 1995 are presently treated in terms of section 3 of the 1974 Act.

In due course sections 187 and 188 of the 2011 Act will re-classify these disposals from 'convictions' to 'alternatives to prosecution' ('ATPs'). Section 187 and 188 cannot yet be brought into force, as the Scottish Ministers have powers to deal with these disposals, in so far as they have an effect on reserved matters, only in relation to **convictions** – in terms of functions transferred to them by the Scotland Act (Transfer of Functions to the Scottish Ministers etc.) Order 2003 (SI 2003/415).

Paragraph 8 of the Policy Note summarises the effect of sections 187 and 188 which are explained in detail in the Annex to the Policy Note. Paragraph 12 of the Policy Note explains that sections 187 and 188 cannot be brought into force until the Scotland Act Order has been made and Article 1(2) of the present Order

indicates that the Order ceases to have effect on the day section 187 comes into force.

Section 187, in effect, extends the definition of “alternative to prosecution” in section 8B of the Rehabilitation of Offenders Act 1974 to include children’s hearings disposals. An alternative to prosecution will have been given where the offence was accepted or established or treated as established and either:-

- (a) a compulsory supervision order has been made, or as the case may be, varied or continued, or
- (b) a supervision requirement has been made, or as the case may be, varied or continued, or
- (c) the referral to the children’s hearing has been discharged.

Section 187 also amends the period after which an alternative to prosecution becomes spent.

Section 188 amends the definition of “relevant matter” in section 113A(6) of the Police Act 1997 to include alternatives to prosecution (as defined in section 187) which relate to any offence which is specified in an order made by the Scottish Ministers. That order effectively specifies the offences which Disclosure Scotland can automatically access for the purposes of issuing standard or enhanced disclosure certificates under the 1997 Act or for checks under the Protection of Vulnerable Groups Scheme. Shortly stated, an ATP will only be a “relevant matter” under the Police Act 1997 if the offence is one which is specified in the order to be made under section 113A(6)(ba) of the 1997 Act.

The provisions will cover supervision requirements or discharges under the Social Work (Scotland) Act 1968.

The general premise of the 1974 Act is that a person is not required to disclose any convictions or alternatives to prosecution which have become ‘spent’.

Therefore, to enable the policy behind the order under the Police Act to be fully achieved, that order needs to be supplemented by an order under paragraph 6 of Schedule 3 to the 1974 Act for the reason set out in paragraph 9 of the Policy Note. The order is intended to ensure that a person will only require to ‘self-disclose’ spent alternatives to prosecution if they relate to offences set out in the Police Act order. In other words, a person will only be required to disclose those alternatives to prosecution which are disclosed by way of standard or enhanced disclosure certificates under the 1997 or for checks under the Protection of Vulnerable Groups Scheme.

However, the order under paragraph 6 of Schedule 3 to the 1974 Act will cover some types of employment and proceedings which fall within reserved matters and it is considered that at present Scottish Ministers do not have the legislative competence to legislate on alternatives to prosecution in reserved areas. This is why the Scottish Ministers need an order under the Scotland Act. The provisions in the Transitory Order amend the effect of the 1974 Act such that certain children’s hearings disposals on offence grounds under the 2011 Act will be regarded as convictions meanwhile.

2. In broad terms, the amendment effected by article 2(2) is necessary if the scheme in respect of rehabilitation of offences under the 1974 Act is to apply to disposals, in offence-based cases, by children's hearings and the sheriff – because the reference to 'criminal proceedings' in section 1(4)(b) would otherwise exclude any disposals in non-criminal proceedings such as these.

The reference to "*any finding... in any...proceedings in which a ground of referral under...section 67(2)(j) of the Children's Hearing (Scotland) Act 2011 is under consideration...that a person has committed an offence or done the act or made the omission charged*" is intended to ensure that the situation in which a finding to the effect that a ground of referral under 67(2)(j) has been established, but the children's hearing has decided to discharge the case, is caught by the provision. That reference is intended to align with the remaining wording of section 1(4): "*a conviction in respect of which an order is made discharging the person concerned absolutely or conditionally shall be treated as a conviction for the purposes of this Act...*". This links to section 5(3), which provides that in such cases a rehabilitation period of six months applies. The key point to note is that for this provision to have effect there has to have been a finding. It is assumed that the question is prompted by the reference to "*proceedings...under consideration*" which might infer that there has not yet been any finding that the grounds of referral are established. This interpretation overlooks the fact that section 1(4) only applies where there has been a finding that the person committed the offence or has committed the act or omission. While it may be that a form of words other than "*proceedings...under consideration*" might have been useful the Scottish Government's view is that these provisions accurately embody the policy intentions.

3(a). Section 5(3) must be read together with section 3, the effect of which has been modified by article 2(3) of the Order. Section 3, thus modified, refers to section 67(2)(j) (the offence-based ground) and specifies that that ground must either have been accepted by the child and, where necessary, by any person who is a relevant person, or been established to the satisfaction of the sheriff.

Section 3 provides that only in cases in which there is an offence-based ground (either under section 52(2)(i) of the 1995 Act or section 67(2)(j) of the 2011 Act) are accepted/established grounds treated as convictions, and disposals of such cases treated as sentences. Only such cases are brought within the provisions of the 1974 Act. Thus to the extent that article 2(4)(a)(ii) can be read as extending article 5(3) to discharges other than a discharge in a case on section 67(2)(j) grounds, it is then constrained by section 3. The Scottish Government's view is that the meaning of the provision, read in context, is clear and that these provisions accurately embody the policy intentions.

3(b)(i). The reference to section 93(2)(b).

One of the outcomes of a case under section 93(2)(b) is that a ground of referral – which could be a section 67(2)(j) ground – is accepted, and the hearing discharges the referral. That case would fall within the scope of sections 3 and 5(3) of the 1974 Act, as modified by the Order. The acceptance would constitute a conviction, and the discharge a sentence, in terms of section 3. An acceptance

and a discharge under a different section 67 ground would not constitute a conviction and sentence, standing the terms of section 3. Non-acceptance of a ground – whether under section 67(2)(j) or any other ground – and a discharge would not constitute a conviction and sentence, standing the terms of section 3. Where none of the grounds has been accepted, and there is an application to the sheriff, that will not – at that stage – constitute a conviction and sentence, because there has been no acceptance/establishment of a ground. Thus section 93(2)(b) is relevantly referred to, because one of the outcomes engages section 3, and the rehabilitation scheme of the 1974 Act, while other outcomes do not. The wording of section 3 ensures that only relevant outcomes are engaged. The Scottish Government's view is that these provisions accurately embody the policy intentions.

3(b)(ii). The reference to section 94(2)(b).

The Scottish Government accept that the reference to section 94(2)(b) is erroneous. However, none of the outcomes possible under section 94(2)(b) engage section 3 of the 1974 Act, and the rehabilitation scheme set out in that Act, since there can be no valid acceptance of a ground of referral and therefore no 'conviction' within the meaning of section 3. Accordingly, the reference to section 94(2)(b) is without effect. The Scottish Government undertake to amend the Order by removing the reference to this provision at the next available opportunity.

3(b)(iii) The reference to section 114(3)(b).

The Scottish Government accept that the reference to section 114(3)(b) is erroneous. However, none of the outcomes possible under section 114(3)(b) engage section 3 of the 1974 Act, and the rehabilitation scheme set out in that Act, since there can be no establishment of a ground of referral and therefore no 'conviction' within the meaning of section 3. Accordingly, the reference to section 114(3)(b) is without effect. The Scottish Government undertake to amend the Order by removing the reference to this provision at the next available opportunity.

3(b)(iv) The reference to section 119(3)(b).

Section 119 deals, shortly stated, with the situation in which a children's hearing has been arranged under various sub-sections of the 2011 Act. That children's hearing has discretion to defer the decision to make a compulsory supervision order until a subsequent children's hearing. One of the outcomes of a case under section 119 is that a ground of referral – which could be a section 67(2)(j) ground – has been accepted under section 91(1)(a) or established under section 108(4)(a), and the children's hearing decides, rather than deferring the decision, to discharge the referral. Thus the acceptance/establishment of the ground would constitute a conviction, and the discharge a sentence, in terms of section 3 of the 1974 Act, as modified. An acceptance and a discharge under another section 67 ground would not constitute a conviction and sentence, standing the terms of section 3. Accordingly section 113(3)(b) is relevantly referred to, as one or more of the outcomes engages section 3, and the rehabilitation scheme of the 1974 Act, while other outcomes do not. The wording of section 3 ensures that only relevant outcomes are engaged. The Scottish Government's view is that these provisions accurately embody the policy intentions.

ANNEX 2

Children's Hearings (Scotland) Act 2011 (Transitional, Savings and Supplementary Provisions) Order 2013 (SSI 2013/150)

On 22 May 2013, the Scottish Government was asked:

1. Article 2(4) excludes the application of any rules of court made under section 91 of the 1995 Act and the general powers to regulate procedure in the sheriff courts and the Court of Session, in relation to “relevant proceedings” in progress under the 1995 Act at the date of commencement of the Order.

Please clarify which rules of court will apply to such proceedings from the commencement date of the Order, if those rules do not apply?

2 (a) Please clarify the intentions underlying article 2(5).

(b) Please explain how this provision can validly have effect to prevent any later repeal or modification of any enactment which contains provisions applicable to “relevant proceedings” having effect until those proceedings have concluded; as any such later enactment would have effect in relation to “relevant proceedings” as that enactment determined, and this Order cannot “entrench” the position to prevent change by later enactment?

3. Article 14 provides that where a court has referred a matter to the principal reporter under section 54 of the 1995 Act (as to children requiring compulsory measures of supervision), the 1995 Act applies to that matter regardless of whether “relevant proceedings in relation to the child to whom the matter relates have commenced before the relevant date”.

Section 54(2) of the 1995 Act defines “relevant proceedings” for the purposes of a reference by the court where it appears that any of the conditions specified in section 52(2)(a) to (h), (j), (k) or (l) of the 1995 Act is satisfied with respect to a child. That definition is different from the definition of “relevant proceedings” in article 1(2) of this Order.

Please clarify which “relevant proceedings” are intended to be referred to, and whether you would consider there is any need to make this clearer?

4. Article 27 revokes the Legal Aid (Scotland) (Children) Regulations 1997 with effect from the date of commencement of the Order. Articles 2(1) and (2) continue to apply those Regulations for all purposes in relation to “relevant proceedings” in progress under the 1995 Act as at the commencement date, and express provision is made in article 2(1) that that is “subject to...the following provisions of this Order”.

Is that provision inconsistent, in specifying that the 1997 Regulations remain in effect for particular purposes, but that is subject to the following provisions, which include the entire revocation of those Regulations? Would it be clearer if article 27 was instead made subject to that provision in article 2(2)?

The Scottish Government responded as follows:

1. It is intended that the existing rules of court made under section 91 of the 1995 Act together with the general powers to regulate procedure in the sheriff courts and the Court of Session are to apply to “relevant proceedings” under the 1995 Act at the date of commencement of the Order. The existing rules made under section 91 of the 1995 Act are to be found in the Act of Sederunt (Child Care and Maintenance Rules) 1997. However, following discussions with the Lord President’s Private Office, the view was taken that the most appropriate place to make such a transitional and saving provision in respect of that instrument was in the Act of Sederunt to be made amending the rules of court in consequence of the 2011 Act coming into force. It is anticipated that this Act of Sederunt will be made on 28 May 2013, and that it will contain transitional and saving provision in respect of the existing rules of court. The intention behind the carve-out provision at article 2(4) is to prevent the existing court rules being effectively saved in two separate pieces of legislation and to avoid any overlap in provision between the current Order and the forthcoming Act of Sederunt, where the saving will more appropriately be made.

2.(a) The intention underlying article 2(5) is to make a general saving of other enactments, beyond the specific “core” enactments saved in article 2(2), which are also applicable in some way to relevant proceedings and which will be either repealed or modified on the date of commencement of the Order (for example, by schedule 5 to the 2011 Act or by the draft Children’s Hearings (Scotland) Act 2011 (Modification of Primary Legislation) Order 2013 which come into force on the same date as the Order). The effect of article 2(5) is that such repeals or modifications do not have effect for the purposes of relevant proceedings until those proceedings have concluded.

(b) It is not intended that this provision has effect to prevent any later repeal or modification of any enactment which contains provisions applicable to “relevant proceedings” having effect until those proceedings have concluded. We agree that this provision in the Order could not validly “entrench” the position to prevent change by later enactment. As discussed in the response to 2(a) above, it is only intended to prevent repeals or modifications of enactments applicable to relevant proceedings, which would otherwise take effect on the same date as the commencement date of this Order, from taking effect until those relevant proceedings are concluded. The Scottish Government considers that when the provisions of article 2(5) are read in context the desired effect is achieved.

3. The “relevant proceedings” referred to in article 14 of the Order are “relevant proceedings” within the meaning of article 1(2) of the Order. As article 1(2) defines the term “relevant proceedings” for the purposes of the Order the Scottish Government considers that the provision is clear and that the provision does not need to be amended. Whilst section 54(2) of the 1995 Act contains a definition of “relevant proceedings”, that definition only applies for the purposes of that section.

4. The intention is that notwithstanding the revocation of the 1997 Regulations they shall continue to apply as regards relevant proceedings. The Scottish Government accepts that the drafting might have been clearer in this respect, but considers that the intention of article 2, as it affects article 27, can still be understood.

ANNEX 3

Animal Health (Miscellaneous Fees and Amendments) (Scotland) Regulations 2013 (SSI 2013/151)

On 23 May 2013, the Scottish Government was asked:

1. The Scottish Government is asked whether the references to EU collection centre, EU quarantine centre and EU storage centre in Schedule 3 are correct given that regulation 7(4) provides that expressions used in that Schedule have the same meaning as they have in the 2007 Regulations. The 2007 Regulations contain definitions of EC collection centre, EC quarantine centre and EC storage centre. The Treaty of Lisbon (Changes in Terminology) Order 2011 would not appear to have glossed those definitions by virtue of article 4(2) of that order.

2. The Scottish Government is asked to clarify what functions regulations 11(1) permits the Scottish Ministers to arrange should be exercised by the Secretary of State on the Ministers' behalf. The regulation refers to "their functions of requiring payment". Is it the functions of inspection, approval, examination etc in respect of which these regulations require payment which are to be exercised by the Secretary of State under such arrangements or the collection of fees chargeable in respect of the exercise of such functions or both?

The Scottish Government responded as follows:

1. In light of article 4(2)(a) of the Treaty of Lisbon (Changes in Terminology) Order 2011 (SI 2011/1043), we agree that the references to "EU collection centre", "EU quarantine centre" and "EU storage centre" in Schedule 3 of the instrument ought indeed to be references to "EC collection centre", "EC quarantine centre" and "EC storage centre". We are grateful to the SLC for drawing this to our attention and we will amend the regulations for clarity at the next available opportunity.

However, in the meantime, the Government's view is that, in context, the references to "EU collection centre", "EU quarantine centre" and "EU storage centre" could only be interpreted as referring to "EC collection centre", "EC quarantine centre" and "EC storage centre" as defined in the Bovine Semen (Scotland) Regulations 2007, so far as those relate to the implementation of EU requirements under Directive 88/407/EEC (as amended) on the Community trade in and imports of semen of domestic animals of the bovine species as mentioned in the 2007 Regulations.

2. Regulation 11(1) of the instrument concerns the Scottish Ministers' functions of collecting fees only. It is not intended to cover functions of inspection, approval and examination, which are covered by existing agency arrangements, for example, under the Scotland Act 1998 (Agency Arrangements) (Specification) Order 2008 (SI 2008/1035). However, the Committee may wish to note that this 2008 Order is currently being reviewed in anticipation of a further order under section 93 of the Scotland Act 1998 being made later this year.

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