



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

35th Report, 2013 (Session 4)

Subordinate Legislation

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Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform 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.
 - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

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Delegated Powers and Law Reform Committee

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The Committee reports to the Parliament as follows—

1. At its meeting on 11 June 2013, the Committee agreed to draw the attention of the Parliament to the following instruments—

Registration of Social Workers and Social Service Workers in Care Services (Scotland) Regulations 2013 [draft]

Water Environment (Controlled Activities) (Scotland) Amendment Regulations 2013 (SSI 2013/176)

Act of Sederunt (Rules of the Court of Session Amendment No. 4) (Miscellaneous) 2013 (SSI 2013/162)

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 AFFIRMATIVE PROCEDURE

Registration of Social Workers and Social Service Workers in Care Services (Scotland) Regulations 2013 [draft]. *(Health and Sport Committee)*

4. These Regulations consolidate the Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) (No. 2) Regulations 2009 (“the 2009 Regulations”), and incorporate some new amendments.

5. Subject to approval of the Parliament, the Regulations will come into force on 1 August 2013.

6. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced at Annex 1. The draft instrument as initially laid on 20 May 2013 was withdrawn and a new version was re-laid on 31 May. This was done to correct the typographical errors identified in the correspondence (questions and responses 1 to 3).

7. Regulation 9(1) provides a savings provision to the effect that regulations 4, 5 and 6 of the 2009 Regulations will continue to apply to social workers in first employment, already registered social workers, and social service workers who started work before these new Regulations come into force on 1 August 2013 (“pending workers”). In general terms, these pending workers must achieve registration under the 2009 Regulations within 6 months of starting work. Regulation 9 appears to have some significance in connection with the registration requirements for those social workers and social service workers who are in work, as at 1 August when these Regulations come into force.

8. The Committee asked the Scottish Government to explain the effect of regulation 9(2). This provides that an application for registration under regulation 4, 5 and 6 of the 2009 Regulations made by any person referred to in paragraph (1) and not determined by the date when these Regulations come into force “*is to be treated as an application for registration under these Regulations*”.

9. The Scottish Government has confirmed in the correspondence that it is intended by regulation 9 to continue or save the effect of regulations 4, 5 and 6 of the 2009 Regulations, despite their revocation by these Regulations, in relation to pending workers.

10. The Scottish Government has also confirmed that regulation 9(2) is intended to deal with the situation in which a pending worker has applied for registration, within the required 6 month period, but the application has not been processed as at 1 August 2013, when these Regulations come into force. It is contended that regulation 9(2) is required, because such a pending application would otherwise fall, when the 2009 Regulations under which the application is made are revoked on 1 August.

11. The Committee would agree to the extent that regulation 9(1) plainly saves (as the Scottish Government intends) the requirements in regulations 4, 5 and 6 of the 2009 Regulations in relation to the persons who have started work before 1 August this year, “until that person is registered”.

12. The Committee considers however that the plain meaning and effect of regulation 9(2) needs to be considered. An application for registration under the 2009 Regulations made by a pending worker and not determined by 1 August 2013 “is to be treated as an application for registration under these Regulations”.

13. The Committee considers that those words introduce a confusion or tension between the express continuation of regulations 4 to 6 of the 2009 Regulations in regulation 9(1), and the effect of 9(2). Regulations 4 to 7 of these Regulations contain the application for registration requirements, but there are some differences between those requirements, compared with those in regulations 4 to 6 of the 2009 Regulations.

14. In particular, there are exemptions from the registration requirements for social workers and social service workers who require to be registered by other legislation to provide a care service with another person and is so registered; such workers who have been subject to a removal order under the rules of the Social Services Council; and social service workers who are authorised and employed by Social Care and Social Work Improvement Scotland (SCSWIS). There is also under the new Regulations partial exemption from registration for workers in seasonal day care of children services (regulation 6).

15. The Scottish Government’s confirmed intention is to continue the effect of regulations 4 to 6 of the 2009 Regulations in relation to pending workers, as regulation 9(1) appears to provide, and not to apply to these workers any changes which are made by the application requirements in regulations 4 to 7 of these new Regulations.

16. The Committee considers therefore that the meaning of regulation 9 could be made clearer.

17. The Committee draws the Regulations to the attention of the Parliament on reporting ground (h), as the meaning of regulation 9 could be clearer.

18. Regulation 9(1) continues the application of the requirements in regulations 4 to 6 of the Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) (No. 2) Regulations 2009 for social workers and social service workers to achieve registration with the Scottish Social Services Council within the period as provided for in those regulations, to workers who started work prior to the coming into force of these Regulations on 1 August 2013.

19. Regulation 9(2) provides that an application for registration under those provisions of the 2009 Regulations made by those workers and not determined by 1 August 2013 “is to be treated as an application for registration under these Regulations”. Regulations 4 to 7 of these Regulations contain some differences in the application for registration requirements, including as to the exemptions from registration which apply. So confusion could be caused by the two incompatible directions - the direction that regulations 4 to 6 of the 2009 Regulations continue to have effect, and the direction that an application under those provisions is to be treated as an application under the provisions in these Regulations.

POINTS RAISED: INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

[Water Environment \(Activities\) \(Scotland\) Amendment Regulations 2013 \(SSI 2013/176\)](#) (*Rural Affairs, Climate Change and Environment Committee*)

20. This instrument amends the Water Environment (Controlled Activities) (Scotland) Regulations 2011. It requires SEPA to consider publishing applications for consents on its website if it considers that the proposed activity would have or would be likely to have an adverse impact on the water environment or other water users.

21. It replaces the General Binding Rules in part 1 of Schedule 3 with a revised list of activities which are authorised subject to the requirements set out in the schedule.

22. The Regulations are due to come into force on 1 July 2013.

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

24. The Government intended that the activity permitted under rule 13 should be subject to the requirement that there is no pollution of the water environment when carrying out that activity. An error in formatting rule 13 has altered the effect of the rule from that which was intended. To have this overarching effect the condition which was expressed as rule 13(h)(iv) should have been expressed as rule 13(i). Instead the condition it imposes is only a requirement of the activity of returning sediment as set out in rule (h) rather than a separate requirement which must be complied with throughout the activity permitted by rule 13. The Government accepts this is an error.

25. The Committee draws this instrument to the attention of the Parliament under the general reporting ground as it contains a minor drafting error.

26. Rule 13(h)(iv) should have been listed as rule 13(i) so that the removal of accumulations of sediment from rivers (etc.) permitted by that rule is only authorised if every aspect of that activity listed does not result in pollution of the water environment. As currently drafted the prohibition on pollution of the water environment only applies as a condition of the return of the removed sediment to the river (etc.) from which it was removed.

27. The Committee notes that the Scottish Government has undertaken to correct this error when the Controlled Activities Regulations are next amended.

POINTS RAISED: INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

[Act of Sederunt \(Rules of the Court of Session Amendment No. 4\) \(Miscellaneous\) 2013 \(SSI 2013/162\)](#) (*Justice Committee*)

28. This instrument amends the Rules of the Court of Session (“the Rules”) in a variety of ways. In particular, it amends the Part of the Rules which deals with appeals in connection with children’s hearings, in consequence of the repeal of relevant provisions in the Children (Scotland) Act 1995 (“the 1995 Act”) and their replacement with new provisions in the Children’s Hearings (Scotland) Act 2011.

29. The instrument is not subject to procedure, apart from laying. It came into force on 4 June 2013, with the exception of the amendments to the rules relating to appeals in connection with children’s hearings, which come into force on 24 June 2013, being the date on which the relevant provisions of the Children’s Hearings (Scotland) Act 2011 come into force.

30. In considering the instrument, the Committee asked the Lord President’s Private Office (LPPO) for clarification of certain points. The correspondence is reproduced at Annex 3.

31. The Committee notes that paragraph 7(a) of the instrument contains a savings provision which applies “for the purpose of any appeal made under section 51 of the Children (Scotland) Act 1995 and not yet determined before [24 June 2013]”. A variety of appeals may be brought under section 51.

32. The Committee considers that the provision may be read so as to save the previous court rules only in cases where an appeal is made to the Court of Session prior to 24 June. Alternatively however, it may be read as saving the rules where an appeal is made to the sheriff court before that date, so that the previous court rules will apply if the case is subsequently appealed to the Court of Session, irrespective of when that appeal is made.

33. The LPPO considers that paragraph 7 achieves the second alternative mentioned above, that is, it saves the previous Court of Session Rules for the lifetime of an appeal, provided the case is initially appealed to the sheriff or sheriff principal before 24 June 2013. It considers that this is consistent with the approach taken in the Children’s Hearings (S) Act 2011 (Transitional, Savings and Supplementary Provisions) Order 2013 (SSI 2013/150).

34. However the Committee notes that SSI 2013/150 saves the provisions of the 1995 Act relating to children’s hearings as it applied immediately before 24 June 2013 for the purposes of all proceedings which commence but are not determined before 24 June 2013. The saving applies until the proceedings are finally concluded.

35. The Committee does not consider that the relevant provision in the instrument under consideration achieves the same effect as in SSI 2013/150. In particular, even if it is read as saving the previous court rules where an *appeal* is made to the sheriff court before 24 June 2013 and is subsequently appealed to the Court of

Session (the second alternative described above), it does not appear to operate so as to save the previous court rules where an *application* is made to the sheriff court before 24 June 2013 (under sections 65 or 81 of the Children (Scotland) Act 1995) and is subsequently appealed to the Court of Session under section 51 of that Act. That is because paragraph 7 as drafted refers only to *appeals* made under section 51.

36. The Committee accordingly draws the instrument to the attention of the Parliament on reporting ground (h), as the meaning of paragraph 7 of the instrument could be clearer in giving effect to the apparent policy intention.

NO POINTS RAISED

37. At its meeting on 11 June 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

Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2013 (SSI 2013/170)

Requirements for Community Learning and Development (Scotland) Regulations 2013 (SSI 2013/175)

Anniesland College and Langside College (Transfer and Closure) (Scotland) Order 2013 (SSI 2013/180)

Kilmarnock College (Transfer and Closure) (Scotland) Order 2013 (SSI 2013/182)

Reid Kerr College (Transfer and Closure) (Scotland) Order 2013 (SSI 2013/183)

Children's Hearings (Scotland) Act 2011 (Commencement No. 8) Order 2013 (SSI 2013/190 (C.13))

Health and Sport

Glasgow Commonwealth Games (Compensation for Enforcement Action) (Scotland) Regulations 2013 (SSI 2013/160)

National Health Service (Superannuation Scheme and Pension Scheme) (Scotland) Amendment (No. 2) Regulations 2013 (SSI 2013/168)

National Health Service Superannuation Scheme (2008 Section) (Scotland) Regulations 2013 (SSI 2013/174)

National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2013 (SSI 2013/191)

Infrastructure and Capital Investment

Mobile Homes (Written Statement) (Scotland) Regulations 2013 (SSI 2013/188)

Justice

Dangerous Dogs (Fees) (Scotland) Order 2013 (SSI 2013/178)

Police Reform (Pensions Amendments) (Scotland) Regulations 2013 (SSI 2013/184)

Firemen's Pension Scheme (Amendment) (Scotland) (No. 2) Order 2013 (SSI 2013/185)

Fire Reform (Pensions Amendments) (Scotland) Order 2013 (SSI 2013/186)

Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No. 3) 2013 (SSI 2013/171)

Act of Sederunt (Children's Hearings (Scotland) Act 2011) (Miscellaneous Amendments) 2013 (SSI 2013/172)

Local Government and Regeneration

Town and Country Planning (Appeals) (Scotland) Regulations 2013 (SSI 2013/156)

Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013 (SSI 2013/157)

Rural Affairs, Climate Change and Environment

Animal Health (Miscellaneous Amendments) (Scotland) Order 2013 (SSI 2013/173)

Plant Health (Scotland) Amendment (No. 2) Order 2013 (SSI 2013/187)

ANNEX 1

Registration of Social Workers and Social Service Workers in Care Services (Scotland) Regulations 2013 [draft]

On 21 May 2013 the Scottish Government was asked:

1. There is an error in the definition of “the 2010 Act” in regulation 2(1), where the Act is cited as “the Public Services Reform (Scotland) Act 1010”. Would you propose to correct this and if so how (given that the draft instrument has been published at legislation.gov.uk)?

2. In regulation 5(5) it appears that “and” is omitted before “that social service worker”, which seems to make the meaning unclear? Would you propose to correct this?

3. In regulation 9(1), there is an apparent error – “the requirement in each of regulations 4,5 and 6 of those regulations for a period [rather than person] to achieve registration within the relevant period ...” Would you propose to correct this ?

4. In relation to the transitional provision in regulation 9(2), please explain the effect of the provision that an application for registration under regulation 4, 5 and 6 of the 2009 Regulations made by any person referred to in paragraph (1) and not determined by the date these Regulations come into force “is to be treated as an application for registration under these Regulations”?

Article 9(1) makes a specific savings provision that regulations 4 to 6 of those Regulations shall continue to apply to persons who started work before the coming into force of these Regulations, to provide the person with a “grace period” for registration in terms of those regulations 4 to 6 and therefore it appears that in respect of those persons, the application for registration provisions in regulations 4 to 6 of these Regulations would not apply?

The Scottish Government responds as follows:

1. The Scottish Government accepts that there is an error in the reference to the Public Services Reform (Scotland) Act 2010, and are grateful to you for pointing this out. Although it is considered that the reader would be able to identify the Act correctly by its title and by the reference in regulation 2 to “the 2010 Act”, the Scottish Ministers propose to correct this erroneous reference by withdrawing and relaying the Regulations.

2. The Scottish Government accepts that there is an error in regulation 5(5) in respect that the word ‘and’ has been omitted before the words ‘that social service worker’ and are grateful to you for pointing this out. It is considered that the reader would be able to identify the error by looking to the parallel provision in regulation 4(5) which is in correct terms, and accordingly that the meaning of the provision is clear. However, the Scottish Ministers propose to correct this erroneous reference by withdrawing and relaying the Regulations.

3. The Scottish Government accepts that there is an error in regulation 9(1) in respect that the word 'period' instead of 'person' appears in the provision and are grateful to you for pointing this out. The Scottish Ministers propose to correct this erroneous reference by withdrawing and relaying the Regulations.

4. Regulation 9(1) provides a savings provision to the effect that regulations 4, 5 and 6 of the 2009 Regulations will continue to apply to certain workers; namely, those who started work prior to the 2013 Regulations coming into force. A key provision of the 2009 Regulations, repeated in the 2013 Regulations, is that such workers must achieve registration within six months of starting work. Thus where such a worker has been working for, say, two months, regulation 4, 5 or 6 (as the case may be) will continue to apply to him, and he will require to achieve registration within the remaining four months of a total six month period, running from the date of starting work, though the 2009 Regulations may have been revoked by the time he does so. Regulation 9(2) is intended to deal with the situation in which such a worker (one who started work before the 2009 Regulations were revoked) has put in an application for registration, within the six month period, but this has not been processed as at the date the 2013 Regulations come into force. Absent regulation 9(2), such an application would fall, as the Regulations under which it is made are no longer in force. Regulation 9(2) provides that it will be treated as an application under the 2013 Regulations. The arrangements for processing applications remain unchanged by the 2013 Regulations. The Scottish Government's view is that the meaning of the provisions is clear and that the provisions accurately embody the policy intentions.

ANNEX 2

Water Environment (Controlled Activities) (Scotland) Amendment Regulations 2013 (SSI 2013/176)

On 31 May 2013, the Scottish Government was asked:

The Scottish Government is asked in relation to General Binding Rule 13 whether rule (h)(iv) should in fact be a separate rule (i) so as to apply to activity 13 generally rather than being an integral condition of the conduct specified in rule (h) only. The equivalent rule applies generally to activity 13 under the 2011 regulations as they presently stand and no change to this was proposed in the draft General Binding Rules published for the purposes of section 21 of the 2003 Act.

If a separate rule (i) is intended does the Scottish Government intend to amend this to make it clear what conduct is authorised by rule 13?

The Scottish Government responded as follows:

In column 2 of the table in the Schedule, sub-paragraph (iv) of rule 13(h) should appear as paragraph (i). We are grateful to the Committee for bringing this to our attention. As matters stand, rule 13(h)(iv) taken together with rules 13(a) to 13(h)(iii) will continue to protect the water environment in relation to the removal of accumulations in the circumstances set out in activity 13. Adjusting rule 13(h)(iv) so that it appears instead as rule 13(i) is not therefore considered essential in order to control activity 13. However, we will correct this formatting error so that rule 13(h)(iv) appears as rule 13(i) when the 2011 Regulations are next amended.

ANNEX 3

Act of Sederunt (Rules of the Court of Session Amendment No. 4) (Miscellaneous) 2013 (SSI 2013/162)

On 30 May 2013, the Lord President's Private Office was asked:

The Lord President's Private Office is asked to explain whether the policy intention is that the savings provision in paragraph 7 of the instrument, in relation to Part V of Chapter 41 of the Rules (children's' hearings appeals), should come into force at the same time as the actual amendments to that Part of the Rules, on 24 June 2013. If so, does the LPPO agree that that intention is not achieved by the drafting in paragraph 1(2) and (3) of the instrument, which provide instead that the savings provision comes into force on 4 June 2013, and the amendments (made by paragraph 3 of the instrument) on 24 June 2013? If so, can the LPPO explain how the savings provision in paragraph 7 can have an effect from 4 June when it applies to provisions of the Rules as they had effect immediately before 24 June?

Further in relation to paragraph 7, the saving applies "for the purpose of **any appeal** made under section 51 of the Children (Scotland) Act 1995" before 24 June 2013 but not determined before that date. A number of appeals may be brought under section 51, including appeals from the children's hearing to the sheriff, appeals from the sheriff to the sheriff principal, and appeals to the Court of Session. Our understanding of the policy intention is that the saving should only apply in respect of appeals made by stated case to the Court of Session before 24 June 2013. In our view however, the effect of the drafting in paragraph 7(a) of the instrument is that the old Court of Session Rules may apply to a stated case which comes before the Court of Session **after** 24 June 2013, provided the case was initially appealed to the sheriff or sheriff principal under section 51 prior to 24 June 2013. That seems to us to be the consequence of providing that the saving has effect for the purpose of any appeal made under section 51 of the Children (Scotland) Act 1995 before 24 June 2013. Does the LPPO agree that regulation 7 as drafted may have that effect? If so, does the LPPO consider that the meaning of the provision could be clearer?

Paragraph 2 of the instrument inserts new rule 24.6 in the court rules. Rule 24.6(4) provides that it is "subject to paragraph (3)". Does the LPPO agree that this is an incorrect reference and that the paragraph should be "subject to paragraph (5)"? If so, does the LPPO consider that the provision requires to be corrected?

New rule 76.37A as inserted by paragraph 6 of the instrument refers to "the Act of 2012". We assume the reference should be to "the Act of 2002" i.e. the Proceeds of Crime Act 2002, as defined in rule 76.27. Does the LPPO agree that the reference is incorrect? If so, does the LPPO consider that the provision requires to be corrected?

The Lord President's Private Office responded as follows:

Whilst it would have been clearer if paragraph 7 was to come into force on 24 June, like paragraph 3, the intention of the drafting has been achieved as the

earlier coming in to force date will have no practicable effect as to the operation of the saving provision. We say this because there will be no further amendments to the rules in question between 4 June and 24 June 2013 thus negating the possibility of any difficulties being encountered in practice before the latter date.

In relation to the second question regarding paragraph 7, your understanding of the effect of the saving provision is correct. The policy intention, which is consistent with the saving provisions contained in article 2 of The Children's Hearings (Scotland) Act 2011 (Transitional, Savings and Supplementary Provisions) Order 2013 (SSI 2013/150), is that the "old law" is saved for the lifetime of an appeal, provided, as you note, that the case was initially appealed to the sheriff or sheriff principal before 24 June.

In relation to the two typographical errors, these do require to be corrected and a correction slip has been requested.

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