



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# SUBORDINATE LEGISLATION COMMITTEE

Tuesday 26 February 2013

Session 4

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**Tuesday 26 February 2013**

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**SUBORDINATE LEGISLATION COMMITTEE**

**7<sup>th</sup> Meeting 2013, Session 4**

**CONVENER**

\*Nigel Don (Angus North and Mearns) (SNP)

**DEPUTY CONVENER**

\*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

**COMMITTEE MEMBERS**

\*Jim Eadie (Edinburgh Southern) (SNP)

\*Mike MacKenzie (Highlands and Islands) (SNP)

\*Hanzala Malik (Glasgow) (Lab)

\*John Pentland (Motherwell and Wishaw) (Lab)

\*John Scott (Ayr) (Con)

\*attended

**CLERK TO THE COMMITTEE**

Euan Donald

**LOCATION**

Committee Room 3



**Scottish Parliament**  
**Subordinate Legislation**  
**Committee**

*Tuesday 26 February 2013*

[The Convener *opened the meeting at 10:32*]

**Instruments subject to**  
**Affirmative Procedure**

**The Convener (Nigel Don):** I welcome everyone to the seventh meeting in 2013 of the Subordinate Legislation Committee and ask members to turn off their mobile phones.

**National Bus Travel Concession Scheme**  
**for Older and Disabled Persons (Scotland)**  
**Amendment Order 2013 [Draft]**

**Police and Fire Reform (Scotland) Act**  
**2012 (Supplementary, Transitional,**  
**Transitory and Saving Provisions) Order**  
**2013 [Draft]**

*The committee agreed that no points arose on the instruments.*

**Instruments subject to Negative**  
**Procedure**

**Police Service of Scotland Regulations**  
**2013 (SSI 2013/35)**

10:32

**The Convener:** We come to agenda item 2.

Regulation 32(2)(a) refers to

“a dependent territory within the meaning of the British Nationality Act 1981”.

That definition, from section 50(1) of the 1981 act, was repealed by the British Overseas Territories Act 2002 on 26 February 2002. Given that, prior to that repeal, the territories in schedule 6 were dependent territories and, on that date, became known as British overseas territories, it appears that regulation 32(2)(a) fails to take account of the modifications to the British Nationality Act 1981 by the 2002 act, and, to the extent that it relies on the repealed definition of “dependent territory” instead of its replacement “British overseas territory”, is defectively drafted.

Does the committee agree to draw the regulations to the Parliament’s attention on reporting ground (i), as the drafting appears to be defective?

**Members indicated agreement.**

**The Convener:** In regulation 2(1), the definition of “qualifying examination” with cross-reference to the Police Service of Scotland (Promotion) Regulations 2013 (SSI 2013/39) could be clearer. Those regulations do not contain such a definition but instead contain four related definitions of “qualifying examination A (elementary)”, “qualifying examination A (advanced)”, “qualifying examination B” and “qualifying examination C”. The Scottish ministers contend that the reference in the regulations is intended to refer to all those qualifying examinations.

Does the committee agree to draw the regulations to the Parliament’s attention on reporting ground (h), as the meaning could be clearer?

**Members indicated agreement.**

**The Convener:** Several points have been raised by the legal advisers about drafting errors. First, regulation 7(4) specifies the different circumstances in which the fixed-term appointment of the chief constable or a deputy chief constable might be terminated early. However, it makes provision about a term of appointment coming to an end

“on promotion, dismissal, the conclusion of disciplinary proceedings and regulation 10.”

The ordinary effect of the word “and” would be to make those circumstances cumulative rather than alternative, which produces an absurd result. The committee might wish to recommend that the Scottish ministers amend the provision at the first possible opportunity to address that drafting error.

Secondly, regulation 24(1)(a) refers to entitlement to incapacity benefit under the Social Security (Incapacity for Work) Act 1994, when entitlement to that benefit properly arises under section 30A of the Social Security Contributions and Benefits Act 1992. The Scottish Government has agreed to consider amending that reference at the next available opportunity in the interests of clarity, and members might wish to recommend that they do so.

Thirdly, regulation 32(2)(a) refers to

“a colony, protectorate or protected state within the meaning of the British Nationality Act 1948”.

Those terms are no longer defined by that act, nor have they been since their repeal on 1 January 1983. Accordingly, it appears that the terms, having no meaning in the British Nationality Act 1948 as it is presently in force, can therefore have no meaning in the regulations.

Finally, in schedule 3, paragraph 20 purports to revoke regulations 12(7) and 12(8) of the Scottish Crime and Drug Enforcement Agency (Scotland) Regulations 2011 (SSI 2011/61). However, there are no such paragraphs in regulation 12 and it appears that the Scottish ministers instead intended to revoke regulations 13(7) and 13(8). Ministers have undertaken to revoke those erroneous references at the next available opportunity.

Does the committee therefore agree to draw the regulations to the attention of the Parliament on the general reporting ground in respect of the aforementioned drafting errors?

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** There are likely to be a number of other regulations in the general area of the new police service. Perhaps it should be considered that the opportunities to address some of the matters to which we are drawing attention exist in early course, and that they should be taken if at all possible.

**The Convener:** Indeed.

**Hanzala Malik (Glasgow) (Lab):** We should emphasise that point. There is no timetable or schedule, so it would be helpful if those matters could be addressed early. That would make sense.

**John Scott (Ayr) (Con):** I concur with the previous two speakers that the work should be done sooner rather than later. Perhaps we should suggest that an early opportunity should be sought, rather than saying that it should be done at the earliest opportunity.

**The Convener:** It is tempting to think that, once we get through this raft of police regulations, there might be some sense in having a tidy-up at the end, because I am afraid that there will be a few more to consider as we go along. We shall see.

In regulation 5(7)(a), the phrase

“member of that individual’s or constable’s family”

includes dependants. That term is undefined, it apparently being the Scottish ministers’ intention that it refer to any person who relies on the individual or constable for his or her maintenance, in order that regulation 5 may be construed broadly. Given that regulation 5 imposes restrictions on the private lives of constables and their families and dependants, the lead committee might want to consider whether it is appropriate that the provision be given that broad construction.

Although not formally reporting the matter, does the committee agree to refer it to the lead committee?

**Members indicated agreement.**

**Hanzala Malik:** I add that we are living in changed times. Family circumstances have changed and the lead committee should take that into account.

**The Convener:** I am sure that it will. We might return to a similar point in considering another instrument.

### **Non-Domestic Rating (Unoccupied Property) (Scotland) Amendment Regulations 2013 (SSI 2013/37)**

**The Convener:** Regulation 6, which inserts a new regulation 4 into the Non-Domestic Rating (Unoccupied Property) (Scotland) Regulations 1994 (SI 1994/3200), makes provision for rating relief to be available to lands and heritages, or rating units, that meet certain conditions. The conditions include, in new regulation 4(1)(b), that:

“either—

(i) when last previously occupied the lands and heritages were in use as office premises or in use as shop premises, or

(ii) where the lands and heritages have never previously been occupied, they are in”

such use.

Where lands and heritages form part of a building, it is intended that the requirement for sole or principal use as a shop or office relates to those

lands and heritages, and not to the building of which they form a part.

The meaning of the definitions of “use as office premises” and “use as shop premises” in regulation 3 could more clearly provide for that intention, as I suspect that that sentence or two has just demonstrated.

Does the committee agree to draw the regulations to the attention of the Parliament on reporting ground (h), as the meaning could be clearer?

**Members indicated agreement.**

**The Convener:** The new regulation 4(2) of the 1994 regulations that is inserted by regulation 6 is made in reliance on the powers contained in section 2(2) of the European Communities Act 1972, mention of which is omitted from the preamble.

Does the committee agree to draw the regulations to the attention of the Parliament on the general reporting ground, as the preamble does not follow proper drafting practice?

**Members indicated agreement.**

### **Police Service of Scotland (Special Constables) Regulations 2013 (SSI 2013/43)**

**The Convener:** Regulation 7(2)(h) provides for inclusion in a special constable’s personal record a record of whether the special constable passed or failed any qualifying examination at which the special constable was a candidate. As neither the Police (Promotion) (Scotland) Regulations 1996 (SI 1996/221) nor the Police Service of Scotland (Promotion) Regulations 2013 (SSI 2013/39) apply to special constables, that provision appears to have been included in error. The Scottish Government has undertaken to adjust the provision at the next appropriate opportunity.

Does the committee agree to draw the regulations to the attention of the Parliament on the general reporting ground?

**Members indicated agreement.**

**The Convener:** In regulation 4(4)(b), the reference to

“member of that individual’s or special constable’s family”

includes dependants. That term is undefined, it apparently being the Scottish ministers’ intention that it refer to any person who relies on the individual or special constable for his or her maintenance, in order that regulation 4 may be construed broadly. Given that regulation 4 imposes restrictions on the private lives of constables and their families and dependants, the lead committee may wish to consider whether it is

appropriate that the provision be given that broad construction.

Additionally, in regulation 17(2), the lead committee may wish to consider whether it thinks that the provisions of regulation 17 adequately provide for the removal of a special constable who refuses to resign in accordance with a requirement to do so under regulation 17(2)(b).

Although the committee is not making a formal report on the regulations, does it agree to refer the aforementioned matters to the lead committee?

**Members indicated agreement.**

**Hanzala Malik:** I refer to my earlier comment about lifestyles, because we no longer live in rigid family structures.

**The Convener:** The point is that this is exactly the same reference as before and I am sure that the same policy considerations apply.

**Hanzala Malik:** Yes. Thank you, convener.

### **Council Tax Reduction (Scotland) Amendment Regulations 2013 (SSI 2013/48)**

**The Convener:** As members will note, our legal advisers have suggested that the regulations raise the question whether they relate to matters that are reserved by section F1 of part II of schedule 5 to the Scotland Act 1998; as such, the committee may wish to report the regulations as raising a devolution issue. The same issue was raised in relation to the Council Tax Reduction (Scotland) Regulations 2012 (SSI 2012/303), the principal regulations that these regulations amend and which the committee has previously considered.

The Scottish Government’s view is that the principal regulations do not relate to any of the reserved matters described in Section F1 of part II of schedule 5 to the Scotland Act 1998. When the committee considered the principal regulations, a majority of committee members preferred the Scottish Government’s view. It is of course for the committee to decide whether it wishes to report the regulations or whether, as with the Council Tax Reduction (Scotland) Regulations 2012, it is content that no devolution issue has been raised.

I imagine that members may have comments.

**John Scott:** As before, the matter should be drawn to the Parliament’s attention; I still believe it to be a devolution issue.

**Stewart Stevenson:** I have previously argued that the matter that our advisers have brought to our attention relates to a matter that is *intra vires*. I think that the Government’s position is quite clear on that. Having examined the regulations and schedule 5 to the Scotland Act 1998, I see why the

Government has come to that conclusion. I propose that the committee consider the regulations to be *intra vires*.

**The Convener:** Stewart Stevenson proposes that we consider the regulations to be *intra vires*. Are there any other comments?

10:45

**John Scott:** The issue obviously also applies to the next regulations—the Council Tax Reduction (State Pension Credit) (Scotland) Amendment Regulations 2013 (SSI 2013/49). I presume that whatever we decide will apply to both sets of regulations.

**The Convener:** If we recognise that we are doing that, it would be helpful. Both sets of regulations are on precisely the same subject. We clearly have two different points of view, which we have debated previously. Does anybody want to push it to a vote? The proposal is that the regulations are *intra vires*.

**John Scott:** I am happy to push it to a vote.

**The Convener:** As no one has any other comments, we will vote on the proposition, as we did before. As Stewart Stevenson said, the proposition is that the committee considers that the regulations are *intra vires* and should not be drawn to the attention of the Parliament. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Don, Nigel (Angus North and Mearns) (SNP)  
Eadie, Jim (Edinburgh Southern) (SNP)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

**Against**

Malik, Hanzala (Glasgow) (Lab)  
Pentland, John (Motherwell and Wishaw) (Lab)  
Scott, John (Ayr) (Con)

**The Convener:** The result of the division is: For 4, Against 3, Abstentions 0. The proposition is agreed to.

### **Council Tax Reduction (State Pension Credit) (Scotland) Amendment Regulations 2013 (SSI 2013/49)**

**The Convener:** Our legal advisers raised precisely the same points on these regulations as they did on SSI 2013/48, which we have just discussed and voted on. Can I take it that we reach the same conclusion?

**Members** *indicated agreement.*

**The Convener:** Can we confirm that there is no need to push it to a vote again—that we have decided the issue from the first vote?

**John Scott:** I am happy that the vote covers both sets of regulations. We do not need to rehearse the argument twice.

**The Convener:** I am advised that the previous vote can refer only to SSI 2013/48, so we will vote again.

The proposition is that the committee considers that the regulations are *intra vires* and should not be drawn to the attention of the Parliament. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Don, Nigel (Angus North and Mearns) (SNP)  
Eadie, Jim (Edinburgh Southern) (SNP)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

**Against**

Malik, Hanzala (Glasgow) (Lab)  
Pentland, John (Motherwell and Wishaw) (Lab)  
Scott, John (Ayr) (Con)

**The Convener:** The result of the division is: For 4, Against 3, Abstentions 0. The proposition is agreed to.

### **Personal Injuries (NHS Charges) (Amounts) (Scotland) Amendment Regulations 2013 (SSI 2013/53)**

*The committee agreed that no points arose on the instrument.*

## **Instruments not subject to Parliamentary Procedure**

### **Police and Fire Reform (Scotland) Act 2012 (Commencement No 3 and Transitory Provision) Order 2013 (SSI 2013/47)**

### **Police and Fire Reform (Scotland) Act 2012 (Commencement No 4, Transitory and Transitional Provisions) Order 2013 (SSI 2013/51)**

10:48

*The committee agreed that no points arose on the instruments.*



## Victims and Witnesses (Scotland) Bill: Stage 1

10:48

**The Convener:** Under agenda item 4 we will consider the delegated powers in the Victims and Witnesses (Scotland) Bill.

The committee is invited to agree the questions that it wishes to raise with the Scottish Government on the delegated powers in the bill. It is suggested that those questions be raised in correspondence. The committee expects to consider a draft report, based on the responses received, at its meeting on 19 March.

Section 271H(1) of the Criminal Procedure (Scotland) Act 1995 specifies a range of special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 8(a) of the bill amends the definition of “standard” special measures.

Section 8(b) inserts new section 271A(15) into the 1995 act. That new section allows ministers to modify section 271A(14), which sets out the standard special measures, so as to add new ones or amend or delete the existing ones. It also enables the modification of the procedures for use of those measures, in consequence of a change to the measures.

Does the committee agree to ask the Scottish Government whether the power in section 8(b) could be drawn more narrowly to allow for the updating of or addition to the current list of standard special measures for vulnerable witnesses contained in section 271A(14) of the 1995 act, rather than enabling the removal of a measure currently listed; and, alternatively, if the power to remove any measure currently listed is required in consequence of the updating of or addition to the measures, whether the power could reflect that?

*Members indicated agreement.*

**The Convener:** As with the previous power considered, section 271H(1) of the 1995 act specifies a range of six special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 17(b) of the bill will allow the Scottish ministers to add new special measures to section 271H(1) or to amend or delete existing special measures and modify the procedures for the use of a special measure in consequence.

Does the committee agree to ask the Government whether the power in section 17(b) could be drawn more narrowly to allow for the updating of or addition to the current list of special

measures for vulnerable witnesses set out in section 271H(1) of the 1995 act, rather than enabling the removal of a measure currently listed; and, alternatively, if the power to remove any measure currently listed is required in consequence of the updating of or addition to the measures, whether the power could reflect that?

*Members indicated agreement.*

**The Convener:** Section 21 provides that instead of or in addition to any sentence for the offence that the court can currently pass, the court may order a person convicted of assaulting or impeding police officers or police staff to pay a sum under a “restitution order” made by the court.

Section 21 of the bill inserts new section 253A into the 1995 act. Does the committee agree to ask the Scottish Government why it is proposed that the power in new section 253A(3) to vary the maximum amount of restitution payment that may be ordered by the court should be exercisable in the form of regulations rather than by order, given that an order is the usual form used to prescribe the level of maximum amount, without other substantive provisions?

*Members indicated agreement.*

**The Convener:** In connection with restitution order payments mentioned in the previous power, any amounts are to be paid to the Scottish ministers. Ministers shall establish and maintain a restitution fund to secure the provision of support services for persons who have been victims of a police assault. New section 253B(6) allows the Scottish ministers to make further provision about the fund, including in connection with its operation, administration, records and reports to the Scottish Government.

The delegated powers memorandum indicates in paragraph 65 that there could be a requirement in future to exercise the powers to make urgent changes in the operation or administration of the restitution fund. In that case, could the application of the affirmative procedure raise any difficulties, for instance if the changes required to be approved urgently by the Parliament during the summer recess? If the emergency affirmative procedure was applied to the exercise of the power to make orders, could that resolve any such difficulties? Does the committee agree to ask the Scottish Government for an explanation of those issues?

**Hanzala Malik:** On restitution payments, if courts are imposing an additional fine and that goes into the Scottish treasury—almost—is that not a conflict of interest?

**The Convener:** That is an interesting question. I am not so sure that the courts regard themselves as the defenders of the Scottish treasury and I

think that the fund is in effect a trust fund. I suggest that that matter is for the committee that considers the policy, rather than for us. The legal advisers seem to agree with that view.

**Stewart Stevenson:** Our briefing does say:

“Any payment out of the fund can only be made to a person who provides or secures the provision of support services for such victims.”

**Hanzala Malik:** Which the Government pays for.

**Stewart Stevenson:** Which the restitution fund pays for.

**Hanzala Malik:** Surely the Government manages it.

**Stewart Stevenson:** No. The money comes from person “P”—as it says in the bill—who is the person who has been found guilty. It is put in the restitution fund and the restitution fund pays money to people who provide or secure the provision of support services for victims. The Government neither contributes to it nor takes from it. That is my understanding, but I am happy to hear another view.

**Hanzala Malik:** I have just raised an issue—

**Stewart Stevenson:** It sounds as if it is a policy issue rather than a subordinate legislation issue.

**The Convener:** I am quite clear that it is a policy issue, and I will have no difficulty in ruling that that is the case if I have to, but the more important thing is that Hanzala Malik may well have a point, in the sense that the restitution fund might make moneys from criminals available to do things that Government funds might otherwise do. That is inevitably the case.

**Stewart Stevenson:** That is fair.

**Hanzala Malik:** I just wanted to draw attention to that.

**The Convener:** Thank you.

Section 22 makes significant provision to establish a victim surcharge and a victim surcharge fund. That is achieved by adding into the 1995 act sections 253F to 253J. The court must impose a victim surcharge on offenders who are subject to any sentence that is prescribed by the Scottish ministers in regulations that are made under this section, except when a restitution order under section 21 is imposed.

In relation to the delegated powers in section 22, which inserts new section 253F into the 1995 act, does the committee agree to ask the Scottish Government why it is considered necessary or appropriate that the scope of the powers in new subsections 253F(2) and (5) is wide enough to enable any level of victim surcharge amounts to

be prescribed to be payable by different descriptions of offender, or different circumstances, without any maximum or initial maximum amounts being prescribed by the bill?

Does the committee agree to ask the Scottish Government to consider whether the scope of the powers could be drawn more narrowly, to reflect the initial policy intentions? In explaining those policy intentions, the DPM says:

“the Scottish Government intends to impose the surcharge on those sentenced to a court fine in the first instance and to set out a tiered scale of surcharge amounts, linked to the amount of the fine.”

Given that statement in the DPM, it is noted that further consideration will be required in advance of putting the proposed details into regulations, and it is assumed that consultation will be needed with the appropriate persons and bodies on those details. Therefore, does the committee agree to ask the Scottish Government to consider whether section 22 should be amended to include a requirement for the Scottish ministers to consult appropriate persons and bodies that have an interest in the regulations under the section before they are made? Is the committee so minded?

**Members indicated agreement.**

**The Convener:** Section 27(2) inserts schedule 1A into the Mental Health (Care and Treatment) (Scotland) Act 2003. Schedule 1A makes further provision in relation to the national confidential forum. It is inserted into the 2003 act because the forum is to operate as part of the Mental Welfare Commission for Scotland, provision in respect of which is set out in that act.

In relation to the power that is contained in section 27(2), which inserts subparagraph (3) of paragraph 7 of schedule 1A to the 2003 act, does the committee agree to ask the Scottish Government whether it is intended that the Scottish ministers will be under a duty to make an order under that subparagraph or whether they will have the discretion to do so; and, accordingly, to consider whether that should be made clearer?

**Members indicated agreement.**

**The Convener:** Sections 1 to 5, 6(b), 8(b), 17 and 24(d) of the bill have varying drafting methods for the powers to modify the list of persons and so on that are contained in each section, which are either of the form, “the Scottish Ministers may by order/regulations modify subsection (X),” or—for example—“the Scottish Ministers may by order/regulations modify the definition of ‘qualifying person’ in subsection (X).”

Does the committee agree to ask for an explanation of a matter that applies generally to the powers that are contained in sections 1 to 5, 6(b), 8(b), 17 and 24(d)? That matter is that each

of those sections contains powers to modify a list of persons, types of information and so on that are provided for in a particular subsection. In some sections, the power is drafted as a power to modify the definition or description of “qualifying person”—for example—in the relevant subsection. In others, the power is framed simply as a power to modify the subsection—for example, in section 2(4). The committee notes that section 3(2) of the Water Resources (Scotland) Bill as amended at stage 2 specifies that the Scottish ministers may by regulations modify the list in subsection (1) by adding a public body or by updating or removing an entry.

Could a consistent drafting method be used in the sections of the bill that have been referred to, to make it clear that the power is a power to modify a list of persons in the relevant subsection and to specify how the modification can be done?

**Members** *indicated agreement.*

11:00

**The Convener:** It is all about clarity of drafting.

The general provisions in sections 28 to 30 come into force on the day after royal assent. There is also a usual power to bring into force the other provisions of the bill on days that will be appointed by order. Section 30(3) proposes that a commencement order may contain transitory, transitional or saving provisions. No parliamentary procedure will attach to such provisions, apart from the laying of the order and consideration by the committee.

In relation to the power in section 30(3) to make transitional, transitory or saving provisions in a commencement order, does the committee agree to ask for further explanation of why it has been considered appropriate that no parliamentary procedure will apply to the making of such provisions? In particular, the bill makes a complex series of amendments to various provisions of the 1995 act in relation to court procedures in the interests of vulnerable witnesses. It may be assumed that any such ancillary provisions that are added to a commencement order could be complex or could have significant implications for the persons affected by them.

Does the committee agree to ask the Scottish Government to consider whether the negative procedure could be more suitable for scrutiny of ancillary provisions that are added to a commencement order, given that that would be consistent with the application of the negative procedure to the ancillary powers in section 29?

It might be worth adding that that is a subject that we have considered relatively recently. We take fright at the idea of such orders just being

laid. Do members agree that we should ask the Government those questions and bring that issue to its attention?

**Members** *indicated agreement.*

## **Aquaculture and Fisheries (Scotland) Bill: Stage 1**

**The Convener:** That completes that item.

Our next meeting will be on Tuesday 5 March.

*Meeting closed at 11:02.*

11:02

**The Convener:** Agenda item 5 is consideration of the response from the Scottish Government to the committee's stage 1 report on the bill. Members will have seen the briefing paper and the response from the Government. Unless amendments that affect the delegated powers provisions are made to the bill at stage 2, the committee will not consider it again. Do members have any comments?

Are we content to note the response and, if necessary, to reconsider the bill after stage 2?

**Members** *indicated agreement.*

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