The Scottish Parliament
Parlaimd na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

17th Meeting, 2010 (Session 3)

Tuesday 25 May 2010

The Committee will meet at 2.15 pm in Committee Room 4.

1. **Draft instruments subject to approval:** The Committee will consider the following—

   the Climate Change (Annual Targets) (Scotland) Order 2010 (SSI 2010/draft).

2. **Instruments subject to annulment:** The Committee will consider the following—

   the Protection of Vulnerable Groups (Scotland) Act 2007 (Power to Refer) (Information Relevant to Listing Decisions) Order 2010 (SSI 2010/178);
   the Protection of Vulnerable Groups (Scotland) Act 2007 (Applications for Removal from List and Late Representations) Regulations 2010 (SSI 2010/179);
   the Protection of Vulnerable Groups (Scotland) Act 2007 (Savings and Transitional Provisions) Order 2010 (SSI 2010/180);
   the Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Organisations and Other Bodies) (Prescribed Information) Regulations 2010 (SSI 2010/181);
   the Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Courts) (Prescribed Information) Regulations 2010 (SSI 2010/182);
   the Protection of Vulnerable Groups (Scotland) Act 2007 (Vetting Information) Regulations 2010 (SSI 2010/189);
   the Police Act 1997 (Alteration of the Meaning of Suitability Information relating to Children and Protected Adults) (Scotland) Order 2010 (SSI 2010/190);
   the Protection of Vulnerable Groups (Scotland) Act 2007 (Health Professionals) (Health Service Lists) Regulations 2010 (SSI 2010/191);
   the Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Manner and Place for the Taking of Fingerprints and Prescribed Personal Data Holders) Regulations 2010 (SSI 2010/192);
the Protection of Vulnerable Groups (Scotland) Act 2007 (Administration of the Scheme) Regulations 2010 (SSI 2010/193);
the Protection of Vulnerable Groups (Scotland) Act 2007 (Unlawful Requests for Scheme Records) (Prescribed Circumstances) Regulations 2010 (SSI 2010/194);
the Arbitral Appointments Referee (Scotland) Order 2010 (SSI 2010/196);
the Sports Grounds and Sporting Events (Designation) (Scotland) Order 2010 (SSI 2010/199).

3. **Instruments not laid before the Parliament:** The Committee will consider the following—

the Arbitration (Scotland) Act 2010 (Commencement No. 1 and Transitional Provisions) Order 2010 (SSI 2010/195 (C.10)).

Irene Fleming
Clerk to the Subordinate Legislation Committee
Room T2.60
The Scottish Parliament
Edinburgh
Tel: 0131 248 5212
Email: irene.fleming@scottish.parliament.uk
The papers for this meeting are as follows—

Legal Brief SL/S3/10/17/1 (P)

Summary of Recommendations SL/S3/10/17/2

**Agenda item 2**

Instrument Responses SL/S3/10/17/3
Summary of Recommendations

The Committee will be invited to consider the following recommendations at the meeting. Decisions are a matter for the Committee.

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**Agenda Item 1**  Draft instruments subject to approval

**The Climate Change (Annual Targets) (Scotland) Order 2010 (SSI 2010/draft)**

The Committee may wish to consider if it is content with this instrument.

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**Agenda Item 2**  Instruments subject to annulment


The Committee may wish to report that the drafting of this instrument is defective in respect that it does not specify “relevant functions” of the NHS Tribunal, as required by section 8(3)(d) of the 2007 Act. The Committee may wish to report that the Scottish Government intends to bring forwards an amendment Order before this instrument comes into force.

The Committee may wish to report that, given that it is intended that a finding of fact by the NHS Tribunal for the purposes of section 17(5) of the 2007 Act is a finding of fact made in proceedings before the NHS Tribunal, the Committee considers that article 3 could be clearer in this regard.

**The Protection of Vulnerable Groups (Scotland) Act 2007 (Applications for Removal from List and Late Representations) Regulations 2010 (SSI 2010/179)**

The Committee may wish to find the Scottish Government’s response satisfactory.

The Committee may wish to find the Scottish Government’s response to questions 1 and 2 to be satisfactory, but to express the view that it may be of assistance to anyone reading the instrument if a comment to the effect that the time limits are those laid down in the Sheriff Court Ordinary Cause Rules (in respect of article 11(2)(a)) and the Rules of the Court of Session 1994 (in respect of articles 11(2)(c) and 11(3)(b) was included in the Explanatory Note or in any guidance to be published.

The Committee may wish to find the Scottish Government’s response to question 3 to be satisfactory.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Organisations and Other Bodies) (Prescribed Information) Regulations 2010 (SSI 2010/181)

The Committee may wish to report that the instrument is not sufficiently clear as to the limits of the duties imposed under sections 3(1), 3(2), 4, 5, 6(2) and 8(1) of the 2007 Act, consequent on the use of the word “including” in paragraphs 1 and 9 of Schedule 1 and paragraphs 1 and 9 of Schedule 2 of the instrument. The Committee may wish to report that it considers this is a significant issue, in particular (a) as paragraph 1 of each schedule relates to identity details relating to an individual and issues of sensitivity may arise; and (b) failure to give any prescribed information held to the Scottish Ministers is in certain cases an offence by virtue of section 9 of the 2007 Act.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Referrals by Courts) (Prescribed Information) Regulations 2010 (SSI 2010/182)

The Committee may wish to report that the instrument is not sufficiently clear as to the limits of the duties imposed under sections 7(1) and 7(3) of the 2007 Act, consequent on the use of the word “including” in paragraphs 2 and 5 of the schedule to this instrument. The Committee may wish to report that it considers this is a significant issue, in particular as paragraph 2 relates to identity details relating to an individual and issues of sensitivity may arise.

The Protection of Vulnerable Groups (Scotland) Act 2007 (Vetting Information) Regulations 2010 (SSI 2010/189)

The Police Act 1997 (Alteration of the Meaning of Suitability Information relating to Children and Protected Adults) (Scotland) Order 2010 (SSI 2010/190)
The Protection of Vulnerable Groups (Scotland) Act 2007 (Health Professionals) (Health Service Lists) Regulations 2010 (SSI 2010/191)

The Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Manner and Place for the Taking of Fingerprints and Prescribed Personal Data Holders) Regulations 2010 (SSI 2010/192)

The Protection of Vulnerable Groups (Scotland) Act 2007 (Administration of The Scheme) Regulations 2010 (SSI 2010/193)

The Protection of Vulnerable Groups (Scotland) Act 2007 (Unlawful Requests for Scheme Records) (Prescribed Circumstances) Regulations 2010 (SSI 2010/194)

The Arbitral Appointments Referee (Scotland) Order 2010 (SSI 2010/196)

The Sports Grounds and Sporting Events (Designation) (Scotland) Order 2010 (SSI 2010/199)

The Committee may wish to consider if it is content with these instruments.

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Agenda Item 3  Instruments not laid before the Parliament

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The Arbitration (Scotland) Act 2010 (Commencement No. 1 and Transitional Provisions) Order 2010 (SSI 2010/195)

The Committee may wish to consider if it is content with this instrument.
The Protection of Vulnerable Groups (Scotland) Act 2007 (Power to Refer) (Information Relevant to Listing Decisions) Order 2010 (SSI 2010/178)

On 12 May 2010 the Scottish Government was asked:

1. In the operation of section 8(1) it is necessary to have regard to the exercise of “relevant functions”. “Relevant functions” are defined in section 8(3). Section 8(3)(d) provides that, in relation to a person specified in an order made under section 8(2), the “relevant functions” are such functions as are specified by the order. Given that this instrument is made under section 8(2) in respect of the NHS Tribunal, and given the requirement in section 8(3)(d) that functions in relation to the NHS Tribunal be specified in the instrument, why have functions not been specified in the instrument and what is considered to be the effect of the failure to do so?

2. The second paragraph of the Explanatory Note states that article 3 of the Order specifies the NHS Tribunal as a person making “a relevant finding of fact” in proceedings before it, for the purposes of section 17(5)(d) of the Act. However, neither article 3 nor section 17(5)(d) refer to “proceedings before”. Given the intention of the provision as expressed in the Explanatory Note, what is considered to be the effect of the absence from article 3 of a reference to “proceedings before”?

The Scottish Government responded:

1. In relation to the first query, it was the intention of the Scottish Government that all the functions of the NHS Tribunal as constituted in accordance with schedule 8 of the National Health Service (Scotland) Act 1978 would be “relevant functions” in terms of section 8(1)(a) of the Protection of Vulnerable Groups (Scotland) Act 2007 and therefore that all the functions would be covered simply by specifying the NHS Tribunal as a person in terms of section 8(2). However the Scottish Government accepts that this should have been specified explicitly in the instrument and therefore it intends to bring forward an amendment order to make this explicit before the instrument comes into force.

2. In relation to the second query, the Scottish Government does not consider, when using the order making power in section 17(5)(d) to specify “any other person” making a relevant finding of fact for the purposes of section 17 of the Act (as opposed to “any other circumstance”), that the wording of the order making power requires a statement that a finding of fact by such person is made in proceedings before it. Further, the Scottish Government thinks that it is implicit that a finding of fact is made by any person, in this case the NHS Tribunal, in any proceedings before it.
On 12 May 2010 the Scottish Government was asked:
Given that regulation 3 of the instrument makes provision for the prescribed period for the purposes of section 25(3)(a) of the 2007 Act (application for removal from the list) and given that regulation 10 makes transitional provision in relation to those individuals transferred to the children’s list under section 43 of the 2007 Act (transfer from 2003 Act list), is it intended that regulation 3 should be subject to the provisions of regulation 10 and, there being no statement to this effect in regulation 3, could the instrument not be clearer in this respect?

The Scottish Government responded:
Regulation 3 prescribes the period at the end of which first application for removal from either the children’s or the adults’ list can be made. The Government does not consider that there should be a statement in regulation 3 to the effect that it is subject to regulation 10 since the provisions deal with different, albeit related, matters and regulation 3 is not truly subject to regulation 10, which is a transitional provision.

Regulation 10 makes transitional provision which applies specific provisions to those individuals transferred to the children’s list under section 43 of the 2007 Act in relation both to their first and subsequent applications for removal from only the children’s list. It is not intended that regulation 3 is subject to regulation 10. Regulation 3 determines the prescribed period. Regulation 10(1) and (2) determine how the date of inclusion on the list is to be calculated for the purposes of regulation 3 for certain persons transferred from the list under the Protection of Children (Scotland) Act 2005 (“the 2005 Act”). Regulation 10 (6) determines who is a child (in relation to persons transferred from the list under the 2005 Act) for the purposes of regulation 3. Regulation 10(3) to (5) make provision for the prescribed period for subsequent applications for removal from the children’s list for persons transferred from the list under the Protection of Children (Scotland) Act 2005 and are therefore not relevant to regulation 3.

The Government considers that the instrument is sufficiently clear as drafted, particularly since regulation 10 is a transitional provision.

On 12 May 2010 the Scottish Government was asked:
1. In article 11(2)(a) what is the time allowed to appeal against the sheriff’s decision, given that section 15 of the 2003 Act does not appear to specify a time? If no time is specified in section 15 of the 2003 Act, what is the meaning and effect of the reference in article 11(2)(a) to the expiry of the time allowed to appeal the sheriff principal’s decision?

2. In article 11(2)(c) what is the time allowed to appeal against the sheriff principal’s decision, given that section 15 of the 2003 Act does not appear to specify a time? If no time is specified in section 15 of the 2003 Act, what is the meaning and effect of the reference in article 11(2)(c) to the expiry of the time allowed to appeal the sheriff principal's decision?

The same issue and question arise with respect to article 11(3)(b).

3. Should article 11(5)(a) not commence “in subsection (1) for “the list kept under section 1(1)” and”, and thereafter continue “in subsection (3) ….”?

The Scottish Government responded:
1. As section 15 of the Protection of Children (Scotland) Act 2003 (“the 2003 Act”) does not specify a time limit for the appeal under section 15(4), the time limit that applies is that laid down in the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (1993/1956) rule 31.1. While no time is specified in section 15 a time period is specified in relation to the lodging of the appeal as stated above and so the meaning and effect of the reference is clear. Section 15 will continue to apply until the time limit set down for the appeal by the generally applicable rules of court has expired.

2. As section 15 of the 2003 Act does not specify a time limit for the appeal under section 15(6), the time limit that applies is that laid down in the Rules of the Court of Session 1994, chapter 40. While no time is specified in section 15 a time period is specified in relation to the lodging of the appeal as stated above and so the meaning and effect of the reference is clear. Section 15 will continue to apply until the time limit set down for the appeal by the generally applicable rules of court has expired.

3. We do not agree that the meaning of section 15(1) of the 2003 Act should be altered as suggested, as article 11 only applies where an appeal has been lodged prior to the relevant date (the repeal of the 2003 Act). The glosses applied are applied only to the later stage of the appeal processes as these are the stages which will still be relevant at that date. After the repeal of the 2003 Act the persons on the list kept under section 1 of the 2003 Act will have been transferred to the children’s list kept under the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”), by virtue of section 43 of that Act, and so any appeal will be under the 2007 Act’s provisions.
On 12 May 2010 the Scottish Government was asked:

The information detailed in Schedule 1 is prescribed information for the purposes of sections 3(1), 3(2), 4, 5 and 6(2) of the 2007 Act. The information detailed in Schedule 2 is prescribed information for the purposes of 8(1) of the 2007 Act. Section 9 of the 2007 Act provides that it is an offence to fail, without reasonable excuse, to comply with a duty under section 3, 4 or 5 to give information prescribed for the purposes of those sections to the Scottish Ministers.

1. In Schedule 1 what is intended by the use of the word “including” in paragraph 1, which prescribes “identity information”, and in paragraph 9 which prescribes details of circumstances in the context of a referral ground? Given the requirements in section 3(1), 3(2), 4 and 5 to give prescribed information and the discretion in section 6(2) to give prescribed information, how are the nature and extent of the prescribed information to be ascertained beyond the information specifically referred to? Given that conduct which amounts to a criminal offence should be clearly identifiable is it considered that the scope of the offence under section 9 of failure to give prescribed information under sections 3, 4 or 5 is sufficiently clear and precise?

2. In Schedule 2 what is intended by the use of the word “including” in paragraph 1, which prescribes “identity information”, and in paragraph 9 which prescribes details of circumstances in the context of a referral ground? Given the discretion in section 8(1) to give prescribed information, how are the nature and extent of the prescribed information to be ascertained and is this considered sufficiently clear?

The Scottish Government responded:

1. Paragraph 1 of Schedule 1 provides that identity details relating to the individual are prescribed information for the purposes of sections 3(1) and (2), 4, 5 and 6(2) of the Act. Similarly, the details of the circumstances in which the referring body considers that a referral ground has been met are prescribed information for the purposes of sections 3(1) and (2), 4, 5 and 6(2), as set out in paragraph 9. The use of the word “including” in each of these paragraphs is intended to give examples of the types of details which would fall within these two categories of prescribed information. Identity details will include the information listed in paragraph 1, whilst details of the circumstances in which the referring body considers that a referral ground has been met will include the information listed in paragraph 9, but these are not exhaustive lists. Given the potentially wide range of referrals which may be made to Scottish Ministers, it is essential that organisations are able to provide further identity details or further details of the circumstances in which the referral ground is considered to have been met beyond the examples listed. It is considered that the two categories of prescribed information - “identity details relating to the individual” and “details of the circumstances in which the referring body considers that a referral ground in section 2(a) or (b) has been met in relation to the individual” - are sufficiently clear to allow referring bodies to determine what information is prescribed.
In terms of sections 3(1) and (2), 4, and 5 of the Act referring bodies are required to provide only such prescribed information that they hold. (Under section 6(2) organisations have a discretion as to whether they provide prescribed information which they hold.) The offence at section 9 of the Act relates to failure to comply with the duties at sections 3 to 5 of the Act. Referring bodies may not hold all of the identity details listed in sub-paragraphs (a) to (f) of paragraph 1 or all of the details of the circumstances surrounding the referral listed in sub-paragraphs (a) to (e) of paragraph 9 and they are then not required to provide that information. Equally they may have other information on identity or on the circumstances of the referral beyond the examples listed in paragraphs 1 and 9 and they would still be under a duty to provide that information. In the circumstances, the Scottish Government is satisfied that the scope of the offence at section 9 is sufficiently clear and precise.

2. Paragraph 1 of Schedule 2 provides that identity details relating to the individual are prescribed information for the purposes of section 8(1) of the Act. Similarly, the details of the circumstances in which the referring regulatory body considers that a referral ground has been met are prescribed information for the purposes of sections 8(1), as set out in paragraph 9. In terms of section 8(1) of the Act referring regulatory bodies have a discretionary power to give the Scottish Ministers prescribed information that they hold, in the circumstances set out in section 8(1)(a) and (b). The use of the word “including” in each of these paragraphs in Schedule 2 to this instrument is intended to give examples of the types of details which would fall within these two categories of prescribed information. As with Schedule 1, identity details will include the information listed in paragraph 1, whilst details of the circumstances in which the referring regulatory body considers that a referral ground has been met will include the information listed in paragraph 9, but these are not exhaustive lists. Given the potentially wide range of referrals which may be made to Scottish Ministers, it is essential that referring bodies are able to provide further identity details or further details of the circumstances in which the referral ground is considered to have been met beyond the examples listed. It is considered that the two categories of prescribed information - “identity details relating to the individual” and “details of the circumstances in which the referring body considers that a referral ground in section 2(a) or (b) has been met in relation to the individual” - are sufficiently clear to allow referring regulatory bodies to determine what information is prescribed. The Scottish Government considers that paragraphs 1 and 9 of Schedule 2 are sufficiently clear.