

## ITS 25.3 – Delegated legislation made under Act

**Delegated legislation made under an Act may be taken into account as persuasive authority on the legal meaning of the Act's provisions, especially where the delegated legislation is roughly contemporaneous with the Act.<sup>1</sup>**

### COMMENTS

Role of delegated legislation in interpreting the Act

Rationale

Contemporary regulation

### **Role of delegated legislation in interpreting the Act**

Delegated legislation can play a role in interpreting a parent Act, much like guidance or official statements related to the Act. While it may provide insight, its authority is persuasive at best. Delegated legislation is particularly relevant when it is contemporaneous with the parent Act.

The principles governing the use of delegated legislation in statutory interpretation were outlined in *Hanlon v Law Society* (1981) AC 124:<sup>2</sup>

1. **Constraining Ambiguity:** Delegated legislation may aid in construing the parent Act only when the Act's meaning is ambiguous.
2. **Contemporanea Expositio:** Regulations made under the Act can serve as a contemporaneous explanation of the Act by Parliament or the administration but do not dictate its meaning. This approach avoids substituting the rule-making authority for judicial interpretation and acknowledges that the

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<sup>1</sup> Bennion 2020 s 24.18

<sup>2</sup> Cited in Bennion 2020 p 767

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regulation itself might be flawed or exceed legal authority (*ultra vires*).

3. **Consistency as Confirmation:** Regulations consistent with a particular interpretation of the Act can reinforce that interpretation.
4. **Framework Guidance:** When regulations are developed alongside an Act to elaborate on its framework, they may provide reliable guidance on its meaning.
5. **Decisive Modifications:** Regulations made under a power to modify the Act and enacted simultaneously with it may serve as a decisive guide to the Act's meaning.
6. **As If Enacted:** Regulations explicitly treated as if they were part of the parent Act can offer clear guidance.

## Rationale

The rationale for using delegated legislation as an interpretive tool is often based on the assumption that it reflects the views of the government department responsible for initiating and administering the legislation. However, this approach raises constitutional concerns, as it equates the government's intent with the legislature's intent. In reality, delegated legislation primarily shows how the executive interpreted the statute after its passage. Its persuasiveness depends on the context.

## Contemporary regulation

Delegated legislation is most persuasive when drafts were available during the Bill's passage through the legislature. In such cases, the legislature's intent may reasonably be inferred from the knowledge of these drafts. However, later regulations created by the executive do not reflect the legislature's original

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intent. Parliament's involvement with such regulations is limited to approval or rejection, and the executive's power to make regulations cannot alter the enabling Act's meaning. Regulations made subsequently by the executive thus have no bearing on the interpretation of the Act. <sup>^3</sup>

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<sup>3</sup> Legal Services Commission v Loomba (2012) EWHC 29 (QB) cited in Bennion 2020 p 768