



The Scottish Parliament
Pàrlamaid na h-Alba

INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

AGENDA

7th Meeting, 2012 (Session 4)

Wednesday 21 March 2012

The Committee will meet at 10.00 am in Committee Room 6.

1. **Subordinate legislation:** The Committee will take evidence on the Scottish Secure Tenancies (Repossession Orders) (Maximum Period) Order 2012 (SSI 2012/draft); and Scottish Secure Tenancies (Proceedings for Possession) (Pre Action Requirements) Order 2012 (SSI 2012/draft) from—

Keith Brown, Minister for Housing and Transport, Pauline Brice, Housing Policy Manager, William Fleming, Branch Head, Social Housing and Strategy Unit, and Gillian Turner, Principal Legal Officer, Scottish Government.

2. **Subordinate legislation:** Keith Brown (Minister for Housing and Transport) to move—

S4M-02390—That the Infrastructure and Capital Investment Committee recommends that the Scottish Secure Tenancies (Proceedings for Possession) (Pre Action Requirements) Order 2012 (SSI 2012/draft) be approved.

3. **Subordinate legislation:** Keith Brown (Minister for Housing and Transport) to move—

S4M-02389—That the Infrastructure and Capital Investment Committee recommends that the Scottish Secure Tenancies (Repossession Orders) (Maximum Period) Order 2012 (SSI 2012/draft) be approved.

4. **Rail Franchise:** The Committee will take evidence from—

Kevin Lindsay, Scottish Secretary, Associated Society of Locomotive Steam Enginemen and Firemen (ASLEF);

Iain Macintyre, Regional Organiser, National Union of Rail, Maritime and Transport Workers (RMT);

Tom Kennedy, Senior Regional Organiser, Scotland, Transport Salaried Staffs' Association (TSSA);

and then from—

Richard Davies, Head of Strategic Policy, Association of Train Operating Companies (ATOC).

5. **Subordinate legislation:** The Committee will consider the following negative instruments—

Water Services Charges (Billing and Collection) (Scotland) Order 2012 SSI/2012/53; and
A720 Edinburgh City Bypass and M8 (Hermiston Junction) (Speed Limit) Regulations 2012 SSI/2012/62.

Steve Farrell
Clerk to the Infrastructure and Capital Investment Committee
Room T3.40
The Scottish Parliament
Edinburgh
Tel: 0131 348 5211
Email: steve.farrell@scottish.parliament.uk

The papers for this meeting are as follows—

Agenda item 1

Cover note

ICI/S4/12/7/1

[Scottish Secure Tenancies \(Repossession Orders\)
\(Maximum Period\) Order 2012 \(SSI 2012/draft\)](#)

[Scottish Secure Tenancies \(Proceedings for Possession\)
\(Pre Action Requirements\) Order 2012 \(SSI 2012/draft\)](#)

Agenda item 4

PRIVATE PAPER

ICI/S4/12/7/2 (P)

Written evidence

ICI/S4/12/7/3

Agenda item 5

Cover note

ICI/S4/12/7/4

[Water Services Charges \(Billing and Collection\) \(Scotland\)
Order 2012 SSI/2012/53](#)

[A720 Edinburgh City Bypass and M8 \(Hermiston Junction\)
\(Speed Limit\) Regulations 2012 SSI/2012/62](#)

Infrastructure and Capital Investment Committee

7th Meeting, 2012 (Session 4), Wednesday, 21 March 2012

Subordinate Legislation

Title of Instruments	Scottish Secure Tenancies (Repossession Orders) (Maximum Period) Order 2012 (SSI 2012/draft) Scottish Secure Tenancies (Proceedings for Possession) (Pre-Action Requirements) Order 2012 (SSI 2012/draft)
Type of Instruments	Affirmative
Laid Date	23 February 2012
Circulated to Members	16 March 2012
Meeting Date	21 March 2012
Minister to attend the meeting	Yes
SSI drawn to the Parliament's attention by Subordinate Legislation Committee	Yes
Reporting Deadline	18 April 2012

Procedure

1. The Infrastructure and Capital Investment Committee has been designated lead committee and is required to report to the Parliament by 18 April 2012.
2. Under Rule 10.6.1 (b), these Orders are subject to affirmative resolution before they can be made. It is for the Infrastructure and Capital Investment Committee to recommend to the Parliament whether the Orders should be approved.
3. The Minister for Housing and Transport has, by motions S4M-02389 and S4M-02390 (set out in the agenda), proposed that the Committee should recommend the approval of these Orders. The Minister will attend in order to speak to and move the motions. The formal debate may last for up to 90 minutes. Ahead of the formal debate (as part of an earlier agenda item), there will be an opportunity for members to ask questions of the Minister and his officials.

4. At the end of debate, the Committee must decide whether or not to agree the motions, and then report to Parliament accordingly. Such a report need only be a short statement of the Committee's recommendation.

Scottish Secure Tenancies (Repossession Orders) (Maximum Period) Order 2012 (SSI 2012/draft) [Motion number: S4M-02389]

Purpose

5. This Order prescribes the maximum period for which a landlord's right to recover possession of a property let under a secure tenancy may be effective, in terms of section 16(5A)(c) of the Housing (Scotland) Act 2001. It provides that the maximum period is six months from the date that the decree authorising recovery of possession is extracted by a sheriff clerk.

Consideration by the Subordinate Legislation Committee

6. The SLC refers the practical effect of this instrument to the lead Committee. The SLC report states that whilst this is not a formal reporting matter, the lead Committee may wish to consider it further.

7. The extract from the Subordinate Legislation Committee (SLC) report, including that Committee's correspondence with the Scottish Government, is provided at **Annexe A**.

8. In view of the issue raised by the SLC, members may wish to explore the following point with the Minister for Housing and Transport at the meeting.

9. The SLC is concerned that although the Order appears to prescribe a maximum period of six months within which an order for recovery of possession may have effect, this is dependent on decree being extracted promptly by the sheriff clerk. It, therefore, highlights that the maximum period is contingent upon the individual actings of sheriff clerks in 49 different courts throughout Scotland.

10. In its report, the SLC states that any delay in extracting decree by the landlord will have the effect of postponing the last date on which the order may have effect against the tenant.

11. In its response to the SLC, the Scottish Government considers that it sees no difficulty in the possibility that a particular sheriff clerk may, as a matter of administrative practice, briefly delay extract because the day the 14 day minimum period expires is not a convenient day for extracting the court order.

12. The Scottish Government explains that the power of the Scottish Ministers is to prescribe the maximum period within which a sheriff may specify that the court order is to have effect, and that the start date (the date of extract) is a matter under the control of the court.

Scottish Secure Tenancies (Proceedings for Possession) (Pre-Action Requirements) Order 2012 (SSI 2012/draft) [Motion number: S4M-02390]

Purpose

13. Tenants who rent properties from local authorities and registered social landlords generally do so on Scottish secure tenancies. Where a landlord wishes to recover possession of a property and evict the tenant, it must obtain a court order which permits it to do so. The procedure with which a landlord must comply is laid down in sections 14 to 16 of the Housing (Scotland) Act 2001 (“the 2001 Act”).

14. Where a landlord seeks to recover possession on the ground that the tenant has not paid rent which is lawfully due, the landlord has to comply with the pre-action requirements laid down in section 14A of the 2001 Act. It may not commence proceedings until it has confirmed to the court that it has done so.

15. This Order makes provision about the pre-action requirements contained in section 14A of the 2001 Act. It specifies further steps about the pre-action requirements on social landlords in relation to—

- providing information to the tenant about the default;
- providing advice and assistance to the tenant in relation to housing benefit and other types of financial assistance;
- making reasonable efforts to agree a plan with the tenant for addressing the default;
- establishing housing benefit entitlement;
- the steps considered likely to result in payment of any arrears within a reasonable time, in addition to the on-going rent obligations; and
- the tenant’s compliance with an agreed repayment plan.

16. The Explanatory Note states that these steps should help to avoid the need for repossession action to be commenced.

17. The Explanatory Note also states that additional costs will arise for the Scottish Courts Service and for social landlords. However, it is suggested that these costs will be offset by the savings to the Scottish Courts Service from fewer cases being progressed and, in relation to social landlords, by the anticipated savings from the good practice that the Order will promote in tackling arrears at an early stage.

Consideration by the Subordinate Legislation Committee

18. The Subordinate Legislation Committee (SLC) agreed to draw the attention of the Parliament to the Order in respect of five specific points, each of which is outlined below—

- **Points 1 to 4** are referred to the lead Committee on the basis that the SLC considers that the form and meaning of the Order could be clearer.
- **Point 5** is referred on the basis of the practical effect of the Order which, although it is not a formal reporting matter, the SLC considers that the lead Committee may wish to consider it further.

19. The extract from the Subordinate Legislation Committee report, including that Committee’s correspondence with the Scottish Government, is provided at **Annexe B**.

20. **In view of the issues raised by the SLC, members may wish to explore the following points with the Minister for Housing and Transport at the meeting.**

Point 1: The meaning of “illustrative indication of legal expenses”

21. Article 2 obliges landlords to provide a breakdown of monies due to the landlord under the tenancy agreement, including charges incurred should rent or other financial arrears arise which the landlord requires to recover by way of legal action. Accordingly, the landlord is required to provide an “illustrative indication of legal expenses” to the tenant.

22. The SLC suggests that the meaning of “illustrative indication of legal expenses” could be clearer. It states that the meaning of legal expenses could be considered to go beyond the judicial expenses that a landlord might in law hope to recover from a tenant. **The SLC highlights in its report that the Scottish Government has not provided further explanation of the precise meaning of the term “legal expenses”.**

Point 2: The meaning of “encourage”

23. Articles 4(1)(b) and 5(1) impose a duty on landlords to “encourage” a tenant to do certain things. As these duties form part of the pre-action requirements, a landlord’s failure to comply with them prevents it from taking legal action to recover possession of its property.

24. The SLC states in its report that the ordinary meaning of “encourage” suggests more than requesting that the tenant do something, and it is not clear what this entails. The SLC notes that the Scottish Government “simply advises that it is for the landlord to decide how best to encourage tenants” to do certain things. **The SLC, therefore, considers the position to be unsatisfactory.**

Point 3: Meaning of “an appropriate debt advice agency”

25. Article 4(1)(c) of the Order requires a landlord to advise the tenant to seek assistance from “an appropriate debt advice agency”. The SLC considers that it is not clear whether it is for the landlord or the tenant to ascertain whether a particular debt advice agency is an “appropriate” one.

26. The Scottish Government accepts that there is a potential lack of clarity to the meaning of the provision and has proposed to clarify this point in guidance, to which landlords are obliged to have regard.

Point 4: Meaning of “relevant housing benefit staff”

27. Article 5(1) requires a landlord to encourage a tenant who has made a housing benefit application to provide the landlord with written authority to discuss that application with “relevant housing benefit staff”.

28. The SLC considers that it is not clear who “relevant housing benefit staff” are. It considers that this is of particular significance given that tenants are to be encouraged to waive their usual right to confidentiality in respect of an application and that it would seem reasonable that tenants are aware of the persons to whom that authority is directed.

29. The SLC also states that, in its view, if authority is to be given to waive confidentiality then it should be directed to the local authority. The SLC explains its reasoning for this: housing benefit applications are made to the local authority; and the local authority is the data controller for the purposes of the Data Protection Act 1998. The SLC notes in its report that whilst the Order does not expressly preclude that the written authority would be addressed to the local authority, it is not clear that that is what is intended from the reference to “relevant housing benefit staff”.

30. In its response to the SLC on these points, the Scottish Government has advised that a landlord “can readily establish which staff are the relevant persons to assist it”. The SLC questions whether that is a reasonable assumption.

Point 5: Practical effect of the Order

31. In addition to Points 1 to 4, which relate to the clarity of form and meaning of the Order, the SLC also refers the practical effect of the Order to the lead Committee.

32. Article 5(2)(d) requires a landlord to whom written authority has been granted to take reasonable steps to establish the likely outcome of a housing benefit application. As described above at Point 4, it is for the local authority to determine whether the tenant meets the criteria for an award of housing benefit and the level of that reward.

33. The SLC is concerned that a local authority which indicates the likely outcome of a housing benefit application before the application has been determined could be seen to have prejudged the application. It considers that whilst the Scottish Government advises that this is current practice within local authorities, a general principle of administrative law is that prejudging the outcome of an application may taint the subsequent decision and leave it open to challenge in the courts.

Steve Farrell
Clerk to the Committee

EXTRACT FROM SUBORDINATE LEGISLATION COMMITTEE REPORT

Scottish Secure Tenancies (Repossession Orders) (Maximum Period) Order 2012 [draft]

48. This Order prescribes the maximum period for which a landlord's right to recover possession of a property let under a secure tenancy may be effective, in terms of section 16(5A)(c) of the Housing (Scotland) Act 2001. It provides that the maximum period is six months from the date that the decree authorising recovery of possession is extracted by a sheriff clerk.

49. The instrument is subject to the affirmative procedure. If approved, it will come into force on 1 August 2012.

50. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in **Appendix 4**.

51. **The Committee refers the practical effect of this instrument to the lead Committee. Although this is not a formal reporting matter, the lead Committee may wish to consider it further. Although this instrument appears to prescribe a maximum period of six months within which an order for recovery of possession may have effect, this is dependent on decree being extracted promptly. Any delay in extracting decree by the landlord will have the effect of postponing the last date on which the order may have effect against the tenant.**

APPENDIX 4

Scottish Secure Tenancies (Repossession Orders) (Maximum Period) Order 2012 (SSI 2012/draft)

On 2 March 2012, the Scottish Government was asked:

The Executive Note indicates that the Order sets out the maximum period that a landlord has to recover possession of a house after an order for repossession has been granted by the court. This Order provides that the maximum period prescribed for the purposes of section 15(5A)(c) of the Housing (Scotland) Act 2001 is six months from the date when decree is extracted. The Act of Sederunt (Summary Cause Rules) 2002 provides that, unless the sheriff orders earlier extract, the sheriff clerk may not issue an extract until 14 days have elapsed from the granting of the decree (rule 23.6(1)). However, there is no requirement that the sheriff clerk must extract the decree as soon as the 14 day period elapses. As the prescribed period does not begin to run until the date of extract, this appears to make the maximum period contingent upon the individual actings of sheriff clerks in 49 different courts throughout Scotland. The Scottish Government is accordingly asked to explain how article 2(1) can be said to set the maximum period for the purposes of section 15(5A)(c), when it appears that an indeterminate

period may elapse between decree and extract before the six month period begins to run.

The Scottish Government responded as follows:

Section 16(5A) (not section 15) of the Housing (Scotland) Act 2001 states that, in the circumstances there specified, a court order for repossession must specify the period for which the landlord's right to recover possession is to have effect. The effect of the Order is to prescribe the maximum period that the period specified by the court can take.

A court order can have no effect prior to it being extracted. Normal court practice is for the decree to be automatically extracted by the sheriff clerk after the lapse of 14 days from its grant. An exception to this is when the sheriff on application orders earlier extract, usually at the request of the pursuer. Less commonly, the sheriff may on application order delayed extract, usually at the request of the defender. Where an appeal is lodged, extract will be delayed until the appeal has been disposed of.

The wording adopted in the Order allows for these situations, and also for the situation where an appeal is lodged after a decree has been extracted. Where a sheriff varies the usual minimum timescale for extract, the provision made by the Order will operate in a way that seems to the Scottish Government to be unexceptional.

No difficulty is perceived as a result of the possibility that a particular sheriff clerk might, as a matter of administrative practice, briefly delay extract other than by order of a sheriff, for example because the day the 14 day minimum period expires is not a convenient day for extracting the court order.

The power of the Scottish Ministers is to prescribe the maximum period within which a sheriff may specify that the court order is to have effect. The start date for that period (the date of extract) is a matter under the control of the court. The period that the court order actually specifies is also a matter under the control of the court, subject only to the provision that the Order makes.

The Scottish Government therefore does not see any difficulty with what has been provided in the Order.

EXTRACT FROM SUBORDINATE LEGISLATION COMMITTEE REPORT

Scottish Secure Tenancies (Proceedings for Possession) (Pre-Action Requirements) Order 2012 [draft]

6. Tenants who rent properties from local authorities and registered social landlords generally do so on Scottish secure tenancies. Where a landlord wishes to recover possession of a property and evict the tenant, it must obtain a court order which permits it to do so. The procedure with which a landlord must comply is laid down in sections 14 to 16 of the Housing (Scotland) Act 2001 (“the 2001 Act”).

7. Where a landlord seeks to recover possession on the ground that the tenant has not paid rent which is lawfully due, the landlord has to comply with the pre-action requirements laid down in section 14A of the 2001 Act. It may not commence proceedings until it has confirmed to the court that it has done so.

8. This Order makes provision about the pre-action requirements contained in section 14A of the 2001 Act. It specifies further steps which landlords must take in order to comply with certain of the requirements, and provides further detail as to the operation of others.

9. The instrument is subject to the affirmative procedure. If approved, it will come into force on 1 August 2012.

10. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in **Appendix 1**.

11. First, as a pre-action requirement, article 2 obliges landlords to provide a breakdown of monies due to the landlord under the tenancy agreement, including charges incurred should rent or other financial arrears arise which the landlord requires to recover by way of legal action. Accordingly, the landlord is required to provide an “illustrative indication of legal expenses” to the tenant.

12. The Scottish Government was asked whether it considers that the basis on which any “illustrative indication of legal expenses” is to be calculated is sufficiently clear. In particular, it was asked whether the term covers only the landlord’s judicial expenses (those expenses which a successful landlord is entitled to recover under the rules of court), or whether it is intended to have a wider meaning.

13. In its response, the Scottish Government notes that a landlord could not estimate in detail what legal expenses might be incurred and states that the reference to “illustrative” legal expenses was inserted in recognition of that. However, it does not explain further the precise meaning of the term “legal expenses”.

14. The Committee observes that the term “legal expenses” is not a term of art and that what might broadly be considered the “legal expenses” of a successful landlord will include expenses which are not recoverable from the tenant. It therefore considers that the term “illustrative indication of legal expenses” could be clearer, as if it is given its natural meaning then it goes beyond what a landlord might in law hope to recover.

15. Secondly, articles 4(1)(b) and 5(1) impose a duty on landlords to “encourage” a tenant to do certain things. As these duties form part of the pre-action requirements, a landlord’s failure to comply with them prevents it from taking legal action to recover possession of its property. The Scottish Government was therefore asked to explain how a landlord might discharge these duties.

16. In its response, the Scottish Government simply advises that it is for landlords to decide how best to encourage tenants to provide details of their financial circumstances (article 4(1)(b)) or to provide written authority to allow the landlord to discuss housing benefit claims (article 5(1)). It states that, ultimately, the courts will determine whether the steps taken are adequate in any given case.

17. The Committee considers that the term “encourage” appears to go beyond simply requesting that a tenant does something. Plainly it does not go so far as to require a tenant to do something, as landlords have no power to require compliance. However, it is unclear what precisely landlords are expected to do to discharge the obligations on them in relation to these pre-action requirements, and the Committee therefore considers the position to be unsatisfactory.

18. Thirdly, article 4(1)(c) of the Order requires a landlord to advise the tenant to seek assistance from “an appropriate debt advice agency”. That expression is not defined in the Order or in the 2001 Act.

19. The Scottish Government was asked to explain whether the landlord has to form a view on which debt advice agencies are appropriate or whether it is sufficient for the landlord to advise the tenant to seek advice from such an agency.

20. In its response, the Scottish Government accepts that there was a potential lack of clarity as to the meaning of “appropriate debt advice agency” and thanks the Committee for drawing it to its attention. It confirms that the intention is that the landlord’s duty is to advise the tenant of bodies that the tenant might approach, with the tenant deciding their course of action thereafter.

21. The Committee notes that the Scottish Government proposes to clarify this point in guidance, to which landlords are obliged to have regard. However, the Committee considers that the provision could be clearer.

22. Fourthly, article 5(1) requires a landlord to encourage a tenant who has made a housing benefit application to provide the landlord with written

authority to discuss that application with “relevant housing benefit staff”. In the absence of any definition, the Scottish Government was asked whether it is sufficiently clear who falls within that category.

23. This is particularly important as tenants are being asked to grant written authority that, in effect, waives their usual right to confidentiality in respect of an application. It would seem reasonable that tenants are aware of the persons to whom that authority is directed.

24. In its response, the Scottish Government states that a landlord “can readily establish which staff are the relevant persons to assist it”. The Committee considers, however, that this response appears to assume that everyone will understand that the term means members of staff of the local authority which is considering the application, and the Committee questions whether that is a reasonable assumption.

25. More fundamentally, the Committee questions whether written authority to “relevant members of housing benefit staff” would be of any effect. It is to the local authority that an application is made. It is the local authority which is the data controller for the purposes of the Data Protection Act 1998. As such, if authority is to be given to waive confidentiality, the Committee considers that it should be directed to the local authority. Although article 5(1) does not expressly preclude the possibility that the written authority would be addressed in those terms, it is not clear to the Committee that that is what is intended from the reference to “relevant housing benefit staff”.

26. Finally, article 5(2)(d) requires a landlord to whom written authority has been granted to take reasonable steps to establish the likely outcome of a housing benefit application. It is for the local authority to determine whether the tenant meets the criteria for an award of housing benefit and the level of that award.

27. The Scottish Government was therefore asked to explain what reasonable steps it considers that a landlord could take to satisfy the requirement in article 5(2)(d) given that, if the local authority has not yet determined the application, any indication by the local authority as to its likely outcome would appear to involve prejudging that determination.

28. In its response, the Scottish Government states that an action that the landlord might take includes “asking housing benefit staff if they can give a view on the likely outcome of an application”.

29. The Committee’s principal concern is that a local authority which indicates the likely outcome of a housing benefit application before the application has been determined could be seen to have prejudged the application. Although the Scottish Government advises that this is current practice within local authorities, a general principle of administrative law is that prejudging the outcome of an application may taint the subsequent decision and leave it open to challenge.

30. Article 5(2)(d) appears capable of being operated without rendering any subsequent decision liable to challenge, in that a landlord may also use the provision simply to obtain information to allow it to form its own views on the likely success of an application. However, the Committee considers that the Scottish Government's response makes it quite clear that it envisages the provision being operated in a different way so that the staff of a local authority who have responsibility for determining the application will be asked to give a preliminary view on the matter. This policy appears to the Committee to leave housing benefit decisions open to potential challenge in the courts. Accordingly, it refers the practical effect of the instrument to the lead Committee's attention.

31. In conclusion, the Committee draws the instrument to the attention of the Parliament on reporting ground (h) in respect of the following five matters—

- **The meaning of “illustrative indication of legal expenses” in article 2(2) could be clearer. From the terms of article 2(1)(b)(ii), it appears that the intention is that tenants should be made aware of the expenses which a landlord will be able to recover from them should the landlord be successful in obtaining an order for recovery of possession. However, the landlord's recoverable, or judicial, expenses are a subset of their legal expenses as a whole.**
- **It is not clear what a landlord must do in order to “encourage” a tenant to take a certain course of action for the purposes of articles 4(1)(b) and 5(1). While the Scottish Government indicates that this is a lesser standard than obliging a landlord to “require” a tenant to do something, the ordinary meaning of “encourage” suggests more than requesting that the tenant do something, and it is not clear what this entails.**
- **It is not clear whether it is for the landlord or the tenant to ascertain whether a particular debt advice agency is an “appropriate debt advice agency” for the purposes of article 4(1)(c).**
- **It is not clear, for the purposes of article 5(1), who “relevant housing benefit staff” are, or even who employs those staff. This is of particular significance given that tenants are to be encouraged under that provision to waive their usual right to confidentiality so that these unascertained persons may discuss the detail of housing benefit applications with landlords.**
- **Written authority under article 5(1) will require to be addressed to the local authority (as data controller) in order to be effective. Standing the references in article 5(1) to “relevant housing benefit staff”, it is not clear that this is what is intended, although it does not appear that the wording of article 5(1) expressly**

precludes the possibility that a landlord could obtain effective written authority.

32. The Committee also refers the practical effect of this instrument to the lead Committee. Although this is not a formal reporting matter, the lead Committee may wish to consider it further. The apparent policy intention, as disclosed in the Scottish Ministers' response to question 5, is that landlords may seek a preliminary indication as to the outcome of a housing benefit application from the persons charged with determining the application, notwithstanding the fact that to give such an indication appears to involve prejudging the application.

APPENDIX 1

Scottish Secure Tenancies (Proceedings for Possession) (Pre-Action Requirements) Order 2012 (SSI 2012/draft)

On 2 March 2012 the Scottish Government was asked:

1. Does the Scottish Government consider that the basis on which any "illustrative indication of legal expenses" (article 2(2)) is to be calculated is sufficiently clear, and in particular:

a. does this relate to the landlord's judicial expenses recoverable in terms of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, or is it intended to have a wider meaning, and if so what is that meaning?

b. would an illustrative indication be expected to deal with the expenses of any potential appeal which might be taken?

2. Given that a landlord may not raise proceedings to recover possession of its property until it confirms to the court that all of the pre-action requirements in section 14A of the Housing (Scotland) Act 2001 ("the 2001 Act") and in this Order have been complied with, what must a landlord must do in order to discharge the requirement that it *encourage* the tenant to provide information in terms of article 4(1)(b)) or that it *encourage* a tenant to provide written authority in terms of article 5(1)? Does the Scottish Government consider that what a landlord must do to discharge these requirements is sufficiently clear?

3. Article 4(1)(c) requires a landlord to advise the tenant to seek assistance from "an appropriate debt advice agency", which expression is not defined in the Order or in the 2001 Act. Does the landlord have to form a view as to which debt advice agencies would be appropriate to assist the tenant, or is it sufficient for the landlord to advise the tenant that he or she should seek advice from such an agency and leave it to the tenant to determine whether a

given agency is appropriate? Does the Scottish Government consider that what is required of a landlord in terms of this requirement is sufficiently clear?

4. Article 5(1) requires a landlord to encourage a tenant who has made a housing benefit application to provide the landlord with written authority to discuss that application with “relevant housing benefit staff”. In the absence of any definition, is it sufficiently clear who falls within that category? Does the Scottish Government consider that authority granted in those terms would be adequate to permit a local authority, as the data controller in respect of applications for housing benefit, to disclose personal data and sensitive personal data to a landlord?

5. Article 5(2)(d) requires a landlord to whom written authority has been granted to take reasonable steps to establish the likely outcome of the housing benefit application. Article 5(3) requires a landlord who has not been granted such authority to take such steps as it can to establish the likely outcome of the housing benefit application. It is for the local authority to determine whether the tenant meets the criteria for an award of housing benefit and the level of that award. The Scottish Government is asked to explain:

a. what reasonable steps it considers that a landlord could take in order to establish the likely outcome of an application, given that – if the local authority has not yet determined the application – any indication by the local authority as to its likely outcome appears to involve prejudging that determination?

b. how a landlord may demonstrate that it has taken “such steps as it can” for the purposes of article 5(3)? What steps does the Scottish Government consider that a landlord could take to establish the likely outcome of a housing benefit application, in circumstances where the applicant has not granted written authority for the landlord to discuss the matter?”

The Scottish Government responded as follows:

1. A landlord plainly cannot estimate in detail what legal expenses might be incurred in a particular case, not least because the amounts will vary according to how any defence is conducted, and whether any qualifying occupiers exercise their right to be heard. The reference in the Order to “illustrative” legal expenses was inserted in recognition of that.

Ministers will expand upon what they consider a landlord should provide as this “illustrative indication” in statutory guidance, to be issued under the power at section 14A(8) of the Housing (Scotland) Act 2001, but ultimately it will be

for a court to determine whether this requirement has been complied with, in the event of any dispute being brought regarding it.

The policy intention is for the tenant to receive an indication of the likely legal expenses they may incur if court action as a result of rent arrears becomes necessary. A landlord is likely to base these on costs tenants have incurred in defending similar types of case. How exactly a landlord does that is a matter for an individual landlord, subject to the possibility of court scrutiny as to whether the legal requirement has been met.

2. The use of “encourage” in articles 4 and 5 is a recognition that a landlord cannot require a tenant to provide details of their financial circumstances or to provide authority for the landlord to discuss a housing benefit application with those dealing with that application. How a landlord best complies with this duty is for a landlord to determine, in the first instance, and for a court to determine conclusively in the event of any dispute being brought regarding it.

In particular, how a landlord might encourage the provision of these matters will vary according to whether, and how, a landlord is able to establish contact with a tenant. In some cases it might be by letter or email, in others by discussion. The Scottish Government does not consider it should be more prescriptive here, but a landlord will need to show how it has complied with a duty which seems to the Scottish Government to be clear as to what must be pursued, albeit the method by which it is pursued has been left flexible.

In relation to article 4, the intention in encouraging the provision of information is so that the landlord can attempt to agree a repayment plan that is reasonable for the tenant’s circumstances, taking into account the debt due to the landlord.

In relation to article 5, the Scottish Government has been advised by landlords it has consulted when preparing the Order that it is standard practice for a landlord to seek to obtain written authority from a tenant to discuss a housing benefit application with housing benefit staff, where it is involved in assisting the tenant with that application.

3. The Scottish Government thanks the Committee for drawing its attention to this potential uncertainty as to the meaning of an “appropriate debt advice agency”, in terms of whether it is a body judged by the landlord to be appropriate, or one judged by the tenant to be appropriate. The policy intention was that it should be for tenants to choose whether, and which, advice agency they consult and that the duty on landlords should be to advise of bodies that a tenant might approach. As with earlier answers, compliance with this requirement would ultimately be a matter for a court to determine.

The Scottish Government will include in the statutory guidance that a landlord should advise the tenant that any agency they approach should be one that offers free and independent debt advice. An example of such an “appropriate debt advice agency” could be a Citizens Advice Bureau or a Welfare Rights organisation, but other bodies exist in some areas and may also be able to offer appropriate assistance.

4. The Scottish Government does not perceive a difficulty with the reference to “relevant housing benefit staff”. A landlord can readily establish which staff are the relevant persons to assist it with the inquiries it is required to make and by whom they are employed. It is not likely that these would be set out on the authority to discuss the application. The situations in which benefit information can be disclosed and shared are essentially matters for the Secretary of State and benefits legislation will contain restrictions on disclosure. However, the Scottish Government considers that client authority will, at least under current legislative arrangements, permit disclosure of information necessary to determine the matters in paragraph (2) of Article 5 (none of which would appear to be sensitive personal data in terms of the Data Protection Act 1998). The disclosure of personal data using such arrangements is standard practice between data controllers, local authority landlords and registered social landlords at the present time.

5. Advice from local authorities and others with expertise in administration of housing benefit is that, in some cases, the outcome of a benefit application will be predictable. For example, an experienced person who assists tenants to make claims (such as an income maximisation officer) will, in some cases, be able to predict that a claim is likely to succeed, or likely to fail, albeit no authoritative decision has yet been taken.

Actions that might be taken here by a landlord would include, where authority has been given for the landlord to discuss a housing benefit application with relevant housing benefit staff: -

- asking housing benefit staff if they can give a view on the likely outcome of an application;
- asking such staff if they can transfer relevant information around a housing benefit claim that a landlord can itself use to attempt a calculation;
- seeking advice from other benefits specialists and advisers; and
- use of online housing benefit calculators.

These steps are not likely to be a calculated figure, but may result in a view that a claim is likely to succeed, be partially successful, or fail. This is not an innovation on current practice. Housing benefit applications can take several weeks or months to process and have a significant impact on whether a

tenant should have rent arrears and the eventual level of these arrears. It is current good practice for landlords to try to establish the likely outcome of a housing benefit claim before deciding to issue a notice of proceedings for rent arrears.

The above steps may allow the landlord to make an informed decision around likely housing benefit entitlement, which can inform any interim repayment arrangement with the tenant. It is not the intention of the Order to prohibit *any* court action pending a determination of a benefit claim. Sometimes, court action should be raised without delay because a housing benefit claim is unlikely significantly to address the arrears. Sometimes, there will appear to be no necessity for the landlord to progress court action, thereby saving the landlord money and avoiding any anxiety the possibility will cause a tenant.

Where authority has not been given by the tenant for the landlord to discuss a housing benefit application with relevant housing benefit staff, the landlord may nonetheless be able to take some of these steps. For example, a landlord may be able to make an informed decision from its expertise in housing benefit matters as to what the benefit position of a tenant is likely to be. In some cases there may be no steps that a landlord can take and the Order allows for that. It simply provides that, where a landlord can take steps, it is required to do so. The intention is to promote some additional tenant protection, by providing that a failure to give authority for a landlord to discuss a housing benefit claim does not absolve the landlord of all obligations to attempt to establish the outcome of that claim.

As with some previous answers, these are not matters where the Order can cover every eventuality that might arise. Leaving some flexibility in operation of the provisions is unavoidable, which is why they are left for a court to determine in the event of dispute, albeit with statutory guidance that will assist use and inform interpretation.

WRITTEN EVIDENCE FROM THE NATIONAL UNION OF RAIL, MARITIME & TRANSPORT
WORKERS

Introduction

The National Union of Rail, Maritime and Transport Workers (RMT) welcomes the opportunity to respond to the Infrastructure and Capital Investment Committee.

The RMT is the largest of the rail unions and organises 80,000 members across all sectors of the transport industry. We negotiate on behalf of our members with some 150 employers. In Scotland, RMT represents over 10,000 transport workers and is the only union in Scotland which represents all grades in the rail industry.

RMT notes that this Committee is being held at a time when, following the closure of the Rail 2014 consultation, the priority must be defending Scotland's rail network from the proposed cuts, and the fragmentation of infrastructure proposed by the McNulty Rail Value for Money report.

In this submission, RMT will outline the dangers posed by the Rail 2014 consultation and McNulty, and also make the case for a more efficient model through which to deliver infrastructure and capital investment.

1. the current efficiency and accessibility of the rail network in Scotland;

RMT notes that Scotrail paid dividends of £18 million in 2010, £18 million in 2009, £17million in 2008 and £21million in 2007. In two of these years Scotrail actually paid more in dividends than it made in profit leading to the obvious conclusion that because it does not contribute anything towards investment in the railway or rail infrastructure, and with the level of government subsidy even covering its track access charges, it is simply milking Scotland's railway. The proposals from the Scottish Government in Rail 2014 allow for the intensification of this theft. If dividends were not paid in 2010, RMT estimates rail fares could have been reduced by almost 7% which would undoubtedly improve accessibility. This makes clear the case for public ownership of Scotland's railways.

Additionally, a clause exists in the Scottish Government's current Scotrail franchise that allows Scotrail to make claims on tax payer's money to indemnify them in event of net losses incurred due to industrial action. This is unprecedented and there are no other Scottish government contracts where tax payer's money can be used to bail out wholly private companies who are in an industrial dispute. RMT has consistently called for the indemnification clause to be removed as soon as the franchise ends and is disappointed that the Rail2014 document does not address the issue.

When the Scottish Government extended the franchise without retendering and without any discussions with stakeholders, it chose to keep that clause in the franchise, even though it was in its power to remove it.

The indemnification clause has incentivized First ScotRail to not to settle multiple disputes with the unions and in particular with RMT.

The rail unions and the STUC believe there are compelling reasons why the Government should reverse this policy and believe that the first step should have been for the matter to have been dealt with in Rail2014.

One example of where the indemnification clause has come into affect was given in 2003 by David Jamieson in a parliamentary answer to a question tabled by Jeremy Corbyn MP:

"In the past year, the Strategic Rail Authority (SRA) has made payments of £12.65 million to National Express in respect of revenue loss by Scotrail arising from industrial action".

It is of course one thing for the Government to take a view on industrial issues in the private sector, but quite another for the Government to take a direct role in private sector industrial relations. The use of these powers is an unprecedented and dangerous departure from existing policy towards private sector industrial relations and could have widespread implications beyond the confines of the railway industry.

We are not aware of any other industry in which the Government has used taxpayer's money to provide direct or indirect financial support to private companies during industrial disputes or to veto private sector pay and conditions agreements.

There is no evidence to suggest that these powers prevent disputes or improve industrial relations. On the contrary the use or the threat of the use of these powers will prolong industrial disputes, as there will be no incentive for private train operators to reach an agreement.

Train Operating Companies will not have any incentive to reach agreements on pay and conditions if it is aware that the Government may veto any such agreement. Indeed, where these powers were used previously by the now defunct SRA industrial relations have deteriorated because the Train Operating Companies involved in the negotiations have no authority to reach an agreement.

In terms of political and public relations consequences, the media, business community and passengers would quite rightly enquire as to what Government involvement there was in particular negotiations or disputes. Clarification would be sought as to whether the Government had vetoed pay or conditions agreements or if taxpayer's money was being used to support private train operating companies in dispute. As a consequence there would also be demands to know what efforts were being made by the Government to resolve a dispute, including the inevitable calls for the Ministers to meet the trade unions directly.

2. what developments could be made to improve the network and rolling stock for passengers;

RMT strongly opposes the proposals as outlined in the Scottish Government's Rail 2014 consultation to:

- Close some stations (it argues the number of stations will remain the same because others will open). In reality this means a cut for those that use the station operational at present.
- Cutting the length of services. The consultation argues the same routes will be served but also greater use of interchanges. This means fewer trains and lower levels of frequency, ultimately discouraging train travel and promoting travel by car which is damaging for the environment. This is true in the case of the Caledonian Sleeper Services with the announced intention to shorten or cancel some routes.
- Demanding that all cross border services start or finish at Glasgow or Edinburgh. This ensures that services operated by, for example, East Coast or Cross Country must terminate at Glasgow or Edinburgh and the passengers travelling further into Scotland must change onto a Scotrail service. Rail2014 claims that the current state of affairs disadvantages Scotrail due to the ORCATS system but in reality this is strengthening the position of Scotrail as a monopoly and will result in a worse service for passengers. The proposal is to ensure that rail passenger services operated by other companies do not continue to travel to other Scottish stations past Glasgow and Edinburgh, thereby negating the "competition" which is the sole argument used in defence of a privatised railway.
- Removing first class on some routes and potentially ban alcohol across the network. This is a cut in on-train services which will inevitably lead to a cut in on-train staff. There has been no consultation as to how this would be enforced.

RMT notes that the proposals in Rail 2014 for Scotland's railway raises serious concerns over the potential development of a two-tier railway with one tier being run commercially, generating profit and more much likely to receive investment in terms of rolling stock, infrastructure and service provision at the expense of the second tier. This two-tier system will inevitably lead to differing levels of service quality, something both the RMT and the travelling public are strongly opposed to. It will have an adverse affect on Scotland's rural communities and alongside the proposals for different regulation of fares on the two-tier will further disadvantage those passengers on lower incomes.

RMT believes that all rolling stock should be publically owned and publically accountable. In terms of action which can be taken immediately, the rolling stock leasing companies should be regulated. At present, despite complaints from the Competition Commission the ROSCOs remain completely

unregulated and solely prioritise making profit and satisfying shareholders, as the expense of both the travelling public and the taxpayer.

RMT argues that capacity should be calculated on the basis of the number of seats available and supports the view of the travelling public that if a passenger buys a ticket then they should be able to expect to sit on the train. The issue of overcrowding must be dealt with by increasing capacity through rolling stock procurement (which leads to the wider issue of the ROSCOs), not through lowering passengers expectations of the service.

RMT is strongly opposed to the suggestions for further fragmentation and privatisation through third party management of some stations and in some cases transferring ownership of stations, the closure of some stations and the proposal that some stations do not need toilets or washrooms if the trains stopping at that station have those facilities. Rail2014 also proposes to create 6 different categories of stations (not dependent on footfall like Network Rail classifies stations) and this will be an indicator as to who should manage or own the station.

RMT believes that the rail network should be expanded and as such does not support the closure of any stations. We agree with the Scottish Government that all routes are socially necessary, and stations are key components of the routes. Footfall at a particular station cannot be the only measure used to determine the value of any station.

RMT believes that only one organisation should be responsible for the management and maintenance of stations, and that that organisation should be publicly owned and publically accountable in order to ensure that the stations, as a component of critical national infrastructure, are managed and maintained as public assets. Therefore, the franchisee nor any third party should not be responsible for the management and maintenance of stations.

Additionally, RMT believes that cutting the length of services and the number of direct services means fewer trains and lower levels of frequency. This is also true in the case of the Caledonian Sleeper Services with the announced intention to shorten or cancel some routes.

Research for the rail unions by the Transport for Quality of Life think tank has shown that over £11 billion has been lost from the rail industry as a result of fragmentation and payments to shareholders since privatisation. (see table below).

The research has also found that by simply having one organisation operating passenger services and infrastructure would save £290m per annum; bringing rail renewals in house a further £200m and running TOCs on a not for profit basis another £300m. In total at least £1.2 billion a year could be saved through reintegrating our railways and scrapping dividend payments to shareholders. The benefits of returning our railways to public ownership are clear.

A publicly owned railway run in the public interests would also bring wider economic, social and environmental benefits. Research for the RMT by the Just Economics think tank has found Britain's privatised railway is failing to realise benefits worth £13 billion a year when compared to more integrated and publicly owned railways in France, Germany, Italy and Spain.

Quantifiable costs of privatisation & fragmentation

TOTAL COSTS	£1.2 billion	£11.3–11.7 billion
	Annual	Cumulative
Excess interest payment on Network Rail debt	£156m	£950m
Fragmentation costs		
Cost of interfaces between TOCs & Network Rail	£290m	not known
Network Rail: cost of outsourcing renewals / enhancements (& maintenance before 2003/04)	£200m	£2311m
TOC sub-contractors' operating margins	£76m	£771m
ROSCO sub-contractors' operating margins	£15m	£176m
Leakage		
Dividend payments: Railtrack	-	£709m
Dividend payments: TOCs	£227m	£507-1000m
Dividend payments: ROSCOs	£207m	£2520m
Sunk costs		
Underselling ROSCOs at time of privatisation	-	£1100m
Debt write-off, liability transfer to sell Railtrack	-	£2208m

transport for quality of life

3. the potential costs associated with such an upgrade and the current providers ability to cope with and provide for, the growing demands on the rail service; and

Any assessment of value for money in the rail industry has to determine whether current levels of employment provide value not only to the industry but also to the economy (and therefore the UK's finances) as a whole. Recent research suggests maintaining and increasing employment levels in the rail industry will have overwhelmingly beneficial consequences.

For example the July 2010 report undertaken by Ekogen¹ found that:

- The UK rail industry employs around 190,000 people and contributes £9bn annually to the national economy;
- The creation of 100 direct rail jobs supports 140 indirect and induced jobs;
- This compared very favourably to the Motor industry where it was found 100 motor industry jobs creates only 48 indirect and induced jobs;
- A reduction in car travel and a transfer to public transport would result in a net increase in employment as on average rail and bus travel generates more jobs per passenger km than car travel.

We also estimate that the social, economic and environmental benefits of achieving a modal shift from road to rail – in terms of reduced congestion, accidents and emissions – could potentially reach £154.8 billion by 2050².

4. the importance of and further potential for, the integration of Scotland's network with the rest of the UK.

¹ Employment in Sustainable Transport, report by Ekogen for Campaign for Better Transport/ PTEG/ Sustrans, July 2010

² Just Economics *A Fare Return: Ensuring the UK's railways deliver true value for money*. 2011

According to the Rail 2014 consultation document, the Scottish Government wants to stop all cross-border services from running beyond Glasgow and Edinburgh thereby granting Scotrail a monopoly on Scotland's railway. By demanding that all cross border services start or finish at Glasgow or Edinburgh ensures that services operated by, for example, East Coast or Cross Country must terminate at Glasgow or Edinburgh and the passengers travelling further into Scotland must change onto a Scotrail service.

The Scottish Government claims that the current state of affairs disadvantages Scotrail due to the ORCATS system but in reality this is strengthening the position of Scotrail as a monopoly and will result in a worse service for passengers. The proposal is to ensure that rail passenger services operated by other companies do not continue to travel to other Scottish stations past Glasgow and Edinburgh, thereby negating the "competition" which is the sole argument used in defence of a privatised railway.

Due to the economic and social necessity of cross-border services for passengers whose journeys begin in England or in Scotland it is essential that the services be jointly specified by the relevant transport authorities either side of the border.

RMT is aware of the proposals to develop Edinburgh into a hub station. Whilst RMT is not opposed to the development of an Edinburgh Hub to provide better connectivity across the network, the Union believes that such a development must be part of an overall regeneration of Scotland's rail network and should not be disingenuously counterpoised to the provision of cross border services.

RMT is strongly opposed to any fragmentation of Network Rail, and believes that any development of interfaces between separate infrastructure managers will potentially lead to major safety issues. RMT maintains that a high level of genuine integration can only be achieved under public ownership and management of rail infrastructure and operations.

RMT's view is that the high-speed network should extend into Scotland, connecting both at Glasgow and Edinburgh, at the earliest possible time.

The economic benefits of a high-speed network are well documented. WS Atkins published research in 2006 which found that high-speed links from London, via Heathrow, to Birmingham and Leeds would cost £31 billion to build and would deliver benefits of £63bn over a sixty year period.

In August 2007, The Northern Way explained that the economic benefits of a high-speed link are substantial, they noted: "Research for the SRA in 2002/03 for example identified total benefits of a new high speed network linking London to the North West and North East and Scotland of £89.9bn giving a benefit ratio of over 2:1. The benefits comprised £20.6 billion in additional revenue, £64.4 billion in non-financial benefits (welfare gains by users and non-users) and £4.8 billion in benefits from freeing up capacity on the existing network".

In terms of creating jobs, the DfT's HS2 London to West Midlands Appraisal of Sustainability documents forecasts that HS2 could attract 30,000 jobs in London and the West Midlands. Furthermore 1,500 operational posts will be created and 9,000 jobs constructing the line.

Research published by KPMG in February 2012 suggests that a national high speed rail network could, as businesses become more productive and offer higher wages due to productivity improvements deliver up to 42,000 additional jobs. It is the view of RMT that Scotland would benefit massively from such a scheme.

Infrastructure and Capital Investment Committee

7th Meeting, 2012 (Session 4), Wednesday, 21 March 2012

Subordinate Legislation Cover Note

Title of Instruments	Water Services Charges (Billing and Collection) (Scotland) Order 2012 SSI/2012/53 The A720 Edinburgh City Bypass and M8 (Hermiston Junction) (Speed Limit) Regulations 2012 SSI/2012/62
Type of Instruments	Negatives
Laid Date	SSI/2012/53: 22 February 2012 SSI/2012/62: 27 February 2012
Circulated to Members	15 March 2012
Meeting Date	21 March 2012
Minister to attend the meeting	No
SSI drawn to the Parliament's attention by Subordinate Legislation Committee	No
Reporting Deadline	SSI/2012/53: 9 April 2012 SSI/2012/62: 16 April 2012

Water Services Charges (Billing and Collection) (Scotland) Order 2012 SSI/2012/53

Purpose

1. This Order requires Local Authorities to collect domestic water and sewerage charges on behalf of Scottish Water, with the exception of metered households. Water and sewerage charges are currently collected jointly with Council Tax by Local Authorities. This arrangement was established in 1996 and enables Local Authorities and Scottish Water to share billing and collection costs. The Order currently in operation, the Water Services Charges (Billing and Collection) (Scotland) Order 2010, expires on 31 March 2012.

2. The 2012 Order makes provision in relation to:

- The amounts that must be billed to each customer;
- The discounts that may apply to customers by virtue of provisions in the Scottish Government's Principles of Charging Statement for 2010-15 or under section 79 of the Local Government Finance Act 1992;
- The format of the bill to be presented to customers;
- The amounts and timing of payments to be made to Scottish Water by Local Authorities;
- The minimum amount payable by Scottish Water to Local Authorities for the billing and collection services provided;
- Appeal arrangements;
- The records and accounts that must be kept and prepared by each Local Authority.

Consideration by Subordinate Legislation Committee

3. The Subordinate Legislation Committee made no comments in relation to the Regulations.

The A720 Edinburgh City Bypass and M8 (Hermiston Junction) (Speed Limit) Regulations 2012 SSI/2012/62

Purpose

4. These regulations specify speed limits which apply on the A720 Edinburgh City Bypass. The regulations will not change the speed limits currently in operation on the A720 Edinburgh City Bypass; however, they will apply those existing speed limits, made by older instruments, to fit the detail of the current road layout.

5. The A720 Edinburgh City Bypass was originally given the speed limit of 70 miles per hour, later amended in certain parts, to a 50 mile per hour limit, also applied to new trunk roads built at Hermiston and Calder.

6. The instrument that originally set the speed limits for the Bypass was made before the additional slip roads and extensions were built, therefore does not apply to them. This instrument is intended to specify speed limits for all currently existing sections of Bypass.

Consideration by Subordinate Legislation Committee

7. The Subordinate Legislation Committee made no comments in relation to the Regulations.

Recommendation

8. A copy of all the SSIs and their accompanying documents are included with the papers.

9. **The Committee is invited to consider any issues which it wishes to raise in reporting to the Parliament on these instruments.**

Steve Farrell
Clerk to the Committee
March 2012