



The Scottish Parliament
Pàrlamaid na h-Alba

INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

AGENDA

9th Meeting, 2012 (Session 4)

Wednesday 25 April 2012

The Committee will meet at 11.15 am in Committee Room 3.

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

Public Contracts (Scotland) Regulations 2012 SSI/2012/88;
Utilities Contracts (Scotland) Regulations 2012 SSI/2012/89;
Scottish Secure Tenancies (Proceedings for Possession) (Form of Notice) Regulations 2012 SSI/2012/92;
Scottish Secure Tenancies (Proceedings for Possession) (Confirmation of Compliance with Pre-Action Requirements) Regulations 2012 SSI/2012/93; and
Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2012 SSI/2012/108.

2. **Subordinate legislation:** The Committee will consider the following instrument which is not subject to any parliamentary procedure—

Housing (Scotland) Act 2010 (Commencement No. 7 and Transitional Provision) Order 2012 SSI/2012/91.

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The papers for this meeting are as follows—

Agenda item 1

Cover note

ICI/S4/12/9/1

[Public Contracts \(Scotland\) Regulations 2012 SSI/2012/88](#)

[Utilities Contracts \(Scotland\) Regulations 2012 SSI/2012/89](#)

[Scottish Secure Tenancies \(Proceedings for Possession\) \(Form of Notice\) Regulations 2012 SSI/2012/92](#)

[Scottish Secure Tenancies \(Proceedings for Possession\) \(Confirmation of Compliance with Pre-Action Requirements\) Regulations 2012 SSI/2012/93](#)

[Public Contracts and Utilities Contracts \(Scotland\) Amendment Regulations 2012 SSI/2012/108](#)

Agenda item 2

Cover note

ICI/S4/12/9/2

[Housing \(Scotland\) Act 2010 \(Commencement No. 7 and Transitional Provision\) Order 2012 SSI/2012/91](#)

Infrastructure and Capital Investment Committee

9th Meeting, 2012 (Session 4), Wednesday, 25 April 2012

Subordinate Legislation

Title of Instruments	Public Contracts (Scotland) Regulations 2012 (SSI/2012/88) Utilities Contracts (Scotland) Regulations 2012 (SSI/2012/89) Scottish Secure Tenancies (Proceedings for Possession) (Form of Notice) Regulations 2012 (SSI/2012/92) Scottish Secure Tenancies (Proceedings for Possession) (Confirmation of Compliance with Pre-Action Requirements) Regulations 2012 (SSI/2012/93) Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2012 (SSI/2012/108)
Type of Instruments	Negative
Laid Date	16 March 2012 30 March 2012 (SSI/2012/108)
Minister to attend the meeting	No
SSIs drawn to the Parliament's attention by Subordinate Legislation Committee	Yes (SSI/2012/88; SSI/2012/89; SSI/2012/93; SSI/2012/108) No (SSI/2012/92)
Reporting Deadline	30 April 2012 14 May 2012 (SSI/2012/108)

Public Contracts (Scotland) Regulations 2012 (SSI/2012/88)

Purpose

1. The Regulations amend and consolidate existing public procurement rules. In amending the rules the Regulations take account of a number of recent developments.

2. The Regulations take account of a decision by the Court of Justice of the EU and will remove uncertainty around the current requirement to bring court

proceedings in Scotland relating to breaches of EU procurement law “promptly” and change the start date for bringing such proceedings.

3. Changes are also required to take account of two pieces of recently-commenced legislation and will ensure that public bodies take the correct approach to excluding tenderers that have been convicted of one of the new bribery or serious organised crime offences from the procurement process.

4. The Committee will recall that, in February 2012, it considered a draft EU directive on public procurement, which raised subsidiarity concerns. That draft EU directive will, if approved by the EU, require new subordinate legislation to be enacted in Scotland, thereby revoking the Regulations under consideration by the Committee. It is understood that rather than waiting until the adoption of the EU directive (around mid-2014), the Regulations are required to be brought into force to take account of the issues set out in paragraphs 2 and 3 above.

Consideration by the Subordinate Legislation Committee

5. The Subordinate Legislation Committee (SLC) considered the Regulations and identified a number of drafting errors, set out in its report. The relevant extract from the SLC report is included at **Annexe A**.

6. Subsequently, the Scottish Government acknowledged the errors and brought forward an amending instrument (SSI/2012/108), which is included for consideration by the Committee later in this paper. In its report, the SLC states that it “welcomes that the Scottish Government has brought forward an amending instrument to correct the drafting errors in time for the coming into force of the Regulations”.

Utilities Contracts (Scotland) Regulations 2012 (SSI/2012/89)

7. The Regulations amend and consolidate existing public procurement rules in relation to entities operating in the water, energy, transport, postal services and telecommunications sectors.

8. As with the Public Contract Regulations (discussed above), the Utilities Contracts Regulations amend the procurement rules to take account of a court ruling by the Court of Justice of the EU and two pieces of recently-commenced legislation.

9. In February 2012, the Committee considered subsidiarity concerns relating to a draft EU directive on public procurement for utilities. That draft EU directive will, if approved by the EU, require new subordinate legislation to be enacted in Scotland, thereby revoking the utilities Regulations under consideration by the Committee. It is understood that rather than waiting until the adoption of the EU directive (around mid-2014), the Regulations are required to be brought into force to take account of the issues set out in paragraph 8 above.

Consideration by the Subordinate Legislation Committee

10. The SLC considered the Regulations and identified a number of drafting errors, set out in its report. The relevant extract from the SLC report is included at **Annexe B**.

11. Subsequently, the Scottish Government acknowledged the errors and brought forward an amending instrument (SSI/2012/108), which is included for consideration by the Committee later in this paper. In its report, the SLC states that it “welcomes that the Scottish Government has brought forward an amending instrument to correct the drafting errors in time for the coming into force of the Regulations”.

Scottish Secure Tenancies (Proceedings for Possession) (Form of Notice) Regulations 2012 (SSI/2012/92)*Purpose*

12. The Housing (Scotland) Act 2001 provides for landlords to raise proceedings for the recovery of possession of their property from tenants in certain grounds. Such proceedings may only be initiated once the landlord has served a notice on the tenants. The Regulations specify the form that such a notice must take.

13. The Regulations include two different notices, one for use where the grounds for recovering possession include rent arrears and another where they do not. Other grounds for recovering possession include, for example, using the property for illegal purposes and damage to the property or furniture through neglect.

14. Where the grounds under which the landlord is seeking repossession include rent arrears, the landlord must complete a number of steps called pre-action requirements before serving a notice on the tenant. These pre-action arrangements were defined in a separate Order¹, which the Committee approved on 21 March 2012.

Consideration by the Subordinate Legislation Committee

15. The SLC determined that it did not need to draw the attention of the Parliament to the Regulations.

Scottish Secure Tenancies (Proceedings for Possession) (Confirmation of Compliance with Pre-Action Requirements) Regulations 2012 (SSI/2012/93)*Purpose*

16. Tenants who rent properties from local authorities and registered social landlords generally do so under Scottish secure tenancies. Where a landlord seeks to recover possession of a property and evict the tenant on the ground that the tenant has not paid rent, before obtaining a court order to do so, the landlord has to comply with certain the pre-action requirements. The

¹ Scottish Secure Tenancies (Proceedings for Possession) (Pre Action Requirements) Order 2012 (SSI/2012/draft)

Committee considered and approved the pre-action requirements in a separate affirmative Order, on 21 March 2012.

17. A landlord may not commence proceedings until it has confirmed to the court that it has complied with the pre-action requirements. This instrument prescribes the form in which landlords must confirm to the court that they have complied with the pre-action requirements.

18. The Regulations state that the form of this notice should be as follows—

“the writ submitted for warrant must include a statement of claim with an averment confirming to the court that the pre-action requirements ... have been complied with.”

Consideration by the Subordinate Legislation Committee

19. The SLC determined that it should draw the Parliament’s attention to the Regulations as the form or meaning of the instrument could be clearer. Specifically, the SLC considered that the terminology used was insufficiently precise and risked confusion between different types of court procedure. The relevant extract from the SLC report is included at **Annexe C**.

20. As stated in its report, the SLC suggested that the use of “a mixture of terminology appropriate to summary causes (“statement of claim”) and ordinary causes (“warrant”) as well as imprecise general terminology (“writ”) which could potentially be interpreted as applying to either procedure”. The SLC considered, therefore, that the meaning of the instrument would have been clearer had the Scottish Ministers used the correct terminology in framing this provision.

21. In response to the SLC’s remarks (see Annexe C, Appendix 4), the Scottish Government did not accept that the terminology used in the Regulations was in any way confusing.

Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2012 (SSI/2012/108)

Purpose

22. The Regulations correct drafting errors identified by the SLC in relation to the Public Contracts (Scotland) Regulations 2012 (SSI/2012/88) and the Utilities Contracts (Scotland) Regulations 2012 (SSI/2012/89), as discussed above.

23. The specific drafting errors are explained in detail in the extracts of the SLC report – see Annexes A and B.

Consideration by the Subordinate Legislation Committee

24. The SLC determined that it should draw the attention of the Parliament to the Regulations as there had been a failure to lay the instrument at least 28 days before it comes into force. The relevant extract from the SLC report is included at **Annexe D**.

25. As stated in its report, the SLC found the explanation provided by the Scottish Government for its failure to meet the 28-day deadline to be acceptable. The SLC acknowledged that this failure was due to urgent action being required to correct errors in two instruments in time for the coming into force of those instruments on 1 May 2012.

Recommendation

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

27. The Committee is invited to consider any issues that it wishes to raise in reporting to the Parliament on these instruments.

Steve Farrell
Clerk to the Committee
April 2012

EXTRACT FROM SUBORDINATE LEGISLATION COMMITTEE REPORT

Public Contracts (Scotland) Regulations 2012 (SSI/2012/88)

6. The Regulations consolidate the Public Contracts (Scotland) Regulations 2006 (SSI 2006/1) (the “2006 Regulations”) and all subsequent amendments – the 2006 Regulations have been amended six times. They also introduce some changes.

7. The instrument gives effect in Scots law to: Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services; Directive 89/665/EEC on the co-ordination of the laws, regulation and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended; and Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

8. The above Directives were previously given effect in Scots law by the 2006 Regulations. The Scottish Government has supplied with these 2012 Regulations a useful table of changes and derivations, which shows the text of changes and where numbering has changed.

9. The Regulations are subject to negative procedure and come into force on 1 May 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. The Scottish Government has acknowledged that there are drafting errors in the instrument. It undertook to bring forward an amending instrument to correct the errors, which is also considered in this report (SSI 2012/108).

12. The drafting errors relate to the following—

- The list of contracting authorities in regulation 3 and Schedule 1 does not include Health Boards constituted under section 2 of the National Health Service (Scotland) Act 1978, while the Special Health Boards so constituted are included. This omission was contrary to the policy intention.
- The list of authorities in Schedule 1 does not take into account the recent merger of the National Archives of Scotland with the General Registers Office, to become the National Records of Scotland.
- Schedule 1 also includes the Crofters Commission. This should have referred to the Crofting Commission as the new statutory name of the body.

13. The Committee therefore draws this instrument to the attention of the Parliament on reporting ground (i). The drafting of Schedule 1 appears to be defective in the respect that the list of contracting authorities in the Schedule omits Health Boards constituted under section 2 of the National Health Service (Scotland) Act 1978.

14. The Committee also draws this instrument to the attention of the Parliament on the general reporting ground in two respects—

- Schedule 1 includes within the list of contracting authorities the National Archives, the General Register Office for Scotland and the Scottish Record Office. The Scottish Government has acknowledged that that listing requires to be amended to take into account the merger of the National Archives of Scotland with the General Register Office, forming the National Records of Scotland.
- There is a drafting error in Schedule 1. The reference to the Crofters Commission should be to the Crofting Commission, being the correct designation of the Commission when the Regulations come into force on 1 May 2012.

15. The Committee welcomes the fact that the Scottish Government has brought forward an amending instrument to correct these errors in time for the coming into force of the Regulations on 1 May 2012.

APPENDIX 1

Public Contracts (Scotland) Regulations 2012 (SSI/2012/88)

On 23 March 2012, the Scottish Government was asked:

1) Please clarify why it appears that the list of contracting authorities in regulation 3 and Schedule 1 does not include a Health Board constituted under section 2 of the National Health Service (S) Act 1978, while a Special Health Board so constituted is included?

(2) The Schedule 1 list of contracting authorities includes the National Archives, the General Register Office for Scotland, and the Scottish Record Office. The National Archives of Scotland (NAS) were known as the Scottish Record Office before 1999, becoming an Executive Agency in 1993. On 1 April 2011, NAS merged with the General Register Office to become the National Records of Scotland.

In light of that background, why has it been considered appropriate to retain the “Scottish Record Office” in Schedule 1, and not include the “National Records of Scotland”, as contracting authorities for the purposes of the Regulations?

(3) Schedule 1 also includes the Crofters Commission. Would you agree this is an error and should have referred to the Crofting Commission, because

section 1(1) of the Crofting Reform (Scotland) Act 2010 provided that the body was re-named, and this has effect on 1 April 2012 by virtue of SSI 2011/334, prior to these Regulations coming into force? Would you propose to correct this by means of an amendment?

The Scottish Government responded as follows:

We are grateful to you for highlighting the points raised and accept that there are errors within the instrument which require to be corrected.

We are preparing an amending instrument (The Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2012), which we intend to lay as soon as possible with a view to coming into force on 1 May 2012. These Regulations will address all three points you have made in your email.

EXTRACT FROM SUBORDINATE LEGISLATION COMMITTEE REPORT

Utilities Contracts (Scotland) Regulations 2012 (SSI/2012/89)

16. The Regulations consolidate the Utilities Contracts (Scotland) Regulations 2006, and introduce some changes to those Regulations. The 2006 Regulations have been amended by six instruments. The Scottish Government has supplied with these Regulations a useful table of changes and derivations, which shows the text of changes and where numbering has changed.

17. The instrument gives effect in Scots law to: Directive 2004/17/EC co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 92/13/EEC co-ordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities in the water, energy, transport and telecommunications sectors; and Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

18. The Regulations are subject to negative procedure and come into force on 1 May 2012.

19. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in Appendix 2.

20. The Scottish Government has acknowledged that there are drafting errors in the instrument. It undertook to bring forward an amending instrument to correct the errors, which is also considered in this report (SSI 2012/108).

21. The errors relate to the following—

- There is an error in Schedule 5, in describing the extent of the revocation of the Public Contracts and Utilities Contracts (Postal Services and Common Procurement Vocabulary Codes) Amendment (Scotland) Regulations 2008 (SSI 2008/376), which is one of the instruments that amend the principal 2006 Regulations, which are consolidated by these Regulations. The drafting copies out the corresponding revocation in the Public Contracts (Scotland) Regulations 2012, instead of providing for revocation of those 2008 Regulations in so far as extending to the Utilities Contracts (Scotland) Regulations 2006.
- Again in Schedule 5, there is a typographical error. The substitutions made in regulations 4(d) and 6(4) to (6) of the Defence and Security Public Contracts Regulations 2011 (S.I. 2011/1848) have the effect that the title of these Regulations becomes “the Utilities Contracts (Scotland) Regulations 2012 2006”, rather than just “2012”.

22. The Committee considered for both those points that it is sufficiently clear from the context which provisions are intended. The effect of the first error is limited. The provision does not revoke the amending instrument SSI 2008/376 so far as it extends to the Utilities Contracts (Scotland) Regulations 2006. SSI 2008/376 is one of the six instruments amending those principal 2006 Regulations, which are revoked in any case by Schedule 5.

23. The Scottish Government has acknowledged that there is a further matter of drafting practice. The instrument provides, in the interpretation article 2(1), for the references made through it to Directives 2004/18/EC and 2004/17/EC and Commission Regulation (EC) 1564/2005 to be references to those enactments “as amended from time to time”. References are made to Regulation 1564/2005 in various places, to refer to the forms of notice used in the procurement procedures, contained in the Regulation.

24. That provision in article 2(1) makes the appropriate “ambulatory reference” to the European Union provisions, in accordance with paragraph 1A of Schedule 2 to the European Communities Act 1972. However, the appropriate explanation in the preamble to the instrument is omitted in relation to Regulation 1564/2005. Such an explanation is appropriate as a matter of proper drafting practice, although the preamble is not part of the operative provisions of the instrument. This is because paragraph 1A of Schedule 2 to the 1972 Act contains the pre-condition that, to make the “ambulatory reference”, the Scottish Ministers must determine that it is either necessary or expedient for the references to the EU legislation to be construed as references as amended from time to time.

25. The Committee agrees with the Government’s view that the “ambulatory reference” to Regulation 1564/2005 has been properly made in regulation 2(1), but the omission above in the preamble is reported as a failure to follow the proper drafting practice.

26. The Committee therefore draws this instrument to the attention of the Parliament on the general reporting ground in the following respects—

- **There is a drafting error in Schedule 5. The revocation of the Public Contracts and Utilities Contracts (Postal Services and Common Procurement Vocabulary Codes) Amendment (Scotland) Regulations 2008 (SSI 2008/376) extends to the whole Regulation so far as extending to the Public Contracts (Scotland) Regulations 2006, when it should extend to the Utilities Contracts (Scotland) Regulations 2006.**
- **There is a further error in Schedule 5. The substitutions made in regulations 4(d) and 6(4) to (6) of the Defence and Security Public Contracts Regulations 2011 (SI 2011/1848) should have replaced “the Utilities Contracts (Scotland) Regulations 2006” but the provision omits “2006”.**

- There is a failure to follow proper drafting practice in the second paragraph of the preamble. That paragraph should have added reference to Commission Regulation (EC) No 1564/2005, in addition to the existing references to Directives 2004/18/EC and 2004/17/EC.

27. The Committee welcomes that the Scottish Government has brought forward an amending instrument to correct the drafting errors in time for the coming into force of the Regulations on 1 May 2012.

APPENDIX 2

Utilities Contracts (Scotland) Regulations 2012 (SSI/2012/89)

On 23 March 2012, the Scottish Government was asked:

(1) (a) In relation to the second paragraph of the preamble, and the definition of Commission Regulation (EC) No 1564/2005 in regulation 2(1), please confirm that in accordance with the statutory pre-condition in paragraph 1A of Schedule 2 to the European Communities Act 1972, the Scottish Ministers have determined that it is necessary or expedient for the various references to that Regulation in the instrument to be construed as references to the Regulation as amended from time to time?

(b) Given that the preamble confirms that the statutory pre-condition has been implemented to make the references “ambulatory” in relation to Directives 2004/18 and 2004/17, but omits it for Regulation 1564/2005, could you comment on the effect of this omission?

(2) There appears to be an error in Schedule 5, in describing the extent of the revocation of S.S.I 2008/376, which duplicates the corresponding revocation in S.S.I 2012/88, instead of providing for revocation of those 2008 Regulations insofar as extending to the Utilities Contracts (Scotland) Regulations 2006. If you agree, would you propose to correct this by amendment?

(3) There appears to be an error in Schedule 5, so far as the substitutions made in regulations 4(d) and 6(4) to (6) of S.I. 2011/1848 have the effect that the title of these Regulations becomes “the Utilities Contracts (Scotland) Regulations 2012 2006”. If you agree, would you propose to correct this by amendment?

The Scottish Government responded as follows:

Thank you for your email regarding the Utilities Contracts (Scotland) Regulations 2012.

We are grateful to you for highlighting the points raised in your email and accept that there are errors in Schedule 5 to the instrument that require to be corrected. We are preparing an amending instrument (The Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2012) which we

intend to lay as soon as possible with a view to coming into force on 1 May 2012. These Regulations will address both points you have made in your email with regards to Schedule 5 (points (2) and (3)).

With regards to point (1)(a) concerning the ambulatory reference, we confirm that the Scottish Ministers have determined that it is necessary or expedient for the references to Regulation 1564/2005 to be construed as references to the Regulations as amended from time to time. We agree that reference to these Regulations should have been included alongside reference to the Directives in relation to the ambulatory references.

Regarding (1)(b), we consider that this omission is a matter of drafting style and does not affect the material provisions of the instrument or the ambulatory reference. We therefore do not propose any further amendment.

EXTRACT FROM SUBORDINATE LEGISLATION COMMITTEE REPORT

Scottish Secure Tenancies (Proceedings for Possession) (Confirmation of Compliance with Pre-Action Requirements) Regulations 2012 (SSI/2012/93)

37. 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”).

38. This instrument prescribes the form in which landlords must confirm to the court that they have complied with the pre-action requirements in section 14A of the 2001 Act.

39. The Regulations are subject to negative procedure and come into force on 1 August 2012.

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

41. When a landlord seeks to bring proceedings to recover possession of a property let on a Scottish secure tenancy, it usually does so by way of summary cause. Rarely, it may be appropriate instead to proceed by ordinary cause. These different procedures are subject to separate rules of court and different terminology is used in each of them.

42. The Committee understands what the Scottish Ministers are trying to achieve in making these Regulations: their intention is that, where a landlord wishes to raise proceedings to recover possession of a property, the documents lodged with the court must contain a statement which confirms that the landlord has complied with the pre-action requirements. However, it appears that the Scottish Ministers may not have used the correct terminology in making the Regulations. In particular, regulation 2 provides that “the writ submitted for warrant must include a statement of claim with an averment confirming to the court that the pre-action requirements ... have been complied with.”

43. Regulation 2 uses a mixture of terminology appropriate to summary causes (“statement of claim”) and ordinary causes (“warrant”) as well as imprecise general terminology (“writ”) which could potentially be interpreted as applying to either procedure. The Committee considers that the courts, if required to do so, could interpret the regulation as applying either to summary cause or to ordinary cause proceedings, although it would require a strained interpretation of the words which refer to the other procedure in order to do so. In the circumstances, the Committee takes the view that it would be difficult for the end user to understand exactly what is intended. The Committee considers that the meaning of the instrument would have been

clearer had the Scottish Ministers used the correct terminology in framing this provision.

44. The Committee draws the instrument to the attention of the Parliament on reporting ground (h). The form or meaning of the instrument could be clearer, in that the terminology used in regulation 2 is insufficiently precise, risks confusion between different types of court procedure, and does not appear adequately to make reference either to ordinary cause or to summary cause procedure.

APPENDIX 4

Scottish Secure Tenancies (Proceedings for Possession) (Confirmation of Compliance with Pre-Action Requirements) Regulations 2012 (SSI/2012/93)

On 23 March 2012, the Scottish Government was asked:

1. Section 14(1) of the Housing (Scotland) Act 2001 provides that the landlord under a Scottish secure tenancy may raise proceedings by way of summary cause for recovery of possession of the house. In terms of rule 4.1 of the Summary Cause Rules 2002, a summary cause action shall be commenced by summons. Furthermore, the summons requires to be authenticated by the sheriff clerk in terms of rule 4.4(1), or failing that by the sheriff in terms of rule 4.4(2), the authenticated summons being warrant for service (rule 4.4(3)). The Scottish Government is accordingly asked to explain:

- a. why regulation 2 of these Regulations uses the terminology appropriate to an ordinary cause (“writ”, instead of summons, and “warrant” instead of authentication), when an action for possession under section 14 proceeds by way of summary cause?
- b. whether the Scottish Government considers that these Regulations have any effect, given that no writ is lodged for warranting in a summary cause?
- c. if the Scottish Government’s position is that “writ” and “warrant” require to be given an expansive reading such that these terms might encompass “summons” and “authentication” respectively, on what basis does it reach that conclusion, and is the intention sufficiently clear?

The Scottish Government responded as follows:

The Scottish Government does not consider that the use of the word “writ” or “warrant” will cause any difficulty in the operation of the Regulations.

Court action is commenced by service of court papers, which are commonly referred to as a “writ”. “Summons” is simply the more specific term for the writ that initiates a court action using the summary cause procedure. The more specific term for the type of writ that initiates an ordinary cause action or a

summary application is an “initial writ”, normally referred to using both words to show the type of writ it is.

By way of illustration, the Summary Cause Rules contain a Glossary at Appendix 2, which includes definitions of both summons and writ: -

a summons - the form which must be filled in to begin a summary cause;

a writ - a legally significant writing.

As a further illustration of how the terms are understood and used, Lord Macphail (in his book Sheriff Court Practice, 3rd Edition) writes at para 31.68:-

"The initiating writ in a summary cause action is a summons".

An example of a generic use of “writ” in legislation can be found at section 32(1) of the Solicitors (Scotland) Act 1980, which makes it an offence for an unqualified person “to draw or prepare any writ relating to any action or proceedings in any court”. The term is undefined in that Act, but would not be understood as allowing an unqualified person to prepare a summons in relation to a summary cause and to be restricted in its application only to actions that were initiated by “initial writ”.

The Scottish Government does not consider that the use of a more generic term will give anyone operating the Regulations a difficulty in understanding what it refers to.

On the “warrant” aspect of the questions, the reference in the instrument to “a writ submitted for warranting” can only in practice refer to the document that is the subject of an application for a summons, and again the Scottish Government cannot see any difficulty with this aspect of the wording.

Although a Sheriff Clerk “authenticates” a summons, Rule 4.4 of the Summary Cause Rules 2002 provides that the authenticated summons is warrant for service of the summons and warrant for arrestment in relation to the remedies it seeks. The landlord’s purpose in submitting the writ to the court is to commence action by serving the writ on the tenant, and possibly also to pursue arrestment, not authentication of the writ in some abstract sense. The applicant wants warrant to proceed with an action in the usual way based on the authentication of the summons. The wording used is readily understood by practitioners. The alternative wording suggested in the question could have been used and would have the same effect. The wording is not capable of being understood to refer to any other process.

As the Executive Note records, there was consultation in the preparation of the instrument. Those consulted included the Legal Services Agency and a firm of solicitors who undertake repossessions work, neither of whom indicated any difficulty with the wording that has been used.

EXTRACT FROM SUBORDINATE LEGISLATION COMMITTEE REPORT

Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2012 (SSI/2012/108)

28. The Regulations correct drafting errors in Schedule 1 to the Public Contracts (Scotland) Regulations 2012 (SSI 2012/88), and Schedule 5 to the Utilities Contracts (Scotland) Regulations 2012 (SSI 2012/89). The Committee identified these errors in its consideration of those instruments (as noted above [see Annexes A and B]).

29. The instrument is subject to negative procedure and comes into force on 1 May 2012, on the same date as those principal Regulations.

30. The Regulations were laid on 30 March 2012. Taking into account the parliamentary recess for Easter, this breaches the “28-day rule” for negative procedure instruments.

31. Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out the rule that a Scottish statutory instrument which is subject to negative procedure must be laid before Parliament as soon as practicable after it is made, and in any event at least 28 days before the instrument comes into force.

32. A failure to comply with section 28(2) does not render the instrument invalid, but the Scottish Government must explain to the Presiding Officer why the laying requirements have not been complied with.

33. The Scottish Government’s letter to the Presiding Officer on this instrument sets out why it was appropriate not to comply with the 28 day rule. In short, the Committee has identified the errors which are corrected by these Regulations, and it is appropriate to bring this instrument into force on the same day as the two instruments being corrected, for the correct functioning of the instruments. The Scottish Government’s letter is included in Appendix 3.

34. Although it is not ideal that the 28 day rule has been broken because of the need to correct two instruments which have recently been made, the Committee considers that the reasons provided for the failure to comply with the 28-day rule are acceptable.

35. The Committee therefore draws the instrument to the Parliament’s attention under reporting ground (j), as there has been a failure to lay the instrument at least 28 days before it comes into force as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

36. In doing so, the Committee finds the explanation provided by the Scottish Government for this failure to be acceptable, since urgent action was required to correct errors in the Public Contracts (Scotland) Regulations 2012 and the Utilities Contracts (Scotland) Regulations 2012

identified by the Committee in time for the coming into force of those Regulations on 1 May 2012.

APPENDIX 3

Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2012 (SSI/2012/108)

Breach of laying requirements: letter to Presiding Officer

The above instrument was made by the Scottish Ministers under section 2(2) of the European Communities Act 1972 on 28 March 2012. It is being laid before the Scottish Parliament today and is to come into force on 1 May 2012.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 has not been complied with. In accordance with section 31(3) of that Act, this letter explains why.

The Regulations correct errors in Schedule 1 to the Public Contracts (Scotland) Regulations 2012 and Schedule 5 to the Utilities Contracts (Scotland) Regulations 2012.

The Subordinate Legislation Committee noted in its letter from 23 March 2012, that there is no entry in Schedule 1 to the Public Contract (Scotland) Regulations 2012 listing Health Boards constituted under section 2 of the National Health Service (Scotland) Act 1978. Without this amendment, Health Boards will be subject to the incorrect procurement threshold level from 1 May 2012. This is an omission which we seek to correct with this amendment. In order to fully update the listing for Health authorities, we have inserted entries for the Common Services Agency and Health Improvement Scotland for the same reason.

We are also taking this opportunity to make other amendments to address further issues identified by the Committee. We are amending Schedule 1 to reflect the merger of the National Archives for Scotland (in the Schedule listed by the name of the predeceasing authority, the Scottish Records Office) with the General Register Office to create National Records of Scotland. We are also correcting minor errors in that schedule and in Schedule 5 to the Utilities Contracts (Scotland) Regulations 2012.

We believe it is necessary for the instrument to be laid and come into force breaching the 28 day rule, because the amendments refer to two instruments which will both come into force on the 1 May 2012 and the amendments are necessary for the correct functioning of those two instruments as they were intended in compliance with our obligations under European Law.

Infrastructure and Capital Investment Committee

9th Meeting, 2012 (Session 4), Wednesday, 25 April 2012

Subordinate Legislation

Title of Instrument	Housing (Scotland) Act 2010 (Commencement No. 7 and Transitional Provision) Order 2012 (SSI/2012/91)
Type of Instrument	Not subject to Parliamentary procedure
Laid Date	16 March 2012
Minister to attend the meeting	No
SSI drawn to the Parliament's attention by Subordinate Legislation Committee	No
Reporting Deadline	30 April 2012

Procedure

1. This instrument was laid before the Parliament, but is not subject to any Parliamentary procedure. Under the new procedure introduced by the Interpretation and Legislative Reform (Scotland) Act 2010, Scottish statutory instruments previously not laid now require to be laid before the Parliament. Under Rule 10.1.3, any instrument laid before the Parliament is to be referred to a lead committee for consideration. Therefore, instruments laid only but not subject to any parliamentary procedure are also now referred to lead committees for consideration.

2. The requirement on lead committees to consider these instruments is an unintended consequence of the recent rule changes, brought into effect by the ILR Act. It is proposed that this requirement be removed in the next round of minor rule changes. Therefore, the requirement to note this type of instrument on the agenda is expected to be a temporary measure.

Housing (Scotland) Act 2010 (Commencement No. 7 and Transitional Provision) Order 2012 (SSI/2012/91)

Purpose

3. The Order commences sections 153 and 155 of the Housing (Scotland) Act 2010, in so far as they are not already in force.

4. Section 153 provides some protection for tenants following a court decree for eviction. For the purposes of the Order, section 153 provides landlords with discretion to retain tenants in their existing tenancies where agreement has been reached about rent arrears following a court decree for eviction. The other provisions of section 153 were commenced by the Housing (Scotland) Act 2010 (Commencement No. 5) Order 2012 and were considered by the Committee at its meeting on 22 February 2012.

5. Section 155 requires landlords to comply with pre-action requirements before commencing court proceedings where the ground of repossession includes that a tenant has rent arrears. As with section 153, the other provisions of section 155 were commenced by the Housing (Scotland) Act 2010 (Commencement No. 5) Order 2012 and were considered by the Committee at its meeting on 22 February 2012.

6. In addition, the Order makes transitional arrangements for proceedings to recover possession of property that are based on notices in existence before the commencement of this Order. In such cases, the rules to comply with pre-action requirements before serving a notice and to confirm to the court that pre-action requirements have been complied with before raising proceedings, do not apply.

Consideration by the Subordinate Legislation Committee

7. The Subordinate Legislation Committee determined that it did not need to draw the attention of the Parliament to the Order.

Recommendation

8. A copy of the SSI and the accompanying documents are included with the papers.

9. **The Committee is invited to take note of this instrument.**

Steve Farrell
Clerk to the Committee
April 2012