



The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

24th Meeting, 2012 (Session 4)

Tuesday 6 November 2012

The Committee will meet at 10.30 am in Committee Room 6.

1. **Declaration of interests:** Bruce Crawford will be invited to declare any relevant interests.
2. **Instruments subject to affirmative procedure:** The Committee will consider the following—

[Scotland Act 1998 \(Modification of Schedule 5\) Order 2013 \[draft\];](#)
[Homelessness \(Abolition of Priority Need Test\) \(Scotland\) Order 2012 \[draft\];](#)
[Housing Support Services \(Homelessness\) \(Scotland\) Regulations 2012 \[draft\];](#)
[Scottish Local Government Elections Amendment \(No. 2\) Order 2012 \[draft\].](#)

3. **Instruments subject to negative procedure:** The Committee will consider the following—

[Criminal Legal Aid \(Scotland\) \(Fees\) Amendment Regulations 2012 \(SSI 2012/276\);](#)
[INSPIRE \(Scotland\) Amendment Regulations 2012 \(SSI 2012/284\);](#)
[Town and Country Planning \(General Permitted Development\) \(Fish Farming\) \(Scotland\) Amendment \(No. 2\) Order 2012 \(SSI 2012/285\);](#)
[Road Works \(Maintenance\) \(Scotland\) Amendment Regulations 2012 \(SSI 2012/286\).](#)

4. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

[Act of Sederunt \(Sheriff Court Rules\) \(Miscellaneous Amendments\) \(No. 3\) 2012 \(SSI 2012/271\);](#)
[Act of Sederunt \(Actions for removing from heritable property\) \(Amendment\) 2012 \(SSI 2012/273\);](#)

[Act of Sederunt \(Rules of the Court of Session Amendment No 5\) \(Miscellaneous\) 2012 \(SSI 2012/275\); Wildlife and Natural Environment \(Scotland\) Act 2011 \(Commencement No. 2\) Amendment \(No. 2\) Order 2012 \(SSI 2012/281 \(C.29\)\).](#)

Euan Donald
Clerk to the Subordinate Legislation Committee
Room T3.60
Tel: 0131 348 5219
Email: euan.donald@scottish.parliament.uk

The papers for this meeting are as follows—

Agenda Items 2, 3 and 4

Legal Brief (private)

SL/S4/12/24/1 (P)

Agenda Items 3 and 4

Instrument Responses

SL/S4/12/24/2

SUBORDINATE LEGISLATION COMMITTEE

24th Meeting, 2012 (Session 4)

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Instrument Responses

INSTRUMENT SUBJECT TO NEGATIVE PROCEDURE

**Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2012
(SSI 2012/276)**

On 26 October 2012, the Scottish Government was asked:

In regulation 12, where it inserts regulation 3A(g) of the principal Regulations, the reference to “the 1998 Act” (referring to section 1 of the Road Traffic Act (causing death by dangerous driving)) is an error and should refer to the 1988 Act? If you agree, would you propose to correct this by an amendment?

The Scottish Government responded as follows:

We thank the Subordinate Legislation Committee for spotting this error in the Regulations. We will bring forward a brief amending set of Regulations as soon as possible to correct this error.

INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE**Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No.3) 2012 (SSI 2012/271)****On 10 October 2012, the Lord President's Private Office was asked:**

Given that rule 3.42.2 appears intended to apply only to authorisations requiring judicial approval which relate to persons falling with paragraph (a) of the definition of "relevant person" in section 23A(6) of the Regulation of Investigatory Powers Act 2000, is the reference in paragraph 6 of Form 59 to section 23A(5)(c) irrelevant and therefore an error?

The Lord President's Private Office responded as follows:

The Lord President's Private Office considers that a local authority in Scotland may require to satisfy the relevant conditions under either section 23A(5)(a) or (c) of the Regulation of Investigatory Powers Act 2000.

Section 23A(5)(a) refers expressly to local authorities, whereas section 23A(5)(c) refers to "relevant persons". Section 23A(6) defines "relevant persons" to include an individual holding "an office, rank or position in a local authority in Scotland (other than an office, rank or position in a fire and rescue authority)". We are of the view that section 23A(5)(c) does not only apply to paragraph (c) of the definition of "relevant persons" given in section 23A(6).

Under section 23A(5)(c) the Secretary of State may prescribe by order conditions that have to be satisfied by a relevant person. Although section 23A(5)(a)(iii) contains a similar order making power, such further conditions must be read with the other conditions set out in section 23A(5)(a)(i) and (ii). The Secretary of State may choose to exercise the condition setting power separately under section 23A(5)(c), which conditions may be more or less onerous than those prescribed under section 23A(5)(a). The primary legislation thus anticipates that there are two alternative regimes under which local authorities may require to satisfy relevant conditions and for that reason, paragraph 6 of Form 59 provides accordingly.

For the reasons given, the Lord President's Private Office does not accept that an error has been made; and we would appreciate if the earlier concession could be disregarded. Given that the Parliament is in recess and the Subordinate Legislation Committee is not due to consider this Act of Sederunt until 30 October, we hope that this will not cause a difficulty.

Act of Sederunt (Actions for removing from heritable property) (Amendment) 2012 (SSI 2012/273)

On 26 October 2012, the Lord President's Private Office was asked:

1. Does the Lord President's Private Office agree that the reference in paragraph 2(1) to "The Act of Sederunt (Actions for removing from heritable property (2012))" instead of "The Act of Sederunt (Actions for removing from heritable property) 2012" is an error? If so, what is the effect of this error and how does the Lord President's Private Office propose to correct it?

2. Paragraph 2 of the instrument provides amendments to rule 3 (charge for removing) of the Act of Sederunt (Actions for removing from heritable property) 2012 ("the principal instrument"). We observe that, in the principal instrument, this provision appears to be referred to variously as a "rule" and its sub-divisions as "paragraphs" (e.g. in the provision itself) or as a "paragraph" (e.g. in paragraph 5). Does the Lord President's Private Office agree that the principal divisions of an Act of Sederunt, unless it embodies rules of court, are called paragraphs? If so, should paragraph 2 of this instrument not refer to paragraph 3 of the principal instrument (and, by extension, to sub-paragraphs (1)(b), (5)(a) and (7)(a) rather than paragraphs 1(b), 5(a) and 7(a))?

The Lord President's Private Office responded as follows:

1. Yes, this is an error. However, a corrections slip has already been ordered and a copy of this is enclosed for your reference. We would observe in any event that the relevant footnote (c) correctly refers to the year and number of the original instrument; and therefore any confusion is likely to be minimal.

2. We agree that the reference to "rule 3" is an error and that this should read "paragraph 3". As a consequence, we agree that the reference to paragraphs 1(b), 5(a) and 7(a) should be to subparagraphs rather than paragraphs. These errors will be amended in a subsequent miscellaneous instrument.

**Act of Sederunt (Rules of the Court of Session Amendment No 5)
(Miscellaneous) 2012 (SSI 2012/275)**

On 26 October 2012, the Lord President's Private Office was asked:

1. Paragraph 3(3) inserts a new rule 55.2D. Paragraph (5) of that rule provides that a party seeking to lodge a counterclaim or serve a third party notice "shall apply by notice to do so". In paragraph (6), reference is made to the judge determining "a motion to lodge a counterclaim or to serve a third party notice". Should the reference in paragraph (5) instead be to an application by motion? If not, what procedure applies to such an application?
2. Paragraph 3(5) inserts new rules 55.5B and 55.5C after rule 55.5. Having checked the versions of Chapter 55 on the court website and on Westlaw, there does not presently appear to be a rule 55.5A, although it may be that there is a prospective amendment which has not yet taken effect. Could you please confirm the position? If there is no rule 55.5A, could you please advise why these new provisions are not numbered 55.5A and 55.5B respectively?
3. Paragraph 5 amends rule 76.37 in a number of respects. The effect of the new rule 76.37(5) would appear to be that the respondent to a petition under section 391 of the Proceeds of Crime Act 2002 is not permitted to borrow or inspect the documents lodged in process – and if a respondent seeks to borrow or inspect documents lodged in process, that party would have to apply by motion under paragraph (8) for variation of the paragraph (5) restrictions. On the face of it, the Article 6 ECHR rights of the respondent may be engaged if the court proceeds to determine that party's civil rights and obligations without permitting the party to examine the documents lodged in support of the petition. Do you consider that paragraph (8) is capable of being operated so as to secure the Article 6 rights of a respondent by varying the restrictions on access should that be necessary to ensure Article 6 compliance?
4. In relation to paragraph 5, we note that section 396(2) of the Proceeds of Crime Act 2002 enables provision to be made by rules of court as to the discharge and variation of disclosure orders, and that section 396(3)(b) provides for this, without prejudice to section 5 of the Court of Session Act 1988, to be by way of act of sederunt. However, this power has not been cited in the preamble as an enabling power. Do you agree that this specific power ought to have been cited?

The Lord President's Private Office responded as follows:

1. This is a typographical error and as you correctly note the reference in paragraph (5) should instead be to an application by motion.
2. This is a typographical error and the provisions should read 55.5 A and 55.5B.
3. By way of background, Part 8 of the Proceeds of Crime Act 2002 enables the granting of various orders in connection with civil recovery investigations. In particular, section 391 provides that the Court of Session may grant a disclosure order if it is satisfied that each of the requirements for the making of the order is

fulfilled (section 391(1), 2002 Act). A disclosure order entitles the Scottish Ministers to issue notices to persons who they consider may have relevant information requiring those persons to answer questions, provide information or produce documents (section 391(4), 2002 Act).

When an application is made for such an order, a certain amount of information about an investigation requires to be provided to the Court. It is understood that if such information were to be released to persons holding property which is the subject of that investigation, this may result in property being disposed of or concealed. There is also a need to ensure that any confidential information does not identify or endanger sources. This is the main reason for rule 76.37(5) being phrased in this way. I would also refer you to the minutes of the Court of Session Rules Council meeting of 14th May (Item 13) which details the Council's consideration of this rule.

In answer to your question, I consider that paragraph 5(8) is capable of being operated so as to secure the Article 6 rights of a respondent by varying the restrictions on access should that be necessary.

4. I agree that it would have been preferable for section 396(3)(b) to have been cited in the preamble as the enabling power. Having said that, I note the terms of the Court of Appeal's judgment in *Vibixa Ltd v Komori UK Ltd and Others* (2006) EWCA Civ 536 and in particular the conclusion which states:

"General enabling powers in the preamble to a statutory instrument may be interpreted as referring to an enabling power, not expressly invoked, in situations such as the following: - (i) where, in order for the SI to have effect, the maker of the instrument must necessarily have invoked that power, or (ii) where the operative provisions of the SI make it clear that its maker must have invoked that power"

On my understanding of this case, although it would have been preferable for the section of the 2002 Act to be referred to in the preamble, the general enabling powers as listed are sufficient.

Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No. 2) Amendment (No. 2) Order 2012 (SSI 2012/281 (C.29))

On 25 October 2012, the Scottish Government was asked:

1. Article 2(2) appoints 22 November 2012 for the coming into force of section 13(3) of the 2011 Act, so far as it inserts section 11A(4) and (9) into the Wildlife and Countryside Act 1981, and section 13(5) of the 2011 Act. The Order does not follow the normal drafting practice, so far as that new commencement is inserted as an amendment to article 2 of the Commencement No. 2 Order (SSI 2011/433), rather than being provision in a commencement order given the appropriate number (5) in the series of commencement orders made under the 2011 Act.

Please explain why the normal drafting practice has not been followed in this instance?

2. So far as the Order is both newly commencing provisions, and making the amendment in article 2(3), would you agree that the title of the Order should more properly have been "The Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No. 5) and (Commencement No. 2) Amendment (No. 2) Order 2012"?

3. Would you agree that, given the new and amended commencement provisions in this order, the next commencement order should have a Note of Earlier Commencement Orders attached to it to help readers?

The Scottish Government responded as follows:

1. Article 2(2) of this Order introduces a new provision into the Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No. 2) Order 2011 ("the 2011 Order") to appoint 22 November 2012 for the coming into force of section 13(3) of the 2011 Act, so far as it inserts section 11A(4) and (9) into the Wildlife and Countryside Act 1981, and section 13(5) of the 2011 Act.

We do not agree that this is a "new commencement" (i.e. the first time these provisions have been commenced). Instead this Order amends the existing commencement date for these provisions. Article 2(4) of the 2011 Order currently provides that these provisions will come into force on 1st January 2013 (being provisions of section 13 which are not already in force on that date).

Accordingly, the appropriate drafting approach was to amend the 2011 Order to effect the change of commencement date rather than to promote a new commencement order. We consider that this Order follows normal drafting practice.

2. We refer to our answer to question (1). As this Order does not contain new commencement provisions, but instead amends existing commencement provisions, we would not agree that its title should more properly have been "The Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No. 5) and (Commencement No. 2) Amendment (No. 2) Order 2012".

3. We refer to our answer to question (1). No further commencement orders are required for the Wildlife and Natural Environment (Scotland) Act 2011, which has been commenced in its entirety. Should further amendment be required to this commencement Order, consideration will be given as to whether a Note of Earlier Commencement Orders would be of assistance to readers.