



The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

11th Meeting, 2013 (Session 4)

Tuesday 26 March 2013

The Committee will meet at 10.00 am in Committee Room 5.

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

[Police Pensions \(Contributions\) Amendment \(Scotland\) Regulations 2013 \(SSI 2013/89\);](#)

[National Health Service \(Optical Charges and Payments\) \(Scotland\) Amendment Regulations 2013 \(SSI 2013/96\);](#)

[Road Traffic \(Permitted Parking Area and Special Parking Area\) \(Fife Council\) Designation Order 2013 \(SSI 2013/93\);](#)

[Parking Attendants \(Wearing of Uniforms\) \(Fife Council Parking Area\) Regulations 2013 \(SSI 2013/94\);](#)

[Road Traffic \(Parking Adjudicators\) \(Fife Council\) Regulations 2013 \(SSI 2013/95\);](#)

[Scottish Fire and Rescue Service \(Framework and Appointed Day for Strategic Plan\) Order 2013 \(SSI 2013/97\);](#)

[Title Conditions \(Scotland\) Act 2003 \(Rural Housing Bodies\) Amendment Order 2013 \(SSI 2013/100\).](#)

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

[Act of Sederunt \(Sheriff Court Rules\) \(Lay representation\) 2013 \(SSI 2013/91\);](#)

[Children's Hearings \(Scotland\) Act 2011 \(Commencement No. 7\) Order 2013 \(SSI 2013/98 \(C.7\)\).](#)

3. **High Hedges (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

SL/S4/13/11/A

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The papers for this meeting are as follows—

Agenda Items 1 and 2

Legal Brief (private)

SL/S4/13/11/1 (P)

Agenda Items 1 and 2

Instrument Responses

SL/S4/13/11/2

Agenda Item 3

[High Hedges \(Scotland\) Bill - as amended at Stage 2](#)

[High Hedges \(Scotland\) Bill - Supplementary Delegated Powers Memorandum](#)

Briefing Paper (private)

SL/S4/13/11/3 (P)

Briefing Paper (private)

SL/S4/13/11/4 (P)

SUBORDINATE LEGISLATION COMMITTEE**11th Meeting, 2013 (Session 4)****Tuesday 26 March 2013****Instrument Responses****INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE****Police Pensions (Contributions) Amendment (Scotland) Regulations 2013
(SSI 2013/89)****On 14 March 2013, the Scottish Government was asked:**

1. It appears from the letter of the Scottish Public Pensions Agency to the Presiding Officer that the contribution rates which are set by this instrument are required, as a matter of policy, to be aligned throughout the United Kingdom. The penultimate paragraph narrates that the appropriate rates were communicated timeously in respect of two other pension schemes, but the rates in respect of the police schemes were not confirmed to the Scottish Government by the Home Office until 1 March 2013. The Scottish Government is asked:

a. to explain the steps which were taken by the Scottish Government and the Home Office to ensure co-operation in respect of the making of this instrument in order that the laying requirements might be respected; and

b. why, when the rates in respect of the other schemes were communicated timeously, the rates in respect of the police schemes could not also have been communicated timeously?

2. The Executive Note to the Police Pensions Amendment (Scotland) Regulations 2010 narrated that a UK-wide consolidation of the Police Pensions Regulations 1987 ("the 1987 Regulations") was planned for later in 2010, that instrument being the 24th amendment to the 1987 Regulations. This instrument will now be the 28th amendment to the 1987 Regulations, and the Policy Note for this instrument gives no indication as to when that proposed consolidation might be forthcoming. The Scottish Government is accordingly asked to provide an update as to the proposals for consolidation of the 1987 Regulations.

The Scottish Government responded as follows:

1. Scottish Government officials responsible for police pensions enjoy a good and constructive working relationship with their counterparts in the Home Office, built up over a number of years. The Home Office officials are fully aware of the existence of the 28-day rule in Scotland and are helpful in providing timeously information which will assist in trying to ensure that that rule is complied with wherever possible. There is, however, no linkage as a matter of law between the applicable contribution rates for police officers in England and those for officers in Scotland. There are likely to have been a considerable number of factors in play in relation to the final decision by UK Government Ministers as to 2013/14 rates for officers in England and that

decision only required to be made early enough to enable the relevant instrument to be laid at Westminster at least 21 days before 1 April. There was no delay between the taking of the final decision and its communication to Scottish Government officials.

2. The Executive Note to the 2010 Regulations was drawn up in March 2010 and made reference to a UK-wide consolidation planned for later that year. The subsequent change of administration following the May 2010 UK general election has led to a wide-ranging programme of reform of public service pensions and the need to divert much official time to this. However, Home Office indicated to key scheme stakeholders as recently as last week that they are working on a draft consolidating instrument and the Scottish Government will do everything possible to assist with progressing this project.

Breach of laying requirements: letter to Presiding Officer

The above instrument was made on 4th March 2013 under section 1 of the Police Pensions Act 1976. It is being laid before the Scottish Parliament on 6th March 2013 and comes into force on 1 April 2013.

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 sets out why it is necessary to lay the instrument less than 28 days before it is brought into force.

This instrument fixes the pension contribution rates for police officers in Scotland under two public sector schemes applicable to Scotland. The schemes are reserved under the Scotland Act 1998, although the making of subordinate legislation in relation to the schemes is executively devolved.

On 28 October 2010 the UK Government set out its intent on delivering savings of £2.8bn per annum across the public sector pension schemes by 2014/15 by increasing employee contribution rates by an average of 3.25% of pay in three annual increments starting April 2012. Despite Scottish Ministers' principled opposition to increasing employee contributions at this time and in this way the UK Government refused to change its policy and indicated that if similar increases were not introduced to the schemes in Scotland then the Scottish Budget would be adjusted accordingly. Scottish Ministers reluctantly introduced the first year of increases in the NHS, Teachers', Police and Firefighter schemes from 1 April 2012.

In a statement to Parliament on 28 November 2012, the Cabinet Secretary for Finance, Employment and Sustainable Growth, John Swinney, announced the Scottish Government's decision to implement the second annual increment of UK Government proposed employee contribution increases for the Teachers', NHS, Police and Firefighters' schemes in Scotland.

Whilst the UK rates for the NHS and Teachers schemes were confirmed to allow the subsequent statutory instruments for the Scottish schemes to be laid within the necessary Parliamentary time limits the revised rates for the Police scheme in

England and Wales were only confirmed to the Scottish Government on 1st March by the Home Office.

This instrument has been made as soon as possible after the details of the contribution rates for England and Wales were communicated to the Scottish Government and in line with contribution increases to the other affected schemes must come into force on 1 April 2013. I should finally add that this is the first occasion that SPPA has had to lay late in respect of the police schemes, and we are making this request due to the unavoidable circumstances outlined above.

National Health Service (Optical Charges and Payments) (Scotland) Amendment Regulations 2013 (SSI 2013/96)**Breach of laying requirements: letter to Presiding Officer**

The above instrument was made by the Scottish Ministers under sections 70(1), 73(a), 74(a), 105(7) and 108(1) of, and paragraphs 2 and 2A of Schedule 11 to, the National Health Service (Scotland) Act 1978 on 13 March 2013. It is being laid before the Scottish Parliament today and is to come into force on 1 April 2013.

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 purpose of this instrument is to amend the National Health Service (Optical Charges and Payments) (Scotland) Regulations 1998 to increase optical voucher values and supplements. Optical vouchers are available to children and people on certain benefits or on low incomes. Voucher values are normally increased on 1 April in line with the increase agreed for England by the Department of Health and are the same throughout the United Kingdom. These increases take place most years, but not every year. Last year, the voucher values were increased.

This year, the Department of Health advised the Scottish Government on 27 February of a 1% increase in voucher values for 2013/14 (28 February we were notified of the actual increase in values). Due to late notification and considering the Easter recess, it is not possible to bring the increased voucher values into effect in Scotland on 1 April 2013 without laying this instrument less than 28 clear days before it is brought into force.

Equivalent Regulations in England and Wales will come into force on 1 April 2013. As at the date of this letter, we understand the position in Northern Ireland is under consideration.

Optical vouchers provide eligible people with help towards the cost of glasses or contact lenses. Any increase in the voucher values benefits eligible people as it increases the help available to them and a later coming into force date would disadvantage eligible people in Scotland. Bringing this instrument into force on 1 April 2013 will ensure that eligible people in Scotland who are issued with a voucher on or after that date are not disadvantaged.

We will work with the Department of Health to ensure earlier notification of future increases in voucher values.

INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE**Act of Sederunt (Sheriff Court Rules) (Lay Representation) 2013 (SSI 2013/91)**

On 15 March 2013, the Lord President's Private Office was asked:

1. Paragraph 5(2) of this instrument inserts a new Chapter 2A (Lay representation) into the Small Claim Rules. Rule 2A.1(1) provides that Chapter 2A is without prejudice to any enactment, including any other provision in the Small Claim Rules, under which provision is made for a party to a particular type of case before the sheriff to be represented by a lay representative. Rule 2A.2(1) goes on to provide that – in any proceedings in respect of which no such provision is in force – the sheriff may, at the request of a party litigant, permit a lay representative to appear under certain conditions for certain purposes. However, rule 2.1(1)(d) provides that a party may be represented, subject to rule 2.1(3), by an authorised lay representative. It accordingly appears that in all small claims a party may be represented by an authorised lay representative in terms of rule 2.1(1)(d), subject to the suitability and continuing authorisation of that individual in terms of rule 2.1(3).

a. Does the Lord President's Private Office agree that, in all small claims, a party may be represented by an authorised lay representative in terms of rule 2.1(1)(d) – and if not, why not?

b. Does the Lord President's Private Office therefore agree that provision of the type mentioned in rule 2A.1(1) (i.e. permitting representation by a lay representative) is in force in respect of all small claims?

c. Given that rule 2A.2(1) applies only in relation to proceedings in respect of which no provision as mentioned in rule 2A.1(1) is in force, the Lord President's Private Office is asked to explain the circumstances in which it considers that rule 2A.2(1) could ever apply – or whether it agrees that, as the Small Claim Rules presently stand, this condition cannot be satisfied.

2. Paragraph 4(2) of this instrument inserts a new Chapter 2A (Lay representation) into the Summary Cause Rules. Rule 2A.1(1) provides that Chapter 2A is without prejudice to any enactment, including any other provision in the Summary Cause Rules, under which provision is made for a party to a particular type of case before the sheriff to be represented by a lay representative. Rule 2A.2(1) goes on to provide that – in any proceedings in respect of which no such provision is in force – the sheriff may, at the request of a party litigant, permit a lay representative to appear under certain conditions for certain purposes. However, rule 2.1(1)(d) provides that a party may be represented, subject to rule 2.1(2) and (4), by an authorised lay representative. It appears that the effect of rule 2.1(2) is that a party may be represented at the initial hearing under rule 8.2 and at any subsequent undefended hearing by an authorised lay representative.

a. By analogy with question 1, does the Lord President's Private Office agree that the consequence is that a lay representative under rule 2A.2(1) may not be appointed for the hearing under rule 8.2 and any subsequent undefended hearing, but may be appointed in respect of a subsequent hearing which is defended on the merits or on the amount of the sum due?

b. If so, the Lord President's Private Office is asked to explain why this interaction between rule 2.1 and Chapter 2A is considered to be sufficiently clear, especially as these provisions are directed at a) parties who are not legally represented and b) prospective lay representatives, who – by definition – are not legally qualified.

The Lord President's Private Office responded as follows:

1. It may be helpful to the Committee to preface the response with some introductory remarks.

Rule 2.1(1)(d) of the Small Claim Rules provides a *right of representation* for authorised lay representatives in all small claims. In accordance with rule 2.1(2) such an authorised lay representative can, in representing a party, do everything for the preparation and conduct of a small claim as may be done by an individual conducting his or her own claim – this would include lodging documents, examining witnesses, making oral submissions. This is, however, subject to the tests provided at rule 2.1(3)(a) and (b), which include a requirement that the sheriff finds that the authorised lay representative is suitable to represent the party. These rules were made further to section 36 of the Sheriff Courts (Scotland) Act 1971 and may be described as an “all or nothing” approach.

The right of representation that is introduced in new Chapter 2A is made in furtherance of section 127 of the Legal Services (Scotland) Act 2010, which expressly preserves section 36 of the 1971 Act. SSI 2013/91 makes similar provision in respect of all 4 main sheriff court rules – the Ordinary Cause Rules, the Summary Application Rules, the Summary Cause Rules and the Small Claim Rules. In each set of new rules it is provided that they are without prejudice to any enactment (including any other provision in those rules) under which provision is, or may be, made for a party to a particular type of case before the sheriff to be represented by a lay representative.

New Chapter 2A in the Small Claim Rules only permits a lay representative to make oral submissions on behalf of a litigant at a specified hearing; it does not permit a right to representation in all respects. It may be that a sheriff finds that an authorised lay representative under rule 2.1(1)(d) is not suitable to represent a party in all respects (e.g. because of concerns about examination of witnesses); but that under new rule 2A.2(1) and (3) the sheriff may consider that having a lay representative appear to make oral submissions at a specified hearing may assist the sheriff's consideration of the case.

a. The Lord President's Private Office agrees that in all small claims a party may be represented by an authorised lay representative in terms of rule 2.1(1)(d), subject to the tests in rule 2.1(3) being satisfied.

b. The Lord President's Private Office agrees that provision permitting representation by a lay representative is in force in respect of all small claims.

c. Rule 2A.1(1) refers to where provision is made in any enactment or rule “for a party to a *particular type of case* before the sheriff to be represented by a lay representative” (italics added). As rule 2A.1(1) is being inserted into the Small Claim

Rules it has to be read in that context. Accordingly, rule 2A.1(1) means that Chapter 2A is without prejudice to any specific provision for lay representation in respect of a particular type of small claim, e.g. if specific provision for lay representation was made in the Small Claim Rules in respect of claims under regulated agreements under the Consumer Credit Act then those rules would apply rather than those provided under new Chapter 2A.

It is submitted that new rule 2A.2(1) applies to all small claim proceedings, except in particular types of small claim where specific provision for lay representation has been, or may be, made. Accordingly, the Lord President's Private Office disagrees with the suggestion that rule 2A.2(1) cannot ever be satisfied.

2. We would refer you to the introductory remarks above by way of background. New rule 2A.1(1) of the Summary Cause Rules refers to where provision is made "for a party to a *particular type of case* before the sheriff to be represented by a lay representative" (italics added).

Rule 2.1(1)(d) of the Summary Cause Rules provides a *right of representation* for authorised lay representatives in all summary causes. Under existing rule 2.1(2) and (3) an authorised lay representative can do everything for the preparation and conduct of a summary cause as may be done by an individual conducting his/her own claim except that he/she may not appear in court except at the calling date in terms of rule 8.2(1) and, unless the sheriff otherwise directs, any subsequent or other calling where the action is not defended on the merits or on the amount of the sum due. This is all subject to the tests set out at rule 2.1(4)(a) and (b).

The new rules sit in parallel with the existing rules. Thus a party may be represented in a summary cause by an authorised lay representative under existing rule 2.1 (save the restrictions on representation at hearings). Alternatively, in accordance with Chapter 2A such party may request that a lay representative appear at a specified hearing to make oral submissions on behalf of the litigant. As set out above, the conditions to be satisfied are different and the sheriff may therefore have different considerations in mind in respect of such categories of representatives.

a. The Lord President's Private Office submits that a party may be represented at the hearing under rule 8.2(1) by an authorised lay representative under rule 2.1(2) or by a lay representative under new rule 2A.2(1).

b. The rules were introduced to the Summary Cause Rules in furtherance of section 127 of the Legal Services (Scotland) Act 2010 to maintain consistency across all sets of sheriff court rules and to ensure that a party in a summary cause is not put at a disadvantage compared to litigants in other sorts of sheriff court actions. It is accepted that the framework for lay representation may benefit from a more fundamental review. The Sheriff Court Rules Council is of course shortly to be dissolved, but as part of its legacy paper for the new Scottish Civil Justice Council it is proposed that it will suggest that the new Council reviews all rules on lay representation as part of its wider policy remit.