



The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

22nd Meeting, 2012 (Session 4)

Tuesday 23 October 2012

The Committee will meet at 10.30 am in Committee Room 4.

1. **Instrument subject to approval:** The Committee will consider the following—

[Fishing Boats \(Satellite-tracking Devices\) \(Scotland\) Scheme 2012 \(SSI 2012/264\).](#)

2. **Instruments subject to affirmative procedure:** The Committee will consider the following—

[Glasgow Commonwealth Games Act 2008 \(Ticket Touting Offence\) \(Exceptions for Use of Internet etc.\) \(Scotland\) Regulations 2012 \[draft\];](#)
[Rent \(Scotland\) Act 1984 \(Premiums\) Regulations 2012 \[draft\].](#)

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

[Housing \(Scotland\) Act 2001 \(Assistance to Registered Social Landlords and Other Persons\) \(Grants\) Amendment Regulations 2012 \(SSI 2012/258\);](#)
[Plant Health \(Scotland\) Amendment Order 2012 \(SSI 2012/266\).](#)

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

[Glasgow Commonwealth Games Act 2008 \(Commencement No. 3\) Order 2012 \(SSI 2012/261 \(C.25\)\);](#)
[Food Protection \(Emergency Prohibitions\) \(Radioactivity in Sheep\) and the Export of Sheep \(Prohibition\) Revocation \(Scotland\) Order 2012 \(SSI 2012/263\);](#)
[Land Registration etc. \(Scotland\) Act 2012 \(Commencement No. 1\) Order 2012 \(SSI 2012/265 \(C.26\)\);](#)
[Private Rented Housing \(Scotland\) Act 2011 \(Commencement No. 4\) Order 2012 \(SSI 2012/267 \(C.27\)\).](#)

5. **Scottish Civil Justice Council and Criminal Legal Assistance Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.
6. **Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

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The papers for this meeting are as follows—

Agenda Items 2, 3, 4 and 5

Legal Brief (private)

SL/S4/12/22/1 (P)

Agenda Items 3 and 4

Instrument Responses

SL/S4/12/22/2

Agenda Item 6

Briefing Paper

SL/S4/12/22/3

Agenda Item 7

[Local Government Finance \(Unoccupied Properties etc.\)
\(Scotland\) Bill - \(as amended at Stage 2\)](#)

[Local Government Finance \(Unoccupied Properties etc.\)
\(Scotland\) Bill - Revised Delegated Powers Memorandum](#)

Briefing Paper (private)

SL/S4/12/22/4 (P)

Draft Report (private)

SL/S4/12/22/5 (P)

SUBORDINATE LEGISLATION COMMITTEE

22nd Meeting, 2012 (Session 4)

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Instrument Responses

INSTRUMENT SUBJECT TO AFFIRMATIVE PROCEDURE

**Glasgow Commonwealth Games Act 2008 (Ticket Touting Offence)
(Exceptions for Use of Internet etc.) (Scotland) Regulations 2012 [draft]**

On 4 October 2012, the Scottish Government was asked:

Regulation 2(1) provides a definition of “EEA state” for the purposes of regulations 2(2) and 3, which contains an “ambulatory reference” to the Agreement on the EEA of 2 May 1992 together with the Protocol adjusting that Agreement of 17 March 1993.

(a) Which enabling power is being relied on to make that reference? Is it paragraph 1A of schedule 2 to the 1972 Act, as regulation 3 is made under the powers in section 2(2) of that Act?

(b) If so, would you agree it is proper drafting practice to cite that power in the preamble, explaining there that the ambulatory reference is being made in the instrument?

The Scottish Government responded as follows:

(a) Section 2(2) of the European Communities Act 1972 (“the 1972 Act”) is relied on to make provision in regulation 2(1) to define “EEA state” as meaning a state which for the time being is a member State or a Contracting Party to the Agreement on the European Economic Area, as modified or supplemented from time to time (“the EEA Agreement”).

Section 2(2) of the 1972 Act enables provision to be made to implement any obligation of the UK arising under the EEA Agreement (see definition of “the Treaties” in section 1(2)) including those arising by virtue of the incorporation of Directive 2000/31/EC, and to deal with matters arising out of or related to any such obligation.

(b) Section 2(4) of the European Communities Act 1972 makes it clear that provision under section 2(2) may include, subject to Schedule 2 to that Act, any provision as might be made by Act of Parliament. Provision under section 2(2) may therefore contain a reference to another instrument (ambulatory or otherwise) provided that there is no breach of Schedule 2.

Paragraph 1A of Schedule 2 provides that where the legislation contains a reference to, in particular, an EU instrument and it appears necessary or expedient for the

reference to be construed as a reference to that instrument as amended from time to time, the legislation may make express provision to that effect. However, it is not considered necessary to rely on (or cite) the power in paragraph 1A because the EEA Agreement is not an instrument issued by an EU institution (see definition of “EU instrument” in Part II of Schedule 1 to the 1972 Act).

INSTRUMENT SUBJECT TO NEGATIVE PROCEDURE**Housing (Scotland) Act 2001 (Assistance to Registered Social Landlords and Other Persons) (Grants) Amendment Regulations 2012 (SSI 2012/258)****On 28 September 2012, the Scottish Government was asked:**

1. Schedule 2 inserts a new Schedule 5 into the Housing (Scotland) Act 2001 (Assistance to Registered Social Landlords and Other Persons) (Grants) Regulations 2004 (“the principal Regulations”). Paragraph 4 of this new schedule refers to a letter dated 21 March 2011 which sets out the procedures to be followed by a local authority in relation to IIF applications. Please explain why prescribing the procedure by reference to an external document is not considered to constitute sub-delegation of the Ministers’ power under section 93 of the Housing (Scotland) Act 2001 (“the 2001 Act”) to make regulations which make provision for the procedure to be followed by local authorities in considering whether to provide assistance.

Further, and in any case, please explain the procedure to be followed by local authorities in considering IIF applications. In terms of new Schedule 5, it appears that IIF applications may be made by registered social landlords and their subsidiaries to local authorities, whereas the letter bears to set out the procedures applicable where a local authority applies to the Scottish Government for funding.

2. Schedule 1 inserts a new Schedule 2 into the principal Regulations. Paragraph 4(g) purports to provide procedures to be followed by a local authority in relation to PSR applications. Please explain why this provision is considered to be within the scope of the enabling powers when it appears that it prescribes a criterion for eligibility for PSR grants rather than a procedure to be followed by local authorities in determining an application.

The Scottish Government responded as follows:Background

Local authorities were invited by a joint Scottish Government and CoSLA letter dated 21 March 2011 to submit bids for provision of affordable housing. Those bids are in respect of a fund known as the Innovation and Investment Fund. That letter encourages collaborative working between local authorities and Registered Social Landlords (RSLs).

Some housing grant payable to local authorities is used by them to fund activity by RSLs. The principal Regulations provide conditions that apply to categories of grant assistance (currently known as HAG, GRO, RHOG and GPSE) that are paid by local authorities to RSLs. The amendment Regulations revoke the conditions in respect of GRO, which is being discontinued, and insert new categories for the category to replace GRO, to be known as Partnership Support for Regeneration (PSR), and for the new fund (IIF).

1. The reference to a letter at paragraph 2 of the Schedule 5 inserted by Schedule 2 of the amendment Regulations is not sub-delegation, as the text of the letter is already published, is fixed and is ascertainable. The reference is simply convenient shorthand to avoid the alternative, of repeating the content in the amendment Regulations. It sets out how Ministers intend to operate the new fund, IIF, in terms of the grants they will make from that fund. The provision in the amendment Regulations is that which is to apply where a local authority is managing a housing development programme using IIF money to fund activity by an RSL. Such assistance is provided by the local authority under section 93 of the 2001 Act, and thus subject to such conditions as the local authority may specify, within the framework of provision made by the Scottish Ministers.

The procedure to be followed in assessing bids submitted to a local authority for support using IIF money is for the local authority to determine, and as a result the new Schedule 5 of the principal Regulations has little within Part 3, when compared for example with Part 3 Schedule 1 to the principal Regulations. It provides that the local authority must carry out invitation of applications, assessment of applications and approval of grant in a manner that accords with what is contained in the letter of 21st March 2011. Thus, applications would have to be assessed to ensure that proposed developments fit within the Local Housing Strategy, that the number of units that are built is maximised within the resources available but not at the expense of having to compromise on design quality. Grant could not be approved by a council unless the recipient RSL was willing to be subject to a grant agreement that would provide the project information that the Scottish Government will require from the council, as per the "Funding Agreements" part of the letter. In short, the letter is referred to as a framework within which they must compliantly set their own conditions.

2. The paragraph referred to is indeed intended as a restriction in eligibility, in other words no PSR grant applicant should be successful unless they have, or will be able to obtain, control of the development site. The procedure that is to be followed by a local authority is such as is necessary to ensure that this restriction is complied with.

This is not novel. Other procedural requirements, in Part 3 of other Schedules, include checking that an applicant meets specific criteria, such as paragraph 4(c) of Schedule 3 (RHOG) which has a condition to prevent approval where a project is eligible for another type of grant.

Even if this were not a procedural provision (and the Scottish Government considers that it is such a provision), it would be within the scope of the power at section 93(2)(a) of the 2001 Act, which allows provision as to the classes of person to whom assistance may be provided, in other words assistance may only be provided to persons who are in a position to provide a development site.

SUBORDINATE LEGISLATION COMMITTEE

22nd Meeting, 2012 (Session 4)

Tuesday 23 October 2012

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Response from the Scottish Government

Background

1. The Subordinate Legislation Committee reported on the delegated powers in the Scottish Civil Justice Council and Criminal Legal Assistance Bill on 27 June 2012 in its [38th Report of 2012](#).
2. The response from the Scottish Government to this report is reproduced in the appendix.
3. The Stage 1 debate is due to take place on Thursday 25 October.

Scottish Government response

Section 18(2) – new section 9B of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”)

4. In its Stage 1 report, the Committee concluded that the power in section 18(2) of the Bill (inserting section 9B into the 1986 Act) which enables the Scottish Legal Aid Board (“the Board”) to make a scheme of eligibility with the approval of the Scottish Ministers is a significant power which would be more appropriately expressed as a power to make subordinate legislation, by means of a Scottish statutory instrument.
5. The Scottish Government notes that the test for eligibility for criminal Assistance By Way of Representation (ABWOR) is set out on the face of the Bill in the provisions that will become section 9A(1) and (2). It also states that there is the option of prescribing (under section 9A(2)(b)) further criterion which must be met and that any regulations setting out the criterion will be subject to affirmative procedure.
6. The Scottish Government emphasises that until now, the test for criminal ABWOR has been based solely on financial circumstances and that moving to a test of undue hardship for criminal ABWOR, as provided for in this Bill, is a fundamental change requiring solicitors to apply a test which is not wholly financial in nature.
7. In order to ensure that eligibility is assessed uniformly across the country, the Scottish Government feels it is necessary to set out as much of the detail as is possible about the first stage of the test in regulations, whilst allowing for the flexibility that the scheme will bring in applying the second part of the test.
8. Where changes to the scheme are necessary, it will be important to be able to make amendments to it quickly. The Scottish Government is of the opinion that making the scheme subject to parliamentary procedure would mean that it could take weeks for changes to take effect and in the interim the scheme would not be able to

assist those who are seeking criminal ABWOR or those who would be eligible under the proposed changes. The Scottish Government believes that if the relevant instruments were subject to the affirmative procedure, the process of obtaining Parliamentary approval would be longer still.

9. In the response, it recognises that without sight of the draft regulations or draft scheme of eligibility it is difficult to clearly see how the two interact and their interaction with the eligibility test set out in the Bill's provisions. Officials are currently working on draft regulations and the Board are working on the scheme of eligibility. The Scottish Government commit to sharing drafts of both with the Subordinate Legislation Committee and the Justice Committee in advance of stage 2.

Direction-making power in new section 9B(5) of the 1986 Act

10. In its report, the Committee asked the Scottish Government to consider whether this power of direction should be more clearly or narrowly drawn, so that it applies only to directions about consultation, method of publication or other procedural requirements.

11. In the response, the Scottish Government indicates that the power of the Scottish Ministers to make directions under what will be section 9B(5) arises in connection with the preparation and publication of the scheme and should be viewed in this context. It believes that this is made clear by the opening words of the provision and that the power will not give Ministers scope to give directions generally in relation to the scheme. It is therefore of the view that it is not necessary to delimit the power any further.

Section 24 – Ancillary provision

12. The Committee considered in its report that the Bill should state more explicitly that the powers contained in section 24 do not include the power to modify or repeal the restriction at section 6(6), resulting in an outcome which would be contrary to the effect of section 6(6) (i.e. removing the limitation on amending the categories of membership at section 6(1)).

13. After careful consideration, the Scottish Government remains of the view that the powers under section 24 must be read in light of the restriction at section 6(6) and that the ancillary provision cannot be used to amend the categories of membership at section 6(1). By the same reasoning, it believes that the section 24 power could not be used to modify section 6(6) so as to modify or repeal that restriction.

14. The Scottish Government therefore considers it unnecessary to specify in the Bill that the powers in section 24 to make ancillary provisions for the purposes of or in connection with the Bill do not include the power to modify or repeal the restriction which is contained in section 6(6), as to the description of the categories of membership of the Scottish Civil Justice Council.

Conclusion

15. Unless amendments are made to the Bill at Stage 2 that affect the delegated powers provisions, the Committee will not consider it again. Members are therefore invited to make any comments they wish on the Bill at this stage.

Recommendation

16. Members are invited to note the Scottish Government's response on the Bill and to make any comments they wish at this stage.

Appendix

Correspondence from the Bill Team Leader dated 18 October 2012

Scottish Civil Justice Council and Criminal Legal Assistance Bill: 38th Report, 2012 by the Subordinate Legislation Committee

Section 18(2) – new section 9B of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”)

The Scottish Government notes that the Subordinate Legislation Committee (the Committee) considers that the power in section 18(2) of the Bill (inserting section 9B into the 1986 Act) which enables the Scottish Legal Aid Board (“the Board”) to make a scheme of eligibility with the approval of the Scottish Ministers is a significant power which would be more appropriately expressed as a power to make subordinate legislation, by means of a Scottish statutory instrument.

The Scottish Government has considered very carefully the terms of the Committee’s report and our response is set out below. I would also like to take the opportunity to apologise if our previous response of 19 June 2012 was not as clear as it could have been.

The test for eligibility for criminal Assistance By Way of Representation (ABWOR) is set out on the face of the Bill in the provisions that will become section 9A(1) and (2). There is the option of prescribing (under section 9A(2)(b)) further criterion which must be met and regulations setting out the criterion will be subject to affirmative procedure. The scheme of eligibility, as provided for in what will become section 9B does not alter eligibility for criminal ABWOR but will provide direction to solicitors as to how to apply the undue hardship test when assessing eligibility.

Under what will become section 9A(1), criminal ABWOR will be available to a person where a two stage test is met. The first stage of the test is set out in section 9A(1)(a)(i). This requires the solicitor to consider “the financial circumstances of the client”. Regulations made under existing powers in the 1986 Act will set out what constitutes a person’s disposable income and disposable capital which will enable a solicitor to determine what the person’s financial circumstances are. In working out what is disposable income and capital various deductions are made, as prescribed in the regulations. For example, the regulations will set out how to calculate the value of a person’s capital resources, bearing in mind market fluctuations, and any income received by way of certain benefits is disregarded from income.

The scheme of eligibility will address the second stage of the test in section 9A(1)(a)(ii). It will give direction to the solicitor as to how to determine whether criminal ABWOR needs to be granted to avoid, knowing the financial circumstances of the person, causing undue hardship to the person or his/her dependants. The scheme will allow a solicitor to consider factors, other than just the financial circumstances of the person, such as if the complexity or unique issues in the case and other personal circumstances of the person. Allowing a solicitor to take into account these other factors gives as much protection as possible to a person: so that a person’s financial circumstances are not just the only basis for deciding whether criminal ABWOR should be granted. It is very important that undue hardship is not

inadvertently caused by making the assessment of eligibility too inflexible, tied to financial matters only or preventing solicitors from taking into account other factors.

Until now the test for criminal ABWOR has been purely financial in basis. Moving to a test of undue hardship for criminal ABWOR, as provided for in this Bill, is a fundamental change and will require solicitors, for the very first time to apply a test which is not wholly financial in nature. In order to ensure that eligibility is assessed uniformly by solicitors across the country, the Scottish Government feels it is necessary to set out as much of the detail as is possible about the first stage of the test (the assessment of a person's financial circumstances) in regulations, whilst allowing for the flexibility that the scheme will bring in applying the second part of the test (what constitutes undue hardship).

As the scheme is concerned with what constitutes undue hardship for a client, or the dependants of a client, it is important that it is as flexible and responsive as possible to emerging needs or new situations. It is therefore envisaged that the scheme will be kept under constant review.

In addition, where changes to the scheme are necessary, it will be important to be able to make amendments to it quickly. Making the scheme subject to parliamentary procedure would mean that it would take weeks in most cases for changes to take effect. In the interim the scheme would not be able to assist those who are seeking criminal ABWOR and would be eligible under the proposed changes. If the instrument were subject to affirmative process, the process of obtaining Parliamentary approval would be longer still.

Where section 9B(1)(b) applies and the Board has been asked to decide whether a person should receive criminal ABWOR, the Board will apply a very similar two stage test.

As the Committee is aware, in relation to summary and solemn legal aid, the Board currently applies an undue hardship test and no criteria are set down in subordinate legislation about how the Board should apply it. As the Board will be authors of the scheme this means that the criteria and approach which solicitor will use for the new test for criminal ABWOR will be consistent with the criteria and approach which the Board already uses for criminal legal aid.

I appreciate that without sight of the draft regulations or draft scheme of eligibility it is difficult to clearly see how the two interact and their interaction with the eligibility test set out in the Bill's provisions. Officials are currently working on draft regulations and the Board are working on the scheme of. Drafts of both will be shared with the Justice Committee in advance of stage 2. We will of course provide the Subordinate Legislation Committee with drafts also.

Direction-making power in new section 9B(5) of the 1986 Act

I note that the Committee has suggested that we consider whether this power of direction should be more clearly or narrowly drawn, so that it applies only to directions about consultation, method of publication or other procedural requirements, which were the examples of the use of the power that we gave in our letter of 19 June.

The power of the Scottish Ministers to make directions under what will be section 9B(5) arises in connection with the preparation and publication of the scheme and should be viewed in this context – the opening words of the provision make this clear. It will not give Ministers a power to give directions generally in relation to the scheme. The Scottish Government is therefore of the view that it is not necessary to delimit the power any further.

Section 24 – Ancillary provision

I note that the Committee considers the Bill should state more explicitly that the powers contained in section 24 do not include the power to modify or repeal the restriction at section 6(6), resulting in an outcome which would be contrary to the effect of section 6(6) (i.e. removing the limitation on amending the categories of membership at section 6(1)).

The Scottish Government has given this matter careful consideration both prior to and following the introduction of the Bill to Parliament. As stated in our letter to the Committee of 12 June 2012, we are of the view that the powers under section 24 must be read in light of the restriction at section 6(6) and that the ancillary provision cannot be used to amend the categories of membership at section 6(1). By the same reasoning, we are of the view that the section 24 power could not be used to modify section 6(6) so as to modify or repeal that restriction.

The Scottish Government is therefore of the view that it is not necessary to specify in the Bill that the powers in section 24 to make ancillary provisions for the purposes of or in connection with the Bill do not include the power to modify or repeal the restriction which is contained in section 6(6), as to the description of the categories of membership of the Scottish Civil Justice Council.

I hope you have found this letter helpful. Should you require any further information please do not hesitate to contact me.