The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

7th Meeting, 2012 (Session 4)

Tuesday 13 March 2012

The Committee will meet at 2.30 pm in Committee Room 5.

1. **Decision on taking business in private:** The Committee will decide whether to take item 5 in private.

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

   Scottish Secure Tenancies (Repossession Orders) (Maximum Period) Order 2012 [draft];
   Scottish Secure Tenancies (Proceedings for Possession) (Pre Action Requirements) Order 2012 [draft].

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

   Teachers' Superannuation (Scotland) Amendment Regulations 2012 (SSI 2012/70);
   Police Pensions (Contributions) Amendment (Scotland) Regulations 2012 (SSI 2012/71);
   A720 Edinburgh City Bypass and M8 (Hermiston Junction) (Speed Limit) Regulations 2012 (SSI 2012/62);
   Sharks, Skates and Rays (Prohibition of Fishing, Trans-shipment and Landing) (Scotland) Order 2012 (SSI 2012/63);
   Community Care (Joint Working etc.) (Scotland) Amendment Regulations 2012 (SSI 2012/65);
   Community Care and Health (Scotland) Act 2002 (Incidental Provision) (Adult Support and Protection) Order 2012 (SSI 2012/66);
   National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2012 (SSI 2012/67);
   National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2012 (SSI 2012/68);
   National Health Service (Superannuation Scheme and Pension Scheme)

(Scotland) Amendment Regulations 2012 (SSI 2012/69);
Education (Fees, Awards and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2012 (SSI 2012/72);
National Health Service (Optical Charges and Payments) (Scotland) Amendment Regulations 2012 (SSI 2012/73);
National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2012 (SSI 2012/74);
Personal Injuries (NHS Charges) (Amounts) (Scotland) Amendment Regulations 2012 (SSI 2012/76).

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

Bovine Viral Diarrhoea (Scotland) Order 2012 (SSI 2012/78).

5. **Consolidation of instruments:** The Committee will consider its approach to the consolidation of Scottish statutory instruments.

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The papers for this meeting are as follows—

Agenda Items 2, 3 and 4

Legal Brief (private)	SL/S4/12/7/1 (P)

Agenda Items 2 and 3

Instrument Responses	SL/S4/12/7/2

Agenda Item 5

Consolidation briefing paper (private)	SL/S4/12/7/3 (P)
Scottish Government Correspondence (private)	SL/S4/12/7/4 (P)

SUBORDINATE LEGISLATION COMMITTEE

7th Meeting, 2012 (Session 4)

Tuesday 13 March 2012

Instrument Responses

INSTRUMENTS SUBJECT TO THE AFFIRMATIVE PROCEDURE

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

On 2 March 2012, the Scottish Government was asked:

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

The Scottish Government responded as follows:

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

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

The wording adopted in the Order allows for these situations, and also for the situation where an appeal is lodged after a decree has been extracted. Where a sheriff varies the usual minimum timescale for extract, the provision made by the

Order will operate in a way that seems to the Scottish Government to be unexceptional.

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

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

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

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

On 2 March 2012 the Scottish Government was asked:

1. Does the Scottish Government consider that the basis on which any "illustrative indication of legal expenses" (article 2(2)) is to be calculated is sufficiently clear, and in particular:
a. does this relate to the landlord's judicial expenses recoverable in terms of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, or is it intended to have a wider meaning, and if so what is that meaning?
b. would an illustrative indication be expected to deal with the expenses of any potential appeal which might be taken?

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

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

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

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

determined the application – any indication by the local authority as to its likely outcome appears to involve prejudging that determination?
b. how a landlord may demonstrate that it has taken "such steps as it can" for the purposes of article 5(3)? What steps does the Scottish Government consider that a landlord could take to establish the likely outcome of a housing benefit application, in circumstances where the applicant has not granted written authority for the landlord to discuss the matter?"

The Scottish Government responded as follows:

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

Ministers will expand upon what they consider a landlord should provide as this "illustrative indication" in statutory guidance, to be issued under the power at section 14A(8) of the Housing (Scotland) Act 2001, but ultimately it will be for a court to determine whether this requirement has been complied with, in the event of any dispute being brought regarding it.

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

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

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

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

In relation to article 5, the Scottish Government has been advised by landlords it has consulted when preparing the Order that it is standard practice for a landlord to seek

to obtain written authority from a tenant to discuss a housing benefit application with housing benefit staff, where it is involved in assisting the tenant with that application.

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

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

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

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

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

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

These steps are not likely to be a calculated figure, but may result in a view that a claim is likely to succeed, be partially successful, or fail. This is not an innovation on current practice. Housing benefit applications can take several weeks or months to process and have a significant impact on whether a tenant should have rent arrears and the eventual level of these arrears. It is current good practice for landlords to try to establish the likely outcome of a housing benefit claim before deciding to issue a notice of proceedings for rent arrears.

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

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

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

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Teachers' Superannuation (Scotland) Amendment Regulations 2012 (SSI 2012/70)

On 2 March 2012, the Scottish Government was asked:

(1) Would you agree there are drafting errors in regulation 3, in respect that-

(a) It appears to be intended that in regulation C3(2)(b) of the principal Regulations, the words “and ending 31st March 2012” should be added after “1st April 2007” but the drafting has “and ending “31st March 2012”” so that the first 2 lines do not appear to make sense, and

(b) The new sub-paragraph (bb) is shown on a new line without words preceding it, to insert it after regulation C3(2)(b)?

(2) If you agree these are errors, is it proposed to correct them timeously by an amendment?

The Scottish Government responded as follows:

The Scottish Government accepts that some punctuation has gone awry in regulation 3. However it considers that no textual amendment is necessary and there can be no doubt as to the meaning intended, namely that one contribution regime applies from 1 April 2007 until 31 March 2012, and another applies from 1 April 2012 to 31 March 2013.

We regret this technical problem with the punctuation and intend to correct it by correction slip as follows:

a) There should be opening inverted commas before “and” on the second line;

b) The next 3 sets of inverted commas are redundant and should be removed;

c) There should be a dash after “1st April 2007” and the long insertion dropped to the next line.

The correction slip should be available prior to the instrument coming into force on 1 April 2012.

Police Pensions (Contributions) Amendment (Scotland) Regulations 2012 (SSI 2012/71)

On 2 March 2012, the Scottish Government was asked:

1. (a) Would you agree that the reference to a "regular police officer" in regulation 2(2) (inserted in the first line of the new regulation G2 (1) appears to be a patent error, in respect that the remainder of the substituted regulation G2 provides for the contributions rates for a "regular policeman" which is a term defined by Schedule A to the principal 1987 Regulations to include particular categories of police officer?

(b) If that is agreed, would it be proposed to correct the point by an amendment?

2. The substituted regulation G2 on page 2, and the substituted regulation 7 on page 3, refer in several places to the provisions being subject to regulation G2A and 7A respectively. Please could you clarify how these regulations have been inserted in the principal Regulations, as it appears they are not shown on the official versions of the 1987 and 2007 Regulations on www.legislation.gov.uk, nor in the Legislation Citator or the other legislative sources we have examined?

The Scottish Government responded as follows:

1. As regards question 1, it is accepted that the reference to police officer is incorrect and it should read policeman. The Scottish Government thinks that given the heading of the regulation and the reference elsewhere in the regulation to policeman the correct reading would be given by any court. Nevertheless the Scottish Government intends to correct the mistake by amendment when it makes the next set of amending regulations.

2. As regards question 2, the Scottish Government accepts that references to regulations G2A and 7A are mistakes, since there are no such regulations. The Scottish Government regrets these unfortunate errors but thinks that they will be read out of the text and hence will have no legal effect. Nevertheless the Scottish Government intends to correct the mistake by amendment when it makes the next set of amending regulations.

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

On 1 March 2012, the Scottish Government was asked:

The Executive Note (paragraph 2) explains that the existing speed limits (50 and 70 MPH) applying on the Edinburgh City Bypass were made by older instruments which do not describe the lengths of road in great detail, and the road layout has changed. Regulation 6 revokes SI 1989/2125, which has until these Regulations specified the speed limit of 70 MPH on the lengths of special road on the Bypass which are subject to that maximum speed limit.

Could you clarify why these Regulations do not require to revoke another instrument or instruments which currently specify the 50 MPH limit applying to the lengths of special road which shall be covered by regulation 3 and part 1 of the Schedule, with effect from 31 March 2012?

The Scottish Government responded as follows:

The existing 50 MPH speed limit is contained in the following instruments:-

- The A720 Trunk Road (Calder Junction to Hermiston Gait Area) (50 mph Speed Limit) Order 1998 (SI 1998/1235); and
- The City of Edinburgh Council (A720, Edinburgh City Bypass) (50 mph Speed Limit) Order 1998 (“the CEC order”).

In conjunction with SSI 2012/62, the Scottish Ministers are preparing a traffic regulation order (“TRO”) setting speed limits on various trunk roads in the area, some of which are presently covered by SI 1998/1235. This TRO will revoke SI 1998/1235 and is planned to come into force on 31 March 2012.

The Scottish Government has also agreed with the City of Edinburgh Council that the Council will revoke the CEC order, through a TRO, at the next suitable opportunity. That will not be before June 2012, due to the upcoming local elections. This has no impact on the effect of SSI 2012/62, although the Scottish Government will ensure that the police and Procurator Fiscal are made aware of the coming into force of that instrument and the intended revocation of the CEC order.