



The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

10th Meeting, 2012 (Session 4)

Tuesday 17 April 2012

The Committee will meet at 2.30 pm in Committee Room 6.

1. **Decision on taking business in private:** The Committee will decide whether to take item 7 in private.
2. **Welfare Reform (Further Provision) (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Chris Boyland, Bill Manager, Welfare Division, Ann McVie, Team Leader, Welfare Division, Alison Stewart, Scottish Government Legal Directorate, John Paterson, Scottish Government Legal Directorate, Scottish Government.

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

[Waste \(Scotland\) Regulations 2012.](#)

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

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

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

[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 \(SSI 2012/108\);](#)

[Adoption and Children \(Scotland\) Act 2007 \(Commencement No. 4, Transitional and Savings Provisions\) Amendment Order 2012 \(SSI 2012/99\);](#)

[Act of Sederunt \(Fees of Shorthand Writers in the Sheriff Court\) \(Amendment\) 2012 \(SSI 2012/101\).](#)

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

[Town and Country Planning \(Continuation in force of Local Plans\) \(Highland\) \(Scotland\) Order 2012 \(SSI 2012/90\);](#)
[Act of Sederunt \(Rules of the Court of Session Amendment\) \(Fees of Shorthand Writers\) 2012 \(SSI 2012/100\).](#)

6. **Scotland Bill (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Scotland Bill (UK Parliament legislation).
7. **Welfare Reform (Further Provision) (Scotland) Bill:** The Committee will consider the evidence it heard earlier in the meeting.

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The papers for this meeting are as follows—

Agenda Item 2

[Welfare Reform \(Further Provision\) \(Scotland\) Bill](#)

[Welfare Reform \(Further Provision\) \(Scotland\) Bill - DPM](#)

Briefing Paper (private)

SL/S4/12/10/1 (P)

Agenda Items 3, 4 and 5

Legal Brief (private)

SL/S4/12/10/2 (P)

Agenda Items 3, 4 and 5

Instrument Responses

SL/S4/12/10/3

Agenda Item 6

[Scotland Bill Legislative Consent Memorandum](#)

Briefing Paper (private)

SL/S4/12/10/4 (P)

SUBORDINATE LEGISLATION COMMITTEE

10th Meeting, 2012 (Session 4)

Tuesday 17 April 2012

Instrument Responses

INSTRUMENT SUBJECT TO THE AFFIRMATIVE PROCEDURE

Waste (Scotland) Regulations 2012 [draft]

On 23 March 2012, the Scottish Government was asked:

1. To explain the meaning of “a manner that promotes high quality recycling” in the duty imposed by new section 34(2L) of the Environmental Protection Act 1990 and whether it is considered the meaning of that expression is sufficiently precise for those to whom the duty applies to be clear what they must do to discharge that duty since failure to do so could render them liable to prosecution under section 34(6);
2. To explain the intended effect of new section 34(2H) of the 1990 Act and whether it is considered the meaning of that expression is sufficiently precise for those to whom the duty in section 34(2F) applies to be clear what they must do to take advantage of the option to depart from section 34(2F) set out in section 34(2H) since failure to discharge the duty in section 34(2F) could render them liable to prosecution under section 34(6).

The Scottish Government responded as follows:

1. The Scottish Government considers that the nature of a duty to manage waste in a manner that promotes high quality recycling will be readily understood in the waste management sector.

For example it considers that a person who compacts separately collected dry recyclable waste will fail in the duty to promote high quality recycling, if the waste is compacted to such an extent that it cannot be accepted for recycling at a materials recovery facility (and might therefore require to be incinerated).

Further, the Scottish Government intends to give guidance in respect of this duty in a code of practice issued under section 34(7) of the Environmental Protection Act 1990 as proposed to be amended by these Regulations, which will assist relevant persons subject to the duty to take all steps necessary to discharge the duty and so avoid the penalty.

Section 34(10) of that Act provides that the code shall be admissible in evidence in court proceedings and that the court shall where relevant take it into account.

The Scottish Government therefore considers that the meaning of the expression is sufficiently precise for those to whom the duty applies.

2. The Scottish Government intends that the derogation should only be available where mixed collection does not materially affect their primary objective of ensuring a reliable supply of good quality food waste from food businesses for recycling.

It therefore considers, having regard to that objective, that it should be for the person seeking to rely on the derogation to show that the amount of food waste in a mixed collection is not significantly less than would be the case were food waste separately collected.

The Scottish Government considers that it will be possible for persons subject to the food waste duty in section 34(2F) of the 1990 Act who wish to take advantage of the derogation to assess whether a mixed waste collection will meet the specified criteria, and therefore that the meaning of the derogation will be sufficiently clear in respect of any particular food waste source.

Further, and to assist persons subject to the food waste duty, the Scottish Government intends to issue guidance in respect of that duty otherwise as set out in answer 1 above. That guidance will cover the scope and requirements of the derogation.

INSTRUMENTS SUBJECT TO THE NEGATIVE PROCEDURE

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.

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.

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.

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.

INSTRUMENT NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Town and Country Planning (Continuation in force of Local Plans) (Highland) (Scotland) Order 2012 (SSI 2012/90)

On 23 March 2012, the Scottish Government was asked:

1. The power in paragraph 7 of Schedule 1 to the 1997 Act (read with paragraph 6) enables the Scottish Ministers to direct that so much of an old development plan as relates to the area to which a newly adopted Local Development Plan (“LDP”) relates will continue in force, instead of ceasing to have effect. Please explain—

(a) Why does article 2(1) specify that provisions of the various Local Plans shall continue in force in relation to the whole area to which the Highland-wide LDP relates, given that it appears evident from the article that the 8 local plans which will continue in force each relate to smaller areas within the Highland-wide LDP area; and the power could be exercised to continue the plans in force in relation to their respective areas?

(b) Given that the power in paragraph 7 enables the provisions of the old Plans to continue in force to the extent specified in the Order, would the meaning and effect of the provision have been clearer if provision had been made to the effect that the existing local plans are continued in relation to their respective areas, rather than relating to the whole Highland-wide area?

2. Paragraph 2 of Part 8 to schedule 1 of the Order (Badenoch and Strathspey Local Plan) refers to the provisions of the “Proposals Map”. From inspection of the local plan on the website referred to in the footnote on page 1, it appears that the provisions are in the “Strategy Diagram”? Is this agreed to be an error, or can it be clarified where this Proposals Map can be viewed?

The Scottish Government responded as follows:

1(a) and (b). In drafting the Order the Scottish Government had considered the questions raised but had concluded that it was unnecessary and undesirable to introduce extraneous wording which would have no additional effect on the operation of the provisions.

Paragraph 6 of Schedule 1 to the Town and Country Planning (Scotland) Act 1997 provides that on the adoption of a local development plan the provisions of an old development plan shall cease to have effect to the extent to which those provisions relate to the area covered by the adopted local development plan. The local plans listed in article 2(1) of the Order are old development plans. Paragraph 6 is, however, subject to Paragraph 7. This confers on the Scottish Ministers the power to direct that the provisions shall continue in force in relation to the area to which the adopted local development plan relates, in this case Highland-wide Local Development Plan (“the HwLDP”). The provisions of the local plans specified in the Order shall continue in force (to the extent specified in the order) if the Scottish Ministers make such a direction. Article 2(1) therefore states, following the manner

in which the power in paragraph 7 is framed, that the specified provisions shall continue in force in relation to the area to which the HwLDP relates.

It is considered that it is self-evident that the continuation of the provisions of a local plan by the Order could only mean that they would continue to apply to the area to which they currently apply. It is therefore wholly unnecessary to state in the Order that the provisions are only continued in force in relation to the areas of the particular individual local plans. It is not considered that the inclusion of any such provision would have made the meaning and effect of the Order any clearer. There would have been no purpose in the inclusion within the Order of a provision which stated that the provisions of a local plan would not apply in relation to an area to which that local plan did not relate. The provision of the local plans could only ever apply to the area to which they relate.

2. The Badenoch and Strathspey Local Plan is a local plan prepared under Part 2 of the Town and Country Planning (Scotland) Act 1997 (“the 1997 Act”) before it was replaced by the new provisions inserted by section 2 of the Planning etc. (Scotland) Act 2006. In terms of section 11(3) of the old Part 2 a local plan is to consist of a written statement setting out the planning authority’s proposals for development and use of land and (under section 11(3)(b)) a map showing those proposals. Section 11(3) of the 1997 Act re-enacted with modifications section 9(3) of the Town and Country Planning (Scotland) Act 1972. In terms of regulation 26 of the Town and Country Planning (Structure and Local Plans)(Scotland) Regulations 1983 (SI 1983/1590) the map comprised in a local plan in compliance with section 11(3) ‘shall be called the proposals map’. It is permissible for inset maps to be contained in or accompany the proposals map to show policies or proposals in greater detail. Any such policies or proposals shown on an inset map are deemed to be shown on the proposals map. The 1983 Regulations are continued in force for the purposes of these local plans by SSI 2008/427.

The reference to the proposals map in the Order is not an error. It is the correct terminology for maps contained in a local plan by virtue of section 11(3) of the 1997 Act. The proposals map forming part of the Badenoch and Strathspey Local Plan is comprised of the maps, including the “Strategy Diagram” made available on the planning authority’s website as specified in the Order.