



The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

26th Meeting, 2012 (Session 4)

Tuesday 20 November 2012

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

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

[Scotland Act 1998 \(Modification of Schedule 5\) \(No. 2\) Order 2013 \[draft\].](#)

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

[Adults with Incapacity \(Public Guardian's Fees\) \(Scotland\) Amendment Regulations 2012 \(SSI 2012/289\);](#)

[Court of Session etc. Fees Amendment Order 2012 \(SSI 2012/290\);](#)

[High Court of Justiciary Fees Amendment Order 2012 \(SSI 2012/291\);](#)

[Sheriff Court Fees Amendment Order 2012 \(SSI 2012/293\);](#)

[Crofting Register \(Scotland\) Rules 2012 \(SSI 2012/294\);](#)

[Crofting Register \(Fees\) \(Scotland\) Order 2012 \(SSI 2012/295\);](#)

[Justice of the Peace Court Fees \(Scotland\) Order 2012 \(SSI 2012/292\);](#)

[International Recovery of Maintenance \(Hague Convention 2007\) \(Scotland\) Regulations 2012 \(SSI 2012/301\).](#)

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

[Act of Adjournal \(Criminal Procedure Rules Amendment No. 3\) \(Procedural Hearings in Appeals from Solemn Proceedings\) 2012 \(SSI 2012/300\).](#)

4. **Social Care (Self-directed Support) (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

SL/S4/12/26/A

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The papers for this meeting are as follows—

Agenda Items 1, 2 and 3

Legal Brief (private)

SL/S4/12/26/1 (P)

Agenda Item 2

Instrument Responses

SL/S4/12/26/2

Agenda Item 4

[Social Care \(Self-directed Support\) \(Scotland\) Bill
\(as amended at Stage 2\)](#)

[Social Care \(Self-directed Support\) \(Scotland\) Bill
\(supplementary DPM\)](#)

Briefing Paper (private)

SL/S4/12/26/3 (P)

SUBORDINATE LEGISLATION COMMITTEE

26th Meeting, 2012 (Session 4)

Tuesday 20 November 2012

Instrument Responses

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Adults with Incapacity (Public Guardian's Fees) (Scotland) Amendment Regulations 2012 (SSI 2012/289)

On 7 November 2012, the Scottish Government was asked:

Whether in the table of fees contained in Schedule 1 to the instrument, the fee set out in Column 3 as the fee formerly payable in respect of:

- entry 19 for estates with a value between £250,001 and £500,000 should read £800 rather than £600 - £800;
- entry 20 for estates with a value between £250,001 and £500,000 should read £860 rather than £660 - £860;

and, if so, whether the Scottish Government intends to correct this error.

The Scottish Government responded as follows:

The Scottish Government acknowledges that the reference to "600 - 800" should read as a reference to "800" and that the reference to "660 – 860" should read as a reference to "860" in entry 19 and 20 respectively, in column 3 of the table of fees contained in Schedule 1 to the instrument.

The Government does not consider that there is a need to amend the instrument to deal with this point as the error has no legal effect. The reference to a fee formerly payable is illustrative only and has no effect upon the fee to be charged under that instrument.

Court of Session etc. Fees Amendment Order 2012 (SSI 2012/290)

On 8 November 2012, the Scottish Government was asked:

1. It appears to be intended that article 6(b) is to come into force on 1 April 2013 (and article 6(a) cease to have effect on that date), and article 6(c) should come into force on 1 April 2014 (and article 6(b) cease to have effect on that date).

However, (i) article 1(2) brings article 5(b) into force on 1 April 2013 when article 5(a) ceases to have effect, and article 1(3) brings article 5(c) into force on 1 April 2014, when article 5(b) ceases to have effect, and (ii) there are no such paragraphs (a) to (c) of article 5.

Would you propose to correct these errors in the commencement of the provisions, by laying a revoking or amending instrument, timeously for the coming into force of certain provisions in the Order on 10 December 2012?

2. In Part II(H)(I.)(1) of the table of fees in Schedule 1 (on page 7), in column 3 the fee formerly payable for registering a case and receiving and delivering up a bond of caution is narrated as £2035, when it is plain from the footnote (b) that the previous fee in terms of S.I. 1997/688 is either £20 or £35.

Would you also propose to correct this by an amendment?

The Scottish Government responded as follows:

1. The Scottish Government acknowledges that the points raised above are errors and thanks the SLC legal advisors for bringing them to the Government's attention. The Government will lay an amending order, to come into force on 9 December 2012, which will correct these errors prior to this Order coming into force.

The amending order will also correct similar errors in the High Court of Justiciary Fees Amendment Order 2012 and the Sheriff Court Fees Amendment Order 2012.

2. The Scottish Government acknowledges that the reference to "2035" as the fee formerly payable in Part II(H)(I.)(1) of the table of fees in Schedule 1 (on page 7), column 3, is an error and agrees the entry should read "20 – 35". The government would point out that as a reference to a fee formerly payable, the entry is illustrative only and has no effect upon the fee to be charged under this instrument. However, given that the government is to amend this order in connection with the points raised in question 1, it will take this opportunity to correct the error.

High Court of Justiciary Fees Amendment Order 2012 (SSI 2012/291)

On 8 November 2012, the Scottish Government was asked:

It appears to be intended that article 4(b) is to come into force on 1 April 2013 (and article 4(a) cease to have effect on that date), and article 4(c) should come into force on 1 April 2014 (and article 4(b) cease to have effect on that date).

However, (i) article 1(2) brings article 3(b) into force on 1 April 2013 when article 3(a) ceases to have effect, and article 1(3) brings article 3(c) into force on 1 April 2014, when article 3(b) ceases to have effect, and (ii) there are no such paragraphs (a) to (c) of article 3.

Would you propose to correct these errors in the commencement of the provisions, by laying a revoking or amending instrument, timeously for the coming into force of certain provisions in the Order on 10 December 2012?

The Scottish Government responded as follows:

1. The Scottish Government acknowledges that the points raised above are errors and thanks the SLC legal advisors for bringing them to the Government's attention. The Government will lay an amending order, to come into force on 9 December 2012, which will correct these errors prior to this Order coming into force.

The amending order will also correct similar errors in the Sheriff Court Fees Amendment Order 2012 and the Court of Session etc. Fees Amendment Order 2012.

Justice of the Peace Court Fees (Scotland) Order 2012 (SSI 2012/292)**On 7 November 2012, the Scottish Government was asked:**

1(a) Article 3(2) defines "partner" for the purposes of establishing whether or not a person is entitled to any of the exemptions listed under Article 3(1). For the purposes of this definition, provision is made for recognising civil partnerships that have been registered in Scotland and in Northern Ireland (sections 85(1) and 137(1) of the Civil Partnership Act 2004 respectively). Would you agree that there has been an omission to provide for civil partnerships registered in England and Wales (under section 2(1) of the 2004 Act)? If so, what do you consider the effect of this omission to be?

1(b) If it is agreed that there has been an omission, would you propose to lay an amendment, timeously in advance of the Order coming into force?

2. Article 4(1) of the instrument revokes the District Court Fees Order 1984. The enabling power cited in the preamble, section 2 of the Court of Law Fees (Scotland) Act 1895, does not specify a power to revoke an order. Section 14 of the Interpretation Act 1978 contains provision to the effect that where a Westminster Act confers power to make an order, it implies a power to revoke any instrument made under the power, but this only applies to Westminster Acts which are passed after 1889 and before commencement of the 1978 Act, only so far as it relates to rules, regulations or bye-laws and not to orders (because the 1889 Interpretation Act did not extend the implied power to orders). Please explain therefore which enabling power is being relied on to revoke the District Court Fees Order 1984, and why that revocation is within the enabling powers?

The Scottish Government responded as follows:

1 (a) The Scottish Government does not agree that there has been an omission in article 3(2) of the Justice of the Peace Court Fees (Scotland) Order 2012 (SSI 2012/292). The article defines "partner" for the purposes of article 3 as a person to whom a person is married or with whom the person is registered as a civil partner in terms of section 1(1), 85(1) or 137(1) of the Civil Partnership Act 2004.

Section 1(1) defines civil partnership for the purposes of the 2004 Act. This includes "a relationship between two persons of the same sex which is formed when they register as civil partners of each other (i) in England and Wales...". The clear reference and interpretation to be taken to "partner" in article 3(2) and therefore 3(1) is to a person with whom the person is registered as a civil partner in terms of section 1(1), which includes where that registration has taken place in England or Wales.

It also includes other categories of civil partnerships registered overseas in section 1(1) of the 2004 Act.

Section 85(1) provides detail of what is required of two people to be regarded as registered as civil partners of each other for the purposes of section 1(1) in Scotland. Section 137(1) provides detail what is required of two people to be regarded as

registered as civil partners of each other for the purposes of section 1(1) in Northern Ireland.

The Scottish Government accepts that, given the reference to section 1(1), the reference to these sections is unnecessary, and that that drafting on this provision could be clearer.

1 (b) However, as we consider that the legal effect of the provision is sufficiently clear we do not propose to lay an amendment.

2. The Scottish Government takes the view that while there is no explicit power to revoke orders made under powers governed by the 1895 Act that the power to do so must be reasonably implied. Parliament clearly conferred the power to fix fees by subordinate legislation rather than on the face of primary legislation and it can be reasonably assumed that such a power was intended to be exercised on more than one occasion and that under such a power, old redundant provisions should be able to be excised from the statute book.

Further, the Justice of the Peace Court Fees (Scotland) Order 2012 clearly supersedes the District Court Fees Order 1984 and is validly made through use of the enabling power given to Ministers to regulate the fees payable in the JP court. The latter instrument impliedly revokes the former as it cannot be given effect alongside the latter. Given this, article 4 serves the purpose of narrating the effect of this supersession. A similar approach has been taken previously in S.I. 1985/827, 1997/687 and 1997/688 which are made under the same powers and which between them narrate the revocation of 14 previous orders.

If it is the view of the committee that the 1984 Order may not be revoked that Order, while remaining on the statute book, is still superseded by the 2012 Order and has no effect. The effect on the instrument of an ultra vires article 4 would be that that article would have no effect and would be treated as pro non scripto. This would not however affect the validity of the fees charged as any court interpreting the Order will give effect to the valid words in the instrument where it can.

The Scottish Government also notes that if the Order had not explicitly revoked the 1984 Order this would create a lack of clarity for the end user of the legislation, with potentially misleading provisions continuing to have purported effect where they have none.

For the reasons noted above, the Scottish Government therefore considers that the revocation was within the enabling powers and that, even if it was not, the inclusion of the revocation does not affect the validity and intended effect of the fees Order.

Sheriff Court Fees Amendment Order 2012 (SSI 2012/293)

On 7 November 2012, the Scottish Government was asked:

It appears to be intended that article 2(10)(b) is to come into force on 1 April 2013 (and article 2(10)(a) cease to have effect on that date), and article 2(10)(c) should come into force on 1 April 2014 (and article 2(10)(b) cease to have effect on that date).

However, (i) article 1(2) brings article 2(11)(b) into force on 1 April 2013 when article 2(11)(a) ceases to have effect, and article 1(3) brings article 2(11)(c) into force on 1 April 2014, when article 2(11)(b) ceases to have effect , and (ii) there is no article 2(11).

Would you propose to correct these errors in the commencement of the provisions, by laying a revoking or amending instrument, timeously for the coming into force of certain provisions in the Order on 10 December 2012?

The Scottish Government responded as follows:

1. The Scottish Government acknowledges that the points raised above are errors and thanks the SLC legal advisors for bringing them to the Government's attention. The Government will lay an amending order, to come into force on 9 December 2012, which will correct these errors prior to this Order coming into force.

The amending order will also correct similar errors in the High Court of Justiciary Fees Amendment Order 2012 and the Court of Session etc. Fees Amendment Order 2012.

Crofting Register (Scotland) Rules 2012 (SSI 2012/294)

On 9 November 2012, the Scottish Government was asked:

Rule 6(3) provides that an application for first registration of a common grazing under section 24(1) of the Crofting Reform (Scotland) Act 2010 is to be made in Form C. Section 24(1) deals with two different registration situations: under paragraph (a), an unregistered common grazing which is a new common grazing must be registered following a determination to constitute the land as a common grazing. Under paragraph (b), the Crofting Commission may apply to register any other unregistered common grazing. Section 26(1)(a) makes provision as to the procedure to be followed in applications for first registration of a new common grazing – they are to be submitted, with the appropriate fee, to the Commission. From this, it would seem clear that the Commission is not the applicant under section 24(1)(a). However, rule 6(3) appears to provide that all applications under section 24(1) – and not merely those under section 24(1)(b) which are to be made by the Commission – are to be made in Form C. It appears from rules 9(2) and 10(2) that Form C is intended for completion by the Commission, and not by any other applicant. Separately, we note that rule 6(4) bears to make further provision about applications for first registration of a new common grazing (which are stated to be made under section 26(1)(a)) so that those applications are to be made in Form D.

- a. Does the Scottish Government agree that, on the face of it, rules 6(3) and 6(4) both purport to make provision as to the form which is to be used in applying for the first registration of a new common grazing – and that they provide for applications on Form C and Form D respectively?
- b. Does the Scottish Government agree that the provision which requires a person to apply for registration of a new common grazing is in fact section 24(1)(a) rather than section 26(1)(a), which appears instead to specify that the application and accompanying fee are to be submitted to the Commission? If so, how does the Scottish Government propose to correct the reference to section 26(1)(a) in rule 6(4)?
- c. Does the Scottish Government therefore agree, standing the apparent intention behind rule 6(4) and Form D, that the provision in rule 6(3) to the effect that all section 24(1) applications be made in Form C is an error? Does the Scottish Government accept that the effect of so providing creates a lack of clarity for persons applying for registration as to which form ought to be used, and how does it propose to remedy that matter?

The Scottish Government responded as follows:

- a. The Scottish Government agrees that rule 6(3) should have referred only to applications for registration of existing common grazings. Rule 6(4) though clearly refers to a 'new common grazing' which is a defined term in the 2010 Act and the guidance which accompanies the application Forms will make it clear that Form D is to be used for first registration of new common grazings.

- b. The Scottish Government agrees that section 24(1)(a) requires registration of new common grazings and section 26(1)(a) relates to the procedure to be followed when doing so. The Government proposes to amend the error in rule 6(3) at the next opportunity to amend the Rules, which it considers will put the position beyond doubt.
- c. The Scottish Government considers that, despite the error in rule 6(3), the list of forms in the Schedule and the title of Form D make clear that form is to be used for first registration of a new common grazing. The guidance on completion of the Forms and information made available by the Commission will ensure that it will be clear to crofters, landlords, etc. which is the correct Form to be used in each case.

Crofting Register (Fees) (Scotland) Order 2012 (SSI 2012/295)**On 9 November 2012, the Scottish Government was asked:**

The Table of Fees in the Schedule to this instrument provides, among other things, that the fee payable for “Registration of a common grazing under section 24(1) of the Act” is £90. It also provides that the fee for “Registration of a new common grazing under section 26(1) of the Act” is £90. Section 24(1)(a) requires the registration of new common grazings, while section 24(1)(b) permits the Crofting Commission to apply for registration of any other common grazing. It accordingly appears that both of these fees are applicable on the first registration of a new common grazing. Separately, we note that section 26(1)(a) deals with the procedure to be followed in applying for first registration of a new common grazing, rather than requiring that the application be made.

- a. Does the Scottish Government agree that the same activity (first registration of new common grazings) appears to be chargeable under both of these provisions in the Table of Fees, and is that its intention?
- b. The Scottish Government is asked to explain what the effect in law of making these overlapping provisions is considered to be, and further to explain how it proposes to clarify this matter.

The Scottish Government responded as follows:

Registration of common grazings, whether of an existing common grazing or a new common grazing, falls under section 24(1) of the Act. That is made clear from the scheme of the group of sections (e.g. the lead-in to section 24(2) and as section 26(1) only refers back to registration, which is under section 24). The Table of Fees however deals with applications for registration, as set out in the heading to column 1 of the Table. It is each application which must be accompanied by the fee relative to registration. Specific provision is made in section 26(1) for applications about new common grazings. At present the same figure is prescribed for both sets of applications, but it would be possible in future to set different fees, so the figures appear under separate heads. There is only however one application for a single registration and only a single fee. Guidance to assist in completing application forms for registration will clarify which Forms are to be used in each case and the associated fee.