



The Scottish Parliament  
Pàrlamaid na h-Alba

## SUBORDINATE LEGISLATION COMMITTEE

### AGENDA

1st Meeting, 2013 (Session 4)

Tuesday 8 January 2013

The Committee will meet at 10.30 am in Committee Room 6.

1. **Decision on taking business in private:** The Committee will decide whether to take item 6 in private.
2. **Instruments subject to affirmative procedure:** The Committee will consider the following—

[Rehabilitation of Offenders Act 1974 \(Exclusions and Exceptions\) \(Scotland\) Order 2013 \[draft\];](#)  
[Council Tax \(Variation for Unoccupied Dwellings\) \(Scotland\) Regulations 2013 \[draft\].](#)

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

[Council Tax \(Administration and Enforcement\) \(Scotland\) Amendment Regulations 2012 \(SSI 2012/338\);](#)  
[Children's Hearings \(Scotland\) Act 2011 \(Safeguarders: Further Provision\) Regulations 2012 \(SSI 2012/336\);](#)  
[Council Tax \(Exempt Dwellings\) \(Scotland\) Amendment Order 2012 \(SSI 2012/339\);](#)  
[M9/A90/M90 Trunk Road \(Humbie Rail Bridge to M9 Junction 1a\) \(Variable Speed Limits and Actively Managed Hard Shoulder\) Regulations 2012 \(SSI 2012/343\);](#)  
[M9/A9 Trunk Road \(Newbridge to Winchburgh\) \(Variable Speed Limits and Actively Managed Hard Shoulder\) Regulations 2012 \(SSI 2012/344\);](#)  
[Local Government Pension Scheme \(Miscellaneous Amendments\) \(Scotland\) Regulations 2012 \(SSI 2012/347\).](#)

4. **Energy Bill 2012-13 (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Energy Bill 2012-13 (UK Parliament legislation).

5. **Freedom of Information (Amendment) (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.
6. **Annual report 2012-13:** The Committee will consider its approach to the annual report for the parliamentary year 2012-13.

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The papers for this meeting are as follows—

**Agenda Items 2 and 3**

Legal Brief (private) SL/S4/13/1/1 (P)

**Agenda Items 2 and 3**

Instrument Responses SL/S4/13/1/2

**Agenda Item 4**

[Energy Bill - Legislative Consent Memorandum](#)

Briefing Paper (private) SL/S4/13/1/3 (P)

**Agenda Item 5**

[Freedom of Information \(Amendment\) \(Scotland\) Bill  
\(as amended at Stage 2\)](#)

[Freedom of Information \(Amendment\) \(Scotland\) Bill  
\(Supplementary Delegated Powers Memorandum\)](#)

Briefing Paper (private) SL/S4/13/1/4 (P)

**Agenda Item 6**

Briefing Paper (private) SL/S4/13/1/5 (P)

**SUBORDINATE LEGISLATION COMMITTEE**

**1st Meeting, 2013 (Session 4)**

**Tuesday 8 January 2013**

**Instrument Responses**

**INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE**

**Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland)  
Order 2013 [draft]**

**On 13 December 2012, the Scottish Government was asked:**

1. Paragraph 11 of Schedule 1 to the Order excludes the application of section 4(1) of the Rehabilitation of Offenders Act 1974 in relation to specified proceedings relating to “any decision taken, by virtue of any of the provisions of this Order, on consideration of .... a spent alternative to prosecution”. Given that this Order does not authorise consideration of spent alternatives to prosecution in relation to any decisions is this a drafting error and if so what is its effect considered to be? When will the Scottish Government remedy this if it is an error?

2. Paragraph 13 of Part 2 of Schedule 4 to the Order specifies any office, employment or work in the Serious Fraud Office as an office which is to be excepted from the provisions of section 4(3)(b) of the 1974 Act. Given that decisions relating to offices in, or employment of persons by, the Serious Fraud Office do not appear to be matters which will have application to Scotland why has this provision been included in the Order? If it has been included in error when does the Scottish Government propose to remove it?

**The Scottish Government responded as follows:**

1. Article 3 of the Order, which introduces Schedule 1, provides for the disclosure of spent convictions in the proceedings listed in Schedule 1. Paragraph 11 of Schedule 1 allows disclosure of spent convictions in proceedings by way of appeal or review of a decision taken by virtue of the provisions of the Order on consideration of a spent conviction or spent alternative to prosecution. Paragraph 11 of Schedule 1 will allow disclosure of spent convictions in proceedings taken by way of appeal or review against a decision taken by virtue of this Order on consideration of a spent conviction. However, as no decisions can be taken by virtue of the Order on consideration of a spent alternative to prosecution, the reference to a spent alternative to prosecution in paragraph 11 of Schedule is a drafting error but it has no legal effect.

The Government will remove the reference to “...or a spent alternative to prosecution” at the next available legislative opportunity.

2. Paragraph 13 of Part 2 of Schedule 4 to this Order lists any office, employment or work in the Serious Fraud Office (SFO) as being exempt from the restrictions in section 4(3)(b) of the 1974 Act. This reference is also contained in the current 2003 Order. The SFO is constituted under the Criminal Justice Act 1987 for England, Wales and Northern Ireland. However, under section 2 of the 1987 Act, the SFO may conduct investigations in Scotland. The Director of the SFO may delegate his or her functions to members of the SFO, including the investigatory functions detailed in section 2. In addition, under section 2(11) of the 1987 Act, the Director may authorise a competent investigator to exercise the section 2 investigatory powers on behalf of the Director. The SFO could potentially employ people in Scotland to exercise the powers of investigation contained in section 2 of the 1987 Act.

The intention behind the reference to the SFO in Schedule 4 to this Order is to exclude the SFO from the restriction in section 4(3)(b) of the 1974 Act in relation to their employees in Scotland. Section 4(3)(b) would otherwise prevent the SFO from using the spent convictions of their employees in Scotland as grounds of dismissal and from using those spent convictions as justification for prejudicing those people in their employment.

The Scottish Government remains of the view that there is a policy justification behind the inclusion of the SFO in Schedule 4 and that the provisions of Article 1(2) of the Order limit the effect of the inclusion to the SFO's employees in Scotland.

Furthermore, the Scottish Government may use the powers conferred on the Secretary of State in sections 4(4) and 7(4) of the 1974 Act by virtue of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2003 (SI 2003/415).

**Council Tax (Variation for Unoccupied Dwellings) (Scotland) Regulations 2013  
[draft]**

**On 14 December 2012, the Scottish Government was asked:**

1. Paragraph 2(9)(a) of Schedule 1 provides a definition of an “associated company”. However, it states that a company is an associated company of another person if certain conditions are met. It appears that the reference to “person” should instead be to “company”, by analogy with e.g. regulation 16(4) of the Regulation of Care (Requirements as to Care Services) (Scotland) Regulations 2002 and regulation 9(4) of the Regulation of Care (Requirements as to Limited Registration Services) (Scotland) Regulations 2003 (in both of which cases the formulation “In this regulation a company is an associated company of another if [...]” is used). Does the Scottish Government agree that the inclusion of the word “person” is an error, and that it should either be omitted or read “company”? If not, the Scottish Government is asked to explain how a company can be an associated company of another person, particularly standing the fact that one of ways of meeting that test is for both the associated company and, presumably, the person to be “under the control of the same person”.

**The Scottish Government responded as follows:**

The Scottish Government agrees that the reference should be to a “company”, rather than a “person”.

The text in question is a re-enactment of a definition in the Council Tax (Discount for Unoccupied Dwellings) (Scotland) Regulations 2005 (S.S.I. 2005/51). It appears in those Regulations at paragraph 2(7) of the Schedule. The Scottish Government suspects that the wording had its origins in the broadly equivalent Council Tax (Prescribed Classes of Dwellings) (England) Regulations 2003 (S.I. 2003/3011), where it appears in paragraph 3 of the Schedule.

The Scottish Government is not aware of any attention having previously been drawn to this point, and the wording appears to have operated in Scotland since April 2005, and rather longer in England, without difficulty. As a company is also a person, it would have to be interpreted in a way that operates as intended. However, the Scottish Government will amend the reference when an opportunity arises.

In looking at this point, the Scottish Government has noticed that paragraph 2(9) refers to “paragraphs (4) to (8)”, which should be “sub-paragraphs”. This also is a result of re-enacting existing provision. The Scottish Government would propose to deal with this as a printing point, unless the Subordinate Legislation Committee has any objection to it so doing.

**INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE****Children's Hearings (Scotland) Act 2011 (Safeguarders: Further Provision) Regulations 2012 (SSI 2012/336)**

**On 12 December 2012, the Scottish Government was asked:**

1. Paragraph (4) of regulation 3 provides that where the circumstances described in paragraph (3) apply, the appointment of the safeguarder will cease on the occurrence of whichever of the various events mentioned in paragraph (2) next occurs. Paragraph (3) applies where the sheriff requires the reporter to arrange a hearing for any purpose under the 2011 Act (as a case may be at different stages in the process and there can be different types of hearing).

Please clarify whether it is intended by this provision that the appointment will cease on any of the events described in paragraph 2(a) to (e) occurring, or alternatively any of the events described in paragraph 2(a) to (h) – because the events in (f) to (h) are expressed not to apply, where paragraph (3) applies. Is this sufficiently clear?

2. Paragraph (4) of regulation 4 applies to end the appointment of a safeguarder where a sheriff requires the reporter under regulation 15, 16 or 17 of the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2012 to arrange a hearing for any purpose permitted under the 2011 Act.

(a) Please explain the effect of this provision, given that those 2012 Regulations have not yet been made or laid in Parliament. Could the provision just have been made in these Regulations, rather than by making that reference to regulations 15 to 17?

(b) Please confirm when it is anticipated those Regulations will be made, and why they can only be made later than these Regulations, and;

(c) Are you in a position to explain the provision that will be made in those regulations 15 to 17?

**The Scottish Government responded as follows:**

1. Regulation 3(2) specifies the circumstances in which the appointment of the Safeguarder ceases. The provisions of paragraphs (2)(a) to (2)(e) apply where the time limit allowed for submitting an appeal has expired without an appeal being lodged. The provisions of paragraphs (2)(f) to (2)(h) apply where an appeal to the Sheriff Principal or the Court of Session as appropriate has been made.

The appointment of a Safeguarder remains in place until any proceedings before a Children's Hearing or a Court are concluded. Where no appeal against a decision of a Children's Hearing is made it is appropriate for the appointment of the Safeguarder to end. That is the purpose behind the provisions of paragraphs (2)(a) to (2)(e). Where an appeal against the Children's Hearing's decision is made the appointment

of the Safeguarder should remain in place until these appeal proceedings are ended, hence the provisions of paragraphs (2)(f) to (2)(h).

Section 163(10) of the Children's Hearings (Scotland) Act 2011 provides that on conclusion of an appeal to the Sheriff Principal or the Court of Session the case must be remitted back to the Sheriff. A number of options are open to the Sheriff. One of these is to require the Reporter to arrange a Children's Hearing (see section 156(3)(a)). If that option is pursued the appointment of the Safeguarder should continue and it is considered that this is achieved by the words "...except where paragraph (3) applies..." at the end of paragraphs (2)(f) to (2)(h). The Safeguarder's appointment should end once any proceedings are finally concluded and that is achieved by the provisions of paragraph (4).

If the Sheriff does not require the Reporter to arrange a Children's Hearing the appointment of the Safeguarder should end on conclusion of the Court proceedings and in those circumstances the provisions of paragraph (2)(f) to (2)(h) are relevant for the purpose of determining when the Safeguarder's appointment ends.

The Scottish Government considers that this is clear from the provisions of regulations 3(2) to 3(4) when read together.

2 (a) The Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2012 (referred to in this note as "the Secure Accommodation Authorisation Regulations") have not yet been made. It is anticipated that minor amendment to the Safeguarders: Further Provision Regulations will be required to take account of the fact that the Secure Accommodation Authorisation Regulations will now be made in 2013. The Secure Accommodation Authorisation Regulations will come into force at the same time as other Regulations required to give full effect to implementation of the Children's Hearings (Scotland) Act 2011. In the event that the Secure Accommodation Authorisation Regulations are not made the provisions of regulation 4(4) of the Safeguarders: Further Provision Regulations will be of no effect. While this may be untidy in the sense that these Regulations will refer to other Regulations that do not exist it is considered that there will be no adverse legal effect because the provisions of regulation 4(4) only apply where the Sheriff requires the Reporter to arrange a Children's Hearing. If the power to make such arrangements does not in fact exist the provisions of regulations 4(4) and 4(5) will be of no practical effect.

While it would have been possible for all of the Regulations designed to implement the scheme under the 2011 Act at the one time it was considered desirable to phase the making and laying of the Regulations to assist the Parliament in its consideration of the Regulations. Unfortunately this means that there will on occasions be provisions in one set of Regulations laid before the Parliament that cross refer to a further set of Regulations not yet made.

Given the range of material covered in subordinate legislation made under the 2011 Act it is important to ensure that the material is contained in coherent packages. This would not be achieved if provision dealing with Secure Accommodation Authorisation is contained in Regulations dealing with Safeguarders. The Scottish



Government is confident that once the Act is fully implemented, and the intention is to commence the relevant Regulations on the same date, all of the Regulations, read together, will make sense.

2 (b) It is not yet clear when the Secure Accommodation Authorisation Regulations will be made.

2 (c) The Secure Accommodation Authorisation Regulations will provide that where an appeal is taken against a decision (a) to implement a secure accommodation authorisation, (b) not to implement a secure accommodation authorisation or (c) to remove a child from secure accommodation the Sheriff will have the power to require the Principal Reporter to arrange a Children's Hearing.

## **Council Tax (Administration and Enforcement) (Scotland) Amendment Regulations 2012 (SSI 2012/338)**

**On 14 December 2012, the Scottish Government was asked:**

Regulation 6 of this instrument amends regulation 12 of the Council Tax (Administration and Enforcement) (Scotland) Regulations 1992 (“the principal Regulations”) to insert references to variations to the amount of council tax payable in terms of section 33 of the Local Government in Scotland Act 2003 (“the 2003 Act”). The effect is that levying authorities are required, before calculating the amount payable in respect of council tax for a dwelling, to take reasonable steps to ascertain whether that amount is subject to any discount under section 79 of the Local Government Finance Act 1992 or variation under section 33 of the 2003 Act, and, if so, the amount of that discount or variation. However, regulations 7 to 10 and 12 of this instrument go on, at various places in the principal Regulations, to substitute for the word “discount” (and related expressions) the word “variation” (or the appropriate related expression). Regulation 13 refers to the steps taken under regulation 12. It accordingly appears that “variation” in regulation 13 and subsequent regulations has the sense given in regulation 12, i.e. the variations in question are those made under section 33 of the 2003 Act.

(a) Does the Scottish Government accept that, by revoking the word “discount” and replacing it in each instance with “variation”, the effect appears to be that regulations 13 to 15 of the principal Regulations apply only to the newly-inserted variations under section 33 of the 2003 Act, and not, as previously, to discounts under section 79 of the Local Government Finance Act 1992?

(b) If the Scottish Government considers that the term “variation” and its related expressions, as inserted into the principal Regulations, have a wider meaning than “variations under section 33 of the Local Government in Scotland Act 2003” as in regulation 12, it is asked to explain the basis for that view, bearing in mind the principle of statutory interpretation that legislation which imposes a tax requires to be strictly construed.

**The Scottish Government responded as follows:**

The Scottish Government does not agree that “variation” in regulations 13 to 15 of the principal Regulations has to be read, or should be read, as “variation under section 33 of the Local Government in Scotland Act 2003”.

The word will carry the meaning that it has in the Act under which the Amendment Regulations are made, and the Local Government Finance (Unoccupied Properties etc.) (Scotland) Act 2012 (“the 2012 Act”) has amended that Act, the Local Government Finance Act 1992, specifically paragraph 4 of Schedule 2 to that Act and the heading to that paragraph, to substitute “variation” for “discount”. In that context, it is plain that a “variation” encompasses a “discount”, but may also include an increase in a chargeable amount (see specifically sub-paragraph (5A)(b)(ii)).

The background to the amendment is that the 2012 Act for the first time enables increases in liability to council tax for unoccupied dwellings. The legislation it

amended, section 33 of the Local Government in Scotland Act 2003 and various provisions of the Local Government Finance Act 1992, previously only enabled discounts to liability when a dwelling was unoccupied.

In consequence, the references in Part 4 of the principal Regulations to “discount” calculations and assumptions will no longer work, as a calculation or assumption may result in an increase in liability. The Amendment Regulations therefore substitute “Variations” for “Discounts” as the heading to Part 4, and in most of that Part make the same change. That approach would not work in regulation 12, as it refers to “discount under section 79 of the Act” (i.e. the Local Government Finance Act 1992), and makes no reference at all to section 33 of the Local Government in Scotland Act 2003. The Scottish Government therefore decided to insert a reference to the possibility of variation under section 33 of the Local Government in Scotland Act 2003, but leave alone the reference to discount under section 79 of the earlier Act. This is on the basis that section 79 continues only to enable discounts, and the possibility of an increased liability only relates to the later Act.

The Scottish Government accepts that this creates a tension between the use of “variation” in regulation 12 of the principal Regulations, where it is linked specifically to section 33 of the Local Government in Scotland Act, and the use of “variation” in later regulations, where it has the more general meaning that it holds in the Local Government Finance Act 1992. However, it considers that users of the legislation (local authorities) will understand how the Regulations are to operate, especially as they will have guidance on the matter, and will interpret the Regulations as they properly fall to be interpreted, in accordance with the usual tenets of statutory construction.