



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Subordinate Legislation Committee**

### **1st Report, 2013 (Session 4)**

## **Subordinate Legislation**

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## **Subordinate Legislation Committee**

### **Remit and membership**

#### **Remit:**

The remit of the Subordinate Legislation Committee is to consider and report on—

- (a)
  - (i) subordinate legislation laid before the Parliament;
  - (ii) any Scottish Statutory Instrument not laid before the Parliament but classed as general according to its subject matter;

and, in particular, to determine whether the attention of Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

#### **Membership:**

Nigel Don (Convener)  
Jim Eadie  
Mike MacKenzie  
Hanzala Malik  
John Pentland  
John Scott  
Stewart Stevenson (Deputy Convener)

#### **Committee Clerking Team:**

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**Support Manager**  
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The Committee reports to the Parliament as follows—

1. At its meeting on 8 January 2013, the Committee agreed to draw the attention of the Parliament to the following instruments—

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

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

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

2. The Committee's recommendations in relation to those instruments are set out below.

3. The instruments that the Committee determined that it did not need to draw the Parliament's attention to are set out at the end of this report.

## **POINTS RAISED: INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE**

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

4. This Order consolidates the current Rehabilitation of Offenders Act 1974 (Exclusion and Exceptions) (Scotland) Order 2003 as amended with the addition of new categories of employment and proceedings to reflect recent legislative changes. The effect of the Order is to exclude the protection afforded to spent convictions under the 1974 Act in circumstances where the public interest dictates that information about such convictions should be made available. Typically these involve positions involving a particular level of trust, such as work in the childcare or health professions or in financial services. The Order sets out the circumstances where the 1974 Act is to be disapplied.

5. The Order is subject to affirmative procedure, and if approved, will come into force the day after the day on which it is made.

6. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in Appendix 1.

7. This Order replaces an earlier draft instrument which included provision excluding the application of the 1974 Act in relation to spent alternatives to prosecution. (Alternatives to prosecution are described in section 8B of the 1974 Act and include warnings issued by police constables or the procurator fiscal or conditional offers to pay a fine.) That draft Order was withdrawn.

8. This replacement Order does not seek to extend the disapplication of the 1974 Act to spent alternatives to prosecution. All references to alternatives to prosecution were removed apart from that contained in paragraph 11 of Schedule 1 to the Order which remains in error. The Scottish Government acknowledges that this stray reference to spent alternatives to prosecution is an error. It also acknowledges that the provision in paragraph 11 cannot apply in relation to consideration of an appeal or review of a decision taken on consideration of a spent alternative to prosecution *by virtue of this Order*, because there is no provision in the Order which authorises the consideration of a spent conviction.

9. To the extent that the paragraph suggests that it is to have application to spent alternatives to prosecution, the Committee considers that it neither makes sense nor has any legal effect. In the circumstances the Committee considers this paragraph to be defectively drafted.

**10. The Committee draws the Order to the attention of the Parliament on ground (i) as the drafting is defective.**

**11. Paragraph 11 of Schedule 1 to the Order is defectively drafted in that it appears to allow the 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 alternative to prosecution. However, no decisions can**

**in fact be taken by virtue of the Order on consideration of a spent alternative to prosecution. The drafting of the provision is therefore defective in that respect.**

**12. The Committee observes that this is the second draft of the Order to be laid. An earlier draft laid in September was withdrawn to correct inaccuracies which arose from a failure to ensure that the legislation being consolidated remained appropriate in the current legislative context.**

**13. The Committee notes that the Scottish Government proposes to correct this drafting error at the next available legislative opportunity. However, the Committee is concerned that the Parliament is being invited by the Scottish Government to approve an order which the Government acknowledges is inherently defective. The Committee is of the view that as a general principle instruments presented for approval should be accurate and fit for purpose.**

**14. The concern is compounded where, as in this case, the instrument is a consolidation and therefore is intended to simplify legislation which has become difficult for the end user to follow due to the number of amendments which have been made. The Committee wishes to support the Government where it consolidates subordinate legislation. But the Committee also considers that when expending resources on consolidating regulations the Scottish Government should take particular care to ensure that the end product is accurate.**

**15. The Committee has not been made aware of any pressing policy reason why this instrument must be made in its current form or that there is no time to correct it. The Committee would prefer that the instrument is withdrawn and replaced with a corrected version.**

**16. It is not clear to the Committee why this matter could not already have been resolved given that the error was identified and acknowledged prior to the Christmas recess. It would have been possible for the Committee to consider any corrected draft laid prior to this meeting without any impact on the timetable for bringing the instrument into force. This question of timing is a matter which the lead committee may wish to explore with the Scottish Government when considering whether to recommend to the Parliament that the instrument be approved in its current form.**

**Council Tax (Variation for Unoccupied Dwellings) (Scotland) Regulations 2013 [draft]** (*Local Government and Regeneration Committee*)

17. This instrument makes provision for variations of the amount of council tax due in respect of unoccupied dwellings: regulation 3 provides, as a default position, for a discount of 50% to be given in respect of dwellings which on any given day have no occupant. Regulation 4 goes on to provide that local authorities, within the bounds set by regulations 5 and 6, may vary the discount applicable between the maximum discount of 50%, and no discount, or provide instead for an increase in council tax when dwellings are unoccupied.

18. The Order is subject to the affirmative procedure, and if approved, is due to come into force on 1 April 2013.

19. In considering the instrument, the Committee asked the Scottish Government to clarify one of its provisions. The correspondence is reproduced in Appendix 2.

20. Paragraph 2(9)(a) of Schedule 1 to these Regulations 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”. The Scottish Ministers agree that this is the case. There is accordingly a patent error in this provision.

21. The Committee notes that this provision repeats the wording of an earlier instrument which appears to derive from similar English regulations made in 2003. The Scottish Ministers advise that they are not aware of any difficulty having arisen in operating the provision since 2005 in Scotland, or since 2003 in England. The Committee observes, however, that this does not mean that the matter has not arisen – merely that it has not come to the Ministers’ attention.

22. On balance, however, the Committee does not think that this error is likely to affect the operation of the instrument. It notes the offer of the Scottish Ministers to amend the reference when an opportunity to do so arises.

**23. The Committee draws the instrument to the attention of the Parliament on the general reporting ground.**

**24. There is a drafting error in paragraph 2(9)(a) of Schedule 1. It provides that a company is an associated company of another *person* if certain conditions are met, when the word “person” should instead read “company”.**



## **POINTS RAISED: INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE**

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

25. This instrument amends Part IV of the Council Tax (Administration and Enforcement) (Scotland) Regulations 1992 (“the principal Regulations”) so that it will apply to variations in council tax charges which may be made by local authorities should the Parliament approve the draft Council Tax (Variation for Unoccupied Dwellings) (Scotland) Regulations 2013 (“the draft Variation Regulations”). This instrument mainly amends Part IV, which will be retitled “VARIATION” instead of “DISCOUNTS”. The other changes to Part IV, on the whole, involve the substitution of “variation” for “discount” wherever it appears.

26. The Order is subject to the negative procedure, and comes into force on 9 February 2013.

27. In considering the instrument, the Committee asked the Scottish Government for clarification as to the effect of the amendments it makes. The correspondence is reproduced in Appendix 3.

28. Part IV of the principal Regulations, at present, makes provision as to the administration of council tax discounts. This instrument amends that Part so that it refers instead to “variations”. At present, regulation 12 applies the ascertainment of entitlement to discounts under section 79 of the Local Government Finance Act 1992 (“the 1992 Act”). As a result of the amendments made by this instrument, it will also apply to the new variations under section 33 of the Local Government in Scotland Act 2003 (“the 2003 Act”) (i.e. variation in respect of unoccupied dwellings).

29. Section 79 of the 1992 Act is not affected by the Local Government Finance (Unoccupied Properties etc.) (Scotland) Act 2012, and so section 79 continues to provide for discounts, rather than variations which is the terminology used in section 33 of the 2003 Act. However, this instrument substitutes “variation” for “discount” wherever it occurs throughout the remainder of Part IV. Accordingly, regulation 12 makes provision about two different things – discounts under section 79 of the 1992 Act and variations under section 33 of the 2003 Act – but the remainder of Part IV now only contains references to “variation”. A question accordingly arises as to how regulations 13 to 15 will apply in respect of section 79 discounts.

30. The Scottish Ministers contend that “variation” is wide enough to encompass section 79 discounts. They do not consider that the word variation in regulations 13 to 15 is limited by the fact that regulation 12 refers expressly to variations under section 33 of the 2003 Act. They pray in aid the sense in which “variation” is used elsewhere in the 1992 Act (as amended) in support of this. However, in the final paragraph of their response they acknowledge that there is a tension between the use of “variation” in regulation 12 and its use elsewhere in the principal Regulations.

31. In the Committee’s view, the use of “variation” in regulations 13 to 15 has to be considered in the context of regulation 12. Regulation 13 makes it clear that local authorities are to do certain things as a result of taking the steps specified in regulation 12. Regulations 14 and 15 operate in dependence on assumptions made

under regulation 13. It therefore considers that there is a clear link between this group of provisions, which together with regulation 11, form Part IV of the principal Regulations. It appears that “variation” is necessarily used in a limited sense, because regulation 12 expressly refers to variations under section 33 of the 2003 Act, and not to any other variations. As the Scottish Ministers acknowledge, they did not consider it appropriate to amend the reference to section 79 of the 1992 Act on the basis that it “...continues only to enable discounts...”.

32. In consequence, it appears to be doubtful whether the Scottish Ministers’ arguments as to the breadth of the definition of “variation” can be sustained. While the Committee considers that the potential consequences of this lack of clarity are limited, it would have been clearer had regulations 13 to 15 continued to refer to discounts as well as referring to variations.

**33. The Committee draws the instrument to the attention of the Parliament on reporting ground (h) as the meaning could be clearer.**

**34. The form or meaning of the instrument could be clearer. This instrument amends Part IV of the Council Tax (Administration and Enforcement) (Scotland) Regulations 1992 by substituting references to “discount” with references to “variation”. However, those provisions are intended to continue to apply to discounts under section 79 of the Local Government Finance Act 1992, and it appears to be doubtful whether, in the context of that Part, “variation” can properly extend to include “discount” standing the drafting of regulation 12 which makes specific reference to “variation under section 33 of the Local Government in Scotland Act 2003”.**

**NO POINTS RAISED**

35. At its meeting on 8 January 2013, the Committee considered the following instruments and determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

***Education and Culture Committee***

Children's Hearings (Scotland) Act 2011 (Safeguarders: Further Provision) Regulations 2012 (SSI 2012/336)

***Infrastructure and Capital Investment Committee***

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 and Regeneration Committee***

Council Tax (Exempt Dwellings) (Scotland) Amendment Order 2012 (SSI 2012/339)

Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Regulations 2012 (SSI 2012/347)

## APPENDIX 1

### 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).

## APPENDIX 2

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

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

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 (SSI. 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.

## **APPENDIX 3**

### **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.



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