



The Scottish Parliament  
Pàrlamaid na h-Alba

## SUBORDINATE LEGISLATION COMMITTEE

### AGENDA

12th Meeting, 2013 (Session 4)

Tuesday 16 April 2013

The Committee will meet at 10.00 am in Committee Room 3.

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

[National Health Service Superannuation Scheme etc. \(Miscellaneous Amendments\) \(Scotland\) Regulations 2013 \(SSI 2013/109\);](#)  
[Act of Sederunt \(Fees of Shorthand Writers in the Sheriff Court\) \(Amendment\) 2013 \(SSI 2013/112\);](#)  
[Police Service of Scotland \(Amendment\) Regulations 2013 \(SSI 2013/122\).](#)

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

[Act of Sederunt \(Rules of the Court of Session Amendment No 2\) \(Fees of Shorthand Writers\) 2013 \(SSI 2013/111\);](#)  
[Aberdeen City \(Electoral Arrangements\) Variation Order 2013 \(SSI 2013/115\);](#)  
[Act of Sederunt \(Rules of the Court of Session Amendment No. 3\) \(Miscellaneous\) 2013 \(SSI 2013/120\).](#)

3. **Scottish Independence Referendum Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.
4. **Post-16 Education (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.

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The papers for this meeting are as follows—

**Agenda Items 1 and 2**

Legal Brief (private)

SL/S4/13/12/1 (P)

**Agenda Item 1**

Instrument Responses

SL/S4/13/12/2

**Agenda Item 3**

[Scottish Independence Referendum Bill  
- as introduced](#)

[Scottish Independence Referendum Bill  
- Delegated Powers Memorandum](#)

Briefing Paper (private)

SL/S4/13/12/3 (P)

**Agenda Item 4**

Briefing Paper

SL/S4/13/12/4

**SUBORDINATE LEGISLATION COMMITTEE**

**12th Meeting, 2013 (Session 4)**

**Tuesday 16 April 2013**

**Instrument Responses**

**INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE**

**National Health Service Superannuation Scheme etc. (Miscellaneous Amendments) (Scotland) Regulations 2013 (SSI 2013/109)**

**On 3 April 2013, the Scottish Government was asked:**

Regulation 11 substitutes regulation E7(2)(b)(ii) of the principal 2011 Regulations. This specifies a condition for certain purposes, that the members' employing authority certifies, if employment is terminated by reason of redundancy, that the member is entitled to claim a pension as an alternative to receiving a lump sum payment otherwise payable to "him".

Is this incorrectly framed in non-gender neutral terms, and if so would you propose to amend the provision? (We note that it appears that there are 2 other references to "him" in the principal 2011 Regulations, in regulation F2(6) and Schedule 1, paragraph 10(3))

**The Scottish Government responded as follows:**

Section 6(a) (as applied by section 23(1)) of the Interpretation Act 1978 provides that words importing the masculine gender include the feminine. Although it would have been better to say "the member" (rather than "him"), the meaning of the inserted provision is clear. However, we will look to adjust this and the other provisions which refer to "him" (to avoid using this gender-specific pronoun) when the next appropriate opportunity arises.

## **SUBORDINATE LEGISLATION COMMITTEE**

**12th Meeting, 2013 (Session 4)**

**Tuesday 16 April 2013**

**Post-16 Education (Scotland) Bill**

**Response from the Scottish Government**

### **Background**

1. The Subordinate Legislation Committee reported on the delegated powers in the Post-16 Education (Scotland) Bill on 19 February 2013 in its [14<sup>th</sup> report of 2013](#).
2. The response from the Scottish Government to this report is reproduced at the annex.

### **Scottish Government response**

*Section 4 (inserting section 9C into the 2005 Act) – Fee cap: students liable for higher education fees*

3. In its stage 1 report, the Committee concluded that the negative procedure did not represent an adequate level of scrutiny for the exercise of this power, given the sensitivity of the function being exercised, and the fact that it would represent a substantially lower level of scrutiny than that applicable when setting fees for Scottish and EU students.
4. The Committee therefore recommended that the power be subject to the affirmative procedure, except in cases when the fee cap is no greater than is required to maintain the value of the amount previously set in real terms.
5. The Scottish Government accepted the Committee's recommendation and agreed to bring forward an appropriate amendment at stage 2 to effect a change in the procedure.

*Section 7 (substituting section 24 of the 1992 Act) – Mismanagement by boards*

6. This power substantially expands the grounds upon which members of a college's board of management may be removed. Given the extent of the expansion, the Committee drew the power to the attention of the lead committee.
7. In its response to the Committee, the Government stated that the power was 'reasonable and would lead to better governance.' However, it agreed to continue to reflect on the provision prior to stage 2 of the Bill.

*Section 12 (inserting section 23N of the 2005 Act) – Mismanagement of regional boards*

8. This power substantially expands the grounds upon which members of a regional board of management may be removed. Given the extent of the expansion, the Committee drew the power to the attention of the lead committee.

9. In its response to the Committee, the Government stated that the power was reasonable. However, it agreed to continue to reflect on the provision prior to stage 2 of the Bill.

*Section 15(1) – Duty to provide information to Skills Development Scotland*

10. This power enables the Scottish Ministers to make subordinate legislation requiring any person to provide information which that person holds about a young person to Skills Development Scotland Co. Limited (“SDS”). At stage 1, the Committee expressed concern that, as “any person” could be required to share information, the power had perhaps been drafted more broadly than was the Government’s policy intention.

11. In its response to the Committee’s stage 1 report, the Scottish Government advised that people other than those who provide education and training to young people may be required to collect and share information with SDS. Therefore, the Government is of the view that the power in section 15(1), as drafted, is necessary.

12. Furthermore, the Scottish Government stated that the use of the word “person” in the power created a level of flexibility which would ensure “that the power will remain fit for purpose in the future in what is likely to be an ever evolving education and training environment.”

13. The Government was also of the view that the power will be constrained as data may only be shared for the purposes set out within subsection (1). However, it recognises the Committee’s view that this does not substantially limit the scope of the power.

14. In its stage 1 report, the Committee observed that the exercise of the power appears likely to engage the rights under Article 8 of the European Convention of Human Rights of the persons whose personal data is shared in terms of an order under this power.

15. In its response to the Committee, the Government provided reassurance that adequate consideration will be given to Article 8 of the European Convention of Human Rights when considering any subordinate legislation made under section 15(1).

16. Finally in relation to section 15(1), the Committee recommended that, in order to ensure adequate scrutiny is carried out, the power be subject to the affirmative procedure, rather than the negative procedure as originally drafted.

17. The Scottish Government accepted the Committee's recommendation in relation to the affirmative procedure and proposed to bring forward an amendment at stage 2 to effect the change.

*Section 15(5) – Duty to provide information to Skills Development Scotland*

18. In its stage 1 report, the Committee recommended that the Scottish Government revisit the drafting of Section 15(5) in order to ensure that the policy intention was unambiguously delivered. The Committee considered that it was unclear whether the power could be exercised simply to reflect any change in the name of SDS.

19. In its response, the Scottish Government informed the Committee that it would bring forward an amendment at stage 2 which would seek to make clear that section 15(5) can be exercised in consequence of a change of name, not only if and when the Scottish Government wishes to substitute a different person.

*Section 15(7) – Duty to provide information to Skills Development Scotland*

20. At stage 1, it appeared to the Committee that the bespoke ancillary powers provision in section 15(7)(b) duplicated the ancillary powers provision in section 17(1). The Committee accordingly recommended that the duplicated provision be omitted from the Bill.

21. The Scottish Government informed the Committee that it intended to bring forward an amendment at stage 2 to remove section 15(7)(b) from the Bill.

*Conclusion*

22. Unless amendments that will affect the delegated powers provisions are made to the Bill at Stage 2 the Committee will not consider it again. Members are therefore invited to make any comments they wish on the Bill at this stage.

**Recommendation**

**24. Members are invited to note the Scottish Government's response on the Bill and to make any comments they wish at this stage.**

**Annex****Correspondence from Scottish Government dated 27 March 2013**

SCOTTISH GOVERNMENT

POST-16 EDUCATION (SCOTLAND) BILL

RESPONSE TO THE SUBORDINATE LEGISLATION COMMITTEE'S REPORT

INTRODUCTION

I would like to thank the Committee for their detailed consideration of the delegated powers in the Bill. We have carefully considered the Committee's recommendations and a detailed response to each is set out below.

I hope that the Committee find this response helpful.

Michael Russell

Cabinet Secretary for Education and Lifelong Learning

TUITION FEES

**Section 4 (inserting section 9C into the 2005 Act) – Fee cap: students liable for higher education fees**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>order</b>
<b>Parliamentary procedure:</b>	<b>negative procedure</b>

**Committee comments:** The Committee does not consider that the negative procedure would represent an adequate level of scrutiny for the exercise of this power. It recommends that its exercise be subject to the affirmative procedure, except when the increase in the fee cap is no greater than is required to maintain the value of the amount previously set in real terms.

**Scottish Government Response:**

As the Committee is aware, proposed new section 9C of the Further and Higher Education (Scotland) Act 2005 is informed, broadly, by the Scottish Government's policy intention that Scottish institutions should not charge full time HE students from other parts of the UK annual tuition fees at a higher level than the maximum tuition fees set by legislation which such students would be charged at institutions elsewhere in the UK. It is against that backdrop that the power in proposed new section 9C(2) is constrained by section 9C(3)(b) and that constraint is the principal reason why, in the Bill as introduced, the Scottish Government provision was made for the order making power to be subject to negative procedure.

But the Scottish Government notes the views of the Committee and, in particular, recognises the Committee's views as set out in paragraph 18 of the Committee's Report. The Scottish Government therefore accepts the recommendation at paragraph 20 of the Committee's report and will seek to bring forward an appropriate amendment to the Bill at Stage 2 to implement the same.

## COLLEGE REGIONALISATION

**Section 7 (substituting section 24 of the 1992 Act) – Mismanagement by boards**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order  
**Parliamentary procedure:** negative procedure

**Committee comments:** Given the substantial expansion of the grounds upon which members of a college's board of management may be removed, the Committee draws the power in section 7 (substituting section 24 of the 1992 Act) to the attention of the lead Committee. It is otherwise content that the exercise of the power be subject to the negative procedure.

**Response:**

As the Cabinet Secretary for Education and Lifelong Learning explained in his evidence to the Education and Culture Committee on 26 February 2013, there is a range of circumstances in which powers concerning college mismanagement would apply [OR column 2087-2088]. Each of the 'grounds' in new section 24 of the 1992 Act, as substituted by section 7 of the Bill, is in our view reasonable and would lead to better governance. We note, however, that the Committee has drawn the power to the attention of the lead Committee. We will continue to reflect on this provision in advance of Stage 2.

**Section 12 (inserting section 23N of the 2005 Act) – Mismanagement of regional boards**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order  
**Parliamentary procedure:** negative procedure

**Committee comments:** . . .given the breadth of the grounds upon which the members of a regional board may be removed, the Committee draws the power in section 12 (inserting section 23N of the 2005 Act) to the attention of the lead Committee. It is otherwise content that the exercise of the power be subject to the negative procedure.

**Response:**

Each of the 'grounds' in proposed new section 23N of the 2005 Act, as inserted by section 12 of the Bill, is in our view reasonable and would lead to better governance. We note, however, that the Committee has drawn the powers to the attention of the lead Committee. We will continue to reflect on this provision in advance of Stage 2.

## DATA SHARING

**Section 15(1) – Duty to provide information to Skills Development Scotland**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order  
**Parliamentary procedure:** negative procedure



**Committee Comments:** . . . draws the power in section 15(1) to the attention of the lead Committee on the basis that it has been drafted in terms which are rather broader than the Scottish Ministers' declared policy intention, observing that it appears possible that the power as drafted could extend beyond the provision which the Ministers say they propose to make.

The Committee also observes that the exercise of this power appears likely to engage the rights under Article 8 of the European Convention on Human Rights of the persons whose personal data is shared in terms of an order under this section. It accordingly notes that it will wish to be reassured, when it comes to consider any subordinate legislation made under this power, that adequate consideration has been given to the Convention rights (in particular Article 8) and that – to the extent that Article 8 is engaged – any interference is capable of being objectively justified and is proportionate.

The Committee further recommends that, if the Scottish Ministers continue to consider it necessary to take this power in its present form, then its exercise should be subject to the affirmative procedure to ensure adequate Parliamentary scrutiny of the use of the power, in particular so that the Parliament may be reassured that the power is being used as intended and not in a wider fashion.

**Scottish Government Response:**

The Scottish Government continues to consider that it is necessary to take this power in its present form. Specifically it is considered necessary and appropriate to retain reference to “person” in section 15(1) of the Bill: “The Scottish Government may, by order require a person to provide information the person holds.....”.

The Scottish Government has indicated that this is necessary because, in some cases, persons other than ‘persons who are providing education and training to young people’ will collect and share data on behalf of the person providing education. And the Scottish Government would wish to be able to use the section 15(1) power to specify such persons. The use of the term “person” in section 15(1) is considered necessary and appropriate to allow for this. More generally the Scottish Government considers that the flexibility which the use of the word “person” in section 15(1) provides is a key element in ensuring that the power will remain fit for purpose in the future in what is likely to be an ever evolving education and training environment. The Scottish Government remains of the view that the power is constrained by the terms of section 15(1)(a), (b) and (c) but recognises the Committee’s view that this does not “[represent] any substantial limitation on the exercise of the section 15 power”.

The Scottish Government also acknowledges that, as the Committee highlights, exercise of the section 15(1) power may engage Article 8 ECHR and that the committee will therefore wish to be assured that adequate consideration has been given to the Convention rights (in particular Article 8) when it comes to consider any subordinate legislation made under the power.

In all of the circumstances, and particularly in light of the Committee’s comments about the breadth of the power, the Scottish Government accepts the Committee’s recommendation that the section 15(1) order making power ought to be subject to

affirmative procedure and will seek to bring forward an appropriate amendment to the Bill at Stage 2 to effect this.

### **Section 15(5) – Duty to provide information to Skills Development Scotland**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order  
**Parliamentary procedure:** negative procedure, or where relating to a change of name, laid in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010

**Committee Comments:** . . . recommends that the Scottish Ministers revisit the drafting of this provision to ensure that it clearly and unambiguously delivers their stated policy intentions. It therefore welcomes the Ministers' intentions to give further consideration to the drafting of this provision.

The Committee considers that it would be appropriate for this power to be subject to the negative procedure. Should the power properly extend to changing the name of Skills Development Scotland Co. Limited, then the Committee is content that such an order would be laid in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010, but would not be subject to any further procedure.

#### **Scottish Government Response:**

The Scottish Government will seek to bring forward an appropriate amendment to the Bill at Stage 2 to amend section 15 of the Bill to make clear that the section 15(5) power to amend the reference to Skills Development Scotland Co. Limited in section 15 is a power exercisable not only if and when the Scottish Government wishes to substitute a different person, but also simply in consequence of a change of name.

### **Section 15(7) – Duty to provide information to Skills Development Scotland**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** order  
**Parliamentary procedure:** negative procedure, or where relating to a change of name, laid in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010

**Committee comments:** . . . recommends that the Scottish Ministers consider simplifying the Bill by omitting the duplicated provision in section 15(7)(b), and welcomes their commitment to give further consideration to this matter.

#### **Scottish Government Response:**

The Scottish Government will seek to bring forward an amendment to the Bill at Stage 2 to remove section 15(7)(b) of the Bill.