



The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

13th Meeting, 2013 (Session 4)

Tuesday 30 April 2013

The Committee will meet at 10.00 am in Committee Room 5.

1. **Decision on taking business in private:** The Committee will decide whether to take item 7 in private.
2. **Instruments subject to affirmative procedure:** The Committee will consider the following—

[Children's Hearings \(Scotland\) Act 2011 \(Rules of Procedure in Children's Hearings\) Rules 2013 \[draft\];](#)
[Children's Hearings \(Scotland\) Act 2011 \(Review of Contact Directions and Definition of Relevant Person\) Order 2013 \[draft\];](#)
[Public Services Reform \(Scotland\) Act 2010 Modification Order 2013 \[draft\].](#)

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

[Firemen's Pension Scheme \(Amendment\) \(Scotland\) Order 2013 \(SSI 2013/128\);](#)
[Firefighters' Pension Scheme \(Scotland\) Amendment Order 2013 \(SSI 2013/129\);](#)
[Action Programme for Nitrate Vulnerable Zones \(Scotland\) Amendment Regulations 2013 \(SSI 2013/123\);](#)
[Freedom of Information \(Scotland\) Act 2002 \(Scottish Public Authorities\) Amendment Order 2013 \(SSI 2013/126\);](#)
[Environmental Information \(Scotland\) Amendment Regulations 2013 \(SSI 2013/127\).](#)

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

[Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 \(Commencement No. 1, Transitional and Transitory Provisions\) Order 2013 \(SSI 2013/124 \(C.9\)\).](#)

5. **Land and Buildings Transaction Tax (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.
6. **Subordinate legislation:** The Committee will consider its approach to the scrutiny of transitional provisions.
7. **Annual report 2012-13:** The Committee will consider a draft of its third quarterly report for the parliamentary year 2012-13.

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The papers for this meeting are as follows—

Agenda Items 2, 3 and 4

Legal Brief (private)

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

Agenda Items 2 and 3

Instrument Responses

SL/S4/13/13/2

Agenda Item 5

Briefing Paper

SL/S4/13/13/3

Agenda Item 6

Briefing Paper (private)

SL/S4/13/13/4 (P)

Agenda Item 7

Briefing Paper (private)

SL/S4/13/13/5 (P)

SUBORDINATE LEGISLATION COMMITTEE

13th Meeting, 2013 (Session 4)

Tuesday 30 April 2013

Instrument Responses

INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE

Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013 [draft]

On 17 April 2013, the Scottish Government was asked:

The Policy Notes for instruments previously laid have explained in relation to those instruments that, while they come into force when other provisions of the 2011 Act are to be brought into force, the scheduled commencement date for the pending series of instruments under the 2011 Act is 24 June 2013.

As it is not explained in the Policy Note for this instrument, please clarify whether the scheduled commencement date for this Order is equally 24 June (when section 126 of the Act is scheduled to be commenced also)?

The Scottish Government responded as follows:

The Scottish Government confirms that the scheduled commencement date for this Order is 24 June 2013, when section 126 of the Children's Hearing (Scotland) Act 2011 is also scheduled to be commenced.

Public Services Reform (Scotland) Act 2010 Modification Order 2013 [draft]

On 17 April 2013, the Scottish Government was asked:

The Policy Notes for instruments previously laid have explained in relation to those instruments that, while they come into force when other provisions of the 2011 Act are to be brought into force, the scheduled commencement date for the pending series of instruments under the 2011 Act is 24 June 2013.

As it is not explained in the Policy Note for this instrument, please clarify whether the scheduled commencement date for this Order is equally 24 June (when section 7 of the Act is scheduled to be commenced also)?

The Scottish Government responded as follows:

The Scottish Government confirms that the scheduled commencement date for this Order is 24 June 2013, when section 7 of the Children's Hearing (Scotland) Act 2011 is also scheduled to be commenced.

Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 [draft]

On 19 April 2013, the Scottish Government was asked:

1. The Policy Notes for instruments previously laid have explained in relation to those instruments that, while they come into force when other provisions of the 2011 Act are to be brought into force, the scheduled commencement date for the pending series of instruments under the 2011 Act is 24 June 2013.

As it is not explained in the Policy Note for this instrument, please clarify whether the scheduled commencement date for the Rules is equally 24 June (when section 177 of the Act is scheduled to be commenced also)?

2. Rule 9 places a requirement on a safeguarder to keep securely and return to the reporter on termination of appointment any documents provided by the Reporter, and a requirement that a safeguarder must not cause or permit information obtained by virtue of appointment under the 2011 Act to be disclosed, except where the Act or other enactment allows. Rule 56(5) and (6) imposes additional requirements on a safeguarder beyond the report required for the hearing by section 33(1)(a), to give a report or interim report to the Reporter.

(a) Please explain why it has been considered appropriate to make those provisions as rules under the powers in section 177 to make procedural rules for hearings, rather than as regulations under the powers in section 34, which specifically provides that regulations may make provision for or in connection with imposing additional requirements on safeguarders, and the termination of their appointment?

(b) If it is considered that rules 9 and 56(5) and (6) should properly have been made under section 34 by regulation, what is the effect of the rules?

3. Section 33(1) requires any safeguarder appointed by virtue of section 30 by a children's hearing, on being appointed, to prepare a report for the hearing. Rule 56(4) modifies the section, by providing that a safeguarder is not required to prepare a report where the safeguarder is appointed by a pre-hearing panel before a grounds hearing, or a hearing held by virtue of sections 45, 46, 50, 96, 123, 126, or 158 of the 2011 Act.

(a) Please explain the basis on which those modifying provisions are made under the powers in sections 177 and 195 of the Act (given that those powers do not include provision permitting modification of the Act) rather than under section 204, which specifically enables ancillary provisions by order which modify the Act, to make supplemental, etc. provision for the purposes of the Act?

(b) Separately if reliance is placed on the power under section 177 which is not yet in force, is it considered that power could be used to derogate from the terms of the Act on an "anticipatory" basis (and why)?

(c) If it is considered that rule 56(4) would be made under the powers in section 204 (though this is not cited in the preamble), please explain—

(i) how the provision is considered appropriate for the purposes of, in consequence of, or to give full effect to the Act, and

(ii) what the effect of it is, given that section 204 enables provision by order rather than rule (subject to the negative procedure where there is no textual amendment of the Act)?

4. Rule 33 (setting out requirements for provision of information in advance of certain hearings) applies where section 109(7), 115(5) or 117(5) of the Act applies. The footnote to the rule explains that sections 115(5) and 117(5) are to be inserted into the Act by the Children's Hearings (S) Act 2011 (Modification of Primary Legislation) Order 2013.

(a) Please explain the effect of this provision, given that that 2013 Order has not yet been made or laid in Parliament. Would it have been possible just to have made further provision explaining when the rule applies, rather than by making that reference?

(b) Please confirm when it is anticipated that that Order will be laid and made, and why it can only be laid and made later than these Rules, and

(c) Are you in a position to explain the provision that will be made in those sections 115(5) and 117(5)?

5. Part 21 makes specific provisions for hearings arranged under the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (S) Regulations 2013, and cross-refer in several places to those Regulations. (In relation to the Children's Hearings (Scotland) Act 2011 (Safeguarders: Further Provision) Regulations 2012, the Committee reported that regulation 4(4) refers to provisions in those yet to be made Regulations .) Without sight of this further instrument, the Parliament is not able to be wholly clear as to the application and effect of Part 21, in the period permitted for scrutiny of these Rules.

(a) Please explain the effect of Part 21, given that it applies where a hearing is to be arranged by virtue of regulation 9 of the 2013 Regulations which are yet to be made, and that Part refers in various places to those Regulations. Please explain why those Regulations could not be made or laid in advance of the laying of these Rules?

(b) Please confirm when it is anticipated those Regulations will be laid and made.

(c) Are you in a position to send a draft of those Regulations to assist in the scrutiny of Part 21?

6. Paragraph (2) of rule 26 makes provision for copy documents to be provided by the Reporter to specified persons in advance of a children's hearing, and expressly excludes the requirement where the person provided the document. Paragraph (3) provides that where the Reporter obtains any information (including any views of the child given orally to the reporter) which is material to the hearing, the reporter must give that information to the specified persons as soon as possible before the

hearing. For this purpose the specified persons include the child, and so the plain meaning is that the oral information shall be given back to the child.

Please clarify the intended effect of that provision in paragraph (3), and whether (contrary to the plain meaning) there may be any intention either to provide for an express exclusion, that the oral views of the child given to the Reporter need not be given back to the child; or to provide that the Reporter must give any such views back to the child (and to the other persons specified in paragraph (4)), but narrated in a copy document? (Cf. rule 27(6)(c) requiring provision of “a copy of” any views of the child?)

The Scottish Government responded as follows:

1. As recorded in page 7 of the Policy Note the proposed date for commencement of these Rules is 24 June 2013.

2 (a) The provisions of rules 9 and 56(5) and (6) are concerned with the conduct of Children’s Hearings and the role of safeguarders. It is considered that these provisions should be included in the Procedure Rules given that these Rules are generally concerned with the conduct of hearings. Regulations under section 34 of the Children’s Hearings (Scotland) Act 2011 do not appear to be the appropriate place to include provisions of a practical nature such as are found in rules 9 and 56(5) and (6). These provisions are, in the Scottish Government’s view, concerned with procedure relating to children’s hearings. While the list in section 177(2) of the Act does not purport to be exhaustive of the matters that may be included in Rules made under section 177(1) the provisions of section 177(2)(i) suggest that the provisions of rules 9 and 56(5) and (6) may competently be included.

(b) This question falls in light of the answer to question (2)(a).

3 (a) The Scottish Government is grateful for this matter being drawn to its attention. Given the terms of section 33(1) of the Act it is accepted that a report requires to be prepared by the safeguarder. Consequently the Scottish Government has arranged for the draft Rules to be withdrawn and a further draft has been laid with the provisions of rule 56(4) of the previous draft removed.

(b) and (c) These questions fall in light of the answer to question (3)(a).

4 (a) The 2013 Order will be made and brought into force at the same time as these Rules come into force so that with effect from 24 June 2013 there will be a package of instruments in force that, read together, make the necessary provision to fully implement the Act. It would have been possible to make provision in rule 33 that repeats the terms of what will appear in sections 115(5) and 117(5) but it would have been unusual to do so for the purpose of giving effect to the Rules from 24 June 2013. It is considered that the usual practice would be to cross-refer to the relevant provisions in the 2011 Act as has been done.

(b) The 2013 Order should be laid on 6 May 2013. The order in which the various instruments required to fully implement the 2011 Act are laid has been given careful consideration. It was considered undesirable to lay all of the instruments on the same date, although that would have been one approach that was considered and

rejected on the grounds that it would be unhelpful to both the Parliament and interested parties. It would have meant that interested parties had no notice of any of the provisions to be made by subordinate legislation until the final instrument was ready to be laid.

(c) The new sub-sections added to sections 115 and 117 will provide, in short, that if the sheriff makes an interim compulsory supervision order specifying that the child is to reside in a place of safety the children's hearing must take place no later than the 3rd day after the day on which the child begins to reside in the place of safety.

5 (a) Part 21 makes provision in relation to a children's hearing that has to be held for the purpose of reviewing a decision to implement a secure accommodation authorisation. The relevant Regulations will be brought into force on 24 June 2013. At the present time they are being finalised. The key provisions, for the purposes of these Rules, is who requires to be notified of the date, time and place of the hearing.

(b) At present it is planned to lay a draft of the instrument on 29 April 2013.

(c) A copy of the current draft of the Regulations, which may be subject to change, is attached for information only and not for wider circulation.

6. The intention is that if the Reporter is sharing oral information given by the child with others the information shared will also be given to the child, and it is considered that this is achieved by the current wording. While the rule is silent as to how any oral information given by the child is conveyed to others it is anticipated that what will be conveyed is a written record of what the child said. It is appropriate that the child should receive a copy in case he or she wishes to challenge the accuracy of the record and also to ensure that he or she is aware of information given to others.

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE**Firemen's Pension Scheme (Amendment) (Scotland) Order 2013 (SSI 2013/128)****Firefighters' Pension Scheme (Scotland) Amendment Order 2013 (SSI 2013/129)****Letter to Presiding Officer: breach of laying requirements:**

The above instruments were made on 18 April 2013 under respectively section 26(1) to (5) of the Fire Services Act 1947 and sections 34 and 60 of the Fire and Rescue Services Act 2004. They are being laid before the Scottish Parliament on 22 April 2013 and come into force on 1 May 2013.

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 sets out why it is necessary to lay the instruments less than 28 days before they are brought into force.

These instruments fix the pension contribution rates for firefighters in Scotland under two public sector schemes applicable to Scotland. These schemes are reserved under the Scotland Act 1998, although the making of subordinate legislation in relation to the schemes is executively devolved.

On 28 October 2010 the UK Government set out its intent on delivering savings of £2.8bn per annum across the public sector pension schemes by 2014/15 by increasing employee contribution rates by an average of 3.25% of pay in three annual increments starting April 2012. Despite Scottish Ministers' principled opposition to increasing employee contributions at this time and in this way the UK Government has refused to change its policy and indicated that if similar increases were not introduced to the schemes in Scotland then the Scottish Budget would be adjusted accordingly. Scottish Ministers reluctantly introduced the first year of increases in the Teachers', NHS, Police and Firefighters' schemes from 1 April 2012.

In a statement to Parliament on 28 November 2012, the Cabinet Secretary for Finance, Employment and Sustainable Growth, John Swinney, announced the Scottish Government's decision to implement the second annual increment of UK Government proposed employee contribution increases for the Teachers', NHS, Police and Firefighters' schemes in Scotland.

Whilst the UK rates for the NHS and Teachers schemes were confirmed to allow the subsequent statutory instruments for the Scottish schemes to be laid within the necessary Parliamentary time limits the revised rates for the firefighters' schemes in England were only confirmed to the Scottish Government by the Department of Communities and Local Government on 26th March. In the circumstances and given the shortness of notice, the Cabinet Secretary for Finance, Employment and Sustainable Growth, John Swinney decided that these two sets of Regulations should come into force on 1st May 2013 (rather than 1st April as originally planned). With the intervening Easter recess, it has not been possible to comply with the 28-day rule and still have the instruments brought into force on 1st May.

SUBORDINATE LEGISLATION COMMITTEE

13th Meeting, 2013 (Session 4)

Tuesday 30 April 2013

Land and Buildings Transaction Tax (Scotland) Bill

Response from the Scottish Government

Background

1. The Subordinate Legislation Committee reported on the delegated powers in the Land and Buildings Transaction Tax (Scotland) Bill on 19 February 2013 in its [15th report of 2013](#).
2. The response from the Scottish Government to this report is reproduced at the annex.

Scottish Government response

Section 24(1) - Duty to specify tax bands and rates

3. Section 24 (1) provides for Scottish Ministers to specify, by order, tax bands and the percentage tax rates for each band. Separate bands and rates can be specified for residential and non-residential property transactions.
4. As currently drafted, the above power would be subject to the affirmative procedure in the first instance and the negative procedure thereafter. The Committee considered that the Scottish Government did not make a wholly convincing argument for this reduction in scrutiny and recommended that the power should always be subject to the affirmative procedure.
5. In his response to the Committee's stage 1 report, the Cabinet Secretary for Finance and Sustainable Growth ("the Cabinet Secretary") indicated his intention to bring forward an amendment at stage 2, making section 24(1) subject to the provisional affirmative procedure after the first occasion in which bands and rates are set.

Section 47(1) - Power to make regulations about residential property holding companies

6. Section 47 confers power on the Scottish Ministers to provide for qualifying transfers of interests in residential property holdings companies to be treated as land transactions and to be chargeable transactions.

7. In its stage 1 report, the Committee noted the Scottish Government's indication that the scope of Section 47(1) was likely to change significantly at stage 2.

8. The Committee agreed to await sight of the proposed amendments before reaching a view on the power. To assist in its consideration of the power, the Committee requested that the Scottish Government allow the Committee early sight of the proposed amendments.

9. In his response to the Committee, the Cabinet Secretary stated that he would undertake to bring the amendments forward in early course.

Section 55(1) - Power to make regulations about the application of the Bill to leases

10. Section 55(1) specifies that Scottish Ministers must, by regulations, make provision about the application of the Act in relation to leases.

11. As with Section 47(1), the Scottish Government have indicated that Section 55(1) is likely to be amended significantly at stage 2. Therefore the Committee will consider the proposed amendments before taking a view on the power. To assist in its consideration, the Committee requested that the Scottish Government allow the Committee early sight of the proposed amendments.

12. In his response to the Committee, the Cabinet Secretary stated that he would undertake to bring the amendments forward in early course.

Conclusion

13. Members are invited to make any comments they wish on the Bill at this stage. Given the Cabinet Secretary's commitment to bring forward amendments at stage 2, it is probable that the Committee will have a further opportunity to consider the Bill after stage 2.

Recommendation

14. **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 18 April 2013

I welcome the Subordinate Legislation Committee's ("the Committee") report on the Delegated Powers Memorandum that accompanies the Land and Buildings Transaction Tax (Scotland) Bill (the Bill) and would like to thank the Committee for their thorough scrutiny of the delegated powers contained in the Bill.

The Scottish Government would like to respond to the Committee's recommendations as set out in paragraphs 16, 21, and 26 of the report.

Section 24(1) - Duty to specify tax bands and rates

The Committee's report states the following at paragraph 1f):-

The Committee considers that the Scottish Government has not provided a compelling argument for a reduction in the level of scrutiny on the second and subsequent exercise of the power. The Committee therefore recommends that the power should always be subject to a form of affirmative procedure. The Committee would not be resistant to a suitable form of emergency affirmative procedure being available to ministers in the event that the need to exercise the power was to arise during a period when the Parliament was not sitting.

Scottish Government response

The Scottish Government acknowledges the Committee's recommendation on the power contained within section 24(1). When the Bill was introduced to Parliament the Scottish Government considered that that the negative procedure was the most appropriate for setting the bands and rates for LBTT, after the first exercise of the power under affirmative procedure. However, I have now had the opportunity to reflect upon the Committee's report and would like to advise the Committee I intend to bring forward an amendment at stage 2 to provide that the power in section 24(1) will be subject to a form of provisional affirmative procedure after the first occasion that the bands and rates are set. This will allow the Scottish Government the necessary flexibility to respond swiftly to changes in the property market.

I would also draw the Committee's attention to the Scottish Government's consultation on tax management, which was published in December 2012 and closed on 12 April:

This includes proposals for an accelerated tax changes regime which would apply to all devolved taxes, and would be subject to a similar provisional affirmative resolution procedure. Both the Subordinate Legislation Committee and the Finance Committee will of course have the opportunity to scrutinise these proposals when the Tax Management Bill is introduced to Parliament, and I look forward to hearing their views.

Section 47(1) - Power to make regulations about residential property holding companies

The Committee's report states the following at paragraph 21 :-

Given that the Scottish Government has indicated that the scope of this power is likely to change significantly at stage 2 the Committee will await sight of the proposed amendments before reaching a view on the power. The Committee requests that the Scottish Government provides the Committee with early sight of any proposed amendments to facilitate the Committee's consideration of the power as amended. The Committee refers to its comments

in paragraph 16 above regarding procedural requirements in situations where the power might be required to be exercised in an emergency.

Scottish Government response

I intend to lodge amendments in respect of section 47 at stage 2. However, I am still considering the detail of these amendments. I will endeavour to share these amendments with the Finance Committee in due course.

Section 55(1) - Power to make regulations about the application of the Bill to leases

The Committee's report states the following at paragraph 26:-

Given that the Scottish Government has indicated that the scope of this power is likely to change significantly at stage 2 the Committee will await sight of the proposed amendments before reaching a view on the power. The Committee requests that the Scottish Government provides the Committee with early sight of any proposed amendments to facilitate the Committee's consideration of the power as amended.

The Committee refers to its comments in paragraph 16 above regarding procedural requirements in situations where the power might be required to be exercised in an emergency.

Scottish Government response

I note that the Committee would also like early sight of stage 2 amendments in relation to non-residential leases. If feasible, I intend to lodge such amendments with the Finance committee at the earliest opportunity.