



The Scottish Parliament  
Pàrlamaid na h-Alba

## SUBORDINATE LEGISLATION COMMITTEE

### AGENDA

10th Meeting, 2013 (Session 4)

Tuesday 19 March 2013

The Committee will meet at 9.30 am in Committee Room 4.

1. **Decision on taking business in private:** The Committee will decide whether to take items 7 and 8 in private.

2. **Draft instruments not subject to any parliamentary procedure:** The Committee will take evidence on the [Public Services Reform \(Functions of the Common Services Agency for the Scottish Health Service\) \(Scotland\) Order 2013 \[draft\] \(SG 2013/12\)](#) from—

John Paterson, Divisional Solicitor, Food, Health and Community Care, and Stuart Aitken, Policy Officer, Directorate for Finance, eHealth and Pharmaceuticals, Scottish Government.

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

[CRC Energy Efficiency Scheme Order 2013 \[draft\]](#).

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

[Scottish Police Authority \(Provision of Goods and Services\) Order 2013 \(SSI 2013/73\)](#);

[Late Payment of Commercial Debts \(Scotland\) Regulations 2013 \(SSI 2013/77\)](#);

[Teachers' Superannuation \(Scotland\) Amendment Regulations 2013 \(SSI 2013/71\)](#);

[Non-Domestic Rates \(Enterprise Areas\) \(Scotland\) Amendment Regulations 2013 \(SSI 2013/78\)](#);

[Tenant Information Packs \(Assured Tenancies\) \(Scotland\) Amendment Order 2013 \(SSI 2013/90\)](#);

[Criminal Legal Aid \(Fixed Payments\) \(Scotland\) Amendment Regulations 2013 \(SSI 2013/92\)](#).

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

[Act of Adjournal \(Criminal Procedure Rules Amendment\) \(Miscellaneous\) 2013 \(SSI 2013/72\);](#)

[Act of Sederunt \(Rules of the Court of Session Amendment\) \(Protective Expenses Orders in Environmental Appeals and Judicial Reviews\) 2013 \(SSI 2013/81\).](#)

6. **Scottish Independence Referendum (Franchise) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.
7. **Victims and Witnesses (Scotland) Bill:** The Committee will consider a draft report to the Justice Committee.
8. **Draft instruments not subject to any parliamentary procedure:** The Committee will consider the evidence it heard earlier in the meeting.

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The papers for this meeting are as follows—

**Agenda Items 2 and 8**

Briefing Paper (private)

SL/S4/13/10/1 (P)

**Agenda Items 3, 4 and 5**

Legal Brief (private)

SL/S4/13/10/2 (P)

**Agenda Items 3, 4 and 5**

Instrument Responses

SL/S4/13/10/3

**Agenda Item 6**

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

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

Briefing Paper (private)

SL/S4/13/10/4 (P)

**Agenda Item 7**

[Victims and Witnesses \(Scotland\) Bill - as introduced](#)

[Victims and Witnesses \(Scotland\) Bill - Delegated Powers Memorandum](#)

Briefing Paper (private)

SL/S4/13/10/5 (P)

Briefing Paper (private)

SL/S4/13/10/6 (P)

**SUBORDINATE LEGISLATION COMMITTEE**

**10th Meeting, 2013 (Session 4)**

**Tuesday 19 March 2013**

**Instrument Responses**

**INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE**

**CRC Energy Efficiency Scheme Order 2013 [draft]**

**On 7 March 2013, the Scottish Government was asked:**

Article 12 of the 2010 Order provides that an application for registration as a participant in the first phase of the CRC Scheme must be made on or before 30 September 2010. Paragraph 7 of schedule 9 to this Order substitutes that article 12, to provide that an application for registration under Part 2 of the 2010 Order must be made no later than 2 months before the beginning of the phase. Article 96 of this Order continues the 2010 Order in effect only in relation to the first phase, which by article 2 of the 2010 Order commenced on 1 April 2010, for 4 years.

(a) Is it agreed that the provision made by paragraph 7 of schedule 9 has no effect, as the provision imposes a requirement to submit applications for registration by a new date of 2 months prior to 1 April 2010, which requirement is not capable of implementation with effect from the commencement of this Order on the 5th date after making?

(b) Is it intended that paragraph 7 should have retrospective effect? If so, could you explain on what basis the provision has been made?

**The Scottish Government responded as follows:**

(a) All participants who required to register for phase 1 of the 2010 Order have done so, and regulation 96 of the draft Order provides for the 2010 Order to continue to have effect in respect of such participants for that phase.

There will be no further phase 1 applications, so the Scottish Government agrees that article 12 of the 2010 Order as prospectively amended has no effect as regards the first phase of the CRC scheme.

The Scottish Government regrets this oversight, and is grateful for the chance to clarify that it considers it has no legal effect.

(b) The Scottish Government confirms that paragraph 7 of Schedule 9 to the draft Order is not intended to, and does not, have retrospective effect.

**INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE****Teachers' Superannuation (Scotland) Amendment Regulations 2013  
(SSI 2013/71)****On 7 March 2013, the Scottish Government was asked:**

Paragraphs (1) and (2) of Regulation C3 of the principal 2005 Regulations provide for the contributions payable by teachers in pensionable employment to the Scottish Teachers' Superannuation Scheme in respect of any period before 1 April 2007, for the years from 1 April 2007 to 31 March 2013, and subsequently. These Regulations substitute new paragraphs (1) and (2), providing for the contribution rates payable in respect of the period from 1 April 2013 and 31 March 2014 alone.

Given that there is no explanation in the Explanatory or Policy Notes, please clarify why it is appropriate for these Regulations to have the effect of substituting the rates payable for 2013-14 alone, and why it is appropriate to remove with effect from 1 April 2013 the requirements in regulation C3 for payment of contributions into the pension scheme in respect of the periods prior to that date?

**The Scottish Government responded as follows:**

It is not common practice in instruments relating to public sector pension schemes made by the Scottish Ministers to maintain in place provisions dealing with employee contribution rates for a period which is past. As an example, the Police Pensions (Contributions) Amendment (Scotland) Regulations 2013 (SSI 2013/89) sets contribution rates as from 1 April 2013 by replacing the rates specified for the year preceding that date. Since employee contributions are collected by deduction from salary, these will in general have been fully paid by the end of the financial year to which they relate. In the event of any contribution being outstanding at the beginning of the next financial year, replacement of the provision which set the rate for the previous year will not cause any liability in respect of that year to fly off (section 16(1)(c) of the Interpretation Act 1978).

Up until the amendment by way of SSI 2013/71 takes effect, regulation C3 of the 2005 Regulations provides not only as to contribution rates for the current and past years but also a mechanism for establishing a contribution rate for future years. In light of the decision to remove this mechanism, it was considered appropriate and more straightforward simply to replace the whole of paragraphs (1) and (2) with provisions setting out only the contribution rate for 2013/14.

**Scottish Police Authority (Provision of Goods and Services) Order 2013  
(SSI 2013/73)****On 8 March 2013, the Scottish Government was asked:**

1. This instrument is made by the Scottish Ministers in exercise of the powers conferred by section 87(1)(b) and (3)(b) of the Police and Fire Reform (Scotland) Act 2012. The making of the instrument on 26 February 2013 accordingly represented the exercise by the Ministers of a function to make subordinate legislation. Schedule 1 specifies certain types of goods and services, and certain types of person to whom each type of goods and services may be supplied. In a number of places, the types of person specified are persons who carry out certain activities and are authorised to do so by a public authority outwith the United Kingdom.

a. The Scottish Government is asked to explain why it is considered to be within devolved competence to specify that certain types of goods and services may be supplied to persons outwith the United Kingdom.

b. To the extent that the Scottish Ministers consider that they may rely upon the modification to section 87 which the UK Government proposes shall prospectively be made by article 13 of the draft Police and Fire Reform (Scotland) Act 2012 (Consequential Provisions and Modifications) Order 2013 (“the draft Westminster instrument”) – should that instrument be made – they are asked to explain the basis for that view, particularly given i) that the draft Westminster instrument had not been made by 26 February when they purported to exercise their functions under section 87 and ii) that the draft Westminster instrument was at that point still a draft and might conceivably never be made at all.

2. On the basis that the provisions of Schedule 1 could be read in such a way as to be outside competence, do the Scottish Ministers consider that it is possible to read the provisions of Schedule 1 sufficiently narrowly to bring them within competence, in terms of section 101(2) of the Scotland Act 1998? What effect would the Scottish Ministers consider the instrument to have were it read as narrowly as is required for it to be within competence?

3. Were this instrument to be read as narrowly as is required for it to be within competence in terms of section 101 of the Scotland Act – and supposing that the draft Westminster instrument is made and comes into force on 1 April 2013 – would the Scottish Ministers propose to amend Schedule 1 after that date when their powers under section 87 will have been augmented by the provision in article 13 of the draft Westminster instrument, in order that they may make provision as regards the exercise of the Scottish Police Authority’s functions under section 87 in or as regards places outwith Scotland?

**The Scottish Government responded as follows:**

It is the view of the Scottish Government that it is within competence to specify goods and services that may be supplied to persons located outwith Scotland, provided that this is done “as regards Scotland” per section 29(2)(a) of the Scotland Act 1998.

The Order can be seen as providing that the goods and services are provided within the territory of Scotland or in circumstances where the goods and services are as regards Scotland. This is within the powers of the Scottish Ministers. To this extent the Scottish Government does not rely upon the modification to section 87 that the UK Government proposes shall be prospectively made by article 13 of the draft Police and Fire Reform (Scotland) Act 2012 (Consequential Provisions and Modifications) Order 2013 (“Westminster Order”).

In relation to the second question asked by the Committee, it is the Scottish Government’s view that to the extent that Schedule 1 can be read as including goods, services or persons otherwise than in or as regards Scotland, it falls to be read down in terms of section 101(2) of the Scotland Act 1998, with the result being that goods and services can only be provided in or as regards Scotland. This is the required effect of the instrument.

With regards to the third question of the Committee, the Scottish Government will continue to assess the need to make any amendment post 1 April 2013 in relation to any goods and services which may in future need to be provided otherwise than in or as regards Scotland and would take any further action if required.

**Late Payment of Commercial Debts (Scotland) Regulations 2013 (SSI 2013/77)****On 8 March 2013, the Scottish Government was asked:**

This instrument is made under section 2(2) of the European Communities Act 1972 and the Scottish Ministers may therefore decide whether to adopt the affirmative or the negative procedure. It is the Committee's established policy that where an instrument made under this power amends primary legislation it considers that the affirmative procedure should be adopted. The policy note accompanying the instrument explains that the negative procedure was chosen since applying the affirmative procedure would have resulted in the instrument coming into force further beyond the relevant EU implementation date of 16 March 2013 than is the case under the negative procedure. (This instrument comes into force on 29 March 2013.)

Directive 2011/7/EU was published on 23 February 2011 allowing 2 years for its transposition and it seems it would have been clear from the outset that substantive amendments to primary legislation would be required in order for that to be done. The Scottish Government is asked to explain why it could not have adopted an implementation programme which allowed for the adoption of the affirmative procedure for this instrument and which would have transposed the requirements of the Directive within the timetable which the Directive requires.

Article 12.4 of the Directive provides that member States are to decide whether to exclude contracts concluded before 16 March 2013 from the application of the Directive. This instrument excludes contracts concluded before 29 March 2013. In its implementation for the rest of the United Kingdom SI 2013/395 excludes contracts concluded before 16 March 2013 in accordance with the discretion permitted by the Directive. The Scottish Government is asked to explain the basis on which it is permitted to adopt a different approach for Scotland to the rest of the United Kingdom and one which does not appear to conform to the requirements of Article 12.4 of the Directive.

**The Scottish Government responded as follows:**

The existing law regarding interest on late payment of debts arising under commercial contracts (as set out in the Late Payment of Commercial Debts (Interest) Act 1998 ("the 1998 Act")) operates on a near identical basis throughout the UK. The law is relatively complex, as are the new provisions in Directive 2011/7/EU which are implemented by SSI 2013/77. Scottish businesses which operate on a cross-border basis are likely to be affected by the 1998 Act both as it applies to Scotland and as it applies to the rest of the UK, since such businesses are likely to be concluding contracts subject to both Scots and English law. Given all these factors, Scottish Government policy is to implement the Directive in a manner as close as possible to that adopted in the rest of the UK. The Scottish Government and the Department for Business, Innovation and Skills accordingly undertook a joint consultation on implementation of the Directive. One of the issues raised in the consultation document was whether the 1998 Act should be repealed and replaced by secondary legislation. It was not therefore clear until analysis of the consultation responses had been undertaken whether implementation in Scotland would involve amendment of the 1998 Act or new free-standing secondary legislation.

Against the background of a policy decision to implement on a uniform basis throughout the UK, it was not feasible for the implementing SSI to be laid before the Parliament until the text of the implementing SI for the rest of the UK was settled. Whilst BIS copied drafts of the SI to the Scottish Government as they were developed, the final form of the SI was radically different from earlier versions. No version similar to the final form was seen by us until 21 February. SSI 2013/77 was then made and laid before the Parliament on 28 February. A commencement date of 29 March was chosen as it was considered that it was preferable to implement slightly after the date set down in the Directive rather than to breach the 28-day rule.

The provision in Article 12.4 of the Directive allowing contracts concluded before 16 March 2013 to be excluded is clearly tied to the implementation date of 16 March in Article 12.1. Given the decision not to implement by 16 March in Scotland, the Scottish Government considered it to be appropriate to exclude from the coverage of SSI 2013/77 any contract concluded before the commencement date for that instrument. We do not consider that proceeding in that way is incompatible with EU law.

**Non-Domestic Rates (Enterprise Areas) (Scotland) Amendment Regulations 2013 (SSI 2013/78)**

**On 7 March 2013, the Scottish Government was asked:**

1. Regulation 3(2) amends regulation 3 of the 2012 Regulations, so that it is one of the conditions of the enterprise area rating relief that a person is liable to pay rates on a day in the period beginning with 1 April 2013 and ending 31 March 2016. However the requirement in regulation 4(a)(i) of the 2012 Regulations continues to apply, that a new entry for the lands and heritages is made in the valuation roll after 1 April 2012.

Please clarify whether, despite the amendment made by regulation 3(2), it is intended that that requirement in regulation 4(a)(i) will remain as an entry in the roll after 1 April 2012 (and not 1 April 2013) ?

2. Regulation 4 adds in Part 1 of the Schedule to the 2012 Regulations, as an activity giving rise to eligibility for rating relief, the “provision of telehealthcare”.

(a) As “telehealthcare” is not a word appearing in the Oxford English Dictionary (online edition) please explain the meaning of this word, and where that meaning is to be found for the purposes of these Regulations.

(b) Would it have been clearer to have added a definition, for instance to clarify whether it covers provision of health care by other electronic means, as well as by telephone?

**The Scottish Government responded as follows:**

1. It is intended that the requirement in regulation 4(a)(i) of the 2012 Regulations will remain as a new entry in the valuation roll after 1 April 2012. This is to cover certain persons who would fulfill the requirements of regulation 3 as amended, but would have been unable to do so had the date in regulation 4(a)(i) been amended to 1 April 2013 due to an entry having been made in respect of the lands and heritage in question after 1 April 2012 but before 1 April 2013. The period for which rate relief may be granted to such a person does however begin on 1 April 2013 and end on 31 March 2016.

2. The prefix “tele” is contained in the Oxford English Dictionary (online edition) and is being used to indicate that the healthcare is being provided at a distance using a range of technologies which would include electronic means as well as by telephone. The Scottish Government considers that the term is sufficiently clear for the purpose of these Regulations to the audience to which they are addressed, being those who operate the rating reliefs system and those persons who carry out this activity.

**INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE****Act of Adjournal (Criminal Procedure Rules Amendment) (Miscellaneous) 2013 (SSI 2013/72)****On 8 March 2013, the Lord President's Private Office was asked:**

1. In Form 9A.4 Schedule 2 paragraph 15 (preparation for trial ) are the questions following "in addition" to be answered regardless of whether the answer to the primary question in the paragraph is yes or no? Is this clear given the different approach to the matter in Schedule 1 which specifies the circumstances in which the additional questions are required to be answered?

2. In Form 23A.1-A is paragraph 6 intended to have application to petitions for letters of request under section 273A(2) of the Criminal Procedure (Scotland) Act 1995 seeking to adduce evidence through a live television link in another part of the United Kingdom? Why is this necessary given that it is beyond question that English is an official language of all of the territories within the United Kingdom?

3. Is it clear that new rule 40.13 is to apply to the determination of a devolution issue by the Supreme Court since rule 40.13(1)(b) applies the rule to situations where proceedings determining compatibility issues are remitted to the High Court in accordance with section 288ZB(7) of the 1985 Act but makes no reference to situations where proceedings determining devolution issues are remitted to the High Court.

**The Lord President's Private Office responded as follows:**

1. Yes this is clear. The "in addition" questions are answered only if the answer to the first question is no. If the answer to the first question is "yes" then you would not provide the reasons for not being ready for trial and there would not, therefore, be any reason for answering the additional questions (1-7) which are clearly questions relating to issues that are common reason for not being ready for trial. There is a different approach to matter in Schedule 1 as there are two circumstances in which the "in addition" questions are required in that example.

2. Paragraph 6 is particular to applications under section 273(2) of the Act of 1995. As such paragraph 6 should appear in brackets. The Form will be amended when the next Act of Adjournal amending the Criminal Procedure Rules is made or, alternatively, varied by the Clerk of Justiciary under section 305 (4) of the Act of 1995.

3. The mention of section 288ZB (7) was intended to make rule 40.13 complete. As the question illustrates, however, it only highlights that there is no statutory requirement to remit a devolution issue reference from the Supreme Court back to the High Court; though this is what happens in practice. This will be amended when the next Act of Adjournal amending the Criminal Procedure Rules is made.

**Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SSI 2013/81)**

**On 7 March 2013, the Lord President's Private Office was asked:**

The new rule 58A.1 (1)(c) provides that the Chapter will apply to applications and appeals which include a challenge to a decision, act or omission which is subject to the public participation provisions of Council Directive 85/337/EEC ("the EIA Directive"). However, that Directive was repealed by the codifying Directive 2011/92/EU of 13 December 2011. (Section 12 of the Interpretation and Legislative Reform (S) Act 2010 provides that a reference to an EU instrument in a Scottish instrument is a reference to the instrument as "amended, extended or applied" by another EU instrument, but this does not provide for where a Directive is wholly repealed and replaced by another).

In light of that, should rule 58A.1(1)(c) refer to Directive 2011/92/EU, whether in addition to or substitution for, Directive 85/337/EEC? If so, would you propose to amend the provision?

**The Lord President's Private Office responded as follows:**

Given that Codification is the process of bringing together a legislative act and all its amendments in a single new act (without changing its substance) and given that Directive 2011/92/EU expressly provides that "Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment has been substantially amended several times. In the interests of clarity and rationality the said Directive should be codified" (i.e. vertical codification), Directive 2011/92/EU is applying the law of Directive 85/337/EEC (as amended) for the purposes of codification and as such the reference to Directive 85/337/EEC is capable of being interpreted, by virtue of Section 12 of the Interpretation and Legislative Reform (S) Act 2010, as a reference to the subsequent codifying Directive 2011/92/EU.

That being said, we recognise that a reference to 2011/92/EU would have been helpful and should, at the very least, have featured as footnote. We will consider an appropriate amendment in due course.