SOCIAL JUSTICE COMMITTEE

AGENDA

16th Meeting, 2002 (Session 1)

Wednesday 2 October 2002

The Committee will meet at 10.30am in Committee Room 2

1. **Item in private:** The Committee will consider whether to take item 4 in private.

2. **Subordinate Legislation:** The Committee will consider the following negative instruments—
   
   The Housing (Scotland) Act 2001 (Registered Social Landlords) Order 2002 (SSI 2002/411)
   
   The Homelessness Persons Interim Accommodation (Scotland) Regulations 2002 (SSI 2002/412)
   
   The Housing (Scotland) Act 2001 (Appointment of Arbiter) Order 2002 (SSI 2002/413)
   
   The Homelessness Persons Advice and Assistance (Scotland) Regulations 2002 (SSI 2002/414)
   
   The Housing (Scotland) Act 2001 (Scottish Secure Tenancy etc.) (SSI 2002/415)
   
   The Housing (Scotland) Act 2001 (Registration of Tenant Organisations) Order (SSI 2002/416)

3. **Debt Arrangement and Attachment (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 1).

4. **Social Inclusion Inquiry:** The Committee will consider a draft report.

Jim Johnston
Clerk to the Committee
Tel. 0131 348 5211
email: james.johnston@scottish.parliament.uk

**************************
The following papers relate to the meeting:

**Agenda Item 2**

- SJ/02/16/2  - Briefing note on Subordinate Legislation
- SL/02/34R  - Subordinate Legislation Committee 34th Report 2002
- SL/02/35R  - Subordinate Legislation Committee 35th Report 2002

**Agenda Item 4**

- SJ/02/16/4(P)  - Draft report on Social Inclusion Inquiry

**Papers not circulated:**

Item 3 – Debt Arrangement and Attachment (Scotland) Bill: Members are reminded to bring with them copies of the Bill and Accompanying Documents, available from Document Supply Centre or at the following website: [http://www.scottish.parliament.uk/parl_bus/legis.html#52](http://www.scottish.parliament.uk/parl_bus/legis.html#52) together with any papers from the Stage 1 process that are considered relevant (such as the Committee’s Stage 1 Report). Copies of the Marshalled List will be available from Document Supply on Wednesday morning and will also be available at the meeting on Wednesday. A list of groupings will be available in Committee Room 2 at the beginning of the meeting and be circulated directly to members on Tuesday.
SOCIAL JUSTICE COMMITTEE
STATUTORY INSTRUMENTS

1. The following instruments were sent to members on 11 September 2002. An Executive Note accompanies each Order. No motions to annul these instruments have been lodged.

   The Housing (Scotland) Act 2001 (Registered Social Landlords) Order 2002 (SSI 2002/411)

   The Homelessness Persons Interim Accommodation (Scotland) Regulations 2002 (SSI 2002/412)

   The Housing (Scotland) Act 2001 (Appointment of Arbiter) Order 2002 (SSI 2002/413)

   The Homelessness Persons Advice and Assistance (Scotland) Regulations 2002 (SSI 2002/414)

   The Housing (Scotland) Act 2001 (Scottish Secure Tenancy etc.) (SSI 2002/415)

   The Housing (Scotland) Act 2001 (Registration of Tenant Organisations) Order (SSI 2002/416)

2. These Orders were laid under a “negative procedure” which means that the Parliament has the power to annul the Orders by resolution within 40 days.

3. The Committee is required to report on the instruments by 7th October 2002. The meeting of Wednesday 2 October is the last scheduled opportunity for annulment to be considered by the Committee.

4. The Subordinate Legislation Committee considered the instruments at its meetings on 17 and 24 September. On 17 September that Committee agreed that it had nothing to report on SSI 2002/413 and SSI 2002/415. The Subordinate Legislation Committee 34th Report is included in the papers. The other instruments were reconsidered at the meeting on 24 September when the Subordinate Legislation Committee considered responses to a number of points from the Scottish Executive. These points are detailed in that Committee’s 35th Report, included with the papers.

5. The Committee is invited to make a recommendation on the instruments listed in paragraph 1.
Subordinate Legislation Committee

Remit and Membership

Remit:

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

(a) (i) subordinate legislation which is laid before the Parliament;

(ii) any Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter;

and, in particular, to determine whether the attention of the 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; and

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

(Standing Orders of the Scottish Parliament Rule 6.11)

Membership:

Bill Butler
Colin Campbell
Brian Fitzpatrick
Murdo Fraser
Gordon Jackson QC
Ian Jenkins (Deputy Convener)
Margo MacDonald (Convener)

Committee Clerks:

Alasdair Rankin
Steve Farrell
Alistair Fleming
Joanne Clinton
Subordinate Legislation Committee

34th Report 2002 [EXTRACT]

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 17th September the Committee determined that the attention of the Parliament need not be drawn to the instruments listed in the Annexe to this report.

2. The report is also addressed to the following committees as the lead committees for the instruments specified:

   Health and Community Care      SSI 2002/397
   Transport and the Environment   SSI 2002/398
                                 SSI 2002/400
                                 SSI 2002/419
   Social Justice                  SSI 2002/413
                                 SSI 2002/415
   Rural Development               SSI 2002/418
Annexe

Instruments subject to annulment

The Housing (Scotland) Act 2001 (Appointment of Arbiter) Order 2002, (SSI 2002/413)

The Housing (Scotland) Act 2001 (Scottish Secure Tenancy etc.) Amendment Order 2002, (SSI 2002/415)

The Conservation of Salmon (Prohibition of Sale) (Scotland) Regulations 2002, (SSI 2002/418)

The Road Humps and Traffic Calming (Scotland) Amendment Regulations 2002, (SSI 2002/419)
Subordinate Legislation Committee

Remit and Membership

Remit:

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

(a) (i) subordinate legislation which is laid before the Parliament;

(ii) any Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter;

and, in particular, to determine whether the attention of the 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; and

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

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

Membership:

Bill Butler
Colin Campbell
Brian Fitzpatrick
Murdo Fraser
Gordon Jackson QC
Ian Jenkins (Deputy Convener)
Margo MacDonald (Convener)

Committee Clerks:

Alasdair Rankin
Steve Farrell
Alistair Fleming
Joanne Clinton
Subordinate Legislation Committee

35th Report 2002 [EXTRACT]

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 24th September the Committee determined that the attention of the Parliament need not be drawn to the instruments listed in the Annexe to this report.

2. The report is also addressed to the following committees as the lead committees for the instruments specified:

   Social Justice
   
   SSI 2002/411
   SSI 2002/412
   SSI 2002/414
   SSI 2002/416

   Health and Community Care
   
   SSI 2002/423
   SSI 2002/424
   SSI 2002/425
   SSI 2002/430
Instruments subject to approval

The Housing (Scotland) Act 2001 (Registered Social Landlords) Order 2002, (SSI 2002/411)

Background
1. The Committee asked the Executive for clarification of one matter in respect of the above instrument.

Question
2. The Committee noted that section 57(2) of the Housing (Scotland) Act 2001 came into force on 1 November 2001. Although the Committee assumed that Scottish Ministers, in order to comply with the provisions of section 57(4) of the Act, must have notified the bodies listed in this Order no later than October 2001, the Executive did not give any indication of compliance with this notification requirement. The Committee therefore asked the Executive to confirm that the bodies specified in the Order were indeed notified in accordance with section 57(4) of the parent Act and if so, why the preamble did not include a statement to this effect.

Answer
3. In its reply, reprinted at Appendix 1, the Executive states that the bodies referred to in the Order were informed that they would be registered. However, the Executive did not notify those bodies under section 57(4), as these bodies were not identified as apt for registration until after 1 November 2001, when section 57(2) came into effect.

4. The Executive considers that there is nothing in the terms of section 57(3)(b) to prevent the exercise of that power after section 57(2) comes into force. The Executive takes the view that section 57(4) should be read as imposing an obligation to notify every body to which section 57(2) appears to apply as at 1 November 2001. Further, and in any event, the Executive considers that, given the purpose and effect of the requirement in section 57(4), it would properly fall to be construed as being of a directory rather than mandatory nature. Accordingly, failure to comply with that requirement would not affect the validity of the Order.

5. The Executive also points out that the effective date of the introduction of the new Scottish Secure Tenancy and Modernised Right to Buy under the 2001 Act is 30 September 2002. Given that the present Order is effective from that date, no rights conferred on tenants who become Scottish secure tenants by virtue of the new legislation will be affected by the Order.

Report
6. The Committee accepts that there appears to be no need for an Order under section 57(4) to be made before the coming into force of section 57(2). Although the parent statute certainly seems to imply that this will be the case, it is not in terms a requirement of that Act. The Committee however has some difficulty with the remainder of the Executive’s submission.
7. Section 57(4) reads as follows-

“The Scottish Ministers must, no later than 1 month before the date on which subsection (2) is to come into force, notify every body appearing to them to be one to which that subsection will apply, of that subsection.”

Subsection (2) reads-

“A body to which subsection (3) applies is by virtue of this subsection registered as a social landlord”.

Subsection (3) reads-

“This subsection applies to…..

(b) any other body which, by order made by the Scottish Ministers is to be treated as being a housing association so registered.”

8. The Committee considers the wording of subsection (4) to be quite clear: it does not appear to be directory rather than mandatory. The word used is “must” and the relevant date is a date at least 1 month before the commencement of subsection (2). The bodies that must be notified are those referred to in subsection (2). This in turn refers to subsection (3), the enabling power under which the current Order is made.

9. It seems therefore to be a statutory requirement that the bodies to be included in an order under subsection (3) must have been so notified prior to the making of the order. Consequently, if the bodies in question were not so notified then they cannot be included in an order under subsection (3). The Executive admits that the bodies named in the order were not notified in accordance with the requirements. Accordingly, the Committee is of the view that there must be doubt as to whether this instrument is intra vires.

10. The Committee therefore draws the attention of the lead committee and the Parliament to this instrument on the grounds that there is doubt as to whether it is intra vires, due to (an admitted) failure to comply with the notification requirement in the enabling Act.

The Homeless Persons Interim Accommodation (Scotland) Regulations 2002, (SSI 2002/412)

Background
11. The Committee raised one point with the Executive.

Question
12. The Committee asked the Executive to explain why, given the use of the terms “accommodation” and “applicant” in the parent Act, it has found it necessary to define these terms in regulation 2.
Answer
13. In its response, reprinted at Appendix 2, the Executive acknowledges that providing a definition of “accommodation” and “applicant” is unnecessary, but considers that making the position express and clear in the regulations could be helpful to some readers.

Report
14. The Committee refers to its previous comments on this issue. The Committee takes the view that reproducing some definitions and not others may risk casting doubt on the meaning of terms left undefined in the instrument and is therefore to be avoided. The Committee suggests that it is best drafting practice to leave terms that are used in the parent Act undefined in subordinate legislation, unless those terms are intended to carry a different meaning in the subordinate legislation.

15. The Committee therefore draws the attention of the lead committee and the Parliament to this instrument on the grounds of failure to follow proper drafting practice.

The Homeless Persons Advice and Assistance (Scotland) Regulations 2002, (SSI 2002/414)

Background
16. The Committee asked the Executive for clarification of one matter in respect of the above instrument.

Question
17. The Committee noted that regulation 4(d) simply refers to “legal advice appropriate on (sic) an applicant’s circumstances” and includes advice on court proceedings and on legal rights. With no qualification to the effect that this advice is restricted to issues of housing, homelessness or threatened homelessness, it was considered conceivable that a local authority could be obliged to provide legal advice to an applicant on matters completely unrelated to their housing situation. Given the drafting of regulation 4(d) in such wide terms, the Executive was asked to explain what power confers the vires for this provision.

Answer
18. In its reply, reproduced at Appendix 3, the Executive comments that sections 31(3)(b) and 32(3) of the 1987 Act clearly set out the limitations on the nature of the prescribed advice and assistance that may be provided. Such advice must be provided to secure accommodation that becomes available or, as the case may be, does not cease to be available. The Executive considered that it was therefore not necessary to place a further express restriction in the Regulations to the effect that the advice to be provided was in connection with housing homeless persons or those threatened with homelessness.

19. The Executive also refers to sections 31(3)(b) and 32(3), which provide for the type of advice and assistance to be prescribed, although the power to prescribe the type of advice is not limited to any particular category of advice. The Executive suggests that part of the reason for a person becoming homeless or threatened with
homelessness may well have a legal dimension, such as housing or other debts, and a landlord may have obtained or be obtaining a decree of eviction in respect of that homeless applicant. It was therefore considered appropriate that the Regulations would allow general advice of a legal nature to be provided. The Executive thus takes the view that the power in the sections referred to is wide enough to make the provisions in regulation 4(d).

Report
20. The Executive has confirmed that it does indeed intend for regulation 4(d) to be construed widely. In the light of the helpful clarification provided by the Executive, the Committee is minded to accept the Executive’s arguments. The Committee notes that the other advice prescribed by the Regulations for the purposes of the Act is expressly limited in its terms to housing related matters. Whilst the Committee suggests that it may have been better if the link to homelessness etc. which is contained in the statute had been similarly reproduced in relation to regulation 4(d), it accepts that the duty to provide legal advice may need to be widely drawn and this is not precluded by the enabling power. The Committee therefore thanks the Executive for its helpful clarification of this matter and draws the attention of the lead committee and the Parliament to the Executive’s response.

The Housing (Scotland) Act 2001 (Registration of Tenant Organisations) Order 2002, (SSI 2002/416)

Background
21. The Committee raised six points with the Executive on this instrument.

Question 1
22. Given the terms of section 53(4) of the enabling Act, the Executive was asked to explain the vires for article 6 in so far as it authorises the landlord to remove a body from the register without prior application by that body.

Answer 1
23. In its response, reproduced at Appendix 4, the Executive states that it considers the vires provided by section 53(4) to be wide enough to empower the provision in article 6. Although section 53(4)(b) refers to the procedure to be followed in relation to applications for removal, it does not provide that the applications need to be made by the body itself. The Executive therefore does not consider that section 53(4) only contemplates removal where there is a prior application by that body and takes the view that, in certain circumstances, this will not be possible where, for example, the body ceases to exist.

Report 1
24. The Committee notes the Executive’s reply. Section 53(4) states:

“The Scottish Ministers may by order make provisions as to—

(a) the criteria to be satisfied by a body seeking registration in the register or removal from the register,
(b) the procedure to be followed in relation to applications for registration and removal from the register."

25. Whilst it is true that this subsection does not state in exact words that it is the body to be removed from the register that makes the application, the Committee considers that this must be the implication of the words “seeking registration in the register or removal from the register” as read with paragraph (b). The Committee is of the view that the word “seeking” must qualify “removal”, otherwise paragraph (a) does not make sense.

26. The Committee considers that if the application is not to be made by the body concerned then it is not clear who else is to make the application. Furthermore, the Executive does not suggest that the criteria specified under paragraph (a) are not to apply to applications under paragraph (b) made other than by the body, which is the logical result of its arguments. If that is so, then the Order, in so far as it purports to prescribe criteria under paragraph (a) that apply to applications under paragraph (b) made other than by the body concerned, must be of very doubtful vires.

27. Although it might be observed that article 6(1) gives a power to the landlord to act of its own accord without application being made by anyone, there does not appear to be any authority in the Act for such a power. The Executive does not deny that the enabling power in paragraph (b) is related not only to an application, but also to procedure.

28. The Committee is very aware that difficulties may arise where a body has ceased to exist and although this is not a matter for the Committee has every sympathy with the Executive on a practical level. However, this does not alter the fact that the order can only be made within the powers granted to it by statute.

29. The Committee therefore draws the attention of the lead committee and the Parliament to the instrument on the grounds that there is a doubt about its vires on the above grounds.

Question 2

30. Given that the Order makes reference at several points to applications and notices being “in writing”, the Committee asked the Executive to clarify whether this would include electronic communications.

Answer 2

31. The Executive is of the view that resulting from the definition of “writing” in The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999, notices “in writing” includes notices in electronic format. However, whilst considering that a notice in electronic format is a mode of representing writing or reproducing words in a visible form, the Executive accepts that it would have been clearer had the acceptability of an electronic communication been expressly provided for in the Order.

Report 2

32. The Committee has agreed with the Executive in the past that it would be better to make it plain on the face of the instrument whether or not electronic
communication would be permissible in any case. The Committee doubts whether the meaning of the Order is as clear as the Executive maintains.

33. The Committee therefore draws the attention of the lead committee and Parliament to this instrument on the grounds that its meaning could be clearer in the above respect, as acknowledged by the Executive.

Question 3
34. The Executive was asked to explain an inconsistency in approach, whereby article 5(3) refers to the “criteria referred to in article 3” (which itself refers to the criteria in Part I of the Schedule), and article 6(1) which refers to the “criteria in Part II of the Schedule”.

Answer 3
35. The Executive accepts that the references to the criteria for registration and for removal are not consistent, but nonetheless considers the effect of the references to be clear.

Report 3
36. The Executive has acknowledged the point made by the Committee. The Committee notes that it has frequently drawn the attention of the Executive to the need for consistency in drafting to ensure a similar consistency in interpretation and for ease of reading. Furthermore, the Committee is of the view that unnecessarily referential drafting is also confusing for the reader and a practice to be avoided. However, the Committee does, of course, agree that the meaning of the provision is not in doubt.

37. The Committee draws the attention of the lead committee and the Parliament to the instrument on the grounds of failure to follow proper drafting practice in the above respect, as acknowledged by the Executive.

Question 4
38. Article 7 provides –

“Notices etc. Any notice which requires to be given under these regulations (sic) shall be deemed to have been given to the organisation if it is served at the address given under paragraph (2)(b) of article 5”.

The Committee asked the Executive what would constitute “service” for the purposes of article 7.

Answer 4
39. For the purposes of article 7, the Executive considers that service could be effected by delivery by post or hand to the address of the organisation.

Report 4
40. The Committee notes that the parent Act contains a definition of “service”, but only in relation to a part of the Act that does not include the enabling power under which this Order is made. The Committee recalls that the construction of the term “service” in relation to documents has been frequently the subject of argument before the courts. On one interpretation, unless the term is further defined, only
service by sheriff officers will suffice. The Committee highlights the cases of Keane v Jackson 1981 SLT (Sheriff Court) 32 and Clyde Shopping Hall v Canning 1990 SLT (Sheriff Court) 10, where the court held that the words “by notice in writing served on that person” meant that service by post was not competent and that personal service was required. These were Sheriff Court decisions and therefore not binding. They were also decided on their facts and may not be directly in point. Nevertheless, they do indicate that the law is not as clear as the Executive maintains.

41. At worst to comply with article 7 the landlord would have to serve all notices under the Order by sheriff officers which the Committee doubts is the policy intention. The landlord is also precluded from benefiting from paragraph 4 of Schedule 1 to SI 1999/1379 which deals with service by post since such service is not provided for expressly in the Order.

42. The Committee therefore draws the attention of the lead committee and the Parliament to this instrument on the grounds that at best its meaning could be clearer and at worst it is defectively drafted in this respect.

Question 5
43. The Executive was asked to explain why, if paragraph 1 of Part II of the Schedule is meant to be a criterion for removal, it makes reference to a body “removed” from the register.

Answer 5
44. The Executive agrees with the Committee that this criterion would have been more clearly stated if the words “to be” were included before “removed”. However, the Executive remains of the view that the meaning of the criterion and its legal effect is clear and that the omission of these words will not affect the proper operation of the Order.

Report 5
45. The Committee comments on the clear difference between “removed” and “to be removed” and therefore considers the provision in question to be defectively drafted, as appears to be acknowledged by the Executive. The Committee therefore draws the attention of the lead committee and the Parliament to the instrument on the grounds of defective drafting in this respect, as acknowledged by the Executive.

Question 6
46. The Committee also noted that the criteria set out in Part II of the Schedule and in particular paragraphs 2 and 3 appear to sit oddly with the wording of regulation 6. It is not clear, for example, how a body that has ceased to exist can apply to be removed from the register. The Executive was asked for its comments on this matter.

Answer 6
47. The Executive acknowledges that a body which has ceased to exist clearly cannot apply to be removed from the register. However, it refers the Committee to article 6(1), which specifies that a body may be removed if it satisfies “any of the criteria in Part II of the Schedule” and “whether or not on the application of the
registered tenant organisation”. The Executive therefore considers that the Order allows that some of the criteria can be satisfied without the body having applied to be removed.

Report 6

48. The Committee refers to its comments under question 1 above, and also to its comments regarding the need for consistency in drafting, and takes the view that there is a serious doubt as to the vires of article 6(1). The Committee therefore draws the attention of the lead committee and the Parliament to the instrument on the grounds that there is doubt as to whether article 6(1) is intra vires.
Appendix 1

THE HOUSING (SCOTLAND) ACT 2001 (REGISTERED SOCIAL LANDLORDS) ORDER 2002 (SSI 2002/411)

On 17 September 2002, the Committee asked the Executive for an explanation of the following matters -

“The Committee notes that section 57(2) of the Housing (Scotland) Act 2001 came into force on 1st November 2001. Accordingly in order to comply with the provisions of section 57(4) of the Act, the Scottish Ministers must have notified the bodies listed in this Order no later than October 2001. The Executive has given no indication of compliance with this notification requirement and is asked to confirm that the bodies specified in the Order were indeed notified in accordance with section 57(4) of the parent Act. Also if this is so why does the preamble not include a statement to that effect?”.

The Scottish Executive responds as follows:

1. The bodies referred to in the Order were informed that they would be registered. However, the Executive did not notify those bodies under section 57(4) as these bodies were not identified as apt for registration until after 1st November 2001 (when section 57(2) of the 2001 Act came into effect).

2. The Executive considers that there is nothing in the terms of section 57(3)(b) which prevents the exercise of that power after section 57(2) comes into force. The Executive considers that section 57(4) must be read as imposing an obligation to notify every body which it appears to the Executive will be a body to which section 57(2) will apply as at 1st November 2001. Further, and in any event, the Executive considers that, given the purpose and effect of the requirement in section 57(4), it would properly fall to be construed as being of a directory rather than mandatory nature. Accordingly, any failure to comply with that requirement would not affect the validity of the Order.

3. The Executive would also wish to point out that the effective date of the introduction of the new Scottish Secure Tenancy and Modernised Right to Buy under the 2001 Act is 30th September 2002. As the present Order is effective from that date, no rights conferred on tenants who become Scottish secure tenants by the new legislation will be affected by the Order.

Scottish Executive
19 September 2002
Appendix 2

THE HOMELESS PERSONS INTERIM ACCOMMODATION (SCOTLAND) REGULATIONS 2002 (SSI 2002/412)

On 17 September 2002, the Committee asked the Executive for an explanation of the following matter:

To explain why it has been found necessary to define in regulation 2 the terms “accommodation” and “applicant” given the use of these terms in the parent Act.

The Scottish Executive responds as follows:

The Executive acknowledges that providing a definition of “accommodation” and “applicant” is unnecessary. However it considered that it could do no harm, and may be helpful to some readers, to make the position express and clear in the Regulations.

Scottish Executive
19 September 2002
Appendix 3

THE HOMELESS PERSONS ADVICE AND ASSISTANCE (SCOTLAND) REGULATIONS 2002 (SSI 2002/414)

On 17 September 2002, the Committee asked the Executive for an explanation of the following matters -

1. The Committee notes that regulation 4(d) simply refers to “legal advice appropriate on (sic) an applicant’s circumstances” and includes advice on court proceedings and on legal rights. There is no qualification to the effect that this advice is restricted to advice in connection with housing or homelessness or threatened homelessness. As such therefore it is conceivable that a local authority could be obliged to provide legal advice to an applicant on matters completely unrelated to their housing situation.

2. Related to the foregoing and the drafting of regulation 4(d) in very wide terms the Executive is asked to explain what power confers the vires for this provision.

The Scottish Executive responds as follows:

First Question

1. Sections 31(3)(b) and 32(3) of the 1987 Act make clear limitations on the nature of the prescribed advice and assistance which may be provided. It must be provided to secure that accommodation becomes available or, as the case may be, does not cease to be available. The Executive considered that it was not therefore necessary to place a further express restriction in the Regulations to the effect that the advice to be provided was in connection with housing homeless persons or those threatened with homelessness.

Second Question

2. As stated in the answer to question 1, sections 31(3)(b) and 32(3) provide for the type of advice and assistance to be prescribed. The power to prescribe the type of advice is not limited to any particular category of advice. Part of the reason for a person becoming homeless or threatened with homelessness may well have a legal dimension such as housing or other debts and a landlord may have obtained or be obtaining a decree of eviction in respect of that homeless applicant. It was therefore considered appropriate than the Regulations would allow general advice of a legal nature to be provided. The Executive takes the view that the power in the sections referred to is wide enough to make the provisions in regulation 4(d).

Scottish Executive
19 September 2002
Appendix 4


On 17th September 2002 the Committee asked the Executive for an explanation of the following matters–

1. Given the terms of section 53(4) of the enabling Act, the Executive is asked to explain the vires provided by article 6 in so far as it authorises the landlord to remove a body from the register without prior application by that body.

2. The Committee notes that the Order makes reference at several points to applications and notices being “in writing” and seeks clarification as to whether this will include electronic communications.

3. Article 5(3) refers to the “criteria referred to in article 3” (which itself refers to the criteria in Part 1 of the Schedule) whereas article 6(1) refers to the “criteria in Part II of the Schedule”. The Executive is asked to explain this inconsistent approach.

4. The Committee requests clarification as to what will constitute “service” for the purposes of article 7.

5. The Executive is asked to explain why, if paragraph 1 of Part II of the Schedule is meant to be a criterion for removal, it makes reference to a body “removed” from the register.

6. The Committee also comments that the criteria set out in of Part II of the Schedule and in particular paragraphs 2 and 3 appear to sit oddly with the wording of regulation 6. It is not clear, for example, how a body that has ceased to exist can apply to be removed from the register. The Executive is asked for its comments.

The Scottish Executive responds as follows:

First Question

1. The Executive considers that the vires provided by section 53(4) are wide enough to empower the provision in Article 6. Although section 53(4)(b) refers to the procedure to be followed in relation to applications for removal it does not provide that those applications need be made by the body itself. We therefore do not think that section 53(4) only contemplates removal where there is a prior application by that body. In certain circumstances, that will not be possible where, for example, the body ceases to exist.

Second Question

2. The Executive is of the view that notices "in writing" includes notices in electronic format. It considers that this results from the definition of "writing" in The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and
Interpretation etc. of Acts of the Scottish Parliament) Order 1999. A notice in electronic format is a mode of representing writing or reproducing words in a visible form. The Executive accepts, however, that it would have been clearer had the acceptability of an electronic communication been expressly provided for in the Order.

**Third Question**

3. The Executive acknowledges that the references to the criteria for registration and for removal are not consistent. Nonetheless it considers that the effect of the references are clear.

**Fourth Question**

4. For the purposes of article 7, the Executive considers that service could be effected by delivery by post or hand to the address of the organisation.

**Fifth Question**

5. The Executive agrees with the Committee that this criterion would have been more clearly stated by including the words "to be" before "removed". However, it remains of the view that the meaning of the criterion and its legal effect is clear and that the omission of these words will not affect the proper operation of the Order.

**Sixth Question**

6. The Executive acknowledges that a body which has ceased to exist clearly cannot apply to be removed from the register. However, article 6(1) specifies that a body may be removed if it satisfies "any of the criteria in Part II of the Schedule" and "whether or not on the application of the registered tenant organisation". The Order therefore allows that some of the criteria can be satisfied without the body having applied to be removed.

Scottish Executive
19 September 2002