

Delegated Powers and Law Reform Committee
Tuesday, 19th November 2024
32nd Meeting, 2024 (Session 6)

Instrument Responses

Town and Country Planning (Fees for Applications) (Scotland) Amendment Regulations 2024 (SSI 2024/292)

On Thursday 7th November 2024, the Committee asked the Scottish Government:

1. In regulation 4, do you consider the definition of “processing agreement” to be sufficiently clear to the reader, given that it contains four “or” conjunctions? Is it clear whether “such an agreement” refers to a processing agreement or to an agreement required by a condition imposed on the grant of planning permission or specified in a masterplan consent scheme?
2. In regulation 6(e), does the use of “or” instead of “and” have the desired legal effect?

On Tuesday 12th November 2024, the Scottish Government responded:

1. It is considered that the definition of “processing agreement” is sufficiently clear and is also a term which is well understood by planning practitioners and planning authorities. It is also considered that it is clear that the reference to “a document setting out the terms of such an agreement” is a reference to a document setting out terms in respect of processing of an application. That is, it is clear “such an agreement” refers to a processing agreement.
2. It is considered that regulation 6(e) has the desired legal effect of requiring information to be published on the planning authority's website whether it is published by a planning authority under paragraph (5) or paragraph (5A).

Firefighters’ Pension Schemes (Scotland) Amendment (No. 2) Order 2024 (SSI 2024/295)

On Thursday 7th November 2024, the Committee asked the Scottish Government:

1. Paragraph 1 of the schedule of the instrument amends rule 2(1) of the New Firefighters’ Pension Scheme (Scotland) (in schedule 1 of the Firefighters’ Pension Scheme (Scotland) Order 2007 (SSI 2007/199)). It changes the default end date of the “extended limited period” from 31 March 2022 to 31 March 2015. The provision being amended has been in force since 18 March 2024 (having been inserted by the Firefighters’ Pension Schemes (Scotland) Amendment Order 2024 (SSI 2024/26), which extended the period during which persons who were employed in Scotland as retained firefighters have access to a person scheme). Since 18 March 2024, could anyone have acted in reliance

on (for example purchased service or elected to pay pension contributions based on) the end date being 31 March 2022? If so, is other provision required in order to address this?

2. Please confirm whether any corrective action is proposed, and if so, what action and when.

On Tuesday 12th November 2024, the Scottish Government responded:

1. Since 18 March 2024, no calculations have been issued in relation to applications to purchase service during the extended limited period. Therefore, it is considered that no individuals have been or will be affected as a result of the end date of the extended limited period having been specified as 31 March 2022, since 18 March 2024.
2. No corrective action is proposed.

Protection of Vulnerable Groups (Referrals by Chief Constable) (Prescribed Information) (Scotland) Regulations 2024 (SSI 2024/313)

On Friday 8th November 2024, the Committee asked the Scottish Government:

The instrument is made under the enabling power in section 6A of the Protection of Vulnerable Groups (Scotland) Act 2007. It prescribes information which, if held by the chief constable, must be given to Scottish Ministers. This is information in relation to an individual whom the chief constable considers is or has been carrying out a type of regulated role whilst not a scheme member. The schedule of the instrument lists the information which must be provided, and this includes at paragraph 6 “Details of the person for whom the chief constable considers that the individual is, or has been, carrying out a regulated role during the relevant period.”.

1. Please explain why you consider the enabling power permits the information listed in paragraph 6 to be prescribed, as this is not information in relation to the individual who is/has been carrying out the regulated role.
2. If you consider the enabling power does permit the disclosure of such information please explain whether you consider the term “details” to be sufficiently clear to identify what information must be passed on to Ministers under paragraph 6, and if so why?
3. Please confirm whether any corrective action is proposed, and if so, what action and when.

On Tuesday 12th November 2024, the Scottish Government responded:

1. The Scottish Government considers that the information listed in paragraph 6 of the schedule is information *in relation to* the individual. Although paragraph 6 refers to details of a person (who is not the individual concerned), the

information is being sought to establish whether the individual concerned is or has been carrying out a regulated role while not participating in the Scheme. The information is required for Ministers to have the necessary details about the regulated role that the individual is, or may have been, doing.

A referral made by the chief constable under section 6A of the Protection of Vulnerable Groups (Scotland) Act 2007 (“the PVG Act”) may result in the Scottish Ministers considering (under section 10 of the PVG Act), whether it may be appropriate for the individual to be included in either the children’s or adults’ (or both) lists under sections 15 and 16 of the PVG Act. The purpose for prescribing all of the information set out in the schedule of this SSI is to enable the Scottish Ministers (or Disclosure Scotland, exercising the Scottish Ministers’ functions in this context) to make enquiries for the purpose of that ‘considering whether to list’ investigation.

The purpose of the schedule to this SSI is to ensure that Ministers are provided with the full information and context to understand the chief constable’s consideration about whether an individual is, or has been, carrying out a regulated role while not participating in the Scheme. The Scottish Government consider that the intent of the schedule is clear, and the information required by each of the paragraphs is information that is *in relation to the individual*. In relation to paragraphs 2-6 specifically, the information is relevant to the question of whether the individual is, or has been, carrying out a regulated role. The information in the schedule will provide the full context that is required for Ministers to investigate whether the individual is, or has been, carrying out a regulated role while not participating in the Scheme. The Scottish Government considers that too narrow an interpretation of the enabling power would frustrate the purpose of this SSI.

2. The Scottish Government considers “details”, in the context of paragraph 6, to be sufficiently clear as meaning the details about the person for whom the individual is carrying out a regulated role as this would enable Disclosure Scotland to establish whether a regulated role is, or was, being carried out and to have the contact details to make further enquires. This SSI only requires the chief constable to provide information held by them. It also applies only to referrals made by the chief constable. The Scottish Ministers are required, under section 84A of the PVG Act, to issue guidance to the chief constable about the exercise of her functions under Parts 1 and 2 of the PVG Act. This guidance will include guidance on the operation of section 6A referrals under Part 1 of the PVG Act.
3. The Scottish Government accordingly considers that no corrective action is necessary.

Protection of Vulnerable Groups (Information for Listing and Vetting) (Scotland) Regulations 2024 (SSI 2024/314)

On Friday 8th November 2024, the Committee asked the Scottish Government:

The enabling provisions for these Regulations, in the Protection of Vulnerable Group (Scotland) Act, permit the Scottish Ministers to require any person who holds central records of convictions, cautions or other information for the use of police forces generally to provide them with the prescribed details of every relevant matter relating to an individual in those records for the purpose of enabling or assisting the decision on whether to list an individual. Section 18(5) includes a definition of “relevant matter”, with Part 2 of schedule 1 of the Regulations prescribing the details of every relevant matter for the purposes of section 18(4)(b) (police information etc.) and schedule 2 of the Regulations prescribing the details of every relevant matter for the purposes of section 49(1)(a) (vetting information).

The definition of “relevant matter” (in section 18(5)) specifically excludes, in the case of a conviction, a non-disclosable conviction and specifically excludes, the case of a caution, a spent caution.

However, spent convictions and spent cautions appear to be included in the information prescribed by paragraph 18 of Part 2 of schedule 1 and paragraph 1 of schedule 2.

1. Please confirm whether the provision made by this instrument is intended to prescribe non-disclosable convictions and spent cautions, and, if so, whether this is permitted by the enabling powers in sections 18(4)(b) and 49(1)(a)?
2. Please confirm whether any corrective action is proposed, and if so, what action and when.

On Tuesday 12th November 2024, the Scottish Government responded:

1. No, the provisions in paragraphs 18 and 19 of Part 2 of schedule 1 and paragraphs 1 and 2 of schedule 2 do not prescribe non-disclosable convictions and spent cautions. These provisions set out the prescribed details for convictions and cautions as relevant matters for the purposes of section 18(4)(b) and section 49(1)(a) of the Protection of Vulnerable Groups (Scotland) Act 2007 (“the PVG Act”). The definition of “relevant matter” in section 18(5) (which applies for the purposes of section 18(4)(b) and section 49(1)(a) of the PVG Act) makes clear that only convictions which are not non-disclosable convictions under section 9 of the Disclosure (Scotland) Act 2020 (“the Disclosure Act”) and cautions that are not spent by virtue of schedule 3 of the Rehabilitation of Offenders Act 1974 (“ROA”) can be “relevant matters”. Section 9 of the Disclosure Act makes it clear that a conviction is non-disclosable if it is a spent conviction *and* either of the requirements in section 9(1)(b) are met. This means that a conviction can be a ‘spent’ conviction and still be disclosable.

Similarly, only cautions that are not spent by virtue of schedule 3 of ROA can be disclosable.

In the case of a conviction or caution that is a relevant matter, then these provisions permit the Scottish Ministers to seek/use the information. In the case of a conviction or caution that is not a relevant matter, then these provisions do not apply.

The purpose of prescribing this information in this SSI is because “central records” (the police databases prescribed in regulation 3 of the Level 1 and Level 2 Disclosure Information (Scotland) Regulations 2024 (SSI 2024/315)) may contain a lot of information. It is only the information prescribed in this SSI that the Scottish Ministers may seek (and use) under sections 18(4)(b) and 49(1)(a), in relation to convictions and cautions that are within the definition of relevant matters, from those central records for the purposes of their functions.

As noted above, spent convictions can be ‘disclosable’ in accordance with section 9 of the Disclosure Act and cautions may not be spent by virtue of schedule 3 of ROA. Accordingly, it is the Scottish Government’s view that the details set out in paragraphs 18 and 19 of Part 2 of schedule 1 and paragraphs 1 and 2 of schedule 2 are permitted by the enabling powers in 18(4)(b) and 49(1)(a) of the PVG Act.

2. The Scottish Government accordingly considers that no corrective action is necessary.

Level 1 and Level 2 Disclosure Information (Scotland) Regulations 2024 (SSI 2024/315)

On Friday 8th November 2024, the Committee asked the Scottish Government:

The enabling power in section 8(1)(a) of the Disclosure (Scotland) Act 2020 permits the Scottish Ministers to prescribe details of the criminal disposals held in central records that are to be contained in a Level 2 disclosure certificate. Section 8(3) provides that “criminal disposal”, for this purpose, does not include a “non-disclosable conviction”. “Non-disclosable convictions” for this purpose means certain spent convictions, as specified in section 9.

However, spent convictions appear to be included in the information prescribed by regulation 5 paragraph (a) without the exclusion of “non-disclosable convictions”.

1. Please confirm whether the provision made by regulation 5(a) this instrument is intended to prescribe non-disclosable convictions, and, if so, whether this is permitted by the enabling power in section 8?
2. Please confirm whether any corrective action is proposed, and if so, what action and when.

On Tuesday 12th November 2024, the Scottish Government responded:

1. No, the provision made by regulation 5(a) of this SSI does not intend to prescribe non-disclosable convictions. This regulation sets out the prescribed details of a criminal disposal for the purposes of section 8(1)(a) of the Disclosure (Scotland) Act 2020 (“the Disclosure Act”). Section 8(3) of the Disclosure Act makes it clear that non-disclosable convictions are not criminal disposals for the purposes of section 8(1).

The purpose of prescribing this information in this SSI is because “central records” (the police databases prescribed in regulation 3 of this SSI) may contain a lot of information in relation to an individual. It is only the information prescribed in this SSI that the Scottish Ministers may seek (and use) under section 8(1)(a) for the purposes of their functions. The details set out in regulation 5(a) are details of a ‘criminal disposal’, the definition of which specifically excludes non-disclosable convictions.

It is the Scottish Government’s view that the details set out in regulation 5(a) are permitted by the enabling powers in section 8(1)(a) of the Disclosure Act.

2. The Scottish Government accordingly considers no corrective action is necessary.