SUBORDINATE LEGISLATION COMMITTEE

AGENDA

1st Meeting, 2009 (Session 3)

Tuesday 6 January 2009

The Committee will meet at 2.15 pm in Committee Room 4.

1. **Draft instruments subject to approval:** The Committee will consider the following—

   - the Prohibited Procedures on Protected Animals (Exemptions) (Scotland) Amendment Regulations 2009 (SSI 2008/draft);
   - the International Organisations (Immunities and Privileges) (Scotland) Order 2009 (SSI 2008/draft);

2. **Instruments subject to annulment:** The Committee will consider the following—

   - the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 (SSI 2008/404);
   - the Pollution Prevention and Control (Scotland) Amendment Regulations 2008 (SSI 2008/410);
   - the Local Government (Allowances and Expenses) (Scotland) Amendment Regulations 2008 (SSI 2008/414);
   - the Assistance by Way of Representation (District Court Financial Limit) (Scotland) Order 2008 (SSI 2008/416).

3. **Instruments not laid before the Parliament:** The Committee will consider the following—

   - Act of Sederunt (Rules of the Court of Session Amendment No.6) (Counter-Terrorism Act 2008) 2008 (SSI 2008/401);
   - the Planning etc. (Scotland) Act 2006 (Commencement No. 5) Order 2008 (SSI 2008/411).
The papers for this meeting are as follows—

**Agenda Items 1-3**

Legal Brief SL/S3/09/1/1 (P)

Summary of Recommendations SL/S3/09/1/2

Government Responses SL/S3/09/1/3
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Summary of Recommendations

The Committee will be invited to consider the following recommendations under consideration at today’s meeting. Decisions are a matter for the Committee.

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**Agenda Item 1**  Draft instruments subject to approval

The Prohibited Procedures on Protected Animals (Exemptions) (Scotland) Amendment Regulations 2009 (SSI 2008/draft)

The International Organisations (Immunities and Privileges) (Scotland) Order 2009 (SSI 2008/draft)

The Further and Higher Education (Scotland) Act 1992 Modification Order 2009 (SSI 2008/draft)

The Committee may wish to consider if it is content with these instruments.

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**Agenda Item 2**  Instruments subject to annulment

The Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 (SSI 2008/404)

The Committee may wish to consider whether it is content with the Scottish Government’s response concerning the choice of procedure adopted. The Committee may wish to report to the lead committee and to the Parliament that in the particular circumstances of the case, it considers the use of negative procedure appropriate but that each case is to be considered on its own merits and it would have been helpful for reasons for the choice of procedure to have been set out within the Executive Note accompanying the instrument. Further, where an instrument affects primary legislation then the starting point is a presumption in favour of affirmative procedure, and it would be for the Scottish Government in those circumstances to explain and justify the use of negative procedure.
The Pollution Prevention and Control (Scotland) Amendment Regulations 2008 (SSI 2008/410)

The Local Government (Allowances and Expenses) (Scotland) Amendment Regulations 2008 (SSI 2008/414)

The Assistance by Way of Representation (District Court Financial Limit) (Scotland) Order 2008 (SSI 2008/416)

The Committee may wish to consider if it is content with these instruments.

Agenda Item 3 Instruments not subject to parliamentary procedure

Act of Sederunt (Rules of the Court of Session Amendment No.6) (Counter-Terrorism Act 2008) 2008 (SSI 2008/401)

The Committee may wish to draw this instrument to the attention of the Parliament on the ground that rule 96.9(2) of the instrument is defectively drafted (insofar as it makes reference to section 70 rather than to section 68 of the Counter-Terrorism Act 2008).

The Committee may also wish to welcome the indication which is provided in the above response that the Court will be invited to correct rule 96.9(2) in a future miscellaneous Act of Sederunt.

The Planning etc. (Scotland) Act 2006 (Commencement No. 5) Order 2008 (SSI 2008/411)

The Committee may wish to consider if it is content with this instrument.
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Scottish Government Responses

Act of Sederunt (Rules of the Court of Session Amendment No. 6) (Counter-Terrorism Act 2008) 2008 (SSI 2008/401)

On 11 December 2008 the Lord President’s Private Office was asked the following question in relation to Act of Sederunt (Rules of the Court of Session Amendment No. 6) (Counter-Terrorism Act 2008) 2008 (SSI 2008/401):

1) whether the reference which is made, at rule 96.9(2) of the instrument (which rule deals with the appointment of special advocates), to section 70 of the Counter-Terrorism Act 2008 (qualification of duty to give reasons), should not instead have been to section 68 of that Act (which deals with the appointment of special advocates); and

2) if so, to explain the implications, so far as the operation of the provision is concerned, of the reference in rule 96.9(2) to section 70 remaining as it stands.

The Lord President’s Private Office responds as follows:

Question 1
The reference to section 70 of the Counter-Terrorism Act 2008 should have been to section 68 (appointment of special advocate).

Question 2
We take the view that it is clear from the context that the reference should, in fact, be to section 68. Section 68 is the only section in the 2008 Act relating to the appointment of special advocates. Rule 96.9 places a duty upon the Treasury to notify the Advocate General of certain matters so that he may consider whether to appoint a special advocate. We consider that the Treasury would be aware that it is section 68, rather than section 70, which is relevant.

However, we will invite the Court to amend rule 96.9(2) to meet this point in a future miscellaneous Act of Sederunt.
The Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 (SSI 2008/404)

On 12 December 2008 the Scottish Government was asked:

In view of the instrument having been made in exercise of powers conferred by section 2(2) of the European Communities Act 1972, and having regard to the nature of the amendments which the instrument makes to primary legislation, to explain the use of negative resolution procedure in preference to draft affirmative resolution procedure.

The Scottish Government responds as follows:

Paragraph 2(2) of Schedule 2 to the European Communities Act 1972 provides that “any statutory instrument containing an Order in Council or any order, rules, regulations or scheme made in the exercise of a power so conferred, if made without a draft having been approved by resolution of each House of Parliament, shall be subject to annulment in pursuance of a resolution of either House”.

There is nothing in the Act which restricts the use of negative procedure and in those circumstances the SSI is intra vires. The question of which procedure is appropriate will depend on the circumstances of each case. The Government accepts that affirmative procedure will be more appropriate for some instruments, for example those imposing onerous financial obligations or creating serious criminal offences. We do not believe that all instruments amending primary legislation need be subject to affirmative procedure. They should also be looked at on a case by case basis, taking into account the nature of the changes they make.

The amendments to primary legislation made by the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 are not substantial. The provisions in the Private International Law (Miscellaneous Provisions) Act 1995 and the Prescription and Limitation (Scotland) Act 1973 which the Regulations disapply conflict with the directly applicable EC Regulation. While they also apply the EC rules within the UK, the Government does not believe that the changes to existing domestic choice of law rules are so substantial that the affirmative parliamentary procedure is justified.

We note that the Solicitors (Scotland) Act 1980 (Foreign Lawyers and Multi-national Practices) Regulations 2004, which made significant changes to the Solicitors (Scotland) Act 1980, were made under section 2(2) and subject to the negative procedure. We also note that the Westminster instrument implementing the EC Regulation, the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008, was laid some weeks ago and was subject to negative procedure.

The Government is of the view that the negative procedure is appropriate for the nature of the changes the Regulations make to primary legislation.