SUBORDINATE LEGISLATION COMMITTEE

AGENDA

3rd Meeting, 2009 (Session 3)

Tuesday 20 January 2009

The Committee will meet at 2.15 pm in Committee Room 2.

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

   the Non-Domestic Rating (Petrol Filling Stations, Public Houses and Hotels) (Scotland) Order 2009 (SSI 2009/draft).

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

   the Transmissible Spongiform Encephalopathies (Scotland) Amendment (No. 2) Regulations 2008 (SSI 2008/417);
   the Beef and Veal Labelling (Scotland) Regulations 2008 (SSI 2008/418);
   the Freshwater Fish Conservation (Prohibition on Fishing for Eels) (Scotland) Regulations 2008 (SSI 2008/419);
   the Zoonoses and Animal By-Products (Fees) (Scotland) Amendment (No. 2) Regulations 2008 (SSI 2008/423);
   the Town and Country Planning (Development Planning) (Scotland) Regulations 2008 (SSI 2008/426);
   the Planning etc. (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Order 2008 (SSI 2008/427);
   Act of Sederunt (Fees of Sheriff Officers) 2008 (SSI 2008/430);
   the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008 (SSI 2008/433);
   the Town and Country Planning (Appeals) (Scotland) Regulations 2008 (SSI 2008/434);
   the Non-Domestic Rate (Scotland) Order 2009 (SSI 2009/3).

3. **Instruments not subject to parliamentary procedure:** The Committee will consider the following—
the Local Electoral Administration and Registration Services (Scotland) Act 2006 (Commencement No. 5 and Transitional Provision) Order 2009 (SSI 2009/2).

4. **Interpretation and Legislative Reform (Scotland) Bill - Consultation:** The Committee will consider a paper from the clerk.

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The papers for this meeting are as follows—

**Agenda Items 1-4**

- Legal Brief SL/S3/09/3/1 (P)
- Summary of Recommendations SL/S3/09/3/2
- Government Responses SL/S3/09/3/3

**Agenda Item 4**

- Paper by the Clerk SL/S3/09/3/4
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 Non-Domestic Rating (Petrol Filling Stations, Public Houses and Hotels) (Scotland) Order 2009 (SSI 2009/draft)

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

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**Agenda Item 2**  
**Instruments subject to annulment**

The Transmissible Spongiform Encephalopathies (Scotland) Amendment (No. 2) Regulations 2008 (SSI 2008/417)

The Committee may wish to consider whether to report this instrument to the lead committee and the Parliament on the grounds that—

(a) the transitional provision in regulation 4 is not sufficiently clear as to the intended limitation on the effect of paragraphs 1 and 2 of the new Schedule 2 of the principal regulations for the period to 12 January - the Committee considers that provisions imposing criminal liability should be clearly expressed;

(b) the extent of the FSA functions set out in paragraph 4(1) of Schedule 7 to the principal regulations could be more clearly expressed and the Committee welcomes the suggestion that this will be reviewed in the context of a consolidation later in the year; and

(c) there is an unnecessary and unintended overlap in the creation of offences under paragraph 1 of new Schedule 7 to the principal regulations and paragraph 3 of SSI 2005/586 which is unsatisfactory given that a defence
of due diligence is only available under SSI 2005/586 and welcomes the commitment to resolve this through the revocation of SSI 2005/586.

The Committee may wish to consider whether it is content with the explanation provided in relation to non-compliance with the 21 day rule (article 10(2) of the transitional order) and if so, to report to the lead committee and the Parliament accordingly.

The Beef and Veal Labelling (Scotland) Regulations 2008 (SSI 2008/418)

The Committee may wish to report the instrument to the lead committee and the Parliament on the grounds that, given that regulation 7 creates a criminal offence, the connection between the person to be found guilty of the offence and condition B should be more clearly expressed and not left to implication.

The Freshwater Fish Conservation (Prohibition on Fishing for Eels) (Scotland) Regulations 2008 (SSI 2008/419)

The Committee may wish to draw this instrument to the attention of the lead Committee and to the Parliament on the ground that in relation to regulation 2 the meaning could have been clearer, in respect that regulation 2 appears to provide for a general prohibition on the fishing for eels of the species specified throughout Scotland’s waters, except under licence, whereas section 51A(4)(a) of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 provides that Regulations can be made only in relation to freshwater fisheries.

In relation to the questions raised concerning the form and content of the preamble the Committee may wish, in noting the Scottish Government’s explanation—

(a) to observe that it raises more general issues as to consistency of approach taken within preambles to instruments, and

(b) to indicate that in relation to what is ultimately a matter of drafting practice, it would be content to await the review which it is understood is currently being undertaken by the Government in relation to its drafting practice in this area.

The Zoonoses and Animal By-Products (Fees) (Scotland) Amendment (No. 2) Regulations 2008 (SSI 2008/423)

The Committee may wish to consider drawing this instrument to the attention of the lead committee and the Parliament on the ground that there appears to be a doubt as to whether it is intra vires.
The Town and Country Planning (Development Planning) (Scotland) Regulations 2008 (SSI 2008/426)

The Committee may wish to consider drawing this instrument to the attention of the lead committee and the Parliament on the grounds that—

(a) in relation to regulations 3(2) and 10(2), it appears to raise a devolution issue in respect of the failure to transpose amendments made by Directive 2003/105/EC to Directive 96/82/EC, into the requirements for preparation of development plans set out in these Regulations, and

(b) in the first 3 lines of regulation 24, the meaning or effect is not clear, which is acknowledged by the Scottish Government, and which it undertakes to correct later. It is considered, however, that this should not affect the validity or the operation of the instrument.

The Planning etc. (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Order 2008 (SSI 2008/427)

The Committee may wish to consider reporting this instrument to the lead committee and to the Parliament on the ground that in article 1(2) there is a drafting error in referring to “the Conservation (National Habitats &c.) Regulation 1994”, which should read “the Conservation (Natural Habitats &c.) Regulations 1994”. The Scottish Government have undertaken to correct this error by amendment prior to the instrument coming into force. The Committee might wish to consider welcoming this undertaking.

Act of Sederunt (Fees of Sheriff Officers) 2008 (SSI 2008/430)

The Committee may wish to draw this instrument to the attention of the lead committee and the Parliament on the basis that it combines negative procedure and no procedure and that, while an explanation has been provided by the Lord President’s Private Office for this approach, the Committee considers such an unusual exercise of the enabling powers inappropriate as it could give rise to technical difficulties in the event of a motion to annul the instrument being successful.

The Committee may wish to consider reporting this instrument to the lead committee and to the Parliament on the grounds that—

(a) in relation to regulations 7(1), 8(1) and 9(2)(b), an explanation has been sought and provided by the Scottish Government, which the Committee may find acceptable; and

(b) in relation to regulation 10(2) there is a drafting error, acknowledged by the Scottish Government and which it undertakes to correct at a later date, but which is not considered to affect the validity or operation of the instrument.

The Town and Country Planning (Appeals) (Scotland) Regulations 2008 (SSI 2008/434)

The Committee may wish to consider drawing this instrument to the attention of the lead committee and to the Parliament on the grounds that—

(a) in relation to regulations 7, 8, 17 and 18, while it may be considered that the Scottish Government has not answered the question asked (why these provisions are compatible with article 6(1) of the European Convention on Human Rights, in respect that the provisions appear not to confer any entitlement to a public hearing in the determination of appeals made under the provisions set out in regulation 1, as an appointed person or the Scottish Ministers can determine there shall be no inquiry or hearing), the Committee may consider there is insufficient basis to report the instrument on the ground there is a doubt whether it is intra vires;

(b) in relation to these Regulations anticipating the repeal of section 48(2) and (4) of the Town and Country Planning (Scotland) Act 1997, by the Schedule to the 2006 Act introduced by section 56, an explanation has been sought and provided by the Scottish Government in relation to the commencement of the repeal of section 48(2) and (4), which the Committee may consider satisfactory; and

(c) in relation to regulation 5(2), there is a drafting error, acknowledged by the Scottish Government and which it undertakes to correct at a later date, but not one that is considered to affect the validity or the operation of the instrument.
The Non-Domestic Rate (Scotland) Order 2009 (SSI 2009/3)

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

Agenda Item 3  Instruments not subject to parliamentary procedure

The Local Electoral Administration and Registration Services (Scotland) Act 2006 (Commencement No. 5 and Transitional Provision) Order 2009 (SSI 2009/2)

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

Agenda Item 4  Interpretation and Legislative Reform (Scotland) Bill - Consultation

The Committee may wish to note a paper from the clerk.
The Scottish Government was asked to explain—

(a) given that:
- A new schedule 2 to the principal regulations (SSI 2006/530) is inserted by regulation 2(6) with effect from 1 January 2009
- Paragraphs 2 and 3 of that new schedule 2 impose obligations on persons who are in control of either the body of a goat aged 18 months or older at death or the body of a bovine animal over 48 months of age but
- Regulation 4 provides that paragraph 1 of schedule 2 to the principal regulations is to continue in effect notwithstanding the above until 12 January 2009 and
- Paragraph 1 of the old schedule 2 makes different provision about bodies of goats and bovines including those which are regulated by paragraphs 2 and 3 of the new schedule;

how paragraphs 2 and 3 of the new schedule 2 and paragraph 1 of the old schedule are intended to have effect together over the period 1 to 12 January 2009 and to comment on whether this could have been more clearly expressed given that failure to comply with both requirements is a criminal offence;

(b) what are the duties of the Member State referred to in paragraph 4(1) of the new Schedule 7 to be substituted in the principal regulations by regulation 2(7) and to comment on whether this is sufficiently clear from the instrument; and

(c) the extent to which the offence created by paragraph 1 of new Schedule 7 to the principal regulations overlaps with the offence provided for in regulations 3 and 7 of SSI 2005/586 and why it was considered necessary to make additional provision to the extent of any overlap.

The Scottish Government responds as follows—

(a) The obligations in paragraphs 2 and 3 of Schedule 2 to 2006/530 as inserted by this instrument are not intended to have effect together with paragraph 1 of that Schedule as made.

We believe that the transitional provision in regulation 4 of this instrument makes that clear, by stating that paragraph 1 as made shall have effect as if the substitution of that Schedule (including the provision in new paragraphs 2 and 3) had not been made.
On that basis our position is that it is clear that an infringement of paragraph 1 as made during the transitional period is indeed an offence, and amenable to prosecution on that basis. In practice, of course, this issue is unlikely to be tested given that the transitional period has now expired.

We gave some thought to whether it would be better to draft this instrument with different commencement dates, which would have avoided the need for any transitional provision.

However, we had already decided that it would assist the reader if this instrument were to provide for a rolling consolidation of Schedule 2. That being so, any commencement provision would itself have been unduly complex. We therefore decided that it was preferable to have a single commencement date, and to make the provision in regulation 4 to cover the short transitional period that then became unavoidable.

(b) The duties of the Member State referred to in paragraph 4(1) of the new Schedule 7 are the duties of inspection and investigation in relation to the enforcement of the offences set out in paragraphs 1 (placing on the market/export to third countries) and 3 (export to third countries of specified risk material) of that Schedule. The drafting of paragraph 4(1) is consistent with the drafting of paragraph 1(1) of Schedule 6 to the principal Regulations which has operated effectively since 2006.

It is anticipated that the principal Regulations will be consolidated this year; therefore, the Scottish Government will take the opportunity to consider the point raised and clarify the drafting of both paragraph 4(1) of Schedule 7 and paragraph 1(1) of Schedule 6.

(c) We agree that there is an overlap in the offence created by paragraph 1 of new Schedule 7 and the offence of failing to comply with regulation 3 of SSI 2005/586.

In particular, it is an offence under both provisions to place on the market a product (other than milk) including material derived from a bovine animal born or reared within the UK before 1 August 1996.

The provision in paragraph 1 also covers exporting (or offering to export) such products to third countries, and should have replaced the provision in SSI 2005/586. That earlier instrument will therefore be revoked at the next opportunity, which is expected to be later this year during a planned consolidation of SSI 2006/530.
On 8 January 2009 the Scottish Government was asked—

To explain, given that it appears it is intended that “a person” referred to in regulation 7(1) and (5) will only be guilty of an offence where that person is either a “relevant person” or a person purporting to act in the capacity of a relevant person, whether this is sufficiently clear from the regulation as drafted, as neither Condition A nor Condition B specifies that the person referred to in 7(1) must be that relevant person (or person purporting to act as such).

The Scottish Government responds as follows—

Regulation 7 applies where an offence has been committed by a body corporate or by a Scottish Partnership under another part of the Regulations: for example, where a company fails to comply with a notice under regulation 5(2) of the regulations, and is guilty of an offence by virtue of section 5(4).

The aim of regulation 7 is to punish persons managing the body corporate or Scottish partnership who are responsible for the offence committed by the company or partnership. It is a separate offence to the offence committed by the body corporate or partnership.

Regulation 7(3) and (4) sets out the categories of person who may be caught by this additional offence. They are “relevant persons” or persons purporting to act in the capacity of those relevant persons.

The "relevant persons" are in the case of bodies corporate: directors, managers, secretaries or other similar officers; and, where the affairs are managed by its members: a member. In the case of a Scottish partnership, the "relevant person" is a partner.

Since there are no other persons referred to in the regulation (other than the body corporate or Scottish partnership which is caught by a separate offence), the only person being referred to by "that person" in regulation 7(5) can be (a) the relevant person or (b) any person purporting to act in the capacity of the relevant person.

We think regulation 7 therefore is sufficiently clear.
The Freshwater Fish Conservation (Prohibition on fishing for Eels) (Scotland) Regulations 2008 (SSI 2008/419)

On 8 January 2009 the Scottish Government was asked—

1. To explain the form which the preamble takes, and in particular to explain:
   
   (a) whether Ministers are of the view that the measures made are either necessary or expedient for the conservation of freshwater fish given that this appears to be a precondition to the exercise of the powers in section 51A and if so why this was not narrated in the preamble to the instrument, and
   
   (b) whether, in narrating within the preamble that consultation has been carried out in accordance with paragraph 9A of schedule 1 to the 2003 Act, consideration was given to narrating the process more fully, with reference to the provisions of paragraphs 11 to 15 of that schedule, in particular in terms of narrating within the preamble the outcome of such consultation.

2. To explain the vires for regulation 2, which provides that no person shall fish for or take eels of the species *Anguilla Anguilla*, except under the authority of a licence granted by the Scottish Ministers, and which regulation appears therefore relate to the fishing for or taking of eels throughout Scotland’s waters, given that section 51A(4)(a) of the 2003 Act provides that Regulations under that section may be made in relation only to freshwater fisheries.

The Scottish Government responds as follows—

1. (a) Section 51A(1) of the 2003 Act provides:

   “The Scottish Ministers may make regulations under this section if they consider that it is necessary or expedient to do so for the conservation of freshwater fish.”

   The Scottish Government confirms that Ministers are of the view that the measures in the Regulations are necessary and expedient in implementation of Council Regulation (EC) No. 1100/2007. The Council Regulation establishes measures for the recovery of stock of the European eel (*Anguilla Anguilla*). It is accepted that normal drafting practice is to narrate pre-conditions in the preamble. However, in our view a requirement to “consider that it is necessary or expedient” is not a pre-condition, but rather forms a limitation of the power when it is being exercised. It is therefore not necessary to narrate the fact that the Scottish Ministers consider the Regulations to be necessary or expedient in the preamble.

   This approach is consistent with previous Scottish statutory instruments where there is a similar requirement in the enabling power for Ministers to consider, for example, that the provisions are “necessary”, “expedient” or “desirable”.


(b) The requirement at paragraph 9A of schedule 1 of the 2003 Act is to consult with such persons as the Scottish Ministers consider appropriate, and then to proceed in accordance with paragraphs 11 to 15 of the schedule. We consider therefore, that for the purposes of the preamble the pre-conditions in paragraphs 11 to 15 should be narrated where they apply in the instant case. Paragraph 11 applies because it contains a requirement for Ministers to give notice before making regulations. Paragraphs 12 to 15 are not in our opinion pre-conditions requiring narration within the preamble. Those paragraphs, as with the requirement in section 51A(1) to consider whether Regulations are necessary or expedient, are a limitation on the power depending on whether Ministers altered the proposals (paragraph 12), received representations or objections (paragraph 13), or held and inquiry (paragraphs 14 and 15).

We recognise that section 51A(4)(a) of the 2003 Act provides that these Regulations may be made only in relation to freshwater fisheries. The Regulations are necessarily limited by this provision in the enabling power, and we do not therefore consider that the fact that the prohibition applies only to freshwater fisheries requires to be referred to in the Regulations.

The Zoonoses and Animal By-Products (Fees) (Scotland) Amendment (No.2) Regulations 2008 (SSI 2008/423)

The Scottish Government is asked—

1. For an explanation as to how the Zoonoses and Animal By-Products (Fees) (Scotland) Amendment (No. 2) Regulations 2008 (SSI 2008/423) (‘the 2008 Regulations’) are considered to be within the powers of section 56(1) and (2) of the Finance Act 1973 given that they do not appear to prescribe payment of a fee or charge or alternatively provide the method by which such a fee or charge is to be determined as required by that section.

The Scottish Government replies—

The 2008 Regulations further amend the Zoonoses and Animal By-Products (Scotland) Regulations 2007 (SSI 2007/577) (‘the 2007 Regulations’).

The 2008 Regulations do not prescribe payment of a fee or charge, or provide the method by which such a fee or charge is to be determined.

They 2008 Regulations do amend the provisions in regulation 3 of the 2007 Regulations which provide for such a method, and therefore cite the applicable enabling powers in the preamble, in particular section 56(1) and (2) of the Finance Act 1973.

The Committee asked for an explanation of how regulation 3 of the 2007 Regulations was within the scope of the enabling powers in the 1973 Act when it was considering the—

- 2007 Regulations, and
• Zoonoses and Animal By-Products (Scotland) Amendment Regulations 2008 (SSI 2008/378) (“the first amending instrument”).

The Scottish Government remains of the view that regulation 3 of the 2007 Regulations prescribes a method by which a fee is to be determined, and that the Regulations (and therefore the amending instruments) are *intra vires* the power in section 56(1) of the Finance Act 1973.

In particular, regulation 3 of the 2007 Regulations provides for the fees to be such as will enable the Scottish Ministers to meet the reasonable expenses incurred as a result of the activities specified in the 2007 Regulations.

The Scottish Ministers must therefore have regard to the criteria in the 2007 Regulations as amended when determining the fee that will be charged for such an activity.

2. Given that the preamble refers to powers conferred by section 56(1) and (2) of the Finance Act 1973 and to ‘all other powers enabling them to do so’ to comment on whether or not the Regulations are made, and if so to what extent, in exercise of powers conferred by section 2(2) of the European Communities Act 1972.

The Scottish Government replies—

The Committee asked for a similar explanation when it considered the first amending instrument, which also amended regulation 3 of the 2007 Regulations.

The Scottish Government considers that the 2008 Regulations are, like the first amending instrument, not made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972.

Section 56(1) and (2) of the Finance Act 1973 allows a Government department to charge fees for services provided in pursuance of any Community obligation, and to provide for the recovery and disposal of any sums payable under the regulations, making different provision for different circumstances.

The 2008 Regulations amend the list of activities for which fees may be charged by the Scottish Ministers, and the persons by whom fees must be paid.

It is therefore considered that the powers conferred by the Finance Act 1973 are apt to make the 2008 Regulations, and were indeed apt in respect of the 2007 Regulations and the first amending instrument.

To assist the Committee, please note that the 2007 Regulations were made in part using the powers in section 2(2) of the European Communities Act, and the preamble to that instrument was framed accordingly.

In particular, Regulation 4 of the 2007 Regulations revoked the Poultry Breeding Flocks, Hatcheries and Animal By-Products (Fees) (Scotland) Order 2002 (SSI 2002/529). That Order was made under enabling powers in the Animal Health Act 1981. The powers in the 1973 Act were not therefore apt to revoke that Order.
3. To comment, given that—

Regulation 3(1) of the Zoonoses and Animal By-Products (Fees) (Scotland) Regulations 2007 (SSI 2007/577) (‘the 2007 Regulations’) as amended empower the Scottish Ministers to charge such fees as the Scottish Ministers consider will enable them to meet any reasonable expenses incurred by them; and that regulation 3(1) of the 2007 Regulations (as amended) lists without any differentiation the services in respect of which charges may be imposed;

it is not clear whether the correlation in regulation 3(1) (as amended) is between expenses incurred by the Scottish Ministers generally or in respect of services provided in individual cases, and, if in respect of services provided in individual cases, how consistency is to be achieved in the application of the power to charge in individual cases.

The Scottish Government replies—

This question appears to relate to the effect of charging scheme in the 2007 Regulations, rather than the amendments to that scheme affected by the instrument being considered.

A similar question was asked when the Committee was considering the first amending instrument.

The Scottish Government therefore confirm that in respect of the fees to be charged, these are all predetermined to ensure transparency.

The charges applicable to laboratories are we believe clearly set out in the Executive Note for the 2007 Regulations.

The actual fee to be levied against a particular laboratory is of course dictated by individual circumstances, e.g. is it an initial application or a renewal, and also by the agents that they seek approval to test for.

The frequency and methodology for official sampling of breeding flocks is set out in the Annex to Commission Regulation (EC) 1003/2005. This ensures consistency in that all holdings will be subject to the same inspection and sampling requirements. Regulation 1003/2005 requires an official sample to be taken at three intervals during the cycle of a breeding flock.

As a minimum each breeding flock holding should receive at least one visit per production cycle from Animal Health for official sampling purposes. There is scope for Animal Health to designate a competent person to obtain samples and submit these for testing. Such an approach would only be adopted however following a risk assessment.

A fee will only be levied against a producer where Animal Health staff attend to collect or supervise the collection of official samples. Producers will still need to meet the costs associated with the testing of an official sample (currently £18.50) regardless of who collected it.
All relevant fees will be made known to affected parties prior to any inspections or sampling being carried out.

Please note that on 30 December 2008 the Scottish Government wrote to the Rural Affairs Committee in response to questions asked by that Committee about the first amending instrument. The Committee may find the policy background set out in that letter of assistance when considering the 2008 Regulations

**The Town and Country Planning (Development Planning) (Scotland) Regulations 2008 (SSI 2008/426)**

**The Scottish Government are asked—**

To explain (given that a Transposition Note has not been provided) why regulations 3(2) and 10(2) properly transpose into domestic law the requirements of Council Directive 96/82/EC (as amended by Regulation 1882/2003 and Directive 2003/105/EC) on the control of major accident hazards involving dangerous substances, in respect that—

> it appears that those paragraphs may seek to partially implement the requirements of the second paragraph of Article 12(1) of that Directive, but that second paragraph (as amended) contains some additional wording to that used in regulations 3(2) and 10(2), as highlighted in bold here-

> Member States shall ensure that their land-use and/or other relevant policies and the procedures for implementing those policies take account of the need, in the long term, to maintain appropriate distances between establishments covered by this Directive and residential areas, buildings and areas of public use, major transport routes as far as possible, recreational areas, and areas of particular natural sensitivity or interest and, in the case of existing establishments, of the need for additional technical measures in accordance with Article 5 so as not to increase the risks to people.”

To explain the meaning and effect of regulation 24, in respect of the first 3 lines of the regulation, and whether it is considered that any words are omitted or require to be altered?

**The Scottish Government responds as follows—**

2008/426) replace and reinstate the current law as set out in the 1983 Directions. It is not thought that a transposition note is necessary in these circumstances. The Scottish Government intend to regulate in respect of the changes to article 12 of the Directive 96/82/EC and other amendments made by Directive 2003/105/EC in the spring.

The meaning and effect of regulation 24 is to require a development plan scheme prepared by a strategic development planning authority or a planning authority under section 20B of the Act to include a timetable which specifies the month in which the authority propose to publish a main issues report, publish a proposed strategic or local development plan, as the case may be, and submit such a plan to the Scottish Ministers. The Scottish Government accept that “by” in line two of regulation 24 may have better read “of” but do not consider that there is any ambiguity or uncertainty as to the import of the provision. The Scottish Government will look to amend the provision when the next appropriate opportunity arises.

The Planning etc (Scotland) Act 2006 (Development Planning) (Saving Transitional and Consequential) Order 2008 (SSI 2008/427)

On 8th January you asked for an explanation of the following matters—

The Scottish Government is asked to explain the effect of the apparent error in the definition of “the 1994 Regulations” in article 1(2) as referring to the Conservation (National Habitats &c.) Regulation 1994, rather than the Conservation (Natural Habitats &c.) Regulations 1994, given that the “1994 Regulations” are referred to in various provisions in the Regulations to provide how the Regulations shall apply to structure and local plans, and for the purposes of the amendments in article 8?

The Scottish Government responds as follows—

The Scottish Government are grateful to you for pointing out the error in the definition of the 1994 Regulations in the Order and intend to bring forward a corrective instrument before the Order comes into force on 28th February 2009 to ensure that no issue as to the effect of the wording of this definition arises.
Act of Sederunt (Fees of Sheriff Officers) 2008 (SSI 2008/430)

On 12 January 2009 the Lord President's Private Office was asked in relation to SSI 2008/430—

Given that the preamble to this instrument states that it is made under powers conferred by section 40 of the Sheriff Courts (Scotland) Act 1907 and section 6 of the Execution of Diligence (Scotland) Act 1926 and that these enabling powers are subject to negative procedure and to no procedure respectively:

(1) to explain why it has elected to combine enabling powers which are subject to negative procedure and no procedure in this instrument;

(2) to advise whether the powers are used in combination for the whole instrument or whether particular provisions are attributable to each power; and

(3) to comment on the practical and legal difficulties that would arise should the Parliament seek to annul this instrument.

The Lord President’s Private Office responds as follows—

The table of fees for sheriff officers is updated on an annual basis. These matters appear to have been raised by the Subordinate Legislation Committee in relation to the 2003 update (SSI 2003/538) when it asked for confirmation as to how the use of two different procedures in that instrument was likely to work in practice and which parts of the instrument could be annulled by the Parliament. A response was provided by letter of 21 November 2003. It is not clear whether the Committee considered this matter further or whether it was content with the explanation given in our letter, although it did not pursue the matter in the immediately subsequent years.

Question (1)

Our response to this question is essentially the same as our response in 2003. We recognise that it is not generally desirable to combine the use of two powers where one is subject to negative procedure and the other to no procedure. However, we would suggest that this is not something which affects the vires of the instrument. Moreover, we consider that there are good practical reasons for doing so in this particular case. The most important of these is that the instruments specifying the fees of sheriff officers are used on a day-to-day basis by sheriff officers and others. For ease of reference, the fees have been set out in a single table. We would suggest that change to that approach might cause confusion amongst the users of the table and would be considerably less convenient for them.

In these circumstances, we consider that the use of two powers in the above instrument is appropriate. Indeed, to do otherwise might be overly technical and perhaps unhelpful. The intention is that the table of fees should be as accessible and straightforward to use as possible and we hope that the Committee will accept that, in this case, the combination of powers is appropriate. Indeed, if the Committee are content, it would be helpful if the matter could be recorded so that the issue is not raised in connection with future annual increases in fees.
**Question (2)**
Our response to this question is, again, essentially the same as our response in 2003. Section 6 of the Execution of Diligence (Scotland) Act 1926 (c.16) (‘the 1926 Act’) provides that the Court of Session may by Act of Sederunt fix the fees of sheriff officers or others in respect of anything done under the 1926 Act. The power to fix fees is limited by reference to the activities of sheriff officers under the 1926 Act. The power could not, for example, be exercised to fix fees in respect of diligence executed by sheriff officers under the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17) (‘the 2002 Act’). The powers which may be exercised by the Court of Session under the 1926 Act are not subject to any parliamentary procedure.

Section 40 of the Sheriff Courts (Scotland) Act 1907 (c.51) (‘the 1907 Act’) provides that the Court of Session may regulate the fees of, amongst others, sheriff officers. No limit is specified as to the activities in relation to which the fees may be regulated, however, the general power set out in the 1907 Act is necessarily subject to the more specific power set out in the subsequent 1926 Act. Accordingly, section 40 of the 1907 Act cannot be used to fix the fees of sheriff officers in relation to anything done under the 1926 Act. The exercise of the power to regulate fees under the 1907 Act is subject to annulment by the Scottish Parliament.

The current table of fees for sheriff officers covers the actions of sheriff officers under both the 1926 Act (such as the service of certain documents by post under section 2 of the 1926 Act), and other enactments such as the Debtors (Scotland) Act 1987 (c.18) and the 2002 Act. Consequently, both powers are narrated in the preamble to the present instrument as has been done on an annual basis since at least 1986 (see Act of Sederunt (Fees of Sheriff Officers) 1986 (S.I. 1986/226)).

**Question (3)**
Our view is that the effect of a successful motion to annul would be that the whole instrument was annulled.


The Scottish Government are asked—

1. (a) in relation to regulation 7(1) (read with section 43A(8) of the 1997 Act), whether the intended meaning or effect is that a review decision by a planning authority shall be delegated to a local review body (a committee of the planning authority comprising at least 3 members) and the decision of the body shall be treated as the decision of the planning authority, or whether the planning authority shall be entitled to accept, alter or reject the recommendation of the body;

2. (b) depending on the reply to (a), whether it is considered that the meaning or effect of regulation 7(1) could be made clearer?

3. (c) if the intended meaning or effect is that a review decision is so delegated to a body, which enabling power is being relied on to make such provision and what is the basis for that view, given that section 43A(8) provides that the applicant may require the planning authority to review the case?
(2) in relation to the references in regulations 8(1) and 9(2)(b) to “the period allowed for determination of the application”, to explain the meaning and effect of these provisions, and which period is prescribed, given that section 43A(8)(c) of the 1997 Act provides that the period within which an appointed person requires to determine an application may be prescribed by regulations or development order?

(3) (a) in relation to the references to any “interested person” in regulation 10(2), when read with the definition of “interested party” in regulation 2, whether it is intended to refer to “interested party”, or if “interested person” refers to another category, and if the latter applies, what is this category of persons?

(b) if the view is taken that “interested party” should have been referred to, what is the effect considered to be?

The Scottish Government responds as follows—

1(a). Regulation 7(1) sets out how a review of a case under section 43A(8) by the planning authority is to be conducted by that authority, i.e. by a committee of that authority comprising at least 3 members. The decision of the committee would, as with other committee decisions, be a decision of the planning authority. Both the requirement that the review is conducted by such a committee in paragraph (1) and the requirement in paragraph (2) that decisions of the committee on the determination of the review are to taken in public clearly indicate that it is the local review body that makes the decision.

1(b). It is considered that the meaning of regulation 7(1) is sufficiently clear.

1(c). As explained in the response to question 1(a) this is not the intention or effect of regulation 7(1).

2. The period prescribed for the purposes of section 43A(8)(c) is “the period allowed for determination of the application”. This term is defined in regulation 2 as the period specified in regulation 26(2) of the Town and Country Planning (Development Management Procedure)(Scotland) Regulations 2008 (SSI 2008/432). The period for the purposes of section 43A(8)(c) is a period of two months from the “validation date” as defined in those Regulations.

3(a) and (b). The Scottish Government agree that it would have been better if the reference to “interested person” in regulation 10(2) had been a reference to “interested party”. The Scottish Government are grateful to you for drawing this to their attention but do not consider that there is any ambiguity or uncertainty as to the meaning of the provisions, particularly as regulation 10(2) merely sets out how notice to an interested party under regulation 10(1) may be given. The Scottish Government will however look to amend regulation 10(2) when the next appropriate opportunity arises.
The Scottish Government are asked—

(1) Regulation 7 provides that an appointed person may determine an appeal without further procedure. Regulation 8 provides that an appointed person may determine that the procedure for an appeal shall be by written submission and/or inspection of the relevant land, instead of by hearing or inquiry. For “called-in applications” and “non-delegated appeals”, this applies by regulations 17 and 18 to the Scottish Ministers, in place of the appointed person. Can it be explained why these provisions are compatible with article 6(1) of the European Convention on Human Rights, in respect that the provisions appear not to confer any entitlement to a public hearing in the determination of appeals made under the provisions set out in regulation 1 (as an appointed person can determine there shall be no inquiry or hearing), and that any further right to appeal to the Court of Session under sections 237 to 239 of the 1997 Act is limited to questioning the validity of the decision appealed against, or that the requirements in or under the Act (including regulations 7, 8, 17 and 18) have not been complied with?

(2) As it appears that these Regulations shall be in substitution for the repeal of section 48(2) and (4) of the 1997 Act (entitlement to be heard by an appointed person), by the Schedule to the 2006 Act introduced by section 56, and it appears that that Schedule has yet to be commenced for the purposes of that repeal, can the Government confirm whether it is proposed to commence that repeal by order, and are they able to confirm when such an order would be made?

(3) (a) in relation to the references to any “interested person” in regulation 5(2), when read with the definition of “interested party” in regulation 2, whether it is intended to refer to “interested party”, or if “interested person” refers to another category, and if the latter applies what is this category of persons?

(b) if the view is taken that “interested party” should have been referred to, what is the effect of this considered to be?

The Scottish Government responds as follows—

1. It is recognised in the caselaw that the Scottish Ministers, or indeed a person appointed by them to consider the case, do not constitute the independent tribunal within the meaning of article 6(1) of the ECHR. It is the access to the Court of Session under sections 237 to 239 which supplies the necessary entitlement to a fair and public hearing by an independent and impartial tribunal. The changes made by the Regulations or indeed the 2006 Act do not alter the right to a hearing in the Court of Session nor do they alter the scope of the Court of Session’s jurisdiction.

2. These Regulations would not substitute the repeal of section 48(2) and (4) of the 1997 Act. The Scottish Government intend shortly to make an order to commence the repeal of those provisions of 1997 Act.

3(a) and (b). The Scottish Government agree that it would have been better if the reference to “interested person” in regulation 5(2) had been a reference to “interested
party”. The Scottish Government are grateful to you for drawing this to their attention but do not consider that there is any ambiguity or uncertainty as to the meaning of the provisions, particularly as regulation 5(2) merely sets out how notice to an interested party under regulation 5(1) may be given. The Scottish Government will however look to amend regulation 5(2) when the next appropriate opportunity arises.
INTERPRETATION AND LEGISLATIVE REFORM (SCOTLAND) BILL – CONSULTATION PAPER

Background

1. On 13 January the Scottish Government published a consultation paper in connection with the draft Interpretation and Legislative Reform (Scotland) Bill. As members are aware this Bill will, in part, make provision for the making and publication of subordinate legislation in the form of a Scottish statutory instrument and for the scrutiny procedures which apply in the Scottish Parliament. These provisions will replace the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SI 1999/1379). In doing so the Bill will address a range of recommendations made by the Subordinate Legislation Committee (SLC) following its inquiry into the regulatory framework in Scotland.¹ (The draft Bill also includes provision on other matters including the interpretation and operation of Acts of the Scottish Parliament, powers to amend enactments prior to consolidation and special parliamentary procedure.)

2. Members may recall that at its meeting held on 30 September 2008 the Committee considered the Scottish Government’s response to its 12th Report 2008, “Inquiry into the Regulatory Framework in Scotland”. At that meeting members agreed that they wished to take evidence from the Minister for Parliamentary Business in connection with the draft Bill.

3. The consultation period will run until 12 April 2009. The Scottish Government intend to issue a report on the consultation on 13 May. It would be helpful if discussions with the Minister could be informed by comments made by other respondents to the consultation. It is therefore proposed that the Minister be invited to give evidence after the consultation period has ended but prior to the Scottish Government making final decisions on the content of the Bill.

Recommendation

4. Members are invited to note the consultation on the draft Interpretation and Legislative Reform Bill and to agree to invite the Minister for Parliamentary Business to give evidence on the draft Bill, following the end of the consultation period.