SUBORDINATE LEGISLATION COMMITTEE

AGENDA

5th Meeting, 2009 (Session 3)

Tuesday 3 February 2009

The Committee will meet at 2.15 pm in Committee Room 6.

1. **Budget (Scotland) (No.3) Bill**: The Committee will consider the delegated powers provisions in this Bill at Stage 1.

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

   - the Scottish Register of Tartans Fees Order 2009 (SSI 2009/6);
   - the Legal Profession and Legal Aid (Scotland) Act 2007 (Transitional Provision) Order 2009 (SSI 2009/17);
   - the Planning etc. (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Amendment Order 2009 (SSI 2009/18);
   - the Justice of the Peace Courts (Sheriffdom of Tayside, Central and Fife) Amendment Order 2009 (SSI 2009/20);
   - the Feeding Stuff (Scotland) Amendment Regulations 2009 (SSI 2009/21);
   - the Scottish Road Works Register (Prescribed Fees) Regulations 2009 (SSI 2009/26).

Shelagh McKinlay
Clerk to the Subordinate Legislation Committee
Room TG.01
Scottish Parliament
Edinburgh
Tel: 0131 348 5212
Email: shelagh.mckinlay@scottish.parliament.uk
The papers for this meeting are as follows—

**Agenda Items 1-2**

Legal Brief  
SL/S3/09/5/1 (P)

Summary of Recommendations  
SL/S3/09/5/2

**Agenda Item 1**

Budget (Scotland) (No.3) Bill

Delegated Powers Memorandum

**Agenda Item 2**

Government Responses  
SL/S3/09/5/3
SUBORDINATE LEGISLATION COMMITTEE

5th Meeting, 2009 (Session 3)
Tuesday 3 February 2009

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.

Agenda Item 1  Budget (Scotland) (No.3) Bill

The Committee may wish to consider if it is content with the delegated power in Section 7, and that this is subject to affirmative procedure.

Agenda Item 2  Instruments subject to annulment


The Committee is invited to find the reasons supplied for the failure to comply with the 21 day rule as set out in article 10(2) of the transitional order satisfactory and to report accordingly.

The Committee is invited to report the order to the lead committee and to the Parliament on the following grounds:

(a) that the Scottish Government has admitted that there was a failure to expedite the publication of this instrument (which was not published until after it came into force) and that it will work with the Queen’s Printer to ensure that this does not happen again;

(b) that in the Committee’s view it would have been possible to specify the date that the instrument comes into force on the face of the Order rather than by reference to the related English Order and that the Committee considers that this approach would have been more transparent and accessible for the reader; and
(c) there has been a drafting error identified in article 5(2) and acknowledged by the Scottish Government but which is not thought to affect the legal operation or effect of the instrument.

The Scottish Register of Tartans Fees Order 2009 (SSI 2009/6)

The Committee may wish to consider whether it finds the explanation provided by the Government only partially satisfactory and, if so, to report this instrument to the lead committee and the Parliament on the basis that an explanation was obtained from the Scottish Government with which it is only partly satisfied but that the Committee does not wish to draw their attention to the instrument in relation to any ground within its remit.

The Legal Profession and Legal Aid (Scotland) Act 2007 (Transitional Provision) Order 2009 (SSI 2009/17)

The Planning etc. (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Amendment Order 2009 (SSI 2009/18)

The Justice of the Peace Courts (Sheriffdom of Tayside, Central and Fife) Amendment Order 2009 (SSI 2009/20)

The Feeding Stuffs (Scotland) Amendment Regulations 2009 (SSI 2009/21)

The Scottish Road Works Register (Prescribed Fees) Regulations 2009 (SSI 2009/26)

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


On 22\textsuperscript{nd} January 2009 the Scottish Government was asked:

(a) to confirm when this instrument will be published on the Queen's Printer for Scotland website and paper copies will be printed and available for sale;

(b) given that the instrument was not so published on the website when this question was submitted (although the instrument was made on 14\textsuperscript{th} January and came into force on 20\textsuperscript{th} January) to explain the reason for the delay in publication;

(c) given that it is not patent from the face of the instrument or the explanatory note when the instrument is to come into force (that date being dependent on the date SI 2009/12 comes into force which was known at the time this Order was made) to explain the drafting approach and comment on whether it is sufficiently transparent; and

(d) to explain whether the words "to be treated" are missing after "person" in the penultimate line of article 5(2) to reflect similar wording in article 4(2) and to comment on the effect of the text of article 5(2) without those words.

The Scottish Government responds as follows:

(a) We have been advised that this Order was published on the Queen’s Printer for Scotland’s website sometime on 22\textsuperscript{nd} January 2009. Paper copies were also printed and made available on that day.

(b) It appears that the publication of this SSI was not expedited as it should have been and we will work with the QPS to try to ensure that this does not happen again.

(c) As explained in the letter to the Presiding Officer the vires of this instrument did not permit our SSI to be made in advance of SI 2009/12. Ministers were required to respond quickly to the making of that SI, the date of which had changed. On 14\textsuperscript{th} January we received confirmation that SI 2009/12 was made on 13\textsuperscript{th} January 2009.

To provide the public and Parliament with as much notice as possible of the Order, within the constraints of the vires and the need for the Order, it was made and laid on 14\textsuperscript{th} January. At the time of drafting the Order, we considered that in order to ensure that it could be signed as soon as confirmation was received that SI 2009/12 was made (without the need to make any alterations to the Order) the safest approach, to ensure that the Order came into force at the same time as SI 2009/12, was to link the
commencement date of the Order to that of SI 2009/12. While the commencement date could have been added immediately prior to signing, we wished to avoid the possibility of any mistakes as to the commencement date.

In any event we consider that the drafting approach is sufficiently transparent. The commencement date was linked to a specified and ascertainable date, the date of making of SI 2009/12.

(d) We confirm that the words “to be treated” are missing from the provision and thank the SLC for bringing this oversight to our attention. While the missing words would have provided additional clarity as to the effect of the provision we do not consider that their absence has any legal effect on the meaning of the provision in question.

The Scottish Register of Tartans Fees Order 2009 (SSI 2009/6)

The Scottish Government was asked—

to explain how it has fulfilled the mandatory requirement under section 14(3) of the Scottish Register of Tartans Act 2008 to consult the Keeper of the Scottish Register of Tartans prior to making the order, given that the office of the Keeper of the Scottish Register of Tartans is not established and his/her functions are not exercisable until sections 3 and 4 are commenced on 5 February 2009.

The Scottish Government responds as follows:

The Scottish Government has fulfilled the mandatory requirement under section 14(3) of the Scottish Register of Tartans Act 2008 (the “2008 Act”) to consult the “Keeper” before making the Order.

The “Keeper” means the Keeper of the Records of Scotland; but when carrying out any function in relation to the Register, the Keeper is to be known as the Keeper of the Register of Tartans, according to section 3(1) of the 2008 Act.

Together with the rest of the Act, so far as not in force, by way of commencement Order, section 3(1) comes into force on 5th February 2009 however the de facto position before and after that date is the same – there is a Keeper of the Records of Scotland. He has been consulted by the Scottish Ministers prior to the making of the Order. After section 3(1) comes into force he will be entitled the Keeper of the Register of Tartans in relation to his Register of Tartans functions.

His functions under section 4 are exercisable from 5th February. However he does not rely upon section 4 in order to be consulted or respond to consultation. It is arguable whether being consulted is a function or whether it requires no exercise of a function. The Keeper is not obliged to do anything in response to being consulted. If it is considered there is a function here it derives from section 14(3) rather than section 4, of the 2008 Act.

The Order making power under section 14(3) is exercised as an anticipatory exercise of powers as authorised by paragraph 10 of Schedule 1 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the
Scottish Parliament) Order 1999 (S.I. 1999/1379). In terms of that paragraph, it is considered necessary for the purpose of giving full effect to the Act, which establishes the Register (section 1), the functions of the Keeper (section 4) and a process for the registration of tartans (sections 5 – 13) all coming into force on 5th February 2009, that fees chargeable for services provided by the Keeper, in relation to the Register generally and the process of registration specifically, are specified from that date also.