SUBORDINATE LEGISLATION COMMITTEE

AGENDA

6th Meeting, 2009 (Session 3)

Tuesday 10 February 2009

The Committee will meet at 2.15 pm in Committee Room 3.

1. **Marine and Coastal Access Bill (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Marine and Coastal Access Bill (UK Parliament legislation).

2. **Coroners and Justice Bill (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Coroners and Justice Bill (UK Parliament legislation).

3. **Borders, Immigration and Citizenship Bill (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Borders, Immigration and Citizenship Bill (UK Parliament legislation).

4. **Instruments subject to approval:** The Committee will consider the following—
   
   - the Local Government Finance (Scotland) Order 2009;
   - the Local Government Finance Act 1992 (Scotland) Order 2009;
   - the Budget (Scotland) Acts 2007 and 2008 Amendment Order 2009 (SSI 2009/draft);
   - the Victim Statements (Prescribed Courts) (Scotland) Order 2009 (SSI 2009/draft).

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

   - the National Health Service (Superannuation Scheme, Pension Scheme and Injury Benefits) (Scotland) Amendment Regulations 2009 (SSI 2009/19).
The papers for this meeting are as follows—

**Agenda Items 1-5**

Legal Brief SL/S3/09/6/1 (P)
Summary of Recommendations SL/S3/09/6/2
Government Responses SL/S3/09/6/3

**Agenda Item 1**

*Marine and Coastal Access Bill*
*Legislative Consent Memorandum*

**Agenda Item 2**

*Coroners and Justice Bill*
*Legislative Consent Memorandum*

**Agenda Item 3**

*Borders, Immigration and Citizenship Bill*
*Legislative Consent Memorandum*
SUBORDINATE LEGISLATION COMMITTEE

6th Meeting, 2009 (Session 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.

Agenda Item 1 Marine and Coastal Access Bill (UK Parliament legislation)

Clause 63: Licensable marine activities

The Committee may wish to consider this delegated power acceptable in principle and agree that it should be subject to affirmative procedure. The Committee may wish to report concerns as to how the division of this power between the Scottish Ministers and the Secretary of State and the future exercise of their powers could affect the overall transparency of the statutory regime.

Clause 64: Applications

The Committee may wish to consider this power to be acceptable in principle and that it should be subject to negative procedure.

Clause 66: Determination of applications

The Committee may wish to consider this power to be acceptable in principle and that it should be subject to negative procedure.

Clause 67: Inquiries (extension of powers under section 210(7B) of the Local Government (Scotland) Act 1973

The Committee may wish to find this power acceptable in principle and that it is subject to no procedure.
Clause 70: Appeals against licensing decisions

The Committee may wish to consider this power to be acceptable in principle and that it should be subject to negative procedure.

Clause 71: Exemptions specified by order

The Committee may wish to consider this power to be acceptable in principle and that it should be subject to negative procedure but may also wish to draw the attention of the lead committee to the relationship between this power and the power under clause 63(3) and the circumstances in which the Parliament may expect the respective powers to be used.

Clause 90: Fixed monetary penalties

The Committee may wish to consider this power to be acceptable in principle and that it is subject to affirmative procedure.

Clause 92: Variable Monetary Penalties

The Committee may wish to consider this power to be acceptable in principle and that it is subject to affirmative procedure.

Clause 95: Delegation of Functions relating to Marine Licensing

The Committee may wish to consider this power to be acceptable in principle and that it is subject to affirmative procedure.

Clause 98: Register

The Committee may wish to consider this power to be acceptable in principle and that it is subject to affirmative procedure.
Clause 105: Appeals against notices

The Committee may wish to consider this power to be acceptable in principle and that it is subject to affirmative procedure.

Clause 203: Orders prohibiting the taking and sale of certain lobsters

The Committee may wish to consider this power to be acceptable in principle and that it is subject to negative procedure.

Agenda Item 2 Coroners and Justice Bill (UK Parliament legislation)

Clause 123 – Implementation of the E-Commerce and Services directives: penalties

The Committee may wish to draw this amendment to the power exercisable by the Scottish Ministers under section 2(2) of the European Communities Act 1972 to the attention of the lead committee on the grounds that it removes the current restrictions on maximum penalties which may be imposed in relation to offences under the exercise of that power. The Committee may wish to draw the attention of the lead committee to its view that where offences are to be created through the exercise of subordinate powers the maximum penalties applicable should be clearly specified in primary legislation.

Clause 152 – Information sharing – addition of sections 50A-F to Data Protection Act 1998

The Committee may wish to consider the provisions with respect to the power to make information-sharing orders acceptable.
Agenda Item 3  
Borders, Immigration and Citizenship Bill (UK Parliament legislation)

Clause 34(5): power to make supplementary etc. provision

While a power of the nature set out at clause 34(5), enabling the Scottish Ministers to make supplementary provision is not of itself exceptional, given—

(1) the context in which it has been provided (in consequence of provision made under Part 1 of the Bill which relates to reserved matters); and

(2) the absence of any reference to it in the draft motion and Memorandum, so that the Scottish Parliament’s consent has not been sought to the conferral of this power on the Scottish Ministers (as is required if such a provision is to be proceeded with in accordance with the Sewel Convention);

the Committee may wish to bring this provision to the attention of the Justice Committee for its further consideration.

Agenda Item 4  
Instruments subject to approval

The Local Government Finance (Scotland) Order 2009

The Local Government Finance Act 1992 (Scotland) Order 2009

The Committee may wish to consider that it is content with the Local Government Finance Act 1992 (Scotland) Order 2009.

So far as the Local Government Finance Act 1992 (Scotland) Order 2009, subject to being approved by the Parliament, will revoke the Local Government Finance (Scotland) Order 2009, the Committee may wish to note the position in regard to the intended revocation of the latter Order.
The Budget (Scotland) Acts 2007 and 2008 Amendment Order 2009 (SSI 2009/draft)

The Committee may wish to consider that it is content with this instrument as now presented, in replacement for the instrument of the same name which was withdrawn by the Scottish Government on 4th February 2009.

The Victim Statements (Prescribed Courts) (Scotland) Order 2009 (SSI 2009/draft)

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

Agenda Item 5 Instruments subject to annulment

The National Health Service (Superannuation Scheme, pension Scheme and Injury Benefits) (Scotland) Amendment Regulations 2009 (SSI 2009/19)

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

(a) regulation 18(b) is defectively drafted;

(b) regulation 61 (as it amends regulation 3.B.5(7) of the principal 2008 Regulations) is defectively drafted;

(c) there is a drafting error in regulation 81(b), but it is considered this error does not affect the validity or operation of the instrument.

The Committee may wish to consider welcoming the Government’s undertaking to correct the errors at (a) and (b) at an early date.
SUBORDINATE LEGISLATION COMMITTEE

6th Meeting, 2009 (Session 3)

Tuesday 10 February 2009

Scottish Government Responses

The Local Government Finance (Scotland) Order 2009 (SSI 2009/draft)

On 30th January 2009 the Scottish Government was asked:

With reference to article 5 and Schedule 2 of the Order, which provide for the redetermination of the amount of non-domestic rate income (‘NDRI’) to be redistributed to each local authority in respect of the financial year 2008-09,

a) to clarify the basis upon which there is calculated the ‘distributable amount’ of NDRI that can be apportioned amongst local authorities given that it appears that this is defined by reference to the amount specified under paragraph 9(4) of Schedule 12 to the Local Government Finance Act 1992.

b) to indicate the Scottish Government’s view on whether the total amount of NDRI payable to local authorities which has been redetermined under paragraph 1 of Schedule 12 may exceed the amount specified under paragraph 9(4) of Schedule 12 (that having been so specified in this case in article 3(1) of SSI 2008/33), and if so on what basis.

c) to indicate the Scottish Government’s view on whether and if so on what basis the distributable amount of NDRI can be altered.

d) to indicate the Scottish Government’s view on the effect of the provision contained at article 5 and Schedule 2, taken with the revocation of article 3 of the previous Order (SSI 2008/33), and whether this has resulted in alteration of the ‘distributable amount’.

In particular, to indicate the Government’s view on whether the power under paragraph 1(3) of Schedule 12 is limited to redetermining what each local authority receives by way of payment from the distributable amount, but does not permit amendment of the (total) distributable amount itself, and to explain the basis upon which a change in the distributable amount has therefore been effected(given that it has, in fact, been increased by £8 million from the distributable amount as was previously (per SSI 2009/33) specified.

The Scottish Government responds as follows:

a) According to paragraph 1(3) of Schedule 12 to the Local Government Finance Act 1992, the Scottish Ministers’ obligation in relation to non-domestic rate income is to determine a part of the distributable amount for a given year in relation to each authority. “Distributable amount”, according to paragraph 1(1)(b) has the meaning given in paragraph 9. This paragraph explains how a distributable amount is calculated. However, paragraph 9 makes clear that a distributable amount prepared at the
beginning of a year is an estimate. The amount “arrived at” and specified in an order made at the start of a financial year in compliance with paragraph 9 is therefore an estimate.

Paragraph 1(4) of the schedule clearly allows for the amendment or revocation or replacement of any order made under paragraph 1. It is therefore open to the Scottish Ministers to replace their previous determination under paragraph 1(3) of the amounts to be distributed to each authority.

b) As explained above, paragraph 1(4) of the schedule clearly allows for the amendment or revocation or replacement of any order made under paragraph 1. It is therefore open to the Scottish Ministers to replace their previous determination under paragraph 1(3) of the amounts to be distributed to each authority. There is no restriction of the powers in paragraph 1(4) and the Scottish Government consider that it is entirely within those powers to exceed the estimated distributable amount specified in an order under paragraph 9(4).

c) Please see the answer to questions a) and b).

d) The Scottish Government’s view is that the previous specification of the “distributable amount” in respect of the financial year 2008-2009 has been revoked by article 5. This is within the power in paragraph 1(4) of schedule 12. Schedule 2 of the Order specifies the part of the distributable amount for that year in relation to each authority. This is within the power in paragraph 1(3) of schedule 12. The new total distributable amount has not been specified but that is not required by the legislation. Such specification is only required under paragraph 9 for the amount estimated before a financial year begins.

The Scottish Government would understand the question to relate to the power under paragraph 1(4). For the reasons given above the Scottish Government does not accept that the power in paragraph 1(4) of schedule 12 is limited in the way suggested. The power in that paragraph clearly permits these changes to be made. In addition, a distributable amount arrived at under paragraph 9 is expressly described as an estimate, which raises the clear inference that the final figure may be different.

The Local Government Finance (Scotland) Order 2009 which was laid on 22 January 2009 has been revoked by the Local Government Finance Act 1992 (Scotland) Order 2009 (laid on 4 February 2009) and will be considered together at the Committee’s meeting on 10 February 2009.

The Budget (Scotland) Acts 2007 and 2008 Amendment Order 2009 (SSI 2009/draft)

The SLC has asked the Scottish Government in relation to the draft Budget (Scotland) Acts 2007 and 2008 Amendment Order 2009:

1) In relation to the amendments made by this instrument to provisions contained within the Budget (Scotland) Act 2007 in respect of the completed financial year 2007-8 and, given that any change in the authority for expenditure conferred by the 2007 Act would appear to be made in relation to a period (and therefore expenditure) now in the past, to
explain whether and is so how such changes, while made under the Budget (Scotland) Act 2007, are consistent with

a) the wider statutory framework relating to the subject matter of this instrument, in particular with the Public Finance and Accountability (Scotland) Act 2000, including the provision contained at section 1 and 3 of that Act concerning the authorisation of the use of resources, and contingencies and

b) any other restrictions which may be inherent in the power conferred by section 7(1) of the 2007 Act

2) In article 6(3)(i) to confirm whether the figure first referred to there, namely '£9,724,769,000' should not read '£9,724,612,000' as it appears in the relevant column of Schedule 1 to the Budget (Scotland) Act 2008 (as amended by SSI2008/424) and, if so, to indicate how the Scottish Government would intend addressing this point.

3) In article 7(5) to explain the meaning of sub-paragraph (b), to the extent that article 7(5)(b)(ii) refers to item 6 of column 2 of Part 4, whereas the introduction to article 7(5)(b) indicates that it is concerned with item 6, column 1.

4) In article 8(3), which relates to a column in Schedule 3 headed 'amount of accruing resources', to confirm whether the reference should have been to column 4, and not 3, as it appears, and, if so, to indicate how the Scottish Government would intend addressing this point.

The Scottish Government replies as follows:

1) The Scottish Government considers that a Budget Revision Order ("BRO") made under section 7(1) of an annual Budget (Scotland) Act may amend the Budget Act both within the financial year to which the Budget Act relates and after the end of that year. This allows expenditure to be adjusted both as regards amount and purposes.

That the power to amend carries on after the end of the financial year is clear from the fact that a Budget Act (other than emergency provisions) is not repealed, and there is no time limit in a Budget Act on the continuing use of the power.

Secondly if it could only be used within the financial year to which it relates, an absurd effect would result, namely that it would not be possible to use it towards the end of the financial year given the time it takes to process a BRO.

Thirdly such a power is normal and almost essential in accounting terms given that adjustments after the end of the financial year may be necessary for a number of reasons, e.g. a) expenditure has to be retrospectively reclassified because of say a Treasury or EC ruling; b) accruing resources come to light relating to a previous year.

This retrospective budgetary legitimisation is also essential in that in Scotland expenditure must have budgetary cover in terms of section 1 of the Public Finance and Accountability (Scotland) Act 2000.
An adjustment of a financial year’s budget after the end of a financial year could of course be made in the subsequent Budget Act as in the Budget (Scotland) Act 2003, but this does not affect the power to do it by BRO. It just shows how such adjustments can be necessary for good legal and accounting reasons.

This BRO power also sits along side the contingency reserve power in section 3 of a Budget Act. That power is tailored for emergencies where budgetary cover cannot be obtained for reasons of urgency. It implies that budgetary cover is obtained in advance of expenditure. That is correct normally in cases where the requirement can be anticipated, but as stated above, this is not always possible and retrospective adjustments have to be made for various reasons and the power has to be read in that light.

Finally as regards limits to the use of a BRO, the Scottish Government considers that it must be used for genuine accounting reasons and cannot be used as an artificial way of getting round primary provisions such as authorisation limits in emergency arrangements in terms of section 6 of a Budget Act and section 2 of the Public Finance and Accountability (Scotland) Act 2000. We think it also likely that the courts might think that the use of the power was subject to a reasonable time limit and not to be used after say 5 to 10 years.

As regards questions 2), 3) and (4), the Scottish Government accepts that there are drafting errors and although the meaning could be construed unambiguously, the errors are best rectified. The Scottish Government is accordingly seeking to withdraw this instrument and submit a new instrument with the errors rectified.

The Budget (Scotland) Acts 2007 and 2008 Amendment Order 2009 laid on 27 January 2009 has now been withdrawn and replaced by the Budget (Scotland) Acts 2007 and 2008 Amendment Order 2009 (laid on 4 February 2009) which has corrected the drafting errors highlighted in questions (2), (3) and (4).

The National Health Service (Superannuation Scheme, etc.) (Scotland) Amendment Regulations 2009 (SSI 2009/19)

On 29th January 2009 the Scottish Government was asked:

(a) in regard to regulation 18(b), to explain the meaning and effect (if any) of the insertion of sub-paragraph (aa) into the definition of “due date” in regulation T9(4) of the principal 1995 Regulations, given that the beginning of that definition remains as- “the later of the applicable day described in paragraph (a), and the day described in paragraph (b)" with no operative reference to paragraph (aa). Is it considered that the meaning and effect of this provision could be made clearer?

(b) in regard to regulation 61, to explain the intended meaning and effect of the insertion of “but” into regulation 3.B.5(7), given that it appears the wording of that regulation becomes- “ A practitioner who opts not to contribute to the scheme in respect of his or her employment as a practitioner but may, nevertheless, participate in the scheme in respect of concurrent employment as an officer under Part 2.”. Is it considered that the meaning and effect of this could be made clearer?
(c) in regard to regulation 81(b), to explain the meaning and effect of “;and” at the end of that paragraph. Is it intended to have a further provision after that word, or is the word added as a typographical error?

The Scottish Government responds:

(a) The Scottish Government considers that the insertion of paragraph (aa) has no effect on the definition of "due date" given the opening words of that definition. The Scottish Government therefore undertakes to amend the opening words to insert reference to paragraph (aa) after "the later of the applicable day described in paragraph (a)", at the earliest opportunity.

(b) It is considered that the addition of the word "but" has no effect on the meaning of regulation 3.B.5(7) and therefore will be removed by the Scottish Government at the earliest opportunity.

(c) The text ";and" is a typographical error and will be dealt with by correction slip.