SUBORDINATE LEGISLATION COMMITTEE

AGENDA

13th Meeting, 2009 (Session 3)

Tuesday 21 April 2009

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

1. **Decision on taking business in private:** The Committee will decide whether to take item 6 in private.

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


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

   the Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) Order 2009 (SSI 2009/115);
   the Charities and Benevolent Fundraising (Scotland) Regulations 2009 (SSI 2009/121);
   the Diligence against Earnings (Variation) (Scotland) Revocation Regulations 2009 (SSI 2009/133);
   the National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment Regulations 2009 (SSI 2009/124).

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

   the Housing (Scotland) Act 2006 (Commencement No. 7, Savings and Transitional Provisions) Order 2009 (SSI 2009/122);
   Act of Sederunt (Rules of the Court of Session Amendment No. 6) (Building Society Special Administration etc.) 2009 (SSI 2009/135).
6. **Draft Interpretation and Legislative Reform (Scotland) Bill** The Committee will consider a paper from the clerk on the draft Bill.

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The papers for this meeting are as follows—

**Agenda Items 1-5**

- Legal Brief
  - SL/S3/09/13/1 (P)
- Summary of Recommendations
  - SL/S3/09/13/2

**Agenda Item 2**

- Coroners and Justice LCM
  - SL/S3/09/13/3

**Agenda Items 3-5**

- Government Responses
  - SL/S3/09/13/4

**Agenda Item 6**

- Paper by the Clerk
  - SL/S3/09/13/5 (P)
- Interpretation and Legislative Reform Bill (Consultation Paper)
  - SL/S3/09/13/6 (P)
- Consultation responses
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 2  Coroners and Justice Bill**

**Clause 41 – Amendments to the Fatal Accidents and Sudden Deaths Inquiry (Scotland)**

The Committee may wish to report to the lead committee that the effect of clause 41 of the Coroners and Justice Bill is that rules may be made by the Scottish Ministers under section 7 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 in respect of the investigation of the deaths of service personnel on active service abroad and the deaths of civilians subject to service discipline accompanying personnel on active service abroad and that any such rules (or amendment of the existing rules under the 1976 Act) will not be subject to parliamentary procedure.

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**Agenda Item 3  Instruments subject to approval**


The Committee is invited to find the draft instrument satisfactory.

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**Agenda Item 4  Instruments subject to annulment**

**The Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) Order 2009 (SSI 2009/115)**

The Committee may wish to draw this instrument to the attention of the lead committee and the Parliament on the ground that there are drafting errors in article
7(9) and 7(10)(b), but it is not considered likely that these errors affect the operation of the instrument.

The Charities and Benevolent Fundraising (Scotland) Regulations 2009 (SSI 2009/121)

The Committee may wish to consider whether the explanation provided by the Scottish Government – that the purpose of the regulations is the regulation of fundraising - is satisfactory, and, if so, to report this instrument to the lead committee and to the Parliament on the ground that a response has been provided by the Government to the Committee, with which it may be satisfied.

The Diligence against Earnings (Variation) (Scotland) Revocation Regulations 2009 (SSI 2009/133)

The Committee may wish to report to the Parliament that the Committee finds satisfactory for its interests the explanation given by the Scottish Government in their letter to the Presiding Officer dated 27th March 2009 for the failure to comply with Article 10(2) of the Scotland Act 1998 (Transitory and Transitional Provisions)(Statutory Instruments) Order 1999.

The Committee may wish to indicate that it is otherwise content with this instrument.

The National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment Regulations 2009 (SSI 2009/124)

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

Agenda Item 5 Instruments not laid before Parliament

The Housing (Scotland) Act 2006 (Commencement No 7, Savings and Transitional Provisions) Order 2009 (SSI 2009/122)

The Committee may wish to take the view that the Government's response does indicate that full consideration appears to have been given to commencement options, including stakeholder engagement in that regard, and, on this occasion, to note the response as being acceptable.
The Committee may wish to consider if it is content with this instrument.
SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

Coroners and Justice Bill

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Parliament agrees that the relevant provisions of the Coroners and Justice Bill, introduced in the House of Commons on 14 January 2009, relating to the EU Services Directive, criminal memoirs and the Scottish system of investigation of deaths and fatal accident inquiries into deaths abroad of members of the armed forces and others, so far as these provisions relate to matters within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Kenny MacAskill, Cabinet Secretary for Justice, under Rule 9.B.3.1(c) of the Parliament’s Standing Orders. The Coroners and Justice Bill was introduced in the House of Commons on 14 January 2009. The Bill can be found at:

http://www.publications.parliament.uk/pa/cm200809/cmbills/009/09009.i-v.html

3. An earlier legislative consent memorandum relating to the Coroners and Justice Bill was lodged by Kenny MacAskill, Cabinet Secretary for Justice, on 20 January 2009.

Update on Information Sharing Gateways

4. In light of recent developments, the Scottish Government is no longer seeking consent to the provisions in the UK Bill relating to the power to create information sharing gateways. As a result, the Scottish Government does not intend to lodge a motion in the terms set out in the memorandum of 20 January. It will instead bring forward the revised motion set out at paragraph 1 above.

5. The Scottish Government’s revised assessment of the information gateway provisions was notified to the Parliament on 2 March in a letter from the Cabinet Secretary for Justice to Bill Aitken MSP, Convener of the Justice Committee.

6. This revised position reflected emerging concern about the effect of the provisions. In particular, important criticisms had been expressed in evidence given to the Justice Committee and in a paper published on 7 February by the UK Information Commissioner’s Office.

7. In light of the significant concerns expressed by the Scottish Government and others, the UK Government has now indicated that it intends to drop the provisions from the UK Bill and attempt to reach a consensus on a scaled-back version of the proposals for inclusion in a future Bill. A statement to this effect was made by Jack Straw, the UK Minister for Justice, on 8 March 2009.
Continued relevance of the memorandum of 20 January

8. The memorandum lodged on 20 January dealt with three matters falling within devolved competence. Of these, the Scottish Government remains content to seek the consent of the Scottish Parliament in relation to provisions concerning the EU Services Directive and criminal memoirs.

9. The revised draft motion therefore omits reference to the power to create information sharing gateways. However, it continues to cover the EU Services Directive and criminal memoirs elements of the UK Bill and is extended to encompass the new provisions relating to Fatal Accidents and Sudden Deaths which form the principal subject matter of this memorandum.

10. The Justice Committee has already considered and reported on the EU Services Directive and criminal memoirs provisions in the UK Bill (7th Report, 2009 (Session 3), published on 12 March 2009). Since both the provisions themselves and the Scottish Government’s position remain unaltered, these matters are not re-examined in this memorandum.

Content of the Coroners and Justice Bill

11. The Coroners and Justice Bill is a bill in nine parts amending the law for purposes connected to coroners, the certification and registration of deaths, dealing with offenders, benefits derived from the exploitation of materials pertaining to offences and data protection.

Fatal Accidents and Sudden Deaths – Military Personnel

12. UK Government amendments to the Coroners and Justice Bill requiring a supplementary legislative consent memorandum in addition to the previously identified provisions have now been tabled at Report stage in the House of Commons. The amendments can be found at:


13. The amendments establish jurisdiction under the Scottish system of investigation of deaths and fatal accident inquiries in relation to the transfer to that jurisdiction of responsibility for the investigation of the deaths of members of the armed forces and related categories of personnel with a link to Scotland who die while engaged in operational theatres outwith the British Isles, in order that inquiry into the circumstances of their deaths can be conducted in Scotland, closer to the homes of bereaved relatives.

14. The amendments provide for either the Secretary of State for Defence or the Chief Coroner of England and Wales to request from the Lord Advocate an agreement to hold a fatal accident inquiry into relevant cases, in specific circumstances.
Fatal Accidents and Sudden Deaths – amendments which relate to Scotland

15. The amendments are made to the Fatal Accident and Sudden Death Inquiries (Scotland) Act 1976 ("the 1976 Act"), which establishes the circumstances under which a death requires to be investigated and under which a fatal accident inquiry may be held.

16. Provision is required to enable the Lord Advocate to accept the transfer to the jurisdiction under the 1976 Act of responsibility for investigating deaths abroad under the specified circumstances, instead of it being dealt with in the coroners’ inquest system in the rest of the UK. This would cover military and associated personnel overseas on military operations associated with preparation, training or direct engagement for active service in operational theatres/conflict zones, where appropriate.

17. A reciprocal transfer mechanism back to the coroners system where this becomes necessary is also provided for in Part 1 of the Coroners and Justice Bill. This might, for example, occur in circumstances where a body were returned direct to Scotland but it then became clear that it would be more appropriate to hold an inquest in England.

18. Under current legislation, fatal accident inquiries may not be held into deaths occurring out with Scotland and its territorial waters, save in those cases occurring on oil installations on the UK continental shelf which are considered as occurring within Scotland for these purposes.

Fatal Accidents and Sudden Deaths – reasons for seeking a legislative consent motion

19. Current military operations in Iraq and Afghanistan and the distress caused to bereaved service families based in Scotland by the requirement to travel to southern England for coroners’ inquests highlight the benefits of these amendments.

20. Moreover, these circumstances suggest that it would be undesirable to await the outcome of Lord Cullen’s review of legislation covering fatal accident inquiries before introducing the ability to investigate deaths abroad for these purposes. Lord Cullen’s review is considering the wider investigation of the deaths of all Scots abroad, and those more general issues can be dealt with in light of the outcome of Lord Cullen’s review and on receipt of Lord Cullen’s recommendations.

21. The Coroners and Justice Bill introduces the office of Chief Coroner for England and Wales, and provides for the power of the Chief Coroner to transfer inquests between jurisdictions of different coroners. It provides an appropriate and more timely legislative vehicle for introducing the required changes enabling such inquiries to be held in Scotland. Amendments to the Bill on 17 March 2009 make provision in Part 1 for a request to be made by the Secretary of State (for Defence) or the Chief Coroner to the Lord Advocate for the transfer of responsibility for the death to the Scottish system of investigation of deaths under the 1976 Act. The Bill also makes amendments to the jurisdiction under the 1976 Act.

22. The amendments made to the Bill relate both to devolved matters and to matters outwith the legislative competence of the Parliament. The consent of the Scottish Parliament is required in light of the effect of the changes to the 1976 Act extending the
civil system of investigation of deaths and fatal accident inquiries in Scotland for the categories of persons affected, including the ability to accept transfers into the Scottish system, to carry out an investigation where a transfer has occurred, and for an application to the sheriff for an inquiry to be held.

23. Consent is not required in relation to the operation of the coroners’ system in England and Wales or to matters falling within the defence reservation in paragraph 9 of Part I of Schedule 5 to the Scotland Act 1998.

Fatal Accidents and Sudden Deaths – financial Implications

24. Agreement to the legislative consent motion will require the Crown Office and Procurator Fiscal Service to take on additional - and potentially complex - cases and to prepare its staff to deal with investigations into deaths occurring abroad in the specified circumstances. New and challenging issues may arise for COPFS staff from these cases and they will need to develop expertise in this new area of work. The Lord Advocate has requested that the demands which this additional work will place on COPFS should be kept under regular review.

25. Other financial and other resource implications - including court time and judicial resources - will be directly related to the unpredictable volume of relevant cases. These are a product of overseas British military engagements and outwith the control of Scottish Ministers. From 2001 - 2008 there were approximately 30 Scottish deaths arising from British military operations in Kuwait, Iraq and Afghanistan.

Conclusion

26. By enabling inquiries to be held in Scotland, this memorandum reflects the clear will of many Members contributing from different parts of the Chamber in the debate held on 27 March 2008, details of which can be found at:

http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-08/sor0327-02.htm#Col7474

Scottish Government
March 2009
The Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) Order 2009 (SSI 2009/115)

On 25th March 2009 the Scottish Government was asked:

(1) in relation to the drafting of article 7(9) of the Order, whether it is considered that the words “the “the relevant district court”” are intended to refer to “the “relevant district court””; and what is the effect of this apparent drafting error considered to be, in particular as it applies to article 6(1) which refers to “a relevant district court” not “the relevant district court”?

(2) in relation to the first line of article 7(10), and 7(10)(b), to explain the effect of the apparent drafting error in respect of the duplication of the words “references to”?

The Scottish Government responds as follows:

We are grateful to the Legal Adviser to the Subordinate Legislation Committee for flagging up these points.

In relation to question (1) we consider that the reference to “…the “the relevant district court…” should indeed refer to “…the “relevant district court”…” . We do not think that the error identified has any substantive effect on the meaning of articles 6 and 7.

On a strict interpretation of article 7(9) one may take the view that the reference to “a relevant district court” in article 6(1) would not be glossed for the purposes of cases in the District Court of East Ayrshire at Cumnock. Given the context of the reference, in that it follows the proposition that article 6 as a whole is to apply to cases in that District Court when sitting at that location, we do not think that would be an logical interpretation of the provision in its proper context.

Further, even if that strict interpretation is applied, paragraph (10)(a) provides that references to “relevant district court” are to be read as references to the District Court of East Ayrshire, where paragraph (9) applies. This interpretive gloss would therefore apply to article 6(1). Given that paragraph (9) is limited to cases in that district court when sitting at Cumnock the result is the same as if the gloss in article (9) applied, namely, that article 6(1) is read as applying to cases in a relevant district court and to cases in the District Court of East Ayrshire while sitting at Cumnock.

In relation to question (2) we consider that the addition of the words “references to” in article 7(10)(b) are superfluous given the terms of the first line of article 7(10). Although they detract from the readability of the article we do not think there is any effect on the
interpretation of that provision. It is clear that, where article 7(9) applies, references to
the appointed JP court are to be read as reference to the JP Court for Ayr.

The Charities and Benevolent Fundraising (Scotland) Regulations 2009
(SSI 2009/121)

On 26th March 2009, the Scottish Government was asked:

To explain and justify why the provision in regulation 5(6)(b) does not relate to the
reserved matter of the regulation of the sale and supply of goods to consumers (in terms
of Section C7(a) of Part II, Schedule 5 to the Scotland Act 1998) and so is intra vires,
given that—

(a) it appears that the effect of that paragraph is that a person making a payment of
£100 of more (albeit in the circumstances described in regulation 5(1) or (2)) is
not entitled to a payment refund within 7 days if on a sale of goods already
received, there cannot be restitution of the goods (and it appears generally that
this regulates the sale of goods) and

(b) the enabling powers cited in section 83 of the Charities and Trustee Investment
(Scotland) Act 2005 do not contain provisions in relation to the regulation of the
sale of goods.

The Scottish Government responds as follows:

Section 83(2)(e) of the Charities and Trustee Investment (Scotland) Act 2005 provides
that regulations made under section 83(1) (Regulations about fundraising), may in
particular, make provision “about circumstances in which payments or agreements made
in response to i) solicitations or representations of the type described in paragraph
83(2)(c), or benevolent fundraising, may be refunded or, as the case may be,
cancelled”. Regulation 5(6)(b) of the Charities and Benevolent Fundraising (Scotland)
Regulations 2009 provides that refunds may only be made to a donor that has made a
charitable donation to a professional fundraiser or commercial participator in exchange
for goods, if that donor returns the goods. Regulation 5(6)(b) regulates the refund of
charitable donations, it is not concerned with the actual sale of the goods or the supply
of the goods in question. Its concern is the charitable donation and the circumstances in
which that donation can be reimbursed. The purpose of the provision is therefore the
regulation of fundraising.

It is the Government’s view therefore that Regulation 5(6)(b) does not engage the C7(a)
reservation of Part II, Schedule 5 to the Scotland Act 1998 of regulating the sale and
supply of goods and services to consumers.

On 1 April the Scottish Government was asked:

To explain why it was not possible, in respect of the Housing (Scotland) Act 2006 (Commencement No. 7, Savings and Transitional Provisions) Order 2009, to allow a greater number of days between the making of this instrument on 24th March 2009 and the coming into force of various provisions on 1st April 2009, which might have made possible both the SLC’s scrutiny and report on this instrument prior to the provisions concerned coming into force, and allowed persons and bodies interested in the instrument a greater period of time to be informed of its effects prior to the provisions concerned coming into force.

The Scottish Government responds as follows:

The Scottish Government appreciates the advantages that are offered by SLC scrutiny and report and regrets that on this occasion the timescale was insufficient to allow such scrutiny prior to commencement of the Order.

As is apparent from its terms, although the Order commences a list of sections that is relatively straightforward, the associated savings and transitional provisions are complex. A change of approach late in the drafting process necessitated considerable redrafting of these provisions, which resulted in the instrument being made later than had originally been intended.

Consideration was given to deferring the commencement date, but stakeholders were aware of the intention to commence the provisions on 1st April 2009, with savings generally of the type that the Order contains. As is explained at paragraph 3 of the Explanatory Note the intention, for a transitional period of a year, is to operate the new scheme for grant assistance which the Order commences alongside the existing grant scheme. The comparatively short notice of the detail of the Order has therefore not caused difficulties for stakeholders, as it commences a transitional period rather than immediately introduces an altered scheme. The Scottish Government decided in these circumstances to maintain the intended commencement date.