SUBORDINATE LEGISLATION COMMITTEE

AGENDA

16th Meeting, 2009 (Session 3)

Tuesday 12 May 2009

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

1. **Schools (Consultation) (Scotland) Bill:** The Committee will take evidence on the delegated powers in the Bill at Stage 1 from—

   Lynn Henni, Bill Team Leader, and Laurence Sullivan, Senior Principal Legal Officer, Scottish Government.

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

   the Adoption Support Services and Allowances (Scotland) Regulations 2009 (SSI 2009/152);
   the Plant Health (Scotland) Amendment Order 2009 (SSI 2009/153);
   the Adoption Agencies (Scotland) Regulations 2009 (SSI 2009/154);
   the Rural Development Contracts (Land Managers Options) (Scotland) Amendment Regulations 2009 (SSI 2009/155);
   Act of Sederunt (Fees of Members of the Association of Commercial Attorneys in the Sheriff Court) 2009 (SSI 2009/162);
   the National Health Service (Appointment of Consultants) (Scotland) Regulations 2009 (SSI 2009/166);
   the Adoption and Children (Scotland) Act 2007 (Supervision Requirement Reports in Applications for Permanence Orders) Regulations 2009 (SSI 2009/169);
   the Applications to the Court of Session to Annul Convention Adoptions or Overseas Adoptions (Scotland) Regulations 2009 (SSI 2009/170).

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

   Act of Sederunt (Sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990) (Association of Commercial Attorneys) 2009 (SSI 2009/163);
the Fees in the Registers of Scotland Amendment Order 2009 (SSI 2009/171);

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The papers for this meeting are as follows—

**Agenda Items 1-3**

Legal Brief SL/S3/09/16/1 (P)

Summary of Recommendations SL/S3/09/16/2

Government Responses SL/S3/09/16/3
SUBORDINATE LEGISLATION COMMITTEE

16th 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 2  Instruments subject to annulment

The Adoption Support Services and Allowances (Scotland) Regulations 2009 (SSI 2009/152)

The Committee may wish to take the view that while, on initial consideration, regulation 11 might appear to be an unusual or unexpected use of the powers conferred by section 71, the position is satisfactorily explained and justified within the Government's response, such that the Committee may on this occasion wish to note the response as satisfactory, and to report accordingly to the lead Committee and Parliament.

The Plant Health (Scotland) Amendment Order 2009 (SSI 2009/153)

The Committee may wish to report to Parliament that it notes the explanation given by the Scottish Government for the failure to refer to wood and bark of the plants mentioned in item 1a added by Article 6(1)(a) of the Order. It may note that the transposition of these EU requirements appears to have been effected by a UK Statutory Instrument, the Plant Health (Forestry) (Amendment) Order 2009 (SI 2009/594).

In relation to item 7a inserted by Article 6(2)(a) of the Order the Committee may wish to report that the Government has admitted that the order is defectively drafted and has undertaken to correct this at the first appropriate opportunity.
The Adoption Agencies (Scotland) Regulations 2009 (SSI 2009/154)

The Committee may wish to consider reporting the instrument to the lead Committee and to the Parliament on the ground that it considers that, having regard to ensuring effective Parliamentary scrutiny, due account should be had to scheduling issues concerning related instruments to which reference is being made, so as to avoid reference to provisions contained in a still to be made instrument, where it is possible to do so, as a matter of good drafting practice.

The Rural Development Contracts (Land Managers Options) (Scotland) Amendment Regulations 2009 (SSI 2009/155)

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

- in relation to the meaning and effect of the rates of payment stated for “Action One-Implementing biosecurity” in the new Land Managers Option 22 (at the top of page 7), the meaning and effect could be made clearer. The Scottish Government have indicated that it shall amend the provision in due course;

- in relation to condition (f) in “Action Four – preventing lameness” in the new Land Managers Option 22 (at the foot of page 11), there is a point of defective drafting in respect that “untaken” should read “undertaken”. The Government have undertaken to amend the provision in due course. It is not considered likely that this error shall affect the operation of the instrument.

Act of Sederunt (Fees of Members of the Association of Commercial Attorneys in the Sheriff Court) 2009 (SSI 2009/162)

The National Health Service (Appointment of Consultants) (Scotland) Regulations 2009 (SSI 2009/166)

The Adoption and Children (Scotland) Act 2007 (Supervision Requirement Reports in Applications for Permanence Orders) Regulations 2009 (SSI 2009/169)

The Applications to the Court of Session to Annul Convention Adoptions or Overseas Adoptions (Scotland) Regulations 2009 (SSI 2009/170)

The Committee may wish to consider if it is content with these instruments.
Agenda Item 3  Instruments not laid before Parliament


The Committee may wish to consider drawing this instrument to the attention of the Parliament on the ground that, in relation to the citation of enabling powers in the preamble, there has been a drafting error, but not such as is considered to affect the validity or the operation of the instrument.

The Fees in the Registers of Scotland Amendment Order 2009 (SSI 2009/171)

The Damages (Asbestos-related Conditions) (Scotland) Act 2009 (Commencement) Order 2009 (SSI 2009/172)

The Committee may wish to consider if it is content with these instruments.
The Adoption Support Services and Allowances (Scotland) Regulations 2009 (SSI 2009/152)

On 1st May the Scottish Government was asked:

given that the ordinary meaning of “allowance” in this context may be said to be “a definite portion, sum, or amount, allotted or granted to meet any expenses or requirements” (Oxford English Dictionary) to explain why regulation 11 is thought to be within the scope of powers of section 71(3) as read with the meaning of allowance scheme in section 71(2) insofar as provision is made for an adoption allowance to include an element of remuneration, being a reward rather than an amount to meet expenses.

The Scottish Government responds as follows:

Regulation 11, which includes the remuneration reference, is very narrow in application. It provides that an adoption allowance may include “an element of remuneration” where the adoptive parent has been a foster carer or kinship carer for the adoptive child and where that person, as a foster parent or kinship carer, was previously receiving remuneration from the adoption agency. Any such remuneration will usually end within 2 years of the adoption order being made under regulation 11(2). The policy intention of regulation 11 is to ensure that a foster parent / kinship carer is not financially disadvantaged by adopting the child they were already caring for. It would be unfortunate if arriving at a beneficial, permanent solution to the child’s situation (i.e. the child being adopted by those already caring for him) triggered financial disadvantage on the part of the adoptive parent. Regulation 11 guards against that possibility.

Given the narrow circumstances in which remuneration can be made under regulation 11, we are of the view that it does fit within an ordinary meaning of “allowance”. It is to be noted that regulation 11(1) provides that an allowance “may include an element of remuneration” so there is no question of an allowance consisting entirely, or even substantially, of remuneration – rather remuneration can be no more than one element, amongst several, within an allowance.

Ordinary meanings of allowance can encompass remuneration. Remuneration means “money paid for work or a service” (the New Oxford Dictionary of English 1998). The same dictionary gives the following meaning of allowance: “a sum of money paid regularly to a person to meet specified needs or expenses” while the Compact Oxford English Dictionary refers to “an amount of money that can be earned”. Therefore allowance can incorporate notions of pay and earning that are more obviously associated with remuneration.
We also note that section 117(2) is referred to as an enabling power for the Regulations. If it is not accepted that allowance encompasses "an element of remuneration" within its ordinary meaning, as we contend, then it is submitted that including an element of remuneration, within the narrow parameters prescribed in regulation 11, is incidental or supplemental to the payment of an adoption allowance following adoption allowances schemes made under section 71 and these Regulations.

**The Plant Health (Scotland) Amendment Order 2009 (SSI 2009/153)**

On 1 May the Committee asked the Scottish Government for an explanation of the following matters ——

(a) why wood and bark of the plants referred to has been omitted from the description of plants in item 1a added by Article 6(1)(a)(i) of the Order when the corresponding entry inserted by para 2(a)(i) of the Annex to the Directive appears to apply to wood and bark;

(b) why only plants intended for planting are listed in item 7a inserted by article 6(2)(a) of the Order when the corresponding entry inserted by para 2(d)(i) of the Annex to the Directive does not appear to be restricted to plants intended for planting;

(c) Whether given these omissions the Directive has been fully transposed.

**The Scottish Government respond as follows:**

(a) The Forestry Commission has responsibility for the control of wood and bark and these items are covered by the Plant Health (Forestry) Amendment Order 2009.

(b) The Scottish Government is grateful to the Committee for drawing attention to this error. This matter will be attended to by way of an amendment at the first appropriate opportunity. However, there is little trade of these plants (*Citrus* L, *Fortunella* Swingle and *Poncirus* Raf) in Scotland so the error is unlikely to have any practical effect.

(c) The Scottish Government believes that the Directive is fully transposed in Scotland by The Plant Health (Scotland) Amendment Order 2009 and The Plant Health (Forestry) Amendment Order 2009 and the UK as a whole by similar statutory instruments in England, Wales and Northern Ireland.
The Adoption Agencies (Scotland) Regulations 2009 (SSI 2009/154)

On 1st May 2009 the Scottish Government was asked:

(a) whether the references in regulation 28 to the Adoption (Disclosure of Information and Medical Information about Natural Parents) (Scotland) Regulations 2009 (“the Disclosure Regulations”) which were not made nor laid in draft before the Scottish Parliament when the Regulations were made can have any meaning or effect as at the date the Regulations were made;

(b) why it is considered appropriate to make and submit the Regulations for parliamentary scrutiny in advance of the Disclosure Regulations having been made;

(c) in relation to regulations 13(6) and 23(4) in so far as these refer, by way of footnotes, to amendments to provisions which are not yet in force, to clarify the Scottish Government's position in regard to commencement of the provisions concerned.

The Scottish Government responds as follows:

(a) The Regulations and the Disclosure Regulations form part of a series of statutory instruments required to implement the Adoption and Children (Scotland) Act 2007 (“the 2007 Act”). They each require different parliamentary procedures. The Regulations are subject to negative resolution procedure whilst the Disclosure Regulations are subject to the affirmative procedure. The coming into force date for both instruments is 28th September 2009. Whilst it is a matter for the Scottish Parliament whether or not to annul the Regulations (subject to negative procedure) or to approve the Disclosure Regulations (subject to affirmative procedure) should both instruments come into force on 28th September 2009 then the reference in regulation 28 of the Regulations to the Disclosure Regulations will have legal effect. Although the Regulations have already been made, until that date the provision has no legal effect.

(b) As noted in the preceding paragraph both instruments are intended to come into force on the same date but both are subject to different forms of parliamentary procedure. They both form part of a suite of instruments required to give effect to the 2007 Act. The Regulations have been laid at this stage to allow sufficient time for parliamentary scrutiny and so that local authorities may have time to revise their procedures for adoption in time for 28th September. In order to manage the process of consultation and following discussion with partners the instruments were consulted on in discrete blocks. Consultation on the Regulations ended on 29th August 2008 whilst consultation on the Disclosure Regulations was carried out in 2 stages ending on 8th October 2008 for disclosure of information and 28th January 2009 for disclosure of medical information about natural parents. It has therefore not been possible to have the Disclosure Regulations finalised, laid in Parliament and made in advance of the making of the Regulations. If Parliament approves the Disclosure Regulations and does not annul the Regulations the date regulation 28 has legal effect will be synchronous with the Disclosure Regulations.

(c) The intention of the Scottish Government is to commence those provisions of the 2007 Act which are not already in force (and these include the amendments in
schedule 1 to the Act referred to in the footnotes in regulations 13(6) and 23(4)) on 28th September. It is therefore considered appropriate to narrate these amendments in the footnotes of this instrument.

The Rural Development Contracts (Land Managers Options) (Scotland) Amendment Regulations 2009 (SSI 2009/155)

On 1 May 2009 the Committee asked the Scottish Government for an explanation of the following matters—

(a) In relation to the meaning and effect of the “Rate of Payment” stated for “Action One – implementing biosecurity” in the new Land Managers Option 22 (at the top of page 7), are the stated rates of £30.00 per hectare on non nitrate vulnerable zone (NVZ) land and £29 per hectare on NVZ land in addition to the rate of £372 per scheme year, or is £372 the maximum rate of payment? Is it considered that the meaning and effect of the rates could be made clearer?

(b) In relation to the meaning and effect of condition (f) in “Action Four – preventing lameness” in the new Option 22 (at the foot of page 11) is it intended that “untaken” should be “undertaken”? What is the effect of this provision considered to be, given that “untaken” means “not taken”?

The Scottish Government respond as follows:

(a) £372 is the standard rate of payment in respect of actions undertaken under Action One – implementing biosecurity. Payments of £29 and £30 per hectare for nitrate vulnerable zone (NVZ) and non NVZ land respectively are made in addition to the standard rate of payment. These additional payments relate to (b) in Action One, and are payable where the separation facility is a field based separation facility, to compensate for loss of grazing, up to a loss of a maximum 5 hectares. Extensive guidance in respect of the Scotland Rural Development Programme is made available to applicants, and we shall ensure that the terms of payment under this action are made clear within this Guidance.

We shall also move, at first amendment, to reword this provision to note that the sums in respect of NVZ and non NVZ land are available in addition for loss of grazing in terms of field based separation facilities under (b) in Column 2 below.

(b) The Scottish Government is grateful to the Committee for drawing attention to this typographical error, which should read “undertaken”. We shall move, at first amendment to correct this error. We note that this error is apparent when Action Four of the Option is read in context, and shall ensure that the Guidance issued to applicants in respect of this Option is clear on this matter.
The Committee asks the Lord President’s Private Office to confirm whether the preamble to this instrument, in stating that it is enacted under powers conferred by section 27(7)(a) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 should not, instead, have referred to section 26(7)(a) of that Act and if so, to indicate the view of the Lord President’s Private Office on the consequences of that erroneous reference.

The Lord President’s Private Office replies as follows:

It is correct that the reference in the preamble should have been to section 26(7)(a) of the 1990 Act rather than section 27(7)(a). This is a typographical error. The second paragraph of the Explanatory Note sets out the position correctly. In view of the fact that section 27(7)(a) does not confer any power to make subordinate legislation, far less confer a power on the Court to make Acts of Sederunt, it is the view of the Lord President’s Private Office that the intention is obvious and that a rectifying construction is to be placed on the reference. In any event, the preamble narrates that the Court is also using “all other powers enabling them in that behalf” and the Lord President’s Private Office takes the view that this is sufficient to avail the Court of the power conferred by section 26(7)(a).

All the foregoing said, the Lord President’s Private Office regrets the error and is grateful to the Committee for having drawn its attention to it.