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

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

2. **Climate Change (Scotland) Bill**: The Committee will consider the delegated powers provisions in this Bill after Stage 2.

3. **Marine (Scotland) Bill**: The Committee will consider the delegated powers provisions in this Bill at Stage 1.

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

   the National Health Service (Superannuation Scheme, Pension Scheme and Injury Benefits) (Scotland) Amendment (No. 2) Regulations 2009 (SSI 2009/208);
   the Looked After Children (Scotland) Regulations 2009 (SSI 2009/210);
   the Contaminants in Food (Scotland) Regulations 2009 (SSI 2009/215);
   the Knife Dealers (Licence Conditions) Order 2009 (SSI 2009/217);
   the Knife Dealers (Exceptions) Order 2009 (SSI 2009/218);
   the Environmental Impact Assessment (Scotland) Amendment Regulations 2009 (SSI 2009/221);
   the Marketing of Horticultural Produce (Scotland) Regulations 2009 (SSI 2009/225);
   the Seed Potatoes (Scotland) Amendment Regulations 2009 (SSI 2009/226);
   the Horse Identification (Scotland) Regulations 2009 (SSI 2009/231);
   the Brucellosis (Scotland) Order 2009 (SSI 2009/232).

5. **Instruments not laid before the Parliament**: The Committee will consider the following—
the Fire and Rescue Authorities (Appointment of Chief Inspector) (Scotland) Order 2009 (SSI 2009/235);  
the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (Commencement No. 7) Revocation Order 2009 (SSI 2009/238);  
the Health Boards (Membership and Elections) (Scotland) Act 2009 (Commencement No. 1) Order 2009 (SSI 2009/242);  
Act of Adjournal (Criminal Procedure Rules Amendment No. 2) (Contempt of Court) 2009 (SSI 2009/243);  
Act of Adjournal (Criminal Procedure Rules Amendment No. 3) (Confiscation Proceedings) 2009 (SSI 2009/244).

6. **Interpretation and Legislative Reform (Scotland) Bill**: The Committee will consider its approach to the scrutiny of the Bill at Stage 1.

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The papers for this meeting are as follows—

**Agenda Items 2-5**

Legal Brief SL/S3/09/21/1 (P)

Summary of Recommendations SL/S3/09/21/2

**Agenda Item 2**

*Climate Change (Scotland) Bill - as Amended at Stage 2*
**Supplementary Delegated Powers Memorandum**

**Agenda Item 3**

*Marine (Scotland) Bill*
**Delegated Powers Memorandum**

**Agenda Item 4**

Government Responses SL/S3/09/21/3

**Agenda Item 6**

Approach paper to ILR Bill SL/S3/09/21/4 (P)
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  Climate Change (Scotland) Bill – as amended at Stage 2

Section 2A(1) - Modifying the interim target

The Committee may wish to report that it is content with the delegated powers in section 2A of the Bill in principle, and that they are subject to affirmative resolution procedure.

It may however wish to draw to the attention of Parliament that no explanation has been given in the Supplementary Delegated Powers Memorandum as to the relationship between the sort of Community instrument that triggers section 2A(2), and the 42% figure in this section.

Section 4 - Setting annual targets

The Committee may wish to report that it is content with the amendments made to the delegated powers provisions in section 4 of the Bill.

Section 6 - Modifying annual targets

The Committee may wish to report that it is content with the amendments made to the delegated powers provisions in section 6 of the Bill.
Section 7 – Advice before modifying annual targets

The Committee may wish to report that it is content in principle with the amendments made at Stage 2 to section 7.

Section 7A – Achievement of annual targets: domestic effort target

The Committee may wish to report that the delegated power contained in section 7A(3) of the Bill is acceptable in principle, and that it is subject to affirmative resolution procedure.

Section 12 - The net Scottish emissions account

The Committee may wish to report that it is content that the amendments made at Stage 2 in section 12(1A) to (1C) do not confer new delegated powers, nor do they substantially affect the delegated powers in this section at Stage 1.

Section 14 - Scottish share of emissions from international aviation and international shipping

The Committee may wish to report that it is content that the amendments made at Stage 2 to section 14 do not confer new delegated powers, nor do they substantially affect existing powers.

Section 18A – Limits on use of carbon units

The Committee may wish to report that it is content that the delegated powers contained in section 18A(1) to (5) are acceptable in principle, and that they are subject to affirmative resolution procedure.

Section 18B – Modifying limits on use of carbon units

The Committee may wish to report that it is content that the delegated powers contained in section 18B are acceptable in principle, and that they are subject to affirmative resolution procedure.
Section 18C – Advice before setting or modifying limits on use of carbon units

The Committee may wish to report that it is content with the additional provisions in relation to the delegated powers, contained in section 18C of the Bill.

Section 23(3A) and (4) – Reporting on progress towards targets

The Committee may wish to report that it is content that the delegated powers contained in section 23(3A) and (4) are acceptable in principle, and that they are subject to affirmative resolution procedure.

Section 24(2) – Scottish Ministers’ response to reports on progress

The Committee may wish to report that it is content that the delegated power contained in section 24(2) is acceptable in principle, and that it is subject to affirmative resolution procedure.

Section 36 – Duties of public bodies relating to climate change

The Committee may wish to report that (as it reported at Stage 1 of the Bill) the power under section 36(1) to impose further duties on public bodies relating to climate change is potentially extremely wide in its scope, in particular as the further climate change duties which may be imposed by order are not clearly defined.

The Committee may wish to welcome that section 36(A2) as inserted at Stage 2 provides a definition of “public body” for the purposes of Part 4 of the Bill.

Section 38 – Reporting on climate change duties

The Committee may wish to report that it considers the amendments made to the delegated powers in section 38(1) of the Bill to be acceptable, and that it is subject to negative procedure.
Section 46 - Variation of permitted times for making muirburn

The Committee may wish to find the power as amended acceptable and that it is subject to affirmative procedure.

Section 47 - Power to modify functions of Forestry Commissioners

The Committee may wish to draw the Parliament’s attention to the width of this power to modify the functions of the Forestry Commissioners as regards Scotland in relation to climate change purposes while noting that there is no longer power to permit the delegation of functions to other bodies.

Section 50 – Non-domestic buildings: assessment of energy performance and emissions

The Committee may wish to draw the Parliament’s attention to there now being a requirement that regulations be made under section 50(1) rather than there being simply a power to do so. The Committee may wish to draw to Parliament’s attention that the power must be exercised to require owners to take steps to improve energy performance and reduce emissions. The Committee may wish otherwise to be content that all of the powers under section 50 are, now, to be exercisable by affirmative procedure. The Committee may wish to note that in view of that requirement, now, to provide regulations there may arise a tension as between that obligation on Ministers, and the need for such regulations to be approved by the Parliament.

Section 50A - Living accommodation: assessment of energy performance and emissions

The Committee may wish to draw the Parliament’s attention to there having been introduced, at Stage 2, a new regulation making power under section 50A, enabling the Scottish Ministers to make provision about the energy performance of living accommodation similar to that imposed under section 50 in relation to non-domestic buildings. The Committee may wish to be satisfied that the powers under section 50A are to be exercisable by affirmative procedure.
Section 50B - Council tax reductions to promote energy efficiency

The Committee may wish to draw Parliament’s attention to the new regulation making provision at section 50B and that no justification has been provided in the Supplementary DPM as to why it is appropriate to make this provision through subordinate legislation. The Committee may wish to note that Ministers are placed under an obligation to make Regulations but can be prevented from so doing if Parliament does not approve what is laid before it. Given the impact of the power if Parliament considers it acceptable then the Government may consider that the power should be exercisable subject to affirmative procedure.

Section 50D - Review of provisions made by virtue of or under sections 50C and (Amounts of reductions in non-domestic rates)

The Committee may wish to draw Parliament’s attention to the new regulation making provision at section 50D, with particular reference to the financial impact of the power provided to the Scottish Ministers. Given the significance of the power then, if it is considered acceptable, the Committee may consider that it should be exercisable subject to affirmative procedure.

Section 51A – Air source heat pumps and micro wind turbines in domestic properties: permitted development rights

The Committee may wish to draw Parliament’s attention to the duty placed on the Scottish Ministers to exercise their powers under section 30 of the Town and Country Planning (Scotland) Act 1997 to achieve the effect set out in 51A(2). The Committee may be content with the additional consultation requirement imposed by section 51A(4).

Section 51B – Microgeneration in non-domestic buildings: permitted development rights

The Committee may wish to draw Parliament’s attention to the duty placed on the Scottish Ministers to exercise their powers under sections 30 and 31 of the Town and Country Planning (Scotland) Act 1997 to achieve the effect set out in 51B(2). The Committee may be content with the additional consultation requirement imposed by section 51B(4).
Section 51E – Scottish civil estate: supplementary

The Committee may wish to be satisfied with the terms of the new power set out in section 51E, and that the exercise of it is to be subject to affirmative procedure.

Section 52 - Waste prevention and management plans

Section 53 - Information on waste

Section 54 - Recyclable waste: facilities for deposit etc.

Section 55 - Recyclable waste: facilities for deposit at events etc.

Section 56 - Procurement of recyclate

Section 57 – Targets for reduction of packaging etc.

The Committee may wish to report that it is content that these broad powers are now subject to super-affirmative procedure which requires a standstill period of at least 30 Parliamentary sitting days.

Section 58 – Deposit and return schemes

The Committee may wish to find the powers as amended acceptable and to note also as acceptable that those which were subject to affirmative procedure are now subject to super affirmative procedure, which requires a standstill period of at least 30 Parliamentary sitting days.

Section 58A - Deposit and return schemes: designation of scheme administrator

The Committee may wish to draw the Parliament’ attention to this power to the extent that it may be used to modify the functions of existing bodies. The Committee may wish otherwise to be satisfied that the process under new section 58A is by super- affirmative procedure.
Section 58B - Power to establish scheme administrator

The Committee may wish to draw Parliament's attention to the breadth of this power, in particular so far as it enables a body established under it ‘to do anything which appears to it to be necessary or expedient for the purposes of, or in connection with, the exercise of its functions in relation to a deposit and return scheme, or conducive to the exercise of those functions’. The Committee may wish otherwise to be satisfied that any order made under section 58B is to be made by super-affirmative procedure.

Section 59 - Charges for supply of carrier bags

The Committee may wish to note as acceptable that those powers which were subject to affirmative procedure are now subject to super-affirmative procedure which requires a standstill period of 30 Parliamentary sitting days.

Agenda Item 3 Marine (Scotland) Bill

Section 3(4) – Power to designate any part of the Scottish marine area as a Scottish marine region

The Committee may wish to consider that the proposed power is acceptable in principle and that affirmative procedure is appropriate.

Section 17(3) - Powers to amend section 17(1) so as to add or remove any activity from the list of licensable marine activities

The Committee may wish to consider asking the Scottish Government the following questions:

- what is the justification for the power being completely open, in that it does not contain any limitation on the nature, scope or extent of any modification which may be made to the list of licensable marine activities?

- by reference to what criteria, if any, will the Scottish Government determine that a particular activity should be added to or removed from the list of licensable marine activities and could these be specified in the Bill?
Section 18(1)(b) - Power to determine fees to accompany licence applications

The Committee may wish to consider that the proposed power is acceptable in principle and that negative procedure is appropriate.

Section 20(4)(a) - Power to specify the persons or bodies to be consulted with regards to each licensing application

The Committee may wish to consider that the proposed power is acceptable in principle and that negative procedure is appropriate.

Section 20(7) – Power to make further provision as to the procedure to be followed in connection with applications for and the grant of licences

The Committee may wish to consider asking the Scottish Government for the following further information:

As the power in section 20(7) does not appear to be addressed in the DPM, the Scottish Government is asked for the justification for this power in accordance with rule 9.4A of Standing Orders.

Section 21(2) - Power to prescribe under subsection 7B of section 210 of the Local Government (Scotland) Act 1973 (c.65) the standard daily amount which may be recovered in respect of an inquiry in relation to marine licences

The Committee may wish to consider that the proposed power is acceptable in principle and that negative procedure is appropriate.

Section 24(1) - Power to specify activities which will not need a marine licence

The Committee may wish to consider asking the Scottish Government the following questions:

- what is the justification for the power being completely open, in respect that it does not contain any limitation on the nature, scope or extent of activities which may be specified as not needing a licence or not needing a licence if conditions specified in the order are satisfied?
• by reference to what criteria, if any, will the Scottish Government determine that a particular activity should be specified in an order under section 24(1) and could this be set out in the Bill?

Section 25(1) - Power to allow licensable marine activities which fall below a specified threshold of environmental impact to be registered rather than licensed

The Committee may wish to ask the Scottish Government the following question:

Given that regulations made under section 25(1) will specify the threshold of environmental impact for the purpose of determining whether a particular licensable marine activity will not need a licence but will instead be registered, can the Scottish Government explain the need for the regulations to define or elaborate the meaning of ‘specified threshold of environmental impact’ and also ‘fall below’ and ‘registered’, as provided for in section 25(2) and how it is envisaged that this power may be exercised?

Section 27(1) - Provision for applications under section 36 of the Electricity Act 1989 and application for a marine licence to be considered together

The Committee may wish to consider that the proposed power is acceptable in principle and that negative procedure is appropriate.

Section 29(1) - Power to make provision for any person who applies for a marine licence to appeal against a decision made under section 22

The Committee may wish to consider asking the Scottish Government, given the importance of providing a Convention compliant appeals regime, to explain why it is considered necessary to use sub-leg for this purpose in this particular case.

Section 37(1) - Power to make provision about the imposition of fixed monetary penalties in relation to offences under Part 3; and

Section 39(1) - Power to make provision about the imposition of variable monetary penalties in relation to offences under Part 3

The Committee may wish to consider asking the Scottish Government the following questions:
• what is the justification for 2 civil sanction regimes (fixed penalty and variable penalty)?

• on what basis or with regard to what criteria will the Scottish Ministers determine which regime to apply in a particular case?

• why is the maximum variable monetary penalty not specified on the face of the Bill?

Section 42(1) - Power to provide for any delegable marine licensing functions to be exercised by a delegate

The Committee may wish to consider that the proposed power is acceptable in principle and that affirmative procedure is appropriate.

Section 45(2) - Powers to prescribe particulars to be contained within a register

The Committee may wish to consider that the proposed power is acceptable in principle and that negative procedure is appropriate.

Section 45(3) - Power to set out further provisions regarding maintenance of the register of licensing information

The Committee may wish to consider that the proposed power is acceptable in principle and that negative procedure is appropriate.

Section 52(1) - Power to make provision for any person to whom a notice listed in subsection (2) is issued to appeal against that notice

The Committee may wish to consider asking the Scottish Government, given the importance of providing a Convention compliant appeals regime, to explain why it is considered necessary to use sub-leg for this purpose in this particular case.
Section 54(3)(1) - Power to provide for marine fish farming not to constitute ‘development’

The Committee may wish to consider asking the Scottish Government the following questions:

- what is the justification for the power i.e. what is the justification for moving aquaculture developments out of the normal planning system and into the marine licensing regime where different mechanisms and criteria will apply?

- what is the justification for moving aquaculture developments out of the normal planning system and into the marine licensing regime on a case by case (i.e. area by area) basis rather than by doing this all at once by an appropriate amendment to the relevant primary legislation, without the requirement for a power?

Section 58(1) – Power to designate any area of the Scottish marine protection area as a nature conservation marine protected area, a demonstration and research marine protected area or a historic marine protected area.

The Committee may wish to consider asking the Scottish Government the following question:

Given the significance of designation as a Nature Conservation MPA, Demonstration and Research MPA or a Historic MPA and of the consequences and obligations which follow thereon, why does the Scottish Government consider that it is not necessary for the power to designate a marine protected area under section 58(1) to be exercised by statutory instrument?

Section 68(2) - Power to provide for procedures to be followed at hearings

The Committee may wish to consider that the proposed power is acceptable in principle and that negative procedure is appropriate.

Section 74(1) - Powers to make marine conservation orders (‘MCAs’)

The Committee may wish to consider that the Scottish Government should be asked to explain fully why negative procedure is considered sufficient scrutiny.
Section 77(1) - Power to make an urgent marine conservation order

The Committee may wish to ask the Scottish Government what the intended effect of section 77(2)(a) is given that it is not necessary to specify this for negative SSIs.

Section 79(2) - Power to provide for procedures to be followed in relation to any hearing on a proposed marine conservation order

The Committee may wish to consider that the proposed power is acceptable in principle and that negative procedure is appropriate.

Section 93 - Penalties in regulations implementing the Habitats Directive for the Scottish marine area

The Committee may wish to consider that the proposed power is acceptable in principle and to note that under section 2(2) and paragraph 2(2) of Schedule 2 to the European Communities Act 1972 the Scottish Government may choose affirmative or negative procedure.

Section 102(1) - Powers to introduce fees for seal licences

The Committee may wish to consider that the proposed power is acceptable in principle and that negative procedure is appropriate.

Section 144(1) - Ancillary provision

The Committee may wish to ask the Scottish Government to explain its approach to the procedure applicable to ancillary powers in more detail given that these are significant powers which should be tailored to the individual circumstances of the Bill in question.

Section 148(1) - Powers to appoint the day on which the provisions of the Act come into force

The Committee may wish to consider that the proposed power is acceptable in principle and that, in accordance with the normal practice with respect to commencement orders, no procedure is appropriate.
Agenda Item 4  Instruments subject to annulment

The National Health Service (Superannuation Scheme, Pension Scheme and Injury Benefits) (Scotland) Amendment (No. 2) Regulations 2009 (SSI 2009/208)

The Committee may wish to report to the lead committee and to the Parliament that an error has been made in regulation 21 (replacement of regulation 2.C.3 in 2008/224) at 2.C.3(22) in respect of the reference to ‘the 2008/09 scheme’ year. The Committee further reports that the Scottish Government anticipates that this error will be corrected in further amending regulations which are due to come into force in October 2009.

The Looked After Children (Scotland) Regulations 2009 (SSI 2009/210)

The Committee may wish to accept the explanation which has been provided in relation to the failure to cite section 17(1) of the Children (Scotland) Act 1995, and the erroneous reference to subsections (2) and (3), within the preamble to this instrument, and to note the indication that matters are to be addressed by way of correction slip.

The Contaminants in Food (Scotland) Regulations 2009 (SSI 2009/215)

The Committee may wish to report this instrument to the lead Committee and to the Parliament on the basis that it contains a drafting error. The instrument fails to identify correctly transitional provisions for the purpose of excluding them from the scope of the offence provision in regulation 3. The Committee may also wish to recommend that the Government take steps to correct this error so that the extent of the criminal offences imposed are clear on the face of the regulations.

The Knife Dealers (Licence Conditions) Order 2009 (SSI 2009/217)

The Committee may wish to report that an explanation as to the powers used to make the instrument was sought from the Government and that it is satisfied with the response and the instrument.
The Knife Dealers (Exceptions) Order 2009 (SSI 2009/218)

The Committee may wish to consider reporting the instrument to the lead committee and the Parliament on the grounds that its meaning could be clearer in relation to the extent to which persons are to be treated as “qualified to teach” fencing. The Committee may consider clarity particularly important here since only “qualified” persons who hire etc. a fencing sword will be exempt from the requirement to hold a licence and hiring etc. a sword without a licence is to be a criminal offence from 1 September 2009.

The Environmental Impact Assessment (Scotland) Amendment Regulations 2009 (SSI 2009/221)

The Committee may wish to report this instrument on the basis that an explanation has been sought and provided by the Scottish Government in relation to regulation 9A, with which the Committee is satisfied.

The Marketing of Horticultural Produce (Scotland) Regulations 2009 (SSI 2009/225)

The Committee may wish report the instrument as failing to follow proper drafting practice in the citation of all and only relevant powers in the preamble given that sections 16(2)(b) and 17(1) of the Food Safety Act 1990 do not appear to be relevant and that section 17(2) may be relevant.

In respect of the use of the term “inspection authority” in regulation 11 the Committee may wish to report the instrument as containing a drafting error which it recommends the Government should remedy at the first appropriate opportunity.

The Committee may wish to report the instrument on the grounds that the extent of certain offences are not sufficiently clear as the government explains that they rely on the use of guidance to set the limits of their scope

In relation to questions 4 and 6 the Committee may wish to report that a satisfactory response was provided.

The Seed Potatoes (Scotland) Amendment Regulations 2009 (SSI 2009/226)

The Committee may wish to report this instrument on the grounds that—

- in relation to the new regulation 8(5)(b) of the Seed Potatoes (Scotland) Regulations 2000 (inserted by regulation 4), as read with the definition of the
“region of origin” in regulation 3, it considers that the meaning and effect of that sub-paragraph (b) could be made clearer;

- in relation to the new regulation 8(6) (inserted by regulation 4), it considers that (having regard to the intended meaning and effect as explained in the Government’s response to the Committee) the meaning and effect of that paragraph could be made clearer.

The Horse Identification (Scotland) Regulations 2009 (SSI 2009/231)

The Committee may wish to report to the lead committee and to the Parliament that responses have been provided by the Scottish Government to the Committee in relation to regulations 4(2), 5(2), 11, 14(4), and 17(2), with which the Committee is satisfied.

The Brucellosis (Scotland) Order 2009 (SSI 2009/232)

The Committee may consider—

In relation to issue 1, so far as a combination of enabling powers subject to different Parliamentary procedures has been used, namely negative procedure and ‘no procedure’, under the powers conferred by various sections of the Animal Health Act 1981, to draw this instrument to the attention of the lead Committee and the Parliament, so far as there has been a failure to follow proper legislative practice.

In relation to issue 2, to bring this drafting error to the attention of the lead committee and the Parliament. In doing so it may wish also to note the indication that the incorrect reference to ‘article 18’ (rather than to ‘article 19’) within article 18 is to be corrected, by way of correction slip.

In relation to issue 3, concerning the reference which is made within article 19 to the Diseases of Animals (Ascertainment of Compensation) Order 1959, to note as satisfactory the response provided.

Agenda Item 5 Instruments not laid before Parliament

The Fire and Rescue Authorities (Appointment of Chief Inspector) (Scotland) Order 2009 (SSI 2009/235)

The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (Commencement No. 7) Revocation Order 2009 (SSI 2009/238)
The Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 6) Order 2009 (SSI 2009/240)

The Health Boards (Membership and Elections) (Scotland) Act 2009 (Commencement No. 1) Order 2009 (SSI 2009/242)

The Committee may wish to consider if it is content with these instruments.
The National Health Service (Superannuation Scheme, Pension Scheme and Injury Benefits) (Scotland) Amendment (No. 2) Regulations 2009 (SSI 2009/208)

On 12 June 2009 the Scottish Government was asked:

In regulation 21 (replacement of regulation 2.C.3 in 2008/224) at 2.C.3(22) is it intended that the reference should be to the 2008/09 scheme year or should the reference be to the 2009-2010 scheme year, given that other references in the instrument are to the 2009-2010 scheme year (e.g. in regulations 4, 13, 20, and 57)? If the reference should be to the 2009-2010 scheme year, what is it anticipated may be the effect of the reference to 2008/09?

The Scottish Government responds as follows:

The reference should be to the "current scheme year" rather than the 2008/09 scheme year. New regulation 2.C.3(22) refers to a situation where there is an in year change of employment, outlined in paragraph (16), but where there is variable pay. Where there is a straight forward (i.e. non variable) change then setting the contribution tier is outlined in paragraph (20) and estimates the pensionable pay arising from that employment during the current scheme year. A similar estimate is required by the employer under paragraph (22) for variable pay based on what the employer considers appropriate. This refers to the new paid employment so must also need to refer to the current scheme year.

The implications of this error are thought to be minimal. If there is variable pensionable pay in 2008/09 the employing authority will refer to it rather than 2009/2010. It is considered that it is unlikely there will be much if any difference. If there is no variable pay in 2008/09 an employing authority may use such amount as it considers appropriate for that year. The most appropriate reference year will be the current scheme year (2009/10). A circular has been issued to employers outlining what action they need take in setting contribution tiers and in particular they are advised that “If the member changes employing authority during the current year then they will receive a new tier for the new employment based on the estimated full year, full time pensionable pay related to the new employment.” It is therefore anticipated that employers will apply this particular regulation correctly despite the incorrect reference to 2008/09.

Further amending regulations are planned to the scheme which is due to come into force from October 2009. This can be used to make the necessary correction to this particular regulation.
The Looked After Children (Scotland) Regulations 2009 (SSI 2009/210)

On 9th June 2009 the Scottish Government was asked:

1. to explain the citation of section 17(2) and (3) of the Children (Scotland) Act 1995 within the preamble which subsections do not appear to confer regulation making powers and the absence of other provisions within section 17, in particular subsection (1);

2. what is the effect of using the citation referred to above.

The Scottish Government responds as follows:

1. The Regulations originally referred to section 17 of the Children (Scotland) Act 1995 ("the 1995 Act") so as to include all provisions within that section. The preamble also cites provisions in the Social Work (Scotland) Act 1968 as well as sections 110 and 117 of the Adoption and Children (Scotland) Act 2007 ("the 2007 Act"). During the styling process for this instrument it was agreed that the reference to section 117 of the 2007 Act should be amended to specify subsections (2) and (3) of that provision. Unfortunately a typing error occurred and that change (the insertion of "(2) and (3)") was made after section 17 of the 1995 Act instead of after section 117 of the 2007 Act. Regrettably this error went unnoticed. As this is a typographical error the Scottish Government intends to rectify this by way of correction slip and thanks the Committee for bringing this matter to their attention.

2. It is regrettable that section 17(1) of the 1995 Act has been omitted from the preamble. However the preamble also cites the fact that the Scottish Ministers use all other powers enabling them to make the Regulations. Section 17(1) of the 1995 Act allows, inter alia, the Scottish Ministers to prescribe the manner in which local authorities must safeguard and promote the welfare of children who are looked after by them. Section 17(2) provides that that duty includes the duty of providing advice and assistance with a view to preparing the child for when they are no longer looked after by the local authority. The view of the Scottish Government is that it is clear from this, and from the operative provisions of the instrument, that the power at section 17(1) is invoked. Therefore, in line with the Vibixia decision (Vibixia Ltd v Komori UK Ltd & Ord (2006) EWCA Civ 536), the view of the Scottish Government is that the preamble may be interpreted as including a reference to section 17(1) and its omission does not affect the vires of the instrument.

The Contaminants in Food (Scotland) Regulations 2009 (SSI 2009/215)

On 9 June 2009 the Scottish Government was asked:

Does the Scottish Government agree that the reference in regulation 3(1) to "the transitional arrangements contained in Article 1........." (which deals with "General Rules") should instead have been to Article 11 (which deals with "Transitional Measures")?

If so, what do you think the effect of this error is?
The Scottish Government responds as follows:

We agree that the reference in regulation 3(1) to "the transitional arrangements contained in Article 1" (which deals with "General Rules") should instead have been to Article 11 (which deals with "Transitional Measures") and apologise for this error.

Despite this, we think that regulation 3(1) will be given its correct intended meaning by the reader and an amending instrument is not necessary. The transitional arrangements in Commission Regulations 1881/2006 and 629/2008 are applicable to the offence created by regulation 3 regardless of whether or not they are referred to explicitly in the regulation. The reference in regulation 3(1) is simply there to remind the reader of the transitional arrangements. We think that this has been achieved and the error will not detract from understanding the provision's intended meaning.

The Knife Dealers (Licence Conditions) Order 2009 (SSI 2009/217)

On 12 June 2009 the Scottish Government was asked:

*Given that section 27C of the Civic Government (Scotland) Act 1982 is only currently commenced by SSI 2007/431 for the purpose of enabling orders under section 27C(1)(a) and section 27C(2) would therefore not appear to be in force until 1 September 2009 by virtue of SSI 2009/197 to explain how the powers on which Ministers rely to make this Order are considered to be in force for that purpose?*

The Scottish Government responds as follows:

The Knife Dealers (Licence Conditions) Order 2009 cites the powers in section 27C(1) and (2) of the Civic Government (Scotland) Act 1982. The Order sets out mandatory conditions that a licensing authority must attach to knife dealer's licence. The power to make these conditions is set out in section 27C(1)(a) of the 1982 Act. The Order sets out additional mandatory conditions to be attached to knife dealer's licences where the dealer deals in swords. Section 27 C(2) of the 1982 Act provides that an order under section 27C(1)(a) may provide for different conditions to apply to different articles or different classes of articles. The Order is to come into force on 1st September 2009.

Section 27C is inserted into the 1982 Act by section 58 of the Custodial Sentences and Weapons (Scotland) Act 2007. Section 58 was commenced on 1st November 2007 for the purpose of inserting Scottish Ministers to make orders under certain provisions including section 27C(1)(a) of the 1982 Act (SSI 2007/431). So section 58 was not commenced just for the purpose of inserting section 27C(1)(a) into the 1982 Act but for the purposes of enabling Orders under that provision to be made. Given that section 27C(2) only clarifies the extent of the power in section 27C(1)(a) we consider that section 27C(2) was commenced by SSI 2007/431 as it is a provision that enables Ministers to make an order under section 27C(1)(a). Section 58 is commenced for the purpose of inserting section 27C, to the extent it is not already in force, on 1st September 2009 (SSI 2009/197).

This paragraph provides that where a provision in an Act of the Scottish Parliament doesn't come into force on Royal Assent and confers power to make subordinate legislation then that power can be exercised at any times after Royal Assent as far is necessary or expedient for the purpose of bringing any provision of the Act into force. This paragraph doesn't apply if the contrary intention is shown. We do not think that there is anything in the wording of section 58 of the 2007 Act that displaces the effect of paragraph 10. Consequently we consider that paragraph 10 can be relied on to commence section 58 of the 2007 Act for the purposes of making an Order under section 27C(2) of the 1982 Act.

**The Knife Dealers (Exceptions) Order 2009 (SSI 2009/218)**

On 12 June 2009 the Scottish Government was asked:

**Given that:**-

- **Section 7 of the Civic Government (Scotland) Act makes it an offence to do anything for which a licence is required without having such a licence;**

- **The exception to the requirement for a licence provided by article 3(1) of the Order is afforded only to persons who are "qualified to teach" the sport of fencing;**

- **The meaning of this expression is not defined and it is unclear whether it is intended to include only a particular formal qualification or whether it also includes persons qualified by reason of skill, experience and aptitude and if so how that is to be assessed;**

the Scottish Government is asked to explain what is meant by the expression "qualified to teach" and whether there is sufficient certainty as to the circumstances in which article 3(1) would apply, and accordingly as to the circumstances in which the exception from the offence in section 7 applies.

**The Scottish Government responds as follows:**

Article 3 of the Knife Dealers (Exceptions) Order 2009 provides an exception where A is teaching B the sport of fencing. For this exception to apply A must be qualified to teach B in the sport. This exception is not defined. The words "A is qualified to teach B in the sport" need to be given their normal meaning and it will be for the courts to determine whether a particular person is qualified to teach the person being taught. How a person demonstrates that he or she is qualified to teach a particular person will be a matter for him or her. It is possible that what constitutes being "qualified to teach" could vary according to the circumstances. We consider that the exception is sufficiently certain for individuals to rely upon it.
The Environmental Impact Assessment (Scotland) Amendment Regulations 2009 (SSI 2009/221)

On 12 June 2009 the Scottish Government was asked:

Regulation 2(7) inserts a new regulation 9A(4) of the Environmental Impact Assessment (Scotland) Regulations 1999, providing that where an applicant does not write to the planning authority in accordance with regulation 9A(3), the resulting deemed refusal of planning permission shall not give rise to an appeal to the Scottish Ministers by virtue of section 47 of the 1997 Act.

(a) Can it be explained which of the enabling powers cited in the instrument is being relied on to make such provision (and given it appears to modify the effect of section 47 of the 1997 Act)?

(b) If section 2(2) of the European Communities Act 1972 is being relied on, can it be explained why it is considered that such provision arises out of the implementation of the “EIA Directive” (85/337/EEC)?

The Scottish Government responds as follows:

Regulation 9A is made under powers contained in section 2(2) of the European Communities Act 1972.

Regulation 9A(4) provides that where–

(a) a planning authority on review informs the applicant that the submission of an environmental statement is required;

(b) and the applicant has not within 3 weeks confirmed that an environmental statement is to be provided,

then (unless the Scottish Ministers have made a screening direction to the effect that the application does not relate to development in respect of which an environmental statement is required) the application is deemed to have been refused.

Regulation 9A(4) is intended to end the consideration of an application where environmental information has not be provided. To ensure that a deemed refusal would result in the conclusion of the consideration of the application, regulation 9A(4) prevents an applicant taking the matter to appeal. The Directive requires environmental information to be considered before a decision is made in connection with an application for planning permission relating to EIA development (as described in the Directive). It is considered that this regulation makes provision with respect to that obligation.

We would note that regulation 9A(4) mirrors the position under the existing regulation 7(5) where the planning authority are considering an application at first instance rather than on review.
On 12 June 2009 the Scottish Government was asked:

1. to explain which provisions of the regulations are made under the power in section 16(2)(b) of the Food Safety Act 1990 given that this power provides for imposing requirements as to the labelling etc of contact materials which are intended to come into contact with food intended for human consumption and the labelling requirements in the regulations appear to relate to community marketing rules in relation to fruit and vegetables and not in respect of the content of the materials in which they are packaged.

2. to explain how the power in section 17(1) of the Food Safety Act 1990 is being used since that is a power to impose prohibitions and regulate commercial operations with respect to food and any prohibition or regulation in this case is in fact provided for by the directly applicable Community provisions referred to in the Regulations.

3. in light of the above which additional powers are considered to have been used to make the regulations, if any?

4. whether the reference in regulation 10(3) to paragraph (1) should read paragraph (2) since that paragraph imposes the requirement to serve notice whereas paragraph (1) imposes a prohibition on movement?

5. Whether the reference to "inspecting authority" throughout regulation 11 is intended to be a reference to "inspection body" within the meaning of regulation 3(1) or if not to explain to what it refers.

6. to explain whether the Scottish Ministers have exercised the derogation under article 3(3) of commission regulation 1580/2007 and whether that is considered sufficiently clear in respect of those measures listed in Schedule 2 which are to be read with article 3(3), particularly given that failure to comply is an offence.

7. whether the scope of the offence created by regulation 15(2) and Schedule 2 with respect to Articles 9(5), 10(4) and 20(3) of Commission Regulation 1580/2007 is clearly defined given that in each of these articles certain information is required to be provided but that in each case Member States appear to be afforded a considerable discretion as to what is required.

The Scottish Government responds as follows:

1. Elements of Regulations 6 and 7 are made under the power in section 16(2)(b) of the Food Safety Act 1990. In terms of Annex 1 Part B of Regulation 1221/2008 (which defines the relevant marketing standards in relation to fruit and vegetables) the specific marketing standards are said to include provisions regarding packaging. In particular, it stipulates as a requirement that packages must be free from all foreign matter and that stickers/labels affixed to the product should not leave visible traces of glue.
2. The Scottish Government considers that the power in section 17(1) of the Food Safety Act provides the vires for the principal provisions of these regulations in domestic legislation. Although the Scottish Government could have relied solely on the powers available in section 2(2) of the European Communities Act 1972, it was considered appropriate to make reference to both sources of power. Whilst reference to section 17(1) of the Food Safety Act 1990 might be considered otiose, in the opinion of the Scottish Government, its inclusion does not invalidate the instrument.

3. In the opinion of the Scottish Government, the only power which might be construed as additional in making these regulations is under section 17(1) of the Food Safety Act 1990. However, as discussed in response number 2 above, the Scottish Government considers that the inclusion of this power does not invalidate the instrument.

4. The reference was intended to refer to paragraph (1) on the basis that paragraph (1) introduces the power to issue a written notice prohibiting the movement of goods, whereas paragraph (2) contains the formal requirements regarding any such notice which may be issued in terms of paragraph (1).

5. The Scottish Government is grateful to the Committee for drawing this matter to its attention and would confirm that the reference to “inspecting authority” throughout regulation 11 is intended to be a reference to “inspection body” within the meaning of regulation 3(1). If it is considered that this is an area which may potentially cause confusion, the matter shall be remedied at the first appropriate opportunity.

6. The Scottish Government would confirm that Scottish Ministers have exercised the derogation under Article 3(3) of Commission Regulation 1580/2007 as explicit in regulation 16. The Scottish Government considers that this reference to the derogation in the general provisions (regulation 16) is sufficiently clear when read together with those measures listed in Schedule 2 which are to be read with Article 3(3).

7. The Scottish Government considers that the scope of the offence created is clearly defined having regard to regulation 15(2) and Schedule 2 and that the existence of current written Guidance available to traders/ producers, which is presently being updated, will have the effect of more accurately defining the limits of the considerable discretion afforded to Member States in terms of Commission Regulation 1580/2007. It is anticipated that the updated Guidance will be available on or before the proposed commencement date of these provisions. It is also anticipated that in addition, inspectors will be involved in providing verbal guidance to traders.
The Seed Potatoes (Scotland) Amendment Regulations 2009 (SSI 2009/226)

On 12 June 2009 the Scottish Government was asked:

1. Can the meaning and effect of new regulation 8(5)(b) (inserted by regulation 4) be explained, in respect that the prohibition on marketing in regulation 8(5) applies within Scotland and Scots law (for the regulation to be intra vires), but regulation 8(5)(b) disapplies the prohibition, where marketing takes place in a region of origin which may (by Article 8(1) of Commission Directive 2008/62/EC and these Regulations) be any part or the whole of the UK?

Is it intended to provide to the effect that marketing is prohibited in Scotland, unless Scotland or part is specified as the region of origin, when marketing must take place in that region?

If so, is it considered that the new regulation 8(5) could be made clearer?

2. The new regulation 8(6) appears to sub-delegate to the Scottish Ministers powers to specify the maximum amount of seed potatoes of a conservation variety which may be marketed in a production season, and different maxima may be specified for different persons or classes. Can it be explained which enabling power is being relied on to make such provision, given that it appears that the cited powers in the Plant Varieties and Seeds Act 1964 do not appear to provide for such delegation of powers to the Scottish Ministers?

3. Given that by section 16(7) of the 1964 Act, a breach of any provisions in seeds regulations is an offence, what effect does the imposition of a total maximum amount of potatoes of a conservation variety to be marketed in a season (in Scotland) have, and how is this enforceable, given that these amending regulations appear to have no mechanism for such enforcement?

The Scottish Government responds as follows:

1. The new regulation 8(5) inserted by regulation 4 of the Seed Potatoes (Scotland) Amendment Regulations 2009 (hereafter referred to as “the Regulations”) means that no person may market a seed potato of a conservation variety unless it has been produced in the region of origin or additional region and marketing takes place in the region of origin. Therefore, where seed potato is produced in the region of origin or additional region but is marketed outwith its region of origin, the producer will be in breach of the provision. Regulation 8(5) gives effect to the requirements for marketing of a conservation variety as stipulated in article 13(1) of Commission Directive 2008/62.

The region of origin is defined as being the region forming a part or the whole of the United Kingdom identified by the Scottish Ministers for the purposes of article 8.1 of the Commission Directive 2008/ 62. There is no situation where it would be appropriate for Scottish Ministers to identify a region of origin for the purpose of registering a conservation variety in the National List (governed by The Seeds (National Lists of Varieties) Regulations 2001) which was not part of Scotland or included Scotland. A collaborate policy decision has been taken in the United
Kingdom by the National Authorities for the ‘region of origin’ of currently known seed potatoes of a conservation variety, to be the ‘United Kingdom’. This mechanism for identifying the region of origin for National List purposes is dealt with separately within The Seeds (National Lists of Varieties) Regulations 2001, therefore the region of origin will already be identified before the provisions of the Regulations come into play. The trigger in the application of regulation 8(5) is not in the description of the region of origin, it is where the marketing is taking place. Where marketing takes place in Scotland, the Regulations will be operable.

The extent provision provides the necessary clarification concerning the application of the regulations. It is contained within the Seed Potatoes (Scotland) Regulations 2000 (“the 2000 Regulations” SSI 2000/ 201) and extends the provisions to Scotland only. The Regulations can therefore only have application to activities which occur within Scotland and must be read accordingly. Marketing outwith Scotland cannot be, and does not purport to be, governed by the Regulations. The effect therefore of new regulation 8(5) is that it is only engaged where the marketing is carried out within Scotland. As the SLC has correctly identified, marketing is prohibited in Scotland, unless Scotland or part is contained within the region of origin but it was not deemed necessary to expressly stipulate this given the extent provision of the 2000 Regulations.

If the region of origin required to emphasise that it contained Scotland there would be a requirement to split the UK into more regions and identify the conservation variety by multiple regions for each conservation variety to cover the whole of the UK, this would be cumbersome where the same effect can be achieved by simply identifying the UK.

It is the view of the Scottish Government that the current provision is sufficiently clear when read within the context of the 2000 Regulations.

2. The Scottish Government is relying upon section 16(1A) of the Plant Varieties and Seeds Act 1964. Section 16(1A) states ‘Seed Regulations may further make provision for regulation the marketing […] of seeds’. The Scottish Government accepts this provision is subject to interpretation but has taken the view that this was drafted in a purposely wide manner. The Scottish Government considers ‘further make provision’, means that provisions can be made which reach farther reaching than those purposes listed in section 16(1)(a) to (e). Section 16(1A)(a) to (e) provides a list of the types of provisions envisaged but this list is not exhaustive. The list provided for in section 16(1A)(a) to (e) demonstrates how wide the power is intended to be, it states that the provisions can be made for the registration or licensing of persons to conferring right of appeal to the Tribunal. The Scottish Government take the view that this power as drafted is sufficiently wide to be relied upon to confer upon the Scottish Minister the power to specify the maximum amount of seed potato of a conservation variety which may be marketed in a production season. It is implicit in the width of the scope of section 16(1A) that such a provision may be made.

3. The Scottish Government did not intend to create an offence for this provision. The provision does not impose on an individual person an obligation not to market seed potatoes of a conservation variety in excess of the prescribed amount. Had the intention been to do so, express words to that effect would have been chosen. This
was a policy decision taken on the basis that enforcement action against individual producers would be evidentially difficult and unnecessary to achieve the effect of article 14(1) of Commission Directive 2008/62/EC. It is likely that more than one producer will be involved in growing any one variety and certainly several will be involved in producing conservation varieties as a whole. The purpose of the provision is not to enforce standards against the individual producer but to allow regulation of the industry as a whole.

The intention is to regulate the situation administratively as seed potatoes are produced over several generations prior to final marketing. In this way the SPCS (the “Seed Potato Certification Scheme”) will have advance warning if the limits are likely to be breached either for a single variety or for conservation varieties as a whole.

In the event that that occurs, the SPCS could seek to limit areas by administrative action. Although this is highly unlikely, if this was deemed necessary SASA (“Science and Advice for Scottish Agriculture”) state that the relevant parties would be brought together to discuss the way forward. However, should the extent of production of conservation varieties reach that level then there would likely have been something else going awry with the SPCS, and this would require rectification. Conservation varieties are a niche market commodity and should not under normal circumstances be replacing new commercially bred varieties in terms of market share.

The Horse Identification (Scotland) Regulations 2009 (SSI 2009/231)

On 12 June 2009 the Scottish Government was asked:

(Any reference to "articles" here is to articles in the Commission Regulation (EC) No. 504/2008. References to "regulations" or "the Regulations" are to the Horse Identification (Scotland) Regulations 2009.)

1. Article 13 imposes requirements for the identification document (“ID”) to accompany a horse at all times, and regulation 4(2) requires any person who buys a horse within 30 days of purchase to return the ID to the issuing body.

   (a) Can it be explained what provision is made to provide for the return of the ID to an owner, following its return to the issuing body under regulation 4(2), as it appears this may be required to implement the requirements of article 13?

   (b) If it is considered that further provision is not required (to implement article 13), can the basis for this view be explained?

2. With reference to regulation 11, article 13(1) imposes a requirement on a horse owner to hold ID with the horse. If the derogation under article 14 is exercised, the owner must hold a smart card with the horse, in place of the ID.

   (a) Can it be confirmed whether the derogation in article 14(1) is operating in relation to Scotland currently, by notification to the Commission?
(b) If not, then on what basis is it considered that regulation 11(1)(b) properly implements articles 13 and 14, given that an owner is able to comply with 11(1)(a) or (b) as alternative requirements?

3. In relation to the apparently general effect of regulation 14(4), can it be confirmed that it is intended that the official veterinarian should be guilty of an offence for failure to comply with the requirements of regulation 14?

4. Article 21(1) requires an issuing body to record certain information when issuing an ID. Article 21(3) requires the issuing body immediately after recording the information, to communicate the information to the central database. Can it be explained why article 21(3) is transposed by the Regulations, given that article 17(2) requires the communication of such information to be made in accordance with a notice served on the issuing body by the Scottish Ministers (and there is no requirement for immediate notice)?

5. (a) Can it be explained how the Regulations shall regulate the operation and validity of identification documents issued prior to the coming into force of the Regulations (given there are no transitional provisions)?

(b) With regard to the offence created by regulation 5(2) for non compliance with article 3(1)(obligation to identify), is it considered that transitional provision is required with regard to documents issued prior to the coming into force of the Regulations? If not, can the basis for this view be explained?

The Scottish Government responds as follows:

1(a) No provision is made within the Regulations to provide for the return of the ID to an owner, following its return to the issuing body under Regulation 4(2).

(b) Policy colleagues have advised that, in practice, many issuing bodies operate a 24 - 48 hour turn around time for the return of identification documents to owners. It is submitted that it would not be in the interests of a passport issuing body not to return an identification document to an owner. Efficient operation is one of the criteria to be met for recognition of breed societies as issuing bodies. Consistent failure to return passports within a reasonable period could result in approval as an issuing body being revoked.

In addition, Article 14(3) provides that issuing bodies must issue a temporary identification document, allowing a horse to be transported within the same member State for up to 45 days, when an identification document has been surrendered to the issuing body or competent authority for the purpose of updating identification details. The purpose of this Article is to ensure that Article 13 can still be complied with when identification documents are surrendered to an issuing body for updating.

2(a) There is no system of smart cards is currently operating within the UK, though one may be introduced in future.

It is submitted that the derogation in Article 14(1) can be exercised without positive action or notification on the part of the Scottish Government; it is a derogation that
applies automatically by operation of the text of the Regulation rather than a derogation which requires to be positively exercised by the Scottish Government. By way of comparison, Article 14(2) provides that "Member States, making use of the derogation provided for in paragraph 1 of this Article, may grant derogations to each other covering movements or transport of the equidae referred to in Article 13(1) within their own territories". Member States wishing to do so must notify the Commission of their intention to grant such derogations. There is no such express requirement to notify the Commission of the exercise of the derogation in Article 14(1). If a system of smart cards were to be introduced in the UK, stakeholders could be advised of its introduction and operation by way of guidance.

(b) Regulation 11(b) requires an owner to comply with one of the three options set out in sub paragraphs (a), (b) and (c), namely: - ensure that a horse is accompanied by (a) its full identification document or (b) a smart card or (c) a temporary document issued under Article 14(3). Until a smart card scheme is introduced it will not be possible for an owner to comply with (b), therefore an owner must ensure that a horse is accompanied by either its full identification or a temporary document. It is therefore submitted that Regulation 11 does properly implement articles 13 and 14.

3. Yes, it is confirmed that it is intended that the official veterinarian should be guilty of an offence for failure to comply with the requirements of Regulation 14. The offences created under Regulation 14(4) can only be committed by persons upon whom legal duties have been placed under regulation 14(1) and 14(2). Hence, under Regulation 14(1) an owner who fails to return an identification document to an issuing body and inform the official veterinarian they have done so will commit an offence. Under 14(2) the owner of a slaughterhouse who fails to give the identification document to the official veterinarian commits an offence and an official veterinarian who fails to comply with the requirements in 14(2)(a)(b) and (c) will commit an offence.

4. Article 21(3) is transposed because it is the policy desire to prescribe the form in which the information is to be communicated to the central database. Read with Article 21(3) this requires an issuing body to communicate the information immediately but also in the form prescribed.

As regards the service of notice on the issuing body by the Scottish Government; the notice will be served on the issuing body at the time it is approved as an issuing body and guidance on implementation of the Regulation will prescribe the form in which the information should be provided. The form will be in line with the requirements of the existing National Equine Database. The database is a collaborative project between the UK Government and the Horse industry. The format is set by Article 21(1) of EC Regulation 504/2008. There is no requirement for Scottish Ministers to serve notice for each identification document that is issued. Should the Scottish Ministers wish to change the form in which they require the information to be communicated in future, they could serve an amended notice on the issuing bodies.

5(a) Identification documents issued prior to the coming into force of the Regulations will have been issued under the Horse Passports (Scotland) Regulations 2005 (2005 Regulations").
Although one drafting option would have been to make transitional provisions of the nature referred to, it was considered unnecessary to insert transitional provisions in view of the provisions of the Interpretation Act 1978. Section 16(1)(b) of that Act has the effect that revocation of the 2005 Regulations does not affect the validity of an identification document (previously referred to as a "passport") issued under the 2005 Regulations. Identification documents issued prior to the coming into force of the Regulations shall continue to operate validly without the need for a transitional or savings provision.

(b) Regulation 5(2) makes it an offence not to identify a horse in accordance with Article 13(1). An identification document issued prior to the coming into force of these Regulations will have been issued under the 2005 Regulations. The combined effect of Regulations 8 and 25 of said Regulations was to make it an offence not to obtain a passport for a horse within the specified time limits.

Section 16(1)(c) and (d) of the Interpretation Act 1978 have the effect that the revocation of the 2005 Regulations does not affect the legal process of charges in relation to offences under the Regulations that have been revoked. A transitional or savings provision is therefore considered unnecessary.

The Brucellosis (Scotland) Order 2009 (SSI 2009/232)

On 12th June 2009 the Scottish Government was asked:

1. To explain why it has used a combination of enabling powers subject to different Parliamentary procedures, namely negative procedure and 'no procedure', that insofar as the Order is made under powers conferred by various sections of the Animal Health Act 1981, with the provisions concerned with compensation being subject to negative procedure, and others not being subject to Parliamentary procedure.

2. To clarify whether the reference which is made in article 18(2)(a)(ii) to 'article 18' should in fact be a reference to 'article 19' and, if so, to indicate what is considered to be the effect of that error.

3. Insofar as article 19(1) commences by stating that the provision made there, with reference to the ascertainment of market value, is 'Notwithstanding the provisions of article 4 of the Diseases of Animals (Ascertainment of Compensation) Order 1959, to clarify the relevance of that reference to the 1959 Order and in particular to article 4 thereof.

The Scottish Government responds as follows:

1. The Scottish Government wishes to make an instrument for brucellosis dealing with European obligations, measures to combat the spread of disease and provisions to compensate owners whose animals require to be slaughtered. In order to make a single instrument which is transparent and offers greater accessibility to the user, it was considered appropriate to combine enabling powers from the Animal Health Act 1981, some of which were subject to 'no procedure' and one of which was subject to
negative procedure as well as an enabling power from the European Communities Act 1972 which can competently be subject to negative procedure.

The Scottish Government rarely makes instruments using a combination of enabling powers subject to different Parliamentary procedures; however, it remains the Scottish Government's view that it can be appropriate to combine 'negative' and 'no procedure' instruments, provided that (as here) the higher of these levels of scrutiny is applied. In the last few years, the Scottish Government has made a small number of instruments in this way, the Tuberculosis (Scotland) Order 2007/147 being particularly in point. Other examples are the Tweed Regulation Order 2007/19 and the Disease Control (Interim Measures) (Scotland) Amendment Order 2007/387.

2. The reference in article 18(2)(a)(ii) to 'article 18' ought to have been a reference to 'article 19' and we are grateful for this error being brought to our attention. Despite the incorrect cross-reference, we consider the meaning of 18(2)(a)(ii) is sufficiently clear as the market value can only be determined in terms of article 19. However, we do propose to correct this typographical error by way of a correction slip.

3. The 1959 Order prescribes how the value of an animal slaughtered under the Diseases of Animals Act 1950 (repealed and replaced by the Animal Health Act 1981) is to be ascertained by the Scottish Ministers. However, it does not apply where any enactment or statutory instrument provides any other method for ascertaining values; therefore, it has been disapplied for that reason.