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

1. **Marine (Scotland) Bill**: The Committee will consider the Scottish Government's response to points raised on the delegated powers provisions in this Bill at Stage 1.

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

   - the Civil Jurisdiction (Application to Offshore Renewable Energy Installations etc.) Order 2009 (SG 2009/1743);
   - the Meat (Official Controls Charges) (Scotland) Regulations 2009 (SSI 2009/262);
   - the Feed (Hygiene and Enforcement) (Scotland) Amendment Regulations 2009 (SSI 2009/263);
   - the Ethical Standards in Public Life etc. (Scotland) Act 2000 (Devolved Public Bodies) Order 2009 (SSI 2009/286);
   - the National Health Service (Optical Charges and Payments) (Scotland) Amendment (No. 2) Regulations 2009 (SSI 2009/288);
   - the Criminal Jurisdiction (Application to Offshore Renewable Energy Installations etc.) Order 2009 (SG 2009/1739);
   - the Debt Arrangement Scheme (Scotland) Revocation Regulations 2009 (SSI 2009/258);
   - the Natural Mineral Water, Spring Water and Bottled Drinking Water (Scotland) Amendment Regulations 2009 (SSI 2009/273);
   - the Licensing (Scotland) Act 2005 (Transitional Provisions) Order 2009 (SSI 2009/277);
   - the Ethical Standards in Public Life etc. (Scotland) Act 2000 (Codes of Conduct for Members of certain Scottish Public Authorities) Amendment Order 2009 (SSI 2009/287);
   - the Looked After Children (Scotland) Amendment Regulations 2009 (SSI 2009/290);
   - the Maximum Number of Judges (Transitional Provision) (Scotland) Order 2009 (SSI 2009/291).
3. **Instruments not laid before the Parliament:** The Committee will consider the following—

- the Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 6) Order 2009 (SSI 2009/240);
- the Lands Tribunal for Scotland Amendment Rules 2009 (SSI 2009/259);
- the Lands Tribunal for Scotland Amendment (Fees) Rules 2009 (SSI 2009/260);
- Act of Sederunt (Rules of the Court of Session Amendment No.7) (Adoption and Children (Scotland) Act 2007) 2009 (SSI 2009/283);
- Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009 (SSI 2009/284);
- Act of Sederunt (Ordinary Cause Rules Amendment) (Personal Injuries Actions) 2009 (SSI 2009/285);
- the Adoption and Children (Scotland) Act 2007 (Commencement No. 4, Transitional and Savings Provisions) Order 2009 (SSI 2009/267);
- the Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 7) Order 2009 (SSI 2009/269);
- the Local Government in Scotland Act 2003 (Commencement No. 4) Order 2009 (SSI 2009/275);

4. **Decision on taking business in private:** The Committee will decide whether its consideration of its approach to oral evidence on the Interpretation and Legislative Reform (Scotland) Bill at its next meeting should be taken in private.

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The papers for this meeting are as follows—

**Agenda Items 1-3**

- Legal Brief SL/S3/09/22/1 (P)
- Summary of Recommendations SL/S3/09/22/2

**Agenda Item 1**

- Marine (Scotland) Bill - Government Response SL/S3/09/22/3

**Agenda Items 2-3**

- Government Responses SL/S3/09/22/4

**For Information**

- Letter from Minister for Parliamentary Business SL/S3/09/22/5
SUBORDINATE LEGISLATION COMMITTEE

22nd Meeting, 2009 (Session 3)

Tuesday 1 September 2009

Summary of Recommendations

The Committee will be invited to consider the following recommendations under consideration at the meeting. Decisions are a matter for the Committee.

Agenda Item 1  Marine (Scotland) Bill

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 draw the power to the attention of the lead committee and to inform the lead committee that the new power to add activities to the regime is unqualified and does not specify any criteria on the basis of which the Scottish Government may determine that a particular activity should be added to or removed from the list.

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 that the proposed power is acceptable in principle and that negative procedure is appropriate.

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 no procedure is appropriate.
Section 24(1) - Power to specify activities which will not need a marine licence

The Committee may wish to draw the attention of the lead committee to the Government’s control as to consultation prior to the exercise of the power and to inform the lead committee that the power does not specify any criteria on the basis of which the Scottish Government may determine that a particular activity should be specified as not requiring a licence or not requiring a licence if specified conditions are satisfied.

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 consider that the proposed power under section 25(1) is acceptable in principle and that affirmative 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

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 inform the lead committee that, notwithstanding the powers to make provision for appeals under sections 29(1) and 52(1) of the Bill, no substantive provision with respect to appeals is made on the face of the Bill and to express to the lead committee the Committee’s view that it expects the fundamental elements of an appeal procedure to appear on the face of the Bill.

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 that the proposed powers are acceptable in principle and that affirmative procedure is appropriate.
Section 54(3)(1) - Power to provide for marine fish farming not to constitute ‘development’

The Committee may wish to draw to the attention of the lead committee that the effect of the power is to permit local authorities to determine whether, in respect of their particular area, marine fish farming is to be in the terrestrial planning regime or in the marine licensing regime. The Committee may also wish to draw to the attention of the lead committee the Committee’s view that the exercise of the power on an area by area basis could result in a lack of uniformity across the country which may give rise to considerable confusion as different criteria for development could apply from one area to another with different procedural rules and different rights of appeal.

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; and

Section 64 – Power to amend or revoke a designation order under section 58

The Committee may wish to consider that it is appropriate for the proposed powers to designate marine protected areas to be exercised by the Scottish Ministers as an administrative process rather than by statutory instrument.

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

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

Section 77(1) - Power to make an urgent marine conservation order

The Committee may wish to consider that the proposed power is acceptable in principle and that negative procedure is appropriate. The Committee may wish to comment that it considers section 77(2)(a) unnecessary.
Section 77(6) - Power to make an urgent continuation order

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 find the powers acceptable in principle but comment in its report that, in the opinion of the Committee, the different elements of ancillary powers provision should be justified on a case by case basis separately by the Scottish Government in the context of each particular Bill.

Agenda Item 2 Instruments subject to annulment

The Civil Jurisdiction (Application to Offshore Renewable Energy Installations etc.) Order 2009 (SG 2009/1743)

The Committee may wish to report that it has received further information from the Government with which it is satisfied.

The Committee may also wish to report that for its interests it is content with the explanation provided for the failure to comply with article 10(2) of the transitional order (the 21 day rule).

The Meat (Official Controls Charges) (Scotland) Regulations 2009 (SSI 2009/262)

The Committee may wish to report that it has received a satisfactory response from the Scottish Government and to note that additional guidance on the methodology for charging will be published which will provide further transparency on this matter.

The Feed (Hygiene and Enforcement) (Scotland) Amendment Regulations 2009 (SSI 2009/263)

The Committee may wish to report the instrument on the grounds that the instrument could be clearer as to the limitations of the enforcement powers available to officers
authorised by the Agency given that regulations 17, 22 and 24 appear to automatically empower all authorised officers to enforce all specified feed law whereas Agency officers may only exercise functions in relation to certain provisions.

The Committee may also wish to report that it considers that the functions conferred on Scottish Ministers by SI 2006/304 are relevant in this case – since the enforcement responsibilities under the 2005 Regulations have been completely re-stated in relation to all feed regulated including those added by SSI 2008/201 – and therefore there has been a failure to follow normal drafting practice in omitting reference to the 2006 order in the footnote to the enabling power.

The Ethical Standards in Public Life etc. (Scotland) Act 2000 (Devolved Public Bodies) Order 2009 (SSI 2009/286)

The Committee is invited to report that it has received further information from the Scottish Government as to the production of draft codes by the bodies listed in this order and in light of that information it finds the instrument satisfactory.

The National Health Service (Optical Charges and Payments) (Scotland) Amendment (No. 2) Regulations 2009 (SSI 2009/288)

In relation to inserted regulation 8(2A), the Committee may wish to bring this to the attention of the lead Committee and the Parliament insofar as it may be seen to raise an issue as to the provision being one which purports to have retrospective effect where the parent statute confers no express authority so to provide.

In regard to the explanation provided as to the breach of the 21 day rule the Committee may wish to find this acceptable for its interest and to report accordingly to the lead Committee and to the Parliament.

The Criminal Jurisdiction (Application to Offshore Renewable Energy Installations etc.) Order 2009 (SG 2009/1739)

The Debt Arrangement Scheme (Scotland) Revocation Regulations 2009 (SSI 2009/258)

The Natural Mineral Water, Spring Water and Bottled Drinking Water (Scotland) Amendment Regulations 2009 (SSI 2009/273)

The Ethical Standards in Public Life etc. (Scotland) Act 2000 (Codes of Conduct for Members of certain Scottish Public Authorities) Amendment Order 2009 (SSI 2009/287)

The Looked After Children (Scotland) Amendment Regulations 2009 (SSI 2009/290)

The Maximum Number of Judges (Transitional Provision) (Scotland) Order 2009 (SSI 2009/291)

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

Agenda Item 3 Instruments not laid before Parliament

The Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 6) Order 2009 (SSI 2009/240)

The Committee may wish to report to the Parliament that this instrument was defectively drafted in so far as it failed to commence section 10(2)(b) of the Management of Offenders etc. (Scotland) Act 2005 for the purposes of section 10(1)(e) of that Act as commenced but to report that the matter has been satisfactorily resolved by the Management of Offenders etc. (Scotland) Act 2005 (Commencement No 7) Order 2009.

The Lands Tribunal for Scotland Amendment Rules 2009 (SSI 2009/259)

The Committee may wish to report that an explanation has been provided by the Scottish Government in relation to the delay in submission of this instrument to the Parliament and its date of publication, with which the Committee is satisfied.

The Lands Tribunal for Scotland Amendment (Fees) Rules 2009 (SSI 2009/260)

The Committee may wish to report that an explanation has been provided by the Scottish Government in relation to the delay in submission of this instrument to the Parliament and its date of publication, with which the Committee is satisfied.

Act of Sederunt (Rules of the Court of Session Amendment No.7) (Adoption and Children (Scotland) Act 2007) 2009 (SSI 2009/283)
The Committee might wish to—

- in relation to question 1, concerning the *vires* for inserted rule 67.12(3)(a) and 67.38(3)(a), to find the response from the Lord President’s Private Office a satisfactory one, insofar as reliance is placed on section 108(1) of the Adoption and Children (Scotland) Act 2007;

- in regard to the subject matter of questions 2, 3 and 4 and concerning, respectively, inserted rule 67.16(1)(a), 67.17(b)(iii) and 67.36(6), inserted rule 67.34(4), and inserted rule 67.35(6), to welcome the indication given in respect of each that the typographical errors concerned will be corrected when the opportunity arises.

**Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009 (SSI 2009/284)**

That the Committee might wish to—

- in regard to question 1, concerning the *vires* for rules 12(3)(a) and 44(3)(a), to find the response from the Lord President’s Private Office satisfactory, insofar as reliance is placed on section 108(1) of the Adoption and Children (Scotland) Act 2007;

- in regard to question 2, concerning whether the Schedule to this instrument should not have been drafted in gender neutral terms, to note that an explanation has been given, but the Committee may wish to encourage the use of gender neutral drafting by the Lord President’s Private Office where the opportunity to do so presents itself.

**Act of Sederunt (Ordinary Cause Rules Amendment) (Personal Injuries Actions) 2009 (SSI 2009/285)**

The Committee may wish to draw this instrument to the attention of the Parliament on the ground that the intention and effect of rule 36.E1(5) were not clear but to inform the Parliament that the Committee has found the explanation provided by the Lord President’s Private Office to be satisfactory.

The Committee may wish to draw this instrument to the attention of the Parliament on the ground that while unusually there is a reference in paragraph 2(7) to a part of the Ordinary Cause Rules which has been revoked, the Committee agrees with the Lord President’s Private Office that the reference is not likely to affect the operation of the provision.
The Adoption and Children (Scotland) Act 2007 (Commencement No. 4, Transitional and Savings Provisions) Order 2009 (SSI 2009/267)

The Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 7) Order 2009 (SSI 2009/269)

The Local Government in Scotland Act 2003 (Commencement No. 4) Order 2009 (SSI 2009/275)

Act of Sederunt (Lands Valuation Appeal Court) 2009 (SSI 2009/295)

The Committee may wish to consider if it is content with these instruments.
SUBORDINATE LEGISLATION COMMITTEE

22nd Meeting, 2009 (Session 3)

Tuesday 1 September 2009

Marine (Scotland) Bill at Stage 1

1. Thank you for your letter of 26 June to Paul Johnston regarding the Subordinate Legislation Committee’s consideration of the Marine (Scotland) Bill at Stage 1. For ease of reference I have set out each of the points raised, followed by the Scottish Government response.

2. 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 asked the Scottish Government:

- 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?

3. Scottish Government response:

It is envisaged that activities will be added to the list of licensable marine activities if the Scottish Ministers consider that it would be appropriate for those activities to be subject to marine licensing. Activities would be deleted from the list if it is no longer appropriate for them to be subject to that system.

There could be any number of reasons (e.g. a change in other regulatory regimes, technological change and the development of new industries) for making a section 17(3) order and therefore determining criteria could not be usefully specified in the Bill.

4. 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 asked the Scottish Government:

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.
5. **Scottish Government response:**

We apologise for the oversight that led to section 20(7) not being addressed in the DPM. The paragraphs set out in Annex A should have appeared in place of paragraphs 21 to 26 in the DPM.

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

The Committee asked the Scottish Government:

- *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?*

7. **Scottish Government response:**

Any order under section 24(1) will specify activities which the Scottish Ministers consider should not require to be licensed. There could be any number of reasons for making a section 24(1) order and therefore determining criteria could not be usefully specified in the Bill. There are existing long established exemptions with regards to licenses under the Food and Environment Protection Act 1985 and consents under the Coast Protection Act 1949 and it is likely that similar exemptions will be continued under the new licensing system after a full consultation process. There are existing exemptions for activities such as the deposit of fishing gear other than for the purpose of disposal and the deposit of cable and associated equipment (other than for the purpose of disposal) in the course of cable laying or cable maintenance.

8. **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 asked the Scottish Government:

*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?*
9. **Scottish Government response:**

It is felt that taking the power to be able to define or elaborate the meaning of the phrases in question in the regulations is a sensible approach and will help to avoid any confusion.

There are a large number of FEPA licences issued at present for small uncontroversial projects each year (e.g. the placing of single sewage outfall pipes for discharge of treated sewage from septic tanks serving single dwellings). These sort of projects (although falling within being a licensable activity under section 17 of the Bill) may merit being registered in future rather than licensed.

The Scottish Ministers will define on the basis of research the ‘specified threshold of environmental impact’ where registration is appropriate. They will be able to use the experience gained through the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (SSI 2005/348) which includes a similar registration system. But the concept of a “specified threshold of environmental impact” is not a straightforward one and the exact meaning of the phrase may need elaborated in the regulations.

10. **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 asked 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.*

11. **Scottish Government response:**

It is considered unexceptional to have the details of appeal procedures left to subordinate legislation, so as amongst other things to allow those details to be adjusted over time in the light of experience.

12. **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 asked the Scottish Government:

- *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?*
13. **Scottish Government response:**

Fixed monetary penalties will be for low level, primarily technical offences which are not causing harm to the environment or human health or interfering with other legitimate uses of the sea. This could include failure to notify when works are to commence or a failure to forward a return form to the licensing authority detailing the work that has taken place over the licensing period.

Variable monetary penalties will be for more serious breaches of licence conditions where it is not proportionate to prosecute. The breach may cause harm to the environment or human health or interfere with other legitimate uses of the sea. As the range of operations can vary from small to large-scale operations it is important that penalties can be varied to provide a proportionate response. They could be used to remove financial benefit resulting from the offence or to apply an additional deterrent element.

The penalty levels will be subject to consultation. The levels of fixed monetary penalty will be set down in regulations and any fixed penalty is not to exceed the fine for summary conviction for the offence in question.

A maximum variable monetary penalty is not specified on the face of the Bill as a maximum for the more serious offences would not be appropriate. The Scottish Ministers must be able to capture any financial benefit gained from non-compliance.

14. **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 asked 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.*

15. **Scottish Government response:**

Reference is made to the answer in paragraph 11 above.

16. **Section 54(3) - insertion of section 26AB into the Town and Country Planning (Scotland) Act 1997 - Power to provide for marine fish farming not to constitute ‘development’**

The Committee asked the Scottish Government:

- *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?*
17. **Scottish Government response:***

During the consultation process leading up to the Bill, there was a mixed response as to who should be responsible for consents for aquaculture developments (that is, whether responsibility should be left with local authorities under the Town and Country Planning (Scotland) Act 1997 or whether the developments should constitute licensable activities under the Bill). The Scottish Ministers decided in light of this that the Bill should include a mechanism whereby any particular local authority could decide to give up its role under the 1997 Act in respect of aquaculture developments, with the result that in the area in question those developments would become licensable under the Bill. It is considered that the use of statutory instruments is the best and clearest way to effect the change in relation to any area where an authority chooses in due course to give up its 1997 Act role.

18. **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 asked the Scottish Government:**

*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?*

19. **Scottish Government response:**

The use of an administrative rather than legislative process to establish MPAs is well paralleled in other legislation dealing with protected areas. For instance, “European sites” as defined in regulation 10 of the Conservation (Natural Habitats, &c.) Regulations 1994 (S.I. 1994/2716) are not set down in statutory instruments. Nor are sites of special scientific interest under Part 2 of the Nature Conservation (Scotland) Act 2004. For historic assets, the scheduling of monuments (Ancient Monuments and Archaeological Areas Act 1979) is also not effected by statutory instrument.

Under the Marine and Coastal Access Bill (currently before the Westminster Parliament), Scottish Ministers will also have responsibility for designating MPAs in the Scottish offshore region and this too will not fall to be done by statutory instrument. An administrative process for establishing MPAs in the inshore region will allow Scottish Ministers to follow through a similar designation process in the inshore and offshore regions.

Part 4 of the Bill contains a process for selecting MPAs and qualifies the grounds on which MPAs may be selected. It is thought appropriate that the Scottish Parliament be asked to agree to a circumscribed selection process rather than to approve each and every MPA designation.
Section 74(1) - Powers to make marine conservation orders (‘MCOs’)

The Committee asked the Scottish Government:

To explain fully why negative procedure is considered sufficient scrutiny.

Scottish Government response:

It is considered that negative procedure is the appropriate procedure for an MCO. A parallel may be drawn with orders made under the Inshore Fishing (Scotland) Act 1984, which are also subject to annulment. While we have no intention of unnecessarily restricting marine activities, should we need to protect an MPA from fisheries related activities then that will be done by an order under the Inshore Fishing Act rather than by an MCO. From a practical point of view we consider it expedient that both sorts of orders should be subject to the same sort of instrument. This will especially be the case where the Parliament is asked to consider fisheries related and non-fisheries related restrictions simultaneously.

Section 77(1) - Power to make an urgent marine conservation order

The Committee asked 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?

Scottish Government response:

Section 77(2) provides clarity as to the period during which an urgent MCO is to remain in force. Whilst it is not necessary to provide that the order comes into force on such date as is specified in it, the terms of paragraph (a) help the reader to understand the reference in paragraph (b) to the period for which the order may remain in force.

Section 144(1) - Ancillary provision

The Committee asked 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.

Scottish Government response:

Section 144 is in fairly standard terms and provides the sort of general powers seen in most Scottish Parliament Bills. As far as procedure is concerned, a section 144 order will be subject to negative procedure unless it contains “provisions which add to, replace or omit any part of the text of an Act”, in which case affirmative procedure will apply (section 145(5)(e)). We see no reason to extend affirmative procedure to any other category of order under section 144.

I hope that this information is helpful to the Committee.
ANNEX A

Section 20(7) - Power to set out further details as to the procedure for applications and for the grant of licences.

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision
1. The Scottish Ministers may by regulations detail the procedure to be followed in relation to applications for licences and the procedure for the granting of licences.

Reason for taking power
2. The policy is that the marine licensing system will be streamlined to allow decisions to be made as efficiently as possible with one point of contact for all marine licensing consents. For the system to remain efficient there needs to be flexibility to revise the system to meet changing requirements.

Choice of procedure
3. The procedures in relation to applications for licences and the procedure for issuing of licences should not be contentious matters and so negative resolution procedure is deemed appropriate.

Section 21(2) - Power to specify standard daily amount in relation to an inquiry under section 210 of the Local Government (Scotland) Act 1973 (c.65)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: no procedure

Provision
4. Section 21(1) enables the Scottish Ministers to hold an inquiry in connection with their determination of an application for a marine licence. Section 21(2) applies subsections (2) to (8) of section 210 of the Local Government (Scotland) Act 1973 to any such inquiry. Section 210(7B) of that Act gives the Scottish Ministers the power to prescribe by regulations a standard daily amount to be used in calculating expenses which may be recovered from parties to the inquiry. Different standard amounts may be prescribed for different categories of inquiry and accordingly the effect of section 21(2) of the Bill is to widen the regulation making powers of Ministers.

Reason for taking power
5. As section 21(2) applies certain general procedural provisions of the 1973 Act to inquiries under that section, it was considered appropriate to give the Scottish Ministers the extended power to set by regulations a standard daily amount in respect of any hearing on a marine licence application.

Choice of procedure
6. There is no Parliamentary procedure on regulations under section 210(7B) generally and no reason was seen to alter that in the case of exercise of powers under that section as extended by the Bill.
SUBORDINATE LEGISLATION COMMITTEE

22nd Meeting, 2009 (Session 3)

Tuesday 1 September 2009

Scottish Government Responses

The Civil Jurisdiction (Application to Offshore Renewable Energy Installations etc.) Order 2009 (SI 2009/1743)

On 15 July 2009 the Scottish Government was asked:

In relation to the Civil Jurisdiction (Application to Offshore Renewable Energy Installations etc.) Order 2009 (SI 2009/1743) whether the power in section 192(4)(a) of the Energy Act 2004 to make different provision for different cases (in particular different provision in respect of English and Scottish areas) was used to make this order – as was the case in related instrument SI 2009/1739. If so, why was this power not cited in the preamble, and given there is no reference to “all other powers” in the preamble, what is the effect of this omission considered to be?

The Scottish Government responds as follows:

Section 87(1) of the Energy Act 2004 enables an Order to be made under it in relation to “the law in force in such part of the United Kingdom as may be specified in the Order”. The Order makes provision in respect of the law in force in England and Wales, and the law in force in Scotland. It is clear that the Order is an exercise of the powers in section 87(1). It does not, and does not need to, rely on section 192(4)(a) of that Act.

The Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 6) Order 2009 (SSI 2009/240)

On 19 June the Scottish Government was asked:

Subject to s.10(11), s.10(1)(e) of the Management of Offenders etc. (Scotland) Act 2005 ("the 2005 Act") requires the responsible authorities for the area of a local authority to jointly establish arrangements for the assessment and management of the risk posed in that area by any person who has been convicted of an offence if, by reason of that conviction, the person is considered by the responsible authorities to be a person who may cause serious harm to the public at large. Section 10(2)(b) of the 2005 Act provides that for the purposes of s.10(1)(e) it is immaterial where the offence of which the person has been convicted was committed. Section 10(2)(b) is not currently in force.

(a) Why is s.10(2)(b) not being commenced given that it appears to be the intention of Parliament that it should operate for the purposes of s.10(1)(e) whenever s.10(1)(e) applies? and,

(b) what is the effect on the operation of s.10(1)(e) as commenced by this order of the non-commencement of s.10(2)(b)?
The Scottish Government responds as follows:

The Scottish Government agrees that section 10(2)(b) operates as clarification for the purpose of section 10(1)(e) and therefore should be commenced with section 10(1)(e).

A Commencement Order will be made to bring section 10(2)(b) into force on 26 June for the purposes of section 10(1)(e).

A copy of this Commencement Order as it is to be made is attached for the Committee’s information.

Lands Tribunal for Scotland Amendment Rules 2009 (SSI 2009/259) and the Lands Tribunal for Scotland Amendment (Fees) Rules 2009 (SSI 2009/260)

On 13th July the Scottish Government was asked:

Given that these Rules were made on 19 June 2009 but were not submitted to the Parliament until 24 June 2009, please explain the reason for this delay and please confirm the date when the Rules were published.

The Scottish Government responds as follows:

These instruments were made on the afternoon of Friday 19th June and we would normally have expected them to have been submitted to Parliament no later than Tuesday 23rd June. Regrettably there was a delay in the finalisation of the accompanying executive note, and the instruments were not submitted until Wednesday 24th June. We note that the instruments are to be considered at the Committee’s meeting on 1st September 2009.

The instruments were published on 30th June 2009.

The Meat (Official Controls Charges) (Scotland) Regulations 2009 (SSI 2009/262)

On 30 June 2009 the Scottish Government was asked:

1. to explain whether it is permissible for cutting plants, game handling establishments or slaughterhouses to be operating without approval under Regulation 853/2004 under the transitional provisions (on account of having been authorised under the relevant 1995 regulations) given that the 2009 regulations apply from 28 September 2009 some 3.5 years after Regulation 853/2004 came into force.

2. why paragraph 2 of Schedule 2 only requires the Agency to comply with article 27.3 of Regulation 882/2004 and not also article 27.4 and 27.5, since the regulations provide the Agency with a discretion as to the percentage to be charged but Regulation 882/2004 provides that charges levied may not exceed 100% of the costs incurred in relation to the items listed in Annex VI?

3. as charging is based on the percentage fixed by the Agency at its discretion and which may vary in relation to different premises, to explain how the calculation of charges is to be published in satisfaction of article 27.12 of Regulation 882/2004.
The Scottish Government responds as follows:

1. All cutting plants, game handling establishments and slaughterhouses that were operating in Scotland before Regulation 853/2004 came into effect have been assessed for approval under that Regulation, and the last approval decisions were made just days before the instrument was signed. As such, there are no premises in Scotland operating under the transitional provisions and it is accepted that the wording included in the instrument in this regard has become unnecessary. For premises other than low throughput premises there is no time limit, so had premises not been approved under Regulation 853/2004, those premises could have continued to operate under the transitional provisions. For low throughput premises there is a time limit, which is set for the end of this year, but all such premises in Scotland have been assessed and approved.

2. Whilst it is appreciated that the provisions of article 27 are directly applicable and did not therefore need to be specifically referred to in the instrument, it was thought helpful to include paragraph 2 of Schedule 2 so as to bring out that the Agency must respect the minima specified in article 27.3 when making calculations under paragraph 1 of Schedule 2. Because of the general approach of the instrument to charge setting, there was not thought to be any advantage in referring specifically to any other directly applicable provision within article 27.

3. The instrument has been drafted in line with equivalent regulations in the rest of the UK. Charges will vary from premises to premises depending upon the circumstances and this means that the degree to which the calculation methodology can be specifically prescribed is limited. The UK Government and the devolved administrations (including the Scottish Government) are satisfied that the instrument sets out the method of calculation insofar as practicable and in fulfilment of the UK's community obligations. The consultation package explained the calculation methodology in some detail and a copy was sent to the EC Commission. The EC Commission will be informed again of the new charging scheme before it comes into force. The Meat Hygiene Service, the Executive Agency that carries out the official controls in question, will also issue guidance explaining the methodology of the new charging arrangements, including the discounts, to food business operators. This guidance will also be publicly available on the Agency's website.

The Feed (Hygiene and Enforcement) (Scotland) Amendment Regulations 2009 (SSI 2009/263)

On 29 June 2009 the Scottish Government was asked:

1. Is it intended that all authorised officers will be able to exercise the functions under regulations 17, 22 and 24 of the Feed (Hygiene and Enforcement) (Scotland) Regulations 2005 as amended in relation to any provision of specified feed law?

2. If it is not, and authorised officers of the Agency are only intended to be able to exercise those functions in relation to the "relevant provisions" within the meaning of regulation 16 as amended, is it considered that this is sufficiently clear from the terms of the 2005 Regulations as amended?
3. As the amendments to the 2005 Regulations appear to be intended to apply to feed additives which are digestibility enhancers, gut flora stabilisers or incorporated with the intention of favourably affecting the environment, is reliance placed on the functions transferred to the Scottish Ministers by SI 2006/304 when making these regulations and, if so, why was this omitted from the footnote to the preamble?

**The Scottish Government responds as follows:**

1. The Food Standards Agency ("the Agency") may authorise officers for the purposes of exercising functions under the "relevant provisions" (as defined in regulation 16(5) (as amended) of the 2005 Regulations), which includes the 2005 Regulations (which includes provisions that make reference to specified feed law for the purposes of the 2005 Regulations), but only insofar as those functions under the "relevant provisions" relate to primary production (as set out in regulation 16(2) (as amended) of the 2005 Regulations). As is the case at present, a feed authority may also authorise officers for these purposes or any of the other purposes that it is currently empowered to do so.

The intention of the Agency at this time is to authorise officers only for the purposes of exercising functions under regulation 17 (feed business improvement notices) and regulation 24 (powers of entry for authorised officers), but not regulation 22 (feed business emergency prohibition notices and orders), of the 2005 Regulations (insofar as they relate to primary production). Authorised officers will be provided with authorisation cards detailing the scope of their authorisation.

2. Regulation 16 in our view makes clear the circumstances in which it is competent for authorised officers of the Agency to act. They may enforce "the relevant provisions" in so far as they apply to the operations mentioned in regulation 16(2). The answer to question 1 indicates what it is intended will happen in practice.

3. No reference to SI 2006/304 was included in the footnote to the preamble since that instrument was not considered relevant to the provisions made by these Regulations. The Regulations are concerned mainly with primary production and this does not include feed additives which are digestibility enhancers, gut flora stabilisers or those that are incorporated with the intention of favourably affecting the environment.

**Act of Sederunt (Rules of the Court of Session Amendment No. 7) (Adoption and Children (Scotland) Act 2007) 2009 (SSI 2009/283)**

On 20 August 2009, the Lord President's Private Office was asked:

1. (a) To explain the basis for inserted rules 67.12(3)(a) and 67.38(3)(a), which both state that a *curator ad litem* ‘must have regard to safeguarding the interests of the child as his paramount duty’, but are not concerned with the manner in which that duty is carried out (in contrast with the list which then follows those provisions, setting out how and in what manner that duty is to be carried out by reference to the duties involved); and

(b) in responding to question 1(a) to indicate whether, in respect of rule 67.12(3)(a) and 67.38(3)(a), reliance is being placed on section 108(1)(a) of the 2007 Act; and if it is
not, to clarify the power which is being relied upon. (Section 108(1), it is noted, enables rules of court to provide for the appointment of a person to act as *curator ad litem* with the duty of safeguarding the interests of the child ‘in such manner as may be prescribed’).

2. With reference to inserted rule 67.16(1)(a), 67.17(b)(iii) and 67.36(6) to clarify whether references, there, to ‘he’ and ‘him’ should not in fact state ‘it’, (it being understood that the references concerned are intended to relate to the court) and if so to indicate what is considered to be the effect of these errors on the operation of the instrument.

3. With reference to inserted rule 67.34(4), to indicate whether the reference there to paragraph (2) should not instead relate to paragraph (3) (or indeed to an order made under paragraph (3)).

4. With reference to inserted rule 67.35(6), to indicate whether the word ‘and’ which appears in the second line of that provision should not read ‘as’.

**The Lord President’s Private Office responds as follows:**

1. (a) The Lord President’s Private Office takes the view that the references in rules 67.12(3)(a) and 67.38(3)(a) are concerned with the manner in which a *curator ad litem* is to carry out his duty of safeguarding the interests of the child. The safeguarding duty is referred to at section 108(1)(a) of the 2007 Act and the same provision also provides a power to prescribe, by rules of court, the manner in which the duty is to be fulfilled. Although the style of wording used in sub-paragraph (a) in each rule differs from the style of wording used in some of the subsequent sub-paragraphs, the requirement for the *curator ad litem* to have regard to the duty as his paramount duty is, in our view, a prescription of how the relevant duty is to be carried out. Both provisions impose a requirement as to method by which the *curator ad litem*’s safeguarding duty is to be met. In any case, we consider that it is also open to the Court to make provision of this nature by virtue of its powers under section 5 of the Court of Session Act 1988.

1. (b) The Lord President’s Private Office takes the view that the powers conferred by section 108(1)(a) of the 2007 Act, as referred to above, and the general power conferred on the Court by section 5 of the Court of Session Act 1988 to regulate and prescribe the procedure and practice to be followed in various categories of causes in the Court (and any matters incidental or relating to any such procedure or practice) both extend to the making of the provisions detailed above.

2. It is correct that the references to ‘he’ and him’ in the specified rules should have referred to ‘it’. These are typographical errors. It is the view of the Lord President’s Private Office that, in the context of the rules in question, the intention to refer to the court in each paragraph is clear, that a rectifying construction is to be placed on each of these references and that the errors do not affect the operation of the instrument. However, we are grateful to the Committee for pointing out these errors and we shall take steps to correct them when the opportunity arises.

3. It is also correct that the reference in rule 67.34(4) should have been to paragraph (3), rather than paragraph (2). This is also a typographical error. The Lord President’s Private Office takes the view that, in the context of the rule as a whole, the intention to
refer to paragraph (3) is clear. However, we shall take steps to correct this error when
the opportunity arises.

4. It is also correct that the word ‘and’ in the second line of rule 67.35(6) should read
‘as’. This is also a typographical error. Again, the Lord President’s Private Office takes
the view that the intention to use the word ‘as’ in this rule is clear. However, we shall
take steps to correct this error when the opportunity arises.

Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children
(Scotland) Act 2007) 2009 (SSI 2009/284)

On 20 August 2009, the Lord President's Private Office was asked:

1. (a) To explain the basis for the inserted rules 12(3)(a) and 44(3)(a), which both state
that a curator ad litem ‘must have regard to safeguarding the interests of the child as his
paramount duty’, but are not concerned with the manner in which that duty is carried out
(in contrast with the list which then follows those provisions, setting out how and in what
manner that duty is to be carried out by reference to the duties involved); and

   (b) in responding to question 1(a) to indicate whether, in respect of rule 12(3)(a) and
44(3)(a), reliance is being placed on section 108(1)(a) of the Adoption and Children
(Scotland) Act 2007; and if it is not, to clarify the power which is being relied upon.
(Section 108(1), it is noted, enables rules of court to provide for the appointment of a
person to act as curator ad litem with the duty of safeguarding the interests of the child
‘in such manner as may be prescribed’).

2. To indicate whether it is considered that the Schedule to this instrument, so far as it
represents ‘stand alone’ text (and in that regard, therefore, might not be regarded as
being bound by the drafting precedent of the legislation being amended) should not have
been drafted in gender neutral terms.

The Lord President’s Private Office responds as follows:

1. (a) Essentially, the answer is the same as that given in relation to the first question
posed in relation to S.S.I. 2009/283. The Lord President’s Private Office takes the view
that the references in rules 12(3)(a) and 44(3)(a) are concerned with the manner in
which a curator ad litem is to carry out his or her duty of safeguarding the interests of the
child. The safeguarding duty is referred to at section 108(1)(a) of the 2007 Act and the
same provision also provides a power to prescribe, by rules of court, the manner in
which the duty is to be fulfilled. Although the style of wording used in sub-paragraph (a)
in each rule differs from the style of wording used in some of the subsequent sub-
paragraphs, the requirement for the curator ad litem to have regard to the duty as his
paramount duty is, in our view, a prescription of the way in which the relevant duty is to
be carried out. Both provisions impose a requirement as to the method by which the
curator ad litem’s safeguarding duty is to be met. In any case, we consider that it is also
open to the Court to make provision of this nature by virtue of its powers under section
32(1) of the Sheriff Courts (Scotland) Act 1971.

1. (b) The Lord President’s Private Office takes the view that the powers conferred by
section 108(1)(a) of the 2007 Act, as referred to above, and the general power conferred
on the Court of Session by section 32 of the Sheriff Courts (Scotland) 1971 to regulate and prescribe the procedure and practice to be followed in any civil proceedings in the sheriff court (including any matters incidental or relating to any such procedure and practice) both extend to the making of the provisions detailed above.

2. The rules contained in the Schedule will essentially replace large parts of Chapter 2 of the existing Child Care and Maintenance Rules 1997, which is not drafted in gender neutral terms. Rather than being a completely fresh set of rules, the new rules are, to a certain extent, based on the existing provisions within Chapter 2 of the 1997 Rules. Against that background, we consider that it was appropriate to adopt a similar style of drafting in the Schedule to this instrument as is used in the existing rules.

Act of Sederunt (Ordinary Cause Rules Amendment) (Personal Injuries Actions) 2009 (SSI 2009/285)

On 4 August 2009, the Lord President’s Private Office was asked:

1. To explain the meaning and effect of new rule 36.E1(5) which states 'But the defences shall not include a note of pleas-in-law' given that rule 36.E1 deals with 'the application of other rules' but rule 36.E1(5) does not refer to any 'other rule'? Is it intended that rule 36.E1(5) should qualify rule 36.E1(4)(d)?

2. To explain the meaning and effect of the reference at paragraph 2(7) of the instrument to Part V (Sex Discrimination Act 1975) in Chapter 36, given that Part V (Sex Discrimination Act 1975) of Chapter 36 appears to have been omitted from Chapter 36 by SSI 2006/509 para. 2(2)?

The Lord President’s Private Office responds as follows:

1. References within rule 36.E1 to the application of specified rules include references to the application of those rules, as qualified. Rule 36.E1(5) is intended to qualify rule 36.E1(4)(d). Although paragraph (5) is drafted in a slightly different style to the subsequent paragraphs within Rule 36.E1 that apply other rules with qualification, it is intended to have the same effect as those subsequent paragraphs. It is the view of the Lord President's Private Office that the intention is obvious when paragraphs (4) and (5) of rule 36.E1 are read together, as both of the relevant provisions relate to defences and paragraph (5) of the rule clearly follows on from paragraph (4). We do not consider that the inclusion of paragraph (5), or any of the other qualifications contained within rule 36.E1, renders the heading above the rule misleading in any way. In any event, we note that the heading has no legal effect.

2. The Lord President’s Private Office accepts that the drafting of paragraph 2(7) could have been made clearer. Part V of Chapter 36 of the Ordinary Cause Rules was omitted by virtue of paragraph 2(2) of SSI 2006/509. It would perhaps have been preferable if paragraph 2(7) had included a footnote making it clear that Part V had been omitted, or had not made any specific reference to Part V at all. However, the purpose of paragraph 2(7) is to insert a new Part VI into Chapter 36. The Lord President's Private Office takes the view that the effect of the provision is to insert Part VI at the end of Chapter 36. The fact that Part V has in fact been omitted does not in our view affect the operation of the inserted rule.
On 13 August 2009 the Scottish Government was asked:

"1. Given that the policy objective of adding two devolved public bodies to schedule 3 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 is to ensure that members of these two bodies are subject to and observe the members' code for the relevant body approved by the Scottish Ministers, the Scottish Government is asked whether the Scottish Ministers have, by order under section 3(2) of the 2000 Act, stipulated a time limit for submission of a draft members' code in respect of each of these bodies?

2. If there is no stipulated time limit in effect for the devolved public bodies added by this Order, how and when does the Scottish Government considers that it would have power to devise a code for that body which would be legally enforceable?"

The Scottish Government responds as follows:

Of the three bodies listed in the Order, National Waiting Times Centre Board and NHS 24 have already submitted draft members' codes, which have been approved. Quality Meat Scotland has also submitted a draft code which is currently under consideration. In these circumstances, an order under section 3(2) of the 2000 Act has not been made.

On 14 August 2009 the Scottish Government was asked:

“With reference to inserted regulation 8(2A), which prescribes an additional category of person to whom payments are to be made by a Health Board in connection with the supply of an optical appliance (or, as elsewhere provided, in relation to the replacement and repair of such appliance):

1. To clarify if it is intended that a person who satisfies the specified requirements, who was supplied with an optical appliance (or had such appliance replaced or repaired) between the period 6th April 2009 and 6th August 2009 is to have any costs incurred in that regard reimbursed (or is otherwise not required to make payment in relation to such appliance) and, if so

2. To clarify the vires for that provision, specifically in relation to the reference which it makes within the description set out there to a 'qualifying' date of 6th April 2009, which precedes the coming into force of these Regulations; and

3. Whether, therefore, that provision is not, for all practical purposes, one which has retrospective effect, the parent statute conferring no express authority so to provide?”
The Scottish Government responds as follows:

1. We confirm that it is intended that a person who satisfies the specified requirements, by having been supplied with an optical appliance (or having had such appliance replaced or repaired) in the period 6 April 2009 to 6 August 2009 is to have any costs incurred in that regard reimbursed, or is otherwise not required to make payment in relation to such appliance.

2. We consider that the vires for this provision is contained in paragraph 2A(1),(3) and (3A) of Schedule 11 to the National Health Service (Scotland) Act 1978.

Paragraph 2A(1) provides that it shall be the duty of Scottish Ministers to provide by regulations for payments to be made by them or by a Health Board to meet, or to contribute towards, the cost incurred for the supply of optical appliances for which a prescription has been given in consequence of a testing of sight under the Act for (a) a child, (b) for a person whose resources fall to be treated under the regulations as being less than his requirements, or (c) for a person of such other description as may be prescribed.

Paragraph 2A(3)(b) provides that the Scottish Ministers may by regulations provide for payments to be made by them or by a Health Board towards any cost accepted by them or by the Board as having been incurred for the replacement or repair in prescribed circumstances of optical appliances for which a prescription was given in consequence of a testing of the sight of a person of a prescribed description.

Paragraph (3A) provides that descriptions of persons may be prescribed under paragraph 2A by reference to any criterion.

We consider that regulation 8(2A) describes other persons in terms of paragraph 2A(1)(c) and (3)(b) and (3A) of Schedule 11. It creates another category of prescribed person. Sub paragraph (3A) expressly states that the descriptions of persons may be prescribed by reference to any criterion. This is a wide power, and we consider that it provides vires for Scottish Ministers to prescribe any reasonable criterion, and this is what regulation 8(2A) does. The reference to 6 April 2009 is part of the criteria by reference to which the description of those persons is prescribed from the date the amending regulations come into force.

3. We consider, therefore, that the provision does not have retrospective effect. Its legal effect is to create a new description of prescribed persons from the coming into force date of the regulations. The 1978 Act confers authority for this in the provisions referred to above.
June 2009

Dear Jamie

During my evidence to the Committee on 28 April 2009 I indicated that I would provide the Committee with further information on two matters relevant to the forthcoming Interpretation and Legislative Reform (Scotland) Bill. These were the 40 day scrutiny period provisions and the Pre-consolidation modification of enactments provisions.

**40 Day Scrutiny Period for SSIs**

It is clear that the Committee still has some concerns about the Government not accepting its recommendations to extend the parliamentary scrutiny period for SSIs from 40 to 50 days. I note that the relevant recommendations in the Committee Report appear to be formed wholly on the basis of a perceived difficulty arising from the terms of Standing Orders as currently drafted, as opposed to any evidence of the current 40 day scrutiny period causing difficulties for the Parliament. The Government’s formal response to the Report accepted the need to remove any ambiguity around scrutiny periods, but did not see an extension of the existing scrutiny timescales as the way forward. On 28 April I explained to the Committee that I saw no merit in moving away from a 40 day scrutiny period given that no evidence had been provided of actual difficulties arising for the Parliament. I also see other recommendations in the Report such as recommendation 13 (parallel consideration) as assisting lead Committees to report on instruments earlier in the 40 day period. The Government’s view is that Standing Orders should make clear how the 40 day period is to be allocated from the laying of an instrument to the conclusion of parliamentary scrutiny.

The short time available for my oral evidence did not permit any detailed or prolonged discussion of this matter. I did however begin to explain the impact such a move would have on the timing of the Government's legislative programme. The timeous delivery of necessary legislative change is a matter of concern, not only for the Government but for the country. As the paper already submitted to the Committee by my officials illustrates, because of parliamentary recesses the nominal increase by 10 days of the scrutiny period may, in some circumstances, produce significantly longer delays (of some months) in the legislative
timetable. Such delays can impact upon the lives of real people and, in consequence, to the reputation of good governance in Scotland.

The Committee should also be aware of the potential for delay in the progression of dual parliament orders, most notably certain orders made under the Scotland Act 1998. Most of those orders require to complete their scrutiny in both parliaments before in turn being subject to consideration at the Privy Council. This further explains the need to co-ordinate parliamentary scrutiny to ensure that orders are considered at the earliest possible meeting of the Privy Council. The Committee may also recognise that certain legislation is brought forward by Ministers to implement EU Directives, sometimes to extremely short deadlines. This provides a further example of where co-ordination across the United Kingdom is highly important and where disparate scrutiny timescales between Holyrood and Westminster could prove problematic.

The paper already submitted to the Committee by my officials sets out in some detail a range of scenarios to demonstrate the practical difficulties that could arise from moving to a 50 day scrutiny period. The paper serves to demonstrate disbenefits not only to the Government, but also to the Parliament and, interestingly, shows that extending the scrutiny period can on occasion reduce the opportunities for scrutiny. I would hope that the Committee can reflect on these points before finalising its view on the merits of extending the 40 day scrutiny period.

**Pre-consolidation Modification of Enactments**

The proposed new section would give the Scottish Ministers an order making power allowing them the flexibility to make desirable pre-consolidation amendments when a particular area of the law was being consolidated. Annex A gives an example of how the proposed order making power would work in practice.

At present a consolidation Bill can make substantive changes to the law being consolidated only if they meet a statutory test and are recommended by the Scottish Law Commission (or both the Scottish Law Commission and the Law Commission jointly). At present, changes beyond those that meet the recommendations test would have to be made in a programme Bill, for which there might not always be space in the legislative programme.

The new provision would enable changes to be made in an order which would be subject to parliamentary scrutiny – and so could be accepted or rejected. The new provision would greatly assist the consolidation process.

BRUCE CRAWFORD
POWER TO MAKE PRE-CONSOLIDATION AMENDMENTS
EXAMPLE ILLUSTRATING HOW THE PROVISIONS WOULD OPERATE

An example of its use would be if 3 Acts on housing are being consolidated into one. The two newer Acts may define "house" as including a caravan. The oldest Act does not. From a policy perspective it makes sense for the material in the oldest Act to apply to caravans. At present, a Bill would have to be passed to amend the oldest Act before the consolidation Bill was dealt with by the Parliament. There might not be parliamentary time available to deal with the Bill amending the oldest Act. Under the proposals, an Order could be made amending the oldest Act. If the Order were agreed to by the Parliament, the consolidation Bill would reproduce the law as amended by the Order.

Illustrative parliamentary timeline for Order and consolidation Bill

1. Consolidation Bill team identify change in existing law that would facilitate the consolidation or would be desirable in connection with it (e.g. clarifying existing law or dealing with a missed consequential).

2. change put in Scottish Government draft Order.

3. draft Bill reproduces law as proposed to be amended by draft Order.

4. draft SSI containing Order laid before the Parliament.

5. draft Bill introduced in the Parliament / presented to either House of Parliament.

6. draft Order considered by SLC and subject Committee.

7. if draft Order approved, consolidation Committee checks draft Bill accurately incorporates changes to the existing law provided for in draft Order.

8. if draft Order not approved, draft Bill is amended so as to reproduce the existing law (and strip out changes provided for in Order).

9. if draft Order approved – Order comes into force an instant before Bill comes into force.

NOTES

1. The precise timing for laying and considering the draft Order and for introducing and considering the draft Bill would be a matter that would need to be planned by the business managers in each case.

2. The fate of the draft Order needs to be known before the Bill is passed because if the draft Order is not approved, the Bill will need to be amended to strip out the changes that the Order proposed to make to the law.

3. A number of Westminster Acts on particular topics contain specific powers similar to the power in section 43. Section 43 would have the same effect as the specific provisions.
that are already on the statute book. It would enable the power to be used in relation to the consolidation of the law on a particular topic.

4 An example of a use of a specific power is an order made under section 36 of the National Health Service Reform and Health Care Professions Act 2002 (which enables the Secretary of State to make an order amending the legislation relating to the health service in England and Wales). The order made under that power is The National Health Service (Pre-consolidation Amendments) Order 2006 (No. 1407).