The Committee will meet at 2.15 pm in Committee Room 5.

1. **Declaration of interests:** Elaine Smith will be invited to declare any relevant interests.

2. **Control of Dogs (Scotland) Bill:** The Committee will consider the response from the member in charge to points raised on the delegated powers provisions in this Bill at Stage 1.

3. **Public Services Reform (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.

4. **Home Owner and Debtor Protection (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

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

   the Registration Services (Prescription of Forms) (Scotland) Regulations 2009 (SSI 2009/314);
   the Sea Fishing (Enforcement of Community Quota and Third Country Fishing Measures and Restriction on Days at Sea) (Scotland) Order 2009 (SSI 2009/317);
   Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment No. 2) 2009 (SSI 2009/321);
   the Protection of Children (Scotland) Act 2003 (The Meaning of Disqualified from Working with Children: Corresponding Disqualifications in Northern Ireland) (No. 2) Order 2009 (SSI 2009/316);
   the Food Labelling (Nutrition Information) (Scotland) Regulations 2009 (SSI 2009/328);
   the Fodder Plant Seed (Scotland) Amendment Regulations 2009 (SSI 2009/330);
the Justice of the Peace Courts (Sheriffdom of North Strathclyde) etc. Order 2009 (SSI 2009/331);
the Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) etc. Order 2009 (SSI 2009/332);
the Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (Scotland) Amendment Regulations 2009 (SSI 2009/333).

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

the Public Health etc. (Scotland) Act 2008 (Commencement No. 2, Savings and Consequential Provisions) Order 2009 (SSI 2009/319);
Act of Adjournal (Criminal Procedure Rules Amendment No.4) (Devolution Issues) 2009 (SSI 2009/322);
Act of Sederunt (Devolution Issues) (Appeals and References to the Supreme Court) 2009 (SSI 2009/323);
the Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Amendment Regulations 2009 (SSI 2009/315);
the Judiciary and Courts (Scotland) Act 2008 (Commencement No. 3) Order 2009 (SSI 2009/318);

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The papers for this meeting are as follows—

**Agenda Items 2-6**

Legal Brief  SL/S3/09/26/1 (P)

Summary of Recommendations  SL/S3/09/26/2

**Agenda Item 2**

Control of Dogs - Response  SL/S3/09/26/3

**Agenda Item 3**

Public Services Reform (Scotland) Bill - Government Response  SL/S3/09/26/4

Public Services Reform (Scotland) Bill - Supplementary Response  SL/S3/09/26/5

**Agenda Item 4**

*Home Owner and Debtor Protection (Scotland) Bill*
Delegated Powers Memorandum

**Agenda Items 5 and 6**

Government Responses  SL/S3/09/26/6
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  Control of Dogs (Scotland) Bill**

**Section 2(7) – (Content of dog control notice) – Powers to amend content of the dog control notice including requirements and examples of steps to be taken**

The Committee may wish to welcome the confirmation provided by the Member in Charge to the effect that the intention of the power set out at section 2(7)(a) is not to allow the Scottish Ministers to remove a requirement set out in subsection (1).

However, the Committee may wish to indicate that it considers there remains doubt as to whether that power could not, in fact, be used to remove a requirement contained in subsection (1) of section 2, and in such circumstances to recommend that the Member in Charge brings forward appropriate amendments at Stage 2 in order to place matters beyond doubt.

**Section 8 – (Scottish dog control database) – Power to make provision as to the establishment, maintenance, operation, management and control of the database and for the appointment of the database operator**

The Committee may wish to welcome the terms of the reply provided by the Member in Charge in relation to the power taken under section 8.

The Committee may wish to welcome the statement which is made by the Member in Charge to the effect that it is not considered that the power in section 8(1) could be used to make provision as to the effect of the database and of being included in it, and that any such provision would be beyond the *vires* of the power.

The Committee may wish to draw this to the attention of the lead committee to pursue this matter in the course of evidence taken from the Member in Charge.
Agenda Item 2  
Public Services Reform (Scotland) Bill

Schedule 2, paragraph 2 - Power for the Court of Session (1) to regulate the conduct of officers of court in exercising their extra-judicial functions and (2) to prescribe the procedure in relation to appeals under section 82 of the Debtors (Scotland) Act 1987

The Committee may wish to report that the powers in Schedule 2, paragraph 2 of the Court of Session (1) to regulate the conduct of officers of court in exercising their extra-judicial functions and (2) to prescribe the procedure in relation to appeals under section 82 of the Debtors (Scotland) Act 1987, are acceptable and that it is content that the powers are exercisable by Act of Sederunt.

Part 2: Order-Making Powers

The Committee may wish to report—

- That the powers in Part 2 are very broad powers which can be used to deliver significant restructuring and revision of public functions across the Scottish Administration and public sector.

- In its view, whether such powers should be given to Ministers is a matter of policy for determination by the Parliament as a whole and should not be prejudged by this Committee. Given the nature of these powers there is clearly a range of opinions which may be taken. It therefore expresses no view on whether the powers are acceptable in principle.

- However there are a number of significant concerns as to the manner in which the powers are framed which the Committee recommends should be considered further by the lead committee and Parliament in their scrutiny of the Bill as follows—

  - whether the criteria set for the limits of the powers in section 10 and 13 and the restrictions set out in section 12 provide sufficient protection, are sufficiently precise and clearly defined;

  - whether certain bodies should be exempted from the scope of the Bill and protected from inclusion in schedule 3 through orders under section 11, and if so, to ensure that has been done in a way which is clear and unambiguous.

- The Committee has concerns as to whether the current procedures proposed in relation to the powers in sections 10, 11 and 13 provide for full and
adequate Parliamentary scrutiny of the respective orders in all cases. It therefore recommends as follows—

- Orders under section 10 and 13 should be subject to super-affirmative procedure which requires a proposed draft order to be laid before Parliament together with the relevant explanatory document for a prescribed period to permit public consultation on the terms of the proposed order prior to Ministers presenting a draft order in final form to the Parliament for approval. Ministers should also be required to consider comments received and provide an explanation to Parliament as to the extent to which such comments have been addressed in the final order.

- Orders under section 11 should be subject to affirmative procedure given that listing for inclusion in schedule 3 in such an order engages the powers under Part 2. Ministers should be under an obligation to consult bodies prior to their inclusion in schedule 3 through a section 11 order.

Section 46(4) - Power to make further provision about the preparation, content and effect of reports

While the Committee may have found it helpful to have had clarification that the Scottish Government do not intend that this provision provides a power with respect to the consequences of a report, the Committee may wish to recommend that the Scottish Government consider redrafting the provision to make clear the intention of the provision in this respect.

Section 47 - Power to make further provision for conducting inspections

The Committee may wish to draw to the attention of the lead committee that the power enables significant provision to be made with respect to interviews and physical and mental examinations (including how examinations are to be conducted) and the disclosure of information obtained from these examination and interviews.

Section 53(1)(c) – Power to prescribe grounds on which SCSWIS may propose to cancel the registration of a care service

The Committee may wish to report that, having obtained further explanation from the Scottish Government, it finds the proposed power is acceptable in principle and is content that it is subject to negative procedure.
Section 62(1) - Power to make regulations relating to the registration of care services

The Committee may wish to note that the Scottish Government has confirmed that it does not intend that the power be used to set out criteria for eligibility to provide services in the wider sense and that such provision would be made under section 63.

The Committee may wish to report that, having obtained further explanation from the Scottish Government, it finds the proposed power is acceptable in principle and is content that it is subject to negative procedure.

Section 63 - Power to make regulations to impose requirements in relation to care services as appropriate for the purposes of Part 4; and
Section 10Z2 - Provision to make regulations relating to independent health care services

The Committee may wish to report that, having obtained further explanation from the Scottish Government, it finds the proposed power is acceptable in principle and is content that it is subject to negative procedure.

Section 76(5)(c) - Power to prescribe an Act and thereby add the requirements or conditions contained in that Act to the list of relevant requirements

The Committee may wish to report that, having obtained further explanation from the Scottish Government, it finds the proposed power is acceptable in principle and is content that it is subject to negative procedure.

Section 76(6) - Power to prescribe matters in relation to a care service registered under Chapter 4 of Part 4, upon which SCSWIS must report and provide information to the Scottish Ministers

The Committee may wish to report that, having obtained clarification from the Scottish Government, it finds the proposed power is acceptable in principle and is content that it is subject to negative procedure.

National Health Service (Scotland) Act 1978
Section 10D(1) - Power to delegate functions
The Committee may wish to consider the proposed power is acceptable in principle and is content that it is subject to negative procedure but to draw to the attention of the lead committee the fact that the power is wider than is necessary to transfer the functions of NHSQIS to HIS or, in addition, any other functions which would properly be within HIS’ remit.

**National Health Service (Scotland) Act 1978**
**Section 10M(4) - Power to make regulations to make further provision about the preparation, content and effect of reports**

While the Committee may have found it helpful to have had clarification that the Scottish Government do not intend that this provision provides a power with respect to the consequences of a report, the Committee may wish to recommend that the Scottish Government consider redrafting the provision to make clear the intention of the provision in this respect.

**National Health Service (Scotland) Act 1978**
**Section 10N(1) - Power to make regulations to make further provisions for conducting inspections**

The Committee may wish to draw to the attention of the lead committee that the power enables significant provision to be made with respect to interviews and physical and mental examinations (including how examinations are to be conducted) and the disclosure of information obtained from these examination and interviews.

**National Health Service (Scotland) Act 1978**
**Section 10R(1)(c) - Power to prescribe grounds upon which HIS may cancel the registration of an independent health care service**

The Committee may wish to report that, having obtained further explanation from the Scottish Government, it finds the proposed power is acceptable in principle and is content that it is subject to negative procedure.

**National Health Service (Scotland) Act 1978**
**Section 10Z1 - Power to make regulations about registers and registration**

The Committee may wish to note that the Scottish Government has confirmed that it does not intend that the power be used to set out criteria for eligibility to provide services in the wider sense and that such provision would be made under section 10Z2.
The Committee may wish to report that, having obtained further explanation from the Scottish Government, it finds the proposed power is acceptable in principle and is content that it is subject to negative procedure.

**Section 96(1) - Power to direct a person or body to participate in a joint inspection**

The Committee may wish to report that, having obtained further explanation from the Scottish Government, it finds the exercise of the power in the form of directions to be satisfactory.

The Committee may wish to express its concern that no provision is made in the Bill for the publication of directions, whereby the public will be made aware what person or body has been directed to participate in a joint inspection and what powers they may exercise.

**Section 97(1) - Power to make regulations relating to joint inspections**

The Committee may wish to draw to the attention of the lead committee that the power enables significant provision to be made with respect to interviews and physical and mental examinations (including how examinations are to be conducted) and the disclosure of information obtained from these examination and interviews.

The Committee may wish to note that regulations made under the Joint Inspection of Childrens’ Services and Inspection of Social Work Services (Scotland) Act 2006, which the power under section 97(1) is said to reflect, do not provide for interviews and examinations.

**Schedule 7, paragraph 2(2) – Power to vary the number of members of SCSWIS; and**

**Schedule 11, paragraph 2(2) - Power to vary the number of members of HIS**

The Committee may wish to report that, having obtained further clarification from the Scottish Government, it finds the proposed powers are acceptable in principle and is content that they are subject to affirmative procedure.

**Part 7: Miscellaneous and General**

The Committee may wish to report that in its view, given the width of the proposed powers in sections 10 and 13 of the Bill, affirmative procedure rather than negative
procedure should apply to all of the ancillary powers as set out in section 101, as it relates to Part 2.

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**Agenda Item 3  Home Ownership and Debtor Protection (Scotland) Bill**

**Section 3(2) (inserting section 5A(4) of the Heritable Securities (Scotland) Act 1894) – Court powers in action for possession of residential property**

The Committee may wish to report that the power to prescribe by regulations the form and manner of notice, as contained in section 3(2) (inserting section 5A(4) of the Heritable Securities (Scotland) Act 1894) is acceptable in principle. The Committee may also wish to report that it is content that the power is subject to negative resolution procedure.

**Section 4 – Pre-action requirements**

The Committee may wish to ask the Scottish Government to explain—

- in more detail why it is appropriate to have a power to completely revise the pre-action requirements which are set out in the Bill through subordinate legislation given the significance of such changes for the relationship between debtor and creditor and the market in secured lending over residential property (as opposed to a power to make further provision about how specified pre-action requirements are to be fulfilled);

- whether it is considered that it will be necessary to use the power in order to give sufficient definition to the pre-action requirements which are to be specified in primary legislation because their meaning is currently determined by reference to imprecise terms such as what are “reasonable efforts” or what is a “likely result”;

- in more detail the relationship between legal requirements set out in the Bill, further legal requirements in subordinate legislation made under this power and non-binding requirements of guidance to which creditors must have regard in providing a regime which regulates repossession.

**Section 4 (inserting section 24A(7) of the 1970 Act and section 5B(7) of the 1894 Act) – Pre-action requirements**

The Committee may wish to ask the Scottish Government to explain what types of matters might be covered by the power to issue statutory guidance and the intended effect of the guidance.
Section 7 – representation in repossession proceedings etc.

The Committee may wish to report that the delegated powers contained in section 7 of the Bill are acceptable in principle, and that it is content that the powers are subject to negative resolution procedure.

Section 9 – certificate for sequestration

The Committee may wish to ask the Government to clarify the scope of the power in new section 5B(5)(e). The DPM suggests that the power can be used to add further substantive preconditions before the certification route is open to debtors. The Committee may wish to seek clarification as to why a power to specify additional substantive conditions may be necessary, and whether such conditions could override the primary definition of when a certificate can be issued set out in section 5B(1) – for example by stating that certain debts were to be excluded from consideration.

Section 10 – trust deeds

The Committee may wish to report that the delegated powers contained in section 10 of the Bill are acceptable in principle, and may be content that the powers are subject to affirmative procedure.

Section 11 – power in relation to a debtor’s family home

The Committee may wish to report that the delegated power in section 11(c) is acceptable in principle, and that it is content that the power is subject to negative resolution procedure.

Section 13 – Regulations under the 1985 Act

The Committee may wish to report that the amendments to certain of the delegated powers provisions in the Bankruptcy (Scotland) Act 1985, as provided for in section 13 of the Bill, are acceptable.

Section 15 – ancillary provision
The Committee may wish to ask the Government to explain why it has considered that, in the context of this particular Bill, it is not thought appropriate that all orders under section 15(1)(a), which must go beyond the terms of the Bill itself should be subject to affirmative procedure.

The Committee may also wish to ask whether, as the DPM suggests, it is more likely in this context that significant supplementary or consequential changes affecting primary legislation are required, should these powers not always be subject to affirmative procedure?

Section 17 – Short title and commencement

The Committee may wish to report that the commencement powers in section 17(3) and (4) are acceptable and that it is content that the powers are not subject to Parliamentary procedure.

Agenda Item 5 Instruments subject to annulment

The Registration Services (Prescription of Forms) (Scotland) Regulations 2009 (SSI 2009/314)

The Committee may wish to draw this instrument to the attention of the lead committee and the Parliament on the ground that there has been a failure to follow normal drafting practice in respect that one of the relevant enabling powers, namely paragraph 6(5) of schedule 1 to the Adoption and Children (Scotland) Act 2007, has not been referred to in the preamble.

The Sea Fishing (Enforcement of Community Quota and Third Country Fishing Measures and Restriction on Days at Sea) (Scotland) Order 2009 (SSI 2009/317)

The Committee may wish to report the instrument as defectively drafted in omitting to specify criminal sanctions in respect of the offences in articles 10(4) and 11(2). The Committee may also wish to welcome the commitment to correct these errors before the instrument comes into force.

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment No. 2) 2009 (SSI 2009/321)
The Committee may wish to report that it is satisfied with the response provided in relation to the application of fee rates under the new Schedule introduced by this instrument, and that it is content with this instrument.

The Protection of Children (Scotland) Act 2003 (The Meaning of Disqualified from Working with Children: Corresponding Disqualifications in Northern Ireland) (No. 2) Order 2009 (SSI 2009/316)

The Food Labelling (Nutrition Information) (Scotland) Regulations 2009 (SSI 2009/328)

The Fodder Plant Seed (Scotland) Amendment Regulations 2009 (SSI 2009/330)

The Justice of the Peace Courts (Sheriffdom of North Strathclyde) etc. Order 2009 (SSI 2009/331)

The Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) etc. Order 2009 (SSI 2009/332)

The Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (Scotland) Amendment Regulations 2009 (SSI 2009/333)

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

Agenda Item 5 Instruments not laid before Parliament

The Public Health etc. (Scotland) Act 2008 (Commencement No. 2, Savings and Consequential Provisions) Order 2009 (SSI 2009/319)

The Committee may wish to draw this instrument to the attention of the Parliament on the ground that it contains a drafting error. In schedule 2 the reference in line one of paragraph 2 should be to Part 1 of schedule 3 to the 2008 Act and not to Part 3 as stated. The Committee is of the view that this is not likely to affect the validity or effect of the instrument since it should be clear to the informed reader what was intended.

The Committee may wish to report that it finds the Scottish Government’s explanation for the removal of certain words from the definition of ‘owner’ in section 25(10) of the Agriculture (Safety, Health and Welfare Provisions) Act 1956 (in Part 1 of schedule 3 of the order) to be satisfactory.
Act of Adjournal (Criminal Procedure Rules Amendment No.4) (Devolution Issues) 2009 (SSI 2009/322)

The Committee may wish to report this instrument to the Parliament as containing two drafting errors. The preamble to the instrument contains an incomplete reference to Schedule 6 of the Scotland Act 1998, and in paragraph 2(5) the reference to rule 40.9 should instead be a reference to rule 40.10.

Act of Sederunt (Devolution Issues) (Appeals and References to the Supreme Court) 2009 (SSI 2009/323)

The Committee may wish to report that there is a drafting error in the preamble to this instrument, in respect that “section 33” in the last line should refer to “section 32”. It is not considered that this error affects the validity or the operation of the instrument.

The Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Amendment Regulations 2009 (SSI 2009/315)

The Judiciary and Courts (Scotland) Act 2008 (Commencement No. 3) Order 2009 (SSI 2009/318)

Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) Amendment (Public Health etc. (Scotland) Act 2008) 2009 (SSI 2009/320)

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

26th Meeting, 2009 (Session 3)

Tuesday 6 October 2009

Response from Christine Grahame MSP (Member in charge)

Control of Dogs (Scotland) Bill at Stage 1

Thank you for your letter of 15 September giving me an opportunity to provide further explanation to the Subordinate Legislation Committee in respect of two delegated powers provisions in my Member’s Bill.

Section 2(7) – (Content of dog control notice) - Power to amend content of the dog control notice including requirements and examples of steps to be taken

The Committee sought clarification (having regard to the final sentence of paragraph 7 of the Delegated Powers Memorandum (DPM)) as to whether the power set out in section 2(7)(a) to amend any paragraph of subsection (1) could be used so as, effectively, to remove a requirement contained therein (notwithstanding the power contained in section 2(7)(b) referring, simply, to amendment of subsection(1) by adding a further requirement).

In order to assist in the clarification of this matter it is necessary to consider the context in which the power is sought.

As indicated in the DPM (paragraph 2) the further requirements to be included in a Dog Control Notice as set out in section 2 are considered to be important. It is appreciated that changes may be needed to the exact nature of these requirements in light of operational experience. A degree of flexibility is required in the light of possible future developments which cannot be anticipated (for example to section 2(1)(b)) which requires the implant of an electronic transponder).

To try to achieve this flexibility, it is considered appropriate to enable the Scottish Ministers to make necessary changes to the requirements included in the relevant paragraphs of section 2.

It is in these limited and constrained circumstances, taking account of it’s underlying purpose, that the extent of the power to amend in section 2(7)(a) should be viewed. The power is exercisable subject to affirmative procedure and has been sought to balance the need to allow flexibility in the operation and enforcement of the Bill with the principal requirements of the Bill in relation to keeping a dog under control.

The specific power in section 2(7)(a) is to enable the Scottish Ministers to amend any paragraph of subsection (1) or (6) of section 2. It is not considered that the power to amend in section 2(7)(a) would enable removal of any of the requirements in those paragraphs, and this is not the intention. The power is expressed as a power to amend, it is considered that the exercise of this power can be construed as being limited to the amendment of any paragraph of section 2(1) or (6), and does not extend this to altering
the effect of any of the paragraphs by removing the requirements contained therein. Further force is given to this interpretation when subsection 2(7)(b) is considered. It is my view that an interpretation of subsection (7) as a whole would demonstrate that the specific powers given are to amend or add. No power is given to remove.

I can confirm that the intention of the provision is not to allow Scottish Ministers to remove a requirement. Should the Committee consider that sufficient doubt exists in relation to the power I would seek to bring forward appropriate amendments at stage 2 to put the matter beyond any doubt.

**Section 8 – (Scottish dog control database) – Power to make provision as to the establishment, maintenance, operation, management and control of the database and for the appointment of the database operator**

The Committee sought further clarification in regard to the power taken under section 8, with reference to the purpose of the database, and the effect of an entry being made on it.

The Committee asked whether the power contained within section 8(1) could not, having regard to the provision which it makes for the ‘operation’ etc, of the database, potentially, be used for purposes extending significantly beyond the nature of what is detailed in section 8(3). In addition the Committee asked if it could be confirmed that this power cannot be used to make provision as to the effect of the database and of being included in it.

With regard to the power under section 8(1) to enable the establishment of a database, this is sought in the context of enabling the monitoring of the effectiveness of dog control notices. It is not considered that this power could be used for purposes extending significantly beyond those detailed in section 8(3) as it is limited to this purpose.

The provisions in subsection (3) relate to the power given in subsection (1). That power can only be exercised to make provision for the setting up and administrative operation of the database (subsection (1)(a) and the appointment of a database operator (subsection (1)(b)).

I do not consider that the provision could be used to make provision as to the effect of the database and of being included in it. Any such provision would be beyond the vires of the power, particularly when the context of the provision is considered.
On 9 September the Scottish Government was asked:

Schedule 2, paragraph 2 - Power for the Court of Session (1) to regulate the conduct of officers of court in exercising their extra-judicial functions and (2) to prescribe the procedure in relation to appeals under section 82 of the Debtors (Scotland) Act 1987

The Committee asks the Scottish Government to explain why it has been considered appropriate that any provisions which shall exercise the power in Schedule 2, paragraph 2(a)(i) of the Bill of the Court of Session to regulate the conduct of officers of court in exercising their extra-official functions shall not be laid in Parliament (because an Act of Sederunt would not require to be laid), whereas any code of practice for persons undertaking “informal debt collection” that would have been issued by the Scottish Civil Enforcement Commission under section 56(2) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (as repealed by this Bill) would have been laid before the Parliament for consideration?

The Scottish Government responds as follows:

The power to regulate the extra-official functions of officers of court by rules of court, which is added to the existing powers of the Court of Session by schedule 2, paragraph 2(a)(i) of the Bill, replaces the power in section 61(4) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 for the Scottish Civil Enforcement Commission to make rules regulating judicial officers. The 2007 Act does not require those rules, which the Bill would replace by the widened rules of court power, to be laid in Parliament.

The repeal of the provisions establishing the Commission by the Bill would render unnecessary the Commission’s specific power in section 56(2) of the 2007 Act to publish information and other material to promote good practice and inform the public about informal debt collection. The rationale for removing this power is that this information and material can instead be published - without the need for any specific statutory power - by the professional association to be designated under section 63 of the 2007 Act. The Scottish Ministers also have the power by negative regulations to add to the functions of the professional association. In line with the other arrangements in the Bill for regulating officers of court, the Bill otherwise relies on the existing supervisory structures of the Court of Session.
Section 46(4) - Power to make further provision about the preparation, content and effect of reports

The Committee asks the Scottish Government—

- what is meant by ‘further provision about the effect of reports’ under section 46? Given that this is a matter of substance rather than an administrative or procedural matter what is the rationale behind and justification for this element of the power?

- in particular, is it intended that the power could be exercised to make substantive provision as to duties to implement the findings of reports or other sanctions?

- if so, why is a power required as opposed to making specific provision as to effect in the Bill and why would negative procedure be considered appropriate?

The Scottish Government responds as follows:

In inspecting social services SCSWIS can carry out various types of inspection; an inspection of ‘care services’, an inspection of ‘social work services’, a combination of both or an inspection of the co-ordination and organisation of any social service or services. Dependent upon the type of inspection carried out, the report generated will have differing effects. In the most straightforward of cases such as an investigation into a care service the effects of the report will be straightforward in that they may result in action being taken by SCSWIS in terms of chapter 3 or 4 of Part 4.

However SCSWIS will be able to carry out an integrated and varied inspection programme combining (within the one inspection), inspections of social work services and care services, and/or inspections relating to an individual’s care journey and a more strategic overview of an organisation’s delivery of services. This flexibility of inspection is to be allied with a flexibility on the effect of the outcome of these inspections: the reports.

Subordinate legislation under this provision will set out the effect of the report, be that to prescribe that a certain type of report is to be sent to the Scottish Ministers, (based on content or just by virtue of its remit) or elsewhere.

It is not thought appropriate to set out in primary legislation detailed rules on the effect of the reports on various combinations of inspection types that SCSWIS can carry out. Further as SCSWIS innovates new methods in simplifying and streamlining its inspection programme by combining various inspection types it is important that the reports produced by them are able to be used in ways which suit those new methods, and accordingly delegated legislation will provide such flexibility.

This matter is administrative as it will be parasitic upon the range of inspections which SCSWIS is empowered to carry out on the face of the Bill. The Scottish Government does not think that it would be a competent use of the power to make substantive provision as to duties to implement the findings of reports or other sanctions, through use of regulations under this subsection. Any regulations made have to be read within the context of Part 4 of the Bill which clearly sets out the specific duties and sanctions available to SCSWIS and Scottish Ministers. The general powers in section 46(4) could not be competently framed to provide rights or duties in addition to, or contrary to them.
Section 47 - Power to make further provision for conducting inspections

The justification for the power (in para. 39 of the DPM) is restricted to the provision of matters of “technical and administrative detail” and to the need for amendment of provisions from time to time. The Committee, therefore, asks the Scottish Government—

- whether the powers in respect of interview, mental and physical examination and disclosure in sections 47(2)(f) and (h) are properly to be considered as only administrative detail;

- to explain why the proposals for these powers cannot be put before the Parliament for consideration in the Bill; and

- how and for what purposes it is intended that the powers in section 47(2)(f) and (h) will be exercised?

The Scottish Government responds as follows:

The regulation making powers in section 47(2)(f) and (h) provide that regulations may be made setting out the practical implementation of the substantive provisions; that interviews and physical and mental examinations may be carried out and that information may be disclosed, in consequence of an inspection under Part 4. They will include who may carry out interviews, the circumstances surrounding same, the types of person to whom information with regard to the inspections may be disclosed, and the types of information that will be subject to such provisions. These powers are flexible given the new inspection regime will bring together different types of inspection (as explained in the government’s response to the Committee’s questions on section 46(4)), and will provide for the different permutations and combinations of inspections that will be carried out by SCSWIS. The Government recognises that these issues are significant however and has set out in the Bill that regulations under section 47 are to be subject to affirmative procedure. The Government will also provide draft regulations for the committee’s consideration prior to the commencement of stage 2 scrutiny in Parliament.

Section 53(1)(c) – Power to prescribe grounds on which SCSWIS may propose to cancel the registration of a care service

Given the potential effect of a proposal to cancel a registration, the Scottish Government is asked to give further consideration to the choice of negative procedure which can allow a change in the criteria for cancellation to be brought into force within 21 days. In light of the significance for service providers and those who receive services, would affirmative procedure not be more appropriate?

The Scottish Government responds as follows:

The Government notes the Committee’s concern on this matter, however would point out that this power represents a re-enactment of the provisions of section 12(1)(c) of the Regulation of Care (Scotland) Act 2001. Regulations under section 12(1)(c) were subject to negative resolution procedure, an approach which met with the approval of the Parliament at the time, and there has been no comment in the past eight years that this
procedure was the wrong one. We therefore see no need to change the procedure in this re-enactment.

Section 62(1) - Power to make regulations relating to the registration of care services

The Scottish Government is asked to clarify what is intended by the reference in section 62(1)(b)(iii) to ‘categories of applicant who cannot competently make applications’ and how it is envisaged that this element of the power may be exercised. Is it intended that this power could set out criteria for eligibility to provide services and, if so, the Scottish Government is asked to explain why this is considered administrative and not a matter of substance which would be better suited to primary legislation? If subordinate legislation is required why would negative procedure be appropriate?

The Scottish Government responds as follows:

The intent of this provision is to permit regulations to set out categories of applicant who cannot competently make an application. It will work in unison with the provisions under section 53(1)(c) in order to ensure that those who are subject to the prescribed grounds for cancellation in section 53 are also not permitted to apply to provide care services. This is a re-enactment of section 28(1)(c)(iii) of the Regulation of Care (Scotland) Act 2001. Regulations under section 28(1)(c)(iii) were subject to negative resolution procedure, an approach which met with the approval of the Parliament at the time, and, as with section 53(1)(c) above there has been no comment in the past eight years to indicate that this was the wrong procedure. We therefore see no need to change the procedure in this re-enactment. It is not intended that this power could be used to set out criteria for eligibility to provide services in the wider sense, the government believes that this would require regulations to be made under section 63 of the Bill.

Section 76(5)(c) - Power to prescribe an Act and thereby add the requirements or conditions contained in that Act to the list of relevant requirements

The Committee asks the Scottish Government—

- to explain why this power is considered administrative rather than substantive given its effect is to extend the reporting system with the enforcement mechanisms that apply to other matters;

- whether it has reviewed other enactments at this point with a view to considering what should be added to the reporting system; and

- why it would be necessary to take this power in relation to new legislative provisions since at the time they are made consideration could be given to including them within this section?

The Scottish Government responds as follows:

The Government notes the Committee’s views on this matter, however would point out that this power applies in relation to care services referred to in section 68(1) in the same way as the power in section 53(1)(c) applies to other care services. Instead of
cancellation of services based on a prescription under section 53(1)(c) the Bill provides for reporting to the Scottish Ministers based on a prescription under section 76(5)(c). It further represents a re-enactment of the provisions of section 41(4)(b)(iii) of the Regulation of Care (Scotland) Act 2001. The Scottish Government prefers to retain the flexibility of adding or revoking prescribed Acts which contain conditions or requirements through the use of subordinate legislation, avoiding the possibility of repeated changes to this primary legislation that could occur if named ‘other Acts’ were to be amended or repealed and subsequently become unsuitable for prescription. Accordingly the Scottish Government’s review of the other enactments will lead instead to subordinate legislation though use of this power.

The Scottish Government accepts that at the time of the making of new legislation amendment could be made imposing any requirements or condition that they contain upon the authorities concerned, however matters may not be considered relevant at the time of the new legislation passing, and may subsequently become so, it is therefore sensible to adopt this approach.

**Section 76(6) - Power to prescribe matters in relation to a care service registered under Chapter 4 of Part 4, upon which SCSWIS must report and provide information to the Scottish Ministers**

*Given that section 76(6) refers to ‘such other matters in relation to a care service’, the Scottish Government is asked if it is intended that the exercise of the power will be of general application (i.e. applying to all care services) or specific application (to individual care services)?*

**The Scottish Government responds as follows:**

The power in section 76(6) is limited in its application only to services registered under chapter 4 and accordingly is of specific application to only those services which fall within the provisions of section 68(1) but could apply to both individual care services falling within the provisions of section 68(1), or all such care services, when read with section 87(1)(b).

**National Health Service (Scotland) Act 1978**

**Section 10D(1) - Power to delegate functions**

*The Committee asks the Scottish Government—*

- *Given the restricted nature of HIS as a body concerned with the improvement of health care services why it is necessary to have a power to delegate to it any of the Scottish Ministers functions in relation to the health service?*

- *Given that legal liability for the exercise of the delegated functions is transferred from the Scottish Ministers to HIS, to explain why affirmative procedure would not be merited?*
The Scottish Government responds as follows:

HIS is to be a Non Departmental Public Body (NDPB) set up under the National Health Service (Scotland) Act 1978 (the “principal Act”). It is to be established in a similar way to the Common Services Agency established under section 10 of that Act. Section 10(3) of the principal Act provides for the delegation of Scottish Ministers’ functions to the NDPB by order. Further HIS (with regard to its role of ensuring quality of service provision within the NHS) takes over the functions currently exercised by NHS Quality Improvement Scotland, a special health board; section 2(1)(b) of the principal Act provides for the delegation of Scottish Ministers’ functions to a special health board by order subject to negative resolution procedure. Accordingly it is the government’s view that this function is appropriately drafted and subject to the appropriate procedure in keeping with the approach laid out in the principal Act.

National Health Service (Scotland) Act 1978
Section 10M(4) - Power to make regulations to make further provision about the preparation, content and effect of reports

The Committee asks the Scottish Government—

- what is meant by ‘further provision about the effect of reports’ under section 10M(4)? Given that this is a matter of substance rather than an administrative or procedural matter what is the rationale behind and justification for this element of the power?

- In particular, is it intended that the power could be exercised to make substantive provision as to duties to implement the findings of reports or other sanctions; and

- if so, why is a power required as opposed to making specific provision as to effect in the Bill and why is negative procedure appropriate?

The Scottish Government responds as follows:

The provisions relating to HIS inspections and reports mirror to a large degree the provisions which have been drafted with regard to SCSWIS inspections and reports under section 46(4); accordingly the Government provides a similar explanation. In inspecting services provided under the health service and independent health care services HIS can carry out various types of inspection; an inspection of services provided under the health service under Section 10I, an inspection of independent health care services under section 10J or, at the request of the Scottish Ministers, an inspection of both under section 10L(1)(d). This flexibility of inspection is to be allied with a flexibility on the effect of the outcome of these inspections: the reports. Dependant upon the type of inspection carried out the report generated will have differing effects.

Subordinate legislation under this provision will set out the effect of the report, be that to prescribe that a certain type of report is to be sent to the Scottish Ministers, (based on content or just by virtue of its remit) or elsewhere.

It is not thought appropriate to set out in primary legislation detailed rules on the effect of the reports on various combinations of inspection types that HIS can carry out. Further
as HIS innovates new methods in simplifying and streamlining its inspection programme by combining various inspection types or methods it is important that the reports produced by them are able to be used in ways which suit those new methods, and accordingly delegated legislation will provide such flexibility.

This matter is administrative as it will be parasitic upon the range of inspections which HIS is empowered to carry out on the face of the Bill. The Scottish Government does not think that it would be a competent use of the power to make substantive provision as to duties to implement the findings of reports or other sanctions, through use of regulations under this subsection. Any regulations made have to be read within the context of the National Health Service (Scotland) Act 1978 as amended by Part 5 of the Bill which clearly sets out the specific duties and sanctions available to HIS and Scottish Ministers. The general powers in section 10M(4) could not be competently framed to provide rights or duties in addition to, or contrary to them.

National Health Service (Scotland) Act 1978
Section 10N(1) - Power to make regulations to make further provisions for conducting inspections

The power to make regulations on inspections under section 10N(1) is very wide but the justification for the power (in para. 89 of the DPM) is restricted to the provision of matters of technical and administrative detail and to the need for amendment of provisions from time to time. The Committee questions whether the powers in respect of interview, mental and physical examination and disclosure in sections 10N(3)f) and (h) are properly to be considered only as administrative detail. The Scottish Government is asked to explain why the proposals for these powers cannot be put before the Parliament for consideration in the Bill. The Scottish Government is also asked how and for what purposes it is intended that the powers in section 10N(3)(f) and (h) will be exercised.

The Scottish Government responds as follows:

The provisions relating to HIS inspections and reports mirror to a large degree the provisions which have been drafted with regard to SCSWIS inspections and reports under section 47, accordingly the Government provides a similar explanation. The regulation making powers in section 10N(1)(f) and (h) provide that regulations may be made setting out the practical implementation of the substantive provisions; that interviews and physical and mental examinations may be carried out and that information may be disclosed, in consequence of an inspection under section 10I, 10J or 10L. They will include who may carry out interviews, the circumstances surrounding same, the types of person to whom information with regard to the inspections may be disclosed, and the types of information that will be subject to such provisions. These powers are flexible given the inspection regime will bring together different types of inspection (as explained in the government’s response to the Committee’s questions on section 10M(4)), and will provide for the different permutations and combinations of inspections that will be carried out by HIS. The Government recognises that these issues are important however and has set out in the Bill that regulations under this section are to be subject to affirmative procedure. The Government will also provide draft regulations for the committee’s consideration prior to the commencement of stage 2 scrutiny in Parliament.
National Health Service (Scotland) Act 1978  
Section 10R(1)(c) - Power to prescribe grounds upon which HIS may cancel the registration of an independent health care service

Given the effect of a proposal to cancel a registration, the Scottish Government is asked to give further consideration to the choice of negative procedure which can allow a change in the criteria for cancellation to be brought into force within 21 days. In light of the significance for service providers and those who receive services, would affirmative procedure not be more appropriate?

The Scottish Government responds as follows:

These provisions are identical in nature to those referred to in the Committee’s question with regard to section 53(1)(c), accordingly the Government provides a similar explanation. The regulation making powers in section 10R(1)(c) represent a re-enactment of the provisions of section 12(1)(c) of the Regulation of Care (Scotland) Act 2001, which section previously applied to the cancellation of the registration of independent health care services. Regulations under section 12(1)(c) were subject to negative resolution procedure, an approach which met with the approval of the Parliament at the time, we therefore see no need to change the procedure in this re-enactment.

National Health Service (Scotland) Act 1978  
Section 10Z1 - Power to make regulations about registers and registration

The Committee asks the Scottish Government to clarify what is intended by the reference in section 10Z1(1)(b)(iii) to ‘categories of applicant who cannot competently make applications’ and how it is envisaged that this element of the power may be exercised. Is it intended that this power could set out criteria for eligibility to provide services and, if so, the Government is asked to explain why this is considered an administrative matter and not a matter of substance which would be better suited to primary legislation? If subordinate legislation is required why would negative procedure be appropriate?

The Scottish Government responds as follows:

These provisions are identical in nature to those referred to in the Committee’s question with regard to section 62(1), accordingly the Government provides a similar explanation. The intent of this provision is to permit regulations to set out categories of applicant who cannot competently make an application. It will work in unison with the provisions under section 10R(1)(c) in order to ensure that those who are subject to the prescribed grounds for cancellation section 10R are also not permitted to apply to provide care services. This is a re-enactment of section 28(1)(c)(iii) of the Regulation of Care (Scotland) Act 2001 which section previously applied to an application to register independent health care services. Regulations under section 28(1)(c)(iii) were subject to negative resolution, an approach which met with the approval of the Parliament at the time, we therefore see no need to change the procedure in this re-enactment. It is not intended that this power could be used to set out criteria for eligibility to provide services.
in the wider sense, the government believes that this would require regulations to be made under section 10Z2.

**Section 96(1) - Power to direct a person or body to participate in a joint inspection**

*How will the participation in a joint inspection of a body not listed in section 95(6) be apparent and how it can be demonstrated what powers that body does or does not have, in particular in the context of a criminal offence relating to the obstruction of an investigation? Given that involvement in joint inspection and the acquisition of investigatory powers has legal effect which can impact on individuals why is it not considered appropriate for this power to be exercised by subordinate legislation?*

The Scottish Government responds as follows:

Scottish Ministers will include the name of the body, the context in which they are being directed and the extent of the powers which they will exercise in the Directions issued under this power. Section 96 represents a re-enactment of the provisions of section 2 of the Joint Inspection of Children’s Services and Inspection of Social Work Services (Scotland) Act 2006, an approach which met with the approval of the Parliament at the time, we therefore see no need to provide for this power to be exercised by subordinate legislation in this re-enactment.

**Section 97(1) - Power to make regulations relating to joint inspections**

*The Committee asks the Scottish Government—*

- whether the powers in respect of interview, mental and physical examination and disclosure in sections 97(2)(d) and (f) are properly to be considered as only administrative detail;

- to explain why the proposals for these powers cannot be put before the Parliament for consideration in the Bill; and

- how and for what purposes it is intended that the powers in section 97(2)(d) and (f) will be exercised?

The Scottish Government responds as follows:

These provisions are almost identical in nature to those referred to in the Committee’s question with regard to section 47 and section 10N1, accordingly the Government provides a similar explanation. The regulation making powers in section 97(2)(d) and (f) provide that regulations may be made setting out the practical implementation of the substantive provisions; that interviews and physical and mental examinations may be carried out and that information may be disclosed, in consequence of a joint inspection. They will include who may carry out interviews, the circumstances surrounding same, the types of person to whom information with regard to the inspections may be disclosed, and the types of information that will be subject to such provisions. These powers are flexible given the inspection regime will bring together different types of inspection and practices, and will provide for the different permutations and combinations of inspections that will be carried out by the persons and bodies under the
joint inspection provisions. As in examples above the Government recognises that these issues are significant and has set out in the Bill that regulations under this section are to be subject to affirmative procedure. This approach reflects that used under the Joint Inspection of Childrens Services and Inspection of Social Work Services(Scotland) Act 2006 which has worked well over the past three years with no adverse comment regarding parliamentary scrutiny. The Government will also provide draft regulations for the committee’s consideration prior to the commencement of stage 2 scrutiny in Parliament.

**Schedule 7, paragraph 2(2) – Power to vary the number of members of SCSWIS**

**Schedule 11, paragraph 2(2) - Power to vary the number of members of HIS**

Given that the powers as drafted permit the substitution of any minimum or maximum number of members of SCSWIS and HIS, the Committee asks whether or not it would be appropriate for a minimum and/or maximum number of members within which the powers may be exercised to be specified on the face of the Bill?

**The Scottish Government responds as follows:**

The existing draft proposes a maximum and minimum limit of members of SCSWIS and HIS based on our knowledge of the circumstances at this time and what seems reasonable. We cannot know what the future circumstances are which might require Ministers to alter those limits, so do not wish to impose an arbitrary limit on the numbers at this point. However any change to Schedule 7 paragraph 2(2) or Schedule 11, paragraph 2(2) would require a statutory instrument which would be subject to due parliamentary process and to a reasonableness test at that point. We feel that the current draft gives the required flexibility with sufficient protection built in.
SUBORDINATE LEGISLATION COMMITTEE

26th Meeting, 2009 (Session 3)

Tuesday 6 October 2009

Scottish Government Supplementary Response

Public Services Reform (Scotland) Bill at Stage 1

When I gave evidence to the Subordinate Legislation Committee together with our officials last week we undertook to provide a written response to three questions raised by the Committee. I am sorry to have taken a few days to do so.

Section 10 of the Public Services Reform (Scotland) Bill
The Subordinate Legislation Committee has asked the Scottish Government whether section 10 of the Public Services Reform (Scotland) Bill could clash with the requirements for elected membership of health boards provided for in the Health Board (Membership and Elections (Scotland) Act 2009.

The Scottish Government replies as follows:
It would not be open to the Scottish Ministers to undermine the electoral machinery in the Health Board (Membership and Elections) (Scotland) Act 2009. The election machinery and the balance of the membership of the boards are designed as a democratic safeguard and would thus constitute ‘a necessary protection’ for the public for the purposes of section 12(2)(b) of the Public Services Reform (Scotland) Bill which could not therefore be removed.

Section 15 of the Public Services Reform (Scotland) Bill
The Subordinate Legislation Committee has asked the Scottish Government to clarify the operation of section 15 in relation to section 10 powers.

The Scottish Government replies as follows:
Section 15 of the Public Services Reform (Scotland) Bill is designed to constrain the way the powers in sections 10 and 13(1) of the Bill may be exercised in relation in particular to any function of legislating (by subordinate legislation). The primary constraint is that any such existing function can be transferred only to Scottish Ministers (section 15(1)), the First Minister or the Lord Advocate. This is designed to keep the function of legislating at the highest level, namely ministerial level. Usually the function will be already at this level but not always.

Similarly if a new function of legislating is conferred it can only be conferred at this highest level (section 15(1)). Such a conferral would of course be subject to the other preconditions in section 12. Given that the object is to retain any legislating function at the highest level, there is also a prohibition on the section 10 and 13 powers being used to delegate the legislating function (section 15(2)). This provision is also consistent with the general rule of law that a power to make secondary legislation cannot be sub-delegated.
Further restraints on legislating are contained in sections 15(4) to (6) which are to do with the process of legislating. Any new function of legislating which is conferred on the Scottish Ministers, the First Minister or the Lord Advocate must be exercisable by statutory instrument subject to either affirmative or negative resolution procedure. This means that Parliament retains control of any new function of legislating for which provision is made in an order under section 10 or section 13(1).

Sections 15(7) and (8) also constrains the use of sections 10 and 13(1) in relation to the functions of giving directions, appointing persons to an office and consenting to anything, which in some ways are analogous in importance to legislating. Once again these functions, if they are being transferred, must be transferred only to Scottish Ministers (section 15(7)), the First Minister or the Lord Advocate. This is designed to keep these functions at the highest level, namely ministerial level. In the case of these functions, especially consenting, this may at present be in the hands of a named official. The provisions mean that a transfer would trigger a requirement for the consent to be given at a higher level than before.

**Section 101 of the Public Services Reform (Scotland) Bill**
The Subordinate Legislation Committee has asked the Scottish Government to explain
a) the rationale behind the Parliamentary procedure in respect of an order under section 101 of the Public Services Reform (Scotland) Bill; and
b) whether the power in section 101(20) could be used to augment the powers in section 10.

The Scottish Government replies as follows:
a) Section 101 of the Public Services Reform (Scotland) Bill allows Scottish Ministers by order to make consequential, supplemental, incidental etc provisions, including ones which effect changes to enactments, instruments and documents (section 101(2)). Orders which make provisions without changing enactments, instruments or documents are subject to negative procedure, whereas ones which do are subject to affirmative procedure.

This type of order-making power is not uncommon, especially where legislation is making substantial changes to complicated areas of law and all consequences cannot always be predicted or covered in advance at the primary legislation stage. A recent example is section 225 of the Bankruptcy and Diligence (Scotland) Act 2007, which is more or less the same as the provisions in section 101 and is subject to the same Parliamentary procedure. This rationale should perhaps have been brought out in the delegated powers memorandum.

b) the Scottish Government does not think that the powers of section 101 could be used to augment the powers in section 10. Section 10(6) itself provides that an order under that section may modify any enactment, instrument or other document, and contain such consequential, incidental, transitory or saving provision as the Scottish Ministers consider appropriate. Unlike section 101 it does not however contain power to make supplemental provisions. The Government does not believe that the power in section 101 could be used to add a supplemental power to the order-making power in section 10, or indeed to make any other substantive changes to the scope of the order-making power in section 10, as this would go well beyond what can be done by powers to make consequential, incidental or supplemental provisions.
The Registration Services (Prescription of Forms) (Scotland) Regulations 2009 (SSI 2009/314)

On 25 September 2009 the Scottish Government was asked:
To indicate what power is being relied upon in regard to regulation 3(2) of the above Regulations, which inserts ‘new’ regulation 2A (registrable foreign adoptions) into the Registration of Foreign Adoptions (Scotland) Regulations 2003 (SSI 2003/67).

The Scottish Government responds as follows:
Paragraph 6(5) of schedule 1 to the Adoption and Children (Scotland) Act 2007 is relied on to make regulation 3(2) of the 2009 Regulations. The Scottish Government accepts that paragraph 6(5) should have been cited in the preamble. Although that sub-paragraph is not cited, the Government considers that the general enabling words in the preamble referring to all other powers enabling the Registrar General to make the Regulations can be relied upon because, in order for the operative provision in regulation 3(2) to have effect, paragraph 6(5) must necessarily have been invoked. The requirement added by regulation 2A which is inserted into the Registration of Foreign Adoptions (Scotland) Regulations 2003 (S.S.I. 2003/67) by regulation 3(2) is explicitly stated to be for the purposes of paragraph 6(5), and there are no other powers available.

Sea Fishing (Enforcement of Community Quota and Third Country Fishing Measures and Restriction on Days at Sea) (Scotland) Order 2009 (SSI 2009/317)

On 25 September 2009 the Scottish Government was asked:
"whether criminal penalties have been specified for the offences created by articles 10(4) and 11(2) of this Order and if not what the effect of this is considered to be."

The Scottish Government responds as follows:
There are no penalty provisions with respect to the offences created by article 10(4) and 11(2) of this Order. This is an inadvertent error which is a matter of regret. It is considered that as drafted these provisions would be unenforceable. Therefore in order to rectify this error and to ensure that there is certainty and precision in the criminal law and to allow proper enforcement of Community obligations, the Scottish Government intends to bring forward a short amending instrument which will come into force on 10th October (when SSI 2009/317 also comes into force). As a result of this action the omission will have no practical legal effect.

The Scottish Government are grateful to the Committee for drawing this matter to its attention.
On 25 September 2009 the Scottish Government was asked:

1. In article 2 is it intended that the reference in line one should be to Part 1 of schedule 3 of the 2008 Act rather than to Part 3 of the schedule, and, if so, what does the Scottish Government consider is the meaning and effect of the reference to Part 3? You have subsequently clarified to me on the telephone that the question relates not to article 2 of the Order but to the amendment to the Public Health (Scotland) Act 1945 in Schedule 2 (paragraph 2) of the Order.

2. Given that the repeal to the Agriculture (Safety, Health and Welfare Provisions) Act 1956 (in Part 1 of schedule 3 of the order) removes from the definition of 'owner' in section 25(10) the words 'in the Public Health (Scotland) Act, 1897, and', is it intended that 'owner' should now be defined in that provision only by reference to landholders or crofters under the respective enactments? What does the Scottish Government consider is the meaning and effect of the repeal?

The Scottish Government responds as follows:

1. The reference in line one of paragraph 2 in the amendment to the Public Health (Scotland) Act 1945 in Schedule 2 of the Order should be to Part 1 of schedule 3 rather than to part 3 of schedule 3. The Scottish Government is grateful to the Committee for pointing out this error but does not consider it likely that anyone reading the instrument would be confused as to the meaning of the provision.

2. "Owner" is defined in section 25 of The Agriculture (Safety, Health and Welfare Provisions) Act 1956 but the term is only used in sections of that Act which have been repealed. The Scottish Government has repealed the part of the definition of "owner" in the 1956 Act which is strictly consequential on the commencement of the provisions in the Public Health (S) Act 2008 ie the part of the definition which refers to the Public Health (Scotland) Act 1897.

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment No. 2) 2009 (SSI 2009/321)

On 25 September 2009, the Lord President’s Private Office was asked:

The Lord President’s Private Office is asked to explain, with reference to the above instrument, why it was not considered necessary or appropriate to include provision, within the instrument itself, to the effect that actions raised before 2 November 2009 are unaffected (or otherwise to set out the extent to which fees chargeable in respect of such actions are affected). Reference is made in this regard, for example, to the provision made within paragraph 2(2) of Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment) 2009 SSI 2009/81.

The Lord President’s Private Office responds as follows:

The new Part IIA that this Act of Sederunt inserts into the sheriff court table of fees applies to defended personal injuries actions proceeding under the new Part A1 of Chapter 36 of the Ordinary Cause Rules, as the heading to Part IIA makes clear. The rules in Part A1 do not come into force until 2 November and an action can be raised under them only on or after that date. Actions raised before that date would be raised
under the usual rules for ordinary actions and fees for those actions would be chargeable under Part II of Chapter II of the Table of Fees, which is not being revoked, rather than Part IIA. The Lord President’s Private Office takes the view that no savings provision is required.

Act of Sederunt (Criminal Procedure Rules Amendment No. 4) (Devolution Issues) 2009 (SSI 2009/322)

On 25 September 2009, the Lord President’s Private Office was asked:
1. what is considered to be the consequence of the preamble having omitted to detail fully one of the powers being relied on in making this instrument, i.e. insofar as the reference which is made to provision in the Scotland Act 1998 is incomplete, it not being stated that the Schedule concerned is Schedule 6.

2. whether, in paragraph 2(5), the reference which is made there to paragraph (1) of rule 40.9 is not in fact intended to refer to paragraph (1) of rule 40.10, and if so to explain what is considered to be the effect of that erroneous reference.

The Lord President’s Private Office responds as follows:

1. In light of the context, it is clear that the reference to paragraph 37 is a reference to that paragraph in Schedule 6. It is the view of the Lord President’s Private Office that the intention to refer to Schedule 6 is clear and a rectifying construction is to be placed on the incomplete reference to Schedule 6. However, we apologise for this omission and we are grateful to the Committee for pointing it out.

2. It is correct that the reference in paragraph 2(5) to an amendment to rule 40.9 should instead have been a reference to rule 40.10. This is a typographical error. In light of the context of this amendment (the parenthetical description of the heading is that of the heading of rule 40.10 rather than of rule 40.9 and both rule 40.9 and its heading are amended in paragraph 2(4)), it is the view of the Lord President’s Private Office that the intention to refer to rule 40.10 is clear and that a rectifying construction is to be placed on the erroneous reference. However, we apologise for this error and we are grateful to the Committee for pointing it out.

Act of Sederunt (Devolution Issues) (Appeals and References to the Supreme Court) 2009 (SSI 2009/323)

On 25 September 2009, the Lord President’s Private Office was asked:
The Lord President’s Private Office is asked whether, in the last line of the preamble to this instrument, the reference to section 33 of the 1971 Act is correct (given that section 33 establishes the Sheriff Court Rules Council but does not provide for its functions), and if not, to comment on the effect of this.

The Lord President’s Private Office responds as follows:
The reference in the preamble to section 33 of the 1971 Act should in fact be a reference to section 32 of that Act. This is a typographical error. Section 32 is correctly referred to at the start of the preamble and it is clear from the substance that the later reference should be also be to section 32. Accordingly, it is the view of the Lord President’s Private Office that a rectifying construction is to be placed on the erroneous
reference. However, we apologise for this error and we are grateful to the Committee for pointing it out.