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

1. **Declaration of interests:** Margaret Curran MSP will be invited to declare any relevant interests.

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

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

4. **Instruments subject to annulment:** The Committee will consider the following—
   - the Glasgow City Council Area and North Lanarkshire Council Area (Cardowan by Stepps) Boundaries Amendment Order 2009 (SSI 2009/368);
   - the Railway Closures (Exclusion) Scotland Order 2009 (SSI 2009/371);
   - the Feed (Specified Undesirable Substances) (Scotland) Regulations 2009 (SSI 2009/373);
   - the Food Labelling (Declaration of Allergens) (Scotland) Regulations 2009 (SSI 2009/374);
   - the Rural Payments (Appeals) (Scotland) Regulations 2009 (SSI 2009/376);
   - the Planning (Control of Major–Accident Hazards) (Scotland) Regulations 2009 (SSI 2009/378);
   - Act of Sederunt (Fees of Sheriff Officers) (Diligence) 2009 (SSI 2009/379);
   - the Home Energy Assistance Scheme (Scotland) Amendment Regulations 2009 (SSI 2009/392).
5. **Instruments not laid before the Parliament**: The Committee will consider the following—

the Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No. 5 and Transitional) Order 2009 (SSI 2009/369);
Act of Sederunt (Rules of the Court of Session Amendment No. 8) (Motions Procedure) 2009 (SSI 2009/387);

6. **Interpretation and Legislative Reform (Scotland) Bill**: The Committee will consider its response to a consultation from the Standards, Procedures and Public Appointments Committee.

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The papers for this meeting are as follows—

**Agenda Items 3-5**

Legal Brief SL/S3/09/30/1 (P)

Summary of Recommendations SL/S3/09/30/2

**Agenda Items 4-5**

Instrument Responses SL/S3/09/30/3

**Agenda Item 6**

Paper by the Clerk SL/S3/09/30/4 (P)
The Committee will be invited to consider the following recommendations under consideration at the meeting. Decisions are a matter for the Committee.

**Agenda Item 4  Instruments subject to annulment**

The **Glasgow City Council Area and North Lanarkshire Council Area (Cardowan by Stepps) Boundaries Amendment Order 2009 (SSI 2009/368)**

The Committee may wish to report this instrument to the lead Committee and to the Parliament on the basis that in relation to the first question raised with the Scottish Government, concerning the reference to DVD-ROM in article 2, it is considered that it would have been helpful if the Explanatory Note had set out the position more fully (given also the absence of an Executive Note), and to report the brevity of the Explanatory Note in such circumstances as a failure to follow proper drafting practice.

The Committee may wish to report that the Boundary Commission’s report required to be laid before the Parliament by section 17(4) of the Local Government (Scotland) Act 1973 was laid before the Parliament only after having been requested by the Committee. Since the obligation to do so is incumbent on the Scottish Ministers fulfilment of this requirement might usefully have been recorded in the preamble or the Explanatory Note to the Order.

The **Railway Closures (Exclusion) Scotland Order 2009 (SSI 2009/371)**

The Committee may wish to report that the instrument contains a drafting error, in respect that the definition of the Railways Act 2005 contained in the preamble is of no legislative effect. The Committee observes that no definition was in fact required, since the 2005 Act is referred to once only.

The Committee may wish to consider that this error is unlikely to affect the validity or the operation of the instrument.
The Feed (Specified Undesirable Substances) (Scotland) Regulations 2009 (SSI 2009/373)

The Committee may wish to consider that a satisfactory response has been provided by the Scottish Government in relation to the question raised concerning whether the instrument’s purpose falls under powers exercisable by the Scottish Ministers, and to report accordingly to the lead Committee and to the Parliament.

The Food Labelling (Declaration of Allergens) (Scotland) Regulations 2009 (SSI 2009/374)

The Committee may wish to draw this instrument to the attention of the Parliament and the lead committee on the grounds that there has been a delay of almost six months in correcting an incompatibility between Scots criminal law and Community law.


The Committee may wish to bring this instrument to the attention of the lead committee and the Parliament on the basis that the form or meaning of article 3, which provides for modification of the Police Act 1997, could have been made clearer. Where the question of whether an instrument makes a textual amendment is determinative of the Parliamentary procedure which applies, the Committee may wish to indicate that it considers the form of modification adopted should be absolutely clear.

The Rural Payments (Appeals) (Scotland) Regulations 2009 (SSI 2009/376)

In the light of the background information and explanation provided in the Scottish Government response, the Committee may wish to find this instrument satisfactory.

The Committee may wish to draw to the attention of the lead committee that, although the Scottish Government considers the relevant provisions to be redundant, they have not been repealed and accordingly there can be no guarantee that a review or appeal may not be sought with respect to regulations 12, 17 or 18 of the Hill Livestock (Compensatory Allowances) (Scotland) Regulations 1999 (SSI 1999/187).
The Planning (Control of Major–Accident Hazards) (Scotland) Regulations 2009 (SSI 2009/378)

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

(a) regulation 5 raises a devolution issue in respect that it may not be compatible with the requirements of Article 1(10) and Annex I of Directive 2003/105/EC. This is in respect that—

(i) that regulation has the effect of permitting those operators meeting the conditions set out in the regulation to have hazardous substances (or controlled quantities of them) which are newly listed by that Annex I present (without obtaining any hazardous substances consent) in the period from 23 November 2009 until 23 May 2010; and

(ii) regulation 3(4) in contrast appears to transpose the requirements of that Article 1(10) and Annex I, to require such consent for those newly listed substances or controlled quantities with effect from 23 November 2009;

with the effect that there is no effective enforcement regime for the transitional period;

(b) there is a failure to follow proper drafting practice in including the extent provision in regulation 1(3), when it is not necessary.

Act of Sederunt (Fees of Sheriff Officers) (Diligence) 2009 (SSI 2009/379)

The Committee may wish to welcome the indication which is given by the Lord President’s Private Office that the drafting error which this instrument contains, in regard to the reference which it makes to item 5(c) will be addressed at the next available opportunity.

It may also wish to report this instrument to the Parliament on the basis that its meaning could be clearer, there being an inconsistency between paragraph 3(2) which provides for the insertion of item ‘5(c)’ in the Table of Fees, and paragraph 4 which states that item 5 in the Table of Fees is omitted. It is not considered however that this error is likely to be such as to have an effect on the operation of this instrument.

In relation to the breach of the 21 day rule the Committee may wish to report to the Parliament that it finds satisfactory for its interests the explanation given by the Lord President’s Private Office in its letter to the Presiding Officer dated 5th November 2009 for the failure to comply with article 10(2) of the Scotland Act (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SSI 1999/1096).
The Home Energy Assistance Scheme (Scotland) Amendment Regulations 2009 (SSI 2009/392)

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

### Agenda Item 5 Instruments not laid before the Parliament

The Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No. 5 and Transitional) Order 2009 (SSI 2009/369)

The Committee may wish to report that it finds this instrument satisfactory but to note that the Scottish Government acknowledge that the commencement position with respect to certain provisions would have been clearer to the reader if full reliance had been placed on the effect of article 3(3) when drafting the entries 10(c) and 16(c) of the Schedule.

Act of Sederunt (Rules of the Court of Session Amendment No. 8) (Motions Procedure) 2009 (SSI 2009/387)

The Flood Risk Management (Scotland) Act 2009 (Commencement No. 1 and Transitional and Savings Provisions) Order 2009 (SSI 2009/393)

The Committee may wish to consider if it is content with these instruments.
The Glasgow City Council Area and North Lanarkshire Council Area (Cardowan By Stepps) Boundaries Amendment Order 2009 (SSI 2009/368)

On 5 November 2009 the Scottish Government was asked:
1. Given that regulation 3 of the Local Government Area Changes (Scotland) Regulations 1977 contains detailed provision in relation to the procedure for the depositing of the certified copy of a map, to explain why it was considered necessary or appropriate to deal with this matter in the manner set out in article 2(a), with particular reference to the provision made there to the effect that the boundary map which is deposited is as recorded on the DVD-ROM deposited with the bodies indicated, and how in that regard certification is to be effected.

2. Given that section 17(4) of the Local Government (Scotland) Act 1973 provides that where the Scottish Ministers decide to make an order which alters the boundaries of any local government area, they must lay the Boundary Commission’s report in that regard before Parliament together with the Order, to indicate whether such a report (which is understood not yet to have been provided along with the Order itself) has now been laid, and otherwise to indicate why this has not been done.

The Scottish Government responds as follows:
1. The Scottish Government supports the use of DVD-ROMs in these circumstances as an appropriate and effective means of storing digital maps. In relation to this Order, the Local Government Boundary Commission for Scotland are responsible for the production, certification and distribution of the map. The procedure for proof of documentation applicable to the Commission is set out in paragraph 10 of Schedule 4 of the Local Government (Scotland) Act 1973 which states;

"Every document purporting to be an instrument made or issued by the Boundary Commission and to be duly sealed with the seal of the Commission or to be signed by the Secretary or any person authorised to act in that behalf shall be received in evidence and, unless the contrary is proved, shall be deemed to be an instrument made or issued by the Commission."

In this case, the Scottish Government is advised by the Commission that the DVD-ROMs issued by the Commission were both sealed and signed in accordance with this paragraph. Several copies of the map were required to be produced by the Commission and circulated to various bodies in accordance with the 1977 Regulations. In each case the seal and signature have been burned directly onto each DVD-ROM to certify validity.
2. The Scottish Government is grateful to the Scottish Parliament for drawing this oversight to its attention. The report was laid before the Parliament on Friday 6th November, as soon as was practicable after the matter was drawn to its attention.

The Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No. 5 and Transitional) Order 2009 (SSI 2009/369)

On 5 November the Scottish Government was asked:

Question 1
The schedule to the instrument lists provisions of schedule 5 to the Bankruptcy and Diligence etc. (Scotland) Act 2007 ('the 2007 Act') which come into force on 23 November.

Item 10(c) of Column 1 of the schedule provides that the provisions listed in sub-paragraph (4) of paragraph 16 of schedule 5 come into force on that date for the purpose specified in Column 2, namely the substitution of section 5(5)(aa) of the 1987 Act.

Item 16(c) of Column 1 of the schedule provides that the provisions listed in sub-paragraph (3) of paragraph 26 of schedule 5 come into force on that date for the purpose specified in Column 2, namely the insertion of the reference to section 196(1) of the 2007 Act.

If it is intended that the whole of the provisions listed in sub-paragraph (4)(a) and the whole of the provisions listed in sub-paragraph (3) of the paragraphs 16 and 26 in schedule 5 respectively are to be brought into force by the instrument, and given that elements of the provisions listed in these sub-paragraphs in schedule 5 are already in force, what is intended and what purpose is served by specifying a purpose in Column 2 of the schedule, given the terms of article 3(3) of the instrument?

Question 2
Given the terms of article 3(3) of the instrument, does the Scottish Government accept that, with respect to items 10(c) and item 16(6) of the schedule to the instrument (which refer to sub-paragraph (4) of paragraph 16 of and sub-paragraph (3) of paragraph 26 of schedule 5 respectively) that the position with respect to coming into force of these provisions would be clearer if no purpose was specified in Column 2 of the schedule (assuming (4) was amended to (4)(a))?

The Scottish Government responds as follows:
It is intended that the whole of the provisions substituted by paragraph 16(4)(a) and inserted by paragraph 26(3) of Schedule 5 to the Bankruptcy and Diligence etc. (Scotland) Act 2007 should be brought into force - insofar as not already into force.

The purpose served by the entry in column 2 of the Schedule in the Order was to make clear the extent of the commencement by the Order, but the Scottish Government accepts, given the terms of article 3(3) of the Order, that had the reference to sub-paragraph (4) been limited to (4)(a), the commencement position would have been clearer if no purpose was specified in Column 2 of the Schedule.
While the Scottish Government considers that what is commenced in each case is clear from the Order as drafted, the Government thanks the Parliament for drawing its attention to the simpler formulation.

The Railway Closures (Exclusion) Scotland Order 2009 (SSI 2009/371)

On 5 November 2009 the Scottish Government was asked:
(a) what it considers the effect of placing the definition of “the 2005 Act” in the preamble to the Order is, given that this is not part of the operative provisions,
(b) whether this affects the meaning or operation of article 2 where that expression is used, and
(c) why in doing so it has departed from standard drafting practice?

The Scottish Government responds as follows:
We recognise that in terms of standard drafting practice the reference in article 2 should be to the "Railways Act 2005" in full rather than relying on the definition which has been included in the preamble and we are grateful to the committee for pointing out this oversight.

We consider however that it will be clear to the reader that it is the Railways Act 2005 which is being referred to in article 2: there is nothing in the operative part of the Order which is in direct conflict with the words used in the preamble and there is no other Act from 2005 relating to the subject matter which could cause confusion.

As such we are of the view that it will have no effect on the intended meaning.

The Feed (Specified Undesirable Substances) (Scotland) Regulations 2009 (SSI 2009/373)

On 5 November 2009 the Scottish Government was asked:
It is stated that these Regulations are intended to provide for the implementation of Commission Directive 2009/8/EC amending Annex 1 of Directive 2002/32/EC as regards maximum levels of unavoidable carry-over of coccidiostats or histomonostats in non-target feed.

Regulation 2 (1) of the Veterinary Medicines Regulations 2005 defines ‘veterinary medicinal product’ as meaning –

a) any substance or combination of substances presented as having properties for treating or preventing disease in animals; or

b) any substance or combination of substances that may be used in, or administered to, animals with a view either to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis,

such products falling under the subject area of the reservation contained in Head J4 of Schedule 5 to the Scotland Act 1998.
The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2006 provides for certain functions of a Minister of the Crown under the Agriculture Act 1970, so far as they are exercisable by that Ministers in or as regards Scotland, to be exercisable by the Scottish Ministers instead of the Minister concerned.

With further reference to that Order the Agriculture Act 1970 functions transferred to the Scottish Ministers are, in terms of the Schedule to that Order, so transferred only so far as they are exercisable in relation to animal feeding stuffs, intended to be used for oral feeding to animals, which are not veterinary medicinal products as defined in regulation 2(1) of the Veterinary Medicines Regulations 2005. It is also clear that insofar as these functions may be exercisable in relation to coccidiostats or histomonostats, they were not transferred by the 2006 Order, and their regulation also appears reserved by J4.

Insofar as these Regulations are made under these powers set out in the Agriculture Act 1970, the Scottish Government is asked to explain how it is considered that they are made for a purpose which falls under powers which are exercisable by the Scottish Ministers, having regard to the terms of the Schedule to the 2006 Order. Are these Regulations not, effectively, concerned with the regulation of veterinary medicinal products having regard also to the provision which they make concerning permitted levels of such products in animal feed?

The Scottish Government responds as follows:
The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2006 (SI 2006/304) devolved certain functions of a Minister of the Crown under the Agriculture Act 1970 to the Scottish Ministers (in so far as not already having been transferred), but only so far as those functions related to (i) animal feeding stuffs, intended to be used for oral feeding to animals, which are not veterinary medicinal products as defined in regulation 2(1) of the Veterinary Medicines Regulations 2005 (SI 2005/2745) (“the 2005 Regulations”); and (ii) any feed additive to which EC Regulation 1831/2003 on additives for use in animal nutrition applies which is not a specified feed additive as defined by paragraph 1(1) of Schedule 5 to the 2005 Regulations. The explanatory memorandum to the 2006 Order set out the objective behind this, which was to “ensure that the Scottish Ministers have the necessary powers to legislate for all non-medicinal animal feed in Scotland”.

Coccidiostats and histomonostats are authorised for use in animal nutrition as feed additives under EC Regulation 1831/2003. These substances help prevent certain infestations of the gastro-intestinal tract (mainly in poultry). They may be used in animal feed “as feed additives” in terms of paragraph 1(1) of Schedule 5 to the 2005 Regulations (being defined as “specified feed additives”) and as a veterinary medicinal product for “for treating or preventing disease in animals” or “with a view either to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis” in terms of regulation 2(1) of the 2005 Regulations. The 2005 Regulations (now revoked and superseded by the Veterinary Medicines Regulations 2009 (SI 2009/2297)) set up a system of controls for veterinary medicines, which cover medicinal animal feed and specified feed additives. This is enforced in Scotland by the Veterinary Medicines Directorate (an executive agency of the Department for Environment, Food and Rural Affairs).
The carry-over of residues of coccidiostats and histomonostats into animal feed for non-target species (species that were not intended to digest these substances) is technically unavoidable in certain circumstances on farms. The purpose of these Regulations is to regulate non-medicinal animal feed in Scotland to ensure that levels of undesirable substances (carry-over residue) are kept within tolerable limits in order to manage any potential risk posed by these substances to animal and human health. These Regulations do not apply to animal feed used as either a veterinary medicinal product in terms of regulation 2(1) of the 2005 Regulations or to coccidiostats and histomonostats which have been added to animal feed as feed additives (being "specified feed additives") in terms of paragraph 1(1) of Schedule 5 to the 2005 Regulations. These Regulations in fact help to ensure that non-medicinal animal feed remains non-medicinal by prohibiting unacceptable levels of carried-over medicinal substances in animal feed.

Tolerances for residue carry-over levels have been set by Commission Directive 2009/8/EC to ensure harmonised levels throughout the EU, which is without prejudice to the use of these substances as feed additives as authorised under EC Regulation 1831/2003. These Regulations implement these requirements for Scotland by inserting a "Chapter E" into Schedule 5 to the Feeding Stuff (Scotland) Regulations 2005. Equivalent regulations have been introduced in the rest of the UK. The Feeding Stuff (Scotland) Regulations 2005 do not regulate "excluded additives" (which includes coccidiostats and histomonostats) used as feed additives and regulates only non-medicinal animal feed. This is enforced in Scotland by, as the case may be, either the relevant local authority or the Food Standards Agency.

It is our view, for the reasons given above, that these Regulations make provision only for non-medicinal animal feed and do not interfere with the regulation of medicinal animal feed and specified feed additives by the Veterinary Medicines Directorate. We consider that these Regulations are within the competence of the Scottish Ministers.

The Food Labelling (Declaration of Allergens) (Scotland) Regulations 2009 (SSI 2009/374)

On 5 November 2009 the Scottish Government was asked: given that the implementation by this instrument of the extension of the transitional period provided by the amendment of Article 3 of Directive 2007/68/EC is 6 months late, can the Scottish Government comment on:

(a) whether there is a risk that persons to whom the new transitional provision inserted by these regulations and the defence would apply after 20 November 2009 may be or may have been prosecuted in relation to acts allegedly committed in the period from the expiry of the current transitional exemption (31 May 2009) until 19 November 2009, being the day before the new exemption under Scots law comes into force?

(b) what steps if any the Scottish Government have taken to address this?

The Scottish Government responds as follows: the Crown Office and Procurator Fiscal Service (COPFS) have confirmed that for the period from 31 May 2009 to 19 November 2009, there were no relevant prosecutions
and there are no relevant prosecutions pending. The COPFS have been notified by the Food Standards Agency of the new transitional measures under EU law and these Regulations. The COPFS are currently in the process of taking the necessary internal measures to ensure that there will be no prosecutions in future for this period. In the circumstances, we do not consider there to be any risk in practice of a prosecution being taken or continued against any person for acts allegedly committed in this period.


On 5 November 2009 the Scottish Government was asked:
1. On what basis it considers that article 3 does not, actually, make textual amendments in relation to the Police Act 1997 (such that this instrument should not therefore be subject to affirmative procedure in terms of section 100(4) of the 2007 Act).

2. (a) Insofar as the drafting of article 3 of this instrument follows the approach taken in SSI 2009/337, in respect of which various points were recently raised, and it being anticipated that the response to question 1 might therefore be in similar terms, whether it would nonetheless accept that in drafting article 3, and indeed the instrument as a whole, a different approach might have been adopted, in the interests of improving clarity and transparency.

(b) In particular, in circumstances where the matter of whether an instrument makes textual amendment is determinative of the Parliamentary procedure which applies, whether it agrees that it is of paramount importance that the form of modification adopted be absolutely plain, and that it is not desirable and should not be necessary for reliance to have to be made on placing a ‘gloss’ on affected provisions, or otherwise to depend on drafting devices which include the use of phrases such as ‘for the purpose of this Order’ and ‘as if it had been modified’, and that, to that end, the drafting of article 3 could have been clearer.

The Scottish Government responds as follows:
1. The Government considers that article 3 does not make textual amendments in relation to the Police Act 1997. The drafting makes it clear that the provision is made only for the purpose of this Order and that the legislation has effect as if it had been modified. The drafting is therefore clearly not intended to make actual textual amendments to the Police Act 1997. Section 100(4) of the Protection of Vulnerable Groups Act 2007 ("the PVG Act") provides that the draft affirmative procedure is the appropriate parliamentary procedure where the instrument adds to, replaces or omits any part of the text of an Act. The approach adopted in the drafting of this Order does not do any of the above, but glosses the meaning of the affected Acts specifically for the purposes of the Order.

The Government has been referred to the approach it took in relation to SSI 2009/337. The Government notes that the approach taken in article 5 of that Order, where a textual amendment is made to the affected Regulations, may be contrasted with the approach taken in this Order.

The Government considers that "For the purpose of this Order" means that the gloss applied to the affected provisions of the Police Act 1997 and of the Protection of
Children (Scotland) Act 2003 is only for the purpose of this Order. Section 87(1) of the PVG Act provides that Ministers may make such provision as they consider appropriate in consequence of, or for giving full effect to, any provision made by virtue of the Safeguarding Vulnerable Groups Act 2006 (“the SVG Act”).

The Order does not deliver a permanent change to the legal effect of sections 113C(3) and 113(D)(3) of the Police Act 1997. The provisions introduced are transitory as they will have effect only until provisions in the PVG Act come into force. It is due to the transitory nature of the provision that the Government considers that it was neither necessary nor appropriate to effect an actual textual amendment.

2 (a) As to whether a different approach might have been adopted to drafting the instrument in the interests of improving clarity and transparency, that is difficult to assess in the abstract. The achievement of clarity and transparency in the drafting of legislation is a goal which the Government continually strives to achieve and one to which the Government is committed. The Government is of the view that clarity and transparency have been achieved, both in the instrument itself, and in the Executive Note which accompanied it.

(b) The Government also agrees that, where the matter of whether an instrument makes textual amendment is determinative of the Parliamentary procedures which apply, it is of paramount importance that the form of modification adopted be absolutely plain. In the present instance (and as also explained in the Government's response of 13 October 2009 in connection with SSI 2009/337) the Government's view is that the instrument does make it plain that the provision is made only for the purpose of this Order and that the legislation has effect as if it had been modified. The drafting is clearly not intended to make actual textual amendments to the Police Act 1997, otherwise the conventional drafting forms normally employed to bring about a textual amendment would have been used for reasons of clarity and transparency. A clear distinction can be drawn between the provisions of article 3, where no textual amendment is made, and article 4 where textual amendment is made to the Police Act 1997 (Criminal Records) (Scotland) Regulations 2006. That those drafting forms were not used reflects the position of the Government that textual amendments were not being made to the 1997 Act.

The Rural Payments (Appeals) (Scotland) Regulations 2009 (SSI 2009/376)

On 5 November the Scottish Government was asked:

**Question 1**

*Given that a decision by the Scottish Ministers to refuse, reduce or recover (in whole or in part) payment of compensatory allowance under regulation 12, 17 or 18 of the Hill Livestock (Compensatory Allowances) (Scotland) Regulations 1999 (SSI 1999/187) ('the 1999 Regulations') is a decision which may, by virtue of regulation 4(c) of the Agricultural Subsidies (Appeals) (Scotland) Regulations 2004 (SSI 2004/381) ('the 2004 Regulations), be reviewed and appealed in accordance with the provisions of the 2004 Regulations; given that the 2004 Regulations are repealed by this instrument; given that a decision by the Scottish Ministers to refuse, reduce or recover (in whole or in part) payment of compensatory allowance under regulation 12, 17 or 18 of the 1999*
Regulations is not a decision which is listed in the schedule of relevant decisions in this instrument;

given that the 1999 Regulations appear to be still in force;

what is the justification for the omission from the list of relevant decisions in the schedule to this instrument of decisions under regulations 12, 17 and 18 of the 1999 Hill Livestock Regulations?

Question 2
Given that a decision by the Scottish Ministers to refuse, reduce or recover (in whole or in part) payment of compensatory allowance under regulation 12, 17 or 18 of the 1999 Regulations is not a decision which is listed in the schedule of relevant decisions in this instrument, what mechanism or process will be available on or after 20 November 2009 whereby a decision by the Scottish Ministers to refuse, reduce or recover (in whole or in part) payment of compensatory allowance under regulation 12, 17 or 18 of the 1999 Regulations may be reviewed or appealed?

The Scottish Government responds as follows:

Question 1
It may be of assistance to provide some background to the Hill Livestock (Compensatory Allowances)(Scotland) Regulations 1999 (SSI 1999/187) (“the 1999 Regulations”). The 1999 Regulations referred to cover the first year of Less Favoured Area support under the 2000 – 2006 Scottish Rural Development Programme (SRDP).

The Less Favoured Area Support Scheme Regulations 2001 (SSI 2001 No 50) (“the 2001 Regulations”) at regulation 23 revoke the 1999 Regulations except to the extent that they relate to any compensatory allowance paid or payable since 31 December 1994. The last Hill Livestock Compensatory Allowances payment made was on 25/3/2003 and there are no unpaid Hill Livestock Compensatory Allowances claims in the pipeline.

The decisions under 1999 Regulations amenable to appeal were made under regulations 12, 17 and 18. Regulation 12 applies the Integrated Administration and Control System (IACS) late claims penalty (SSI 3887/92) to late Hill Livestock Compensatory Allowances claims and sets the Hill Livestock Compensatory Allowances closing dates for cattle and sheep as 20 December 1999 and 4 February 2000, respectively. Regulation 17 described the circumstances in which the Scottish Ministers could withhold, recover etc and include: breach of the 5 year undertaking; Good Farming Practice breach; overgrazing notification breach; obstructing an inspector; sheep record, ID and movement order breach; and finally, because the regulations pre-dated the approval of the SRDP there was also a provision that allowed the Scottish Ministers to recover Hill Livestock Compensatory Allowances if the European Commission did not approve the plan. Finally regulation 18 obliges the Scottish Ministers to charge interest on recovered allowances, unless the overpayment was a mistake.

The likelihood of an applicant submitting an Hill Livestock Compensatory Allowances claim under the 1999 Regulations is extremely low given the passage of time since the Scheme was first run and the final qualifying period ended. If a claim was made it would be refused because of the late IACS penalties. Even if there was a force majeure
event preventing the applicant from submitting a timeous claim, the time limit for reporting a force majeure event could now not be met and therefore they would be unable to proceed their claim. Turing to regulation 17, there are no inspections planned that will look back 10 years and the European Commission approved Scheme under the 1999 Regulations in the context of the SRDP 2000 – 2006.

In summary therefore the 1999 regulations are extant but, given that there are no outstanding applications to be processed, or recoveries to be made, the regulations in question would only be applicable to applications under those regulations not yet made. The passage of time, combined with the nature of the scheme and the period for which the scheme conditions which had to be met renders the Hill Livestock Compensatory Allowances regulations (which were previously amenable to appeal) redundant in practice.

Question 2
Because of the reasons stated above the Scottish Government cannot envisage circumstances where decisions to refuse, reduce or recover (under regulations 12, 17 or 18 of the 1999 Regulations) might be taken and therefore there is no requirement for a mechanism to be in place for review or appeal.

The Planning (Control of Major-Accident Hazards) (S) Regulations 2009 (SSI 2009/378)

On 5 November 2009 the Scottish Government was asked:
(a) how the transitional exemptions provisions in regulation 5 are compatible with Community law, since they appear to perpetuate the failure to implement Directive 2003/105/EC until May 2010;

(b) why it has been considered that the extent provision in regulation 1(3) is appropriate, given that the Regulations being amended by these regulations do not appear to have an extent provision, and the enabling provisions cited in the preamble extend to Scotland only?

The Scottish Government responds as follows:
(a) Directive 2003/105/EC amends the lists of substances which are to be subject to the regime to control the storage of hazardous substances envisaged by Directive 96/82/EC. The Regulations will require consent for storage of all listed substances, including those newly listed, from the date on which the Regulations come into force. The transitional provisions do not remove the requirement to obtain consent but rather limit the enforcement action which may be taken. Firms which store or process newly listed substances which would not have required hazardous substances consent before the coming into force of these Regulations must now apply for consent if the quantities are at or above the thresholds set out in the Directive. Since storing or processing without consent comprises a criminal offence under the Planning (Hazardous Substances) (Scotland) Act 1997, a transitional exemption is necessary, to avoid incompatibility with ECHR. It is accordingly considered that this provision is not incompatible with Community Law.
The Scottish Government accepts that inclusion of the extent provision in regulation 1(3) is not necessary, however, it is considered that the inclusion of this provision does not affect the validity of the instrument.

**Act of Sederunt (Fees of Sheriff Officers) (Diligence) 2009 (SSI 2009/379)**

**On 5 November 2009 the Lord President’s Office was asked:**
"to explain the intention, and also what is considered to be the consequence, of paragraph 3(2), which provides for the insertion of item ‘5(c)’ in the Table of Fees, when taken with paragraph 4, which states that item 5 in the Table of Fees is omitted”.

**The Lord President’s Private Office responds as follows:**
The intention behind paragraph 3(2) of SSI 2009/379 was to insert a reference to item 4A(b) into regulation 9 of the Regulations set out in the Schedule to Act of Sederunt (Fees of Sheriff Officer) (No. 2) 2002 (SSI 2002/567). There was a typographical error in that instrument in that it referred, in regulation 9, to item “2.5(c)” whereas it should have referred to items 2 and 5(c). Paragraph 3(2), which intended to correct that and at the same time insert a reference to item 4A(b), replaced “2.5(c)” with “2, 4A(b), 5(c)”. However, in light of the removal of item 5 by paragraph 4 of SSI 2009/379, we accept that the reference to item 5(c) should have been omitted altogether from regulation 9.

Whilst we accept that this error may have the potential to confuse, it is our view that it has no adverse legal effect. By virtue of paragraph 4 there will not be an item 5(c) in the table of fees and, therefore, the reference in regulation 9 is redundant. Moreover, item 5 has been removed because sequestration for rent and poinding of the ground have been abolished by the Bankruptcy and Diligence etc. (Scotland) Act 2007 and, therefore, no work should be carried out or chargeable by sheriff officers in relation to those former diligences. However, we are grateful to the Committee for pointing out this error and we shall remove the reference to item 5(c) at the next available opportunity.