SUBORDINATE LEGISLATION COMMITTEE

AGENDA

31st Meeting, 2009 (Session 3)

Tuesday 24 November 2009

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

1. **Decision on taking business in private:** The Committee will decide whether to take item 4 in private.

2. **Instruments subject to annulment:** The Committee will consider the following—
   
   - the Public Health etc. (Scotland) Act 2008 (Sunbed) Regulations 2009 (SSI 2009/388);
   - the Diligence against Earnings (Variation) (No. 2) (Scotland) Regulations 2009 (SSI 2009/395);
   - the Diligence (Scotland) Amendment Regulations 2009 (SSI 2009/396).

3. **Instruments not laid before the Parliament:** The Committee will consider the following—
   
   - Act of Sederunt (Fees of Messengers-at-Arms) (Diligence) 2009 (SSI 2009/383);
   - Act of Sederunt (Money Attachment Rules) 2009 (SSI 2009/382);
   - the Specified Animal Pathogens (Scotland) Amendment Order 2009 (SSI 2009/394);
   - Act of Sederunt (Amendment of the Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2009) 2009 (SSI 2009/402).

4. **Interpretation and Legislative Reform (Scotland) Bill:** The Committee will consider its response to a consultation from the Standards, Procedures and Public Appointments Committee.
The papers for this meeting are as follows—

**Agenda Items 2-3**

- Legal Brief \(\text{SL/S3/09/31/1 (P)}\)
- Summary of Recommendations \(\text{SL/S3/09/31/2}\)
- Instrument Responses \(\text{SL/S3/09/31/3}\)

**Agenda Item 4**

- Paper by the Clerk \(\text{SL/S3/09/31/4 (P)}\)
The Committee will be invited to consider the following recommendations under consideration at the meeting. Decisions are a matter for the Committee.

Agenda Item 2  Instruments subject to annulment

The Public Health etc. (Scotland) Act 2008 (Sunbed) Regulations 2009 (SSI 2009/388)

The Committee may wish to report that—

- an explanation has been sought and provided by the Scottish Government as to the anticipatory exercise of the powers to make the instrument, in sections 95(4)(c) and 96(5)(c) of the Public Health etc. (Scotland) Act 2008 before those sections are brought into force, with which the Committee is satisfied;

- an explanation has been sought and provided by the Scottish Government as to the observation of the required 3 month “standstill” period following notification of the draft Regulations to the European Commission under the requirements of the “Technical Standards Directive” (98/34/EC) before the Regulations were made. The Committee is satisfied with this explanation.

The Diligence against Earnings (Variation) (No. 2) (Scotland) Regulations 2009 (SSI 2009/395)

The Diligence (Scotland) Amendment Regulations 2009 (SSI 2009/396)

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

Act of Sederunt (Fees of Messengers-at-Arms) (Diligence) 2009 (SSI 2009/383)

The Committee may wish to report to the Parliament that, in consequence of the reliance on section 5 of the Court of Session Act 1988 as the enabling power, and given that this section does not provide express authority to impose a charge for the execution of diligence, there appears to be a doubt that this instrument is intra vires.

Act of Sederunt (Money Attachment Rules) 2009 (SSI 2009/382)

The Specified Animal Pathogens (Scotland) Amendment Order 2009 (SSI 2009/394)

Act of Sederunt (Amendment of the Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2009) 2009 (SSI 2009/402)

The Committee may wish to consider if it is content with these instruments.
Act of Sederunt (Fees of Messengers-at-Arms) (Diligence) 2009 (SSI 2009/383)

On 13 November 2009 the Lord President's Private Office was asked:

“Does the Lord President's Private Office not consider that an express power is required in order to prescribe a fee or a charge by subordinate legislation as a matter of general administrative law?

Given that this instrument purports to set fees of messengers-at-arms in respect of the execution of a new form of diligence can the Lord President's Private Office explain which express power to this effect is being used to make this instrument?

Section 5 of the Court of Session Act 1988 which is referred to in the preamble to this instrument does not appear to provide express authority to prescribe such fees.”

The Lord President’s Private Office responds as follows:

The Lord President’s Private Office accepts that, as a matter of general administrative law, an express power is generally relied upon where a fee or a charge is prescribed by subordinate legislation. However, it is the view of the Lord President’s Private Office that section 5(a) of the Court of Session Act 1988 (“the 1988 Act”) provides the Court with the necessary power to prescribe fees for messengers-at-arms. The prescription of these fees is considered to be clearly “incidental or relating to” the procedure and practice to be followed in relation to diligence following on causes before the Court of Session. For that reason, section 5 is considered to be sufficient in relation to the particular fees contained within this Act of Sederunt.

In general, section 6 of the Execution of Diligence (Scotland) Act 1926 (“the 1926 Act”) is relied upon to regulate the fees relating to matters contained within that Act and section 5 of the 1988 Act is used to regulate the fees relating to matters outwith the scope of the 1926 Act. Accordingly, in the Acts of Sederunt making provision for fees of messengers-at-arms which include matters covered by the 1926 Act, including increases across the table of fees, both powers are narrated in the preamble. This has been the practice in such Acts of Sederunt which have been made on an annual basis since at least 1989 (see Act of Sederunt (Fees of Messengers-at-Arms) 1989 (S.I. 1989/1019)). Indeed, the current Act of Sederunt amends the table of fees set out in an earlier Act of Sederunt (Act of Sederunt (Fees of Messengers-at-Arms) (No. 2) 2002 (S.S.I 2002/566)) which used those same powers to prescribe the fees of messengers-at-arms.

The Lord President’s Private Office takes the view that, in relation to the current Act of Sederunt, section 6 of the 1926 Act is not relevant, as the business concerned does not fall within the subject matter of that Act. Accordingly, section 5 of the 1988 Act is the power which is relied upon.
On 13th November 2009 the Scottish Government was asked for an explanation of the following.

(A) This instrument is made in exercise, partly, of the powers contained in sections 95(4)(c) and 96(5)(c) (in Part 8) of the Public Health etc. (Scotland) Act 2008 (powers to prescribe documents for the purposes of proving a persons age). It appears that those provisions have not yet been brought into force, either by the 2008 Act, or the 2 commencement orders, SSI 2009/9 and 2009/319.

(1) What does the Government consider the effect of this is, in relation to the provisions made by the instrument?

(2) Is reliance being placed on the anticipatory exercise of those powers, and if so, can the legal basis for such reliance be explained?

(B) While the last paragraph of the Explanatory Note explains that the Regulations were notified in draft to the European Commission in accordance with the Technical Standards Directive (98/34/EC), can it be explained and clarified how the required “standstill period” under the Directive following notification of the draft until the making of the Regulations has been observed?

The Scottish Government responds as follows:

(A) This instrument relies on anticipatory use of powers in accordance with paragraph 10 of schedule 1 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999. The anticipatory exercise of these powers is expedient for the purpose of giving effect to these provisions of the Act to allow the regulations to be made.

The Scottish Government is making a third commencement order to the Public Health (Scotland) Act 2008 which will bring the remaining provisions of Part 8 of the 2008 Act into force on 1 December - the day on which the Public Health etc. (Scotland) Act 2008 (Sunbed) Regulations 2009 (SSI 2009/388) come into force. The commencement order will be laid tomorrow.

(B) The Regulations were notified in draft (in accordance with the guidance of the Department for Business, Innovation and Skills) on 24th June 2009. A letter was received by policy colleagues on 1 October 2009 from the Department for Business, Innovation and Skills advising that the standstill period ended on 25 September 2009 and that no comments or opinions were received by the Commission.