SUBORDINATE LEGISLATION COMMITTEE

AGENDA

33rd Meeting, 2009 (Session 3)

Tuesday 8 December 2009

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

1. Draft instruments subject to approval: The Committee will consider the following—

   the Adoption and Children (Scotland) Act 2007 (Modification of Enactments) Order 2010 (SSI 2010/draft);
   the Census (Scotland) Order 2010 (SSI 2010/draft).

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

   the Law Applicable to Contractual Obligations (Scotland) Regulations 2009 (SSI 2009/410);
   the Rural Development Contracts (Rural Priorities) (Scotland) Amendment (No. 4) Regulations 2009 (SSI 2009/411);
   the Sea Fishing (Prohibition on the Removal of Shark Fins) (Scotland) Amendment Order 2009 (SSI 2009/413);
   the Sheep and Goats (Identification and Traceability) (Scotland) Revocation Regulations 2009 (SSI 2009/415);
   the Zoonoses and Animal By-Products (Fees) (Scotland) Amendment Regulations 2009 (SSI 2009/416);
   the Wildlife and Countryside Act 1981 (Variation of Schedule 4) (Scotland) Order 2009 (SSI 2009/418);
   the Wildlife and Countryside (Registration and Ringing of Certain Captive Birds) (Scotland) Regulations 2009 (SSI 2009/419);
   the Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2009 (SSI 2009/426);
   the Food for Particular Nutritional Uses (Addition of Substances for Specific Nutritional Purposes) (Scotland) Regulations 2009 (SSI 2009/427);
3. **Interpretation and Legislative Reform (Scotland) Bill (in private):** The Committee will consider a draft Stage 1 report.

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The papers for this meeting are as follows—

**Agenda items 1 - 2**

Legal Brief  
Summary of Recommendations  
Instrument Responses

**Agenda item 3**

Draft Report
SUBORDINATE LEGISLATION COMMITTEE

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Summary of Recommendations

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

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**Agenda Item 1** Draft instruments subject to approval

The Adoption and Children (Scotland) Act 2007 (Modification of Enactments) Order 2010 (SSI 2010/draft)

The Census (Scotland) Order 2010 (SSI 2010/draft)

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

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**Agenda Item 2** Instruments subject to annulment

The Law Applicable to Contractual Obligations (Scotland) Regulations 2009 (SSI 2009/410)

The Committee may wish to report that—

(a) an explanation has been sought and provided by the Scottish Government in relation to the choice of the negative procedure adopted for this instrument made under the powers in section 2(2) of the European Communities Act 1972, and that the Committee is satisfied with that explanation; and

(b) the Committee reiterates that it will be helpful to it for the Scottish Government’s reasons for the choice of procedure adopted for instruments made under section 2(2) (which amend primary legislation) to be explained in the Executive Note accompanying the instrument. Where an instrument affects primary legislation, then the Committee’s starting point is a presumption in favour of affirmative procedure, and it would be for the Scottish Government in those circumstances to explain and justify the use of negative procedure.

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The Committee may wish to consider if it is content with these instruments.
The Law Applicable to Contractual Obligations (Scotland) Regulations 2009 (SSI 2009/410)

On 26 November 2009 the Scottish Government was asked:

The Committee reported in relation to the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 (SSI 2008/404) that the selection of affirmative procedure or negative procedure applying to instruments made under section 2(2) of the European Communities Act 1972 is to be considered in each case on its own merits. It is helpful for the reasons for the choice of procedure to be set out in the Executive Note. Further, where an instrument affects primary legislation, then the starting point is a presumption in favour of affirmative procedure, and it would be for the Scottish Government in those circumstances to explain and justify to the Committee the use of negative procedure.

Given that the Executive Note with this instrument does not explain the choice of negative procedure, despite the instrument amending provisions in the Contracts (Applicable Law) Act 1990 and the Prescription and Limitation (Scotland) Act 1973, can the Government explain the use of negative resolution procedure in preference to draft affirmative.

The Scottish Government responds as follows:

As with the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 (SSI 2008/404 - “the 2008 Regulations”) to which the Committee refers, this instrument is made under section 2(2) of the European Communities Act 1972. The Government’s reasons for selecting negative procedure are similar for both instruments (the justification for the 2008 Regulations is annexed).

As noted there, which procedure is appropriate will depend on the circumstances of each case. Affirmative procedure will be more appropriate for some instruments, for example those imposing onerous financial obligations or creating serious criminal offences, but not all instruments amending primary legislation require to be subject to affirmative procedure. They should be looked at on a case by case basis, taking into account the nature of the changes they make.

The amendments to primary legislation made by this instrument are also not substantial. The provisions of the Contract (Applicable Law) Act 1990 and the Prescription and Limitation (Scotland) Act 1973 which the Regulations disapply are also for this instrument replaced by a directly applicable EC Regulation - Regulation (EC) No. 593/2008 on the law applicable to contractual obligations. As with the 2008 Regulations, this instrument applies those EC rules within the UK, but the Government does not believe that the changes to the existing domestic choice of law rules are so substantial that the affirmative parliamentary procedure is justified.
For these reasons, the Government is of the view that negative procedure is appropriate for the nature of the changes this instrument makes to primary legislation.