SUBORDINATE LEGISLATION COMMITTEE

AGENDA

34th Meeting, 2009 (Session 3)

Tuesday 15 December 2009

The Committee will meet at 2.15 pm in Committee Room 6.

1. **Decision on taking business in private:** The Committee will decide whether to take item 7 in private.

2. **Bribery Bill (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Bribery Bill (UK Parliament legislation).


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

   The Crofting (Designation of Areas) (Scotland) Order 2010 (SSI 2010/draft).

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

   the Less Favoured Area Support Scheme (Scotland) Amendment Regulations 2009 (SSI 2009/412);
   the Control of Salmonella in Turkey Flocks (Scotland) Order 2009 (SSI 2009/417);
   the Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009 (SSI 2009/428).

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

   the Sheep and Goats (Records, Identification and Movement) (Scotland) Order 2009 (SSI 2009/414);
the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (Commencement No. 8) Order 2009 (SSI 2009/432); the Health Boards (Membership and Elections) (Scotland) Act 2009 (Commencement No. 2) Order 2009 (SSI 2009/433).

7. **Legal Services (Scotland) Bill**: The Committee will consider a draft report on the delegated powers provisions in this Bill at Stage 1.

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The papers for this meeting are as follows—

**Agenda Items 2 - 6**

Legal Brief
SL/S3/09/34/1 (P)

**Agenda Items 4 - 6**

Summary of Recommendations
SL/S3/09/34/2

**Agenda Item 2**

Legislative Consent Memorandum
SL/S3/09/34/3

**Agenda Item 3**

Legislative Consent Memorandum
SL/S3/09/34/4

**Agenda Items 5 - 6**

Instrument Responses
SL/S3/09/34/5

**Agenda Item 7**

Draft Report
SL/S3/09/34/6 (P)

Scottish Government Response
SL/S3/09/34/7
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  Draft instruments subject to approval**

The Crofting (Designation of Areas) (Scotland) Order 2010 (SSI 2010/draft)

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

**Agenda Item 5  Instruments subject to annulment**

The Less Favoured Area Support Scheme (Scotland) Amendment Regulations 2009 (SSI 2009/412)

The Committee may wish to report that an explanation has been sought and provided by the Scottish Government as to the temporary effects of regulations 3(b), (d) and 6. The Committee may also note that the Government has confirmed that new principal Regulations are intended to be made in March 2010, which would bring in new rates to be paid for Less Favoured Area support, for the Scheme Year 2010.

The Control of Salmonella in Turkey Flocks (Scotland) Order 2009 (SSI 2009/417)

The Committee may wish to report that in relation to this order there has been a failure to follow proper legislative process. The order was laid in Parliament as being subject to negative resolution procedure, but following challenge to this view by the Committee the Government has confirmed in its response that the correct procedure applying is that the order is not laid.
The Committee may also report that while it considers this has no effect on the validity or the operation of the provisions in the order, as the resulting error is contained in its italicised heading, which is not part of the operative provisions, the Committee is highly critical of the absence of adequate quality control of the drafting process in relation to this instrument.

The Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009 (SSI 2009/428)

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

- the new regulation 47C of the Public Contracts (Scotland) Regulations 2006 and regulation 45C of the Utilities Contracts (Scotland) Regulations 2006 (as inserted on pages 12 and 21 of the instrument) provide that the Scottish Ministers shall pay into the Scottish Consolidated Fund any financial penalty ordered to be paid by them or recovered by them, where such a financial penalty is ordered by the Court to be paid by a contracting authority in terms of the Regulations;

- the Scottish Government confirms in its response that in its view, civil financial penalties that may be paid into the Scottish Consolidated Fund by virtue of those new regulations 47C and 45C are not designated receipts for the purposes of section 64(5) to (7) of the Scotland Act 1998. They are viewed therefore as payments into to the Fund, but not charged on the Fund as designated receipts;

- regulation 2(4)(b)(i) and (5)(b)(i) are defectively drafted. These provisions should refer to the word “ensure” where it first appears in regulations 17(23) and 18(23) of the Public Contracts (Scotland) Regulations 2006, rather than where it second appears. The Government intends to lay a correcting instrument, to ensure that the 2006 Regulations are amended correctly on 20 December 2009 when this instrument comes into force.

Agenda Item 6 Instruments not subject to Parliamentary procedure

The Sheep and Goats (Records, Identification and Movement) (Scotland) Order 2009 (SSI 2009/414)

The Committee may wish to report as satisfactory the response provided by the Scottish Government in relation to the meaning of the term ‘critical control point’ as used in this Order, and in consequence the Committee may wish to be content with this instrument.
The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (Commencement No. 8) Order 2009 (SSI 2009/432)

The Health Boards (Membership and Elections) (Scotland) Act 2009 (Commencement No. 2) Order 2009 (SSI 2009/433)

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

Bribery Bill

Draft Legislative Consent Motion

1. The draft motion, lodged by the Cabinet Secretary for Justice, is:

“That the Parliament agrees that the relevant provisions of the Bribery Bill, introduced in the House of Lords on 19 November 2009, relating to bribery and corruption, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Kenny MacAskill, Cabinet Secretary for Justice, under Rule 9B.3.1(a) of the Parliament’s standing orders. The Bribery Bill was introduced in the House of Lords on 19 November 2009.1

Content of the Bribery Bill

3. The Bribery Bill aims to provide a clearer and more effective legal framework to combat bribery in both the public and private sectors and will assist the United Kingdom, including Scotland, in more effectively fulfilling international obligations.

4. Under the Bill, two new general offences will be created covering:

- the offer, promise and giving of an advantage; and
- the request, agreeing to receive or acceptance of an advantage.

The Bill will also create a new discrete offence of bribery of foreign public officials and a new corporate liability offence of negligently failing to prevent bribery. In addition, the Bill will increase the maximum penalty for bribery to up to ten years’ imprisonment.

5. It is hoped that such provisions will assist in the international fight against bribery and corruption and will support high ethical standards in business across the UK.

Provisions which relate to Scotland

6. In the main, the Bribery Bill clauses extend to all of the UK. It contains a range of provisions aimed at modernising the law of bribery and corruption in the UK while also ensuring that the UK meets its international obligations. The consent of the Scottish Parliament is required to allow these clauses to extend to Scotland.

7. Clause 16 of the Bill provides the Scottish Ministers with a power to make such supplementary, incidental or consequential provision as they consider appropriate for the purposes of the Bill or in consequence of the Bill. It is likely that the Scottish

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1 The Bill can be found at [http://services.parliament.uk/bills/2009-10/bribery.html](http://services.parliament.uk/bills/2009-10/bribery.html).
Ministers will use this power in connection with consequential amendments to paragraph 2 of the Schedule to the Harris Tweed Act 1993 and secondary legislation.

**Reasons for seeking a Legislative Consent Motion (“LCM”)**

8. The consent of the Scottish Parliament is required because the Bribery Bill makes provision in relation to Scotland on matters within the legislative competence of the Scottish Parliament, namely the criminal law. Taking such a route is considered, in this instance, to be appropriate given the importance of ensuring that a consistent approach to bribery and corruption reform is taken throughout the United Kingdom. Uniformity across the UK would provide a more effective and workable legislative framework than would be possible if separate legislation were introduced in the two Parliaments. It would also help to ensure that Scotland does not fall behind the rest of the UK in reforming this area of the law and would avoid the situation whereby the current deficiencies in the law remain in Scotland for longer than is necessary.

**Consultation**

9. In March 2007, following unsuccessful attempts at reform in the past, the Home Office asked the Law Commission in England and Wales (the Law Commission) to look at the law of bribery. The Law Commission published a consultation paper in October 2007 and issued a report containing recommendations for reform in November 2008.\(^2\)

10. The Law Commission’s report concluded that the current law of bribery is out-dated and, in some circumstances, unfit for purpose. The Commission recommended that the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 (together with some other statutory provisions) be repealed and the common law offences of bribery and embracery be abolished, to be replaced by two general offences of bribery and a specific offence of bribing a foreign public official.

11. The Ministry of Justice issued its draft Bribery Bill, which was based largely on the recommendations of the Law Commission, on 25 March 2009. The UK Parliament established a Joint Committee on the draft Bill, which undertook a consultation on it between May and July 2009. The Committee heard evidence from 37 witnesses and received a total of 61 written submissions. Contributors included the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD) and the United States Department of Justice.

12. The Joint Committee’s report was published on 28 July 2009.\(^3\)

13. In its report, the Committee welcomed the draft Bribery Bill as being an important opportunity to modernise the law of bribery. However, it made a number of (relatively minor) recommendations, including:

- amending the draft Bill to make it clear that an advantage is not “legitimately due” unless required or permitted by “written law”
- the removal of the need to prove negligence under clause 5(1)(c)

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\(^2\) This report can be found at [http://www.lawcom.gov.uk/docs/lc313.pdf](http://www.lawcom.gov.uk/docs/lc313.pdf).

\(^3\) It can be found at [http://www.publications.parliament.uk/pa/jt/jtbribe.htm](http://www.publications.parliament.uk/pa/jt/jtbribe.htm).
• the removal of the bar to the adequate procedures defence following on from the failure of a senior officer contained in clause 5(5) of the draft Bill.

14. The UK Government published their response to the Joint Committee’s report on 23 November 2009.4

15. In July 2009, the Scottish Government began its own consultation on bribery and corruption reform in Scotland, based on the UK Government's draft Bribery Bill.5 There was very limited interest in the consultation with only six written responses received. The general opinion among consultees was that the current law of bribery and corruption in Scotland is in need of reform and that any such reform should be consistent with changes in the rest of the United Kingdom. There was general satisfaction with the proposals. Some consultees did, however, consider that there were minor areas of the draft Bribery Bill which could be improved in relation to Scotland. We are currently considering the merit of these recommendations and will engage with UK colleagues in considering whether any changes should be sought.

16. The only consultee to object was the Law Society of Scotland. It did not object to the proposals themselves, but questioned why a reform of the law was necessary and expressed concern that any proposed rationalisation would detract from the flexibility of the common law. In contrast, the Faculty of Advocates, while recognising that there do not appear to have been any problems with prosecutors achieving convictions under the current law, commented that the law at present is “somewhat fragmented” and that reform is necessary in order for the law to be simplified and improved.

Financial implications

17. The number of bribery and corruption offences recorded in Scotland is consistently low. As a result, we do not anticipate there being any significant financial implications from the provisions of the Bribery Bill. The primary financial impact will be in relation to transitional arrangements when the Crown Office and Procurator Fiscal Service and the Police make alterations to their respective procedures. Consequently, it is anticipated at this stage that costs associated with the change in law can be met within existing resources.

Conclusion

18. The view of the Scottish Government is that it is in the interests of good governance and an effective justice system that the provisions of the Bribery Bill, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

SCOTTISH GOVERNMENT
November 2009

4 This response can be found at http://www.justice.gov.uk/about/docs/draft-bribery-joint-cttee-govt-response.pdf.
LEGISLATIVE CONSENT MEMORANDUM

Crime and Security Bill

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Parliament agrees that the relevant provisions of the Crime and Security Bill, introduced in the House of Commons on 19 November 2009, relating to the regulation of the private security industry, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Kenny MacAskill, Cabinet Secretary for Justice, under Rule 9B.3.1(a) of the Parliament’s standing orders. The Crime and Security Bill was introduced in the House of Commons on 19 November 2009. The Bill can be found at: http://services.parliament.uk/bills/2009-10/crimeandsecurity.html.

Content of the Crime and Security Bill

3. The UK Crime and Security Bill contains a package of measures under the “protection” theme and will be designed to step up the protection for communities against a range of threats, including violence, anti-social behaviour and financial exploitation. The measures have been designed to focus on issues that will have the maximum impact on the public’s key concerns. The Bill primarily applies to England and Wales. However, there are some provisions which apply to Scotland and one set of provisions in particular – amendments to the Private Security Industry Act 2001 (“the 2001 Act”) – which (i) apply to Scotland and are for devolved purposes and (ii) alter the executive competence of the Scottish Ministers.

Provisions which relate to Scotland

4. Clauses 39 and 40 of the Bill amend the 2001 Act on matters within the Parliament’s legislative competence, while clause 45 confers a new power on the Scottish Ministers.

Amendments to the 2001 Act

5. The 2001 Act introduced a regulatory regime for the licensing of individuals working in designated sectors of the private security industry in England and Wales. The Serious Organised Crime and Police Act 2005 (c.15) extended this regulatory regime to Scotland. As responsibility for the regulation of the private security industry is devolved to the Scottish Parliament a Legislative Consent Motion was agreed on 2 February 2005. The 2001 Act has since been extended to Northern Ireland and licensing will be introduced there from 1 December 2009, providing UK-wide regulation.
6. In so far as they apply to Scotland, the provisions in the Bill amending the 2001 Act do two main things:

- Clause 39 extends the requirement to hold a license for carrying out the activities of a security operative to businesses and gives the Scottish Ministers the power to designate by order the activities of a security operative for which such a license is required.

- Clause 40 extends the current Approved Contractor Scheme to include companies providing in-house security services.

New power exercisable by Scottish Ministers

7. Clause 45 gives Scottish Ministers responsibility for bringing clauses 39 and 40 into force, in so far as they apply to Scotland, following consultation with the Secretary of State.

New offence

8. One other provision in the Bill will apply in Scotland – the proposed creation under clause 42 of a specific offence for a person in possession of an air weapon to fail to take reasonable precautions to prevent young people from gaining unauthorised access to it. This offence will apply in Scotland but it is a reserved matter and there are no legislative implications for Scotland.

Reasons for seeking a legislative consent motion

9. The 2001 Act provides a UK-wide regulatory regime for the regulation of the private security industry. The Security Industry Authority (SIA) is responsible for regulating individuals working in designated sectors in the industry. It is an offence to employ a security industry operative who is not licensed. Regulation on a UK-wide basis ensures consistency of approach; allows Scottish companies to operate across the UK on a level playing field and reduces bureaucracy. Regulation has also been helpful in supporting the police in preventing crime by providing an additional enforcement tool.

10. The UK Government has identified a particular issue with regards to vehicle immobilisation, which is regulated in England and Wales, where regulation applicable to individual operatives has not been successful in preventing abuses. To tackle this, clause 39 of the Bill introduces mandatory business regulation of vehicle immobilisers. As vehicle immobilisation on private land is illegal in Scotland ([Black & Anor v Carmichael (1992)]), regulation of individual vehicle immobilisers does not extend to Scotland and there is consequentially no need for companies to be regulated. However, the clause also allows mandatory licensing to be introduced by order for other particular sectors within the private security industry. As far as Scotland is concerned, this order-making power is given to the Scottish Ministers who must consult the Secretary of State before exercising that power.

11. Although there are currently no plans to extend mandatory regulation of businesses to any other sector of the industry, it is sensible for this new order-making power to extend to Scotland. This will allow Scottish Ministers to introduce regulation of businesses in the private security industry whenever that becomes necessary or desirable.
12. To ensure that consistency across the UK is maintained, it is sensible for this provision to be included in UK legislation. However, as this is a provision which (i) applies to Scotland and is for devolved purposes and (ii) alters the executive competence of the Scottish Ministers, the consent of the Scottish Parliament is required for the provision to be enacted by the UK Parliament.

13. The Security Industry Authority operates a voluntary Approved Contractor Scheme (ACS) for the private security industry. The ACS provides users of private security firms with reassurance that the company only uses licensed staff and that they meet rigorous standards set by the SIA, which are robustly enforced. The scheme currently only applies to companies who are providing private security operatives under contract. Clause 40 of the Bill provides for the scheme to be extended to include in-house providers of security services. This is aimed primarily at vehicle immobilisation and door supervision companies to allow these companies to develop their businesses by providing services (such as training) to other companies and to apply for ACS status. This provision is to be extended to Scotland to allow in-house door supervision companies to seek ACS status as a demonstration of their commitment to quality. Again, to ensure consistency of approach across the UK and to ensure ACS status can be extended at the same time in Scotland as the rest of the UK, it is sensible to include this provision in the UK Bill. However, as this is a provision applying to Scotland which is for devolved purposes, the consent of the Scottish Parliament is again required.

14. Clause 45 of the Bill gives Scottish Ministers responsibility for bringing clauses 39 and 40 into force in so far as they apply to Scotland, following consultation with the Secretary of State. As this is a provision which alters the executive competence of the Scottish Ministers, the consent of the Scottish Parliament is required for the provision to be enacted by the UK Parliament.

Consultation

15. The UK Government has consulted with the vehicle immobilisation industry in advance of these provisions. A full regulatory impact assessment will be carried out before the provisions are commenced. There would also be full consultation before this provision was extended to any other sector.

Financial implications

16. There are no direct costs to the Scottish Government. The SIA is funded by fee income for licenses and any additional costs would be borne by the industry direct. A full regulatory impact assessment, including the cost of the additional regulation, would be carried out before this provision was extended to include Scotland.

Conclusion

17. The Parliament is asked to agree that the provisions in the Crime and Security Bill relating to the regulation of the private security should, in so far as they apply to Scotland, are for devolved purposes and alter the executive competence of the Scottish Ministers, be considered by the UK Parliament.

SCOTTISH GOVERNMENT
December 2009
SUBORDINATE LEGISLATION COMMITTEE

34th Meeting, 2009 (Session 3)

Tuesday 15 December 2009

Instrument Responses

INSTRUMENTS SUBJECT TO ANNULMENT

The Less Favoured Area Support Scheme (Scotland) Amendment Regulations 2009 (SSI 2009/412)

On 4 December 2009 the Scottish Government was asked:

The definitions of “cross compliance” and “holding” in regulation 3(b) and (d) are substituted to apply for “Scheme Years” 2007 to 2009, and regulation 2 of the principal 2007 Regulations defines this period as from 1 January 2007 to 31 December 2009. Regulation 6 substitutes Schedule 3 of the principal Regulations to provide for payment rates for the Scheme Years 2007 to 2009.

(1) As the provisions in the principal Regulations before these amendments (including regulation 12 determining the payment rates by reference to Schedule 3) do not appear to be time limited, is the intended effect to time limit the provisions in the paragraph above only to apply to the end of the Scheme Year at 31 December 2009?

(2) If so, can it be explained how these provisions shall have effect from 1 January 2010, and could the position be made clearer in effect?

The Scottish Government responds as follows:

(1) The Less Favoured Area Support Scheme (S) Amendment Regulations 2009 are an interim measure to allow an increase in payment rates to be accommodated for LFASS 2009 payment rates. These payments are due to be paid out from late January 2010 but relate to the Scheme year ending 31 December 2009. New principal regulations will replace SSI 2007/439 and are expected to be made in March 2010. The new principal regulations will bring in new rates to be paid for the Scheme Year 2010, however payments from this will not be made until January 2011. Therefore the intended effect is indeed to time limit the provisions in the relevant paragraph to apply to the Scheme Year ending on 31 December 2009. The new principal regulations will also reflect more substantive scheme changes, including further increases in the payment rates, for the 2010 scheme year.

(2) As mentioned above, the start of the Scheme Year and associated payment practice works with roughly a year’s delay. The Scottish Government therefore will bring in new principal regulations to cover the Scheme Year 2010.
The Control of Salmonella in Turkey Flocks (Scotland) Order 2009 (SSI 2009/417)

On 3 December 2009 the Scottish Government was asked:
The instrument is made in exercise of the powers conferred by sections 1 and 8(1) of the Animal Health Act 1981, as read with paragraph 1A of Schedule 2 to the European Communities Act 1972 (in regard to the ambulatory references to Community instruments). It appears that provisions under the powers in the 1981 Act do not require to be laid in Parliament, but the instrument has been submitted as subject to negative procedure (reflected in its heading).

(A) Can it be explained on what basis the instrument has been submitted as subject to negative procedure, rather than not requiring to be laid?

(B) If the view is taken that the instrument did not require to be laid, what is the effect of this considered to be, in relation to the terms of the instrument as submitted?

The Scottish Government responds as follows:
In response to question (A), you are correct in saying that the instrument does not require to be laid in the Scottish Parliament as it is not subject to any parliamentary procedure. Therefore, the Order cannot be laid in the Scottish Parliament. The italicised heading is incorrect to the extent that the words "Laid before the Scottish Parliament.....25th November 2009" are not required. The decision on which enabling powers to use in the above instrument was made at a late stage in the drafting. An earlier version of the instrument would have been subject to negative procedure but a late change to the preamble had the effect of making the instrument 'not laid'. Unfortunately, we failed to amend the Form D and italicised heading to reflect the final position. In these circumstances, we shall instruct a correction slip to remove the words which are no longer required.

In response to question (B), we consider that the unnecessary words are otiose and this error has no effect as the italicised headings do not form part of this instrument and are not required in terms of article 10(4) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999/1096.
The Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009 (SSI 2009/428)

On 4 December 2009 the Scottish Government was asked:
(1) Can the Scottish Government confirm that financial penalties paid into the Scottish Consolidated Fund by virtue of new regulation 47C of the 2006 Public Contracts Regulations and regulation 45C of the 2006 Utilities Contracts Regulations are designated receipts under SI 2009/537 (or otherwise) for the purposes of section 64(5) to (7) of the Scotland Act 1998?

(2) In relation to regulation 2(4)(b)(i) and 2(5)(b)(i), whether it is considered that the effect of re-ordering the text from the word “ensure” in this way is clear, or whether it could be made clearer, for example by referring to the text from “ensure” where it first appears to the end?

The Scottish Government responds as follows:
(1) The Scottish Government's view is that civil financial penalties paid into the Scottish Consolidated Fund by virtue of new regulation 47C of the Public Contracts (Scotland) Regulations 2006 and new regulation 45C of the Utilities Contracts (Scotland) Regulations 2006 are not designated receipts for the purposes of section 64(5) to (7) of the Scotland Act 1998. Although Directive 2007/66/EC requires the imposition of “fines” in certain cases, the Scottish Government is mindful that procurement proceedings are civil proceedings and takes the view is that the Directive's requirements are satisfied by the imposition of civil financial penalties, and not criminal fines. The Scottish Government's view is that reference to “fines” in article 2(2)(b) of the Scotland Act 1998 (Designation of Receipts) Order 2009 (S.I. 2009/537) designates receipts into the Scottish Consolidated Fund of criminal fines, but not civil financial penalties.

(2) The Scottish Government thanks the Subordinate Legislation Committee for identifying errors in regulation 2(4)(b)(i) and 2(5)(b)(i). These provisions should refer to the word "ensure" where it first appears in regulations 17(23) and 18(23) of the Public Contracts (Scotland) Regulations 2006. A correcting instrument will be made and laid as soon as possible to ensure that the 2006 Regulations are amended correctly on 20 December 2009.
INSTRUMENTS NOT LAID BEFORE THE PARLIAMENT

The Sheep and Goats (Records, Identification and Movement) (Scotland) Order 2009 (SSI 2009/414)

On 4 December 2009 the Scottish Government was asked:

1. With reference to this instrument, to explain the meaning of a “critical control point”, which is defined in article 2 as “a holding or a third party approved by the Scottish Ministers under section C.2 of the Annex”. In particular it is asked to do so having regard to that definition referring to section C.2 of the Annex (to Council Regulation (EC) No. 21/2004), which section does not however appear to relate to the subject matter of the definition.

2. Further, with reference to article 23(1), which provides for identification codes of animals moved being recorded 'at a critical control point', to explain how such recording can be effected in circumstances where a critical control point is 'a third party' (ie as distinct from a place which forms a holding).

3. Does the Scottish Government accept, having regard to the above, that the meaning of a 'critical control point' is unclear and, if so, to indicate what it would consider to be the effect on the operation of this instrument.

The Scottish Government responds as follows:

1. The definition of a “critical control point” (“CCP”) as a holding or a third party approved by the Scottish Ministers under section C.2 of the Annex is correct. The CCP definition simply reflects the fact that designating CCPs is the way in which the Scottish Ministers intend to exercise the derogation contained in section C.2, although obviously section C.2 does not refer to CCPs in terms. The derogation in section C.2 was inserted in the Council Regulation following representations from the Scottish sheep farming industry and the Scottish Government. It is aimed at reducing the administrative recording burden on farmers by allowing others to electronically record animal id codes on their behalf. This derogation allows the Scottish Ministers, as competent authority, to authorise in relation to movements, except export, the recording of the individual identification code of each animal other than by the keeper of the holding of departure. In essence, the Order will allow markets, abattoirs or particular individuals to electronically record the id codes in relation to animal movement, rather than every individual farmer involved in a movement. The aim is to reduce the overall burden on industry that might otherwise arise as a result of all individual farmers having to invest in the necessary equipment for electronic identification. The term CCP is fully understood within the sheep farming industry and a full explanation of how CCPs will operate is to be included in the guidance to accompany the above instrument which is to be sent to all sheep and goat keepers, markets and abattoirs in Scotland.

2. The definition of CCP encompasses a 'holding or a third party' to provide for the recording of animal id codes at either a specific location or to make provision whereby a person could travel to a holding to act as a CCP (the person, rather than the place, therefore being the CCP). For example a particular market may be approved as a CCP or a certain farmer or market operator may be approved as a CCP to go to holdings to carry out the recording functions under section C.2 of the Annex.
3. The Scottish Government does not accept that the meaning of “critical control point” is unclear given that CCPs will be designated for the purposes of section C.2 of the Annex to Council Regulation (EC) No. 21/2004.
SUBORDINATE LEGISLATION COMMITTEE

34th Meeting, 2009 (Session 3)

Tuesday 15 December 2009

Scottish Government Response

Legal Services (Scotland) Bill at Stage 1

Section 6(7) - Approval of regulators
Given that the exercise of the power is not restricted to matters of detail or administration but may extend to substantive matters (as reflected by the express inclusion of further criteria for approval and the specification of categories of bodies which may or may not be an approved regulator) can the Scottish Government explain in more detail why affirmative procedure is not more appropriate than negative procedure?

The intention is to use the power to make provision in respect of operational details of processes and criteria within the context of the section, rather than make any substantive changes. The power is necessary in order to ensure that any emerging challenges can be met.

The Scottish Government’s view is that the negative procedure is more appropriate because the power will not be used to add new criteria which are unrelated to what is in the Bill. For example, this power may be used to set out exactly what criteria must be met with regard to financial and other resources. This would not involve adding new, unrelated criteria, but rather would be expanding on criteria which are already mentioned (see section 6(1)(a)(ii)).

A similar example where negative procedure was prescribed can be found in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 in relation to the draft scheme of a regulatory body seeking rights to conduct litigation and rights of audience for its members (see section 25(5) and (6) of the 1990 Act).

However, with regard to paragraph (c) (which relates to the categories of bodies which may or may not be an approved regulator), we recognise that the power is very wide. It was included as a safeguard in case experience throws up situations where it may be useful to exclude certain types of body. It was recognised that unsuitable applicants could be excluded by reference to their application, but this power would allow their exclusion without having to consider the application. At present we are considering whether there should be an amendment to narrow the provision, or whether all applications should be considered and thus there would be an amendment to dispense with it.

Section 7(10) - Authorisation to act
Given that the exercise of the power is not restricted to matters of detail or administration but may extend to substantive matters (as reflected by the express inclusion of further criteria for authorisation) can the Scottish Government explain in more detail why affirmative procedure is not more appropriate than negative procedure?
The intention is to use the power to make provision in respect of operational details of processes and criteria within the context of the section rather than make any substantive changes. The power is necessary in order to ensure that any emerging challenges can be met. For example, this power could be used to expand on the information which must be made available to the Scottish Ministers under section 7(9). The Scottish Government’s view is that the negative procedure is more appropriate because the power will not be used to add new criteria which are unrelated to what is in the Bill.

Section 27(1) – Guidance on functions
Given that the guidance may be directed at a particular approved regulator, is it intended that every approved regulator will be consulted in respect of guidance to be issued to a particular regulator or that only that particular regulator will be consulted; and how is this reflected in section 27(2)?

We are grateful to the Committee for drawing this to our attention. We recognise that section 27(1)(a) implies that different guidance could be issued to different approved regulators. However, our intention is that the same guidance should be issued to every approved regulator (and that every approved regulator should be consulted on the guidance). So we intend to bring forward an amendment at Stage 2 with a view to ensuring that the provision meets this intention.

Section 35(2) - Step-in by Ministers
Has the Scottish Government considered whether the use of Class 3 procedure (rather than negative procedure) would not address the Scottish Ministers concerns about the need to take action at short notice but at the same time give the Scottish Parliament an opportunity to consider and, if the Parliament considered it appropriate, approve the action which had been taken by the Scottish Ministers?

Yes, the Scottish Government has considered the use of Class 3 procedure and its view is that it is not appropriate in the circumstances. The emergency affirmative procedure is meant to deal with expected emergency situations which may arise, such as is often found in emergency food orders, or emergency orders for the slaughter of livestock under the Animal Health Act 1981 (see paragraph 9(3) of Schedule 3A). Usually such orders only remain in force for a specified period, such as 28 days. Section 35 allows the Scottish Government to act as an approved regulator. While the Scottish Ministers may be required to step in at short notice, it is not envisaged that the use of the power would arise in an emergency; the power in this provision is there as a safeguard if a gap in regulation should appear and to ensure that the Scottish Ministers would have enough time to properly prepare for them taking over regulatory functions of an approved regulator. The power is required but it is intended to be used only where necessary. Therefore, the negative procedure is sufficient.

Section 37(6) - Eligibility criteria
Given that the exercise of the first element power (in section 37(6)(a)) is not restricted to matters of clarification or technical addition but may extend to substantive matters which could have a material and significant impact on potential licensed providers, on their prospects for meeting the eligibility criteria or on the costs involved in meeting those
criteria, can the Scottish Government explain in more detail why affirmative procedure is not more appropriate than negative procedure?

The intention is to use the power to make further provision about eligibility within the context of the section, rather than make any substantive changes. The power is necessary in order to ensure that any emerging challenges can be met. Therefore, the Scottish Government considers negative procedure to be appropriate. However, we acknowledge that the power could be extended to substantive matters and we intend to consider an amendment at Stage 2.

Section 52(2) - More about investors
Given that the exercise of the power is not restricted to matters which are administrative or of technical detail but may extend to substantive matters (as reflected by the express inclusion of requirements on licensed providers and the modification of definitions in section 52(4)) can the Scottish Government explain in more detail why affirmative procedure is not more appropriate than negative procedure?

This power was intended to be fairly wide, as the area it covers is one in which safeguards (and their performance and fitness for purpose) are crucial. This is reflected in the level of detail given in sections 49-51 relating to the fitness and behaviour of outside investors. In order to ensure that the safeguards provided are sufficient in practice, and that involvement of outside investors does not compromise the core principles of the legal profession in any way, the Scottish Government considers it important to have a wide ranging power to make further provision in this area if necessary. As mentioned in the Delegated Powers Memorandum, the negative procedure is considered appropriate as, despite the fact that the power could be extended to substantive matters, it is quite narrowly focussed on one class of people and is intended to be used to expand on the areas already covered in the Bill. However, we do acknowledge the Committee’s concerns, and we intend to consider an amendment at Stage 2.

Section 74(7) - Certification of bodies
Given that the exercise of the power is not restricted to matters of detail or administration but may extend to substantive matters (as reflected by the express inclusion of further criteria for certification and the specification of categories of bodies which may or may not be an approving body) can the Scottish Government explain in more detail why affirmative procedure is not more appropriate than negative procedure?

The intention is to use the power to make provision in respect of operational details of processes and criteria of the type already outlined in the Bill rather than to make any substantive changes. For example, any criteria set out to expand on section 74(1)(a) (applicant’s suitability to be an approving body) would be designed to ensure that the applicant was able to perform the functions of an approving body, as described in the Bill. This might include financial resources, or other things which any approving body would require, but would be consistent with the functions as set out in the Bill.

The Scottish Government’s view is that the negative procedure is more appropriate because the power will not be used to add new criteria which are unrelated to what is in the Bill. However, with regard to paragraph (c) (which
relates to the categories of bodies which may or may not be an approving body), we recognise that the power is very wide and we intend to consider an amendment to narrow, or dispense with it.

**Section 81(4) - Ministerial intervention**
In relation to the power contained within section 81(4), can the Scottish Government comment on the reason for taking this provision and the choice of procedure?

The Scottish Government apologises that the regulation making power in section 81(4) was not addressed in the Delegated Powers Memorandum. This was an unintentional oversight.

After further consideration, we intend to amend the Bill to insert the requirement to carry out an annual review and to send the report on it to the Scottish Ministers on the face of the Bill. A delegated power would still be required to make further provision about these reviews, similar to that provided at section 24(9) in relation to assessments of licensed providers. However, the Scottish Government is of the view that scrutiny provided by negative procedure would be sufficient.

**Section 81(5) - Ministerial intervention**
In regard to section 81(5), having regard to the very wide scope of this power, can the Scottish Government explain more fully the need for this ‘reserve power’ to create further regulatory safeguards? In particular, the Committee asks whether existing powers such as those contained at sections 74(7), 75(2)(f), section 81(4) and section 83 are not sufficient, and whether the Scottish Government can provide any examples of circumstances in which the power might be used.

Sections 74(7), 75(2)(f), 81(4) and 83 of the Bill contain provisions giving the Scottish Ministers specific powers in relation to, respectively, approving bodies and certification, regulatory scheme, performance and complaints about agents. We recognise that the power in section 81(5) is very wide, but it is still a provision which we consider is required and, therefore, we intend to consider an amendment to narrow the terms of the power by references to particular purposes.

**Section 92 - Council membership**
Can the Scottish Government provide examples of the circumstances in which this power might be used? What provision is currently made in relation to determining numbers/criteria for non-solicitor members, and how might it therefore be determined that the Society’s actions are to be deemed inadequate, such as to necessitate the use of this regulation making power?

Currently, the members of the Council of the Law Society of Scotland are elected in accordance with the provisions of the scheme made under paragraph 2 of Schedule 1 to the Solicitors (Scotland) Act 1980. The Law Society’s constitution provides for the membership of the Council which at present consists of 44 from different geographical constituencies and up to 9 co-opted members. At present, there are no non-solicitor members (although there are 4 non-solicitor observers).
The Scottish Government considers that there should be a significant proportion of lay members. The Law Society agrees but considers that the composition of the Council cannot be changed immediately. As a consequence, no proportion is specified in the Bill.

Although the policy has been agreed in principle with the Law Society, the Scottish Government considers it important to have this power in order to ensure that the required changes are made, and to resolve any disagreements regarding the proportion of lay members.

**Schedule 4 Paragraph 2(2) and 11(2) - financial penalties**

Can the Scottish Government provide further explanation why it is not considered appropriate to have a ceiling on the maximum penalty specified on the face of the Bill?

The Scottish Government does not consider it appropriate to have a ceiling on the maximum penalty specified on the face of the Bill as to do so would take away the flexibility to adjust that amount as necessary to reflect an appropriate penalty for the failure of an approved regulator to adhere to its internal governance arrangements or comply with a direction by the Scottish Ministers. It is not a new proposition for maximum financial penalties to be prescribed in subordinate legislation or by other means. For example, the Legal Service Complaints Commissioner (Maximum Penalty) Order 2004 specifies the maximum penalty the Complaints Commissioner can impose under section 52(3) of the Access to Justice Act 1999.

In addition, the equivalent provision in the UK’s Legal Services Act 2007 deals with financial penalties imposed by and paid to the Legal Services Board. Section 37(4) and (5) of that Act states that the Board must make rules prescribing the maximum amount of a penalty which must have the consent of the Lord Chancellor but no other procedure is required.

Can the Scottish Government explain in more detail why the maximum penalty and the rate of interest are not matters which should be considered and determined by Parliament under affirmative procedure?

The Scottish Government’s view is that the negative procedure is more appropriate for this matter. We intend to set the maximum penalty and the rate of interest at a reasonable level and do not think that it is desirable to have recourse to primary legislation if and when change is wanted in respect of these two matters. However, the Scottish Government will give the Committee an indication of the range of penalties which are under consideration at Stage 2.