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

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

2. **Alcohol etc. (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

3. **Instruments subject to approval:** The Committee will consider the following—
   - the Loch Ryan Port (Harbour Empowerment) Order 2009;
   - the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2010 (SSI 2010/draft).

4. **Instruments subject to annulment:** The Committee will consider the following—
   - the Food Enzymes (Scotland) Regulations 2009 (SSI 2009/435);
   - the Food Additives (Scotland) Regulations 2009 (SSI 2009/436);
   - the Food Supplements, Vitamins, Minerals and Other Substances (Scotland) Regulations 2009 (SSI 2009/438);
   - the Public Contracts and Utilities Contracts (Scotland) Amendment (Amendment) Regulations 2009 (SSI 2009/439);
   - the INSPIRE (Scotland) Regulations 2009 (SSI 2009/440);
   - the Food (Jelly Mini-Cups) (Emergency Control) (Scotland) Regulations 2009 (SSI 2009/437);
   - the Angus Council Area and Dundee City Council Area (Fithiebank) Boundaries Amendment Order 2009 (SSI 2009/442);
   - the Shetland Islands Regulated Fishery (Scotland) Order 2009 (SSI 2009/443);
   - the Inshore Fishing (Prohibition of Fishing for Cockles) (Western Isles) (Scotland) Order 2009 (SSI 2009/444);
the Action Programme for Nitrate Vulnerable Zones (Scotland) Amendment Regulations 2009 (SSI 2009/447);

5. **Guidance subject to approval**: The Committee will consider the following—

the Scottish Government Code of Practice for the Welfare of Dogs (SG 2009/279);

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The papers for this meeting are as follows—

**Agenda items 1-5**

Legal Brief SL/S3/10/1/1 (P)

**Agenda items 3-5**

Summary of Recommendations SL/S3/10/1/2

**Agenda item 1**

Legislative Consent Memorandum SL/S3/10/1/3

**Agenda item 2**

Alcohol etc. (Scotland) Bill
Delegated Powers Memorandum

**Agenda items 3-5**

Instrument Responses SL/S3/10/1/4

**Agenda item 5**

Scottish Government Accompanying Memo (Loch Ryan) SL/S3/10/1/5
SUBORDINATE LEGISLATION COMMITTEE

1st Meeting, 2010 (Session 3)

Tuesday 12 January 2010

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.

Agenda Item 3  Instruments subject to approval

The Loch Ryan Port (Harbour Empowerment) Order 2009

The Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2010 (SSI 2010/draft)

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

Agenda Item 4  Instruments subject to annulment

The Food Enzymes (Scotland) Regulations 2009 (SSI 2009/435)

The Committee may wish to report that an explanation was sought from and provided by the Scottish Government in relation to the conduct which amounts to an offence as of 20 January 2010 with reference to EC Regulation 1332/2008 with which the Committee is satisfied.

The Food Additives (Scotland) Regulations 2009 (SSI 2009/436)

The Committee may wish to report that an explanation was sought from and provided by the Scottish Government in relation to the meaning and effect of “an appropriate mixture of (b) and (c)” in regulation 4(d).

The Committee may also wish to report that the Government response clarifies that the effect of regulation 4(d) is to directly implement the requirement in Article 2(8) of the Directive 94/36/EC on colours for use in foodstuffs, but that the response does not clarify how (in practice) persons requiring to mark meat are to establish what an
“appropriate” or “inappropriate” mixture of the colours E133 Brilliant Blue and E129 Allura Red is, to comply with regulation 4(d).

The Food Supplements, Vitamins, Minerals and Other Substances (Scotland) Regulations 2009 (SSI 2009/438)

The Committee may wish to report this instrument as follows—

- Regulation 6(3)(e) of the Food Supplements (Scotland) Regulations 2003 as substituted by regulation 2(6)(b) of this instrument is defectively drafted as it should refer to the list in Annex I to Directive 90/496 and not simply the Annex to that Directive;

- the Committee recommends that the Scottish Government rectify this error to ensure proper operation of the 2003 Regulations;

- New regulation 12 of the 2003 Regulations as inserted by regulation 2(7) of this instrument could have been more clearly expressed since not all the changes made by regulation 2(2) are relevant for the purposes of the transitional defence;

- While it is accepted that there has been no breach of the requirements of article 2 of Directive 2008/100/EC, the Committee considers that it is good drafting practice to refer to all community instruments being implemented in the explanatory note as this assists the reader’s understanding of the instrument;

- the Committee is content, for its interests, with the reason given for the 21 day rule not having been complied with.

The Public Contracts and Utilities Contracts (Scotland) Amendment (Amendment) Regulations 2009 (SSI 2009/439)

The Committee may wish to accept the explanation offered by the Scottish Government for the breach of the “21 day rule”, between the date of laying and the coming into force date of the instrument.

The INSPIRE (Scotland) Regulations 2009 (SSI 2009/440)

Breach of the “21 day rule”

The Committee may wish to report that it accepts that an explanation has been provided of the necessity for this breach and therefore that the requirements of the Transitional Order have been fulfilled in this respect. Nevertheless, the Committee
finds it unsatisfactory that it was the approach to implementation taken by the Scottish Government that has led to the need to breach the Parliament’s rule. The Committee considers that it is not a satisfactory explanation for the breach of the rule that the timing of laying the Scottish Regulations to implement the EC Directive 2007/2 (late) was dependent upon the completion and laying of the Regulations for the remainder of the UK. The Committee considers that, when preparing a timetable for and delivering implementing regulations, the Government should take full account of the rules which afford sufficient time for Parliamentary scrutiny.

The instrument
The Committee may wish to report that—

(a) an explanation has been sought and provided by the Scottish Government as to why the following provisions do not relate to the reserved matters of telecommunications and wireless telegraphy, international relations, defence, national security or intellectual property, which are reserved matters in terms of Schedule 5 to the Scotland Act 1998;

(The provisions are regulations 8(2)(c), (4)(c), 10(3), (5)(a) and (c), 11(4) and 13(2));

The Committee considers that the explanation provided by the Government to the questions asked could have been a more expansive analysis, but ultimately finds the explanation acceptable;

(b) an explanation has been sought and provided by the Government as to when the United Kingdom as a Member State has, in relation to the Regulations, exercised the derogations under Articles 13(1), 14(2) and 17(7) of Directive 2007/2/EC. The Committee finds that explanation satisfactory;

(c) an explanation has been sought and provided by the Scottish Government as to why regulation 15(2) does not breach the prohibition contained in Schedule 2, paragraph 1(c) of the European Communities Act 1972. This provides that the power to make the Regulations (under section 2(2) of that Act) does not include a “power to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal;

The Committee is satisfied that regulation 15(2) does not so breach that prohibition. However, the Committee does not agree with the view expressed by the Scottish Government in its response that in general terms the requiring of the issue of guidance in Regulations made under section 2(2) of the European Communities Act 1972 does not constitute the conferral of a power to legislate.

The Committee takes the view that, depending on how any particular provision is drafted, it is possible for provisions to breach the requirement in paragraph 1(c) of Schedule 2 to the European Communities Act 1972, where they confer a power to legislate by means of any subordinate instrument (including one designated as “guidance”) if the instrument will confer a power to legislate in breach of that requirement.
The Food (Jelly Mini-Cups) (Emergency Control) (Scotland) Regulations 2009 (SSI 2009/437)

The Angus Council Area and Dundee City Council Area (Fithiebank) Boundaries Amendment Order 2009 (SSI 2009/442)

The Shetland Islands Regulated Fishery (Scotland) Order 2009 (SSI 2009/443)

The Inshore Fishing (Prohibition of Fishing for Cockles) (Western Isles) (Scotland) Order 2009 (SSI 2009/444)

The Action Programme for Nitrate Vulnerable Zones (Scotland) Amendment Regulations 2009 (SSI 2009/447)


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

**Agenda Item 5  Guidance subject to approval**


The Scottish Government Code of Practice for the Welfare of Cats (SG 2009/280)

The Committee may wish to consider if it is content with these Codes of Practice.
SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

EQUALITY BILL

Draft Legislative Consent Motion

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

“That the Parliament agrees that the relevant provisions of the Equality Bill, introduced in the House of Commons on 24 April 2009, to make provision within the legislative competence of the Parliament and to alter the executive competence of Scottish Ministers in respect of the public sector duty to promote equality; the hearing of disability discrimination school education cases by the Additional Support Needs Tribunals for Scotland; the arrangements for educational endowments; the power to prescribe qualification authorities in relation to equality, transitional arrangements for single sex educational establishments; a duty on relevant public authorities in Scotland, when making decisions of a strategic nature about how to exercise their functions, to have due regard to socio-economic disadvantage; and reasonable adjustments to common parts of buildings to suit the needs of disabled people who live in those buildings, should be considered by the UK Parliament.”

Content of the Equality Bill

2. The overarching aim of the Bill is to consolidate, simplify and, where appropriate, harmonise the different pieces of equality legislation that have been produced over the last forty years. There are 7 areas where the Bill currently triggers the need for legislative consent – the public sector duty to promote equality; the hearing of disability discrimination school education cases by the Additional Support Needs Tribunals for Scotland; the arrangements for educational endowments; qualification authorities; and transitional arrangements for single sex educational establishments to become co-educational; a duty on relevant public authorities in Scotland, when making decisions of a strategic nature about how to exercise their functions, to have due regard to socio-economic disadvantage; and reasonable adjustments to common parts of buildings to suit the needs of disabled people who live in those buildings.

3. A Legislative Consent Motion was submitted to the Scottish Parliament in May 2009 which covered the public sector duty to promote equality, the hearing of disability discrimination school education cases by the Additional Support Needs Tribunals for Scotland, the arrangements for educational endowments, qualification authorities, and transitional arrangements for single sex educational establishments to become co-educational. That LCM was considered by the Subordinate Legislation Committee, which reported on 4 June, and by the Equal Opportunities Committee, which reported on 12 June. The original LCM and Committee reports can be found here: http://www.scottish.parliament.uk/business/legConMem/LCM-2009-2010/EqualityBill.htm

4. The Equal Opportunities Committee recommended that the Scottish Government consult on the public sector duty regarding socio-economic inequality. A written consultation exercise on the duty was subsequently undertaken by the Scottish Government along with discussions with key stakeholders such as the Equality and
Human Rights Commission. The consultation closed on the 28 October 2009 and received 69 responses. The majority of respondents to the consultation, including the Equality and Human Rights Commission, NHS Boards, and third sector organisations were broadly in favour of legislating. However, there was a lack of support for the duty among local government respondents, including COSLA and SOLACE. On balance, the Scottish Government has taken the view that placing socio-economic issues on a statutory footing would add weight to existing mechanisms such as Single Outcome Agreements.

5. The Bill introduced on 24 April contained provisions that dealt with consent for alterations to common parts of buildings, but they were designed around English law and practice for property holding, where a single freeholder or a commonhold association has control over the building as a whole. The Scottish Government has worked with Westminster to achieve an equivalent for the multiple ownership arrangements in Scotland.

6. The Bill was subsequently amended at Westminster, inserting new provisions which require the consent of the Scottish Parliament – a duty on relevant public authorities in Scotland, when making decisions of a strategic nature about how to exercise their functions, to have due regard to socio-economic disadvantage; and reasonable adjustments to common parts of buildings to suit the needs of disabled people who live in those buildings. These new provisions required that the draft Motion be revised and that this supplementary Memorandum be lodged. The new provisions are discussed in detail below.

Public Sector Duty Regarding Socio-Economic Inequalities

Background

7. The duty will apply to specified public authorities in Scotland and will complement and reinforce the existing work that is being undertaken to tackle inequality. The duty is high level and non-prescriptive in nature. The implementation of the duty will be supported by a provision which allows Scottish Ministers to take powers to issue guidance which would be drafted to ensure that it supports and enhances the arrangements already established through the Concordat and Single Outcome Arrangements rather than cutting across them.

Legislative Consent

8. These proposals will amend Part 1 of the Bill to provide for the socio-economic duty in the UK Equality Bill to apply to Scottish public authorities.

9. Scottish Ministers will have the power to list Scottish public authorities whose functions are broadly the same as those listed in s1(3) to whom this duty will apply, in conducting functions exercisable in or as regards Scotland and that relate to devolved matters to be subject to the duty. They will also be able to remove bodies from the list or specify that the body is only subject to the duty in relation to some of its functions and add or remove specified functions. There will be a requirement for the Scottish Ministers to consult a Minister of the Crown before making the Regulations.
10. The duty on Scottish public authorities may be made subject to the obligation to take into account guidance issued by Scottish Ministers. There will be a requirement for the Scottish Ministers to consult a Minister of the Crown before producing guidance.

11. These proposals make provision within the legislative competence of the Scottish Parliament and alter the executive competence of the Scottish Ministers, engaging the need for a Legislative Consent Motion. Legislative competence is involved because the socio-economic duty does not come within the reserved area of equal opportunities, as set out in Section L2 of Part 2 to Schedule 5 to the Scotland Act 1998.

Financial Implications

12. It is not anticipated that there will any significant financial implications. Should the Parliament agree to extension of the duty outlined in the UK Bill, the Westminster Government Equalities Office have estimated there will be a one off familiarisation and implementation cost of less than £1,000 per public authority. The Scottish Government is in discussions with COSLA regarding the implementation of the duty.

Adjustments to Common Parts of Buildings

Background

13. The Housing (Scotland) Act 2006 gives tenants a ‘right to adapt’ to suit the needs of a disabled occupant. The landlord cannot unreasonably refuse an application to alter the house (including common parts) to suit the needs of a disabled resident. This is considered to be within devolved competence because, as an issue between landlord and tenant, it can be dealt with as a matter of housing law.

14. This existing right for tenants does not extend to consents required from other joint owners of the common parts (such as stairs, access paths etc.). Nor does it help a disabled owner-occupier who needs to alter the common parts. The making of such provision between individuals who have no housing contractual relationship with each other is considered to be within reserved competence as it relates to equal opportunities, specifically the prohibition of discrimination on grounds of disability.

Legislative consent

15. The Bill (clause 37(1)) gives Scottish Ministers power to make regulations that will entitle a person to make alterations or additions to the common parts of a building where the person’s only or main home is in that building and the alterations or additions are likely to avoid a substantial disadvantage in the use of the common parts for a disabled person. The powers provide, in particular, for the regulations to require that owners of the common parts do not refuse consent unreasonably, and where this happens, for the sheriff to be able to make an order authorising works.

16. These proposals to confer on Scottish Ministers a power to make regulations alter the executive competence of the Scottish Ministers, engaging the need for a Legislative Consent Motion.
Financial Implications

17. The proposal has no direct financial implications for the Scottish Government. By making it possible for some disabled people to do works when they otherwise would not have the necessary consent from owners of the common parts, there is likely to be a small increase in the number of applications to local authorities for grant for adaptation works essential to the needs of a disabled person that would otherwise have been blocked. Analysis of the available data suggests that the total cost of grant for works made possible by this legislation would be of the order of £37,000 - £75,000 per year for the first three years. If local government considers that their extra costs as a result of this legislation are significant then this will be discussed with COSLA as part of the continuing arrangements under the Concordat.

SCOTTISH GOVERNMENT
December 2009
INSTRUMENTS SUBJECT TO ANNULMENT

The Food Enzymes (Scotland) Regulations 2009 (SSI 2009/435)

On 18 December 2009 the Scottish Government was asked:

Regulation 3 establishes an offence for a failure to comply with specified provisions of the EC Regulation. The Scottish Government is asked to explain what conduct is considered to amount to an offence from 20 January 2010 with reference to the specified provisions in the absence of the Community list provided for in article 17 of the Regulation and whether this is considered to be clear and transparent to producers or users of food enzymes.

The Scottish Government responds as follows:

Regulation 3 of these Regulations makes it an offence to contravene or fail to comply with the provisions of EC Regulation 1332/2008 specified in paragraph (2). In terms of regulation 3(1) those provisions fall to be read with the transitional arrangements in Articles 18 (transitional measures) and 24 (entry into force). The provisions in regulation 3(2) include Article 4 of the EC Regulation (restriction on placing on the market and use of food enzymes not on the list provided for in Article 17). The list provided for in Article 17 is the approved "Community list" of enzymes and this is yet to be devised at EU level.

Providing the enforcement mechanisms for requirements in an EC Regulation whose effect is contingent on a future event provided for in the EC instrument itself (such as the introduction of the Community list) is common practice and this is the situation with regulation 3 so far as dealing with Article 4. As for the remainder of regulation 3(2), Articles 10 and 12 expressly apply from 20th January 2010 and need to be enforced as of then, Article 14(1) could have relevance before the Community list is in place (during the time when applications for authorisation are being submitted) and it is difficult to know due to the lack of specificity whether Article 5 was intended to be tied to the Community list or to have a more general effect (and as always, it would ultimately be a matter for the courts to decide what the wording of the EC Regulation actually means). These Regulations have been drafted in order to implement in Scotland, as fully and as transparently as possible, the relevant EU obligations and they are in line with equivalent Regulations being introduced in the rest of the UK.

Existing domestic provisions already apply in respect of general food safety and those enzymes that are specifically regulated. These provisions will continue to apply to enzymes once the Community list is in force. The additional regulatory requirements imposed in relation to those enzymes that will be included on the Community list will enhance consumer protection. There has been extensive consultation with stakeholders on these Regulations and the Food Standards Agency will continue to support producers and users of food enzymes in relation to the Regulations. It is anticipated that a review
of these Regulations will take place within 2 years of the Community list coming into force.

The Food Additives (Scotland) Regulations 2009 (SSI 2009/436)

On 18 December 2009 the Scottish Government was asked:
The Scottish Government are asked to explain the meaning and effect of “an appropriate mixture of (b) and (c)” in regulation 4(d), given that a failure to comply with this requirement is an offence which is liable to prosecution with a fine not exceeding level 5 on the standard scale? How are persons who require to mark meat to establish what an “appropriate” or “inappropriate” mixture of colours E133 Brilliant Blue and E129 Allura Red is, to comply with this requirement?

The Scottish Government responds as follows:
These Regulations, amongst other things, revoke and re-enact in part (with modifications) the Colours in Food Regulations 1995 (SI 1995/3124) (the “1995 Regulations”). Regulation 4 of the 1995 Regulations implemented Article 2(8) of Directive 94/36. Both regulation 4 and Article 2(8) use the expression “appropriate mixture”. Regulation 4(d) of these Regulations effectively now replaces regulation 4 of the 1995 Regulations and as such, follows previous drafting by using this same expression, in order to fully implement in Scotland, Directive 94/36. As is always the case, it would ultimately be a matter for the courts to decide exactly what this expression means in the Directive (and thereby, in these Regulations). Furthermore, there has been consultation on these Regulations and no concerns were raised by stakeholders with the Food Standards Agency in respect of this expression. The expression is used in the same way in these Regulations as it is in Regulations recently made in respect of the other parts of the UK.
The Food Supplements, Vitamins, Minerals and Other Substances (Scotland) Regulations 2009 (SSI 2009/438)

On 16 December 2009 the Scottish Government was asked:

2. If that is the case what is the effect of this drafting error considered to be?

3. Is it intended that the reference to amendments made by regulation 2(2) of the 2009 Regulations contained in the transitional provision set out in new regulation 12 of the 2003 Regulations is to be construed only as a reference to the insertion of the new definition of Directive 90/496 for the purposes of the transitional defence, and if so, could that have been made clearer? Is it thought that this make any difference to the operation of the defence?

4. How has the Scottish Government implemented the requirement of Article 2 of Directive 2008/100/EC to make reference to that Directive in the legislation implementing it or in documents accompanying such legislation given that neither the Executive Note nor the Explanatory Note contain a reference to that Directive or explain clearly to the reader how the changes made by that Directive are implemented?

The Scottish Government responds as follows:
1. The Scottish Government is grateful to the Committee for pointing out that Directive 90/496/EEC as amended by Directive 2008/100/EC, now contains both Annex I and Annex II. The reference in regulation 6(3)(e) of the Food Supplements (Scotland) Regulations 2003 ("the 2003 Regulations") , as substituted by regulation 2(6)(b) of the 2009 Regulations, to "listed in the Annex of Directive 90/496" should indeed have been a reference to "listed in Annex I to Directive 90/496".

2. The Scottish Government does not believe that this drafting error will in practice have any effect. Annex I is headed "Vitamins and minerals which may be declared and their recommended daily allowances (RDAs)" and contains a list of vitamins and minerals. Annex II is headed "Definition of the material constituting fibre and methods of analysis as referred to in Article 1(4)(j)" and there are no vitamins or minerals listed in it. In these circumstances the Scottish Government does not believe that the reader will be in any real doubt as to the intended meaning - namely that, in amended regulation 6(3)(e), the reference to a "vitamin or mineral listed in the Annex to Directive 90/496" in fact relates to a vitamin or mineral listed in Annex I.

3. The Scottish Government confirms that the reference to amendments made by regulation 2(2) of the 2009 Regulations is significant only as regards the insertion of the new definition of Directive 90/496 for the purposes of the transitional defence. The amendment made by regulation 2(2) only inserts definitions of EU legislation in the 2003 Regulations, and the only one of these definitions that is used in the text inserted by regulation 2(6)(b) is the definition of Directive 90/496. It is not believed that the revisions
to the definitions of Directive 2001/83 or 2002/46 are relevant for the purposes under consideration. The Scottish Government considers that the form of drafting adopted clearly delivers the intended result.

4. The relevant paragraph of Article 2 of Directive 2008/100/EC provides:-

"When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made."

Therefore Article 2 requires that there be a reference to the EU legislation so that the reader knows that the source of the domestic law is the European instrument in question. The Scottish Government's view is that this has been achieved in the 2009 Regulations, as there is a reference to Directive 2008/100 in regulation 2(2). There is no further requirement to spell out in detail how any particular European instrument is being implemented.
On 18 December 2009 the Scottish Government was asked:

(1) Why is it considered that regulation 8(2)(c) and (4)(c), and regulation 11(4), do not relate to the reserved matter of telecommunications and wireless telegraphy contained in Section C10 of Part II, Schedule 5 to the Scotland Act, and which includes internet services (provided by electronic means at a distance)?

(2) (a) For regulations 10(3), (5)(a), and 13(2), when has the United Kingdom as a Member State exercised the derogations in terms of Articles 13(1) and 17(7) of Directive 2007/2/EC, which enable limitations to public access and data sharing, where this would adversely affect international relations, public security or national defence?

(b) Why is it considered that those regulations in (a) above do not have as their purpose international relations, defence or national security, which are reserved matters by Schedule 5, Part I, para 7 and 9, and Part II Section B8 of the Scotland Act?

(3) Why is it considered that regulation 10(5)(c) does not have as its purpose intellectual property (or the protection of it) which is a reserved matter by Schedule 5, Part II, Section C4 of that Act?

(4) For regulation 11(2), when has the United Kingdom as a Member State exercised the derogation under Article 14(2) of Directive 2007/2/EC, which enables States to allow public authorities to apply the charges that are the subject of that regulation?

(5) For regulation 15(2), can it be explained why that provision conferring power on the Scottish Ministers to issue guidance regarding their implementation of that Directive (which by 15(4) public authorities and third parties must have regard to in performing functions) does not breach the prohibition in Schedule 2, para 1(1)(c) of the European Communities Act, which prohibits a power to legislate by means of subordinate instruments, other than rules of procedure for a court or tribunal?

The Scottish Government responds as follows:

Questions (1), (2)(b) and (3)

We do not consider that the provisions referred to relate to (or have as their purpose) any of the reserved matters mentioned. Whether a provision “relates” to a reserved matter and is thus outwith devolved competence does of course fall to be determined by reference to the purpose of the provision (see section 29(3) of the Scotland Act). In our view, the purpose of each of the provisions mentioned is to make law regarding the devolved matter of the creation and operation of infrastructure relating to spatial information. So far as any provision concerns a reserved matter, this is merely incidental. In relation to the provisions mentioned in questions (2)(b) and (3), the approach taken on competence would appear to be in line with that taken in the Freedom of Information (Scotland) Act 2002 (asp 13) and in the Environmental Information (Scotland) Regulations 2004 (SSI 2004/520). Both contain relevant provisions (similar to those in SSI 2009/440) on national security and defence and on international relations (see sections 31 and 33 of the 2002 Act and regulation 10(5)(a) of the 2004 Regulations). In addition, regulation 10(5)(c) of the 2004 Regulations concerns intellectual property rights.
Questions (2)(a) and (4)

Exercise of the derogations referred to is constituted by making the provisions in these Regulations and by the Secretary of State making similar provisions (not extending to Scottish public authorities or third parties) in the INSPIRE Regulations 2009 (SI 2009/3157).

Question (5)

Paragraph 1(1)(c) of Schedule 2 to the European Communities Act 1972 prevents regulations under section 2(2) of that Act conferring a power “to legislate”. We do not consider that requiring the issuing of guidance constitutes the conferral of a power to legislate. It is reasonably common practice for regulations under section 2(2) of the 1972 Act to authorise the issuing of guidance.
1. The enabling powers for a harbour empowerment order are contained in sections 16(1) and (6). In terms of section 16(1) there is express power for the order to make provision “conferring on the applicant...all such powers...as are requisite for enabling [the harbour] object to be achieved”. That accordingly provides a wide power for conferring a power on the company, including we consider by delegation. Subsection (6) then provides, in addition to the usual provision regarding making supplementary provisions, that a harbour empowerment order may “include all such powers as appear to the [Scottish Ministers] by whom it is made to be requisite or expedient for giving full effect to any provision included in the order”.

2. The powers to make harbour empowerment and harbour revision orders under the 1964 Act were intended to provide new or existing harbour authorities with a simpler and cheaper alternative to Private Bills, Provisional Orders under the General Pier and Harbour Act 1861 or, in Scotland, Provisional Orders under the Private Legislation Procedure (Scotland) Act 1936 as a means of seeking the powers necessary for carrying out their respective harbour undertakings.

3. Parliament therefore intended that harbour empowerment (or harbour revision) orders may include all the provisions previously contained in Private Acts or Provisional Orders. This is evidenced by the comments of the Parliamentary Secretary to the Ministry of Transport made during the Standing Committee proceedings of the Harbours Bill in the House of Commons. In relation to what was then subsection(3) of clause 15 (but which became subsection (6) of section 16 of the 1964 Act he stated that:-

“The best thing for me to do is to ask the Committee to look at subsection (3) of the clause and to bear in mind that that subsection appears in a clause which confers order making powers to enable existing harbours, docks or wharves to be improved, maintained or managed, or new harbours, docks or wharves to be constructed. It follows, therefore, that empowerment orders will need to contain provisions of a very varied kind, such as can be found in Private Bills or Provisional Orders made for this purpose. It is for that reason, therefore, that subsection (3) provides that a harbour empowerment order may include all such provisions as appear to the Minister to be..."
requisite or expedient for giving full effect to provisions conferring the powers which I have mentioned.

I refer the Committee to lines 36-38 of page 13 of the Bill, where it is stated that such an order may include “any consequential or incidental provisions (including penal provisions) appearing to him to be requisite or expedient for the purposes thereof”.

The specific reference to penal provisions was included to make it clear that these empowerment orders might include provisions of the kind which are found in local harbour legislation for the protection of the harbour and the maintenance of order in it, such as are exemplified by provisions enabling byelaws to be made for that purpose and penalties to be imposed for breaches of byelaws or provisions protecting works and installations from interference. Such provisions frequently take the form of incorporating with modifications the provisions relating to byelaws which are contained in the Harbours, Docks and Piers Clauses Act, 1847. It will be noted that the subsection does not specifically say that an empowerment order may include provisions incorporating a provision of the 1847 Act. In fact, we did not think that this was necessary.

As a result, however, of representations made to us from other Government Departments which are concerned to ensure that their vessels shall be entitled to exemption from harbour charges, which is commonly provided for them in Private Bills and provisional orders by the application of Section 28 of the 1847 Act, we believe that it would be advantageous to include a specific reference to the incorporation of provisions of the 1847 Act, in a harbour empowerment order. (Hansard, House of Commons, Standing Committee F 4 February 1964 cols. 396/7)"

Matters of sub-delegation

4. Powers of sub-delegation contained within the Order are considered necessary for the operation of the new port, specifically sub-delegation may arise to:-

- the company in articles 18 (licensing moorings), 19 (making byelaws), 21 (general directions) and 27 (levying charges);
- the harbourmaster in article 23 (special directions);
- Scottish Ministers in articles 7(2) approval to the deposit of material), 9 (approving works and attaching conditions), 15
(extending time for construction) and 20 (confirming byelaws), and to

- third parties in articles 11 and 13-14 regarding lighting the works in accordance with directions from the Commissioners of Northern Lighthouses.

**Powers sub-delegated to the company**

**Article 18 (moorings)**

5. This article is well precedented. It is an essential feature of any port that there are available suitable and sufficient moorings for vessels which are likely to use that port. The detailed requirements for the location and number of moorings will vary from time to time. The purpose of article 18 is to ensure that the Company will have a degree of flexibility for providing moorings, over and above those provided as part of the main port works (see article 4 - power to construct works), so as to make the port as commodious as possible for vessels without the need subsequently to seek further powers by means of a harbour revision order.

6. The Company can’t anticipate in advance who might want to moor and how and where that person may wish to moor. Article 18(2) will allow the Company to make appropriate arrangements by way of a licence e.g. to make sure the mooring doesn’t interfere with navigation in the port.

**Article 19 (making byelaws)**

7. Paragraph (1) of article 19 (general byelaws) confers power on the Company to make byelaws for the efficient management and regulation of the port. The power to make byelaws is subject to those powers being confirmed by the Scottish Ministers under article 20 which is discussed at paragraphs 28 to 31 below.

8. Local legislation relating to harbour authorities almost invariably contains provision empowering harbour authorities to make byelaws, in this case by including substantive powers to enable a harbour authority to make byelaws for specified purposes such as those mentioned in paragraph (2) of article 19. It is considered that all the purposes so specified are matters which currently may arise and need to be regulated to ensure good management of and avoid disruption to the running of the port. The Order is likely to stand for a considerable period of time and the byelaw making power needs to be wide enough to deal with other matters that may arise in future.

9. A byelaw making power was clearly intended by Parliament to be capable of inclusion in a harbour empowerment order, as evidenced by the statement of the Parliamentary Secretary to the Ministry of Transport referred to at paragraph 3 above.
Article 21 (general directions)

10. Research indicates that powers to give general directions first appeared in local harbour legislation some years after the passing of the 1964 Act. This is confirmed by a passage in *Douglas and Geen on the law of Harbours, Coasts and Pilotage* (fifth edition: 1997) -

“6.12 Although the harbour master’s powers under section 52 of the Harbours, Docks, and Piers Clauses Act 1847 have proved effective there seemed to be a case for harbour authorities for major harbours to have somewhat wider powers - powers which would, in particular, enable the harbour authority to lay down general and long term rules to regulate the movement etc. of ships by a simpler and more flexible method than the by-law procedure.

6.13 Most harbour authorities for major harbours and several others have now obtained, by means of private Act of Parliament or harbour revision Order, wider and up-to-date powers to regulate the movement and berthing of ships. An example of such powers are those contained in sections 20 and 21 for Medway Ports Authority Act 1973 ... These sections are in the form which has been adopted, with slight variations, by all the harbour authorities which have obtained such powers.”

11. Article 21 is well precedented in many harbour empowerment or revision orders made over the last 35 years. This article is considered to confer essential powers on the Company to regulate navigation by vessels in the port and its approaches by giving general directions to vessels such as for designating areas, routes or channels in the port and in the approaches to the port which vessels are to use and for requiring a master of a vessel to give to the harbour master information relating to the vessel reasonably required by the harbour master to identify the vessel, its cargo and its likely time of arrival at, and departure from, the port.

12. Whilst byelaws will apply to the port in general, general directions relate to vessels only. Prior to giving directions the Chamber of Shipping and the Royal Yachting Association must be consulted. These are bodies representative of those persons most likely to be affected by general directions and it is therefore considered that this level of consultation is sufficient.
Article 27 (Charges)

13. Article 27 (Charges) authorises the Company to levy charges for services performed by it and enables the Company to provide exemptions from, or to compound, such charges.

14. Section 16 of the 1964 Act expressly provides that an Order may confer “all such powers (including…power…to levy charges other than ship, passenger and goods dues)” as are requisite for enabling [the harbour] object to be achieved”. Ship, passenger and goods dues are defined in section 57 of the 1964 Act.

15. Article 27 would enable the Company to levy other charges for services such as providing cafeteria facilities, fuel for vessels or electricity and electrical power points for mobile refrigerated units parked at the port prior to embarkation. The costs incurred in providing such services are likely to vary over a period of time and therefore are not something which we consider should be specified in the Order itself.

16. It is considered that the powers contained in all of the above articles fall within the powers of section 16(6) of the 1964 Act as being “requisite or expedient for the purposes of, or in connection with, the order”.

Powers sub-delegated to the Harbormaster

Article 23 (special directions)

17. Paragraph (1) of article 23 confers power on the harbour master to issue special directions to vessels, for example, for regulating the time at which a vessel shall enter into or go out of the port or regulating the movement, mooring or unmooring of a vessel.

18. The power of the harbour master to give special directions is essential for the proper regulation of vessels in any port. It allows the harbour master to deal with circumstances as they arise including emergencies and give specific directions to specific ships for specific movements. The harbour master is defined in article 1 of the Order and is appointed or authorised by the Company. The Order could have incorporated section 52 of The Harbours, Docks, and Piers Clauses Act, 1847 (“the 1847 Act”) which enables harbour masters to give directions. Article 23 is in terms which are very similar to section 52 of the 1847 Act but, since this is such a key power for regulating the port, it was considered that the power should be set out substantively in the Order rather than by the incorporation of section 52 of the 1847 Act.

19. Section 16(6) of the 1964 Act provides that “a harbour empowerment order may include … any supplementary, consequential or incidental provisions appearing to [the Scottish Ministers] to be requisite or expedient for the
purposes of, or in connection with, the order including, but without prejudice to
the generality of the foregoing words, penal provisions and provisions
incorporating, with or without modifications, any provision of ... any other
enactment." As is evidenced by the statement of the Parliamentary Secretary
of the Department of Transport referred to at paragraph 3 above, the
reference in section 16(6) to incorporating “any other enactment” was
intended to make it clear that harbour empowerment orders could incorporate
provisions of the 1847 Act with or without modifications. As explained in
paragraph 18 above, article 23 has essentially the same effect as
incorporating section 52 of the 1847 Act.

20. It is considered that the power to make special directions falls within the
powers of section 16(6) of the 1964 Act as being “requisite or expedient for
the purposes of, or in connection with, the order”.

Powers sub-delegated to the Scottish Ministers

Article 7 (power to dredge)

21. The purpose of the provision in article 7(2) is to enable the Scottish Ministers
to control the disposal of dredged materials at sea. It makes it clear that the
disposal of such material below high water must be made in the position and
in accordance with such terms and conditions as are set by Scottish
Ministers.

22. In the absence of a harbour order such a deposit is likely to require a consent
from Scottish Ministers under section 34(1)(b) of the Coast Protection Act
1949 ("the 1949 Act"). In terms of section 35 of the 1949 Act operations
excepted from that restriction are “any operations authorised by an order
under section 14 or 16 of the Harbours Act 1964”. In essence article 7(2) is a
saving for the powers of the Scottish Ministers under section 34 of the 1949
Act. It will allow Scottish Ministers to attach appropriate conditions in
appropriate cases where the deposit of materials might endanger navigation.

Article 9 (tidal works)

23. This provision is one of a series of provisions relating to tidal works, namely
articles 9 to 14 of the Order, which appears in almost all local Acts and Orders
which authorise the construction of marine works. Research indicates that
this series of provisions was formulated by the Admiralty early in the 19th
century as a means of ensuring that the waters around the UK would remain
open at all times for navigation by the Royal Navy. These provisions have
subsequently been “inherited” by Government Departments in England and
Wales and by the Scottish Ministers and are now intended to ensure that the
UK waters remain open for all shipping.
24. Again in the absence of a harbour order a consent would be required in terms of section 34(1)(a) of the 1949 Act. However where there is a harbour order section 35 of the 1949 Act operates so that a consent is not required.

25. It is considered that the marine works to be authorised by the Order should be subject to the approval by the Scottish Ministers as a safeguard to ensure that the works do not cause danger to vessels navigating within the waters of Loch Ryan adjacent to the port.

Article 15 (period for construction)

26. Paragraph (1) of article 15 provides that the power to construct the works to be conferred by article 4 shall cease unless the works have been completed within five years from the date of the coming into force of the Order, except as regards any works which have been substantially commenced. However, paragraph (1) of this article also provides that the Scottish Ministers may extend that period, on application by the Company, by a consent given in writing. Paragraphs (2) to (4) provide that the consent may be given unconditionally or subject to terms and conditions and that the notice of the consent must be published and be available for public inspection at the port.

27. It is expected that the Company will be able to complete the development of the port within five years from the coming into force of the Order. However, if there should be any unexpected delay in carrying out the development, article 15 will enable the Scottish Ministers to extend that period without the unnecessary expense which would otherwise be incurred by the Company in applying for a harbour revision Order to extend that period.

Article 20 (confirming byelaws)

28. Paragraph (1) of article 20 provides that any byelaws made by the Company under article 19 shall not come into operation until they have been confirmed by the Scottish Ministers.

29. Article 20 also contains safeguards to ensure that, where an application for the confirmation of byelaws is made by the Company to the Scottish Ministers, notice of the application must be published and that notice must also be served on Dumfries and Galloway Council. The published notice must state that objections or representations regarding the proposed byelaws may be made to the Scottish Ministers. The article also provides that a copy of any byelaws which have been confirmed must be available for public inspection at the office of the harbour master.

30. Article 20 is a safeguard to ensure that any byelaws made by the Company are subject to public scrutiny and cannot have effect unless and until confirmed by the Scottish Ministers.
31. It is therefore considered that the powers within these articles fall within the
powers of section 16(6) of the 1964 Act as being “requisite or expedient for
giving full effect to any provisions included in the Order” and specifically
article 19.

Powers sub-delegated to the Commissioners of Northern Lighthouses

32. Section 193 (general and local lighthouse authorities) of the Merchant
Shipping Act 1995 provides that for the purposes of Part VIII of that Act
(which relates to lighthouse authorities) the Commissioners of Northern
Lighthouses ("the Commissioners") are the general lighthouse authority as
respects Scotland and the adjacent seas and islands; and as such have the
superintendence and management of all lighthouses, buoys and beacons in
Scotland by virtue of section 195 of that Act.

33. Provisions in articles 11, 13 and 14 require the Company to lay down such
buoys, exhibit such lights and take such other steps for preventing danger to
navigation as the Commissioners may from time to time direct and are
supplementary to the general powers of the Commissioners to “have the
superintendence and management of all lighthouses, buoys and beacons
within [Scotland]” contained in section 195 of the Merchant Shipping Act 1995
as noted at paragraph 32 above. These articles are part of the series of
provisions relating to tidal works mentioned in paragraph 23 above which
appears in almost all local Acts and Orders authorising the construction of
tidal works.

34. It is considered that the lighting and marking of the tidal works to be
authorised by the Order should be subject to the overall superintendence of
the Commissioners as a safeguard to ensure that the works do not cause
danger to vessels navigating within the waters of Loch Ryan adjacent to the
port. It is expected that the Order will stand for a considerable period of time
and it would not be possible to specify the location of lights etc or identify
steps required in the Order as it will depend on the circumstances that arise
on each occasion.

35. Articles 11, 13 and 14 are supplementary to the power to construct the works
contained in article 4 of the Order (being a restriction on that power) and fall
within the powers of section 16(6) of the 1964 Act as being “requisite or
expedient for the purposes” of article 4.