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 8 in private.

2. **Public Services Reform (Scotland) Bill:** The Committee will consider the Scottish Government’s response to points raised on the delegated powers provisions in this Bill at Stage 1.

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

4. **Scottish Government correspondence:** The Committee will consider correspondence from the Scottish Government in relation to a forthcoming Scottish statutory instrument on water quality.

5. **Instruments subject to approval:** The Committee will consider the following—
   
   the Local Government Finance (Scotland) Order 2010.

6. **Instruments subject to annulment:** The Committee will consider the following—
   
   the Snares (Scotland) Order 2010 (SSI 2010/8);
   the Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2010 (SSI 2010/9);
   the Water Services Charges (Billing and Collection) (Scotland) Order 2010 (SSI 2010/10);
   the Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) etc. Amendment Order 2010 (SSI 2010/15).

7. **Instruments not laid before the Parliament:** The Committee will consider the following—
Act of Sederunt (Registration Appeal Court) 2010 (SSI 2010/7);
Act of Sederunt (Rules of the Court of Session Amendment) (Transfer of Functions of the Asylum and Immigration Tribunal Order 2010) 2010 (SSI 2010/16)

8. **Home Owner and Debtor Protection (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2, and the contents of a draft report.

Douglas Wands  
Clerk to the Subordinate Legislation Committee  
Room T2.60  
The Scottish Parliament  
Edinburgh  
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The papers for this meeting are as follows—

Legal Brief

Summary of Recommendations

**Agenda item 2**

Paper by the Clerk

Subordinate Legislation Committee report on the Public Services Reform (Scotland) Bill at Stage 1

**Agenda item 3**

Crofting Reform (Scotland) Bill

Delegated Powers Memorandum

**Agenda item 4**

Paper by the Clerk

**Agenda item 6**

Instrument Responses

**Agenda item 8**

Home Owner and Debtor Protection (Scotland) Bill (as amended at Stage 2)

Supplementary Delegated Powers Memorandum
The Committee will be invited to consider the following recommendations at the meeting. Decisions are a matter for the Committee.

### Agenda Item 5  Draft instruments subject to approval

**The Local Government Finance (Scotland) Order 2010 (SSI 2010/draft)**

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

### Agenda Item 6  Instruments subject to annulment

**The Snares (Scotland) Order 2010 (SSI 2010/8)**

The Committee may wish to report that there is a drafting error in article 6 of this Order, in respect that the words “having been” are duplicated. The Committee may consider that, while this error is not likely to affect the operation of the instrument, the meaning of the provision would be clearer if the provision was to be amended.

**The Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2010 (SSI 2010/9)**

**The Water Services Charges (Billing and Collection) (Scotland) Order 2010 (SSI 2010/10)**

**The Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) etc. Amendment Order 2010 (SSI 2010/15)**

The Committee may wish to consider if it is content with these instruments.
Agenda Item 7  Instruments not laid before the Parliament

Act of Sederunt (Registration Appeal Court) 2010 (SSI 2010/7)

Act of Sederunt (Rules of the Court of Session Amendment) (Transfer of Functions of the Asylum and Immigration Tribunal Order 2010) 2010 (SSI 2010/16)

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

4th Meeting, 2010 (Session 3)

Tuesday 2 February 2010

Paper by the Clerk

Public Services Reform (Scotland) Bill – Response to SLC Stage 1 Report

Background

1. Under Rule 9.6.2 of Standing Orders the Committee submitted its report on the delegated powers provisions in the Public Services Reform (Scotland) Bill to the Finance Committee, as lead committee for the Bill, on 16 October 2009. At the same time, the Committee submitted its report to the Scottish Government for a response.

Scottish Government Response

2. Unfortunately, the response (which was due before Stage 2 began) was only received on Friday 29 January 2010. Stage 2 proceedings commenced on Tuesday 26 January.

3. The response indicates that the Scottish Government intends to seek to amend (or has already amended) the Bill in line with some of the Subordinate Legislation Committee’s recommendations on the delegated powers contained in the Bill.

4. However, there are a number of areas where the Scottish Government has indicated that it is not convinced by the recommendations made by the SLC in its Stage 1 report, and will not bring forward amendments to the Bill at Stage 2. Due to the timing of the response, Members may now not be in a position to lodge suitable amendments at Stage 2.

Progress of the Bill

5. The Bill passed Stage 1 on 17 December 2009. Stage 2 proceedings started on 26 January 2010 and are expected to conclude on 2 March 2010.

6. The Subordinate Legislation Committee will give further consideration to the delegated powers contained in the Bill after Stage 2.

Recommendation

7. Members are invited to note the Scottish Government’s response and to consider whether to write to the Minister for Parliamentary Business to seek an explanation as to why the response was not submitted before Stage 2 proceedings began.
The Scottish Government’s response to the Subordinate Legislation Committee’s Stage 1 Report on the Public Services Reform (Scotland) Bill is set out below. The Subordinate Legislation Committee’s recommendations or comments are highlighted in bold and are followed by the Scottish Government’s response.

PART 2

Orders under section 10 and 13 should be subject to super-affirmative procedure which requires a proposed draft order to be laid before Parliament together with the relevant explanatory document for a prescribed period to permit public consultation on the terms of the proposed order prior to Ministers presenting a draft order in final form to the Parliament for approval. Ministers should also be required to consider comments received and provide an explanation to Parliament as to the extent to which such comments have been addressed in the final order.

The Government gave careful thought to the Reports and recommendations from the Finance and other Committees which took evidence in the Bill and, as a result, brought forward amendments at Stage 2 to strengthen both the procedural safeguards and the statutory preconditions to which the Order-making powers in Part 2 of the Bill are subject.

In particular, the Government brought forward amendments which require proposals for an Order under sections 10 or 13 to be subject to an enhanced form of ‘super-affirmative’ procedure. These require a proposed draft Order to be laid before Parliament together with an explanatory document for a period of 60 days to permit public consultation and scrutiny by the relevant parliamentary Committees, if they so wish, on the terms of the proposed Order before a final version is laid before Parliament, which would be accompanied by a further explanatory document giving details of the comments received and any changes made, and which would be subject to affirmative resolution procedure.

Orders under section 11 should be subject to affirmative procedure given that listing for inclusion in schedule 3 in such an order engages the powers under Part 2. Ministers should be under an obligation to consult bodies prior to their inclusion in schedule 3 through a section 11 order.

The Government introduced amendments at stage 2 to require Ministers to consult any person, body or office-holder in respect of which they propose to add an entry to schedule 3 and to require that an Order under section 11(2)(a) proposing to add a new entry to the list of bodies in Schedule 3 should be subject to affirmative rather than negative resolution procedure.
Whether the criteria set for the limits of the powers in section 10 and 13 and the restrictions set out in section 12 are sufficiently precise and clearly defined, in particular, whether the term “necessary protection” is sufficiently clear and precise, and also whether it will be open to different interpretations.

In response to concerns expressed in evidence to the various Committees, the Government introduced amendments at stage 2 to provide examples of ‘protections’ for the purposes of section 12 and 14 and to make it expressly clear that an Order under section 10 could not interfere – amongst other things - with the independence of judicial bodies or judicial decision-taking; the constitution of the Scottish Courts Service; or existing duties to protect and preserve the cultural heritage.

Whether certain bodies such as local government and bodies established specifically to scrutinise Government should be exempted from the scope of the Bill and protected from inclusion in schedule 3 through orders under section 11, and if so, to ensure that has been done in a way which is clear and unambiguous.

The Government introduced amendments at stage 2 to make it expressly clear that the power in section 11 could not be used to add local government bodies to schedule 3, which means that they could not at some future date be brought within the scope of the Order-making powers in Part 2 of the Bill (although a section 10 Order could still transfer or delegate functions to them from another body).

The Finance Committee also noted that a number of parliamentary commissioners and ombudsmen had expressed concern about their inclusion in schedule 3, on the basis that they were accountable to Parliament rather than Ministers. On the other hand, several of the commissioners acknowledged that provided there were appropriate safeguards to reflect the independence of Parliamentary bodies from Ministers, the Order-making power could provide a useful means of making sensible changes to their functions and jurisdiction without the need for primary legislation.

The Government considered that the best way forward would be to retain the six parliamentary commissioners and ombudsmen in Schedule 3 but introduced amendments at Stage 2 to provide that in relation to these bodies the power to initiate proposals for an Order under Part 2 of the Bill should rest with the Scottish Parliamentary Corporate Body (SPCB) rather than Ministers. The amendment also provides that Scottish Ministers can only embark on a statutory consultation process in relation to these bodies if requested to do so by the SPCB; and that following consultation a draft Order can only be laid with the consent of the SPCB.

The Government also reached the view that Audit Scotland and the Scottish Commission for Public Audit (SCPA) should be removed from schedule 3 altogether, since Audit Scotland may be required to audit both Government
and the SPCB itself and the SCPA’s role is to scrutinise the budget of Audit Scotland. In addition, it did not seem appropriate for one parliamentary body – the SCPA – to be subject in any way to the jurisdiction of another – the SPCB. Amendments were therefore introduced to remove Audit Scotland and the SCPA from schedule 3.

PART 4
Section 46(4) - Power to make further provision about the preparation, content and effect of reports

While the Committee has found it helpful to have had clarification that the Scottish Government does not intend that this provision provides a power with respect to the consequences of a report, the Committee recommends that the Scottish Government consider redrafting the provision to make clear the intention of the provision in this respect.

The Government notes the Committee’s concerns, but is not convinced of the need to lodge an amendment to Section 46(4). Regulations under this section may provide for the effect of reports and, as was explained in the Government’s response to the SLC in September 2009, there could be many different types of reports prepared under the inspection regime and the effect of each report may be different. We do not, therefore, consider it appropriate to set out in primary legislation detailed rules on the effect of the reports on the various combinations of inspection types that SCSWIS can carry out.

PART 5

New Sections to National Health Service (Scotland) Act 1978
Section 10D(1) - Power to delegate functions

The Committee considers that the proposed power is acceptable in principle and is content that it is subject to negative procedure. However, the Committee draws to the attention of the lead committee the fact that the power is wider than is necessary to transfer the functions of NHSQIS to HIS or, in addition, any other functions which would properly be within HIS’ remit.

Section 10M(4) - Power to make regulations to make further provision about the preparation, content and effect of reports

While the Committee has found it helpful to have had clarification that the Scottish Government does not intend that this provision provides a power with respect to the consequences of a report, the Committee recommends that the Scottish Government should redraft the provision to make clear the intention of the provision in this respect.

We would refer the Committee to our response in respect of section 46(4) as section 10M(4) is the same provision replicated for HIS.
PART 6

Section 96(1) - Power to direct a person or body to participate in a joint inspection

The Committee reports that it remains concerned that no provision is made in the Bill for the publication of directions, whereby the public will be made aware what person or body has been directed to participate in a joint inspection and what powers they may exercise.

Section 97(1) - Power to make regulations relating to joint inspections

The Committee therefore draws to the attention of the lead committee that the power enables significant provision to be made with respect to interviews and physical and mental examinations (including how examinations are to be conducted) and the disclosure of information obtained from these examination and interviews.

The Committee also notes that regulations made under the Joint Inspection of Children’s’ Services and Inspection of Social Work Services (Scotland) Act 2006, which the power under section 97(1) is said to reflect, do not provide for interviews and examinations.

The powers which a person exercises when conducting a joint inspection will be those the authorised person derives from the Joint Inspection legislation (and not any powers which they may have as for example a social work inspector). Nevertheless the Government recognises that transparency in the conduct of such inspections will be important for public confidence in them and is prepared to make arrangements to publish any Direction which it issues in respect of joint inspections.

The Government notes the Committee’s concerns regarding regulations made under Section 97 but would reassure the Committee that any regulations made under this section will be subject to extensive consultation and are also subject to affirmative procedure.

PART 7

Section 101 - Power to make ancillary provision

Given the width of the proposed powers in sections 10 and 13 of the Bill, the Committee considers that affirmative procedure rather than negative procedure should apply to all of the ancillary powers as set out in section 101, as it relates to Part 2.

The Scottish Government does not agree that because orders under Part 2 are wide-ranging that the ancillary power under Part 7, as it relates to Part 2, should be affirmative. The proposed orders under Part 2 are subject to extensive Parliamentary scrutiny and control (as amended at Stage 2 – see paragraphs 2 and 3 earlier). Section 101 allows Scottish Ministers by order to
make consequential, supplemental, incidental etc provisions, including ones which effect changes to enactments, instruments and documents (section 101(2)). Orders which make provisions without textually amending enactments, instruments or documents are subject to negative procedure, whereas ones which do are subject to affirmative procedure. The Scottish Government considers that this is appropriate for such ancillary powers.
Background

1. On Friday 22 January 2010, the Convener received, via email, a letter from Roseanna Cunningham MSP, Minister for Environment.


3. The Reasoned Opinion requires the UK Member State to comply within two months of its issue (by 20 January 2010). The UK Government has written to the Commission seeking an extension of up to three months to undertake the various legislative procedures to comply with the Reasoned Opinion.

4. The Minister's letter explains that the Scottish Government proposes to introduce to the Parliament the additional legislative measures which are necessary to comply with the Reasoned Opinion through a single Scottish Statutory Instrument which has been given the working title “The Water Quality (Scotland) Regulations 2010”.

5. The Government intends to lay the SSI at the earliest opportunity and by early March at the latest in order to avoid the Easter recess and comply with the anticipated extension of the Commission’s deadline to 20 April 2010.

Choice of procedure

6. Section 2(2) of the European Communities Act 1972 offers a choice between negative and affirmative Parliamentary procedure. The Minister's letter acknowledges that it is the usual convention for statutory instruments which amend primary legislation and create new offences to be subject to affirmative Parliamentary procedure. However, in this instance, the Government intends to use the negative procedure. The letter states—

“Whilst not wishing to curtail the opportunity for full and transparent Parliamentary consideration the very tight time scales imposed by the
Reasoned Opinion means that we must investigate opportunities to reduce timescales wherever possible. The use of negative procedure for this SSI would be competent and would allow more time for drafting but more importantly offer greater opportunity to consult key stakeholders including the Convention of Scottish Local Authorities and Scottish Water."

7. The Committee is invited to note that to meet a deadline day of 20 April, the difference in timing for laying an affirmative instrument compared with a negative, to meet such a coming into force date, is not very great. An affirmative instrument laid on 22 February would allow 44 days to 20 April, whereas a negative instrument laid on 16 March would allow 21 days prior to 20 April, taking the Easter recess into account.

Options

8. The Committee is invited to consider how it wishes to respond to the Minister’s letter. The options available to the Committee include—

- inviting the Minister to give oral evidence to the Committee to explain in more detail the circumstances of the case and the reasons for the choice of negative procedure;

- await the laying of the instrument and then invite the Minister to appear before the Committee to give evidence; or

- acknowledge the letter and consider the instrument in the normal manner once it is laid.

For decision

9. The Committee is invited to agree its approach to scrutiny of this forthcoming instrument.

Dougie Wands
Clerk to the Committee
Annexe

Jamie Stone MSP
Convener
C/O Clerk to the Subordinate Legislation Committee
The Scottish Parliament
Edinburgh
EH99 1SP

20 January 2010

THE WATER QUALITY (SCOTLAND) REGULATIONS 2010

It might help the Committee to know that the European Commission has now provided a Reasoned Opinion against the UK Member State setting out its continuing concerns about the transposition into national law of Council Directive 98/83/EC (“the Drinking Water Directive”) on the quality of water intended for human consumption. The UK Government accepted the Reasoned Opinion without further challenge and we supported this assessment. We must now introduce amending legislation as soon as possible.

The Reasoned Opinion requires the UK Member State to comply within 2 months of its issue (by 20 January 2010). However, in all the UK Administrations, the processes of developing, amending and bringing into force the necessary legislative changes cannot be completed by the 20 January 2010 compliance deadline. The UK believes that it meets the criteria for an extension to the time limit and has written to the Commission seeking an extension of up to three months (20 April 2010) to undertake the various legislative procedures to comply with the Reasoned Opinion. The UK is now awaiting a formal response from the Commission but should they refuse to grant an extension the consequences for the UK Administrations could be significant in that the Commission may choose to refer the case to the European Court of Justice to escalate the infraction case.

The Scottish Government proposes to introduce to Parliament the additional legislative measures which are necessary to comply with the Reasoned Opinion through a single Scottish Statutory Instrument which has been given the working title ‘The Water Quality (Scotland) Regulations 2010’. At this stage we anticipate that we may need to amend primary legislation, including the Water (Scotland) Act 1980 and the Water Industry (Scotland) Act 2002, using powers under section 2(2) of the European Communities Act 1972. These amendments may include the creation of an offence of non-compliance with a requirement to take remedial action. In order to address the more minor inconsistencies and deficiencies identified by the Commission we may also need to amend the Water Supply (Water Quality) (Scotland) Regulations 2001 (SSI 2007 No. 207) and the Private Water Supplies (Scotland) Regulations 2006 (SSI 2006 No. 209).

Section 2(2) of the European Communities Act offers a choice between negative and affirmative Parliamentary procedure. It is the usual convention
for Statutory Instruments which amend primary legislation and create new offences to be subject to affirmative Parliamentary procedure. Whilst not wishing to curtail the opportunity for full and transparent Parliamentary consideration the very tight time scales imposed by the Reasoned Opinion means that we must investigate opportunities to reduce timescales wherever possible. The use of negative procedure for this SSI would be competent and would allow more time for drafting but more importantly offer greater opportunity to consult key stakeholders including the Convention of Scottish Local Authorities and Scottish Water. The Scottish Government received a generally favourable response from local authorities and other professional bodies to its March 2002 consultation on proposed improvements to the regulatory framework for drinking water quality in public buildings. The legislative amendments which will be set out in ‘The Water Quality (Scotland) Regulations 2010’ formalise these proposals.

My officials are working to lay the negative SSI at the earliest opportunity and by early March at the latest in order to avoid the Easter recess and comply with the Commission’s deadline of 20 April 2010 (assuming of course, that the UK is granted such an extension by the Commission). The Committee can therefore expect to be asked to consider the relevant provision in the near future.

I hope you find this advance notice and explanation of our choice of procedure helpful.

ROSEANNA CUNNINGHAM
SUBORDINATE LEGISLATION COMMITTEE

4th Meeting, 2010 (Session 3)

Tuesday 2 February 2010

Instrument Responses

INSTRUMENTS SUBJECT TO ANNULMENT

The Snares (Scotland) Order 2010 (SSI 2010/8)

On 26 January 2010 the Scottish Government was asked:
The Scottish Government are asked to explain the effect of the apparent drafting error in the first line of article 6, where “having been” is duplicated. Would the Government propose to correct this error by an amendment, given that this describes the circumstances in which a criminal offence is committed?

The Scottish Government responds as follows:
The Scottish Government is grateful to the Committee for drawing our attention to this error.

We consider that this is clearly a typing error but we are satisfied that it will not have any effect on the meaning of article 6. Nor do we consider that it would affect a reader’s ability to understand the provision.

We are arranging for the printed version to be corrected.