SUBORDINATE LEGISLATION COMMITTEE

AGENDA

9th Meeting, 2010 (Session 3)

Tuesday 16 March 2010

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

1. Interpretation and Legislative Reform (Scotland) Bill: The Committee will consider the Bill at Stage 2 (Day 1).

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

   - the Beet Seed (Scotland) Regulations 2010 (SSI 2010/67);
   - the Food Hygiene (Scotland) Amendment Regulations 2010 (SSI 2010/69);
   - the National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2010 (SSI 2010/74);
   - the Bankruptcy Fees (Scotland) Amendment Regulations 2010 (SSI 2010/76);
   - the Tobacco and Primary Medical Services (Scotland) Act 2010 (Ancillary Provisions) Order 2010 (SSI 2010/77);
   - the Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment (No. 2) Order 2010 (SSI 2010/78);
   - the Police Pensions Amendment (Scotland) Regulations 2010 (SSI 2010/85);
   - the Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2010 (SSI 2010/87);
   - the Zoonoses and Animal By-Products (Fees) (Scotland) Amendment Regulations 2010 (SSI 2010/88);
   - the Fish Labelling (Scotland) Regulations 2010 (SSI 2010/90);
   - the Registration Services (Fees, etc.) (Scotland) Amendment Regulations 2010 (SSI 2010/92);
   - the National Health Service (General Medical Services Contracts, Primary Medical Services Section 17C Agreements and Primary Medical Services Performers Lists) (Scotland) Amendment Regulations 2010 (SSI 2010/93);
   - the National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment Regulations 2010 (SSI 2010/94).
3. **Public Services Reform (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

4. **Scottish Parliamentary Commissions and Commissioners etc. Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

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The papers for this meeting are as follows—

**Legal Brief**
SL/S3/10/9/1 (P)

**Summary of Recommendations**
SL/S3/10/9/2

**Agenda item 2**

**Instrument Responses**
SL/S3/10/9/3

**Agenda item 4**

*Scottish Parliamentary Commissions and Commissioners etc. Bill*

*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 2 Instruments subject to annulment**

The Beet Seed (Scotland) Regulations 2010 (SSI 2010/67)

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

- the Scottish Government has agreed that the meaning of regulation 7(1)(c) to (e) could be clearer in restricting the application of the power to issue general licences to exemption from the operation of the regulations;

- there has been an unusual exercise of the power in section 16. Regulation 10(8) prohibits the marketing of seed of a Conservation variety in excess of the maximum amount, contravention of this prohibition is automatically a criminal offence by virtue of section 16(7) of the parent act but the Scottish Government advises that it did not intend to create a criminal offence. The Committee may also wish to report that in this respect the drafting of the regulations is not sufficiently clear;

- the drafting of regulations 17(3)(e), 18(2)(b), 19(13) and the definition of EEA state are not sufficiently clear and that in relation to regulations 17 and 18 this could have an effect on the proper operation of the instrument;

- to the extent that the definition of seed lot purports to add a 5% tolerance in addition to that provided by Schedule 5 this is not compatible with Community law and therefore raises a devolution issue;

- it is content with the explanation provided for the meaning of “some other sealing system” for the purposes of regulation 18;

- the omission of a value for maximum moisture content in the final line on page 33 of the table in para 8(a) of Schedule 4 is a failure to properly transpose and implement EU requirements set out in the 2002 Directive and as such raises a devolution issue;
• it is content with the explanation provided as to why the use of published
guidance to set sampling methods is permissible but it may also wish to draw to
the lead committee’s attention that any concerns as to the terms of that guidance
would require to be addressed before the 40 day period expires.

The Committee may wish to consider that it would be helpful to have a discussion
with officials from the Scottish Government on—

• the quality control mechanisms on SSI drafting currently in place and how they
were applied to this instrument, and

• the priority afforded to full and proper transposition of EU obligations whether or
not the practical effect is of importance for Scotland.

The Food Hygiene (Scotland) Amendment Regulations 2010 (SSI 2010/69)

The Committee may wish to report as follows:

• the Committee is satisfied with the explanation provided in relation to
authorisation of the national measures;

• the Committee notes that the omission to refer to the Technical Standards
Directive will be corrected in due course and recommends that the explanatory
note to the instrument as published on the OPSI and QPS website should be
amended;

• the Committee considers that the Government’s explanation as to how the EU
consultation requirements set out in article 9 of Regulation 178/2002 have been
met could be more fully addressed in order to demonstrate clearly to the
Parliament that those obligations have been fulfilled and recommends that the
Government take this into account in future executive notes.

The National Assistance (Sums for Personal Requirements) (Scotland)
Regulations 2010 (SSI 2010/74)

The Committee may wish to report that—

• it appears that regulation 3 is defectively drafted, in respect that the regulation
revokes the 2008 Regulations (SSI 2008/14) rather than the 2009 Regulations
(SSI 2009/73), and

• there is a drafting error in paragraph 2 of the Explanatory Note (which is not part
of the Regulations), and which refers to 6 April rather than the correct coming into
force date of 12 April 2010.
The Bankruptcy Fees (Scotland) Amendment Regulations 2010 (SSI 2010/76)

The Committee may wish to be content with the response provided by the Scottish Government on the matter of the authority for the savings provision which is contained in this instrument, and to indicate that it is content otherwise with the instrument.

The Tobacco and Primary Medical Services (Scotland) Act 2010 (Ancillary Provisions) Order 2010 (SSI 2010/77)

The Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment (No. 2) Order 2010 (SSI 2010/78)

The Police Pensions Amendment (Scotland) Regulations 2010 (SSI 2010/85)

The Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2010 (SSI 2010/87)

The Zoonoses and Animal By-Products (Fees) (Scotland) Amendment Regulations 2010 (SSI 2010/88)

The Fish Labelling (Scotland) Regulations 2010 (SSI 2010/90)

The Registration Services (Fees, etc.) (Scotland) Amendment Regulations 2010 (SSI 2010/92)

The National Health Service (General Medical Services Contracts, Primary Medical Services Section 17C Agreements and Primary Medical Services Performers Lists) (Scotland) Amendment Regulations 2010 (SSI 2010/93)

The National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment Regulations 2010 (SSI 2010/94)

The Committee may wish to consider if it is content with these instruments.
INSTRUMENTS SUBJECT TO ANNULMENT

The Beet Seed (Scotland) Regulations 2010 (SSI 2010/67)

On 4 March 2010 the Scottish Government was asked:

1. To explain whether regulation 7(1)(c) to (e) delegates to the Scottish Ministers the power to make further provision which is legislative in character and if so, why this is permitted within the enabling powers, when such authority is generally required to be explicit (it being accepted that section 16(5) of the parent act permits Ministers to authorise further exemptions but it is not clear that this is what is afforded by regulation 7(1)(c) to (e)).

2. To explain whether it is intended that contravention of regulation 10(8) is to be treated as a criminal offence by virtue of section 16(7) of the parent act. If so, how is the maximum amount referred to in that regulation to be established and published so that persons may comply with the law or, if not, is this sufficiently clear given the terms of section 16(7) and these regulations?

3. To explain the following and to comment on whether the drafting is considered sufficiently clear:
   - Should regulation 17(3)(e) a full out to regulation 17(3) which applies in the event of any of (a) to (d) applying
   - In regulation 18(2)(b) - are (ii) and (iii) alternatives or cumulative
   - What are the mandatory attributes (if any) of “some other sealing system” for the purposes of regulation 18(2)(a) and (4).
   - In regulation 19(13) are the requirements of paragraphs 4(e) and 5(f) of Schedule 6 alternatives or cumulative
   - in the definition of “EEA State” is the reference to EEA State intended to be a reference to member State of the European Union
   - in the definition of “seed lot” is the addition of a 5% tolerance within that definition in addition to the tolerance already specified in Schedule 5

4. Whether the following cross references are correct, and if not, to confirm the correct reference and whether the Government considers that this requires to be amended in order to make clear the obligations imposed by these regulations:
   - The reference to paragraph 4 of Part II of Schedule 2 in the definition of “seed of a Conservation Variety”
   - The reference to paragraph (11) in regulation 18(1)
   - The reference to sub-paragraph (a) in regulation 18(8) (which contains no sub-paragraphs)
   - The reference to Part I of Schedule 6 in regulation 19(2)(a)
• The reference to regulation 14(1) in paragraph 1 of Schedule 2
• In the table in para 8(a) of Schedule 4 the entry in the column “maximum moisture content” for “fodder beet - natural seed of varieties with 15% or more triploids and/or tetraploids” is blank when the appropriate entry in the Directive is “15”.
• In the note to the table in para 8(a) of Schedule 4 the reference to paragraph 3 of Schedule 5 (there is no paragraph 3)

5. The Scottish Government is also asked to explain whether the Sampling Guidance as defined:
• is considered to be made in furtherance of the powers by which these regulations are made (or by which seed regulations are made generically under the parent act) and if so why its provision take the form of guidance and are not fully incorporated in the SSI; and
• is already in existence and if so whether it has been fully identified for the purposes of the regulations.

The Scottish Government responded:
1. Section 16(5)(a) of the parent Act 1964 provides that ‘seeds regulations may exempt, or authorise the Minister to exempt, any person or class of persons, or persons generally, from compliance with any of the provisions of the regulations, and may provide that the exemptions are to be, or may be made, subject to conditions’. This is a wide power that enables the Scottish Ministers to make specific exemptions from compliance with seed marketing regulations in specific circumstances.

Regulation 7(1)(c) to (e) enables the Scottish Ministers to issue general licences which will exempt persons from compliance with certain provisions of the regulations where this is deemed necessary in order to comply with Articles 23 and 24 of the Beet Seed Directive or to give effect to the Agreement between the EC and the Swiss Confederation on Trade in Agriculture Products. These exemptions would be made in such circumstances as when there is a germination problem or where there are supply issues and no other stocks are available from other member states.

It is acknowledged that the drafting could have made it clearer that the exemptions are exemptions from the regulations and we will take this into account when next amending this instrument.

2. The Scottish Government did not intend to create a criminal offence for this provision. Had the intention been to do so, express words to that effect would have been chosen.

The intention is to regulate the situation administratively on the basis that enforcement action against an individual would be evidentially difficult and unnecessary to achieve the effect of article 14 of Commission Directive 2008/62/EC. Regulation 10(7) gives the Scottish Ministers the flexibility to specify the maximum amounts of seed that may be marketed in any given growing season. The person(s) applying to the Scottish Ministers to market seed of a conservation variety would be notified by the Scottish Ministers of the maximum amount of seed of a conservation variety that can be marketed. Regulation 10(8) clarifies that these amounts will be the maximum that a particular person can market. In the event that a person exceeds any maxima applicable to them,
then SASA would seek to limit amounts by administrative action. Although this is highly unlikely, if this was deemed necessary, SASA state that the relevant parties would be brought together to discuss the way forward.

3. Regulation 17(3)(e) should not be a separate paragraph and was intended to be a full out to apply to paragraphs (a) to (d) in regulation 17(3). The Scottish Government is grateful to the SLC for pointing out this formatting error. We will correct this when the Regulations are next amended.

Regulation 18(2)(b) – a similar formatting error has occurred in this paragraph as paragraph (iii) should not be a separate sub-paragraph but should be a full out applicable to (i) and (ii). We will correct this when the Regulations are next amended.

The mandatory attributes of ‘some other sealing system’ are those outlined in regulation 18(2)(a) and (4). The package must be sealed using either a non-resuable sealing system or another type of sealing system that still meets the requirements in regulation 18(2)(a) and (4). This provision was drafted to provide for the inclusion of some other sealing systems which may be used and which are re-useable. The Scottish Government are of the view that these requirements fully implement Article 11 of the Beet Seed Directive (2002/54/EC) and are clear from the drafting of regulation 18.

In relation to regulation 19(13), the requirements of 4(e) and 5(f) of Schedule 6 are the same requirements. The reference to the two paragraphs is to make it clear that these requirements apply to be fulfilled when marketing seed in respect of which a breeder’s confirmation has been applied for. The appropriate paragraph in Schedule 6 will be dependant upon the type of seed (Pre-Basic Seed, Basic Seed or Certified Seed). The Scottish Government are of the view that it would be clear to the reader that, when affixing a label in respect of which a breeder’s confirmation is to be applied for, they would of course require to follow the requirements set out in the appropriate paragraph of Schedule 6 (be it paragraph 4 or 5) depending on the type of seed.

The term ‘EEA State’ in the definition of ‘EEA State’ should in fact be a reference to a Member State of the European Union. The Scottish Government is grateful to the Committee for pointing out this error and we will correct this when the Regulations are next amended.

The addition of a 5% tolerance within the definition of “seed lot” in addition to the tolerance already specified in Schedule 5 is an error and we will remove this reference when we next amend the Regulations.

4. The Scottish Government accepts that the cross references referred to in paragraph 4 of the Legal Adviser’s email of 4 March 2010 are erroneous and we will correct these when the Regulations are next amended.

- The reference to paragraph 4 of Part II of Schedule 2 should be to paragraph 4 of Part II of Schedule 1
- The reference to paragraph (11) in regulation 18(1) should be to paragraph (13)
- The reference to sub-paragraph (a) in regulation 18(8) should be a reference to paragraph (7)
• The reference in regulation 19(2)(a) should be a reference to Part II of Schedule 6, rather than Part I.
• The reference in paragraph 1 of Schedule 2 to regulation 14(1) should actually be a reference to regulation 15(1), which deals with applications for official certificates.
• The entry in the table should be 15.
• The reference in the note to the table regarding the minimum weight of a sample to be submitted for moisture content testing refers to paragraph 3 of Schedule 5, when it should refer to paragraph 2(2) of Schedule 5.

5. Regulation 17(1)(b) provides that samples of seed taken for the purpose of an official examination shall be taken in accordance with the methods specified by the Scottish Ministers in Sampling Guidance. “Sampling Guidance” is defined in regulation 2 as the guidance booklet titled ‘Instructions for Seed Samplers Licensed in Scotland, 2010’ produced by the Scottish Ministers. The Explanatory Note explains that copies of this document can be obtained from SASA and an address is provided. The guidance is therefore already in existence and has been fully identified for the purposes of the regulations.

Section 16(1)(e) of the parent Act provides a very broad power for the Scottish Ministers to make regulations necessary for the purposes of prescribing anything which is authorised or required to be prescribed under Part II of the parent Act. In addition section 16(4) allows the Scottish Ministers to make regulations about the manner in which samples are to be taken. The Scottish Government takes the view that these powers in combination are sufficient authority for sub-delegation in this particular instance.

As Beet Seed is not currently marketed in Scotland the Regulations currently have no practical consequences. Nonetheless we plan to bring forward a further a set of seed regulations in the near future and will use that opportunity to make any necessary amendments referred to above.
The Food Hygiene (Scotland) Amendment Regulations 2010 (SSI 2010/69)

On 3 March 2010 the Scottish Government was asked:

- To set out for the committee by reference to the requirements of article 10 of Regulation 853/2004/EC and the Technical Standards Directive (98/34/EC) the steps taken by the United Kingdom and the Commission’s response in order to confirm why the Scottish Ministers are permitted to make the national measures set out in new regulation 17 and new schedules 3A to 3D;
- To explain how the requirement of article 12 of Directive 98/34/EC has been complied with in this case since the Government has not adopted the usual practice of referring to compliance with the Directive in the Explanatory Note;
- To confirm how the consultation requirements set out in article 9 of Regulation 178/2002 have been satisfied with respect to those amendments made to implement the various community instruments which were only made after the date at which the executive note explains the consultation exercise conducted by the Food Standards Agency closed (14 March 2008).

The Scottish Government responded:

- In accordance with the requirements of Article 10 of Regulation 853/2004 and Directive 98/34/EC, the UK notified the Commission in 2008 of its intention to introduce national measures in relation to the need for cleansing and disinfection facilities and detained meat facilities in certain slaughterhouses. A number of comments on the proposed measures were made by the Commission and, following bilateral discussion between the Commission and the UK, these were taken into account in the framing of the Regulations.
- We apologise for omitting to refer to compliance with Directive 98/34 in the Explanatory Note to these Regulations. Steps will be taken to include an appropriate reference in the published version of the Regulations.
- In view of the frequent amendments to the EU legislation that constitutes the EU Hygiene package, it was necessary to take a practical approach on how best to address the changes to directly applicable EU legislation that have been made in the period since the consultation on these Regulations ended. Significant amendments affecting the obligations of individuals would be the subject of further consultation. However, minor amendments have been reflected in the statutory instrument as made. The Official Feed and Food Controls (Scotland) Regulations 2009 (SSI 2009/446) provided for the execution and enforcement of Regulation 669/2009 and this was consulted upon separately. It is our intention in a forthcoming statutory instrument amending the Food Hygiene (Scotland) Regulations 2006 to provide for the references to the EU instruments defined in Schedule 1 to those Regulations to be references to those instruments as amended from time to time.
On 5 March 2010 the Scottish Government was asked:

- the effect of the apparent error that regulation 3 revokes the 2008 Regulations (SSI 2008/14), which it appears are already revoked by the 2009 Regulations (SSI 2009/73), instead of those 2009 Regulations?

- given that the Explanatory Note in the second paragraph states that the sum of £22.30 per week is prescribed from 6 April 2010, but the Regulations come into force on 12 April 2010, whether this reference in the Explanatory Note is an error and what the significance is of the Regulations coming into force on 12th rather than 6th?

The Scottish Government responded:

We accept that there is an error in that regulation 3 revokes the 2008 Regulations, which have already been revoked by the 2009 Regulations, instead of those 2009 Regulations. Since the 2008 Regulations have already been revoked regulation 3 is of no practical effect. However the failure to revoke the 2009 Regulations has no substantive effect either. This regulation is simply intended to tidy up the statute book as a result of the change made by regulation 2 of the 2010 Regulations. Regulation 2 prescribes the amount of £22.30 for the purposes of section 22(4) of the National Assistance Act 1948. That amount will apply from 12th April 2010. It is clear from the terms of section 22(4) that there will be a prescribed amount. In our view it is clear that from 12th April 2010 that amount will be £22.30 notwithstanding the fact that the 2009 Regulations have not been revoked. The Scottish Government could bring forward an amending SSI to expressly revoke the 2009 Regulations but does not consider it is necessary in the circumstances.

The reference in the Explanatory Note to the Regulations coming into force on 6th April rather than the 12th April is an error but as the Explanatory Note is not part of the instrument, has no legal effect. The date the Regulations come into force is the 12th April as stated in Regulation 1.
The Bankruptcy Fees (Scotland) Amendment Regulations 2010 (SSI 2010/76)

On 4 March 2010 the Scottish Government was asked: In relation to this instrument the preamble provides that it is made in exercise of powers conferred by sections 69A, 72 and 73(1) of the Bankruptcy (Scotland) Act 1985. The Scottish Government is asked to clarify which of those powers (or alternatively, what other power) is relied upon with respect to the savings provision contained at regulation 3.

The Scottish Government responded:
Section 69A of the Bankruptcy (Scotland) Act 1985 allows the Scottish Ministers to prescribe the fees and outlays payable to the Accountant in Bankruptcy in respect of the exercise of any of her functions under that Act. The Scottish Government considers that the use of this power to amend those fees from time to time must necessarily extend to making transitional or savings provision in respect of cases which are ongoing when those amendments are made. Failure to do so could cause uncertainty and potentially disputes as to which fees applied in those cases.

Moreover, section 72 of the Bankruptcy (Scotland) Act 1985 provides that regulations under that Act may make different provision for different cases or classes of case. The Scottish Government considers that, if the powers in section 69A were in any way insufficient to allow savings provision to be made, section 72 could be relied on to provide authority for the making of provision for cases commenced before 1st April 2010.