SUBORDINATE LEGISLATION COMMITTEE

AGENDA

16th Meeting, 2010 (Session 3)

Tuesday 18 May 2010

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

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

   - the Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (SSI 2010/168);
   - the Town and Country Planning (Hazardous Substances) (Scotland) Amendment Regulations 2010 (SSI 2010/171);
   - the Transmissible Spongiform Encephalopathies (Scotland) Regulations 2010 (SSI 2010/177);
   - the Protection of Vulnerable Groups (Scotland) Act 2007 (Consideration for Listing) Regulations 2010 (SSI 2010/183).

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

   - Act of Adjournal (Criminal Procedure Rules Amendment) (Miscellaneous) 2010 (SSI 2010/184);
   - The Smoking, Health and Social Care (Scotland) Act 2005 (Commencement No. 6) Order 2010 (SSI 2010/185 (C.9)).

3. **Annual report:** The Committee will consider a draft annual report for the parliamentary year from 9 May 2009 to 8 May 2010.

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The papers for this meeting are as follows—

Legal Brief SL/S3/10/16/1 (P)
Summary of Recommendations SL/S3/10/16/2

**Agenda item 1**
Instrument Responses SL/S3/10/16/3

**Agenda item 3**
Draft annual report SL/S3/10/16/4
The Committee will be invited to consider the following recommendations at the meeting. Decisions are a matter for the Committee.

**Agenda Item 1  Instruments subject to annulment**

**The Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (SSI 2010/168)**

The Committee may wish to express the view that the Scottish Government should give the public 21 days notice in advance of section 78 of the 2007 Act (and consequently this instrument) coming into force.

The Committee may wish to report that the power in section 113A(6)(c) was cited in error as it was not required but the Committee agrees with the Scottish Government that this does not affect the validity of the instrument.

The Committee may wish to find the Scottish Government’s response with respect to regulation 8(1)(l) satisfactory.

The Committee may wish to report that it finds the exercise of the power in section 113B(2)(b) satisfactory.

The Committee may wish to note that the Scottish Government has confirmed that the definition of “host parent” will be brought into force at the same time as this instrument.

**The Town and Country Planning (Hazardous Substances) (Scotland) Amendment Regulations 2010 (SSI 2010/171)**

The Committee may wish to report that it appears that the drafting of regulation 3 (transitional exemptions) appears to be defective, in respect that its effects do not appear to accord with the intended effects, as explained in the Government’s response. Specifically, it appears that—
• the transitional relief provided in regulation 3(1)(c) is not restricted to the presence of the relevant category of ammonium nitrate, but permits the exemption to apply where any category of that substance was present from 23 November 2009 until 31 May 2010 without hazardous substances consent being required; and

• the regulation does not appear to relate to the calculation of the controlled quantity of substances, where there are combined hazardous substances at land, for the purposes of Note 4 to Parts A and B of Schedule 1 to the Town and Country Planning (Hazardous Substances) (Scotland) Regulations 1993.

As a result of the extended transitional relief, it appears to the Committee that the suspension of effective enforcement of the Directive provided in regulation 3 is broader than required, and accordingly this raises a devolution issue.

The Transmissible Spongiform Encephalopathies (Scotland) Regulations 2010 (SSI 2010/177)

The Protection of Vulnerable Groups (Scotland) Act 2007 (Consideration for Listings) Regulations 2010 (SSI 2010/183)

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

Agenda Item 2 Instruments not laid before the Parliament

Act of Adjournal (Criminal Procedure Rules Amendment) (Miscellaneous) 2010 (SSI 2010/184)

The Smoking, Health and Social Care (Scotland) Act 2005 (Commencement No. 6) Order 2010 (SSI 2010/185)

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

The Police Act 1997 (Criminal Records) (Scotland) Regulations 2010 (SSI 2010/168)

On 7 May 2010 the Scottish Government was asked:

1. Regulation 1 provides that the instrument will come into force on the same day as section 78 of the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”). Please confirm that section 78 of the 2007 Act will not be brought into force within 21 days of the date on which this instrument has been laid.

2(a) The enabling powers listed in the Schedule include section 113A(6)(c) of the Police Act 1997 (“the 1997 Act”). What provision of this instrument is made under section 113A(6)(c) as there does not appear to be such a provision and section 78(2)(d) of the 2007 Act, which inserts “a prescribed court order” into the definition of “relevant matter” in section 113A(6)(c) of the 1997 Act, does not appear to have been commenced?

2(b) If the power under section 113A(6)(c) has been used, why has the power not been commenced and what is the effect of that?

3. To confirm the basis on which it is permitted in regulation 8(1)(l) to delegate to a chief officer of a police force identified as a relevant police force by virtue of paragraphs (a) to (k) of regulation 8(1) the ability to identify other police forces for the purposes of these regulations?

4. To explain why it appears that in regulations 9, 10 and 12 an enhanced criminal record certificate can be required only for the purposes of an exempted question asked with respect to the matters specified in the respective regulations when the enabling power does not appear to be so restricted?

5. Regulation 10(2)(j) refers to a host parent within the meaning of paragraph 11A of schedule 2 to the 2007 Act. It is intended that paragraph 11A of schedule 2 to the 2007 Act will be inserted by article 7 of the Protection of Vulnerable Groups (Scotland) Act 2007 (Modification of Regulated Work with Children) Order 2010. Please confirm that it is the Scottish Government's intention that the definition of “host parent” will be in force when this instrument (SSI 2010/168) comes into force.

The Scottish Government responded:

1. The Government confirms that section 78 of the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”) will not be brought into force within 21 days of the date on which this instrument has been laid.
2(a). The power at section 113A(6)(c) of the Police Act 1997 has not been used to make any provision in this instrument. The Government regrets that the power has been cited unnecessarily, but this does not affect the validity of the instrument.

2(b). This is not applicable since the power has not been used.

3. The legislative basis for regulation 8(1)(l) is section 113B(9) of the Police Act 1997, and, in particular, the definition of “relevant police force” which provides that “relevant police force”, in relation to an application under this section, means a police force which is a relevant police force in relation to that application under regulations made by the Secretary of State”. It is submitted that the Scottish Ministers are given a broad power by this provision, which goes beyond enabling the Scottish Ministers to prescribe those police forces which are to be a relevant police force, and provides a suitable basis in primary legislation for regulation 8(1)(l).

The effect of regulation 8(1)(l) is that a chief officer of a relevant police force (by virtue of the provisions of regulation 8(1)(a) to (k)) can identify a police force which may have relevant information as a “relevant police force”, and then inform the Scottish Ministers. In other words, it is purely an administrative mechanism for allowing the chief officer of a relevant police force to tell the Scottish Ministers from where they might better (or also) seek information. It would then be for Scottish Ministers to approach that “second relevant police force” for information under section 113B(4) or (5).

4. The Government confirms that by virtue of regulations 9, 10 and 12 an enhanced criminal record certificate can be required only for the purposes of an exempted question asked with respect to the matters specified in the respective regulations. The Government agrees that the enabling power is not restricted to the purposes of asking exempted questions. However, the Government is of the view that it can exercise the power in a restrictive manner if it wishes to do so.

In fact, the Scottish Ministers are only permitted to provide enhanced criminal record certificates for the purposes of asking exempted questions in relation to certain specified matters or individuals. Details of spent convictions can only be disclosed if permitted by virtue of the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003. That Order excludes questions in certain specified circumstances from the provisions of section 4(2)(a) and (b) of the 1974 Act (referred to as “exempted questions” for the purposes of this instrument), and it is in only in those specified circumstances that spent convictions can be disclosed. Given the terms of the 1974 Act, the Scottish Ministers could therefore not exercise this power in any other way.

5. As stated, it is intended that the definition of “host parent” in paragraph 11A of schedule 2 to the 2007 Act will be inserted by article 7 of the Protection of Vulnerable Groups (Scotland) Act 2007 (Modification of Regulated Work with Children) Order 2010. It is currently the Government's intention to bring this instrument and the Protection of Vulnerable Groups (Scotland) Act 2007 (Modification of Regulated Work with Children) Order 2010 into force at the same time.
The Town and Country Planning (Hazardous Substances) (Scotland) Amendment Regulations 2010 (SSI 2010/171)

On 5 May 2010 the Scottish Government was asked:
(1) How the transitional exemption provisions in regulation 3 are compatible with Community law, as they appear to perpetuate a failure to implement, in one particular respect, the Directive 2003/105/EC until 30 November 2010?

(2) As the position is not fully explained in the Explanatory or Executive Notes, can the effects of the correction made by regulation 2(2) and who it may apply to, be explained to the Committee?

Why is the transitional exemption required, given that it appears from entry 1 in Schedule 1, Part A of the 1993 Regulations that the relevant controlled quantity for ammonium nitrate (fertilisers capable of self-sustaining decomposition) is 5,000 tonnes, and the removal of the quantity of 10,000 in column 3 of entry 1 appears to have the effect that that higher threshold permitted quantity (only applying for the purposes of Note 4 of the Notes to Parts A and B) would no longer be applicable, from the coming into force of the Regulations on 23 November 2009?

The Scottish Government responded:
(1) The effect of the Regulations is to alter the circumstances in which consent is required under the addition rule described in paragraph 2 below. The storage of a number of different hazardous substances will be subject to the regime of control envisaged by Directive 2003/105/EC. The transitional provisions do not remove the requirement to obtain consent but rather limit the enforcement action which may be taken. Since storing or processing without consent comprises a criminal offence under the Planning (Hazardous Substances) (Scotland) Act 1997, a transitional exemption is necessary, to avoid incompatibility with ECHR. It is accordingly considered that this provision is not incompatible with Community Law.

(2) Hazardous substance consent may be required where a number of different hazardous substances are stored even where the quantity of any single hazardous substances present would not itself trigger a requirement for consent for that substance alone. The requirement for consent arises in terms of what is known as the “addition rule” set out in Note 4 to the Notes to Parts A and B of Schedule 1 to the Town and Country Planning (Hazardous Substances) (Scotland) Regulations 1993 (“the 1993 Regulations”). The addition rule requires that the quantity of each of the hazardous substances present be divided by the controlled quantity for that substance (the quantity in column 2 or, where a figure is present for that substance, the figure in column 3) and these proportions to be added together; if the total is greater than or equal to 1, then hazardous substances consent for each of the substances must be obtained.

The change made by the Regulations alters the calculation of the quantity of the relevant Ammonium Nitrate for the purposes of the addition rule. By removing the entry in column 3 the number acting as the denominator in the relevant fraction for the purposes of the addition rule changes from 10,000 to 5,000. The result is to double the contribution of any such Ammonium Nitrate when applying the addition rule. This could have the result that consent would be required where previously it would not have been.
The transitional provision is required to avoid persons storing the relevant Ammonium Nitrate along with other substances without consent suddenly being in the position of committing an offence under section 21 of the Planning (Hazardous Substances) (Scotland) Act 1997 and open to enforcement action, despite having complied with the requirements of the 1993 Regulations. The transitional provisions allow someone in that position time to obtain the necessary consent, without allowing them to increase the quantities of substance above the maximum levels which were present since 23 November 2009 when the previous changes to the 1993 Regulations made by the Planning (Control of Major-Accident Hazards) (Scotland) Regulations 2009 came into force.
The Committee reports to the Parliament as follows—

Introduction

1. This Report covers the work of the Subordinate Legislation Committee during the parliamentary year from 9 May 2009 to 8 May 2010. The Committee has scrutinised a number of bills and instruments again this year, reporting to subject Committees and the Parliament on issues such as the scope of delegated powers, and whether delegated powers are within vires as well as on detailed drafting issues.

Interpretation and Legislative Reform (Scotland) Bill

2. The Bill was introduced on 15 June 2009 following a lengthy inquiry into the Regulatory Framework in Scotland by both the Session 2 and Session 3 Subordinate Legislation Committees. It is the first time that the Subordinate Legislation Committee has been designated as the lead Committee on any Bill and it formed a major part of the Committee’s workload during 2009-2010. The Bill is highly technical in nature and replaces three transitional orders under the Scotland Act 1998 to provide the Scottish Parliament with its own distinct subordinate legislation procedures.

3. The Committee issued a call for evidence on 29 June 2009 and received 10 written submissions from public and private sector organisations as well as academics. On the basis of the written evidence received, the Committee took oral evidence from interested parties, culminating in a session with the Minister for Parliamentary Business on 3 November 2009.

4. The Committee published its Stage 1 report on the Bill in December 2009. It welcomed the modernisation of the law concerning the making and interpretation of Acts of the Scottish Parliament and Scottish instruments made under them, but identified a number of significant issues which required further consideration and amendment. Many of the Committee’s recommendations were accepted, with the Bill being amended before being passed by the Parliament. The Bill is expected to receive Royal Assent at the beginning of June 2010.
Bills

5. The Committee considers delegated powers provisions in Government, Members', Committee and Private bills. Over the reporting period, the Committee has considered and reported on 16 bills at Stage 1 and nine bills as amended at Stage 2. As with previous years, the recommendations of the Committee on bills have led to a number of changes by the Government to relevant provisions, and through its scrutiny process the Committee continues to ensure that the correct balance between primary and secondary legislation is maintained.

6. The Committee has also considered four legislative consent memorandums. These are Westminster Bills which seek to change the law or alter Scottish Ministers' or the Scottish Parliament's powers in relation to devolved matters.

Subordinate Legislation

7. The Committee has continued to work to tight timescales in its consideration of subordinate legislation, producing 64 reports over the reporting year. During the parliamentary year, the Committee published 33 statutory instrument reports, reporting on 343 Scottish Statutory Instruments in total.

8. Of the instruments considered, 54 were subject to affirmative procedure, 221 to negative procedure, and 68 which were either not laid or not subject to Parliamentary procedure.

Equalities

9. The Committee considers equalities issues which can arise under the European Convention on Human Rights and under Community law. It is part of the Committee’s remit to draw the attention of lead committees and the Parliament to any instrument that, in its opinion, fails to comply with any such requirement.

10. It is also within the Committee’s remit to report any instrument on the grounds of an unusual or unexpected use of a power which raises equalities issues.

11. The Committee also scrutinises drafting practice and so points out, for example, failure to use gender neutral language in instruments.

Meetings

12. During the parliamentary year, the Committee met 33 times. Of these meetings, none were entirely in private and 20 were partly in private.

13. All the meetings have been held in Edinburgh.