SUBORDINATE LEGISLATION COMMITTEE

AGENDA

18th Meeting, 2010 (Session 3)

Tuesday 1 June 2010

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

1. **Declaration of interests**: Alex Johnstone MSP will be invited to declare any relevant interests.

2. **Crofting 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. **Legal Services (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.

4. **Draft instruments subject to approval**: The Committee will consider the following—
   - the Dormant Bank and Building Society Accounts (Scotland) Order 2010 (SSI 2010/draft);
   - the Budget (Scotland) Act 2010 Amendment Order 2010 (SSI 2010/draft);
   - the Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment (No. 2) Regulations 2010 (SSI 2010/draft).

5. **Instruments subject to annulment**: The Committee will consider the following—
   - the Air Quality Standards (Scotland) Regulations 2010 (SSI 2010/204);
   - the Plant Health (Scotland) Amendment Order 2010 (SSI 2010/206);
   - the Plant Health Fees (Scotland) Amendment Regulations 2010 (SSI 2010/207);
   - the National Health Service (General Dental Services) (Scotland) Regulations 2010 (SSI 2010/208).
The papers for this meeting are as follows—

PRIVATE PAPER SL/S3/10/18/1 (P)
Summary of Recommendations SL/S3/10/18/2

**Agenda item 2**

Crofting Reform (Scotland) Bill - Paper by the Clerk SL/S3/10/18/3

**Agenda item 3**

Legal Services (Scotland) Bill - Paper by the Clerk SL/S3/10/18/4
SUBORDINATE LEGISLATION COMMITTEE

18th Meeting, 2010 (Session 3)

Tuesday 1 June 2010

Summary of Recommendations

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

Agenda Item 2  Crofting Reform (Scotland) Bill

The Committee may wish to note the Government response to its stage 1 report.

Agenda Item 3  Legal Services (Scotland) Bill

The Committee may wish to note the Government response to its stage 1 report.

Agenda Item 4  Draft instruments subject to approval

The Dormant Bank and Building Society Accounts (Scotland) Order 2010 (SSI 2010/draft)

The Budget (Scotland) Act 2010 Amendment Order 2010 (SSI 2010/draft)

The Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment (No. 2) Regulations 2010 (SSI 2010/draft)

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

Agenda Item 5  Instruments subject to annulment

The Air Quality Standards (Scotland) Regulations 2010 (SSI 2010/204)

The Plant Health (Scotland) Amendment Order 2010 (SSI 2010/206)
The Plant Health Fees (Scotland) Amendment Regulations 2010 (SSI 2010/207)

The National Health Service (General Dental Services) (Scotland) Regulations 2010 (SSI 2010/208)

The Committee may wish to consider if it is content with these instruments.
Crofting 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 Crofting Reform (Scotland) Bill to the Rural Affairs and Environment Committee, as lead committee for the Bill, on 3 March 2010.

2. On 26 May 2010, Iain Dewar, Head of the Crofting Reform (Scotland) Bill team, wrote to the Clerk of the Subordinate Legislation Committee responding to its Stage 1 report.

Scottish Government Response

3. The Scottish Government remains of the view that the power in section 2(2) is narrow in scope and specific. It contends that the power is limited in that it can only be used by the Scottish Ministers when they consider it appropriate to ensure the Commission can carry out its functions efficiently and effectively.

4. The Scottish Government intends to bring forward an amendment at Stage 2 to remove the delegated power in section 15(5) of the Bill.

5. In relation to the powers in section 16(1), the Scottish Government is content with the power as drafted which it considers to be necessary for the operation of the Crofting Register. A Stage 2 amendment is proposed to replace the reference to the Lands Tribunal for Scotland with a reference to the Land Court.

6. The Scottish Government does not consider that the power in Schedule 12, paragraph 2(2)(d) should require Ministers to consult (as the Committee’s stage 1 report requested), citing similar powers such as the setting of fees in respect of the Registers of Scotland.

7. The Scottish Government considers the power in Schedule 1, paragraph 7(1) should not be set out on the face of the Bill, but left to subordinate legislation. It has, however, agreed to consult on the draft regulations before laying in the Parliament, which it believes will ensure the appropriate level of scrutiny. The Scottish Government will bring forward an amendment at Stage 2 to enable the creation of offences in respect of elections in regulations made under this power.
8. Finally, the Government disagrees with the recommendation on section 32(1), where the Committee considered that Part 5 of the Bill should be amended to remove the power for Scottish Ministers to make pre-consolidation modifications of enactments relating to crofting by order. The Scottish Government considers that crofting law should be considered a special case and that without this power, the result would be a far more limited consolidation of crofting law, frustrating a widely supported effort to replace, simplify and clarify existing crofting law.

Progress of the Bill

9. The Bill passed Stage 1 on 13 May 2010. Day 1 of Stage 2 will be held on 2 June 2010.

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

Recommendation

11. Members are invited to note the Scottish Government’s response to the Subordinate Legislation Committee’s report on the Crofting Reform (Scotland) Bill at Stage 1.

Irene Fleming
Clerk to the Committee
Crofting Reform (Scotland) Bill
Scottish Government response to SLC Stage 1 Report

I refer to Mr Wand’s letter of 3 March 2010 to Elspeth MacDonald, which has been passed to me for a reply. Your letter sought a response to the Subordinate Legislation Committee’s Stage 1 report on the Crofting Reform (Scotland) Bill prior to the commencement of Stage 2 proceedings. I have addressed each of the Committee’s recommendations in turn below.

Section 2(2) - power to confer functions on, remove functions from or otherwise modify functions of the Crofting Commission

The Committee considers that the power in section 2(2) is unnecessary, given the proposed power in section 10(1) of the Public Services Reform (Scotland) Bill, and recommends that the Scottish Government should reconsider the need for this power.

The Committee recommends that, in the event that the power under section 2(2) is retained in the Bill, any orders under section 2(2) (new section 2A(1) of the 1993 Act) should be subject to super-affirmative procedure, requiring a proposed draft order to be laid before the Parliament together with the relevant explanatory document for a prescribed period. This would permit public consultation on the terms of the proposed order prior to the Scottish Ministers presenting a draft order in final form to the Parliament for approval. The Committee recommends that Ministers should also be required to consider comments received and provide an explanation to the Parliament as to the extent to which such comments have been addressed in the final order.

The Order-making power in section 14(1) of the Public Services Reform (Scotland) Act 2010 are for the general purposes of improving the exercise of public functions and for removing or reducing burdens in existing legislation. By contrast, the power in section 2(2) of the Crofting Reform (Scotland) Bill is a specific power for Ministers to confer, remove or otherwise modify functions of the Crofting Commission to ensure that the Commission carry out their functions efficiently and effectively. This is a narrower power for a specific purpose. Furthermore, the exercise of this power is limited as the Scottish Ministers may only use it where they consider that it is appropriate in order to ensure that the Commission can carry out their functions efficiently and effectively.

The Government considers that the affirmative procedure provides the appropriate degree of Parliamentary scrutiny given the more limited nature of this power. Therefore, the Government does not propose to bring forward any amendments to this section in Stage 2.
Section 15(5) – power to prescribe circumstances when there is to be no entitlement to indemnity from the Keeper in relation to the Crofting Register

The Committee therefore—

• suggests to the lead committee that it pursue the issue of specification in the Bill of those circumstances which have already been identified by the Scottish Government as circumstances in which there is to be no entitlement to indemnity;

• accepts the need for a power to provide for additional circumstances in which there is to be no entitlement to an indemnity;

• notes the Scottish Government’s commitment to review the effect of the exercise of the power and to consider whether affirmative procedure may be more appropriate;

• recommends that the power should be made subject to affirmative procedure since it is concerned with substantive rights.

The Government has reconsidered the provisions in the Bill relating to indemnity and will be bringing forward an amendment at Stage 2 to remove this power. The only circumstances in which there will be an entitlement to indemnity will be set out on the face of the Bill.

Section 16(1) – power to make rules for the Crofting Register

The Committee recommends that, if it is intended that the exercise of the power in paragraph (e) is to be restricted to matters which are administrative or procedural in nature concerning the operation of the Crofting Register, the Scottish Government should amend the power to express it in terms which limit its exercise to this extent. The Committee notes that, at present, the power appears to extend to other matters within Part 2 such as ranking and appeals which are substantive in nature.

The Government is content with the current drafting of the power under section 16(1) of the Bill, which it considers is necessary to ensure the effective operation of the Crofting Register. It does not consider that expressly limiting the use of rules to administrative or procedural matters to be helpful in achieving this aim.

The Government does not consider that the rules to be made under this delegated power will address the matter of appeals to the Scottish Land Court by a person aggrieved by an act or omission of the Keeper of the Registers of Scotland (which is set out on the face of the Bill in section 17 – a Stage 2 amendment is proposed to replace reference to the Lands Tribunal for Scotland with the Land Court)
Schedule 1, Paragraph 2(2)(d) – Power for the Crofting Commission to charge in respect of its functions

The Committee finds the proposed power acceptable in principle and that it is subject to negative procedure. However, the Committee draws to the attention of the lead committee the absence of any requirement on the Scottish Ministers to consult in advance of the exercise of the power.

The Government has indicated in its response to the Rural Affairs and Environment Committee’s Stage 1 Report that such a power would be used to charge for the processing of regulatory applications where the individual is the principal beneficiary rather than the wider crofting community, and that the charge should represent a percentage of the overall cost to the public of processing that application. There are many similar powers to prescribe fees that do not include an obligation to consult. For example, the Scottish Ministers are not obliged to consult before setting the fees in respect of the Registers of Scotland.

Schedule 1, Paragraph 7(1) – power to make provisions for the election of members to the Commission

The Committee suggests to the lead committee that it considers whether key elements of the system for elections (including franchise) should be set out in the Bill, leaving more administrative matters to be addressed in secondary rather than primary legislation. The Committee reports that, in the absence of an express power to create offences in primary legislation, the Scottish Ministers will not be able to create offences in respect of elections under the power in schedule 1, paragraph 7(1).

The Government considers that subordinate legislation is more appropriate for the kind of detail required to support crofting elections. Making detailed provision for the elections in subordinate legislation rather than in primary legislation will provide greater flexibility to change the election system, if required in light of experience. The Rural Affairs and Environment Committee have suggested that the Government might consider expanding the franchise but having such details set out in primary legislation may prevent such changes from taking place in future. The Government has agreed to consult on the draft Regulations before laying before the Parliament and they will be subject to the affirmative procedure in order to ensure a higher level of scrutiny. It considers that this approach provides the necessary flexibility whilst ensuring appropriate Parliamentary scrutiny.

The Government will bring forward an amendment at Stage 2 to enable the creation of offences in respect of elections in regulations to be made under this power.
Section 32(1) – power to make modifications of enactments relating to crofting, or otherwise in connection with the consolidation of the law on crofting

The Committee recommends that Part 5 of the Bill should be amended to remove the power of the Scottish Ministers to make pre-consolidation modifications of enactments relating to crofting by order.

The Scottish Government considers that a special case can be made for the power in the Bill to make modifications of enactments in relation to crofting in connection with the consolidation of law on crofting. Crofting law is widely regarded to be complex and cumbersome and this view was reiterated during the Government’s consultation on the Bill.

The power is limited insofar as such modifications must be facilitate or be desirable in respect of the consolidation crofting law, which in itself is simply a restatement of existing law and does not allow for changes in the policy intentions behind the law. An example of where this power would be beneficial is to bring a greater degree of uniformity to complex procedures relating to decision making. Without this provision any consolidation could not resolve such gaps or inconsistencies.

Some of the arguments made against the power included in the Interpretation and Legislative Reform (Scotland) Bill do not really arise in relation to the consolidation of crofting law. For example, concern that it might be applied to sensitive areas of law where substantive policy changes should not be fast-tracked and concerns about possible difficulties relating to control of process where there is also a Westminster Bill dealing with the same areas are not relevant to crofting legislation.

Moreover, any order made under this power would be subject to the affirmative procedure, which the Government considers would be the most appropriate level of Parliamentary scrutiny for this power. In addition to the Parliament having the power to approve or reject any draft Order, it would also be able to amend any consolidating Bill (which will incorporate the amendments made by such an Order). The effect of this is to afford the Parliament more than one opportunity for scrutiny.

Removing this power from the Crofting Reform (Scotland) Bill would result in a far more limited consolidation of crofting law and would frustrate a widely supported effort to replace, simplify and clarify the accumulated laws that set the framework for crofting today.

I hope that this letter is helpful in setting out the Government’s response to the Subordinate Legislation Committee’s Stage 1 report ahead of Stage 2 of the Crofting Reform (Scotland) Bill.

Yours sincerely,

Iain Dewar
Crofting Bill Team Leader
Background

1. Under Rule 9.6.2 of Standing Orders the Committee submitted its report on the delegated powers provisions in the Legal Services (Scotland) Bill to the Justice Committee, as lead committee for the Bill, on 6 January 2010.

2. On 25 May 2010, Andrew MacKenzie, Head of the Legal Services (Scotland) Bill team, wrote to the Clerk of the Subordinate Legislation Committee responding to its Stage 1 report.

Scottish Government Response

3. The response indicates that the Scottish Government intends to seek to amend the Bill in line with most of the Subordinate Legislation Committee’s recommendations on the delegated powers contained in the Bill.

4. The only exception to this is the Committee’s recommendations with regard to paragraph 2(2) of schedule 4 relating to the imposition of financial penalties on approved regulators. Such penalties will be specified in regulations subject to negative procedure. The Committee recommended that a ceiling on the financial penalties prescribed in regulations should be specified on the face of the Bill. If the Scottish Government did not agree to this, the Committee recommended that the regulations be subject to affirmative procedure.

5. The Scottish Government has indicated that specifying a maximum penalty on the face of the Bill would be too inflexible to adjust the amount once the regulatory framework was in place. It also indicated that the maximum penalty will be set at a reasonable level and that affirmative procedure is unnecessary.

Progress of the Bill

6. The Bill passed Stage 1 on 28 April 2010. Day 1 of Stage 2 will be held on 8 June 2010.

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

8. Members are invited to note the Scottish Government’s response to the Subordinate Legislation Committee’s report on the Legal Services (Scotland) Bill at Stage 1.

Irene Fleming
Clerk to the Committee
Legal Services (Scotland) Bill
Scottish Government response to SLC Stage 1 Report

In its Stage 1 report on the Legal Services (Scotland) Bill ("the Bill"), the Subordinate Legislation Committee ("the Committee") raised a number of concerns about various delegated powers. As requested, we have prepared a formal response to these points in advance of Stage 2, which is expected to start in June.

This response focuses on those delegated powers about which the Committee made specific recommendations or comments. It does not cover those which the Committee determined it did not need to draw the attention of the Parliament to, which are found in the following sections: 5(6), 8(2)(c), 8(5), 9(3), 22(1), 24(9), 26(1), 29(6), 33(1), 35(1), 34(6), 39(9), 40(7), 41(5), 52(2), 55(10), 64(7), 65, 67(5), 68(6), 73(6), 75(2)(f), 83, 93, 100(1) and 102(2). In addition, the Committee stated that it is content with our explanation of the delegated powers in section 35(2) and schedule 4(11)(2), and so these are also not included in this response.

Section 6(7) - Approval of regulators
Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

The Committee expressed concern that the negative procedure is to be used for this power, given that “the express inclusion of criteria for approval, and the specification of categories of bodies which may or may not be an approved regulator, demonstrated that the scope of the power goes beyond matters of detail and administration and into matters of substance”.

As stated previously, we believe that the negative procedure is more appropriate because the power will not be used to add new criteria which are unrelated to what is in the Bill. However, we have given further consideration to this power in light of the Committee’s concern, and intend to offer an amendment at Stage 2.

Firstly, the amendment will limit the power in section 6(7)(b), which allows further provision to be made about the criteria for the approval of approved regulators, in order to address concerns that this could be used to make substantive changes. The ability to set new criteria will be narrowed by reference to criteria which relate to the applicant’s capability to act as an approved regulator. Any new criteria will therefore be linked to the functions of approved regulators, which are clearly set out in the Bill.

Secondly, the amendment will remove section 6(7)(c) entirely. This power permits provision to be made which could limit the types of bodies which may become approved regulators. As noted in our earlier response, we recognise that this power is very wide. We now consider this power to be unnecessary. The Scottish Ministers are able to exclude unsuitable applicants by reference to their application, and we do not think it likely that it would ever be desirable
to exclude an entire class of applicants without consideration on an individual basis.

Section 7(10) - Authorisation to act
Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

As with section 6(7), the Committee suggested that the negative procedure is inappropriate for the power in section 7(10), given that it can be used to alter the criteria for authorisation (under section 7(10)(b)). On further reflection, we feel that the power in section 7(10)(b) is unnecessary, given that any further criteria which are required can be added using the power in section 6(7), and would carry through to the authorisation process under section 7(2)(b). Therefore, we intend to put forward an amendment at Stage 2 to remove this. Section 7(10)(a), which relates to the process for requests for authorisation, will remain as it is currently.

Section 27(1) – Guidance on functions
Power conferred on: Scottish Ministers
Power exercisable by: Guidance
Parliamentary procedure: None – publication only

The Committee noted that some clarification is required for this provision. As stated in our previous response, we intend to introduce an amendment at Stage 2 to make clear that any guidance is to be issued to all approved regulators.

Section 37(6) - Eligibility criteria
Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

The Committee expressed concern with the first element of this delegated power, in section 37(6)(a), which permits further provision to be made about eligibility to be a licensed provider. It suggests that this power could be used to make substantive changes to the eligibility criteria, and that adequate justification has not been given for making this power subject to the negative procedure.

Following further consideration of this provision, we intend to introduce an amendment at Stage 2. This amendment will split the power in section 37(6)(a) into two parts. The first part will consist of a power to make further provision setting out addition categories of body which may or may not be eligible to be a licensed provider. This could obviously be used to make fairly substantive changes to the eligibility criteria, and we therefore propose to make it subject to the affirmative procedure. The second part will consist of a more general power to make further provision about eligibility criteria. In contrast with the first part, this will be used within the context of the criteria
already set out in section 37, rather than to make any substantive changes. As such, this part will be subject to the negative procedure.

Section 52(2) - More about investors  
**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

The Committee suggested that this power, which allows further provision to be made about interests (i.e. investors) in licensed providers, should be subject to the additional scrutiny of the affirmative procedure. We acknowledge that this power is potentially very wide ranging but, as stated in our previous response, feel that this is necessary given the importance of ensuring that the provisions around outside investors are robust. We also maintain that the negative procedure is appropriate for the majority of these powers, which apply only to a very narrow class of people. We therefore do not intend to change the parliamentary procedure to be used for the powers in section 52(2)(a)(i) to (iii) or 52(2)(b). However, we do accept the Committee’s recommendation in relation to the power in section 52(2)(a)(iv), as this involves modifying a definition in the Bill itself. We will therefore put forward an amendment at Stage 2 to make this power subject to the affirmative procedure.

Section 74(7) - Certification of bodies  
**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

The power in this section is equivalent to that applying to the approval process for approved regulators in section 6(7) of the Bill. The Committee raised similar concerns about the use of the negative procedure. Following further consideration, we intend to introduce an amendment to this power at Stage 2. This will be equivalent to that offered for section 6, described above. Section 74(7)(b) will be narrowed by reference to criteria which relate to the applicant’s capability to act as an approving body, and section 74(7)(c) will be removed entirely.

Section 81(4) - Ministerial intervention  
**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

Section 81(4) gives the Scottish Ministers a power to require an approving body (of confirmation agents) to carry out an annual review, and send a report to the Scottish Ministers. As indicated in our previous response, we intend to introduce an amendment at Stage 2 remove this power and insert a requirement to carry out such a review on the face of the Bill. A delegated power will still be required to make provision about these reviews, which will be similar to that in section 24(9) in relation to the assessment of licensed providers.
Section 81(5) - Ministerial intervention
Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

The Committee expressed concern at the width of this power, which allows the Scottish Ministers to make further provision about approving bodies and confirmation agents. It suggested that, given the other powers in Part 3 relating to confirmation agents and approving bodies, such a wide power is unnecessary.

After further consideration, we agree that this power is unnecessarily wide at present. However, notwithstanding the other powers available in Part 3, we believe that there is a need for a power to create additional regulatory safeguards if this proves necessary once the regulatory regime is operational. Therefore, we intend to introduce an amendment at Stage 2 to link the power to this purpose, with the effect that the Scottish Ministers will only be able to make further provision relating to approving bodies or confirmation agents where this is necessary in order to safeguard the interests of clients of confirmation agents.

Schedule 4 Paragraph 2(2)
Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

As set out in our previous response, we believe that this power and the parliamentary procedure selected are appropriate. Specifying a maximum penalty on the face of the Bill would take away the flexibility to adjust that amount as may be required once the regulatory framework is operational. The maximum penalty will be set at a reasonable level, and we do not believe the extra scrutiny offered by the affirmative procedure is necessary.

I hope this has been helpful.

ANDREW MACKENZIE