SUBORDINATE LEGISLATION COMMITTEE

AGENDA

22nd Meeting, 2010 (Session 3)

Tuesday 29 June 2010

The Committee will meet at 2.15 pm in Committee Room 3.

1. **Decision on taking business in private:** The Committee will decide whether to take item 6 in private.

2. **Wildlife and Natural Environment (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

3. **Draft instruments subject to approval:** The Committee will consider the following—

   - the Cairngorms National Park Elections (Scotland) Amendment Order 2010 (SSI 2010/draft);
   - the Cairngorms National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2003 Modification Order 2010 (SSI 2010/draft);
   - the Loch Lomond and The Trossachs National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2002 Modification Order 2010 (SSI 2010/draft);
   - the Scottish Local Government Elections Amendment Order 2010 (SSI 2010/draft).

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

   - the National Health Service (Tribunal) (Scotland) Amendment Regulations 2010 (SSI 2010/227);
   - the National Health Service (Tribunal) (Scotland) Amendment (No. 2) Regulations 2010 (SSI 2010/266);
   - the National Health Service (Vocational Training for General Dental Practice) (Scotland) Amendment Regulations 2010 (SSI 2010/229);
   - the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2010 (SSI 2010/237);
the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No. 2) Regulations 2010 (SSI 2010/267);
the Rice Products from the United States of America (Restriction on First Placing on the Market) (Scotland) Revocation Regulations 2010 (SSI 2010/248);
the Notice to Local Authorities (Scotland) Amendment Regulations 2010 (SSI 2010/251);
the Grampian Joint Fire and Rescue Board (Specified Equipment) (Scotland) Order 2010 (SSI 2010/252);
the Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010 (SSI 2010/264).

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

   the Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No. 6 and Savings) Order 2010 (SSI 2010/249 (C.13)).

6. **Crofting Reform (Scotland) Bill**: The Committee will consider the Scottish Government’s response to points raised on the delegated powers provisions in this Bill after Stage 2, and the contents of a draft report.

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The papers for this meeting are as follows—

Legal Brief SL/S3/10/22/1 (P)

Summary of Recommendations SL/S3/10/22/2

**Agenda item 2**

*Wildlife and Natural Environment (Scotland) Bill*

*Delegated Powers Memorandum*

**Agenda item 4**

Instrument Responses SL/S3/10/22/3

**Agenda item 6**

Scottish Government response SL/S3/10/22/4

Draft Report SL/S3/10/22/5 (P)
The Committee will be invited to consider the following recommendations at the meeting. Decisions are a matter for the Committee.

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**Agenda Item 2  Wildlife and Natural Environment (Scotland) Bill**

**Section 14(5) – Power to specify invasive animals and plants outwith their native range which specified persons must provide notification of**

The Committee may wish to ask the Scottish Government—

Given that the breadth of the power may appear to be disproportionate if it is intended to impose duties on ordinary members of the public, the Scottish Government is asked for an indication of the types of persons whom it is intended will be subject to a notification duty and who will in consequence will be subject to criminal sanctions in the event of a breach of duty?

**Section 15 – Non-native species code**

The Committee may wish to ask the Scottish Government—

Given that the provisions of new section 14C(7) are in identical terms to, and have the same effect as, the provisions of section 37(9) of the Animal Health and Welfare (Scotland) Act 2006 in respect of animal welfare codes and given that a failure to comply with a relevant provision of an animal welfare code under section 37(9) of the 2006 Act or a relevant provision of a code of practice under new section 14C(7) may be relied upon as tending to establish liability for a criminal offence, the Scottish Government is asked why affirmative procedure is adopted with respect to an animal welfare code under the 2006 Act but neither affirmative nor negative procedure is proposed with respect to a code under new section 14C?

**Section 18(3) and (4) – Delegation of a licence granting power to a local authority**
The Committee may wish to ask the Scottish Government—

Given that delegation of licensing functions to SNH is to be made by written direction, how does the Scottish Government intend to publish the fact that there has been a delegation of licensing functions to SNH, or otherwise make the public aware that there has been such a delegation? Can this be made clear on the face of the Bill?

Section 23 – Deer management code of practice

The Committee may wish to ask the Scottish Government—

Given that the code of practice on deer management will drive and influence certain actions on the part of SNH, why does the Scottish Government consider that some form of parliamentary scrutiny is not required?

Section 27(7) – Protection of Badgers

The Committee may wish to ask the Scottish Government—

Given that delegation of licensing functions to SNH is to be made by written direction, how does the Scottish Government intend to publish the fact that there has been a delegation of licensing functions to SNH, or otherwise make the public aware that there has been such a delegation? Can this be made clear on the face of the Bill?

Agenda Item 3 Instruments subject to annulment

The Cairngorms National Park Elections (Scotland) Amendment Order 2010 (SSI 2010/draft)


The Scottish Local Government Elections Amendment Order 2010 (SSI 2010/draft)
The Committee may wish to consider if it is content with these instruments.

**Agenda Item 4  Instruments subject to annulment**

The National Health Service (Tribunal) (Scotland) Amendment Regulations 2010 (SSI 2010/227)

The Committee may wish to report a drafting error has been made in these regulations since the references to 2 copies in Forms 1, 2, 3 and 5 in Schedule 2 of the 2004 Regulations have not been amended to 5 copies to reflect the substantive changes made to the requirement to produce 5 copies. This inconsistency is not considered to affect the validity or operation of the instrument however it has the potential to confuse applicants. The Committee may wish to welcome the commitment made by the Scottish Government to lay further amending regulations to address this point.

The National Health Service (Tribunal) (Scotland) Amendment (No. 2) Regulations 2010 (SSI 2010/266)

The Committee may wish to be content with this instrument and also, for its interest, with the explanation provided in the letter to the Presiding Officer concerning the breach of the 21 day rule.

The National Health Service (Vocational Training for General Dental Practice) (Scotland) Amendment Regulations 2010 (SSI 2010/229)

The Committee may wish to report this instrument to the lead committee and the Parliament, as—

- it is considered that regulation 2(6) fails to follow normal drafting practice. This paragraph could have made the consequential amendment of the 2010 Regulations directly, which the Committee may think would have been more understandable to the reader, rather than making the amendment indirectly through an amendment of the 2004 Regulations; and

- regulation 2(6) contains a drafting error, in referring to the National Health Service (Vocational Training in General Dental Practice) (Scotland) Regulations 2004 rather than to that instrument’s correct title.

It is not considered likely, however, that either of these points will affect the operation of these Regulations.
The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2010 (SSI 2010/237)

The Committee may wish to report this instrument on the ground of defective drafting, in respect that the error contained in regulation 2(2) is such that, as is acknowledged by the Scottish Government, the Regulations fail to apply, as they are intended to, to proceedings commenced after the Regulations were made, on 10 June 2010, but before they come into force on 5 July 2010.

The Committee may also welcome the amending Regulations which have been subsequently laid, in order to address this matter.

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No 2) Regulations 2010 (SSI 2010/267)

The Committee may wish to be content with this instrument and welcome the swift correction of the error identified in SSI 2010/237. The Committee may also wish to be content, for its interest, with the explanation provided in the letter to the Presiding Officer concerning the breach of the 21 day rule.

The Rice Products from the United States of America (Restriction on First Placing on the Market) (Scotland) Revocation Regulations 2010 (SSI 2010/248)

The Committee may wish to be content with this instrument and also, for its interest, with the explanation provided in the letter to the Presiding Officer concerning the breach of the 21 day rule.

The Notice to Local Authorities (Scotland) Amendment Regulations 2010 (SSI 2010/251)

The Grampian Joint Fire and Rescue Board (Specified Equipment) (Scotland) Order 2010 (SSI 2010/252)

The Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010 (SSI 2010/264)

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

**Agenda Item 5 Instruments not laid before the Parliament**
The Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No. 6 and Savings) Order 2010 (SSI 2010/249)

The Committee may wish to consider if it is content with this instrument.
SUBORDINATE LEGISLATION COMMITTEE
22nd Meeting, 2010 (Session 3)
Tuesday 29 June 2010
Instrument Responses

INSTRUMENTS SUBJECT TO ANNULMENT

The National Health Service (Tribunal) (Scotland) Amendment Regulations 2010 (SSI 2010/227)

On 16 June 2010 the Scottish Government was asked:
Given that 5 copies of supporting documents for representations and statements in answer are now required to be submitted by virtue of the changes made by regulation 2(3), why are references to the number of copies which must be submitted in Forms 1, 2, 3 and 5 not also amended and what is the effect of this inconsistency considered to be?

The Scottish Government responded:
The Scottish Government is grateful to the SLC for drawing this matter to their attention and agrees that the reference to the number of copies that are to be submitted together with forms 1, 2, 3 and 5 should also have been amended from “2” to “5”. It is not thought that this error will have legal effect upon the interpretation of the regulations as a whole. However, in order to put the workings and procedures of the NHS Tribunal beyond doubt the Scottish Government will bring forward a further set of regulations to make the appropriate amendments to the National Health Service (Tribunal) (Scotland) Regulations 2004, this further set of regulations shall come into force on 2nd July 2010.

The National Health Service (Vocational Training for General Dental Practice) (Scotland) Amendment Regulations 2010 (SSI 2010/229)

On 15 June 2010 the Scottish Government was asked:
(1) Why is the approach taken in regulation 2(6) of amending the 2010 Regulations indirectly by adding a new regulation 7A of the 2004 Regulations, rather than simply providing in regulation 2(6) for the consequential amendment to the 2010 Regulations? Would the latter approach have been clearer and in accordance with normal drafting practice?

(2) What is the effect of the apparent error in that new regulation 7A(a) considered to be, in referring to the National Health Service (Vocational Training in General Dental Practice) (S) Regulations 2004, rather than “for”?

The Scottish Government responded:
(1) The Scottish Government accepts that the approach taken in regulations 2(6) is unusual, however it has legal effect and provides the amendment to the 2010 regulations as required in order to permit specialised orthodontists access to the dental list. The Scottish Government believes that this approach will better assist the reader of
any consolidated version of the 2004 regulations in understanding the new approach to specialised orthodontists under the 2004 regulations.

(2) The Scottish Government is grateful to the SLC for drawing this error to its attention and agrees that the reference should be to “for” rather than “in”; there are no regulations called the National Health Service (Vocational Training in General Dental Practice) (Scotland) Regulations 2004.

It is not thought that this error will cause any problem in practice as it is an obvious error and it is apparent in the context of the regulations that the reference should be to the National Health Service (Vocational Training for General Dental Practice) (Scotland) Regulations 2004.

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2010 (SSI 2010/237)

On 17 June 2010 the Scottish Government was asked:

Regulation 2(2), which is effectively in two parts, provides that regulations 3(4) and (5)(a) (providing for fixed payments to be made in respect of specified bail appeals) are to apply also to proceedings commenced on or after 30 June 2008 and before 5 July 2010 (the latter being the date on which this instrument comes into force). That is the position if the proceedings were continuing as at the date the Regulations were made. (ie 10 June 2010).

1. The Scottish Government is asked to explain the operation of regulation 2(2), with particular reference to proceedings which commenced on or after 11 June 2010 and before 5 July 2010, which proceedings would satisfy the requirements of the first part of regulation 2(2), ie in terms of having commenced on or after 30 June 2008 and before 5 July 2010, but not the second part of that regulation, ie such proceedings could not be said to be “continuing” as at the date the Regulations were made, namely 10 June 2010.

It is also noted, in this regard, that the Executive Note (para 3 of Policy Objective section) refers to application to proceedings which “have not concluded before 5 July 2010”. This appears to contemplate the linkage being to the date on which this instrument comes into force, rather than the date on which it is made, as in fact provided for in regulation 2(2).

2. Does the provision within regulation 2(2) to which we refer represent a drafting error and if so how does it affect the operation of this instrument?

3. If not a drafting error, is the effect of the provision sufficiently clear with respect to proceedings falling within the period mentioned above?

The Scottish Government responded:

The Scottish Government is grateful to the Committee for bringing this issue to its attention. The Scottish Government agrees with the Committee that there is a drafting error in regulation 2(2). Specifically, it will not be possible for proceedings commenced on or after 11th June 2010 to satisfy the requirement of being proceedings “continuing as at” 10th June 2010. The Regulations therefore fail to apply, as they are intended to,
to proceedings commenced after they are made (i.e. 10th June 2010) but before they come into force on 5th July 2010.

To remedy this drafting error, the Scottish Government intends to make a further set of Regulations. The new Regulations will extend the effect of the amendments made by regulations 3(4) and (5)(a) in relation to proceedings which begin between 11th June and 5th July 2010, provided those proceedings are continuing as at 4th July 2010. The Scottish Government will lay this further set of Regulations before the Parliament as soon as possible.
Thank you for your letter of 22 June 2010 to Elspeth MacDonald, which has been passed to me for a reply. Your letter sought an explanation on the following matters.

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

The Committee therefore asks the Scottish Government:

- why it has not made provision for the maximum penalty which may be imposed in relation to offences created by the exercise of the power to make election regulations in order that this can be approved by Parliament;

- if it intends to do so by amendment at stage 3; and

- if so, what the maximum penalty will be.

The Government is grateful to the Committee for drawing this to its attention. Although such provision is not always contained in primary legislation, the Government agrees that it is appropriate to include it in this Bill and intends to bring forward an amendment at Stage 3 that provides for the maximum penalty which may be imposed in relation to offences created through regulations made under paragraph 7(1) of Schedule 1 to the Bill.

The Government intends to provide that the maximum penalty for any offences created in such regulations is that they may not be punishable on indictment with imprisonment for a term exceeding 2 years or on summary conviction with imprisonment for a term exceeding 12 months or a fine exceeding level 5 on the standard scale. Where an offence is triable either way, the maximum fine will be the statutory maximum.