The Scottish Parliament
Parliament na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

23rd Meeting, 2010 (Session 3)

Tuesday 7 September 2010

The Committee will meet at 2.15 pm in Committee Room 4.

1. **Decision on taking business in private:** The Committee will decide whether to take item 5 in private.

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

   the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Treatment of Office or Body as Specified Authority) (No. 2) Order 2010 (SSI 2010/draft).

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

   the General Pharmaceutical Council (Transfer of Property, Rights and Liabilities, Fees and Grants) Order of Council 2010 (SI 2010/1618);
   the Pharmacy Order 2010 (Registration - Transitional Provisions) Order of Council 2010 (SI 2010/1619);
   the Pharmacy Order 2010 (Approved European Pharmacy Qualifications) Order 2010 (SI 2010/1620);
   the Pharmacy Order 2010 (Commencement No. 2) Order of Council 2010 (SI 2010/1621 (C. 85));
   the Criminal Legal Assistance (Fees) (Scotland) Regulations 2010 (SSI 2010/270);
   the Smoke Control Areas (Authorised Fuels) (Scotland) Regulations 2010 (SSI 2010/271);
   the Less Favoured Area Support Scheme (Scotland) Regulations 2010 (SSI 2010/273);
   the Additional Support Needs Tribunals for Scotland (Practice and Procedure) Amendment (No. 2) Rules 2010 (SSI 2010/274);
   the Additional Support for Learning (Co-ordinated Support Plan and Dispute Resolution) (Scotland) Amendment Regulations 2010 (SSI 2010/275);
the Additional Support for Learning (Appropriate Agencies and Sources of Information) (Scotland) Amendment of Commencement Dates Order 2010 (SSI 2010/276);
the Charities Accounts (Scotland) Amendment Regulations 2010 (SSI 2010/287);
the General Pharmaceutical Council (Appeals Committee Rules) Order of Council 2010 (SI 2010/1614);
the General Pharmaceutical Council (Fitness to Practise and Disqualification etc. Rules) Order of Council 2010 (SI 2010/1615);
the General Pharmaceutical Council (Statutory Committees and their Advisers Rules) Order of Council 2010 (SI 2010/1616);
the General Pharmaceutical Council (Registration Rules) Order of Council 2010 (SI 2010/1617);
the Smoke Control Areas (Exempt Replaces) (Scotland) Order 2010 (SSI 2010/272);
the Education (Treatment of Student Loans on Sequestration) (Scotland) Regulations 2010 (SSI 2010/300);
the Nutrition and Health Claims (Scotland) Amendment Regulations 2010 (SSI 2010/307);
the Addition of Vitamins, Minerals and Other Substances (Scotland) Amendment Regulations 2010 (SSI 2010/308).

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

   - the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 1) Order 2010 (SSI 2010/297 (C. 15));
   - the Education (Additional Support for Learning) (Scotland) Act 2009 (Commencement No. 2) Order 2010 (SSI 200/277 (C. 14));
   - Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2010 (SSI 2010/279);
   - Act of Adjournal (Criminal Procedure Rules Amendment No. 2) (Presentation of Conviction Appeals in Writing) 2010 (SSI 2010/309);
   - Act of Sederunt (Lands Valuation Appeal Court) 2010 (SSI 2010/310).

5. **Wildlife and Natural Environment (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, and the contents of a draft report.

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The papers for this meeting are as follows—

Legal Brief  SL/S3/10/23/1 (P)

Summary of Recommendations  SL/S3/10/23/2

**Agenda Items 3 and 4**

Instrument Responses  SL/S3/10/23/3

**Agenda Item 5**

Scottish Government response  SL/S3/10/23/4

Draft Report  SL/S3/10/23/5 (P)
SUBORDINATE LEGISLATION COMMITTEE

23rd Meeting, 2010 (Session 3)

Tuesday 7 September 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  Draft instruments subject to approval

The Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Treatment of Office or Body as Specified Authority) (No. 2) Order 2010 (SSI 2010/draft)

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

Agenda Item 3  Instruments subject to annulment

The General Pharmaceutical Council (Transfer of Property, Rights and Liabilities, Fees and Grants) Order of Council 2010 (SI 2010/1618)

The Committee may wish to report that this instrument contains an error, in respect that the text of article 6(1) is incomplete, the words “by or” having been omitted where reference is made thereto the (General Pharmaceutical) Council, and his being inconsistent with the terms of the earlier reference which is made in that article with respect to the (Royal Pharmaceutical) Society.

The Committee may wish to note the intention of the Westminster Department of Health to arrange for this matter to be addressed by means of the correction slip process.


The Committee may wish to report that this instrument contains two drafting errors, in respect that references contained within article 5(11) to paragraph (11) and within
article 5(14) to paragraph (12) should actually be to paragraph (12) and paragraph (13), respectively.

The Committee may wish to take the view that these are not however considered likely to affect the operation of the instrument, and to note the intention of the Westminster Department of Health to issue corrections slips and to amend the electronic version of the instrument on the OPSI website.

The Pharmacy Order 2010 (Approved European Pharmacy Qualifications) Order 2010 (SI 2010/1620)

The Committee may wish to find this instrument satisfactory but to note that there is an error in the first paragraph of the explanatory note in that the instrument does not currently provide for the recognition of pharmacy qualifications awarded by Switzerland.

The Pharmacy Order 2010 (Commencement No. 2) Order of Council 2010 (SI 2010/1621 (C. 85))

The Committee may wish to report this Order as containing a drafting error, in respect of the inclusion of a reference within the instrument to Schedule 1 of the Pharmacy Order 2010 (insofar as not already in force) being commenced under this instrument. Schedule 1 has however already been brought into force by other provision.

However, the Committee may wish to take the view that this error essentially concerns a superfluous reference, and is not considered likely to affect the validity or operation of this instrument.

The Criminal Legal Assistance (Fees) (Scotland) Regulations 2010 (SSI 2010/270)

The Committee may wish to report that it is content with this instrument, and for its interests, with the reason given for the 21 day rule not having been complied with.

The Smoke Control Areas (Authorised Fuels) (Scotland) Regulations 2010 (SSI 2010/271)

The Committee may wish to report this instrument as follows—
• Paragraph 46 of the Schedule to these Regulations appears to be defectively drafted as it fails to regulate the manner of burning of the fuel Unicite as well as its composition at the point of sale.

• It is recommended that the Scottish Government rectify this error to ensure the proper operation of these Regulations.

• A typographical error appears in paragraph 46(a)(ii). The reference to sub-paragraph (d) should be to sub-paragraph (c).

• It welcomes the Scottish Government’s commitment to rectify this error at the earliest opportunity.

The Less Favoured Area Support Scheme (Scotland) Regulations 2010 (SSI 2010/273)

The Committee may wish to accept for its interests the explanation provided by the Scottish Government for the breach of the 21 day rule between laying this instrument and the coming into force date.

However, the Committee may also wish to draw to the attention of the lead Committee that it may have been useful (given that the breach of that rule in this instance has meant that the Committees consider this instrument some 2 months after it has been brought into force) if the letter provided to the Presiding Officer had explained in greater detail the actions that were scheduled in advance to prepare the instrument, and the actual circumstances, which led to it not being possible to make and lay the instrument any earlier than 1 July 2010.

The Committee may wish to report that the meaning of regulation 10(3) could be clearer, in respect that—

• it applies where “the hectare multiplier” (1 of 2 figures specified in Schedule 8) is “unrepresentative of the usual enterprise mix of the applicant”, when it appears that the policy intention is rather that it should refer to where the enterprise mix of livestock units (after the culling of stock in accordance with regulation 10(3)) becomes unrepresentative of the usual mix;

• the response to the Committee confirms that the policy intention is that the applicant farmer should determine when the “enterprise mix” of live stock becomes unrepresentative, but this is not specified in regulation 10(3); and

• the last 2 lines could make clearer that the Scottish Ministers may substitute a figure of their own choice as the hectare multiplier, for the purposes of the formula in regulation 10(1), independently from the figures in Schedule 8.
The Committee may wish to report that the Parliament finds satisfactory for its interests the explanation given by the Scottish Government in its letter to the Presiding Officer dated 1 July 2010 for the failure to comply with article 10(2) of the Scotland Act (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SSI 1999/1096). The Committee may otherwise wish to find this instrument to be satisfactory.

The Additional Support for Learning (Co-ordinated Support Plan and Dispute Resolution (Scotland) Amendment Regulations 2010 (SSI 2010/275)

The Committee may wish to report that this instrument addresses an inconsistency in the wording used in new regulations inserted by SSI 2010/149, which inconsistency the Committee had drawn to the Scottish Government’s attention. The Committee may otherwise wish to find this instrument to be satisfactory.

The Additional Support for Learning (Appropriate Agencies and Sources of Information (Scotland) Amendment of Commencement Dates Order 2010 (SSI 2010/276)

The Committee may wish to report that the Parliament finds satisfactory for its interests the explanation given by the Scottish Government in its letter to the Presiding Officer dated 1 July 2010 for the failure to comply with article 10(2) of the Scotland Act (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SSI 1999/1096). The Committee may otherwise wish to find this instrument to be satisfactory.
The Charities Accounts (Scotland) Amendment Regulations 2010 (SSI 2010/287)

The Committee may wish to report that an explanation has been provided as to the meaning and effect of regulation 9(a), with which it is satisfied.

The General Pharmaceutical Council (Appeals Committee Rules) Order of Council 2010 (SI 2010/1614)

The General Pharmaceutical Council (Fitness to Practise and Disqualification etc. Rules) Order of Council 2010 (SI 2010/1615)

The General Pharmaceutical Council (Statutory Committees and their Advisers Rules) Order of Council 2010 (SI 2010/1616)

The General Pharmaceutical Council (Registration Rules) Order of Council 2010 (SI 2010/1617)

The Smoke Control Areas (Exempt Fireplaces) (Scotland) Order 2010 (SSI 2010/272)

The Education (Treatment of Student Loans on Sequestration) (Scotland) Regulations 2010 (SSI 2010/300)

The Nutrition and Health Claims (Scotland) Amendment Regulations 2010 (SSI 2010/307)

The Addition of Vitamins, Minerals and Other Substances (Scotland) Amendment Regulations 2010 (SSI 2010/308)

The Committee may wish to find these instruments satisfactory.

Agenda Item 4 Instruments not laid before the Parliament

The Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 1) Order 2010 (SSI 2010/297) (C15)

The Committee may wish to be content with this instrument and, to the extent of its interest, with the account provided by the Scottish Government as to why it has been necessary to bring this instrument into force immediately following up on Royal Assent, and without the usual period between making the order and it coming into force.
The Education (Additional Support for Learning) (Scotland) Act 2009 (Commencement No. 2) Order 2010 (SSI 2010/277 (C. 14))

Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2010 (SSI 2010/279)

Act of Adjournal (Criminal Procedure Rules Amendment No. 2) (Presentation of Conviction Appeals in Writing) 2010 (SSI 2010/309)

Act of Sederunt (Lands Valuation Appeal Court) 2010 (SSI 2010/310)

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

The General Pharmaceutical Council (Transfer of Property, Rights and Liabilities, Fees and Grants) Order of Council 2010 (SI 2010/1618)

On 12 August 2010 the Scottish Government was asked:
Whether the words “by or” have been omitted in error after “done” in the last line of article 6(1) of the order and if so whether article 6(1) is considered to have proper effect to place the Council in the position of the Society in relation to things done by the Society as appears to have been the intention.

The Scottish Government responds as follows:
The Scottish Government is grateful to the SLC Legal Advisers for pointing out this error and agrees that the words “by or” have been omitted in error after “done” in the last line of article 6(1) of the order.

The Scottish Government has contacted the Department of Health (which has the lead policy responsibility for this instrument) about this and they have advised that the Order will be amended to correct this error. The Department of Health has advised that the need for a correction slip for this Order has therefore been lodged with the S.I. Registrar who will deal with this as soon as time and resources permit.


On 22 July 2010 the Scottish Government was asked:
1. Article 5(11) provides ‘Except as provided for by paragraph (11)’. Given that the phrase appears in paragraph 11 (of article 5) it is not clear which paragraph is being referred to. What paragraph (if any) is it intended that the caveat refer to and what does the Scottish Government consider is the effect on the meaning and interpretation of article 5(11), given the erroneous reference to ‘paragraph (11)”?

2. Article 5(14) refers to ‘the notice under paragraph (12) [of article 5]. Given that article 5(12) makes no reference to a notice, which notice or which paragraph is it intended should be referred to in article 5(14) and what does the Scottish Government consider is the effect on the meaning and interpretation of article 5(14) of the erroneous reference to paragraph (12)?
The Scottish Government responds as follows:
The Scottish Government is grateful to the SLC Legal Advisers for pointing out these errors.

1. In Article 5(11), the reference to "paragraph (11)" should be "paragraph (12)"; and

2. In Article 5(14), the reference to "paragraph (12)" should be "paragraph (13)".

The Order will be amended by the Department of Health (which has the lead policy responsibility for this instrument) to make these corrections. This will be done both by issuing corrections slips and by amending the electronic versions on the O PSI website.

The Pharmacy Order 2010 (Approved European Pharmacy Qualifications) Order 2010 (SI 2010/1620)

On 16 July 2010 the Scottish Government was asked:
I write to inquire if you can assist with the following informal inquiry:

‘Appropriate European diplomas’ are defined in article 2(2) of the instrument. Articles 2(2)(b)(i) and 2(2)(b)(iv) refer to ‘a relevant European State’ and to the ‘reference date’ in respect of that state. In terms of article 3 of the Pharmacy Order (SI 2010/231), ‘a relevant European State’ means an EEA State or Switzerland. Article 1(2) of this instrument defines ‘reference date’ as the date specified in relation to the relevant European State in Annex V, point 5.6.2 of Directive 2005/36/EC (‘the 2005 Directive’).

Annex V, point 5.6.2 of the 2005 Directive lists all the EU countries and gives a reference date in respect of each. The countries listed do not include Iceland, Lichtenstein, Norway or Switzerland as they are not EU countries.

I have been able to satisfy myself that, for the purposes of the EEA Agreement, Annex V point 5.6.2 of the Directive is to be read as including a reference to Iceland, Lichtenstein and Norway, together with a specified reference date in respect of each country.

I have examined the EFTA Agreement but I have not been able to find any reference to Switzerland, and to the recognition of Swiss pharmacy qualifications, in the context of the 2005 Directive. I have therefore not been able to satisfy myself that, for the purposes of the EFTA Agreement (and accordingly for the purposes article 2(2)(b) of the instrument) Annex V, point 5.6.2 of the 2005 Directive is to be read as including a reference to Switzerland, together with a specified reference date.

Are you able to direct me to a relevant provision within the EFTA Agreement or are you otherwise able to assist in clarifying the situation with respect to Switzerland and ‘its reference date’ for the purposes of article 2(2)(b) of this instrument?
The Scottish Government responds as follows:

Many thanks for your informal query. I have now had the opportunity to look into this matter and to discuss this with the Department of Health. Our response to your query is as follows:

- The above Order (SI 2010/1620) provides for the approval of qualifications by reference to the framework for mutual recognition in Directive 2005/36/EC.

- Directive 2005/36/EC currently does not apply to Switzerland, although there is a bilateral Agreement between the EU and Switzerland in respect of the predecessor Directives (now repealed) which will be amended so that suitable modifications can be made to bring Switzerland under Directive 2005/36/EC. Please see the link to the Agreement as it appears in the OJ, with the covering decision: http://eur.lex.europa.eu/JOIndex.do?year=2002&serie=L&textfield2=114&Submit=Search&submit=Search&ihtmlang=en.

- The 2010/1620 Order anticipates amendments to that Directive as they are made from time to time, using the power in paragraph 1A of Schedule 2 to the European Communities Act 1972, and we would anticipate (subject to reviewing the Order's provisions in light of the terms of the amended Agreement) that the future application of the Directive in relation to Switzerland would not require further amendment.

- In light of your informal query, we think on reflection that we could have explained the position with Switzerland better in our Explanatory Note because currently no Swiss qualifications fall under the Directive. DH have advised that they will look into making a suitable revision to the Explanatory Note in the electronic version of the SI on OPSI. We will work together with DH in order to agree any such revision.

The Pharmacy Order 2010 (Commencement No. 2) Order of Council 2010 (SI/2010/1621)

On 11 August 2010 the Scottish Government was asked:

Whether it agrees that the reference to Schedule 1 of the Pharmacy Order in the first entry in the Schedule to SI 2010/1621 is superfluous and of no effect given that Schedule 1 of the Pharmacy Order appears to have been fully commenced with effect from 11 February 2010 by article 1(2)(b) of the Pharmacy Order?

If it does not agree, what does the Scottish Government consider is the effect of that reference?

The Scottish Government responds as follows:

The Scottish Government is grateful to the SLC Legal Advisers for drawing this to our attention. We agree with the conclusion of the SLC that the reference to Schedule 1 in the first entry in the Schedule is superfluous. The Department of Health have also considered this and agree the reference was included in error. In our view, however, this drafting error does not have any adverse legal effect on the commencement provisions in the Order.
The Smoke Control Areas (Authorised Fuels) Scotland Regulations 2010 (SSI 2010/271)

On 13 August 2010 the Scottish Government was asked:

Whether it agrees that the omission of what was paragraph 45(c) of the Schedule to the Smoke Control Areas (Authorised Fuels) (Scotland) (No.2) Regulations 2008 in the re-enactment of the authorisation of Unicite in the Smoke Control Areas (Authorised Fuels) (Scotland) Regulations 2010 permits the use of Unicite in a manner which would exceed the maximum permitted composition of briquettes within the mixture, and whether this was the policy intention? If it does not agree, what does the Scottish Government consider is the effect of the omission?

Can the Scottish Government confirm that the reference in paragraph 46(a)(ii) of the Schedule to sub-paragraph (d) is an error and that the reference should be to the text contained in sub-paragraph (c)?

The Scottish Government responds as follows:

What was paragraph 45(c) of the Schedule to the Smoke Control Areas (Authorised Fuels) (Scotland) (No.2) Regulations 2008 was omitted in the re-enactment of the authorisation of Unicite in the Smoke Control Areas (Authorised Fuels) (Scotland) Regulations 2010 as it was considered that provision simply repeated the requirement imposed by sub-paragraph (a)(ii) to ensure that the proportion of Union briquettes in Unicite does not exceed the percentage range specified in that subparagraph.

Accordingly, the provision in question was omitted from the 2010 Regulations as it was considered to be superfluous, and there has been no change in the policy objective.

The Scottish Government confirms that the reference in paragraph 46(a)(ii) of the Schedule to the 2010 Regulations to sub-paragraph (d) should be a reference to sub-paragraph (c). However, we consider that in context the intended effect is clear. This reference will be corrected next time the Regulations are re-enacted.

The Less Favoured Area Support Scheme (Scotland) Regulations 2010 (SSI 2010/273)

On 13 August 2010 the Scottish Government was asked:

Could the meaning and effect of regulation 10(3) be made clearer, in respect that-

(a) a hectare multiplier “unrepresentative of the usual enterprise mix of the applicant” does not appear to be further defined, nor is it specified who shall determine when this applies,

(b) it refers in the second last line to Ministers determining the multiplier in the second column of Schedule 8, but does not specify either that such determination will substitute the figure in that column, nor whether this applies to one or both of the figures in that column, and
(c) it does not specify how Ministers shall calculate or give notice of their determination, and so far as framed as a discretion to determine, what the position is if Ministers do not so determine?

The Scottish Government responds as follows:

We think that the meaning and effect of regulation 10(3) is clear for the following reasons:

Point (a)
The context of regulation 10 is the "livestock units" (defined in regulation 2 (1)) of the applicant's business. The term "enterprise mix" refers to the mix of livestock which a farmer has on his eligible land. The term - which has been used since the Less Favoured Area Support Scheme (Scotland) Regulations 2003 is well understood by farmers. Further guidance is given to farmers in the Explanatory Notes for the Less Favoured Area Support Scheme LFASS 2010-2013. It was not thought appropriate further to define the term "unrepresentative of the usual enterprise mix of the applicant" as what constitutes the usual enterprise mix of livestock is specific to each individual farmer.

The Scottish Government takes the view that it is clear from the drafting when Regulation 10 (3) applies. It applies in a situation where the livestock on the land in question has been culled due to an outbreak of epizootic disease (in 2009 or the first year of application.) In that situation, when the farmer considers that, due to the cull, the applicable figure in the second column of Schedule 8 (as determined by regulation 10 (1)) does not reflect that farmer's usual mix of livestock, he may request that the Scottish Ministers determine the hectare multiplier to be used for the purposes of the formula in regulation 10(1). It is therefore dependent on the farmer, in such circumstances, taking a view that the multiplier would be unrepresentative. If he is of that view he may make a request.

Point (b)
The Scottish Government takes the view that it is clear from the drafting and the context that a determination made by Ministers in terms of regulation 10(3) could substitute either of the figures in the second column of Schedule 8 in its application to the applicant for the purposes of the formula in regulation 10(1). Regulation 10 (3) refers to the formula in regulation 10(1) which determines which hectare multiplier in Schedule 8 is to be used for a particular farmer according to the proportion of his livestock units which are cattle. Where the proportion of livestock units which are cattle is affected by a cull, the proportion of livestock units which are cattle could be pushed below either the 50% or the 10% levels referred to in Schedule 8 and therefore either of the figures in column 2 might require to be substituted.

Point (c)
The Scottish Ministers have discretion to determine the hectare multiplier where a farmer has made a request under regulation 10 (3). As previously explained, the "normal" enterprise mix is specific to each individual farmer and it is impossible to predict the extent and effect of a cull in any individual case. It is therefore necessary for Ministers to have discretion so that a fair result can be reached for farmers in individual cases. If, in a particular case, where a farmer had made a request under regulation 10(3), Ministers felt there were no grounds to apply a different multiplier to
that in Schedule 8, the Schedule 8 multiplier would apply as normal. A decision of the Scottish Ministers under 10(3) is subject to the possibility of an application for review under the Rural Payments (Appeals) (Scotland) Regulations 2009.

In practice, the procedure in regulation 10(3) is unlikely to be used as it applies where there has been an outbreak of epizootic disease in 2009 or the first year of application. To the best of the Scottish Government’s knowledge there has been no outbreak of epizootic disease in 2009 and the provision is only likely to be of relevance to first-time applicants in subsequent years whose historic values will be based on the first year of application and there is an outbreak of epizootic disease in that year. In that eventuality, Ministers envisage an informal, administrative procedure whereby they would notify the applicant in writing of the outcome of a determination under 10(3). It was not considered necessary to make further, over complicated provisions, about giving notice.

The Charities Accounts (Scotland) Amendment Regulations 2010 (SSI 2010/287)

On 11 August 2010 the Scottish Government was asked:
To explain the meaning and effect of “the charity’s relevant financial year” in regulation 9(a), and whether it is considered that this term requires definition in the Charities Accounts (Scotland) Regulations 2006 (SSI 2006/218), as amended.

The Scottish Government responds as follows:
"Financial year" has the meaning given to it in regulation 3 of the Charities Accounts (Scotland) Regulations 2006 and “the charity’s relevant financial year” means the financial year that is relevant to the provision. "Relevant" is given its ordinary meaning. The effect is that the calculation in regulation 10(b) of the Charities Accounts (Scotland) Regulations 2006 will be made with reference to the financial year that relates to the statement of account referred to in regulation 8 of the 2006 Regulations.

It is not considered that “the charity’s relevant financial year” requires definition in the Charities Accounts (Scotland) Regulations 2006.
INSTRUMENT NOT LAID BEFORE THE PARLIAMENT

The Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 1) Order 2010 (SSI 2010/297)

On 26 August 2010 the Scottish Government was asked:
Normally, statutory instruments are not made until at least 2 months have elapsed since the coming into force of the primary legislation under which the instrument is made. Further, while a commencement order is not subject to Parliamentary procedure, it is the Scottish Government’s usual practice for a minimum period of 10-14 days to be provided for between such an instrument being made and it coming into force, to afford notice to Parliament of the proposed commencement. Here, Royal Assent was received on 6 August, the instrument was then made on 12 August, and came into force on 16 August when the Parliament is in recess.

In the absence of any explanation within the material accompanying this instrument, the Scottish Government is asked to clarify why it has been necessary to bring it into force immediately following upon Royal Assent, and without the usual period between making the order and it coming into force.

The Scottish Government responds as follows:
It was necessary to bring section 178(3)(f) of the Criminal Justice and Licensing (Scotland) Act 2010 (“the Act”) into force without the usual period in order to comply with our European obligations under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (“the Services Directive”).

Section 178(3)(e) amends paragraph 9(3) of Schedule 2 to the Civic Government (Scotland) Act 1982 to remove the prohibition on granting sex shop licences to a person who is not resident in the United Kingdom, or was not resident in the U.K. for six months prior to a licence application being made. Section 178(3)(e) does not impose any duties or requirements on individuals, nor does it create any criminal offences. Rather it removes restrictions on individuals applying for such licences.

It was necessary to commence this paragraph immediately in order to avoid infraction proceedings from the European Commission.
Wildlife and Natural Environment (Scotland) Bill at Stage 1

I refer to your letter of 1 July, addressed to Elspeth MacDonald, requesting further explanation of a number of proposed powers, noted in the Delegated Powers Memorandum.

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

The Scottish Government’s intention is that the duty to notify will only be applied to persons who might reasonably be expected to identify the individual species. Such persons would be likely to come into contact with, and be able to identify, species in a professional or official capacity. The Policy Memorandum provides a table of examples of categories of persons the notification duty might be applied to. The table is reproduced here for ease of reference:

<table>
<thead>
<tr>
<th>Species</th>
<th>Species Specified persons for notification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chinese muntjac deer (Muntiacus reevesi)</td>
<td>Forestry/woodland managers; Professional stalkers; Agricultural and Environmental Officials</td>
</tr>
<tr>
<td>Cervus species (deer) excluding red deer (Cervus elaphus) on the refugia islands</td>
<td>Forestry/woodland managers; Professional stalkers; Agricultural and Environmental Officials</td>
</tr>
<tr>
<td>Carpet sea squirt (Didemnum vexillum)</td>
<td>Harbour Masters; Port Authorities; Agricultural and Environmental Officials</td>
</tr>
<tr>
<td>European and Canadian beavers (outwith trial reintroduction area)</td>
<td>District Salmon Fishery Boards; Water Bailiffs; Fisheries Managers; Agricultural and Environmental Officials</td>
</tr>
<tr>
<td>Floating pennywort (Hydrocotyle ranunculoides)</td>
<td>District Salmon Fishery Boards; Water Bailiffs; Fisheries Managers; Agricultural and Environmental Officials</td>
</tr>
<tr>
<td>Water primrose (Ludwigia grandiflora)</td>
<td>District Salmon Fishery Boards; Water Bailiffs; Fisheries Managers; Agricultural and Environmental Officials</td>
</tr>
</tbody>
</table>
Section 15 – Non-native species code
The code of practice is intended to be user-friendly and accessible so that it is of value to both professionals and the public. Given the subject matter of this code it is expected to require regular revision to ensure that it is up to date and relevant and incorporates new issues as they arise (which is likely given the nature of this subject). In addition the code may require updating as any new orders are made under the Bill.

The need not to take up an undue amount of Parliamentary time dealing with regular changes, together with the requirement upon Scottish Ministers when making or revising the code to consult SNH and any other person appearing to have an interest, are considered to justify that the Bill requires neither affirmative nor negative procedure.

Section 18(3) and (4) – Delegation of a licence granting power to a local authority
Currently, both the Scottish Government and SNH exercise species licensing functions. Details of the responsibilities of each body are contained on their websites. If a delegation to SNH was made to change the current split in functions, this would be noted on the appropriate pages of the Scottish Government and SNH websites. In addition to this the Scottish Government would inform relevant stakeholders prior to any change to the current split of functions. The Scottish Government does not consider that any statutory provision on this matter is necessary.

Section 23 – Deer management code of practice
Although the Bill requires SNH to have regard to the code of practice and monitor compliance with the code, a breach of the code does not operate as a direct trigger for statutory enforcement action. The code is intended to enable SNH to provide practical advice and examples to assist deer managers. It is therefore prepared by SNH for approval by the Scottish Ministers. The Scottish Government considers that this is the appropriate level of scrutiny for a code of this type, and that Parliamentary scrutiny is not therefore required.

Section 27(7) – Protection of Badgers
Currently, both the Scottish Government and SNH exercise licensing functions in relation to badgers. Details of the responsibilities of each body are contained on their websites. If a delegation to SNH was made to change the current split in functions, this would be noted on the appropriate pages of the Scottish Government and SNH websites. In addition to this the Scottish Government would inform relevant stakeholders prior to any change to the current split of functions. The Scottish Government does not consider that any statutory provision on this matter is necessary.