SUBORDINATE LEGISLATION COMMITTEE

AGENDA

24th Meeting, 2010 (Session 3)

Tuesday 14 September 2010

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

1. **Decision on taking business in private:** The Committee will decide whether to take item 7 in private.

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


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

   - the Pharmacy Order 2010 (Appeals - Transitional Provisions) Order of Council 2010 (SI 2010/2150);
   - the Criminal Legal Assistance (Fees) (No. 2) (Scotland) Regulations 2010 (SSI 2010/312);

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


5. **Housing (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.

6. **Children's Hearings (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.
7. **Correspondence to the Scottish Government:** The Committee will consider the content of a draft letter to the Scottish Government regarding the number of breaches of the 21-day rule.

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Clerk to the Subordinate Legislation Committee  
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The papers for this meeting are as follows—

- Legal Brief SL/S3/10/24/1 (P)
- Summary of Recommendations SL/S3/10/24/2
  **Agenda Item 5**
- Note from the Clerk SL/S3/10/24/3
  **Agenda Item 6**
- Note from the Clerk SL/S3/10/24/4
  **Agenda Item 7**
- Draft letter SL/S3/10/24/5 (P)
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 Scottish Parliament (Disqualification) Order 2010 (SI 2010/draft)

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

**Agenda Item 3  Instruments subject to annulment**


The Criminal Legal Assistance (Fees) (No. 2) (Scotland) Regulations 2010 (SSI 2010/312)

The Home Owner and Debtor Protection (Scotland) Act 2010 (Transitional and Saving Provisions) Order 2010 (SSI 2010/316)

The Committee may wish to find these instruments satisfactory.

**Agenda Item 4  Instruments not laid before the Parliament**

The Home Owner and Debtor Protection (Scotland) Act 2010 (Commencement) Order 2010 (SSI 2010/314) (C.16)

The Committee may wish to consider if it is content with this instrument.
Agenda Item 5  Housing (Scotland) Bill

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

Agenda Item 6  Children’s Hearings (Scotland) Bill

The Committee may wish to note the Scottish Government’s response to its stage 1 report.
SUBORDINATE LEGISLATION COMMITTEE

24th Meeting, 2010 (Session 3)

Tuesday 14 September 2010

Paper by the Clerk

Housing (Scotland) Bill – Response to SLC Stage 1 Report

Background

1. Under Rule 9.6.2 of Standing Orders, the Subordinate Legislation Committee submitted its report on the delegated powers provisions in the Housing (Scotland) Bill to the Local Government and Communities Committee, as lead committee for the Bill, on 12 April 2010.

2. On 3 September 2010, Alex Neil, Minister for Housing and Communities, wrote to the Clerk to the Subordinate Legislation Committee responding to the Committee’s Stage 1 report.

Scottish Government Response

3. The response indicates that the Scottish Government intends to seek to amend the Bill in line with the Subordinate Legislation Committee’s recommendations on the delegated powers contained in sections 24(1)(b), 142 and 146(2)(a).

4. The Committee was content at Stage 1 with the choice of procedure (affirmative) for the power in section 31, but was not persuaded by the Government’s view that the Charter would be binding on social landlords in the sense of creating standards which would be legally enforceable. The Committee contended that it would have some effect, in that failure to achieve a target would engage legal powers. The Government has merely noted the Committee’s observations.

Progress of the Bill

5. The Bill passed Stage 1 on 23 June 2010. Stage 2 will start on Wednesday 22 September.

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

Recommendation

7. Members are invited to note the Scottish Government’s response to the Subordinate Legislation Committee’s report on the Housing (Scotland) Bill at Stage 1.
Irene Fleming
Clerk to the Committee
3 September 2010

Dear Jamie

I am pleased to attach the Scottish Government’s response to the Subordinate Legislation Committee’s Stage 1 Report on the Housing (Scotland) Bill.

In its report, the Committee has asked that I bring forward proposals on protection of unauthorised tenancies so that it is able to consider these in advance of stage 2.

These proposals have not yet been fully developed but once they are, I will write separately to the Committee outlining the revised approach.

The Committee’s Report highlighted concerns about the marker provision on unauthorised tenancies. I can confirm that, following the Repossessions Group recommendations, I intend to bring forward an amendment that will propose the removal of the broad order making power to introduce secondary legislation to improve protection for unauthorised tenants.

ALEX NEIL
HOUSING (SCOTLAND) BILL: SCOTTISH GOVERNMENT RESPONSE TO SUBORDINATE LEGISLATION COMMITTEE STAGE 1 REPORT

1. The Scottish Government’s response to the Subordinate Legislation Committee’s Stage 1 Report on the Housing (Scotland) Bill is set out below. The Subordinate Legislation Committee’s recommendations or comments are highlighted in bold and are followed by the Scottish Government’s response.

PART 1

Delegated powers provisions

Section 24(1)(b) – Power to prescribe legislative registration criteria to be eligible for inclusion in the register of social landlords.

The Committee accepts the need for a power to prescribe legislative registration criteria, but suggests that the lead committee may wish to pursue the issue of specification in the Bill of certain legislative criteria, including consideration of whether or not criteria which are currently specified in section 58(2) and (3) of the Housing (Scotland) Act 2001 should be carried over into this Bill.

2. The Scottish Government has given careful thought to this recommendation, which was also endorsed by the Local Government and Communities Committee. The Scottish Government confirmed in a letter from the Minister of Housing and Communities to the Convenor of the Local Government and Communities Committee dated 21 June that it will be bringing forward amendments to the legislative registration criteria at stage 2. The amendments will provide for a set of core criteria that are based on section 58(2) and (3) of the Housing (Scotland) Act 2001. These will be the criteria that a body must meet in order to be eligible for registration.

3. The Bill will also provide for a set of additional criteria and purposes which a body may meet. In order to achieve the policy objective to allow more flexibility for new types of body (which are able to improve the quality and level of housing) being eligible for registration in the future, Ministers will have the power to amend the additional criteria following consultation.
PART 3

Section 31 - Scottish Social Housing Charter

The Committee considers that the use of this procedure is appropriate for the purpose which is to be served by the Charter and, having regard to the Charter's nature and effect, does not take issue with the choice of affirmative procedure. However, the Scottish Government's response has not persuaded the Committee that the Charter will be binding on social landlords in the sense of creating standards which are legally enforceable – it has some effect, in that failure to achieve a target engages legal powers.

4. The Scottish Government notes the committee's observations and notes in particular the Committee's view that the combination of the Charter and the Regulator's powers of intervention has some effect and that failure to achieve a target engages legal powers.

PART 14

Section 142 - Protection of Unauthorised Tenants

The Committee reports that it does not consider the holding measure approach proposed by the Scottish Government in introduction of this power to be acceptable. The Committee asks the Scottish Government to forward their proposals, once developed, to the Committee so that it has the opportunity to consider the proposals in advance of Stage 2, and call for evidence if necessary.

5. The Minister of Housing and Communities' letter of 13 January, the policy memorandum and the delegated powers memorandum set out the reasons for the marker provision on unauthorised tenancies at section 142. The Scottish Government included in the Bill at introduction a power in broad form to draw attention to the wide range of legislative actions that the Repossessions Group might recommend and to allow some stage 1 consideration of this matter. However, the intention was to come forward at stage 2 with amendments, either removing the section or making more specific provisions.

6. The Scottish Government recognises the Committee's concerns about the approach taken in the marker provision. However, the Government included a broad power to draw attention to the wide range of legislative actions that the Repossessions Group might recommend and to allow some stage 1 consideration of this matter. Now that this Group has reported, the Government does not believe that it will require a broad power to introduce secondary legislation, and can confirm that when proposing the revised...
provision at stage 2, it will propose the removal of this broad order making power.

7. The Scottish Government notes the Committee’s points on its restricted opportunities to consider powers after stage 1. As already indicated, the Government intends to remove this broad power to introduce secondary legislation to improve protection for unauthorised tenants.

PART 15

Section 146(2)(a) - Orders – Power when making orders to make supplementary, incidental, consequential, transitional, transitory or saving provision within those orders.

The Committee recommends that section 146(2)(a) should not apply to commencement orders or, alternatively, that where section 146(2)(a) is applied to a commencement order, it should be subject to negative procedure.

8. The Scottish Government recognises the concerns raised by the Committee and will bring forward an amendment at stage 2 to strike an appropriate balance of parliamentary scrutiny for the various “bolt on” powers in section 146(2)(a) when they are attached to a commencement order.

The Scottish Government
August 2010
SUBORDINATE LEGISLATION COMMITTEE

24th Meeting, 2010 (Session 3)

Tuesday 14 September 2010

Paper by the Clerk

Children’s Hearings (Scotland) Bill – Response to SLC Stage 1 Report

Background

1. Under Rule 9.6.2 of Standing Orders, the Subordinate Legislation Committee submitted its report on the delegated powers provisions in the Children’s Hearings (Scotland) Bill to the Education, Lifelong Learning and Culture Committee, as lead committee for the Bill, on 28 April 2010.

2. On 9 September 2010, Adam Ingram, Minister for Children and Early Years, wrote to the Clerk to the Subordinate Legislation Committee responding to the Committee’s Stage 1 report.

Scottish Government Response

3. The response indicates that the Scottish Government intends to seek to amend the Bill in line with the Subordinate Legislation Committee’s recommendations on the delegated powers contained in sections 144(1), 146(1), 147(1) and 191(2).

4. During its Stage 1 consideration, the Committee recommended that the power in section 30(2)(g) should be subject to affirmative, rather than negative procedure. The Government contends that it considers negative procedure to be appropriate, but has indicated that a consultative approach will be taken to the development of regulations under this power which will not alter the fundamental role of the safeguarder to provide independent advice to the children’s hearing. A Stage 2 amendment will also be brought forward to restate provisions in the Children (Scotland) Act 1995 to clarify the role of safeguarder, in safeguarding the interests of the child.

5. In relation to section 128(5) the Committee had previously noted an indication given by the Scottish Government that it would look again at this provision to see if its effect could be clarified further, but nothing is said about this within the response.

6. The Government also contends that the powers contained in sections 143(1)(b) and 170(2) should remain as negative, rather than affirmative procedure as the Committee recommended in its Stage 1 report. Specifically, in relation to section 170(2), the Committee had recommended review of the powers contained at paragraphs (a) to (m), especially (d) to (f), (h) and (k).
7. In its Stage 1 report, the Committee agreed that, where textually amending an Act, the power set out in section 189 should be subject to affirmative procedure. However, it considered that there is an issue in regard to whether the higher level of scrutiny afforded by affirmative procedure should apply in all circumstances where ancillary provision is being made under section 189, given the potential for matters of significance to be taken forward under this power. It sought further comment on this from the Scottish Government. The Scottish Government has maintained its view that the power in section 189 should be affirmative procedure for amendments to primary legislation and negative procedure for secondary legislation. It has also maintained the view that any further provision required to give full effect to, or in consequence of the approved provisions, or to further the purposes of the Bill, should be subject to negative procedure.

**Progress of the Bill**

8. The Bill passed Stage 1 on 16 June 2010. Stage 2 will start on Wednesday 15 September.

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

**Recommendation**

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

Irene Fleming
Clerk to the Committee
I am writing following publication of the Subordinate Legislation Committee’s (SLC) Stage 1 report of 28 April 2010 to the Education, Lifelong Learning and Culture Committee on delegated powers in the Children’s Hearings (Scotland) Bill.

The attached response provides an update to the previous response that was sent to the SLC on 31 March 2010 on action being taken as a result of the SLC’s initial considerations.

I hope the Committee finds this response helpful.

ADAM INGRAM
CHILDREN’S HEARINGS (SCOTLAND) BILL – RESPONSE TO STAGE 1 REPORT ON DELEGATED POWERS

Section 10 – Power of Scottish Ministers to change National Convener’s functions

Section 17 – Power of Scottish Ministers to change Principal Reporter’s functions

I note that the Committee is satisfied with the response provided on 31 March and is content with those powers and that affirmative procedure is the appropriate level of parliamentary scrutiny.

Section 30(2) – Safeguarder Panels

While the SLC is content that the powers contained within paragraphs (a) to (f) are subject to negative procedure, it is of the view that the powers contained in s30(2)(g) should be subject to affirmative procedure.

We anticipate the initial use of this power will focus on the role of the safeguarder in sheriff courts. The development of regulations will require consultation with safeguarders and sheriffs in the first instance, and also the wider range of stakeholders involved in the children’s hearings system. However, the fundamental function of a safeguarder – to provide a report to a children’s hearing – will remain unchanged.

The Committee may be interested to note that a process of consultative development of these regulations with appropriate stakeholders is in the early stages of discussion.

The Committee may also be interested to note that a Stage 2 amendment will be brought forward to re-state provisions in the Children (Scotland) Act 1995 to clarify the role of the safeguarder - to safeguard the interests of the child - in primary legislation.

I have considered the committee’s concerns further and remain of the view that negative procedure is the most appropriate level of scrutiny, given the consultative approach that will be taken to the development of regulations under this power and that changes to functions under this provision will not alter the fundamental role of the Safeguarder to provide independent advice to the children’s hearing. Regulations for safeguarders are not new and are currently subject to negative procedure.
Section 55 – sections 53 and 54; regulations (making further provision in respect of child removed to or kept in place of safety)

I note that the Committee is satisfied with the Government response provided on 31 March and is content with those powers and that negative procedure is the appropriate level of parliamentary scrutiny.

Section 128 - Right of the child or relevant person to require a review

I note that the Committee is satisfied with the Government response provided on 31 March and is content with those powers and that negative procedure is the appropriate level of parliamentary scrutiny.

Section 143(1) – Compulsory supervision orders etc: further provision

I note that the Committee is satisfied with the Government response provided on 31 March with regard to the matters in section 143(1)(a), (c) and (d), and is content with those powers and that negative procedure is the appropriate level of parliamentary scrutiny.

I note that Committee takes the view that the power contained in section 143(1)(b) should be subject to affirmative procedure. An example of a use of this power is in regulation 4 of the current rules, Children’s Hearings (Transmission of Information etc.) (Scotland) Regulations 1996, obliges local authorities in specified circumstances to arrange temporary accommodation when they cannot find an immediate place at an establishment detailed in a supervision order, failing which to refer the matter back to the Principal Reporter to deal with. Local authorities have a duty to implement the CSO and where the order is not being complied with to refer the matter back to the children’s hearings - see section 127(2) of the Bill. The regulations may make provision only in relation to the provision of temporary accommodation pending the accommodation of the child in line with the terms of the order. In these circumstances I am content that negative procedure is the appropriate level of scrutiny for provisions which may be made under this power.

Section 144(1) – Movement Restriction conditions: regulations etc.

As indicated in the response of 31 March, amendments will be brought forward to ensure regulations under this section are subject to affirmative procedure.

Section 146(1) – Secure accommodation : placement in other circumstances

As indicated in the response of 31 March, amendments will be brought forward to ensure regulations under this section are subject to affirmative procedure.

Section 147(1) – Secure accommodation: regulations

As indicated in the response of 31 March, amendments will be brought forward to ensure regulations under this section are subject to affirmative procedure.
Section 170 – Children’s Hearings: procedural rules

Following our response of 31 March, the Committee has asked for further consideration of whether certain provisions within this section should be subject to affirmative procedure.

I have re-considered this issue and stand by the view expressed in our response of 31 March.

As the Committee will be aware the Administrative Justice and Tribunals Council (AJTC) keeps under review the administrative justice system as a whole with a view to making it accessible, fair and efficient. They seek to ensure that the relationships between the courts, tribunals, ombudsmen and alternative dispute resolution providers satisfactorily reflect the needs of users.

‘Administrative justice’ includes the procedures for making decisions, the law that regulates decision-making, and the systems (such as the various tribunals and ombudsmen) that enable people to challenge these decisions.

Under paragraph 14(2) of Schedule 7 to the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”) the AJTC is empowered to scrutinise and comment on legislation, existing or proposed, relating to tribunals or to any particular tribunal. Under paragraph 24 of Schedule 7 to the 2007 Act, the power of the Scottish Ministers to make, approve, confirm or concur in procedural rules for certain “listed” tribunals is exercisable only after consultation with the AJTC. These tribunals are listed in The Administrative Justice and Tribunals Council (Listed Tribunals) (Scotland) Order 2007 (S.S.I. 2007/436) and include any children’s hearing constituted and arranged in pursuance of the Children (Scotland) Act 1995. We intend to make consequential amendment to this to reflect the provisions of the Bill.

This will mean that any rules made under s170 of the Bill will to be subject to mandatory consultation with the AJTC. It is mandatory for instruments containing the proposed rules to be submitted to the AJTC in draft form before they are made. In addition, the AJTC will continue to have an absolute right to attend hearings under section 77(1)(g) of the Bill to enable continuous monitoring and review of hearings procedures.

The committee expressed concerns about rules specifying circumstances in which persons can be excused from children’s hearing (s170(2)(f)), and rules about withholding documents (s170(2)(h)). However as stated in our response of 31 March the Bill already provides rights of attendance, excusal and information for the key participants in the hearing process and the provision that may be made under the rules will be supplementary to the Bill provisions. Any provision made would, of course, require to be ECHR compatible.

The Scottish Government hopes that the above explanation provides greater reassurance that the rules made under s170 do not need affirmative procedure.
Section 189 – Power to make supplementary, incidental or consequential provision as is considered appropriate for the purposes of, in consequence of, or for giving effect to any provision of the Bill

Provision made under this order power could be standalone provision or amendments to primary or secondary legislation. If such provision makes textual amendments to primary legislation then it will require to be made in an instrument subject to the affirmative procedure. If the amendments are to secondary legislation then negative procedure will apply. It would be unusual for consequential, incidental or supplementary amendment to existing secondary legislation to require the affirmative procedure. This would mean, in some circumstances, that replacing a set of principal regulations in their entirety would attract a lower level of parliamentary scrutiny than would be required for a small consequential change to them.

The power in section 189 can only be used to make provision which is considered appropriate for the purposes of, in consequence of or for giving full effect to, any provision in the Bill. To that extent it is a restricted power. The purposes and provisions of the Bill have been subject to full parliamentary scrutiny. We remain of the view that any further provision required to give full effect to, or in consequence of the approved provisions, or to further the purposes of the Bill, should be subject to the negative procedure.

Section 191(2) – Power to commence provisions of the Bill

As indicated in the response of 31 March, amendments will be brought forward to provide that a commencement order cannot include incidental, supplementary or consequential provision.

Sections 13 and 22 – Powers of direction

I note that the Committee is content with the further explanation provided in our response of 31 March 2010.