SUBORDINATE LEGISLATION COMMITTEE

AGENDA

27th Meeting, 2010 (Session 3)

Tuesday 5 October 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 6 in private.

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

   - the Sexual Offences (Scotland) Act 2009 (Supplemental and Consequential Provisions) Order 2010 (SSI 2010/draft);
   - the Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2010 (SSI 2010/draft);
   - the Protected Trust Deeds (Scotland) Amendment Regulations 2010 (SSI 2010/draft);
   - the Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010 (SSI 2010/draft).

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

   - the Materials and Articles in Contact with Food (Scotland) Regulations 2010 (SSI 2010/327);
   - the Food Irradiation (Scotland) Amendment Regulations 2010 (SSI 2010/328);
   - the Firefighters’ Pension Scheme Amendment (Scotland) (No. 2) Order 2010 (SSI 2010/332);
   - the Firefighters’ Pension Scheme (Scotland) Order 2007 Amendment (No. 2) Order 2010 (SSI 2010/333);
   - the Special Restrictions on Adoptions from Haiti (Scotland) Order 2010 (SSI 2010/341);
   - the Plant Health (Scotland) Amendment (No. 2) Order 2010 (SSI 2010/342).
4. **Instruments not laid before the Parliament:** The Committee will consider the following—

   - the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 2) Order 2010 (SSI 2010/339 (C. 18));
   - the Protection of Vulnerable Groups (Scotland) Act 2007 (Commencement No. 4) and the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 3) Order 2010 (SSI 2010/344 (C. 19));
   - the Tobacco and Primary Medical Services (Scotland) Act 2010 (Commencement No. 1, Consequential and Saving Provisions) Order 2010 (SSI 2010/345 (C.20)).

5. **Property Factors (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

6. **Public Services Reform (Scotland) Act 2010:** The Committee will consider its approach to consideration of reports laid under section 26.

   Irene Fleming
   Clerk to the Subordinate Legislation Committee
   Room T2.60
   The Scottish Parliament
   Edinburgh
   Tel: 0131 348 5212
   Email: irene.fleming@scottish.parliament.uk
The papers for this meeting are as follows—

Legal Brief  
Summary of Recommendations  
**Agenda Items 2, 3 and 4**  
Instrument Responses  
**Agenda Item 5**  
*Property Factors (Scotland) Bill*  
Briefing Paper  
**Agenda Item 6**  
Paper by the Clerk
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 Sexual Offences (Scotland) Act 2009 (Supplemental and Consequential Provisions) Order 2010 (SSI 2010/draft)

The Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2010 (SSI 2010/draft)

The Protected Trust Deeds (Scotland) Amendment Regulations 2010 (SSI 2010/draft)

The Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010 (SSI 2010/draft)

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

### Agenda Item 3  Instruments subject to annulment

The Materials and Articles in Contact with Food (Scotland) Regulations 2010 (SSI 2010/327)

The Committee may wish to report that it welcomes the Scottish Government’s clarification of the scope of the offence of contravening regulation 8 as set out in its response.

The Committee may also wish to report that the reference to the transitional defence in relation to regenerated cellulose film in the explanatory note is an error and to welcome the Scottish Government’s commitment to correct this by correction slip.
The Food Irradiation (Scotland) Amendment Regulations 2010 (SSI 2010/328)

The Committee may wish to report that an explanation has been provided by the Scottish Government of how regulation 4 makes the necessary correction to properly transpose the requirements of articles 8 and 9 of Directive 1999/2/EC, on which the Committee reported in its 39th Report, on the 2009 Regulations (SSI 2009/261). The Committee may be satisfied with that explanation.

The Firefighters’ Pension Scheme Amendment (Scotland) (No 2) Order 2010 (SSI 2010/332)

The Committee may wish to draw to the attention of the Parliament that the risk of volatility in the pension provision is to be borne by the Scottish Consolidated Fund, rather than the operating accounts of the fire and rescue authorities. This is in so far as—

- the new Rule LA6(1) (inserted by article 8) will result in the imposition of a charge on the Consolidated Fund, if the Scottish Ministers determine to pay to a fire and rescue authority under that Rule any sums which are transferred under Rule LA5(1) (transfers between Pension Account and Operating Account) out of moneys provided by the Parliament; and

- the new Rule LA6(2) (also inserted by article 8) will result in sums being paid in to the Consolidated Fund, when otherwise they would not be, if the Scottish Ministers determine to require fire and rescue authorities to pay any sums which are transferred under Rule LA5(2), into the Fund.

The Committee may highlight the response, which has further explanation of how these payments could arise, for the attention of the lead committee and the Parliament.

The Firefighters’ Pension Scheme (Scotland) Order 2007 Amendment (No. 2) Order 2010 (SSI 2010/333)

The Committee may wish to draw to the attention of the Parliament that the risk of volatility in the pension provision is to be borne by the Scottish Consolidated Fund, rather than the operating accounts of the fire and rescue authorities. This is in so far as—

- the new rule 6(1) in Part 13B (inserted by the Schedule) will result in the imposition of a charge on the Consolidated Fund, if the Scottish Ministers determine to pay to a fire and rescue authority under that Rule any sums which
are transferred under the new rule 5(1) (transfers between Pension Account and Operating Account) out of moneys provided by the Parliament; and

- the new Rule 6(2) in Part 13B (also inserted by the Schedule) will result in sums being paid in to the Consolidated Fund, when otherwise they would not be, if the Scottish Ministers determine to require fire and rescue authorities to pay any sums which are transferred under Rule 5(2), into the Fund.

The Committee may highlight the response, which has further explanation of how these payments could arise, for the attention of the lead committee and the Parliament.

The Special Restrictions on Adoptions from Haiti (Scotland) Order 2010 (SSI 2010/341)

The Committee may wish, in noting the explanation given by the Scottish Government in its letter to the Presiding Officer dated 23 September 2010 for the failure to comply with article 10(2) of the Scotland Act (Transitory and Transitional Provisions)(Statutory Instruments)Order 1999, to take the view that this does not adequately address the matter of “necessity” in terms of why it was not in fact possible to comply with the 21 day rule here. The Committee may wish to draw that matter to the lead committee’s attention for consideration.

The Committee is invited to be content, otherwise, with this instrument.

The Plant Health (Scotland) Amendment (No 2) Order 2010 (SSI 2010/342)

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

Agenda Item 4 Instruments not laid before the Parliament

The Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 2) Order 2010 (SSI 2010/339 (C. 18))

The Protection of Vulnerable Groups (Scotland) Act 2007 (Commencement No 4) and the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 3) Order 2010 (SSI 2010/344 (C. 19))

The Tobacco and Primary Medical Services (Scotland) Act 2010 (Commencement No. 1, Consequential and Saving Provisions) Order 2010 (SSI 2010/345)
The Committee may wish to consider if it is content with these instruments.

### Agenda Item 5  Property Factors (Scotland) Bill

#### Section 3(4): Fees for applications

The Committee may wish to consider asking the member sponsoring the Bill, in relation to section 3(4) and (5) and section 7(4)

- for an explanation of how the Scottish Ministers (at the date of exercising these delegated powers to prescribe the fee levels) shall be in a position to comply with the duty in section 3(5), that fee income under sections 3 and 7 “taking one financial year with another” shall not exceed the costs of exercising the functions under Part 1?

This is given that it appears that future fee income, and also possibly the costs of exercising the Bill functions (for any particular future financial year) might only be estimated amounts at the date of making any regulations, and that fee income received might depend on the number of applications received?

- on what date/s is it to be established that the Scottish Ministers have complied with the requirement in section 3(5) (by prescribing the fee levels in regulations), and in the absence of provision in that subsection, what would the consequences be if there is a failure to comply?

#### Section 13: Property factor code of conduct

The Committee may wish to consider asking the member sponsoring the Bill for an explanation why it is considered to be an appropriate level of scrutiny of the code of conduct under section 13, that it is laid in the Parliament prior to publication, but without a stated period of time for the Parliament to consider it in its laid form before publication, or any requirement for approval by resolution?

#### Section 26: Delegation of functions

The Committee may wish to consider asking the member sponsoring the Bill for an explanation why it has been considered that negative resolution procedure is the appropriate level of scrutiny for the delegated power contained in section 26, given the apparent significance of this power to delegate functions under the Bill?
SUBORDINATE LEGISLATION COMMITTEE

27th Meeting, 2010 (Session 3)

Tuesday 5 October 2010

Instrument Responses

INSTRUMENTS SUBJECT TO ANNULMENT

The Materials and Articles in Contact with Food (Scotland) Regulations 2010 (SSI 2010/327)

On 23 September 2010 the Scottish Government was asked:

1. Any person who contravenes regulation 8 commits an offence by virtue of regulation 13(1)(a). In the equivalent regulation in the 2007 Regulations, which this instrument replaces, only contravention of regulation 8(2) was an offence. Can the Scottish Government confirm whether contravention of regulation 8(1) alone is intended to be an offence, if so what conduct would amount to the offence and if it is not so intended whether this is clear from the instrument as drafted?

2. Can the Scottish Government confirm whether, as stated in the explanatory note, the transitional defence under SI 1987/1523 in relation to RGF manufactured before 29 April 1994 remains available given that what was regulation 12(1) of the 2007 regulations has been revoked and has not been re-enacted?

The Scottish Government responds as follows:

1. Regulation 13(1)(a) sets out that contravention of regulation 8 is an offence. Regulation 8(2) sets out that no person may sell, import or use in certain circumstances, materials or articles which do not comply with conditions which are set out in regulation 8(1). It is intended that paragraphs (1) and (2) of regulation 8 are read together for the creation of the offence, and it is not intended that contravention of regulation 8(1) alone should be an offence. The Scottish Government take the view that this is clear from the instrument as drafted.

2. The Scottish Government confirms that the provision previously contained in regulation 12(1) of the Materials and Articles in Contact with Food (Scotland) Regulations 2007 was not re-enacted in the instrument as it was felt to be highly unlikely that any RCF manufactured before 29.4.94 would still be on the market. Therefore the reference to it in the Explanatory Note was included in error, for which the Scottish Government apologises. However the Scottish Government take the view that this error will not prejudice those affected by the Regulations and it will arrange for it to be amended by correction slip.
The Food Irradiation (Scotland) Amendment Regulations 2010 (SSI 2010/328)

On 23 September 2010 the Scottish Government was asked:

In its 39th Report, on the 2009 Regulations (SSI 2009/261), the Committee reported—

“Regulation 5(2) (b) and (3) (a), and Schedule 2(10) and (15) (1) (b) raise a devolution issue as they do not fully transpose the requirements of articles 8 and 9 of Directive 1999/2/EC. The batch number for the particular food applied by the irradiating facility outside Scotland requires to be specified in the documentation accompanying the food imported into Scotland from a third country; and

Regulation 6(1) (b) (i) and (ii) are defectively drafted as they do not give effect to the intention that batch numbers applied to irradiated food by a facility within the UK, or outside Scotland on import, should be specified in documentation accompanying the food, as a condition of persons being permitted to store or transport such food for the purpose of sale in Scotland.

The Committee notes that the Scottish Government has undertaken to bring forward an amending instrument to correct these matters as soon as possible.”

Given the terms of that report, can it be explained and clarified why regulation 4 amends Schedule 2, paragraph 15(1)(b) of the 2009 Regulations, but the instrument does not amend the other provisions which are cited in the report?

The Scottish Government responds as follows:

The 2009 Regulations intended that a batch number should be specified in documentation accompanying irradiated food imported into Scotland (regulations 5(2)(b) and (3)(a)) and that a batch number applied by a facility within the UK, or outside Scotland on import, should be specified in documentation accompanying irradiated food in relation to the restriction on storage or transport for the purpose of sale (in Scotland) of irradiated food (regulation 6(1)(b)(i) and (ii)).

The Committee identified in its 39th report that the 2009 Regulations had not sufficiently given effect to this intention. The reason being, because regulations 5(2)(b) and (3)(a), and 6(1)(b)(i) and (ii), make reference to the information specified in paragraph 15(1)(b) of Schedule 2, requiring that “the number given to it under paragraph 10” should accompany the irradiated food. Paragraph 10 relates to batch numbers for Scottish licences and “licence” is defined in regulation 3(1) to mean a licence granted by the Food Standards Agency in accordance with Schedule 2 (with “licensee” being construed accordingly). Since paragraph 10 is concerned only with numbering batches in Scotland, the cross-reference in paragraph 15(1)(b) does not make sense for food irradiated outside Scotland. These amending Regulations correct this by substituting a new paragraph 15(1)(b) that replaces the reference to paragraph 10 with “its batch number” and this can be read as either that number given to the food in Scotland or elsewhere, as the case may be.

Accordingly, by amending paragraph 15(1)(b) of Schedule 2, this has the effect by way of the cross-referencing in the 2009 Regulations, of correcting the effect of all the provisions referred to by the Committee.
On 24 September 2010 the Scottish Government was asked:

(a) In relation to the new Rule LA6(1) (inserted by article 8) can it be explained whether, when the Scottish Ministers determine to pay to a fire and rescue authority under this Rule any sums under Rule LA5(1) (transfers between Pension Account and Operating Account) out of moneys provided by the Parliament, that will result in the imposition of a charge on the Consolidated Fund?

(b) In relation to the new Rule LA6(2), so far as this provides for determinations by the Scottish Ministers to require fire and rescue authorities to pay sums into the Fund, will this result in such sums paid to be added to the Fund, when otherwise they would not be?

(c) Could the potential significance of any such sums out of or into the Fund be explained, to assist the Committee?

The Scottish Government responds to questions on SSI 2010/332 and SSI 2010/333 as follows:

(a) Yes, if Scottish Ministers decided to pay such sums to an authority, it would result in the imposition of a charge on the Consolidated Fund.

(b) Yes, if Scottish Ministers did require an authority to do this, it would result in sums being added to the Fund when otherwise they would not be.

(c) It is not expected that there will be many payments made or received outside the planned in-year top-ups or the management of surpluses or deficits through future employer contribution funding. Furthermore, if there were any charges made, or sums added, to the Scottish Consolidated Fund under the Scottish Ministers’ discretionary powers in rule LA6 these are not expected to be significant.
The amendments give effect to the agreement reached between the Scottish Government and COSLA on how (police and) fire pensions should be funded. The new system allows the employing authorities to meet the cost of the pension schemes going forward via an actuarially-set employer contribution. The cost of pensions in payment is now met using each authority’s new Pensions Account, into which defined income will be paid, for example by members and via employer contributions, and out of which pensions in payment will be paid. As explained in the Executive Note, fire and rescue authorities receive direct funding to cover their employer contribution liability.

The cost of pensions in payment is now met from the Pensions Account but any surpluses or deficits on those Accounts are managed by the Scottish Government as part of the agreement. Hence pensions in payment volatility is now managed and met by the Scottish Government thus removing the threat of pension costs impacting on authorities’ operational commitments.

The new rules identified relate to how surpluses or deficits on the Pension Account are to be managed and replicate the processes already in force under regulation 9 of the Police Pension Account (Scotland) Regulations 2010 (SSI 2010/232).

It is anticipated that the agreed funding arrangements will provide sufficient estimates and reports to allow any surpluses or deficits to be managed within future funding allocations of employer contributions by the Scottish Government. However there remains a possibility that additional funding may be required where there is a considerable deficit in an authority’s Pension Account. In such a situation, that amount will require to be transferred from the authority’s Operating Account, and this transfer may as a result impact on operational functions. In those cases the new rule provides that further monies may be made available by the Scottish Government. This would require the Scottish Government to take monies from the Scottish Consolidated Fund. In the first instance the Scottish Government’s Scottish Resilience Finance team would be required to identify the necessary funds required.

Similarly for surpluses, it is expected that these will be managed within the future allocation of employer contribution funding. However, in the unlikely event that an authority has a considerable surplus the new rule provides that Scottish Ministers may require this amount to be paid back to the Scottish Consolidated Fund. In practice this amount would be paid back in the first instance to the Scottish Resilience (Finance team), funded by Justice Finance.

The new system includes in-year monitoring and checks to ensure that funding is managed as effectively and efficiently as possible. There is some flexibility in in-year funding which should significantly reduce the need for unplanned and unexpected funding. The nature of pensions, however, is that pensions liability can be subject to fluctuations from year to year, for example due to an unexpected increase in members choosing to retire and taking their lump sums. So the rules provide for that eventuality. Guidance issued to fire and rescue authorities outlines how in-year funding, and end-of-year audited surpluses or deficits in the Pension Account are to be managed. An extract from the guidance is attached.
The following summarises the current payment mechanism and timescales.

<table>
<thead>
<tr>
<th>Year</th>
<th>By end</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1.</td>
<td>October 2009</td>
<td>The Scottish Government receives the estimates for 2010-11 and 2011-12 of estimated fire pension income, expenditure and potential top-up requirements.</td>
</tr>
<tr>
<td>2.</td>
<td>April 2010</td>
<td>The Scottish Government pays grant to each Fire Authority for 100% of their estimated employers' contributions for 2010-11. The payment of the grant will be made in 12 monthly payments.</td>
</tr>
<tr>
<td>3.</td>
<td>April 2010</td>
<td>The Scottish Government pays grant to each Fire Authority for 100% of their estimated 'top up' for 2010-11. This payment will also be made in 12 monthly payments.</td>
</tr>
<tr>
<td>4.</td>
<td>September 2010</td>
<td>The Fire Authority sends the Scottish Government details of:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• its actual spend for the first 5 months of 2010-11</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• its forecast out-turn for the rest of 2010-11</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• a revised estimate for 2011-12</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• a new estimate for 2012-13.</td>
</tr>
<tr>
<td>5.</td>
<td>Final months of 2010-11</td>
<td>The Scottish Government may adjust its final 'top-up' payment(s) to each Fire Authority for 2010-11 in the light of information on actual spend and revised estimates provided by Fire Authorities in September 2010 in order to get closer to the actual top-up required. Alternatively, this may be done by adjusting payments in the following year.</td>
</tr>
<tr>
<td>Year 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6.</td>
<td>April 2011</td>
<td>The Scottish Government pays grant to each Fire Authority for 100% of their estimated employers' contributions for 2011-12. The payment of the grant will be made in 12 monthly payments.</td>
</tr>
<tr>
<td>7.</td>
<td>April 2011</td>
<td>The Scottish Government pays grant to each Fire Authority for 100% of their estimated 'top up' for 2011-12. This payment will also be made in 12 monthly payments.</td>
</tr>
<tr>
<td>8.</td>
<td>July 2011</td>
<td>The Fire Authority sends the Scottish Government the unaudited account to demonstrate any shortfall or over-provision of Scottish Government grant for 2010-11.</td>
</tr>
<tr>
<td>9.</td>
<td>September 2011</td>
<td>The Fire Authority sends the Scottish Government details of:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• its actual spend for the first 5 months of 2011-12</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• its forecast out-turn for the rest of 2011-12</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• a revised estimate for 2012-13</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• a new estimate for 2013-14.</td>
</tr>
<tr>
<td>10.</td>
<td>October 2011</td>
<td>The Fire Authority sends the Scottish Government a copy of the audited accounts for 2010-11 to demonstrate</td>
</tr>
</tbody>
</table>
any shortfall or over-provision of Scottish Government grant for 2010-11.

<table>
<thead>
<tr>
<th>Year 3</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>11. Final months of 2011-12</td>
<td>The Scottish Government may adjust its final ‘top-up’ payment(s) for 2011-12 in the light of the information provided on audited 2010-11 accounts and the revised estimates for 2011-12 provided by Fire Authorities in September 2011. Alternatively, this may be done by adjusting payments in the following year.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year 3</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>12. April 2012</td>
<td>The Scottish Government pays grant to each Fire Authority for 100% of their estimated employers’ contributions for 2012-13. The payment of the grant will be made in 12 monthly payments.</td>
</tr>
<tr>
<td>13. April 2012</td>
<td>The Scottish Government pays grant to each Fire Authority for 100% of their estimated ‘top up’ for 2012-13. This payment will also be made in 12 monthly payments.</td>
</tr>
</tbody>
</table>
| 17. September 2012 | The Fire Authority sends the Scottish Government:  
  - its actual spend for the first 5 months of 2012-13  
  - its forecast out-turn for the rest of 2012-13  
  - a revised estimate for 2013-14  
| 17. October 2012 | The Fire Authority sends the Scottish Government a copy of the audited accounts for 2011-12 to demonstrate any shortfall or over-provision of Scottish Government grant for 2011-12. |
| 18. Final months of 2012/13 | The Scottish Government may adjust its final ‘top-up’ payment(s) for 2012-13 in the light of the information provided on audited 2011-12 accounts and the revised estimates for 2012-13 provided by Fire Authorities in September 2012. Alternatively, this may be done by adjusting payments in the following year. |
|                                                                 | Repeat as above for subsequent years |