SUBORDINATE LEGISLATION COMMITTEE

AGENDA

28th Meeting, 2010 (Session 3)

Tuesday 26 October 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 9 in private.

2. **Draft instruments subject to approval:** The Committee will consider the following—
   - the Regulation of Investigatory Powers (Scotland) Amendment Order 2010 (SSI 2010/draft);

3. **Instruments subject to annulment:** The Committee will consider the following—
   - the Animals and Animal Products (Import and Export) (Scotland) Amendment Regulations 2010 (SSI 2010/343);
   - the Protection of Vulnerable Groups (Scotland) Act 2007 (Corresponding Disqualifications) Order 2010 (SSI 2010/346);
   - the East Dunbartonshire Council Area and Glasgow City Council Area (Princes Gate and Greenacres by Robroyston) Boundaries Alteration Order (SSI 2010/353);
   - the Foodstuffs Suitable for People Intolerant to Gluten (Scotland) Regulations 2010 (SSI 2010/355);

4. **Instruments not laid before the Parliament:** The Committee will consider the following—
   - Act of Sederunt (Sheriff Court Rules) (Equality Act 2010) 2010 (SSI 2010/340);
the Sexual Offences (Scotland) Act 2009 (Commencement No. 1) and the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 4) Order 2010 (SSI 2010/357).

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

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

7. **Housing (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

8. **Domestic Abuse (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

9. **Property Factors (Scotland) Bill:** The Committee will consider the contents of a draft report.

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 SL/S3/10/28/1 (P)

Summary of Recommendations SL/S3/10/28/2

**Agenda Item 3**

Instrument Responses SL/S3/10/28/3

**Agenda Item 5**

**Palliative Care (Scotland) Bill**

Briefing Paper SL/S3/10/28/4 (P)

**Agenda Item 6**

**Damages (Scotland) Bill**

Briefing Paper SL/S3/10/28/5 (P)

**Agenda Item 7**

**Housing (Scotland) Bill (as amended at Stage 2)**

**Supplementary Powers Memorandum**

Briefing Paper SL/S3/10/28/6 (P)

**Agenda Item 8**

**Domestic Abuse (Scotland) Bill**

Briefing Paper SL/S3/10/28/7 (P)

**Agenda Item 9**

Draft Report SL/S3/10/28/8 (P)
SUBORDINATE LEGISLATION COMMITTEE

28th Meeting, 2010 (Session 3)

Tuesday 26 October 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 Regulation of Investigatory Powers (Scotland) Amendment Order 2010 (SSI 2010/Draft)

The Protection of Vulnerable Groups (Scotland) Act 2007 (Miscellaneous Provisions) Order 2010 (SSI 2010/draft)

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

Agenda Item 3  Instruments subject to annulment

The Animal and Animal Products (Import and Export) (Scotland) Amendment Regulations 2010 (SSI 2010/343)

The Committee may wish to report this instrument under the general ground in that it has failed to follow proper drafting practice as follows.

The Committee does not dispute that the effect of the instrument is to make references to the new EU provisions inserted by it into the principal regulations ambulatory.

The Committee considers however that in making new ambulatory references by virtue of this instrument (whether achieved by a gloss or not) the power in paragraph 1A of Schedule 2 to the European Communities Act 1972 must have been exercised by this instrument. Accordingly proper practice is to refer to this in the preamble and to explain whether the necessity or expediency test was considered satisfied in this case. The Committee considers this is necessary to assist Parliamentary scrutiny of the reason for making ambulatory references.
The Protection of Vulnerable Groups (Scotland) Act 2007 (Corresponding Disqualifications) Order 2010 (SSI 2010/346)

The East Dunbartonshire Council Area and Glasgow City Council Area (Princes Gate and Greenacres by Robroyston) Boundaries Alteration Order 2010 (SSI 2010/353)

The Foodstuffs Suitable for People Intolerant to Gluten (Scotland) Regulations 2010 (SSI 2010/355)

The Mental Welfare Commission for Scotland (Qualifications, Training and Experience of Medical Visitors) Regulations 2010 (SSI 2010/356)

The Committee may wish to find these instruments satisfactory.

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

**Act of Sederunt (Sheriff Court Rules) (Equality Act 2010) 2010 (SSI 2010/340)**

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

The Committee may wish to consider noting and welcoming that these amendments to the Sheriff Court Rules take a new approach in drafting the relevant provisions in “gender neutral” terms.

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**The Sexual Offences (Scotland) Act 2009 (Commencement No. 1) and the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 4) Order 2010 (SSI 2010/357) (C.21)**

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

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**Agenda Item 5** Palliative Care (Scotland) Bill

**Section 48B(3) – (Reports to the Scottish Parliament) - Power to modify the terms of Schedule 9A Paragraph 1 indicators**

The Committee may wish to consider that the proposed power is acceptable in principle and whether affirmative procedure is too high a level of scrutiny or whether negative procedure might be more appropriate.
Section 48B(4), (5) and (6) – (Reports to the Scottish Parliament) - Power to modify the terms of Schedule 9A requirements and definitions

The Committee may wish to consider if it finds the power in sections 48B(4), (5) and (6) acceptable in principal and that negative procedure is appropriate.

Agenda Item 6  Damages (Scotland) Bill

Section 18(1) – transitional provision etc.

The Committee may wish to ask the member to clarify the intended meaning and scope of the phrase “an enactment contained in an Act” where it appears in section 18(4), and its intended application to this legislation. Could that reference, given that it describes those circumstances in which an order under section 18(1) is to be subject to affirmative procedure, and is therefore of particular importance, be clarified (for example, by instead making reference to “any enactment (including this Act)”?}

Section 19(3) - commencement

The Committee may wish to find the proposed power under section 19(3) acceptable in principle, and that it is not subject to Parliamentary procedure.

Agenda Item 7  Housing (Scotland) Bill

Section 24(2B)(a) – Power to amend purposes, objects and powers in relation to legislative registration criteria

The Committee may wish to consider the new power provided for at section 24(2B)(a) acceptable and that negative procedure is appropriate.

Section 142 – Protection of unauthorised tenants

The Committee is invited to note removal of the order making power which was previously contained within section 142 of the Bill, that section within the Bill as amended at Stage 2 now containing no delegated powers.
Section 142A – Tenant protection: repossession orders

The Committee may wish to consider the new order making power introduced at section 142A acceptable, and that it is subject to negative procedure.

Section 142C(a) – Scottish Secure Tenancy: rent arrears pre-action requirement – confirmation to the court

The Committee may wish to consider the proposed power under section 142C(a) acceptable and that it is subject to negative procedure.

Section 142C(b) – Scottish Secure Tenancy: rent arrears pre-action requirement – power to make further provisions about pre-action requirements

The Committee may wish to be content with the power contained within section 142C(b) and that affirmative procedure is appropriate.

Section 146(2) – Orders

The Committee may wish to consider the amended power contained within section 146(2) acceptable and the procedure to be attached to the exercise of such power appropriate.

Agenda Item 8 Domestic Abuse (Scotland) Bill

Section 4(3) – (meaning of domestic abuse) - Power to modify the terms of section 4(1)

The Committee may wish to ask the member why, in the light of the legal effect of the exercise of the power to extend categories of relationship to which the Bill’s remedies can apply, it is considered that negative procedure provides a sufficient level of scrutiny?
Ancillary Powers

The Bill does not contain the power to make transitional, transitory or savings provision. Given that the Bill creates new criminal offences in relation to extant protection orders and makes provision for the availability of legal aid in certain types of proceedings, the Committee may wish to explore with the Member whether it would be appropriate to have the power to make such provision.
INSTRUMENTS SUBJECT TO ANNULMENT

The Animals and Animal Products (Import and Export) (Scotland) Amendment Regulations 2010 (SSI 2010/343)

On 30 September 2010 the Scottish Government was asked:
The effect of regulation 2(2)(b) and (e) of this instrument which adds new definitions of Community Instruments to regulation 2(1) of the principal regulations is to make references to those instruments ambulatory. Why did the Scottish Government not cite use of the power in paragraph 1A of Schedule 2 to the 1972 Act which permits such ambulatory references to be made in the preamble to the instrument and explain whether it was considered necessary or expedient to do so?

The Scottish Government responds as follows:
The Scottish Government did not cite the use of the power in paragraph 1A of Schedule 2 to the 1972 Act as it did not think it was necessary to do so.

When the principal Regulations (the Animal and Animal Products (Scotland) Regulations 2007 (SSI 2007/194)) were made they did not use the power in paragraph 1A so none of the references to Community instruments were ambulatory. In 2009 the principal Regulations were amended by SSI 2009/227 which inserted a gloss at regulation 1(7) which states “Any reference to a Community instrument in these Regulations is a reference to that instrument as amended from time to time.”

We discussed the gloss in a telephone conversation with the SLC legal advisers prior to laying that amending instrument and they expressed the view that they were content that the gloss operated to ensure that all the references in the principal Regulations are ambulatory and not simply those contained in the 2009 amending instrument. When drafting SSI 2010/303, the Scottish Government took the view that the gloss would continue to work for the principal Regulations once amended to include new references to EU instruments as set out in the new definitions and replacement Schedules in SSI 2010/303.

However, if the Committee were to take the view that the gloss does not work for the new definitions and replacement Schedules in SSI 2010/303, the Scottish Government confirms that the general enabling words “and all other powers enabling them to do so” would include the power in paragraph 1A of Schedule 2 to the 1972 Act notwithstanding that it is not specifically cited and that it is expedient for the references to be construed as amended from time to time. Therefore, the omission of specific reference to that power and the narration that it is expedient for the references to be ambulatory does not affect the validity or operation of the instrument.
The Protection of Vulnerable Groups (Scotland) Act 2007 (Corresponding Disqualifications) Order 2010 (SSI 2010/346)

I refer to our telephone conversation regarding the Protection of Vulnerable Groups (Scotland) Act 2007 (Corresponding Disqualifications) Order 2010 (SSI 2010/346). You asked in particular if we could give you some further information about the time for which this Order is intended to have transitory effect.

In terms of section 92(1) and (2) of the Protection of Vulnerable Groups (Scotland) Act 2007 a person is barred from regulated work if they are listed on the children’s list or the adults’ list under that Act. In order to ensure that the Protection of Vulnerable Groups Scheme works with similar schemes in other parts of the UK, section 92 also provides that a person is barred from regulated work if they are on an equivalent barred list under the two pieces of legislation which were in force in relation to England, Wales and Northern Ireland at the time that the Protection of Vulnerable Groups Act was passed. There are powers under section 92 to add other equivalent lists for other jurisdictions as well as to substitute different lists for England, Wales and Northern Ireland.

The situation is, however, not as straightforward as at the time the Protection of Vulnerable Groups Act was passed. Although the lists under the Safeguarding Vulnerable Groups Act 2006 (SVG Act) are in operation for England and Wales, there is still a reasonable number of individuals who have to be transferred to those lists from previous children’s /adults’ list in England and Wales. The Protection of Children and Vulnerable Adults (Northern Ireland) Order 2007 (as referred to in sections 92(1)(c) and (2)(c)) is to be replaced by the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 and lists under that 2007 Order are already in operation. However, as with the SVG Act, there are still individuals on previous children’s/adults’ lists in Northern Ireland and those lists remain in operation until the individuals are transferred to the new lists.

The aim of the Corresponding Disqualifications Order is to ensure that any person who is currently on a list (whether an SVG list or one of the ‘old’ lists held in England, Wales and Northern Ireland) is barred from doing regulated work with children and/or protected adults in Scotland. (In terms of the previous Scottish legislation, the Protection of Children (Scotland) Act 2003, persons on those equivalent children’s lists in England, Wales or Northern Ireland were barred from working with children in Scotland, so it is essential that those restrictions continue seamlessly. Until now there was no adults’ list in Scotland and therefore the adults’ lists in England, Wales and Northern Ireland were not recognised here.) The Corresponding Disqualifications Order has transitory effect until all persons are transferred from the various ‘old’ lists to the lists held under the SVG Act and the equivalent Northern Irish SVG Order. We unfortunately cannot say how long that will take, particularly since it has been announced that there will be a review of the SVG Act and the terms of reference of that review have not been announced. It is the Scottish Government’s current intention to revoke the Corresponding Disqualifications Order once the various ‘old’ lists for England, Wales and Northern Ireland are closed after all persons have been transferred to an SVG list. At that point we would also make an order under section 92(5) and (6) to substitute the lists kept under the Northern Irish SVG Order 2007 (in place of the legislation referred to presently in section 92(1)(c) and (2)(c)).
We have no information as to the extent of the SVG Act review. However, in the event that any of the lists were to continue indefinitely - and provision was no longer required on a merely transitory basis, then we would review the position with a view to making textual amendment to the Protection of Vulnerable Groups Act.