SUBORDINATE LEGISLATION COMMITTEE

AGENDA

30th Meeting, 2010 (Session 3)

Tuesday 9 November 2010

The Committee will meet at 2.15 pm in Committee Room 5.

1. **Decision on taking business in private:** The Committee will decide whether to take item 8 in private.

2. **Instruments subject to approval:** The Committee will consider the following—
   - the Fishing Boats (EU Electronic Reporting) (Scotland) Scheme 2010 (SSI 2010/374).

3. **Draft instruments subject to approval:** The Committee will consider the following—
   - the Waste Information (Scotland) Regulations 2010 (SSI 2010/draft);
   - the Scottish Public Services Ombudsman draft Statement of Complaints Handling Principles and covering submission to Parliament.

4. **Instruments subject to annulment:** The Committee will consider the following—
   - the Animal Feed (Scotland) Regulations 2010 (SSI 2010/373);
   - the Criminal Legal Aid (Scotland) Amendment Regulations 2010 (SSI 2010/377).

5. **Instruments not laid before the Parliament:** The Committee will consider the following—
   - the Legal Profession and Legal Aid (Scotland) Act 2007 (Commencement No. 6) Order 2010 (SSI 2010/376 (C. 24)).

6. **Instruments not subject to parliamentary procedure:** The Committee will consider the following—
the Public Services Reform (General Teaching Council for Scotland) Order 2011 and Executive Note (SG 2010/174);
the Public Services Reform (General Teaching Council for Scotland) Order 2011 - Explanatory Document (SG 2010/175);
the Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 and Executive Note (SG 2010/182);
the Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 - Proposed Explanatory Note (SG 2010/183).

7. **Private Rented Housing (Scotland) Bill**: The Committee will consider the delegated powers provisions in this Bill at Stage 1.

8. **Damages (Scotland) Bill**: The Committee will consider the contents of a draft report.

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The papers for this meeting are as follows—

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## 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  Instruments subject to approval

**The Fishing Boats (EU Electronic Reporting) (Scotland) Scheme 2010 (SSI 2010/374)**

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

### Agenda Item 3  Draft instruments subject to approval

**The Waste Information (Scotland) Regulations 2010 (SSI 2010/draft)**

The Committee may wish to report that the meaning of “undertaking”, which is a fundamental definition for the purposes of the operation of the regulations, could be more clearly expressed. While that term includes “any business or profession” it is not clear from the regulations themselves what else it is intended (or not intended) to include.

The Committee may also wish to report that the regulations could be clearer as to the circumstances in which the pre-notification requirement has been satisfied and therefore when the duty to provide information arises.

**Scottish Public Services Ombudsman – Statement of Complaints Handling Principles, November 2010 (2010/draft)**

The Committee may wish to be content with the draft Statement of Principles.
Agenda Item 4  Instruments subject to annulment

The Animal Feed (Scotland) Regulations 2010 (SSI 2010/373)

The Criminal Legal Aid (Scotland) Amendment Regulations 2010 (SSI 2010/377)

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

Agenda Item 5  Instruments not laid before the Parliament

The Legal Profession and Legal Aid (Scotland) Act 2007 (Commencement No. 6) Order 2010 (SSI 2010/376)

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

Agenda Item 6  Instruments not subject to Parliamentary procedure


The Committee may wish to report in relation to this draft Order laid for consultation as follows—

(1) In relation to the following functions of the General Teaching Council (GTCS) to make rules or schemes in the draft Order, the Committee remains to be convinced that these provisions do not breach the prohibition in section 20(1) of the 2010 Act that the order may not confer or transfer functions of legislating on persons other than the Scottish Ministers, the First Minister or the Lord Advocate—

   (a) the functions of making rules in relation to the registration of teachers in article 15,

   (b) the functions of making schemes under articles 26, 31 and paragraphs 2 and 7 of Schedule 2,

   (c) the function of making rules under schedule 4, paragraph 1.

(2) in relation to paragraph 11 of schedule 3, the Committee remains to be convinced that the provision permitting GTCS to delegate its functions of making rules or
schemes (as above) under the Order to any persons as listed in that paragraph does not breach the prohibition of the delegation of any legislative functions in section 20(2) of the 2010 Act,

(3) in relation to article 15 (rules by the Council), a response has been obtained from the Government as to why it is considered that this article (taken with the repeal of section 6(5B) of the Teaching Council (Scotland) Act 1965) does not breach the prohibition in section 20(7) and (8) of the 2010 Act. On balance, the Committee may accept the explanation provided,

(4) in relation to Schedule 2 of the draft Order (taken with the repeal of Schedule 1 of the 1965 Act), the Committee remains to be convinced that such provision does not breach the prohibition contained in section 20(7) and (8) of the 2010 Act, in respect of having an effect of transferring to another person the function of the Scottish Ministers to nominate or appoint 6 members of the Council, as conferred by paragraph 1 of Schedule 1 to the 1965 Act,

(5) in light of the Committee’s concerns, it recommends that further information in support of the Government’s position should be provided in the revised explanatory document with the draft Order to explain such further provisions in the draft which delegate functions, and to explain the procedural requirements attaching to the exercise of those functions,

(6) in relation to the last paragraph of the preamble, it would assist Parliamentary consideration also to explain that the condition in section 20(5) of the 2010 Act has been implemented for functions of legislating conferred in the instrument, and whether in respect of that function, draft affirmative or negative procedure has been chosen for the exercise of the function by order,

(7) in relation to paragraph 8 of Schedule 2, there is a point of defective drafting, in the omission to specify that an order shall be made by statutory instrument. The Government have however undertaken to correct this in the finalised draft Order to be laid.


In relation to article 3 of the Order, the Committee may wish to welcome the commitment to correct inaccuracies in the description of the operation of the current law set out in the Explanatory Document. The Committee may also wish to report that while it accepts that burdens can arise from the form of legislation, the burden itself must be of the nature of a financial cost or administration inconvenience and that it is not clear to the Committee how the outdated nature of the “two man rule” operates as an administrative inconvenience. It recommends that further explanation of this be provided in the Explanatory Document when it is amended prior to being laid with the final draft order.
In relation to article 4 of the Order, the Committee may wish to welcome the additional explanation provided and to recommend that the Explanatory Document is amended to reflect this prior to being laid in its final form.

In relation to article 5 of the Order, the Committee may wish to report that it recommends that further evidence from the Government as to how the absence of notice of intention to review the rent results in administrative inconvenience for landlords or tenants is provided in the revised Explanatory Document.

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**Agenda Item 7 Private Rented Housing (Scotland) Bill**

**Section 31(4) (inserts section 28B into the Housing (Scotland) Act 2006) – Landlord application to private rented housing panel: further provision**

The Committee may wish to query the use of negative procedure in relation to the power contained at section 31(4), relating to the insertion of section 28B into the Housing(Scotland) Act 2006. Regulations made under this power could cover a wide range of matters, including specifying the circumstances in which a panel member must decide to reject an application or stop assisting a landlord, which might be regarded as a matter of some significance in relation to the overall scheme of the landlord application process. Also, the provision made at section 28B(2) is not exhaustive, and the Scottish Ministers could make further provision, by regulations, around the fairly wide subject area of the “making or deciding of applications under section 28A”.

Is it not the case that this power could be used to deal with a range of matters, potentially involving rather more than administrative detail, and that it would be appropriate that they be subject to affirmative procedure?

**Section 35 – Commencement**

The Committee may wish to ask the Scottish Government why an order made under section 35, where it includes transitional, transitory or saving provision, should be subject to no procedure, in contrast to an order containing such provision where made under section 33, which would be subject to negative procedure.

Should an order under section 35, in those circumstances where it deals not simply with matters of commencement, but also includes transitional, transitory or saving provision, be subject to negative procedure (i.e. rather than no procedure)?
INSTRUMENTS SUBJECT TO APPROVAL

The Waste Information (Scotland) Regulations 2010 (SSI 2010/draft)

On 29 October 2010 the Scottish Government was asked:

1. To clarify the meaning of “undertaking” provided in regulation 2 given that it is stated that this includes any business or profession but does not indicate what other unspecified characteristics in addition to these an undertaking is to have.

2. To clarify how it is to be clear when the duty in regulation 5(1) applies if the requirement for publication of the intention to make a waste information request can be satisfied by such means as SEPA considers appropriate. If undertakings are unaware of how this requirement is to be fulfilled when will it be clear that the duty attaches to them and that they may then be liable to criminal sanction for failure to comply with the duty?

The Scottish Government responds as follows:

1. The word “undertaking” and its definition are deliberately expansive. They are intended to be sufficient to cover all business and professional activities and also the work of public sector and voluntary sector bodies, and to exclude arguments that enterprises which are not in the private sector, not profitable or not designed to generate profit are not covered. The intention is that SEPA will be able to use these Regulations to acquire accurate information over time about all non-household waste, although individual surveys are likely to be sent only to selected representatives of particular economic sectors.

2. The requirement in regulation 5(1)(c) is not intended to be onerous and is intended to require only some form of prior notice to have been published. The requirement for instance could be satisfied by publication in a local or national newspaper, in the Edinburgh Gazette or on SEPA’s website. If an individual recipient of a waste information request has not seen the prior publication and wishes to see confirmation that it took place, that is a question they can ask of SEPA. Unless there has not in fact been any publication and SEPA have no evidence of publication to exhibit in response to a query, we do not think there could be any question of there being no duty to respond to the request for information. Regulation 5(1)(c) is intended simply to build in a “pre-notification” stage for the benefit of economic sectors which are geared up to tracking these things and preparing members to respond to questionnaires. Given that a waste information request has to be properly served on an appropriate individual, and there will be a minimum of 28 days to respond, we do not consider that this additional stage provides any essential protection to recipients of requests.
INSTRUMENTS NOT SUBJECT TO PARLIAMENTARY PROCEDURE:

The Public Services Reform (General Teaching Council for Scotland) Order 2011 and Executive Note (SG 2010/174)

The Public Services Reform (General Teaching Council for Scotland) Order 2011 – Explanatory Document (SG 2010/175)

On 29 October 2010 the Scottish Government was asked:
1. Section 20(1) and (2) of the 2010 Act prohibit the Order from conferring a function of legislating on persons apart from the Scottish Ministers, First Minister or Lord Advocate, and prohibit delegation of any function of legislating. By section 30 this applies to rules or other subordinate instruments.

Can it be explained why the following provisions are within the enabling powers in the 2010 Act—

a) the powers of the General Teaching Council (GTCS) to make rules in relation to the registration of teachers contained in article 15 (given that articles 15 to 22 enable the rules to specify substantive matters, for example the criteria for registration of teachers and removal and suspension of persons from the register)?

Can it be explained, to assist the Committee, what the legal effects shall be of the registration of teachers under these rules (or suspension or removal), beyond the provisions in this Order?

b) the powers of GTCS to make a scheme in article 26 in regard to the registration of other individuals working in educational settings (given that this may include equivalent substantive provisions to those in relation to teacher registration)?

c) the powers of GTCS to make a scheme in article 31 imposing (or enabling the GTCS to be delegated to impose) requirements on registered teachers or their employers, and as to the failure to comply with such requirements?

d) the powers of GTCS to make an election scheme to govern the election of elected members of GTCS in Schedule 2, paragraph 2?

e) the powers of the GTCS to make a scheme in Schedule 2, paragraph 7 which may contain substantive matters for example provision for disqualification of persons as GTCS members, or removal of members?

f) the powers of the GTCS (with approval of the Lord President) to make rules under Schedule 4, paragraph 1 as to fitness to teach, conditions on registration, reprimands etc?

g) the powers of the Lord President in Schedule 4, paragraph 5 to make rules as to the functions of legal assessors?

2. Can it be explained why paragraph 11 of schedule 3 complies with the prohibitions in article 20(2), (7) and (8) of the 2010 Act, given that that article appears to enable
GTCS to delegate the functions of making rules and schemes under the draft Order to any of the persons set out in the article?

3. Can it be explained why article 15 and Schedule 2 of the draft Order do not breach the prohibition contained in section 20(7) and (8) of the 2010 Act (no transfer to other persons to consent or appointment functions of the Scottish Ministers), given that—

a) Section 6(5B) of the Teaching Council (Scotland) Act 1965 provides for a function to the effect that the Scottish Ministers require to consent to the making of rules for registration of teachers under section 6?

b) Schedule 1 paragraph 1 of the 1965 Act provides to the effect that 6 members of the GTCS may be appointed by the Scottish Ministers?

4. If it is agreed that any of the Order provisions set out above confer functions of legislating, then what is the effect considered to be of the apparent omission from the explanatory document of reasons for such functions of legislating and the procedural requirements attaching to those functions, required by section 27(1)(e) (qv para 3.27 of the explanatory document)?

5. As paragraph 8 of Schedule 2 confers functions of legislating on the Scottish Ministers by order subject to affirmative procedure, would it be considered appropriate that the last sentence of the preamble should have added citation to section 20(5) of the Act?

6. As section 20(4) of the 2010 Act provides that the order may not confer a function of legislating on Scottish Ministers unless the condition is satisfied that the function is exercisable by statutory instrument, should paragraph 8 of Schedule 2 of the draft Order have referred to this requirement, and if so, what is the effect of the omission?

The Scottish Government responds as follows:

1(a) The Scottish Government considers that section 20(1) of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”) enables functions of legislating contained in orders made under the relevant sections of the 2010 Act only to be conferred on or transferred to the Scottish Ministers, the First Minister or the Lord Advocate, and that section 20(2) prevents the delegation of any function of legislating. The Scottish Government also agrees that section 30 of the 2010 Act (interpretation) provides that a “function of legislating” is a function of legislating “by order, rules, regulations or other subordinate instruments”. However, the Scottish Government does not consider that the conferral of a power on a body to make “rules” necessarily amounts to the creation of a “function of legislating”.

In article 15 of the draft Public Services Reform (General Teaching Council for Scotland) Order 2011 (“the draft Order”), the Scottish Government does not consider that the power granted to the General Teaching Council for Scotland (“the GTCS”) to make rules as to the operation of a register of teachers amounts to a “function of legislating” which has been delegated in contravention of section 20(2) of the 2010 Act. A function of legislating is a function of making law. Law can be distinguished as a set of rules which are generally applicable as opposed
to rules applicable only to the members of a particular organisation, or which make provision as to the administration of an organisation. The Scottish Government therefore considers the provisions in article 15 to be within the enabling powers of the 2010 Act. The Scottish Government would also note that the provisions contained within article 15 of the draft Order broadly mirror the rule-making powers contained in section 6(4) of the Teaching Council (Scotland) Act 1965 ("the 1965 Act").

The register of teachers is a list of teachers appropriately qualified to teach in educational establishments, and is of application only to that limited part of the population seeking to be registered as teachers by the GTCS. The details of the procedure for inclusion in the register, the registration criteria and other matters governing the operation of the register, which article 15 obliges the GTCS to set out in rules, are considered to be more administrative in nature than legislative. The rules are not of general application. They amount to a communication to relevant individuals of how registration will be dealt with in particular circumstances. Therefore, the Scottish Government does not consider the making of these rules to be a function of legislating. As such, it does not seem to the Scottish Government that it would be appropriate for such rules to be prepared in the form of a SSI, or to be made subject to legislative procedure and Scottish Parliamentary approval.

The Scottish Government is also asked to explain the legal effects of the registration of teachers under these rules (or suspension or removal), beyond the provisions in this Order.

The key legal effect of the registration of teachers is governed by a SSI subject to Parliamentary control. Regulation 4 of the Requirements for Teachers (Scotland) Regulations 2005 (SSI 2005/355) provides that every education authority shall, in discharging their functions under section 1 of the Education (Scotland) Act 1980, employ only registered teachers, meaning a teacher recorded in the register maintained by the GTCS. (The relevant consequential amendment to these Regulations is found in paragraph 7 of Schedule 6 to the draft Order). This is a control on the exercise of functions by education authorities. Thus, teachers working in schools operated by education authorities must be registered in the register maintained by the GTCS. The Scottish Government thinks it significant that the legal effects flowing from registration are set out in a separate statutory instrument subject to Parliamentary procedure.

1(b) The Scottish Government is also asked to explain why it is within the enabling powers of the 2010 Act for the GTCS to make a scheme in article 26 as regards the registration of other individuals working in educational settings, given that this may include equivalent substantive provisions to those in relation to teacher registration.

Article 26 enables the GTCS to keep other registers of other individuals working in educational settings as it thinks fit. If it chooses to exercise this power, it must make and publish a scheme governing the operation of any such register.

As with the power granted to the GTCS in article 15, we do not consider that the power to make and publish a scheme governing the operation of a register of other
individuals working in educational settings is a “function of legislating” within the meaning of section 20(1) or (2) of the 2010 Act.

The Scottish Government considers that inclusion in such a register would amount to a judgment on the value of the relevant individuals’ qualifications and to their fitness to work in an educational setting. (The Scottish Government would also note for the benefit of the Committee that there would be no particular legal effect stemming from their inclusion in (or exclusion from) the register; there is no separate legislation setting out any such legal effects as there is for registered teachers, nor is any planned.)

The schemes would be addressed to a group of individuals in particular circumstances who wish to be part of the scheme, rather than the population as a whole. Again, the Scottish Government takes the view that the content of a scheme governing the operation of registers of individuals working in educational settings is not provision which is legislative in nature and hence it does not amount to a “function of legislating” which is being delegated in contravention of section 20(1) and (2) of the 2010 Act.

1(c) Article 31 enables the GTCS to make and publish a scheme setting out measures to be undertaken so as to allow it to keep itself informed about the standards of education and training of registered teachers. The policy intention is to make provision enabling the GTCS to build on aspects of current good practice which can help registered teachers to keep their skills up to date as their careers develop and school curriculum and learning patterns change. This in turn will improve the quality of Scotland’s teachers and will enhance the impact they have on pupils’ learning. The draft Order allows the GTCS to impose requirements on registered teachers or their employers, and to make provision with respect to failure to comply with those requirements.

The Scottish Government does not consider this amounts to the delegation to the GTCS of a function of legislating. It is anticipated that any such scheme would impose requirements on registered teachers to ensure the maintenance and development of their skills. Such requirements may include teachers regularly sharing evidence with the GTCS to show they have maintained professional skills and understanding and have been involved in continuing professional development.

As the Scottish Government takes the view that the detailed operation of the register of teachers should be regarded as administrative in nature, and should not be regarded as the conferral on, or delegation to, GTCS of a “function of legislating”, it also takes the view that a scheme which links an individual’s continuing development as a teacher to retention of their entry on the register is administrative rather than legislative in nature.

The SLC’s question may indicate a concern that the consequences of a registered teacher’s failure to meet requirements could be severe, given that article 31(2)(b) of the draft Order envisages the review of registration in cases where requirements are not met, and also that removal from the register could have serious consequences in light of SSI 2005/355. However, those consequences would arise from failing to meet the requirements of registration (e.g. in relation to
continuing professional development) whilst registered, rather than by operation of law. Further, the Scottish Government would note that, in a situation where an individual has failed to meet ongoing educational requirements, the GTCS would require to act reasonably in considering their ongoing registration. Article 8 of the draft Order (best regulatory practice) requires the GTCS to perform its functions in a way which is (amongst other things) proportionate, accountable, transparent and consistent, and targeted where action is needed.

1(d) Paragraph 2 of Schedule 2 to the draft Order requires the GTCS to make and publish an election scheme to govern the election of elected members.

Whilst it is correct that Schedule 1 to the 1965 Act required twenty-six members of the GTCS to be elected under an election scheme which required to be approved by the Scottish Ministers by order (paragraph 1(2), (5) and (8)), the Scottish Government does not consider that the new provisions as to election schemes should be regarded as delegation of a function of legislating to impermissible persons in contravention of section 20(1) and (2) of the 2010 Act.

It is clear that Parliament’s intention at the time the 1965 Act was drafted was that the Secretary of State should have a role in considering and approving the election scheme. But the fact that in previous legislation Parliament saw fit to require the Secretary of State to approve the scheme does not provide a definitive answer as to whether or not the preparation of an election scheme is properly to be regarded as a function of legislating.

The policy intention now is for the GTCS to become an independent, self-regulating body. It is therefore a core policy for the GTCS to be able to operate independently of the Scottish Ministers. With that in mind, the Scottish Government does not consider that the preparation of an election scheme applicable to 19 members of a body intended to operate at arm’s length from the Scottish Government is properly to be regarded as a function of legislating requiring Scottish Ministers’ approval. An election scheme such as is contained in SSI 2004/542 is addressed to a small category of persons, and it is administrative in nature. This level of organisational detail of an independent body does not appear to the Scottish Government to be legislative in nature.

As the Scottish Government takes the view that this is not to be regarded as a “function of legislating”, it does not consider this to amount to delegation of a “function of legislating” (section 20(2) of the 2010 Act).

1(e) Paragraph 7 of Schedule 2 to the draft Order requires the GTCS to make a membership scheme relating to the removal, disqualification and replacement of members of the GTCS.

Although provision on this matter was made in paragraph 4 of Schedule 1 to the 1965 Act, as above the Scottish Government does not think that the historic approach is definitive as to the question of whether a matter is a “function of legislating”. The Scottish Government does not consider that the circumstances in which members of the GTCS vacate office is a matter that should be regarded as a “function of legislating”. The draft Order being presented to the Scottish Parliament reflects a policy by which the GTCS is given a greater degree of
independence over its internal operation. The removal, disqualification and replacement of members of the GTCS appears to the Scottish Government to be an internal organizational matter for the GTCS, and not be of such a nature that it requires legislative procedure to apply, with Parliamentary scrutiny.

If the SLC is concerned that by avoiding classification as a “function of legislating”, some degree of accountability is lost in the preparation of the membership scheme, it should also be borne in mind that the GTCS is a body representative of its members. 19 of the members of the GTCS (more than half) will be elected from the ranks of registered teachers. Its processes will require to satisfy the registered teachers who elect these members, and it will be accountable to them. The Scottish Government would also note that article 8 of the draft Order (best regulatory practice) obliges the GTCS to act in a proportionate, accountable, transparent and consistent manner.

1(f) The Scottish Government does not consider that the power set out in paragraph 1 of Schedule 4 to the draft Order amounts to a “function of legislating” which may be conferred only on the Scottish Ministers, the First Minister or the Lord Advocate pursuant to section 20(1), and which may not be delegated pursuant to section 20(2), of the 2010 Act.

The Scottish Government considers that these rules concern the detailed management and administration of the register, in this case the ancillary investigative powers, and powers of disposal, of the GTCS. The Scottish Government does not consider that the function of preparing these rules amounts to a function of legislating. The provisions set out in paragraph 1 of Schedule 4 indicate the anticipated content of the rules on fitness to teach, and amount to enabling powers being granted to the GTCS which the Scottish Government consider appropriate for the Scottish Parliament to consider. However, the Scottish Government considers that the detailed content of these rules concerning investigations and how the GTCS should dispose of investigations, review them or re-register individuals, is administrative rather than legislative in nature, and hence that the making of the rules should not be regarded as a “function of legislating". The Scottish Government therefore does not consider that the conferral of a power of approval onto the Lord President breaches the restrictions in section 20(1), nor does the Scottish Government consider that it amounts to delegation of a function of legislating to the Lord President in breach of section 20(2), all of the 2010 Act.

1(g) Paragraph 3(4) of Schedule 4 to the draft Order confers on the Lord President the power by statutory instrument to make rules relating to the functions of legal assessors. Paragraphs 3(5) and 3(6) of that Schedule supplement that provision.

The Scottish Government considers that these provisions amount to provision which merely restates an enactment (section 20(6) of the 2010 Act) and as a result section 20(1) and (2) of the 2010 Act do not apply. The Scottish Government would note that expressing something in identical terms is not a prerequisite to something being a restatement; the aim of restatement is to replicate legal effect in a better way (see section 16(10) of the 2010 Act which requires restatement to consist of provision which would make the law more accessible or more easily understood).
The Scottish Government considers that paragraphs 3(4), (5) and (6) of Schedule 4 to the draft Order recast paragraph 3(2) and (3) of Schedule 2 to the 1965 Act in a concise way which makes the law easier to understand and therefore more accessible.

2. Section 20(2) of the 2010 Act prohibits provision for the delegation of any function of legislating. As noted above, however, the Scottish Government considers that the powers to make rules and schemes under the order do not amount to functions of legislating. The Scottish Government considers that these powers to make rules and schemes are not legislative in nature, relating more to, for example, administrative matters and internal organisational matters for the GTCS.

Section 20(7) and (8) prohibit provision which has the effect of transferring certain functions to persons other than the Scottish Ministers, the First Minister or the Lord Advocate. That prohibition will be considered in more detail in relation to the response to question 3 below.

3. In relation to question 3(a), the Scottish Government considers that the function of consenting has been abolished (as is permitted under section 14(3)(a) of the 2010 Act). There is now simply a power for GTCS to make rules in relation to registration. Therefore the prohibition in section 20(7) and (8) on transferring a function of consenting to a person other than the Scottish Ministers, the First Minister or the Lord Advocate is not applicable here.

In relation to question 3(b), the make-up of the GTCS membership as set out in Schedule 2 to the draft Order is quite different from that set out in Schedule 1 to the 1965 Act. Our analysis is that the constitution of the GTCS under the 1965 Act is being repealed and a new GTCS constitution is being created, as reflected in the draft Order. As stated above, the policy intention behind the draft Order is for the constitution of the GTCS to be altered so as to enable it to become an independent, self-regulating body. In Schedule 1 to the 1965 Act the Scottish Ministers have a function of nominating six persons to the GTCS, within certain specific parameters (paragraph 1(9) of Schedule 1 to the 1965 Act). In line with the policy above, it is not thought appropriate to retain a role for the Scottish Ministers in relation to decisions about the membership of GTCS. Therefore, the Scottish Ministers’ power to nominate persons as members of the GTCS is being abolished as part of the repeal of the 1965 Act. There is no transfer of Scottish Ministers’ powers under the 1965 Act as their powers are not granted to another person in the same form.

Instead, under the new GTCS constitution, GTCS is given power to appoint persons to become part of its own membership. The Scottish Government takes the view that there is a significant difference between (a) the Scottish Ministers, or some other person, appointing members to a third party body and (b) granting that body the power to take decisions on its own membership. Furthermore, if one compares the powers of the Scottish Ministers to nominate members of the GTCS under the 1965 Act with the new powers to elect, nominate and – most pertinently – to appoint members of the GTCS under the draft Order, there are significant differences. The GTCS is not required to ensure that nominees satisfy criteria matching those set out in paragraph 1(9) of Schedule 1 to the 1965 Act. Under paragraph 4(b) of Schedule 2 to the draft Order (which has no equivalent in the
1965 Act) the GTCS is to be prevented from appointing under this provision individuals who are, have been, or who are eligible to be registered. The GTCS is also prevented from exercising their discretion so as to appoint a person who has obtained a recognised teaching qualification. Again, there is no equivalent provision limiting appointments in this way in the 1965 Act. The further requirements placed on the GTCS in appointing its 7 members are that appointed members come from as wide a range of applicants as practicable. This grants the GTCS a power to appoint which is limited in different ways to the power that was granted to the Scottish Ministers under the 1965 Act. On this basis, the Scottish Government does not consider there to have been a transfer of functions to nominate/appoint from the Scottish Ministers to the GTCS.

The Scottish Government would also submit that under the 2010 Act a narrow view should be taken of what may amount to restatement of an enactment. The Scottish Government therefore consider this supports the legal position that no function of appointing members has transferred from Scottish Ministers. For those reasons it is our position that there has not been a transfer of a function to appoint here in contravention of section 20(7) and (8) of the 2010 Act.

4. For the reasons given in response to questions 1(a), (b), (c), (d), (e), (f) and (g) above, the Committee will note that the Scottish Government does not consider that any functions of legislating conferred by the order, or any of the procedural requirements attaching to the exercise of those functions, have been omitted from the proposed explanatory document in contravention of section 27(1)(e) of the 2010 Act. (For the avoidance of doubt, the Scottish Government takes the view that a provision which merely restates an enactment is not covered by section 27(1)(e) of the 2010 Act.)

5. The Scottish Government does not consider that the last sentence of the preamble should have cited section 20(5) of the 2010 Act. The Scottish Government considers that the preamble grants the Scottish Ministers the opportunity to narrate their view as to whether the various preconditions contained within the 2010 Act, and which relate to the draft Order as a whole, have been satisfied. This has been done, alongside a statement as to whether the consultation requirement has been satisfied. The opportunity would not seem to exist elsewhere in the instrument to narrate that these preconditions relating to the whole draft Order have been satisfied.

Section 20(5) of the 2010 Act contains a condition that is of relevance to the function of legislating conferred on Scottish Ministers in the order. The Scottish Government would agree that section 20(5) places conditions on the conferral of such functions, but we consider the Scottish Ministers’ compliance with these conditions can be identified by reference to the body of the instrument rather than by reference to the preamble. Moreover, this particular condition does not relate to the making of the draft order itself. It is, therefore, quite a specific condition and, in the Scottish Government’s view, quite different in character from the conditions in, say, section 16 which require the Scottish Ministers to confirm in some manner that they have been satisfied. For those reasons the Scottish Government feels that it is not necessary to cite section 20(5) of the 2010 in the preamble.
6. The Scottish Government would confirm that the omission of “made by statutory instrument” after “by order” is a drafting error. The Scottish Government is grateful to the Committee for drawing this to its attention. While it is thought that, by conferring the power on Scottish Ministers, by using the words “by order”, by making reference to “affirmative procedure”, and by the clear requirement in section 20(4) of the 2010 Act, the intention in paragraph 8 is clear, the Scottish Government agrees that this should be corrected and will amend the draft Order to include specific reference to this function being exercisable by statutory instrument. Given that the intention in paragraph 8 of Schedule 2 is apparent, the Scottish Government does not feel that the omission calls into question whether the section 20(4) condition has been satisfied.

The Committee specifically asks about the effect of the omission. The Scottish Government does not consider the omission of this text from a draft Order subject to statutory consultation calls into question the vires of the final Order.
On 1 November 2010 the Scottish Government was asked:

1. In relation to article 3 of the Order:
   - Whether it considers that para 6.19 of the Explanatory Document is accurate given that cases 3 and 7 of Schedule 2 appear to refer to occupation by the tenant of land other than the holding to which the notice to quit relates.
   - To explain if the change in the definition to “viable unit” involves the same policy considerations in relation to balance and proportionality in such cases since it concerns the existing holding of the tenant rather than the effect on the landlord of the transfer of the holding to which the tenant is to succeed.
   - To explain why it is considered an outdated definition is properly an “administrative inconvenience” within the meaning of section 17(3) of the Public Services Reform (Scotland) Act 2010 - the definition is not hard to understand, the Explanatory Document indicates that its meaning is understood but it is outdated and no longer relevant. In other words it is clear what it means in the legal sense and so can be applied but does not achieve the original policy objective because it does not represent modern practice. In what way is this an administrative inconvenience? Is it suggested that any law in need of reform because it is outdated would amount to an administrative inconvenience and could be subject to a section 17 Order?

2. In relation to article 4 of the Order:
   - To explain why the existing section 5(4A) and (4B) of the 1991 Act are considered to have “uncertain effect” per para 7.10 of the Explanatory Document. The legal effect seems clear - the difficulty is that it affords tenants an unintended unfair advantage as described in para 7.12.
   - Can it be explained how this article will remove an existing obstacle to efficiency and productivity since this will not increase the land available to let. The legal loophole only appears to apply in relation to existing leases in respect of which post lease agreements 27 November 2003. It readjusts the balance between landlord and tenant in existing leases. How does this achieve increased efficiency?
   - The true purpose of the measure appears to be to prevent tenants from making use of an unintended legal loophole. It is to readjust the balance of the legal relationship between the parties rather than address a specific financial cost. Most legal provisions will result in financial implications of a greater or lesser degree on the interests of persons being regulated. In light of this what are considered to be the limits of the scope of section 17(2)(a) and what a “financial burden” is considered to be?
3. In relation to article 5 of the order:

- In essence there has been a drafting error. This has resulted in some uncertainty as to the effect of the provision, however the courts have determined that it is within their power to apply the intended meaning.

- In light of this can it be explained why “missing wording” is considered properly to be an “administrative inconvenience” simply because the Legislation contains a mistake? The courts appear to have adopted a solution to the problem.

- If this argument is accepted what are the limits on what errors can be corrected using the powers in section 17?

The Scottish Government responds as follows:

1. In relation to article 3 of the Order:

1.1 We are grateful to you for spotting this and we agree that paragraph 6.19 of the Explanatory Document would be clearer if it distinguished between cases 2 and 6 and cases 3 and 7 of Schedule 2 respectively. We would propose to amend the Explanatory Document when we have received all responses to the consultation to clarify this point.

1.2 The essence of the amendment is to modernise an otherwise obsolete definition. It is not to influence the way the legislation works. The new definition will be used in relation to cases 2 and 6, and to cases 3 and 7 of the Schedule and the same policy considerations in relation to balance and proportionality apply in relation to each of those cases.

1.3 Section 17(3) of the Act provides that “For the purposes of subsection (1), a financial cost or administrative inconvenience may result from the form of any legislation (for example, where the legislation is hard to understand).”

1.4 The wording in brackets in 17(3) is illustrative and not definitive. Whilst the operation of the legislation may have been clear at the time it was brought into force, changes in circumstances have rendered it hard to understand how it can be sensibly applied in a modern context. As this difficulty results from the form of the legislation (as read in a modern context) it is considered that this falls within section 17(3) and therefore constitutes an administrative inconvenience.

1.5 It is considered that the application of section 17(3) would need to be assessed on a case by case basis in relation to provisions in other legislation which were considered outdated.

2. In relation to article 4 of the Order:

2.1 We are grateful to you for drawing the wording of paragraph 7.10 to our attention. We agree that this could more clearly indicate that the burden arises simply by virtue of the legislative provisions in force and not because their legal effect is uncertain. We would propose to amend the Explanatory Document once we have received all responses to the consultation.
2.2 Striking the right balance between the interest of landlords and tenants is critical to the effective functioning of the agricultural lettings market. Perceived unfairness undermines confidence in this market.

2.3 In this instance, an anomaly has been identified in that the legislation fails to strike a fair balance between the interests of parties within a particular group (those who are party to a post-lease agreement entered prior to November 2003 which continues to have effect). That unfairness has a wider effect on relationships within the tenant farming industry and undermines confidence in the fairness of the legislation which governs it.

2.4 Scottish Ministers consider the current anomaly to be a burden for the purposes of Section 17(1) and that its removal will improve the perception of fairness which is critical to the proper functioning of the market and will thus facilitate its efficiency and productivity.

3. In relation to article 5 of the order:

3.1 We agree that this provision is designed to clarify what the law is for the benefit of the reader. Whilst we recognise that the courts can (and in this case, have) read in wording to resolve the ambiguity, we consider that section 17(3) when read with section 17(1) and (2) provides the power to allow us to take the opportunity to rectify this patent defect.

3.2 Subsection (3) is illustrative and not in itself definitive. It acknowledges that such an inconvenience may result from the “form” of legislation. It is considered that missing wording is something in the nature of the “form” of the legislation, that this missing wording creates an ambiguity and that ambiguity makes this particular section hard to understand.

3.3 It is considered that this provision falls within the powers of section 17. As far as errors in other legislation may be concerned, it is considered that the limits of the powers in section 17 would fall to be assessed on a case by case basis.
Correspondence from Bill Butler MSP dated 5 November 2010

Damages (Scotland) Bill at Stage 1

I refer to your letter of 26 October seeking clarification as to the meaning and scope of the phrase “enactment contained in an Act” in section 18(4).

The Committee asked, in particular, whether it was intended to include the Bill itself and whether it should be clarified (for example by referring instead to “an enactment (including this Act”).

The expression “enactment contained in an Act” was intended to be restricted to an enactment or provision contained or comprised in an Act. This was considered necessary in view of the wide definition of “enactment” in Schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) (“the 2010 Act”) which would include not only the Act itself but any provision of subordinate legislation. It is thought that there would not be any need for an order under section 18(1) to amend or repeal a whole Act or any provision in subordinate legislation and that it would be undesirable, given the wide power conferred by section 18, to extend that power further than could be justified. That is the first reason why it is thought that the Committee’s suggested wording would not be appropriate because the unrestricted reference to “enactment” would attract the wide definition in Schedule 1 to the 2010 Act.

The term “Act” in that expression was intended to include any Act, including, if thought necessary, the Damages (Scotland) Act itself. It is thought that this is achieved by the existing wording. This is because Schedule 1 to the 2010 Act provides

““Act” means, as the context requires, an Act of Parliament or an Act of the Scottish Parliament,”

And goes on to provide

““Act of the Scottish Parliament” includes an Act of the Scottish Parliament whenever passed.”

It is submitted that this makes it clear that the reference in an Act to “an Act” would, unless the context otherwise requires, include a reference to that Act itself. There is nothing in this Act which indicates that the context otherwise requires. There is therefore no reason why it should be thought that the reference to “an Act” in the Damages (Scotland) Act would not include a
reference to itself. Furthermore, to provide expressly that the reference to “an Act” would include “this Act” might merely cast doubt upon the width of the definition of an “Act of the Scottish Parliament” in Schedule 1, which would be undesirable.

In this connection, I would refer to section 57(3) of the 2010 Act which provides that an order making ancillary provision “may modify any enactment”. This did not make it clear expressly that the reference to “enactment” included the 2010 Act but again there is no doubt that it would do so. The position in this case is the same.

Accordingly, for these reasons, it is not thought that any clarification of section 18(4) is required.