SUBORDINATE LEGISLATION COMMITTEE

AGENDA

31st Meeting, 2010 (Session 3)

Tuesday 16 November 2010

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

1. **Choice of Deputy Convener:** The Committee will choose a new Deputy Convener.

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

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

   - the *Scallops (Luce Bay) (Prohibition of Fishing) Order 2010* (SSI 2010/375);
   - the *National Health Service (General Ophthalmic Services and General Dental Services) (Scotland) Amendment Regulations 2010* (SSI 2010/378);
   - the *Scottish Social Services Council (Appointments, Procedure and Access to the Register) Amendment (No. 2) Regulations 2010* (SSI 2010/379);
   - the *Protection of Vulnerable Groups (Scotland) Act 2007 (Power to Refer) (Information Held by Public Bodies etc.) Order 2010* (SSI 2010/380);
   - the *Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Purposes for Consideration of Suitability) Regulations 2010* (SSI 2010/381);
   - the *Police Act 1997 (Alteration of the Meaning of Suitability Information relating to Children and Protected Adults) (Scotland) (No. 2) Order 2010* (SSI 2010/382);
   - the *Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2010* (SSI 2010/383);
   - the *Public Finance and Accountability (Scotland) Act 2000 (Economy, efficiency and effectiveness examinations) (Specified bodies etc.) Order 2010* (SSI 2010/389);
   - the *Cleaner Road Transport Vehicles (Scotland) Regulations 2010* (SSI 2010/390);
the Non-Domestic Rating Contributions (Scotland) Amendment Regulations 2010 (SSI 2010/391).

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

   the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 5) Order 2010 (SSI 2010/385 (C. 25)).

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

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

7. **Children's Hearings (Scotland) Bill**: The Committee will take evidence on the delegated powers provisions in this Bill after Stage 2 from—

   Denise Swanson, Policy and Programme Manager, and Laurence Sullivan, Senior Principal Legal Officer, Scottish Government.

8. **Children's Hearings (Scotland) Bill**: The Committee will consider the evidence heard earlier in the meeting.

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The papers for this meeting are as follows—

Legal Brief SL/S3/10/31/1(P)

Summary of Recommendations SL/S3/10/31/2

**Agenda Items 3 and 4**

Instrument Responses SL/S3/10/31/3

**Agenda Item 5**

*Local Electoral Administration (Scotland) Bill (as introduced)*

*Delegated Powers Memorandum*

Briefing Paper SL/S3/10/31/4(P)

**Agenda Item 6**

*Reservoirs (Scotland) Bill (as introduced)*

*Delegated Powers Memorandum*

Briefing Paper SL/S3/10/31/5(P)

**Agenda Item 7**

*Children's Hearings (Scotland) Bill (as amended at Stage 2)*

*Supplementary Delegated Powers Memorandum*

Briefing Paper SL/S3/10/31/6(P)

Briefing Paper SL/S3/10/31/7(P)
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 3  Instruments subject to annulment

The Scallops (Luce Bay) (Prohibitions of Fishing) Order 2010 (SSI 2010/375)

The Committee may wish to be content with this instrument.

For its interests, the Committee may wish to be content with the reason given for not complying with the 21 day rule and the rule that instruments are to be laid before the Parliament before they come into force.

The National Health Service (General Ophthalmic Services and General Dental Services) (Scotland) Amendment Regulations 2010 (SSI 2010/378)

The Scottish Social Services Council Appointments, Procedure and Access to the Register) Amendment (No 2) Regulations 2010 (SSI 2010/379)

The Protection of Vulnerable Groups (Scotland) Act 2007 (Power to Refer) (Information Held by Public Bodies etc) Order 2010 (SSI 2010/380)

The Protection of Vulnerable Groups (Scotland) Act 2007 (Prescribed Purposes for Consideration of Suitability) Regulations 2010 (SSI 2010/381)

The Police Act 1997 (Alteration of the Meaning of Suitability Information relating to Children and Protected Adults) (Scotland) (No. 2) Order 2010 (SSI 2010/382)

The Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2010 (SSI 2010/383)

The Public Finance and Accountability (Scotland) Act 2000 (Economy, efficiency and effectiveness examinations) (Specified bodies etc.) Order 2010 (SSI 2010/389)
The Committee may wish to consider if it is content with these Instruments.

Agenda Item 4  Instruments not laid before the Parliament

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

Agenda Item 5  Local Electoral Administration (Scotland) Bill

Section 5 – Directions to returning officers

The Committee has a remit to assess whether the power of direction in section 5(1) may be more appropriately exercisable as a power to make subordinate legislation. To assist that assessment, the Committee may wish to ask the Scottish Government for the following information—

(a) examples of how this power could be used, and how it would relate to existing law on the functions of returning officers for local government elections (including any other powers of direction),

(b) why it is considered appropriate to have this power of direction (not subject to Parliament procedure) rather than enabling powers to make subordinate legislation, given that the power could extend to local government elections generally?

Agenda Item 6  Reservoirs (Scotland) Bill

Section 1(4) - Power to specify whether individual structures or combinations of structures are to be treated as a controlled reservoir

The Committee may wish to ask the Scottish Government to explain why this power by order is subject to negative resolution procedure, when the power in section
1(6)(a) is proposed to be subject to draft affirmative procedure? For both orders, the effect would be to amend the Bill, to include reservoirs (or combinations of them) in the Bill controls, though not meeting the 10,000 cubic metre threshold? Why is it not considered appropriate to include any minimum cubic metre threshold?

Section 1(6)(a) - Power to substitute a different volume of water to the 10,000 cubic metres of water currently specified

The Committee may wish to ask why, although the power to change the 10,000 cubic metre threshold for controlled reservoirs may be required if engineering advice on the minimum threshold changes in future, it is considered necessary to have an unqualified power to amend the Bill with any different volume, without—

(a) any minimum or maximum threshold being stated, or

(b) any requirement to have regard to advice from ICE, for example, or the safety matters set out in section 1(5)?

Section 25 – Power to establish panels of reservoir engineers

The Committee may wish to ask for further explanation of the intended effect of the power in section 25(a), to “specify by order the sections of this Part under which the members of any such panel may be appointed.”

Is it intended that the order may only specify the relevant sections, which then have effect for that purpose? If so, can it be clarified why negative procedure should apply to the power rather than no procedure? Or is it intended that the order may also specify the parameters within which the members of a particular panel may be appointed under section 26 (and could this be made clearer)?

Section 52(1) – Power to make provision for reporting incidents to SEPA relating to reservoir safety

The Committee may wish to ask, in relation to section 52(2)—

why is it necessary to extend the power to make regulations to provide that another person (apart from SEPA operating the reporting scheme) may specify the criteria for incidents to be reported, or that that person may determine whether a reservoir meets the criteria? Would it be possible or appropriate to restrict this power to another person acting for SEPA?

why is it necessary for the provision in relation to ensuring remedial action is taken after an incident report, to include the power to amend the Act (apart from section 52) or to apply the Act with modifications? Could examples be provided as to how this power could be used?
Section 53(1) – Power to make provision for preparing reservoir flood plans

The Committee may wish to ask for explanation why the power to amend the Act or apply it with modifications in section 53(3)(n) is necessary, given that this section appears to make particular provision for the preparation of flood plans for controlled reservoirs, and otherwise it appears that flood plan provisions do not extend through the Bill?

Section 71(1) – Power to make provision for SEPA to give stop notices to reservoir managers of controlled reservoirs

Section 76(1) – Power to make provisions for SEPA to accept an enforcement undertaking from a reservoir manager

Section 77(1) – Power to impose fixed monetary penalties on reservoir managers

Section 80(1) – Power to make provisions about the imposition of further enforcement measures on reservoir managers

Generally, in relation to sections 71(1), 76(1), 77(1) and section 80(1), can it be explained and clarified why it is necessary or appropriate to provide for most of these enforcement measures, to enforce the rest of Part 1 of the Bill, in discretionary order-making powers which Scottish Ministers can either implement as a whole, or partially, or not, as they determine? Why has the approach been taken that Parliament is asked to approve all the provisions in these sections (and related sections) but thereafter the decision to implement the provisions will be discretionary, by order?

The Committee may wish to ask, in relation to sections 80(4)(a) and 83(1), for an explanation why it is necessary to delegate powers in an order to SEPA to impose on reservoir managers (a) an amount of penalty as a further enforcement measure which is potentially unlimited by the enabling power, and (b) a non-compliance penalty which is again potentially unlimited? Could any maximum limits be specified? Can the Government provide any analogous examples of enforcement powers of SEPA (or other Scottish public bodies) which are potentially unlimited in amount?

In particular, can it be clarified why SEPA should be given discretion over the penalty amount, when they are not responsible directly to the Parliament?

Section 87(1) – Power to permit SEPA to publish information
The Committee may wish to ask in relation to section 87(1) why this order-making power is necessary or appropriate, given that as drafted it permits SEPA to publish information, as the subsection itself provides, and the power does not specify any further matters which could be set out in an order?

Section 103 - Power to make offences inserted into section 22 of the Water Environment and Water Services (Scotland) Act 2003 to be triable and subject to specified liabilities

The Committee may wish to ask for clarification whether the Delegated Powers Memorandum is correct to state that the power in section 103 is proposed to be subject to negative procedure, as section 36(5) of the 2003 Act appears to provide that regulations under section 22 are subject to the “open” procedure of either negative resolution or draft affirmative?

As regulations under this section of the Bill may create offences, including those triable on indictment and subject to a term of prison of up to 1 or 2 years (as the case may be), would it be considered that such provision should be subject to draft affirmative procedure?
INSTRUMENTS SUBJECT TO ANNULMENT

The Scallops (Luce Bay) (Prohibition of Fishing) Order 2010 (SSI 2010/375)

On 4 November 2010 the Scottish Government was asked:
Article 10 of SI 1999/1096 requires that an explanation is to be given as to why it is not possible for any instrument that is required to be laid before the Scottish Parliament to be laid before it comes into force.

The reason why it was not possible to lay SSI 2010/375 before it came into force was not set out in the letter dated 2 November accompanying the instrument when it was laid - although it was stated that the Government regretted that it was not possible to do so.

The Scottish Government is therefore asked to provide that explanation now in satisfaction of the requirement in article 10(3) of SI 1999/1096.

The Scottish Government responds as follows:
You have asked for an explanation in satisfaction of the requirement in article 10(3) of SI 1999/1096 as to why it was not possible to lay SSI 2010/375 before it came into force, as this was not set out in the letter dated 2 November accompanying the instrument when it was laid.

The instrument was made under sections 5(1) and 15(3) of the Sea Fish (Conservation) Act 1967 on the 29th of October and came into force on the 1st of November. It was as you know laid before the Scottish Parliament on the 2nd of November 2010.

Article 10(1) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (“the SSI Order”) has not been complied with.

The reason for not complying with that article is that the instrument was signed late on the day of making (after 4.30pm on the 29th October). The instrument was made so as to continue the closure of Luce Bay in the south west of Scotland to fishing boats fishing for scallops. The existing prohibition in that area lifted on the 1st November (an area of the Irish Sea including Luce Bay is closed from 1 June to 31st October each year under the Scallops (Irish Sea) (Prohibition of Fishing) Order 1984), any delay in the coming into force date would have allowed the re-opening of the area (albeit for a short period) and the policy aim of the order was to continue to prohibit fishing activities in the area without interruption. It was therefore necessary that the instrument came into force on the 1st November. As the date of making of the instrument was a Friday, it was not possible to lay the instrument over the weekend and therefore prior to the date of coming into force.
As priority was given to the preparation of the final instrument for signing on the 29th, there was very little time between confirmation that the order would be required (mid-morning on the 29th October the day of making), having the instrument signed (later on the 29th) and finalising the necessary documentation for laying (i.e. the Executive Note and the Letter to the Presiding Officer). As a result it was necessary to delay laying the instrument until Tuesday 2nd November, a day after the instrument came into force (had the instrument been laid on the 1st November the requirements of article 10(1) would equally not have been complied with, although the delay would have been shorter). As a result of this article 10(1) of the SSI Order was not complied with.

The issue of non compliance with article 10(1) of the SSI Order was not dealt with sufficiently in the letter which was submitted on the 2 November (as required by article 10(3) of the SSI Order) for which the Scottish Government apologises.