SUBORDINATE LEGISLATION COMMITTEE

AGENDA

1st Meeting, 2011 (Session 3)

Tuesday 18 January 2011

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

1. Decisions on taking business in private: The Committee will decide whether to take items 8 and 9 in private.

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

   - the Prohibited Procedures on Protected Animals (Exemptions) (Scotland) Amendment Regulations 2011 (SSI 2011/draft).

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

   - the Eggs and Chicks (Scotland) Amendment Regulations 2010 (SSI 2010/450);
   - the Non-Domestic Rate (Scotland) (No.2) Order 2010 (SSI 2010/457);
   - the Civil Legal Aid (Scotland) Amendment Regulations 2010 (SSI 2010/461);
   - the Advice and Assistance (Scotland) Amendment Regulations 2010 (SSI 2010/462);
   - the Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Scotland) Regulations 2010 (SSI 2010/467);
   - the Limitation on Right to Purchase (Form of Notice) (Scotland) Regulations 2010 (SSI 2010/468);
   - the Housing (Scotland) Act 2010 (Consequential Amendment) Order 2010 (SSI 2010/469).

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

   - Act of Sederunt (Rules of the Court of Session Amendment No.6) (Terrorist Asset-Freezing etc. Act 2010) 2010 (SSI 2010/459);
5. **Guidance subject to approval:** The Committee will consider the following—


6. **Energy Bill (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Energy Bill (UK Parliament legislation).

7. **Double Jeopardy (Scotland) Bill:** The Committee will consider the Cabinet Secretary's response in relation to section 4(7) of the Bill.

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

9. **Historic Environment (Amendment) (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2 and the contents of a draft report.

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The papers for this meeting are as follows—

Legal Brief (private) SL/S3/11/1/1
Summary of Recommendations SL/S3/11/1/2

**Agenda Item 6**

*Energy Bill Legislative Consent Memorandum*

*House of Lords Delegated Powers and Regulatory Reform Committee report*

*Energy Bill and accompanying documents*

*UK Department of Energy and Climate Change briefing*

Briefing Paper (private) SL/S3/11/1/3

**Agenda Item 7**

*Double Jeopardy (Scotland) Bill (as introduced)*

*Delegated Powers Memorandum*

Briefing Paper SL/S3/11/1/4
Correspondence from the Scottish Government SL/S3/11/1/5

**Agenda Item 8**

Draft Report (private) SL/S3/11/1/6
Briefing Paper (private) SL/S3/11/1/7
Correspondence from the Scottish Government SL/S3/11/1/8

**Agenda Item 9**

*Historic Environment (Amendment) (Scotland) Bill (as amended at Stage 2)*

*Revised Delegated Powers Memorandum*

Draft Report (private) SL/S3/11/1/9
SUBORDINATE LEGISLATION COMMITTEE

1st Meeting, 2011 (Session 3)

Tuesday 18 January 2011

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 Prohibited Procedures on Protected Animals (Exemptions) (Scotland) Amendment Regulations 2011 (SSI 2011/draft)

The Committee may wish to be content with the Regulations.

Agenda Item 3 Instruments subject to annulment

The Eggs and Chicks (Scotland) Amendment Regulations 2010 (SSI 2010/450)
The Non Domestic Rate (Scotland) (No. 2) Order 2010 (SSI 2010/457)
The Civil Legal Aid (Scotland) Amendment Regulations 2010 (SSI 2010/461)
The Advice and Assistance (Scotland) Amendment Regulations 2010 (SSI 2010/462)
The Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Scotland) Regulations 2010 (SSI 2010/467)
The Limitation on Right to Purchase (Form of Notice) (Scotland) Regulations 2010 (SSI 2010/468)
The Housing (Scotland) Act 2010 (Consequential Amendment) Order 2010 (SSI 2010/469)

The Committee may wish to be content with these instruments.
Agenda Item 4  Instruments not laid before the Parliament

Act of Sederunt (Rules of the Court of Session Amendment No. 6) (Terrorist Asset-Freezing etc. Act) 2010 (SSI 2010/459)

The Wild Birds (Special Protection in Severe Weather) (Scotland) (No. 3) Order 2010 (SSI 2010/470)

The Committee may wish to be content with these instruments.

Agenda Item 5  Guidance subject to approval

The Code of Practice for the Welfare of Gamebirds Reared for Sporting Purposes December 2010 (SG 2010/275)

The Committee may wish to be content with this Code of Practice.

Agenda Item 6  Energy Bill (UK Parliament legislation)

Clause 10(2): Confirmation of plan: supplementary provision for Scotland

The Committee may wish to find the powers in clause 10(2) acceptable in principle, and should be subject to negative resolution procedure.

Clause 11(6): Updating information produced under section 8

The Committee may wish to find the powers in clause 11(6) acceptable in principle, and should be subject to negative resolution procedure.

Clause 13(7): Acknowledgement of green deal plan on sale or letting out

The Committee may wish to find the power in clause 13(7) of the Bill acceptable in principle, and should be subject to negative resolution procedure.
Clause 13(8): Cases or circumstances in which section 13(2) will not apply

The Committee may wish to find the power in clause 13(8) of the Bill acceptable in principle, and should be subject to negative resolution procedure.

Clause 50: Power to make domestic energy efficiency regulations: Scotland

The Committee may wish to seek an explanation from the Government on the following matters, in connection with the powers to make domestic energy efficiency regulations in clauses 50 to 52.

(a) The regulations would define various substantive matters after April 2015 (including the descriptions of private rented properties which would be subject to the requirements, the level/s of energy efficiency required, any exemptions, and sanctions for non-compliance). Why has it been considered that draft affirmative procedure is an appropriate level of Parliament scrutiny of the Regulations, rather than a form of “super affirmative” procedure which could allow the Scottish Parliament the opportunity to consider initial draft Regulations once there has been the necessary evolution of policy before they are laid for approval, and might allow stakeholders in the proposals an opportunity for consultation on draft Regulations from April 2015, and for such consultation to be taken into account?

(b) In relation to clause 52(2) and (3), why is it necessary to confer a general power to impose sanctions for non-compliance with requirements in the Regulations, without any maximum penalty defined in the Bill, apart from £5000 for a civil penalty imposed by a local authority? What other sanctions or compliance provisions could be envisaged, and why can these not be further defined in the Bill?

(c) Is it intended that the power to impose “sanctions” includes the power to create criminal offences? If so, why is such a significant power not expressly specified, and why cannot any maximum levels of criminal penalty be defined in the Bill?

Clause 50(7): Amending the definition of “energy performance certificate”

The Committee may wish to find the power in clause 50(7) acceptable in principle, and should be subject to negative resolution procedure.
Clause 53: Power to make tenants’ energy efficiency improvements regulations: Scotland

The Committee may wish to seek an explanation from the Government on the following matters, in connection with the powers to make tenants’ energy efficiency improvements regulations in clauses 53 to 55.

(a) The regulations would define various substantive matters after April 2015 (including the descriptions of private rented properties which would be subject to the requirements, the level/s of energy efficiency improvements which may be requested by tenants, any exemptions, and provisions to secure compliance). Why has it been considered that draft affirmative procedure is an appropriate level of Parliament scrutiny of the Regulations, rather than a form of “super affirmative” procedure which could allow the Scottish Parliament the opportunity to consider initial draft Regulations once there has been the necessary evolution of policy before they are laid for approval, and might allow stakeholders in the proposals an opportunity for consultation on draft Regulations from April 2015, and for such consultation to be taken into account?

(b) In relation to clause 55(1), why is it necessary to confer a general power to make any provisions to secure compliance with the requirements imposed on landlords by or under the Regulations, without any maximum penalties being specified? What types of enforcement provisions could be envisaged, and why can these not be further defined (with some penalty limits) in the Bill?

(c) How could the power in clause 55(1) be exercised differently from the power to impose “sanctions” in clause 52? Is it intended that the power in clause 55(1) includes the power to create criminal offences? If so, why is such a significant power not expressly specified, and why cannot any maximum levels of criminal penalty be defined in the Bill?

Clause 56: Power to make non-domestic energy efficiency regulations: Scotland

The Committee may wish to seek an explanation from the Government on the following matters, in connection with the powers to make non-domestic energy efficiency regulations in clauses 56 to 58.

(a) The regulations would define various substantive matters after April 2015 (including the descriptions of non-domestic rented properties which would be subject to the requirements, the level/s of energy efficiency required, any exemptions, and sanctions for non-compliance). Why has it been considered that draft affirmative procedure is an appropriate level of Parliament scrutiny of the Regulations, rather than a form of “super affirmative” procedure which could allow the Scottish Parliament the opportunity to consider initial draft Regulations once there has been the necessary evolution of policy before they are laid for approval, and might allow stakeholders in the proposals an
opportunity for consultation on draft Regulations from April 2015, and for such consultation to be taken into account?

(b) In relation to clause 58(1) and (2), why is it necessary to confer a general power to make provisions to secure compliance with requirements imposed on landlords by or under the regulations, and which may include (but is not limited to) sanctions for non-compliance with requirements in the Regulations? What sanctions and other provisions could be envisaged here, and why cannot these be further defined in the Bill?

(c) Is it intended that the powers in clause 58(1) and (2) include the power to create criminal offences? If so, why is such a significant power not expressly specified, and why cannot any maximum levels of criminal penalty be defined in the Bill? Why in the case of the non-domestic regulations, is it necessary or appropriate that the Bill should not provide for any maximum amount for a civil penalty imposed by a local authority?

Clause 56(6): Amending the definition of “energy performance certificate”

The Committee may wish to find the power in clause 56(6) acceptable in principle, and should be subject to negative resolution procedure.

Clause 71: Access to register of energy performance certificates etc: Scotland

The Committee may wish initially to note that in its 8th Report (paragraph 14) on the Bill, the House of Lords Delegated Powers and Regulatory Reform Committee recommended in relation to clause 70(2)(e) that “unless the Bill can be amended so as to specify the nature for the sanctions that may be provided for, and to specify a maximum amount of any financial penalty that may be imposed, provision made under subsection (2)(e) should require the affirmative procedure.”

Accordingly in relation to the equivalent Scottish provision in clause 71(2)(e), the Committee may wish to enquire whether in view of that recommendation, the Government proposes that that sub-paragraph should be subject to affirmative procedure, or whether the power could be defined to state the nature of the sanctions that may be imposed, and a maximum amount of any financial penalty? Is there any intention that the sanctions could include criminal offences, and if so, could the maximum penalty be specified?

Clause 104: Commencement

The Committee may wish to find that the commencement powers conferred on the Scottish Ministers in clause 104(2) and (6) are acceptable.
Double Jeopardy (Scotland) Bill – Response from Cabinet Secretary

Background

1. Section 4(7) of the Double Jeopardy (Scotland) Bill sets out a power for Scottish Ministers to make an order to modify the list of offences in schedule 1. The Committee asked whether exercise of this power should be subject to a consultation requirement.

2. Members will recall that the Cabinet Secretary for Justice, Kenny MacAskill promised to write to the Committee following his evidence session with the Justice Committee on the Bill, before coming to a view on this matter.

Cabinet Secretary Response

3. The response indicates that the Scottish Government is content that the affirmative procedure, recommended by the Scottish law Commission in its 2009 report on Double Jeopardy, should provide an appropriate safeguard for situations where it is proposed to add or remove offences from the list.

4. However, he also indicates that he will consider any recommendations in the Justice Committee’s stage 1 report. Their stage 1 report is likely to be published towards the end of January.

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

Recommendation

6. Members are invited to note the Cabinet Secretary’s response on this matter and to reconsider this matter after Stage 2.

Irene Fleming
Clerk to the Committee
DOUBLE JEOPARDY (SCOTLAND) BILL

I am writing to follow up my response on 6 December to queries raised by the Committee after its 30 November meeting on the Double Jeopardy (Scotland) Bill. These points were raised in relation to section 4(7) of the Bill, which sets out a power for Scottish Ministers to make an order to modify the list of offences in schedule 1.

The Committee questioned whether exercise of the power so as to add or remove offences should be subject to a consultation requirement. I was asked about the issue on 21 December during my Stage 1 evidence on the Bill at the Justice Committee.

As I indicated to the Justice Committee, I think that if consultation is to be required ahead of any changes to the list, then that should be decided by the Government and Parliament at that time and we should not bind them into a formal statutory process. I also indicated that if there was a strict legal requirement to consult, this could invite legal challenges about the consultation process in any trials resulting from the change, even if the amendment adding an offence was merely consequential or removed an offence which had been repealed.

I accept that an amendment to the list might mark a change of policy, but it may not be controversial and could for example be consequential to other reforms such as the creation of a new serious offence. In the second case, statutory consultation might be unnecessary and cause a delay.

I sought to persuade the Justice Committee that the right balance is struck in the Bill by requiring the use of affirmative procedure to ensure that the Parliament of the day would require to consider and positively approve any changes.

The proposed power and form of procedure was recommended by the Scottish Law Commission in its 2009 Report on Double Jeopardy (SCOT LAW Com No 218, recommendation 30) and affirmative procedure should provide an appropriate safeguard for situations where it is proposed to add or remove offences from the list. However, as I indicated to the Justice Committee, I will of course carefully consider any recommendations made in its Stage 1 Report on any issues in relation to the Bill.

I hope that this response is helpful to the Committee. I am copying this letter to the Convener of the Justice Committee.

KENNY MACASKILL
CABINET SECRETARY FOR JUSTICE
Correspondence from the Scottish Government dated 7 January 2011

PUBLIC RECORDS (SCOTLAND) BILL

I refer to the Subordinate Legislation Committee's letter of 14 December 2010 requesting further explanation about the delegated powers in the Public Records (Scotland) Bill. Please see the following further information.

The power to make consequential, supplementary, incidental, transitional, transitory or saving provision was included to ensure that if Ministers decide to add a new body to the list in the schedule, they will also be able to make related amendments to existing records management duties which the body already has. So the power could be used to repeal provisions which overlapped with the records management duties under the Bill (in the same way as section 13 repeals general records management duties which apply to Local Authorities, SEPA, Scottish Water and National Park authorities) or to amend provisions to ensure consistent terminology (in the same way as section 14 amends provisions about court records). This could involve amending primary as well as secondary legislation, which is why the power to modify enactments was included. The power was included to allow flexibility in future and was not drafted with a particular body in mind. Given that the purpose of an order under section 2(2) is only to modify the list of bodies to which records management duties apply, it is considered that there is little or no risk of the power to make consequential, supplementary, incidental, transitional, transitory or saving provision being used to make wider provision than is appropriate.

The power is already subject to affirmative procedure. It is considered that this will give the Scottish Parliament an appropriate opportunity to scrutinise any proposed amendments to primary legislation.

I trust that this explanation is sufficient to answer the Committee's enquiry.

George MacKenzie
Keeper of the Records of Scotland
The National Archives of Scotland