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

1. **Decisions on taking business in private:** The Committee will decide whether to take items 7, 8 and 9 in private.

2. **Draft instruments subject to approval:** The Committee will consider the following—
   
   - the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) (No.2) Order 2011 (SSI 2011/draft);
   - the Scottish Public Services Ombudsman Act 2002 Amendment Order 2011 (SSI 2011/draft);
   - the Retention of Samples etc. (Children's Hearings) (Scotland) Order 2011 (SSI 2011/draft).

3. **Draft negative instrument:** The Committee will consider the following—
   
   - the Disposal of Court Records (Scotland) Amendment Regulations 2011 (SSI 2011/draft).

4. **Instruments subject to annulment:** The Committee will consider the following—
   
   - the Community Payback Orders (Prescribed Persons for Consultation) (Scotland) Regulations 2011 (SSI 2011/1);
   - the Restriction of Liberty Order and Restricted Movement Requirement (Scotland) Regulations 2011 (SSI 2011/3);
   - the Council Tax (Discounts) (Scotland) Amendment Order 2011 (SSI 2011/5).

5. **Instruments not laid before the Parliament:** The Committee will consider the following—
the Interpretation and Legislative Reform (Scotland) Act 2010 (Commencement) Order 2011 (SSI 2011/4 (C.1));
the Children’s Hearings (Scotland) Act 2011 (Commencement No.1) Order 2011 (SSI 2011/8 (C2.));
the Interpretation and Legislative Reform (Scotland) Act 2010 (Commencement No.2 and Transitional Provision) Order 2011 (SSI 2011/17 (C.3)).


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

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

9. **Budget (Scotland) Bill**: The Committee will consider the delegated powers provisions in this Bill at Stage 1 and 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 (private) SL/S3/11/2/1

Summary of Recommendations SL/S3/11/2/2

**Agenda Items 2, 3, 4 and 5**

Instrument Responses SL/S3/11/2/3

**Agenda Item 6**

Scottish Parliamentary Pensions Act 2009

Motion S3M-7736

Explanatory Note

Briefing Paper (private) SL/S3/11/2/4

**Agenda Item 7**

Scotland Bill Legislative Consent Memorandum from the Scottish Government

Scotland Bill Legislative Consent Memorandum from Iain Gray MSP

Briefing Paper (private) SL/S3/11/2/5

**Agenda Item 8**

Draft Report (private) SL/S3/11/2/6

Correspondence from the Scottish Government SL/S3/11/2/7

Response from the Faculty of Advocates SL/S3/11/2/8

**Agenda Item 9**

Budget (Scotland) (No. 5) Bill (as introduced)

Delegated Powers Memorandum

Briefing Paper (private) SL/S3/11/2/9
SUBORDINATE LEGISLATION COMMITTEE

2nd Meeting, 2011 (Session 3)

Tuesday 25 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  Draft instruments subject to approval

The Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) (No.2) Order 2011 (SSI 2011/draft)

The Scottish Public Services Ombudsman Act 2002 Amendment Order 2011 (SSI 2011/draft)

The Retention of Samples etc. (Children’s Hearings) (Scotland) Order 2011 (SSI 2011/draft)

The Committee may wish to be content with these Regulations.

Agenda Item 3  Draft negative instrument

The Disposal of Court Records (Scotland) Amendment Regulations 2011 (SSI 2011/draft)

The Committee may wish to be content with the Regulations.

Agenda Item 4  Instruments subject to annulment

The Community Payback Orders (Prescribed Persons for Consultation) (Scotland) Regulations 2011 (SSI 2011/1)

The Committee may wish to report this instrument on the basis that the use of the expression “one or more” which is used at regulation 2(e) to (g), in the context of the intended prescription of persons, or a class or classes or person, for the purposes of section 227ZL(2) of the Criminal Procedure (Scotland) Act 1995, appears to
represent an unusual or unexpected use of the powers conferred by the parent statute.

The Restriction of Liberty Order and Restricted Movement Requirement (Scotland) Regulations 2011 (SSI 2011/3)

The Council Tax (Discounts) (Scotland) Amendment Order 2011 (SSI 2011/5)

The Committee may wish to be content with these instruments.

Agenda Item 5 Instruments not laid before the Parliament

The Interpretation and Legislative Reform (Scotland) Act 2010 (Commencement No. 2 and Transitional Provision) Order 2011 (SSI 2011/17 C.3))

The Interpretation and Legislative Reform (Scotland) Act 2010 (Commencement) Order 2011 (2011/4 (C.1))

The Committee may wish to be content with 2011/17, note that 2011/4 omitted to make provision for publication of instruments made under the 2010 Act before 6 April 2011 and to welcome the swift rectification of the matter.

The Children's Hearings (Scotland) Act 2011 (Commencement No.1) Order 2011 (SSI 2011/8 (C.2))

The Committee may wish to be content with this instrument.
INSTRUMENTS SUBJECT TO ANNULMENT

The Community Payback Orders (Prescribed Persons for Consultation) (Scotland) Regulations 2011 (SSI 2011/1)

On 14 January 2011 the Scottish Government was asked:

The Scottish Government is asked to explain the significance of the expression “one or more” which is used at regulation 2(e) to (g) in the prescription of persons set out in that regulation, and whether it considers that it properly refers to a person or class of person for the purposes of section 227ZL(2).

Taking the example of regulation 2(e), can “one or more community council” be said to be a “prescribed person” for section 227ZL(2) purposes, and should reference not have been made to “any community councils” or to “community councils” (which is also the approach taken within paragraphs (c) and (d) of regulation 2)?

The Scottish Government responds as follows:
The expression “one or more” was used at regulation 2(e) to (g) to clarify that the requirement to consult can be fulfilled by consulting only one of each of these classes of person. Taking into consideration comments received during the consultation that was carried out before these Regulations were made, the Scottish Government decided not to refer to “any community council” or “community councils”, because of the perceived implication among stakeholders that this meant that all community councils within a local authority area must be consulted. This was a concern in some areas such as the Northern Community Justice Authority where community councils number into the hundreds. The Scottish Government has drawn up guidance to accompany this SSI to make clear that while local authorities are encouraged to consult more widely, only one of each of the bodies referred to in paragraphs (e) to (g) of regulation 2 must be consulted to fulfil the legal requirement.
SUBORDINATE LEGISLATION COMMITTEE

2nd Meeting, 2011 (Session 3)

Tuesday 25 January 2011

Correspondence from the Scottish Government dated 20 January 2011

LONG LEASES (SCOTLAND) BILL AT STAGE 1


Section 21(3) - Power to prescribe a period during which a person may oppose or make representations in relation to an application to the Lands Tribunal to dispense with the need for a conversion condition to be met when converting a leasehold condition to a real burden

2. Paragraphs 35 to 37 of the Delegated Powers Memorandum outlines the provision, the reason for taking the power and the choice of procedure.

3. You asked for a fuller explanation and, in particular, why it is not possible for a period to be set out on the face of the Bill, with a power to change that if required.

4. The power in section 21(3) of the Bill is along the same lines to previous similar powers in relation to applications to the Lands Tribunal. Section 21 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 refers to “within such time as may be so prescribed”.

5. The advantage of not laying down a period on the face of the Bill is that this reduces interference with the Tribunal’s procedures. The power to prescribe a period would only be used if it appeared that regulations were necessary. Generally, the Government expects that the details of the Tribunal’s procedures can be dealt with through the existing Lands Tribunal for Scotland Rules or through the Tribunal’s discretion. Paragraph 4.45 of the Scottish Law Commission report on Conversion of Long Leases\(^1\), on which the Bill is based, notes that the “relatively small number of leases eligible for conversion means that applications to the Lands Tribunal should occur in small and manageable numbers”. The Government agrees with the Commission and, therefore, is of the view that the Bill does not need to be detailed in relation to Lands Tribunal procedures.

Section 75(5) - Power to prescribe a date or period after which notices and agreements determined registrable by the courts or the Lands Tribunal cannot be registered and to provide that applications to the courts or the Tribunal must be made within a specified period for the notices and agreements to be registrable.

---

6. You asked for a fuller explanation of the need for the use of a delegated power at section 75(5).

7. Paragraphs 44 and 45 of the Delegated Powers Memorandum provide details on the reasons for the powers.

8. The key point is that the Land Register needs to be accurate: paragraph 8.10 of the Scottish Law Commission report provides more detail on this.

9. If the Keeper of the Registers should refuse to register a notice or agreement, it is right that an aggrieved party should be able to challenge this refusal in the ordinary courts or in the Lands Tribunal, as outlined in the first sentence of paragraph 8.12 of the Commission’s report. Ultimately, however, the Register needs to be accurate so that it can be relied upon.

10. To achieve this end, section 75(5)(b) empowers Ministers to make an order laying down a period during which applications to the court or the Tribunal for a determination that a notice or agreement is registrable may be made. This power means that, if needed, Ministers can stop applications being made long after the Keeper has taken a decision: late applications could raise questions as to whether or not the Register has comprehensive information.

11. Section 75(5)(a) empowers Ministers to specify a date or period after which notices cannot be registered after the court or Tribunal determines that they are registrable. Again, the aim is to be able to prescribe a long-stop period or date so that parties can have confidence in the accurate and comprehensive nature of the Register.

12. The purpose of the power is to provide a degree of certainty to other users of the Land Register. Once the power is used to specify a particular date, then anyone who looks at the Register after that date would know (without needing to check for outstanding cases before the courts or the Tribunal or otherwise taking account of the provisions of the Bill) that the Register can be relied upon.

13. Our expectation is that the power would be used some time after any reasonable application should have been determined, i.e. it would be used on the basis that it wouldn't affect any actual case but would simply provide certainty.
INTRODUCTION
1.1 When consultation took place on the Bill at the Consultation Draft stage in March 2010, the Faculty commented briefly in its answers to the questions asked. The answers to Questions 4 (fishing rights) and 5 (compensation) suggested reconsideration. The Faculty comments further at the end of this Response on these matters, although they are matters of limited significance.

1.2 Of more general importance in the Faculty’s view is the proposal in the Bill as now issued that alterations may be made to it by subordinate legislation. The Faculty advises against that proposal.

USE OF SUBORDINATE LEGISLATION
2.1 The Delegated Powers Memorandum divides the delegated powers proposed into four categories: provision of forms and notices (paragraphs 15-34); powers to prescribe periods and to prescribe a table of life expectancy (paragraphs 35-46); power to alter primary legislation (paragraphs 47-52) and power in relation to commencement (paragraphs 53-56). In this part of the Report and after a general introduction these categories are dealt with separately.

2.2.1 The existence of the Scottish Parliament with law-making powers is of great significance at a practical as well as a constitutional level. It is what has permitted innovative and sometimes long-awaited reforms of legislation to be made without delay.

2.2.2 When all Scottish matters had to be dealt with by the UK Parliament, occasionally, but only occasionally, parliamentary time would be found for a proposal of only Scottish significance. Otherwise there were two possibilities. Scotland could wait for an appropriate UK Bill to go before the Westminster Parliament in a similar field and make provision for Scotland by tacking on a subsidiary part to the UK Bill. Or Scottish alterations could be gathered together from various areas of reform and brought as a “Law Reform (Miscellaneous Provisions etc) (Scotland)” Bill. Neither course was satisfactory.

2.2.3 Some attempt had been made to shorten the need for Parliamentary scrutiny and therefore to speed up the (UK) Parliamentary process by introducing an ability to alter primary legislation by the use of subordinate legislation (Statutory Instruments). If the provision was significant, it might require a positive resolution of the
Westminster Parliament to authorise the change. Lesser alterations were subject to negative resolution only. Thus changes to Acts of Parliament could be made with little or no scrutiny by Parliament.

2.2.4 This background to the introduction of legislation by statutory instrument is missing in Scotland today. The Scottish Parliament is well able to – and does – introduce legislation quickly and without less pressing matters being left to languish at the end of another Parliament’s queue.

2.2.5 The Faculty considers there is a major disadvantage in legislation by statutory instrument. Statutory instruments are not so readily available to, obvious to and accessible by those affected by the legislation. A provision can easily be lost sight of within the sheer mass of subordinate legislation, whereas a short amending Act is easily discovered in its place in Scottish legislation and is therefore as available to, obvious to, and accessible by those affected as the original legislation.

2.3 Forms and Notices (Memo paragraphs 15-34)

2.3.1 There is no requirement for the forms to be available when the legislation is passed by Parliament. Leaving the provision of forms to subordinate legislation can result in the Act coming into force without those affected or their advisers having access to its necessary forms.

2.3.2 The Delegated Powers Memorandum (paragraph 48) refers to the earlier land tenure legislation. Those Acts did contain the necessary forms and schedules and these were therefore immediately available. Alterations to, and the introduction of further forms into the Abolition of Feudal Tenure etc (Scotland) Act 2000 were made by the Title Conditions (Scotland) Act 2003. The same procedure was followed with the Title Conditions (Scotland) Act 2003 and also with the Tenements (Scotland) Act 2004. That, the Faculty recommends, is how such matters should be dealt with in the current Bill.

2.3.3 The Faculty is not aware of any complaint coming from those to whom the earlier legislation applies or from their advisers about the forms having been included in the original legislation. Nor is there any suggestion from either the Scottish Law Commission’s earlier consultation or the consultation exercise last year that would suggest it is better to adopt the subordinate legislation route.

2.3.4 Should it be considered important to allow more flexibility by permitting any subsequent alteration to forms and notices without a further Act of the Scottish Parliament, the Faculty would accept that course to be better than excluding the forms and notices from the principal legislation altogether.

2.4 Power to prescribe time limits and a life expectancy table (Memo paras 35-46)

2.4.1 What is said in the general introduction above applies with particular force in relation to these proposals. In the Delegated Powers Memorandum (paragraph 11) reference is made to the proper use of Parliamentary time. That is no reason, since no extra Parliamentary time would be involved, in deciding before introducing the
legislation whether such time limits should be included in the legislation and which table of life expectancy should be used.

2.4.2 As with the substitution of forms and notices (paragraph 2.3.4 above), the substitution by subordinate legislation of varied time limits or of a different table of life expectancy would be preferable to there being no provision in the principal legislation.

2.5 Power to alter primary legislation (Memo paragraphs 47-52)
2.5.1 Clause 78 proposes that the Scottish Ministers should have the power to alter the legislation by “such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient”. This is plainly the most intrusive example of legislation by statutory instrument, a fact recognised by the provision in Clause 78(3) for a positive resolution by the Scottish Parliament.

2.5.2 Granting this power, particularly in relation to supplementary and saving provisions, is an extreme example of legislation by statutory instrument. It is left up to the Scottish Ministers to determine what is “necessary or expedient for the purposes of or in connection with” the new legislation. That puts within the power of the Scottish Ministers legislation, even of retrospective effect after the event. Also questions of necessity and expedience might well be determined by the Ministers in a succeeding government in a very different way from anything that would have been intended by the government responsible for the introduction of the legislation. This power also holds all the problems and concerns about the certainty and availability of the terms of the legislation.

2.5.3 The Faculty recommends against such provisions in statutes, particularly where they are dealing with the establishment of modern and fixed provisions for land tenure.

2.6 Powers in relation to commencement
2.6.1 By way of contrast, this is a normal and appropriate use of subordinate powers.

3 FISHING RIGHTS (Clause 7)
3.1 There are provisions in s.65A of the Abolition of Feudal Tenure etc (Scotland) Act 2000 regulating the position about fishing rights (other than salmon) and rights to game.

3.2 In its earlier Response, the Faculty questioned the need for the creation of the new category of rights proposed for non-exclusive rights to salmon fishing.

3.3 The Faculty is not aware of any real need to introduce this new right and therefore warns against its inclusion for the reason previously given.

4 COMPENSATION and ADDITIONAL PAYMENTS (Clauses 40 and 48)
4.1 The Faculty notes that the calculation follows that set out in its earlier Response and therefore has no comment to offer.