The Scottish Parliament
Parlament na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

7th Meeting, 2011 (Session 3)

Tuesday 8 March 2011

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 4 to 7 in private.

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

   - the Officers of Court's Professional Association (Scotland) Regulations 2011 (SSI 2011/90);
   - the Plastic Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2011 (SSI 2011/100);
   - the National Health Service Superannuation Scheme (Scotland) Regulations 2011 (SSI 2011/117);
   - the Provision of Water and Sewerage Services (Reasonable Cost) (Scotland) Regulations 2011 (SSI 2011/119);
   - the Public Services Reform (Scotland) Act 2010 (Health and Social Care) Savings and Transitionl Provisions Order 2011 (SSI 2011/121);
   - the Licensing (Food Hygiene Requirements) (Scotland) Order 2011 (SSI 2011/128);
   - the Sale of Tobacco (Display of Warning Statements) (Scotland) Regulations 2011 (SSI 2011/132);
   - the Parole Board (Scotland) Amendment Rules 2011 (SSI 2011/133);
   - the Town and Country Planning (General Permitted Development) (Non-Domestic Microgeneration) (Scotland) Amendment Order 2011 (SSI 2011/136);
   - the Extreme Pornography (Electronic Commerce Directive) (Scotland) Regulations 2011 (SSI 2011/137);
   - the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (SSI 2011/139);
   - the Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011 (SSI 2011/140);
   - the Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141);
the Radioactive Substances Exemption (Scotland) Order 2011 (SSI 2011/147);
the Police Grant (Carry-forward Percentages) (Scotland) Order 2011 (SSI 2011/148);
the Licensing (Minor Variations) (Scotland) Regulations 2011 (SSI 2011/151);
the Fruit Juices and Fruit Nectars (Scotland) Amendment Regulations 2011 (SSI 2011/153);
the Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2011 (SSI 2011/155);
the Healthcare Improvement Scotland (Transfer of Property) Order 2011 (SSI 2011/156);
the Removing from Heritable Property (Form of Charge) (Scotland) Regulations 2011 (SSI 2011/158);
the Adoptions with a Foreign Element (Scotland) Amendment Regulations 2011 (SSI 2011/159);
the Advice and Assistance and Legal Aid (Online Applications etc.) (Scotland) Regulations 2011 (SSI 2011/161);
the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (SSI 2011/162);
the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 (SSI 2011/163);
Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2011 (SSI 2011/166);
the Public Services Reform (Scotland) Act 2010 (Health and Social Care) Savings and Transitional Provisions (No.2) Order 2011 (SSI 2011/169);

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

the Protection of Vulnerable Groups (Scotland) Act 2007 (Commencement No. 5, Savings, Transitional and Consequential Provisions) and the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 7, Savings and Transitional Provisions) Order 2011 (SSI 2011/157 (C.13));
the Housing (Scotland) Act 2010 (Commencement No. 2, Transitional, Transitory and Saving Provisions) Order 2011 (SSI 2011/96 (C.9));
the Alcohol etc. (Scotland) Act 2010 (Commencement) Order 2011 (SSI 2011/149 (C.12));
Act of Sederunt (Rules of the Court of Session Amendment No.2) (Fees of Shorthand Writers) 2011 (SSI 2011/165);

4. **Certification of Death (Scotland) Bill**: The Committee will consider the delegated powers provisions in this Bill after Stage 2, and the contents of a draft report.
5. **Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2, and the contents of a draft report.

6. **Private Rented Housing (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2, and the contents of a draft report.

7. **Reservoirs (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/S3/11/7/1
Summary of Recommendations  SL/S3/11/7/2

**Agenda Items 2 and 3**

Instrument Responses  SL/S3/11/7/3

**Agenda Item 4**

**Certification of Death (Scotland) Bill (as amended at Stage 2)**

Supplementary Delegated Powers Memorandum

Briefing Paper (private)  SL/S3/11/7/4

**Agenda Item 5**

**Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Bill (as amended at Stage 2)**

Briefing Paper (private)  SL/S3/11/7/5

**Agenda Item 6**

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

Supplementary Delegated Powers Memorandum

Briefing Paper (private)  SL/S3/11/7/6

**Agenda Item 7**

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

Supplementary Delegated Powers Memorandum

Briefing Paper (private)  SL/S3/11/7/7
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 annulment**

**The Officers of Court's Professional Association (Scotland) Regulations 2011 (SSI 2011/90)**

The Committee may wish to report under the general reporting ground that this instrument has failed to follow proper drafting practice in that regulation 11 limits the annual membership fee which the society of Messengers-at Arms and Sheriff Officers may charge for 2011 by reference to an external document but does not state where the document may be obtained or inspected.

The Committee may wish to accept the Scottish Government’s view that this is unlikely to have any practical effect on the operation of the instrument.

**The Plastic Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2011 (SSI 2011/100)**

The Committee may wish to report that it notes that due to the late implementation of the measures contained in this instrument, and the use of ambulatory references to EU law in earlier implementing legislation, there was a temporary incompatibility with EU law which has now been resolved.

The Committee may wish to report that this illustrates the risks inherent in the use of ambulatory references and that it considers it necessary for the Scottish Government to act expeditiously to implement relief from the effects of ambulatory references to EU law in domestic legislation fully and on time, particularly so as to remove criminal liability where this is incompatible with EU law.

The Committee may otherwise wish to be content, for its interests, with the reasons given for the 21 day rule not having been complied with.
The Committee may wish to report that these Regulations are defectively drafted, as listed below. However the Scottish Government has undertaken in its response to the Committee to remedy these points by laying an amending instrument to come into force at the same time as these Regulations. The Committee may wish to welcome that such speedy amendment is being taken forward.

It appears that there is defective drafting in these provisions—

- the definition of “the 2008 Section” in regulation A2(4) should refer to the rules in all Parts of the scheme contained in the National Health Service Pension Scheme (Scotland) Regulations 2008, not only those in Parts 1 (Introduction) and 2 (Officers);

- the reference to notice of election to the Secretary of State in regulation B1(3) should refer to the Scottish Ministers;

- In regulation E6(1)(a), “or” is omitted at the end of subparagraph (iii);

- Regulation G16(3) provides that an election to purchase a surviving partner’s pension in respect of service before 6 April 1988 “must be made within the period of 15 months beginning with the date on which these Regulations come into force.” The Government has confirmed that this should refer to 15 months from the date when SSI 2008/226 came into force.

The Committee may also wish to report (under the general reporting ground) that there is a drafting error in Schedule 1, paragraph 1, in the definition of “Common Services Agency”, which should refer to the National Health Service (Scotland) Act 1978, not “the 1972 Act”. It is not considered likely that this patent error would affect the operation of the instrument.

The Committee may also wish to consider drawing to the attention of the lead Committee that in relation to the National Health Service Superannuation Scheme (Scotland) Amendment Regulations 2008 (SSI 2008/226), the Committee reported that there appeared to be a doubt whether regulation D1(2) and Schedule 1, paragraph 10(2A) of the 1995 Regulations (as amended by those 2008 Regulations) are intra vires the powers contained in paragraphs 5 and 11 of Schedule 3 to the Superannuation Act 1972.

Those provisions appear to be duplicated in these consolidating Regulations, in regulation D1(3), and Schedule 1, paragraph 14(4).
The Committee may wish to report that it considers that regulation 2 is made by what appears to be an unusual or unexpected use of the powers conferred by the parent statutes (the Sewerage (Scotland) Act 1968 and the Water (Scotland) Act 1980).

This is in respect that the regulation does not directly provide under the enabling powers for the determination of a question as to what is a reasonable cost for the purposes of section 6 of that 1980 Act and section 1 of that 1968 Act, respectively. Regulation 2 appears to provide for a determination of the physical limit of the supply or system, without reference to the actual costs of this in any individual case, and whether that is “reasonable”.

The Public Services Reform (Scotland) Act 2010 (Health and Social Care) Savings and Transition Provisions Order 2011 (SSI 2011/121)

The Committee may wish to report this instrument on the basis that the meaning of regulation 21(b) could be clearer in regard to the obligations on service providers. That is, so far as that regulation, in providing for the continuation in force of regulations 19 to 24 of SSI 2002/114, refers also to the continuation of such other provisions of that instrument as are necessary for the purposes of regulations 19 to 24. The Committee may wish also to note that this is not a matter which is considered likely to affect the validity of the instrument.

The Committee may wish otherwise to be content with this instrument.

The Licensing (Food Hygiene Requirements) (Scotland) Order 2011 (SSI 2011/128)

The Committee may wish to report that there is a doubt whether the Order is intra vires, in that the powers under which it are made are not yet in force, and it seems to be doubtful whether the exercise the powers inserted by the 2010 Act can be necessary or expedient simply for the purpose of giving effect to the provisions in the 2010 Act which insert those powers into existing legislation. Instead it seems that what it is necessary to give effect to are the provisions of the Civic Government (Scotland) Act 1982 and the Licensing (Scotland) Act 2005 to which these powers relate. This appears to be outside the scope of section 4 of the Interpretation and Legislative Reform (Scotland Act 2010 on which the Government seeks to rely.

The Committee may also wish to report that it is doubtful whether article 2 of the Order is intra vires, in that while the enabling powers permit the Scottish Ministers to specify certain requirements with which vehicles, kiosks and moveable stalls must comply to obtain a food hygiene certificate, article 2 appears instead to impose a duty on food authorities to make certain statements in granting a food hygiene certificate.

The Committee may further wish to report that it is doubtful whether article 3 of the Order is intra vires, in that while the enabling powers permit the Scottish Ministers to specify certain requirements with which subject premises must comply to obtain a
food hygiene certificate, article 3 appears instead to redefine what a food hygiene certificate is.

However, the Committee may wish to welcome the Scottish Ministers’ further consideration of these matters and their subsequent intention to revoke this Order and to re-make it in early course.

**The Sale of Tobacco (Display of Warning Statements) (Scotland) Regulations 2011 (SSI 2011/132)**

The Committee may wish to report the failure to cite all relevant enabling powers used as explained in the Government’s response as a failure to follow proper drafting practice.

**The Parole Board (Scotland) Amendment Rules 2011 (SSI 2011/133)**

The Committee may wish to report under the general reporting ground that this instrument contains a minor drafting error in not clearly specifying in the operative text which provision of the 2001 Rules is being amended by Regulation 3(b).

The Committee may wish to accept the Scottish Government’s view that this is unlikely to have any practical effect on the operation of the instrument.

**The Town and Country Planning (General Permitted Development) (Non-Domestic Microgeneration) (Scotland) Amendment Order 2011 (SSI 2011/136)**

The Committee may wish to report (under its general reporting ground) that it would have been better drafting practice to have added a definition of “solar PV” in “Interpretation of Part 1B” at the end of the Order, as the term is already defined for the purposes of Part 1A of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992. This is not considered to affect the operation of this Order, but the Committee may wish to welcome the Government’s commitment to clarify this at the next opportunity.

**The Extreme Pornography (Electronic Commerce Directive) (Scotland) Regulations 2011 (SSI 2011/137)**

The Committee may wish to report that the meaning and effect of regulation 4 of these regulations could be clearer in that the transmission condition is only to be satisfied (and consequently conduct excepted from the offence of possession of extreme pornography) where the service provider does none of the things listed in regulation 4(2) as opposed to where one of the prohibited actions is complied with but not another.
The Committee may wish to welcome that the Scottish Government has already addressed this point by bringing forward an amending instrument SSI 2011/170 which is also before the Committee today.

**The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (SSI 2011/139)**

The Committee may wish to report (under the general reporting ground) that in respect that regulation 49(1) revokes with exceptions the whole of Part II and Schedules 1 to 6A of the Environmental Impact Assessment (Scotland) Regulations 1999 (SI 1999/1), and it appears that many individual provisions of later instruments have amended those revoked provisions, then it would have been more helpful to users of the legislation to have listed (in a table of revocations) any such amending provisions which are also revoked, or the extent to which they are revoked. This would also have provided greater clarity as to which provisions remain in force.

The Committee notes that this approach has been taken in a recent consolidation, in the National Health Service (Superannuation Scheme) (Scotland) Regulations 2011 (SSI 2011/117). This makes it clear to readers of the instrument which amending provisions are revoked, to clear them from the statute book, or the extent of such revocations.

**The Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011 (SSI 2011/140)**

The Committee may wish to draw to the attention of the lead Committee the fact that the Scottish Ministers have elected to make these Regulations subject to negative procedure when the Committee considers that affirmative procedure would have been more appropriate, given that the Regulations effect a substantive change in the law and require to modify primary legislation to do so.

**The Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141)**

The Committee may wish to report under the general reporting ground that regulation 37(4) contains a minor drafting error in that it erroneously refers to form 3 instead of form 4, but that it accepts that this is unlikely to affect the operation of the regulation.

The Committee may also wish to welcome the Scottish Government’s undertaking to correct this error at the first legislative opportunity.

The Committee may wish to report that the form or meaning of regulation 39(2) could be clearer, in that on the face of it the duty contained therein applies only to continuing money advisers, when the Government’s intention is that it will apply also
to debtors who do not have a continuing money adviser, and this is not apparent from the wording of regulation 39(2).

The Radioactive Substances Exemption (Scotland) Order 2011 (SSI 2011/147)
The Police Grant (Carry-forward Percentages) (Scotland) Order 2011 (SSI 2011/148)
The Licensing (Minor Variations) (Scotland) Regulations 2011 (SSI 2011/151)
The Fruit Juices and Fruit Nectars (Scotland) Amendment Regulations 2011 (SSI 2011/153)
The Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2011 (SSI 2011/155)
The Healthcare Improvement Scotland (Transfer of Property) Order 2011 (SSI 2011/156)
The Removing from Heritable Property (Form of Charge) (Scotland) Regulations 2011 (SSI 2011/158)
The Adoptions with a Foreign Element (Scotland) Amendment Regulations 2011 (SSI 2011/159)
The Advice and Assistance and Legal Aid (Online Applications etc.) (Scotland) Regulations 2011 (SSI 2011/161)
The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (SSI 2011/162)
The Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 (SSI 2011/163)
Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2011 (SSI 2011/166)
The Public Services Reform (Scotland) Act 2010 (Health and Social Care) Savings and Transitional Provisions (No.2) Order 2011 (SSI 2011/169)
The Extreme Pornography (Electronic Commerce Directive) (Scotland) Amendment Regulations 2011 (SSI 2011/170)

The Committee may wish to be content with these instruments.
Agenda Item 3  Instruments not laid before the Parliament


The committee may wish to be content with this instrument but to note that it is a matter of regret that such a short period of time for public notice of the commencement of this significant regulatory scheme has been given and that this appears to have arisen out of a failure to properly manage the delivery of the contract for necessary IT services.

The Housing (Scotland) Act 2010 (Commencement No. 2, Transitional, Transitory and Saving Provisions) Order 2011 (SSI 2011/96 (C.9))

The Alcohol etc. (Scotland) Act 2010 (Commencement) Order 2011 (SSI 2011/149 (C.12))

Act of Sederunt (Rules of the Court of Session Amendment No. 2) (Fees of Shorthand Writers) 2011 (SSI 2011/165)

Act of Adjournal (Criminal Procedure Rules Amendment No. 2) (Protection of Vulnerable Groups (Scotland) Act 2007) 2011 (SSI 2011/167)

The Committee may wish to be content with these instruments.
INSTRUMENTS SUBJECT TO ANNULMENT

The Officers of Court’s Professional Association (Scotland) Regulations 2011 (SSI 2011/90)

On 23 February 2011 the Scottish Government was asked:

1. Does the Government considers that the reference to the resolution in Regulation 11(2)(a) is sufficient to identify the document referred to?

2. Can the Government explain why there is no footnote to the instrument or any statement in the Explanatory Note as to where a copy of the resolution may be obtained or inspected and what effect does the Government think this may have?

The Scottish Government responds as follows:

1. The Government considers that the reference to the resolution in regulation 11(2)(a) is sufficient to identify the resolution. The resolution is recorded in the formal minutes of the Society meeting under the head “Annual Subscription” (at £535 per member, the same as the previous year) and as having been agreed by the meeting. The Society routinely sends the minutes to every member, and will send a copy to every new member of the Society.

2. As the resolution is identified with certainty and will be publicised to each officer of court liable to pay the fee, it is not considered that there is any effect of the lack of indication where a copy may be obtained or inspected. A copy may be obtained from the Society by any officer affected.
On 22 February 2011 the Scottish Government was asked:

The Scottish Government is asked to explain the reason why the Scottish Government has not been able to give effect to the transitional relief on time in accordance with the requirements of article 2 of Directive 2011/8/EU in particular since the effect of not doing so is that Scots law will prohibit the use of Bisphenol A in the manufacture of plastic infant feeding bottles and the sale and import from outside the EU of such bottles for the period 15 February to 1 March contrary to EU law requirements and such activity is also a criminal offence.

The Scottish Government responds as follows:

Directive 2011/8/EU was published in the Official Journal of the European Union on Saturday, 29th January 2011. A short time was then needed for the Food Standards Agency in Scotland to liaise with administrations in the rest of the United Kingdom to finalise plans for consistent implementation and to finalise these Regulations and the accompanying documentation. These Regulations were made on Thursday, 10th February 2011, laid before the Scottish Parliament on Monday, 14th February 2011 and come into force at the same time as equivalent legislation in the rest of the United Kingdom, on Tuesday, 1st March 2011. Local authorities and the Crown Office and Procurator Fiscal Service were notified of the short delay in implementing the transitional measures; the Scottish Government does not consider that there will be any adverse implications.
On 27 February 2011 the Scottish Government was asked:

1. The definition of “the 2008 Section” in regulation A2 (4) defines the 2008 Section of the NHS Superannuation Scheme. Can it be clarified why this includes the rules in Parts 1 (Introduction) and 2 (Officers) of the 2008 Regulations, but not in Parts 3 (Practitioners, etc.) or 4 (Mixed Service)?

2. (i) Why regulation B1(3) refers to the coming into force date of these Regulations, in substitution for the coming into force date of the equivalent provision in the 1995 Regulations, which it consolidates?

(ii) What is the effect of regulation B1(3) and W2(2) and the revocation of B1(3) of the 1995 Regulations, in relation to persons who have elected for inclusion to the Scheme under that provision of the 1995 Regulations, on the basis they were in NHS employment on the coming into force of that provision in April 1995 (and given that W2(2) appears to have the effect of modifying the qualifying date of the NHS employment to 1 April 2011)? Are any saving or transitional provisions needed to cater for these persons?

(iii) Should the reference to notice of election to the Secretary of State in B1(3) have referred instead to the Scottish Ministers? If so, what are the implications of persons being entitled to give notice to the Secretary of State?

3. In regulation E6(1)(a), is “or” omitted at the end of subparagraph (iii), or is there any intention that subparagraphs (iii) and (iv) both require to be implemented within the conditions in paragraph (a)?

4. Regulation G16(3) is a consolidation of the equivalent provision in the 1995 Regulations as amended. However it makes the same provision that an election to purchase a surviving partner’s pension in respect of service before 6 April 1988 “must be made within the period of 15 months beginning with the date on which these Regulations come into force.”

Is this intended to refer to 1 April 2011 (extending the period allowed for election), or should this have referred to the coming into force date of the provision in the 1995 Regulations (and which appears to be 1 April 2008)?

5. In Schedule 1 paragraph 1, in the definition of “Common Services Agency”, it appears that “the 1972 Act” should refer to the 1978 Act. What is the effect of this?

The Scottish Government responds as follows:

1. SG accepts that there is an error and intends at the earliest opportunity to correct it by making clear that “the 2008 Section” means that the rules set out in the 2008 Regulations (i.e. not confined to Parts 1 and 2)
2. (i) SG thinks that it is correct that regulation B1(3) refers to the coming into force of “these Regulations” because the 1995 Regulations are being repealed and the right has to exist after the coming into force of the consolidated Regulations;

(ii) Regulation B1(3) affects only those persons who on the coming into force of the consolidated regulations for some reason are not in the scheme, although they are in NHS employment. They have a right to elect to join the scheme subject to the conditions set out in the regulation.

(iii) SG accepts that there is an error and the reference should have been to the Scottish Ministers and intends to correct this at the earliest opportunity.

3. SG accepts that there is a drafting error here and there is a missing “or” and intends to correct it at the earliest opportunity.

4. SG accepts that there is a drafting error here and the reference should have been to 15 months from the date that the 2008 Reform Regulations (SSI 2008/226) came into force. If this error is allowed to stand, it would create unintended extra rights for certain persons and SG accordingly propose to correct it at the earliest opportunity.

5. SG accepts that there is a drafting error here and the reference should have been to the 1978 Act and intends to correct it at the earliest opportunity.
On 24 February 2011 the Scottish Government was asked:

1. Can it be explained and clarified how regulation 2 makes provision by virtue of the powers in section 1(3C) of the 1968 Act and section 6(2D) of the 1980 Act to determine a question as to what a reasonable cost is for the purposes of those sections (given that the need for connection to the public sewerage system or water supply by only the construction of a drain or a service pipe (as the case may be) does not appear to involve an assessment of reasonable cost)?

2. In relation to all the tables set out in Schedule 2 (non-dwellings/reasonable costs) is any provision intended, to cater for the possibility that facilities could have a number of employees greater than the maximum number stated at the end of each table, up to the year 2015? Is the reasonable cost per the tables intended to be zero for such facilities, in the absence of provision?

The Scottish Government responds as follows:

1. The terms “drain” and “service pipe” are defined in section 59(1) of the 1968 Act and section 109(1) of the 1980 Act respectively. According to those definitions, a “drain” or “service pipe” is a piece of infrastructure serving an individual set of premises, as opposed to (for example) a “sewer” or “main”. It can be seen that, when considering the chain of connection between premises which constitute new development and the pre-existing public sewerage or water supply network, a “drain” or “service pipe” represents the final link in what can potentially be a much more substantial chain of new infrastructure needed to achieve connection of the development. Therefore, the fact that in an individual case all that a developer needs to do to connect premises to the public system is to construct a drain or service pipe is highly relevant to the question of whether that connection is possible at reasonable cost to the developer.

Section 1(3C) of the 1968 Act provides that any question as to what is a reasonable cost shall be determined in accordance with regulations. The Scottish Ministers have power by regulations to determine (in whole or in part—see response to question 2 below) what constitutes a reasonable cost. There is no requirement that this must be done by any form of arithmetical formula. Section 1(3D) provides that regulations may, in particular, specify criteria to be applied as well as (or instead of) method of calculation to be adopted in determining what is a reasonable cost. Section 6(2D) and (2E) of the 1980 Act are in corresponding terms. Regulation 2 simply provides that, where all a developer would be required to do to connect premises to the public system is to construct a drain or service pipe, that connection is possible at reasonable cost to the developer (and Scottish Water is not required to extend the public network any further in order to accommodate the development).

2. There is no intention that the regulations should make such provision. While sections 1(3C) of the 1968 Act and 6(2D) of the 1980 Act provide that any question as to what is a reasonable cost shall be determined in accordance with regulations, this does not mean that, in the absence of regulations dealing with
any aspect of reasonable cost, the reasonable cost is zero. Section 1(4) of the 1968 Act states that “If any question arises...as to whether a reasonable cost has been properly determined in accordance with regulations...or anything is or is not practicable at a reasonable cost or as to the point or points to which a public sewer...must be taken...the Water Industry Commission for Scotland, if requested to do so by any person aggrieved, shall,...determine that question”. Section 6(3) of the 1980 Act is in similar terms. If it was mandatory for Ministers to make regulations which dealt comprehensively with all possible issues of reasonable cost, much of these two subsections would be redundant. Where regulations do not cover an aspect of reasonable cost and negotiations between Scottish Water and the developer fail to resolve the problem, the WIC will act as referee and will come up with its own determination, although in the case of enterprises with a greater number of employees than shown in the tables it is anticipated that the WIC will use the Regulations as an analogy.

It should be noted that the Provision of Water and Sewerage Services (Reasonable Cost) (Scotland) Regulations 2006 (which are revoked by these Regulations) relate only to dwellings and do not cover commercial premises. Until now issues of reasonable cost for such premises have been dealt with in the absence of regulations by either negotiation or determination by WIC.
On 24 February the Scottish Government was asked:

1. To clarify the basis on which the regulations to continue in force, and which appear to make provision relating to elements of an outgoing regulatory regime, are to continue to operate with reference to what is understood to be a wholly new regulatory regime established under the Public Services Reform (Scotland) Act 2010.

2. To explain the effect of regulation 21(b), so far as it provides, in broad terms, for “such other provisions of (SSI 2002/114) as are necessary for the purposes of regulations 19 to 24” to continue in force. In not specifying which other provisions of that instrument are to remain in force, is it therefore plain as to the precise extent of the legislation which is actually to continue to apply?

The Scottish Government responds as follows:

1. Part 5 of the Public Services Reform (Scotland) Act 2010 will create a new regulatory regime for care services and sections 10P to 10Z15 of the National Health Service (Scotland) Act 1978 will create a new regulatory regime for independent health care services. At present, under the Regulation of Care (Scotland) Act 2001, SSI 2002/114 sets out certain requirements which care services and independent health care services registered with the Care Commission are required to meet. These relate to the keeping of records, making of returns, and the provision of notifications and notice in certain circumstances. Under the new regulatory regime, whilst there will be a core set of requirements each care provider must meet, over and above this SCSWIS and HIS will set additional requirements for each service that will be tailored to the type of service provided. It is unlikely that this more specific regime will be fully operational by 1st April. So, to ensure that there continues to be an obligation to keep records, make returns, etc during the period until the new regime is fully operational, regulations 19 to 24 of SSI 2002/114 have been saved. This will allow SCSWIS and HIS time to issue notifications on a gradual basis to deemed registered services of the new requirements under the Public Services Reform Act and the National Health Service (Scotland) Act. As the new requirements come into force, the old requirements will fall away and services will be notified of that fact by SCSWIS and HIS. SSI 2002/114 will be revoked when that transition is complete. If these regulations were not saved, there is a risk that for a period of time some services would no longer be subject to a formal requirement to keep records, make returns, etc.

SSI 2009/118 provides for the registration and regulation of social workers and social service workers in Scotland. During the period of transition from the Care Commission to SCSWIS, the policy intention is to maintain stability as far as possible so the current system of registration of social workers and social service workers will be maintained. The intention is to update and consolidate the system of registration in line with the new legislation later in 2011, at which point SSI 2009/118 will be revoked.
Section 132 of the Public Services Reform (Scotland) Act 2010 gives the power to make such savings provisions so as to give full effect to the provisions of the Act including the establishment of SCSWIS and HIS.

2. The effect of regulation 21(b), so far as it provides, in broad terms that “such other provisions of SSI 2002/114 as are necessary for the purposes of regulations 19 to 24” are to continue in force is to ensure that such interpretation provisions as may be required for the purposes of regulations 19 to 24, continue in force.
On 24 February 2011 the Scottish Government was asked:

1. To explain the vires to make the Order under section 39(4) and (5) of the Civic Government (Scotland) Act 1982 (“the 1982 Act”) and under section 50(7) and (7A) of the Licensing (Scotland) Act 2005 (“the 2005 Act”), as amended by sections 175 and 186 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”) respectively, when neither section 175 nor 186 of the 2010 Act is in force.

2. To the extent that this is considered to be an anticipatory exercise of powers under section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010, to explain the basis for this view given that the new powers conferred by the amendments made by sections 175 and 186 of the 2010 Act do not appear to relate to giving full effect to the 2010 Act, but rather to giving full effect to provisions of the 1982 Act and the 2005 Act respectively which are already in force.

3. To explain why regulation 2(1) is within vires of section 39(4) as amended, since instead of specifying the requirements with which a vehicle, kiosk or moveable stall must comply (as the power permits), it appears instead to impose a duty on a food authority to state in the certificate that the vehicle, kiosk or moveable stall complies with all relevant requirements of the Specified Community provisions.

4. To explain why regulation 3 is within vires of section 50(7) as amended, since instead of specifying the requirements compliance with which are to be stated on a food hygiene certificate (as the power permits), it appears instead to redefine what a food hygiene certificate is, by stating that a food hygiene certificate is “a certificate... stating that the subject premises comply with all relevant requirements of the Specified Community provisions”.

The Scottish Government responds as follows:

1. This is an anticipatory use of powers under section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010.

2. Section 4 of the 2010 Act permits the use of a power which has not yet been brought into force where it is necessary or expedient to do so for the purpose of giving full effect to the Act at or after the time when the provision conferring the power comes into force. The provisions of the Licensing (Food Hygiene Requirements)(Scotland) Order 2011 are required to give full effect to sections 175 and 186 of the 2010 Act.

At present, licensing authorities are required to refuse applications under section 39 of the 1982 Act and are unable to process applications under section 50 of the 2005 Act unless satisfactory food hygiene certification is provided by the applicant. On the commencement of sections 175 and 186 of the 2010 Act, this certification will be confirmation from the food authority that the applicant’s business (be that a licensed premises or a street trader’s stall) complies with requirements set out by Ministers.
Without having an Order in place on the commencement of those sections specifying the relevant requirements with which street traders or premises licence applicants must comply, it would be impossible for food authorities to provide the necessary certification required by applicants.

The Order being discussed is necessary to give full effect to the powers created by sections 175 and 186 of the 2010 Act which powers come into force, by virtue of the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 8) Order 2011, on the 28th March 2011. This means that this Order gives full effect to sections 175 and 186 at the time when those provisions come into force. The powers conferred by sections 175 and 186 can therefore be used in accordance with section 4 of the Interpretation and Legislative reform (Scotland) Act 2010.

3. Section 39(4) of the 1982 Act requires a licensing authority to refuse a street traders' licence application unless a certificate by the food authority is provided to them. Section 39(4) enables the Scottish Ministers to specify the requirements with which this certificate must document compliance. The Scottish Government submits that article 2 of the Order does not place any additional obligation on food authorities to make certain statements in a certificate issued under section 39(4) of the 1982 Act, as amended by section 175 of the 2010 Act. However, where a food authority is issuing a food hygiene certificate to an applicant for a street trader’s licence, the licensing authority must refuse the application for a street trader’s licence unless the certificate complies with certain requirements. The principal purpose of article 2 is to set out clearly the requirements that a certificate issued under section 39(4) of the 1982 Act must reference. The Scottish Government’s position is that this is within the vires of section 39(4) of the 1982 Act as amended by section 175 of the 2010 Act.

4. The Scottish Government submits that article 3 of the Order does not re-define what a food hygiene certificate is. Section 50(1) of the 2005 Act provides that a premises licence application must be accompanied by a food hygiene certificate where food is to be supplied on the premises. Accordingly, where a food hygiene certificate is required but not provided the licence application is incomplete and cannot be processed by the licensing board. Section 50(7) of the 2005 Act as amended by section 186 of the 2010 Act, enables the Scottish Ministers to specify the requirements with which a food hygiene certificate must document compliance. The principal purpose of article 3 is to set out clearly the requirements that a food hygiene certificate must reference. The Scottish Government’s position is that this is within the vires of section 50(7) of the 2005 Act as amended by section 186 of the 2010 Act.
The Sale of Tobacco (Display of Warning Statements) (Scotland) Regulations 2011 (SSI 2011/132)

On 23 February 2011 the Scottish Government was asked:

1. The powers the Government has cited it is exercising are powers to prescribe various matters. It is the definition of prescribed which dictates the manner in which the functions are to be exercised. What is the effect of the definition of “prescribed” not being in force at the time the powers were exercised considered to be?

2. What power was used to make regulation 3 given that this does not prescribe anything, but makes a consequential amendment to existing provision which prescribes matters for another purpose? What is the effect of failing to cite a relevant enabling power considered to be?

The Scottish Government responds as follows:-

1. The definition of “prescribed” in section 35 of the Tobacco and Primary Medical Services (Scotland) Act 2010 comes into force on 1 April 2011 at the same time as the Regulations. The Scottish Government’s view is that the power to make the Regulations is section 8(5) of the 2010 Act. The definition of “prescribed” is not a power necessary to make the Regulations and so they can be made before the definition comes into force. If this position is not accepted, then to the extent that the power to make Regulations is conferred by the definition in section 35, the exercise is an acceptable anticipatory use of powers. A power can be exercised during the pre-commencement period if it is necessary or expedient to do so for the purpose of giving full effect to the Act at or after the time when the provision conferring the power comes into force. The Scottish Government considers that it was necessary and expedient to use this power and does not therefore consider that the fact that the definition of prescribed was not in force when the Regulations were made has any effect on the validity of the Regulations.

2. The power to make regulation 3 is the power in section 4(3) of the Children and Young Persons (Protection from Tobacco) Act 1991 under which the Protection from Tobacco (Display of Warning Statements) Regulations 1992 were made. Such a power includes an implied power to revoke an instrument made under that power. Regrettably that power was inadvertently not cited in the regulations, however the regulations did cite “all other powers” enabling the Scottish Ministers to make the regulations, which would include the power in section 4(3) of the 1991 Act. Failure to cite a relevant enabling provision in the preamble to an instrument does not result in the invalidity of the instrument according to Craies on Legislation (eighth edition, paragraph 3.3.5). Vibixa Ltd v Komori UK Ltd and Ors [2006] EWCA Civ 536 is the leading case on what powers are brought into play by the general enabling provision. The Court of Appeal’s conclusions at paragraph 12 in the Vibixa case included the following:-

“General enabling powers in the preamble to a statutory instrument may be interpreted as referring to an enabling power, not expressly invoked, in situations such as the following:-
(i) where, in order for the SI to have effect, the maker of the instrument must necessarily have invoked that power, or

(ii) where the operative provisions of the SI make it clear that its maker must have invoked that power,”

In our view regulation 3 of the Regulations falls within the situations described in (i) and (ii) and accordingly the general enabling power can be interpreted as referring to section 4(3) of the 1991 Act.

While Vibixa is an English decision the Scottish Courts are likely to find it persuasive.
The Parole Board (Scotland) Amendment Rules 2011 (SSI 2011/133)

On 24th February 2011, the Scottish Government was asked:

*The words “in the definition of “prisoner”” appear to have been omitted from Regulation 3(b) as there is no sub-paragraph (c) in rule 2(1) of the Parole Board (Scotland) Rules 2001. Can the Government explain what effect it thinks that this omission may have?*

The Scottish Government responds as follows:

The Scottish Government does not consider that the omission of the words “in the definition of “prisoner” “affects the operation of rule 3(b). While those words should have been included, it is clear when looking at rule 3(b) of SSI 2011/133, in the context of rule 2(1) of the 2001 Rules, what the intention of the provision is, since there is no other subparagraph (c) in rule 2(1) that could be referred to. In our view the provision achieves the intended policy and there is no need to amend the provision.
On 24 February the Scottish Government was asked:

*The new Part 1B of Schedule 1 to the 1992 Order contains various references to “solar PV”. This is defined as solar photovoltaic, for the purposes of Part 1A in the 1992 Order, but not defined at “Interpretation of Part 1B” at the end of this Order.*

*Why has it been considered that no similar definition is required for the purposes of Part 1B, or would you propose to add this definition by an amendment?*

**The Scottish Government responds as follows:**

The Scottish Government notes that the term “solar PV” is defined for the purposes of Part 1A in the 1992 Order but that there is no equivalent definition of the same term in the new Part 1B to be inserted by this Order. The Scottish Government is grateful to the Committee for drawing this matter to its attention. It is considered that the term “solar PV” is itself sufficiently well used and understood that the lack of a definition of the term in the new Part 1B does not give rise to any real doubt as to the correct interpretation of Part 1B. The Scottish Government nevertheless proposes to include a definition in the 1992 Order for the purpose of Part 1B when the opportunity arises.
On 23 February 2011 the Scottish Government was asked:

1. To confirm whether the intention is that the transmission condition specified in regulation 4(2) is only satisfied where a service provider does not do any of the things listed in paragraphs (a) to (c) and, if so, whether the use of the conjunction “or” only after (b) makes clear that these are cumulative conditions and not alternatives, in comparison with the drafting of regulation 5(3) where the same approach is used where it appears the intention is to provide a list of alternatives?

2. To confirm when it is intended that section 51A of the Civic Government (Scotland) Act 1982 is to come into force and when provision to this effect will be made?

The Scottish Government responds as follows:

1. The transmission condition in regulation 4(2) is only satisfied where a service provider does not do any of the things listed in paragraphs (a) to (c). On reflection, whilst we consider that the use of the conjunction “or” would have the desired legal effect, on balance we agree that the use of the conjunction “or” only after paragraph (b) does not make it as clear as it might that these are cumulative conditions and not alternatives. To address this we have laid amending Regulations which will substitute ‘and’ for ‘or’.

2. Section 51A of the Civic Government (Scotland) Act 1982 will come into force on 28 March 2011. Provision to that effect is being made in the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 8, Transitional and Savings Provisions) Order 2010, which will be laid in early course. You may wish to note that the amending Regulations referred to in reply to question 1 will also come into force on 28 March 2011.
On 25 February the Scottish Government was asked:

*In relation to regulation 49(1), providing for the revocation of Part II and Schedules 1 to 6A of the 1999 Regulations, that Part and Schedules have been modified by a considerable number of provisions. Can it be explained why the usual legislative practice has apparently not been followed, to also suitably revoke the amending provisions, and to remove them from the statute book?*

**The Scottish Government responds as follows:**

Regulation 49 revokes Part II and Schedules 1 to 6A of the 1999 Regulations with the exception of the provisions specified in regulation 49(2). These include regulation 2 of the 1999 Regulations. The 1999 Regulations have been amended by a number of other statutory instruments, however, all of these instruments either (or both) amend provisions of the 1999 Regulations which are not revoked by regulation 49 or make provision that affect other enactments. As it would not be just a matter of revoking spent statutory instruments in their entirety, rather than make extensive amendments to provision of the 1999 Regulations which remain in force and other amending instruments it was considered preferable to adopt the approach taken.
The Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011 (SSI 2011/140)

On 24 February the Scottish Government was asked:

Although the Regulations bear to reinstate Scots law to the position prior to the coming into force of Council Regulation (E.C.) No. 1346/2000 on 31 May 2002, the law on the appointment of receivers was altered at that date and had now been in force in that form for over 8 years and 9 months. The Regulations accordingly effect a substantive change in the law relating to the appointment of receivers. Given the significance of this change in the law (which requires the amendment of primary legislation), the Scottish Government is asked why it is considered appropriate that this instrument be subject to negative procedure.

The Scottish Government responds as follows:

The Council Regulation mentioned above altered the jurisdiction of the Court of Session in insolvency proceedings. The change which it made to the law on the appointment of receivers set out in section 51 of the Insolvency Act 1986 was unintended and resulted purely from the reference in that section to the winding-up jurisdiction of the Court of Session. Although we are not aware of any cases in which it has caused a difficulty so far, the undesirability of the change was confirmed by the consultation carried out between July and October 2010.

The Regulations reinstate the position on the appointment of receivers to that which existed prior to the coming into force of the Council Regulation. They ensure that the law set out in section 51 remains as Parliament intended. Given the nature of the changes made and in particular, the fact that the changes are simply directed at reinstating the long established position before the Regulation had this unintended consequence, the Scottish Government considers that the negative procedure provides the appropriate level of scrutiny.
The Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141)

On 25 February 2011 the Scottish Government was asked:

1. To explain what powers are being relied upon to make regulation 32(6), in that it appears to provide for the prescription of an employer’s obligation to make payment. Is the basis for doing so clear?

2. Whether the reference in regulation 37(4) to “form 3” ought in fact to be a reference to “form 4”, and if so to explain the effect of this error.

3. Whether regulation 39(2) is intended to apply also to the DAS Administrator as it does to a continuing money adviser? As regulation 39(2) stands an employer to whom a payment instruction is addressed will only be notified of the outcome of a variation to the debt payment plan if there is a continuing money adviser. Is this not inconsistent with the provision made in regulation 46(2) whereby either the DAS Administrator or the continuing money adviser must intimate the completion of the debt payment programme to such an employer?

The Scottish Government responds as follows:

1. Regulation 32(6) is made under section 7(1)(d) of the Debt Arrangement and Attachment (Scotland) Act 2002—provision for failure of an employer to comply with the duty to comply with a payment instruction to a debtor's employer. We consider the basis for making this provision clear, as a restriction on the duration of the liability arising under from a payment instruction under regulation 32.

There is also specific power in section 7(2)(p) and (3) of the Act to provide for the manner in which a debt payment programme affects the rights of third parties, and to make different provision for different matters.

2. The reference in parentheses at the end of regulation 37(4) should be to “form 4” and we thank the Committee for pointing this out. We consider the intention of the Regulations is nonetheless clear—the parenthesis is only to indicate that disposable income assessed for the purposes of the categories in regulation 37(3) is not applied against the actual figures submitted in the initial application for approval of a debt payment programme (form 1), but rather assessed on the same basis as those figures are submitted, but in the application for a variation seeking a payment holiday. The Government will correct the typographical error at the next legislative opportunity.

3. Regulation 39(2) was not intended to apply also to the DAS Administrator, as under the current Debt Arrangement Scheme (Scotland) Regulations 2004 (SSI 2004/468 as amended). It is a standard condition of a debt payment programme that the debtor gives all notices and intimations which he or she requires to give under the regulations (regulation 27(2)(g)). Where a variation is agreed and this method of payment is used the debtor would require to submit a new mandate to his or her employer directly under regulation 32 in view of section 6 of the 2002 Act. There would be no need for the DAS Administrator to notify the employer.
A continuing money adviser may be assisting the debtor in the variation process. It was accordingly considered that he or she should have the function of notifying an employer where a variation is agreed which affects a payment instruction.
INSTRUMENTS SUBJECT TO APPROVAL

The Housing (Scotland) Act 2010 (Commencement No. 2, Transitional, Transitory and Saving Provisions) Order 2011 (SSI 2011/96 (C.9))

On 22 February the Scottish Government was asked:

In relation to the commencement of sections 2(2) and 3(2) of the Housing (Scotland) Act 2010, can it be explained and clarified how these provisions can have effect in relation to the performance of the functions of the Scottish Housing Regulator, without section 3(1) also being brought into force on 1 April 2011 (or earlier), because 3(1) provides for the whole general functions of the Regulator?

The Scottish Government responds as follows:

The Government considers that sections 2(2) and 3(2) of the Housing (Scotland) Act 2010 can clearly have effect in relation to the performance of certain functions of the Regulator. Those functions are additional to its “general functions” within the meaning of section 3(1).

SSI 2011/96 brings certain specific functions of the Regulator into force on 1st April 2011. These functions are conferred on the Regulator in advance of it having responsibility for the performance of the more general functions. These general functions will be conferred in due course. In the meantime it is relevant and appropriate that sections 2(2) and 3(2) have effect in relation to the specific functions commenced on 1st April 2011.

The general functions are set out at section 3(1). They are, broadly, to keep a register of social landlords, and to perform a regulatory role in relation to social landlords. The legislative intention is that the Regulator will not exercise those functions until its substantive powers and duties under the Act come into force, and the equivalent regulatory regime under the Housing (Scotland) Act 2001 has been repealed.

The Regulator’s functions, on the other hand, are all the functions which it performs, including both its general functions and those which fall outside that scope. The additional functions conferred with effect from 1st April include: engaging in consultation and being consulted; preparing statements, guidance, and codes of conduct; and cooperating with other regulators. These functions need to be exercised in the first instance in advance of the Regulator assuming its substantive regulatory powers and duties. The Government considers it appropriate that they be exercised subject to the objective in section 2(2) and the duty in section 3(2).

Accordingly sections 2(2) and 3(2) of the Act can have effect in advance of the commencement of section 3(1). For that reason, the Government does not consider that the provisions of the commencement order require to be amended.