

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 9 September 2008

Session 3

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2008.

Applications for reproduction should be made in writing to the Licensing Division,  
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ  
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate  
Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR  
Donnelley.

---

## CONTENTS

Tuesday 9 September 2008

	Col.
<b>JUDICIARY AND COURTS (SCOTLAND) BILL: AFTER STAGE 2</b> .....	343
<b>SEXUAL OFFENCES (SCOTLAND) BILL: STAGE 1</b> .....	345
<b>SCOTTISH GOVERNMENT RESPONSES</b> .....	347
Plastic Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2008 (SSI 2008/261) .....	347
Control of Salmonella in Poultry (Scotland) Order 2008 (SSI 2008/266) .....	349
<b>DRAFT INSTRUMENTS SUBJECT TO APPROVAL</b> .....	350
Scottish Commission for Human Rights (Specification) Order 2008 (Draft) .....	350
Freedom of Information (Relaxation of Statutory Prohibitions on Disclosure of Information) (Scotland) Order 2008 (Draft) .....	350
<b>INSTRUMENTS SUBJECT TO ANNULMENT</b> .....	351
National Health Service (Charges to Overseas Visitors) (Scotland) Amendment Regulations 2008 (SSI 2008/290) .....	351
Public Contracts and Utilities Contracts (Common Procurement Vocabulary Codes) Amendment (Scotland) Regulations 2008 (SSI 2008/291) .....	351
Divorce etc (Pensions) (Scotland) Amendment Regulations 2008 (SSI 2008/293) .....	351
National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment (No 2) Regulations 2008 (SSI 2008/288) .....	351
National Health Service (Optical Charges and Payments) (Scotland) Amendment (No 2) Regulations 2008 (SSI 2008/289) .....	351
<b>INSTRUMENT NOT LAID BEFORE THE PARLIAMENT</b> .....	352
Licensing (Scotland) Act 2005 (Commencement No 5) Order 2008 (SSI 2008/292) .....	352

---

# **SUBORDINATE LEGISLATION COMMITTEE**

## **24<sup>th</sup> Meeting 2008, Session 3**

### **CONVENER**

\*Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

### **DEPUTY CONVENER**

Gil Paterson (West of Scotland) (SNP)

### **COMMITTEE MEMBERS**

\*Jackie Baillie (Dumbarton) (Lab)

\*Jackson Carlaw (West of Scotland) (Con)

\*Helen Eadie (Dunfermline East) (Lab)

\*Ian McKee (Lothians) (SNP)

John Park (Mid Scotland and Fife) (Lab)

### **COMMITTEE SUBSTITUTES**

Bill Aitken (Glasgow) (Con)

Ross Finnie (West of Scotland) (LD)

\*Christopher Harvie (Mid Scotland and Fife) (SNP)

Elaine Smith (Coatbridge and Chryston) (Lab)

\*attended

### **THE FOLLOWING ALSO ATTENDED :**

Judith Morrison (Legal Adviser)

### **CLERK TO THE COMMITTEE**

Shelagh McKinlay

### **SENIOR ASSISTANT CLERK**

David McLaren

### **ASSISTANT CLERK**

Jake Thomas

### **LOCATION**

Committee Room 3

## Scottish Parliament

### Subordinate Legislation Committee

*Tuesday 9 September 2008*

[THE CONVENER *opened the meeting at 14:15*]

**The Convener (Jamie Stone):** I welcome everyone to the 24<sup>th</sup> meeting in 2008 of the Subordinate Legislation Committee. We have received apologies from Gil Paterson and John Park. I also welcome two people to today's meeting: Christopher Harvie, who is attending as a substitute for Gil Paterson, and Rachael Berry, who is helping out with the Sexual Offences (Scotland) Bill.

I remind everyone to turn off their mobiles or BlackBerrys, please.

### Judiciary and Courts (Scotland) Bill: After Stage 2

**The Convener:** Sections 15 and 15A are on guidance to the judicial appointments board for Scotland. Are we content that the delegated powers in section 15, as amended at stage 2, and new section 15A, are acceptable?

**Members indicated agreement.**

**The Convener:** Are we also content to draw the terms of new section 15A to the attention of the Justice Committee for its interest in the Parliament's role in scrutinising the guidance made under section 15, and in particular the period of time given to Parliament under section 15A to make recommendations?

**Members indicated agreement.**

**The Convener:** Section 38 inserts new section 12E into the Sheriff Courts (Scotland) Act 1971, giving the power to remove a person from the office of sheriff principal, sheriff or part-time sheriff. That happened in my constituency some years ago, as members might recall.

Are the delegated powers in section 38 acceptable? Are we also content that they are subject to negative procedure and cannot come into effect until 40 days after they are laid?

**Members indicated agreement.**

**The Convener:** We move on to section 38A, "Provision relating to tribunal considering fitness for office of justices of the peace". Are we content that the delegated powers in section 38A, which are conferred on the Court of Session, are

acceptable and that they are not subject to parliamentary procedure?

**Members indicated agreement.**

**The Convener:** That takes us to section 38B, "Training and appraisal of justices of the peace" and paragraph 7 of schedule 5 to the bill. I wonder how many of us around the table have been or are JPs? I was, but am not any longer.

Are we content that the delegated powers in section 38B and paragraph 7 of schedule 5 to the bill, which will be conferred on the Lord President, are acceptable and that they are subject to negative procedure?

**Members indicated agreement.**

**The Convener:** Section 42, "Divisions of the Inner House", inserts into the Court of Session Act 1988 new section 5(ba), which confers a new power to regulate procedure in the Court of Session. Are we content that the delegated power in section 42 is acceptable and that it is not subject to parliamentary procedure?

**Members indicated agreement.**

**The Convener:** Finally, section 66(2) confers a default power on the Scottish ministers to carry out the functions of the Scottish Court Service. Are we content that section 66, as amended, is acceptable?

**Members indicated agreement.**

**The Convener:** That concludes our consideration of the bill. The stage 3 debate will be on Thursday 25 September.

## Sexual Offences (Scotland) Bill: Stage 1

14:18

**The Convener:** This is our first consideration of the bill. There is quite a lot to consider, so we will take it step by step.

Section 29 confers a power to specify “relevant offences” for the purpose of section 29(2). Are members content to ask the Scottish Government the four questions that are set out in the summary of recommendations, to which I should have drawn members’ attention when I started the meeting?

*Members indicated agreement.*

**Ian McKee (Lothians) (SNP):** I am slightly concerned about section 29(2), which specifies that the accused will be given the benefit of the doubt over any misunderstanding about the age of the child only when they have not been previously charged with a relevant offence. It is a bit dangerous if the fact that someone has merely been charged—and is therefore innocent until proven guilty—can be used as a mechanism to deny him or her a defence on a subsequent charge. Someone might be charged, but innocent, and they will have been denied a possible defence for later. I can envisage situations whereby someone could be innocent, but denied a defence.

I am not certain whether that is a matter for the Subordinate Legislation Committee or the lead committee, but the point should be highlighted and discussed, either through a question to the Government or a comment to the lead committee.

**The Convener:** The thrust of what we are saying about the bill is that the delegated powers that it proposes to grant to ministers are rather sweeping at various points. We are asking whether those powers should be subject to affirmative rather than negative procedure, or whether the provision should be specified in the bill. Your question might well be relevant within that context.

**Ian McKee:** Yes, but it is different. I agree that we should find out what the relevant offences are, because that is a broad range. However, I am asking about denying someone one element of a defence solely on the ground that they have been charged with a previous offence. In our country, people are innocent until they are proved guilty, so it is not right that a possible defence should be taken away from someone because they have been charged.

**The Convener:** Very good. We can write to the Government about that.

Section 32, “Positions of trust”, confers the power to amend the definition of what constitutes a position of trust in respect of the offence of sexual abuse of trust at section 31. Are members content to ask the Scottish Government the two questions that are set out in the summary of recommendations?

*Members indicated agreement.*

**The Convener:** Section 35 confers a power to specify circumstances that are to be regarded as constituting the provision of care services for the purpose of the offence of sexual abuse of trust of a mentally disordered person.

Are we content to seek an assurance from the Government that the power is framed more narrowly than that in section 32(1), for the reasons described in the summary of recommendations?

*Members indicated agreement.*

**The Convener:** Sections 38 and 30 confer powers to prescribe the form of notice of alternative verdicts. Section 42 confers a power to prescribe a period of notice of defence to an offence under section 42(1). Section 43 confers a power to prescribe the period of notice of defence to an offence under section 43(2)(b). Are those powers acceptable and are we content that they are not subject to parliamentary procedure?

*Members indicated agreement.*

**The Convener:** On section 45, “Ancillary provision”, are members content to ask the Scottish Government the two questions that are set out in the summary of recommendations?

*Members indicated agreement.*

**The Convener:** Are members content that the power conferred under section 46, “Orders”, is acceptable?

*Members indicated agreement.*

**The Convener:** Finally, on section 49, “Short title and commencement”, are we content that the power is acceptable and that it is not subject to parliamentary procedure?

*Members indicated agreement.*

**The Convener:** We do not normally have a problem with the short title and commencement, do we?

We will consider the Government’s response to our questions at our meeting a fortnight hence.

## Scottish Government Responses

14:23

**The Convener:** For those members who were not here last week, we wrote to the Scottish Government about two Scottish statutory instruments, and we have seen the responses.

### Plastic Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2008 (SSI 2008/261)

**The Convener:** We have a bit of a difficulty with the response to our points on the regulations. Our advisers have drawn some serious issues to our attention about the regulations and the response that we have received from the Food Standards Agency.

The first issue relates to the breach of the 21-day rule and the explanation given to the Presiding Officer for that breach. We know that, where it is necessary for an instrument to be brought into force at any time before the expiry of the 21-day period, an explanation must be provided to the Presiding Officer giving the reasons for doing so. We have known that ever since Parliament was set up in 1999. This Committee should be satisfied that the explanation provides reasonable justification as to why the test of necessity was met. "Necessity" is the key word. In this case, although the explanation might be thought to be acceptable in relation to the parts of the regulations that concern the enforcement of EC regulation 597/2008, we questioned why the FSA also used the regulations to permit the early commencement of unrelated provisions. We knew why one bit was to breach the 21-day rule, but not why the other bits would.

The FSA's response suggests that it applied the test whether it was "appropriate and expedient" to breach the rule, rather than whether it was necessary. No explanation was provided for why it was not appropriate or expedient to produce a corrective instrument to deal with matters before the end of June, especially when they had been recognised in April as errors that affected the principal regulations.

Our legal brief says that the 21-day rule is enshrined in the Scotland Act 1998, whereas it is merely a convention at Westminster, so it is a solid aspect of how the Scottish Parliament works. I open this important point to debate.

**Jackie Baillie (Dumbarton) (Lab):** The test of necessity is statutory and, as the convener said, officials knew about the errors in April and had the opportunity to rectify them by June. If the justification is not necessity but appropriateness

and expediency, I have serious issues with the validity of the regulations.

In addition, an explanation to the Presiding Officer is needed, but that has not happened. It is also suggested that the regulations contain an error in the description of some additive substances, so an error exists, notwithstanding the approach that has been taken.

The position is extraordinary. The Parliament is not new and everybody knows the rules, so I wonder whether we should report the situation to the lead committee and Parliament. I want the committee to correspond with the Minister for Parliamentary Business, because rules have not been followed. We need to get to the bottom of that and ensure that the matter is dealt with properly.

**Ian McKee:** Would it have been possible to have different commencement dates for different provisions in the regulations?

**Judith Morrison (Legal Adviser):** Yes.

**The Convener:** Yes. That could have been done.

For the sake of formality, we will go through the decisions that we must make one by one. Are we content to draw the regulations to the attention of the lead committee and Parliament on the grounds that the absence of any explanation as to why it was necessary to bring into force within 21 days the provisions that did not concern the enforcement of EC regulation 597/2008 gives rise to a doubt as to whether those parts of the regulations are within vires and that the failure to provide a full explanation to the Presiding Officer at the time that the instrument was laid, as required by article 10(3) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SI 1999/1096), is a failure to follow normal legislative practice? Given the importance of the proper observance of the application of articles 10(2) and (3) of the 1999 order, are we content to take the matter up in correspondence with the Minister for Parliamentary Business, as Jackie Baillie suggested, to seek a further explanation and to seek his assurance that such breaches will not be repeated? If so, are we content to delegate clearance for that letter to me?

**Members indicated agreement.**

**The Convener:** Thank you. I hope that just a series of oversights has occurred. However, the position cuts against the thrust of the 1998 act and of how the Parliament has operated. What matters is proper parliamentary scrutiny, whether an instrument is subject to the affirmative or negative procedure.

The second issue relates to an error in the regulations that the FSA has said is a typographical error that does not in its view have a “significant effect”. It has said that it will correct the error through further amendment by early 2009. However, our legal team considers that because the correct substance is not specified in the principal regulations as amended, doubt remains as to whether an appropriate transitional arrangement has been put into effect in domestic law for that substance. To that extent, domestic law appears to be restrictive when that is not permitted.

Are we content to draw the regulations to the attention of the lead committee and Parliament on the ground that the failure to provide for an effective transitional defence in respect of the substance with reference number 74560, as required by Community law, raises a devolution issue that should be rectified at an early opportunity?

**Members** *indicated agreement.*

#### **Control of Salmonella in Poultry (Scotland) Order 2008 (SSI 2008/266)**

**The Convener:** Are we content to draw the order to the attention of the lead committee and Parliament on the grounds that are set out in the summary of recommendations?

**Members** *indicated agreement.*

## **Draft Instruments Subject to Approval**

### **Scottish Commission for Human Rights (Specification) Order 2008 (Draft)**

### **Freedom of Information (Relaxation of Statutory Prohibitions on Disclosure of Information) (Scotland) Order 2008 (Draft)**

14:30

*The committee agreed that no points arose on the instruments.*



## **Instruments Subject to Annulment**

### **National Health Service (Charges to Overseas Visitors) (Scotland) Amendment Regulations 2008 (SSI 2008/290)**

14:30

**The Convener:** Are members content to ask the Scottish Government the question that is set out in the summary of recommendations? To set the question in context, the power appears to permit the Scottish ministers to set the charge on any basis that is considered to be the appropriate commercial basis. May we ask the question, which is probably important?

*Members indicated agreement.*

### **Public Contracts and Utilities Contracts (Common Procurement Vocabulary Codes) Amendment (Scotland) Regulations 2008 (SSI 2008/291)**

**The Convener:** Are we content to ask the Scottish Government the two questions that are set out in the summary of recommendations?

*Members indicated agreement.*

### **Divorce etc (Pensions) (Scotland) Amendment Regulations 2008 (SSI 2008/293)**

### **National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment (No 2) Regulations 2008 (SSI 2008/288)**

### **National Health Service (Optical Charges and Payments) (Scotland) Amendment (No 2) Regulations 2008 (SSI 2008/289)**

*The committee agreed that no points arose on the instruments.*

**The Convener:** I ask members to note that the National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No 2) Regulations 2003 (SSI 2003/460), which SSI 2008/288 amends for the 13<sup>th</sup> time, are a candidate for consolidation—here we go again. I ask members to note also that the National Health Service (Optical Charges and Payments) (Scotland) Regulations 1998 (SI 1998/642), which SSI 2008/289 amends for the 17<sup>th</sup> time, are a candidate for consolidation. We wonder whether we will see consolidation before we finish our time on the committee, but there we are.

## **Instrument Not Laid Before the Parliament**

### **Licensing (Scotland) Act 2005 (Commencement No 5) Order 2008 (SSI 2008/292)**

14:32

**The Convener:** Are we content to ask the Scottish Government the two questions that are set out in the summary of recommendations?

*Members indicated agreement.*

**The Convener:** I invite members to note from the annex to the summary of recommendations that minor points arise on the draft Freedom of Information (Relaxation of Statutory Prohibitions on Disclosure of Information) (Scotland) Order 2008 and SSI 2008/291, which will be raised with the Scottish Government informally, as happens every week.

I thank everyone for contributing to the meeting and I thank Christopher Harvie for attending. We hope to see him again. We would also like to see Gil Paterson back, but we are always pleased to see Christopher Harvie in his absence.

The committee's next meeting will be held on Tuesday 16 September at 2.15. I remind members that our away day will follow that meeting. It will be held in the Apex City hotel in the Grassmarket from 3 pm until 5ish—I am not sure what the definition of "ish" is among our officials. Taxis will be arranged by the clerks and papers for the away day will be issued to members on Thursday. We look forward to next week's work and to a constructive away day.

*Meeting closed at 14:34.*



Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

**Wednesday 17 September 2008**

#### PRICES AND SUBSCRIPTION RATES

##### OFFICIAL REPORT daily editions

*Single copies: £5.00*

*Meetings of the Parliament annual subscriptions: £350.00*

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

##### WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

*Single copies: £3.75*

*Annual subscriptions: £150.00*

Standing orders will be accepted at Document Supply.

Published in Edinburgh by RR Donnelley and available from:

#### **Blackwell's Bookshop**

**53 South Bridge  
Edinburgh EH1 1YS  
0131 622 8222**

**Blackwell's Bookshops:**  
243-244 High Holborn  
London WC1 7DZ  
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

**Blackwell's Scottish Parliament Documentation**  
Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

**Telephone orders and inquiries**  
**0131 622 8283 or**  
**0131 622 8258**

**Fax orders**  
**0131 557 8149**

**E-mail orders**  
**business.edinburgh@blackwell.co.uk**

**Subscriptions & Standing Orders**  
**business.edinburgh@blackwell.co.uk**

#### **Scottish Parliament**

**RNID Typetalk calls welcome on**  
**18001 0131 348 5000**  
**Textphone 0845 270 0152**

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

**Accredited Agents**  
(see Yellow Pages)

and through good booksellers