



The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

19th Meeting, 2012 (Session 4)

Tuesday 4 September 2012

The Committee will meet at 10.30 am in Committee Room 5.

1. **Declaration of interests:** Hanzala Malik will be invited to declare any relevant interests.
2. **Instruments subject to affirmative procedure:** The Committee will consider the following—

[Property Factors \(Scotland\) Act 2011 \(Modification\) Order 2012 \[draft\];](#)
[Population \(Statistics\) Act 1938 Modifications \(Scotland\) Order 2012 \[draft\];](#)
[Criminal Justice and Licensing \(Scotland\) Act 2010 \(Incidental Provisions\) Order 2012 \[draft\].](#)

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

[Bluetongue \(Scotland\) Order 2012 \(SSI 2012/199\);](#)
[Energy Performance of Buildings \(Scotland\) Amendment \(No. 2\) Regulations 2012 \(SSI 2012/208\);](#)
[Conservation \(Natural Habitats, &c.\) Amendment \(Scotland\) Regulations 2012 \(SSI 2012/228\);](#)
[Building \(Scotland\) Amendment Regulations 2012 \(SSI 2012/209\);](#)
[Green Deal \(Acknowledgment\) \(Scotland\) Regulations 2012 \(SSI 2012/214\);](#)
[Charities Restricted Funds Reorganisation \(Scotland\) Regulations 2012 \(SSI 2012/219\);](#)
[Charities Reorganisation \(Scotland\) Amendment Regulations 2012 \(SSI 2012/220\).](#)

4. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

[Annual Close Time \(Permitted Periods of Fishing\) \(River Dee \(Aberdeenshire\) Salmon Fishery District\) Order 2012 \(SSI 2012/210\);](#)
[Public Services Reform \(Scotland\) Act 2010 \(Commencement No. 6\) Order 2012 \(SSI 2012/218\);](#)
[Act of Sederunt \(Sheriff Court Rules\) \(Miscellaneous Amendments\) \(No. 2\) 2012 \(SSI 2012/221\).](#)

5. **Freedom of Information (Amendment) (Scotland) Bill:** The Committee will consider its approach to the delegated powers provisions in this Bill at Stage 1.

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The papers for this meeting are as follows—

Agenda Items 2, 3 and 4

Legal Brief (private)

SL/S4/12/19/1 (P)

Agenda Item 3

Instrument Responses

SL/S4/12/19/2

Agenda Item 5

Briefing Paper (private)

SL/S4/12/19/3 (P)

SUBORDINATE LEGISLATION COMMITTEE**19th Meeting, 2012 (Session 4)****Tuesday 4 September 2012****Instrument Responses****INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE****Bluetongue (Scotland) Order 2012 (SSI 2012/199)****On 24 August 2012, the Scottish Government was asked:**

1. Article 11(1)(c) of the Order provides that persons who suspect that an animal or carcase is infected with bluetongue must ensure, where there are means available for doing so, that any animals on the premises where that animal or carcase is located are confined indoors during any “period of midge activity”. A person who fails to comply with this requirement commits an offence under the Animal Health Act 1981. Can the Scottish Government explain what is meant by the expression “period of midge activity” in this context, and does the Scottish Government consider the term to be sufficiently clear for the purposes of enabling persons affected by the requirement in Article 11(1)(c) to comply with it fully?

2. Article 19(4) of the Order states that for the purposes of Articles 19 and 20, “restricted zone” means a zone anywhere in the European Union consisting either or both of protection and surveillance zones. However, Article 2 of the Order defines both “protection” and “surveillance” zones as zones declared by the Scottish Ministers under Articles 16 and 24. The Scottish Ministers may only declare a protection or a surveillance zone under Articles 16 or 24 if that zone is in Scotland. The Scottish Government is therefore asked whether the definition of “restricted zone” in Article 19(4), if it is intended to capture such zones anywhere within the European Union, is to be construed without reference to the definitions of “protection” and “surveillance” zones in Article 2 of the Order, and if it is to be so construed, to explain whether it considers the definition of “restricted zone” for the purpose of Article 19(4) to be sufficiently clear.

The Scottish Government responded as follows:

1. The expression “period of midge activity” originates in article 9(1)(c) of the Bluetongue (Scotland) Order 2008 (SSI 2008/11), which article 11(1)(c) of the Order restates without modification. In the absence of any further definition, the Scottish Government considers that the expression is to be given its ordinary meaning. The Scottish Government considers that the ordinary meaning of a “period of midge activity” is a period in which midges are active, that is flying around and biting. Midge activity depends on a number of factors, including temperature, wind strength, season and time of day but it is nevertheless an observable activity. The Scottish Government considers that livestock keepers and owners will be able to determine without significant difficulty that midges are active on their holding. Consequently, it

is considered that “period of midge activity” is sufficiently clear for the purposes of enabling any owner or keeper of animals to comply with the requirement to secure the confinement of animals indoors with article 11(1)(c) imposes.

2. The definition of “restricted zone” in article 19(4) of the order is indeed intended to capture any zone in the European Union consisting either or both of protection and surveillance zones. The reference to “a zone anywhere in the European Union” in the definition of “restricted zone” in article 19(4) of the Order would make no sense if the subsequent references to protection and surveillance zones were confined to zones so declared under the Order (i.e. zones in Scotland). It is accepted that it would have been possible to address this point expressly by qualifying the application of the definitions of “protection zone” and “surveillance zone” in article 2 of the Order in much the same way as the definition of “restricted zone” is qualified. It is nevertheless thought that a court would have little hesitation in interpreting article 19(4) in accordance with its intended meaning given the result which the alternative would produce.

Energy Performance of Buildings (Scotland) Amendment (No.2) Regulations 2012 (SSI 2012/208)

On 17 August 2012, the Scottish Government was asked:

Regulation 9 amends regulation 7 of the 2008 Regulations, to insert “or building units” after “buildings” “in both places where it appears”. However “buildings” occurs twice in regulation 7(a), and once in 7(b).

(a) to clarify whether it intends to make the insertion in both places in regulation 7(a), or in all 3 places in regulation 7?

(b) whether it proposes to amend the regulations to reflect the policy intention?

The Scottish Government responded as follows:

We are grateful to the Committee for drawing this matter to our attention. The intention is to insert “or building units” after “buildings” in all places where it appears in regulation 7 of the Energy Performance of Buildings (Scotland) Regulations 2008.

Regulation 7 currently requires the Scottish Ministers to approve a methodology of the calculation of the energy performance of buildings and the ways in which that energy performance is expressed. This has been done as required by regulation 7 and the existing approved methodology (and manner of expression) already extends and applies to buildings and buildings units in line with the terms of regulation 7 as amended by regulation 9. The Scottish Government will, however, when the next opportunity arises further amend the 2008 Regulations to clarify regulation 7.

Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2012 (SSI/2012/228)

On 22 August 2012, the Scottish Government was asked:

1. Regulation 3(c) amends the definition of “local authority” in relation to Scotland, in regulation 2 of the principal 1994 Regulations. However for the purposes of the definition of “competent authority” (that term being referred to in regulation 4 in various places), regulation 6(3) of the 1994 Regulations provides that in relation to Scotland, this remains a regional, islands or district council.

Should this definition also have been updated for Scotland, to reflect the correct new definition in regulation 3(c)? If so, could you comment on the effect of the former definition being retained, and whether and when the Scottish Government would propose to remedy this by means of an amendment?

2. The new regulation 3A(4) of the principal Regulations, inserted by regulation 4, applies the requirements stated in 3A(1) and (2) in particular to (among other provisions) sections 23 and 25 of the Hill Farming Act 1946. Section 25 specifies an offence if any person makes muirburn or causes or procures muirburn on any land, other than (among other requirements) in accordance with a licence granted under section 23C of the 1946 Act.

(a) Could you clarify why it is appropriate for the new regulation 3A(4) to particularly include functions stated in section 25, when that section does not refer to any functions of the Scottish Ministers or other authorities, and it is sections 23A to 23C which provide for functions of the Scottish Ministers in relation to varying permitted times for muirburn, extension of the muirburn season, and granting licences for muirburn?

(b) If a reference to any of sections 23A to 23C ought to have been included, whether and when the Scottish Government would propose to remedy this by means of an amendment?

3. The principal Regulations are now extremely complex to read as regards the differences in application across Great Britain. They have been amended a significant number of times in relation to Scotland since 2007.

The explanatory memorandum to the Conservation of Habitats and Species Regulations 2010 (S.I. 2010/490) states (at para 7.3-7.7) –
 “... Scottish Ministers have amended the 1994 Regulations on a number of occasions, so that the Regulations as they apply to Scotland are different in a significant number of places compared to the Regulations as they apply to England and Wales. The consolidated Habitats Regulations [S.I. 2010/490] do however extend to Scotland in respect of certain reserved matters. The relevant authorities in Scotland are aware of the extent of the Habitats Regulations, and are considering whether to undertake a consolidation of their own.”

Could the Scottish Government provide an update as to those plans to undertake this consolidation?

4. In relation to the breach of section 28(2) of the Interpretation and Legislative Reform (S) Act 2010 (“ILRA”), it is appreciated that for policy reasons the dates of laying and coming into force of this instrument might have required to be co-ordinated with those for S.I. 2012/1927. The letter from the Environment and Forestry Directorate, Scottish Government to the Presiding Officer offers explanation that both instruments have been co-ordinated, to relate to ongoing proceedings brought against the UK by the European Commission under Article 258 of the Treaty of the EU for alleged deficiencies in the domestic transition of the requirements of the “Wild Birds Directive” (EC Directive 2009/147/EC).

However, the letter does not offer an explanation how those ongoing proceedings, and the decision to co-ordinate the timing of implementation across G.B., have meant that a timetable could not be prepared which would respect the Parliament’s expectation that section 28(2) of ILRA would be complied with. Could this be explained to assist the Committee?

The Scottish Government responded as follows:

1. Regulation 3(2) of the amending Regulations omits regulation 6(3)(c) of the Conservation (Natural Habitats, &c.) Regulations 1994/2716 (“the Habitats Regulations”), which refers to the long abolished regional, islands and districts councils. Accordingly, the definition of “local authority” inserted into regulation 2 of the Habitats Regulations by regulation 3(1)(c) of the amending Regulations will apply to that term where it appears in regulation 6.

2 (a) The Scottish Government agrees that this is an error, and is grateful to the Committee for identifying this issue. The correct reference should have been to the sections 23A to 24 of the 1946 Act which provide for the delegated powers of Scottish Ministers and a power of direction by them.

2 (b) Regulation 3A is intended to improve the transposition of the Wild Birds Directive, and is part of a range of measures to similar effect.

The Committee will note that this instrument also inserts a new regulation 3 of the Habitats Regulations which requires Ministers to exercise all of their functions under the 1946 Act so as to ensure compliance with the Directives (which is as a result of this instrument a defined term that covers the Wild Birds Directive). It is considered the functions specified in regulation 3A are also covered by that general duty for the purposes set out in that regulation. Further, the Scottish Ministers as an emanation of the Member state are required to implement the Directives whether transposed or not.

The Scottish Government therefore considers that the Wild Birds Directive has been adequately transposed by the measures in this instrument, notwithstanding the error. It also considers that it has no effect on scope of the duties with which Ministers must comply. It does however still intend to correct this error at the first available opportunity, in order to improve the clarity of the legislation.

3. The Scottish Government recognises the good arguments in favour of consolidating the Habitats Regulations, and will do so as soon as is practicable having regard to the resources that are required. It is not however able to offer a definite date by which that exercise will be completed.

4. The Scottish Government recognises the importance of complying with section 28(2) ILRA, and in particular the legitimate interests of the Committee in such matters.

It hopes that the Committee will recognise that Government also needs to respect the interests of the other administrations and of the Commission in the confidence of communications in this on-going dispute.

The response seeks to give due regard to the interests of all parties, and in particular the Committee. The Scottish Government is therefore happy to explain that the key objective in amending the Habitats Regulations over the recess has been to ensure that all the UK administrations can argue from a common platform in the period leading up to the next Infraction Chefs meeting in September 2012, with a view to negotiating the outcome that is the most beneficial to Scotland.

The Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2012 (SSI 2012/228)**Breach of laying requirements: letter to Presiding Officer**

The above instrument was made by the Scottish Ministers on 26 July under section 2(2) of the European Communities Act 1972. It has been laid before the Scottish Parliament under the negative procedure on 31 July and will come into force on 16 August.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 has not been complied with. In accordance with section 31(3) of that Act, this letter explains why.

The instrument relates to on-going proceedings brought against the United Kingdom by the European Commission under Article 258 of the Treaty of the EU for alleged deficiencies in domestic transposition of the requirements of EC Directive 2009/147/EC on the conservation of wild birds. The Commission issued a press release in July 2006 on the case which is available via the following web link:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/907&format=HTML&aged=0&language=EN&guiLanguage=en>

The Scottish Ministers have agreed with their UK counterparts that new measures should be brought forward to address some reasonable concerns of the Commission. These are being introduced in a co-ordinated manner by the several UK administrations.

However, differences in Parliamentary procedures mean that, in this case, compliance with Section 28(2) could have resulted in Scotland becoming out of step with the other administrations. This would result in an unnecessary disadvantage, for example by limiting our capability to react to the outcomes of any further contact between the UK Government (at member state level) and the European Commission. Ministers therefore wish to ensure that there is no significant divergence in timing between Scotland and the UK Government (in particular) on the introduction of these measures.

It is therefore considered that in this case there is sufficient justification to breach the 28 day rule.