Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Chic Brodie
Nigel Don (Convener)
James Dornan (Deputy Convener)
Mike MacKenzie
Hanzala Malik
John Pentland
John Scott

Committee Clerking Team:

Clerk to the Committee
Irene Fleming

Support Manager
Daren Pratt
Subordinate Legislation Committee

41st Report, 2012 (Session 4)

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 4 September 2012, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Bluetongue (Scotland) Order 2012 (SSI 2012/199);

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

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

2. The Committee’s recommendations in relation to those instruments are set out below.

3. The instruments that the Committee determined that it did not need to draw the Parliament’s attention to are set out at the end of this report.
POINTS RAISED: INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Bluetongue (Scotland) Order 2012 (SSI 2012/199) (Rural Affairs, Climate Change and Environment Committee)

4. The purpose of this Order is to consolidate and re-state with modifications the Bluetongue (Scotland) Order 2008.

5. The Order is subject to negative procedure and comes into force on 24 September 2012.

6. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in Appendix 1.

7. Article 11(1)(c) of the Order requires the owner or keeper of an animal or carcase suspected to be infected with bluetongue to ensure that any animals located on the premises are confined indoors during “any period of midge activity”. The Committee asked for an explanation of the meaning of “period of midge activity” and whether it was sufficiently clear for the purposes of enabling persons to whom article 11(1)(c) applies to comply with its requirements.

8. The Scottish Government considers that the expression is sufficiently clear and is to be given its ordinary meaning. Periods of midge activity are periods when midges are flying around and biting.

9. The Committee recognises that flexibility may be required so as to give proper effect to the requirements of the European Directive. Nevertheless the Committee considers that, since a failure to comply with the requirements of this Order exposes persons to criminal liability, greater clarity as to how periods of midge activity are to be identified would be preferable.

10. The Committee also asked for an explanation of the drafting of article 19(4) of the Order. It seemed that this article was intended to impose a movement restriction on animals previously located on holdings affected by bluetongue within protections or surveillance zones declared anywhere in the European Union. However, the drafting expressions used for protection and surveillance zones in this article specifically referred only to zones in Scotland declared by the Scottish Ministers.

11. The Scottish Government accepts that it would have been possible to qualify these definitions for the purposes of this article in order to make it clear that they included any similar zone declared by another competent authority within the European Union. However the Government considers that, if required to consider the matter, “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.”

12. The Committee considers that clarity of drafting is particularly important when considering the application of rules to cross-border issues and that it is poor drafting practice to rely on the courts to correct lack of clarity through
interpretation. Legislation should be sufficiently clear in its own right that the end users – particularly those that are immediately affected by it – are able to understand it and to act in accordance with any requirements that it lays down from the outset rather than trying to guess how a court would interpret the provision.

13. The Committee therefore draws the Order to the attention of the Parliament under the general reporting ground. There is a drafting error in the instrument, in that it does not make clear the Scottish Government’s intention that the definitions of the terms “protection zone” and “surveillance zone” in article 2 of the Order are not to apply for the purposes of interpreting the term “restricted zone” in article 19(4) of the Order. As a result it is not clear that the requirement to notify the movement of animals under article 19 applies to animals previously located in zones declared to be affected by bluetongue which are outside Scotland.

14. In doing so, the Committee considers it unfortunate that the Scottish Government has not considered it necessary to correct this error, either now or at the next available opportunity. The Committee therefore calls on the Government to revisit this issue.

15. The Committee also draws the Order to the attention of the Parliament under reporting ground (h). It considers that the meaning of the expression “period of midge activity” in article 11(1)(c) of the Order could be more clearly expressed so that affected persons know how to comply with the requirements which it imposes.

17. The Regulations are subject to negative parliamentary procedure. Some provisions in the Regulations come into force on 1 October 2012, and others on 9 January 2013 (regulation 1).

18. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in Appendix 2.

19. Regulation 9 of the Regulations 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).

20. The response from the Scottish Government to the Committee has acknowledged that regulation 9 should patently have inserted “or building units” in three places, rather than two, and that an amendment will be made “when the next opportunity arises”.

21. The Committee draws the Regulations to the attention of the Parliament on the general reporting ground. There is a drafting error in regulation 9(a), which the Scottish Government has undertaken to amend when the next opportunity arises. Regulation 9(a) inserts “or building units” in regulation 7 of the principal 2008 Regulations after “buildings” “in both places where it appears”, when it is plainly intended to insert those words in three places.
Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2012 (SSI 2012/228) (Rural Affairs, Climate Change and Environment Committee)

22. The overall purpose of these Regulations is to further transpose the requirements of Directive 2009/147/EC on the conservation of wild birds ("the Birds Directive"), in relation to Scotland, and the functions and duties of public authorities in relation to that Directive, so far as devolved. This objective relates specifically to Articles 3(2), 4(4) (second sentence) and 10 of that Directive (as is further explained in the Policy Note for the Regulations). The instrument will further amend the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended) ("the 1994 Regulations").

23. The Regulations are subject to negative procedure, and came into force on 16 August 2012.

24. In considering the instrument, the Committee asked the Scottish Government various questions. The correspondence is reproduced in Appendix 3.

Drafting error in regulation 4

25. The Committee queried whether there is a drafting error in the new regulation 3A(4) of the 1994 Regulations (in the third line), which is inserted by regulation 4 of these Regulations. The new regulation 3A(4) applies the requirements which are placed on the Scottish Ministers and other specified public authorities as set out in new regulation 3A(1) and (2) in particular to (among other provisions) sections 23 and 25 of the Hill Farming Act 1946 ("the 1946 Act").

26. Section 23 provides for the ability of persons to make muirburn on land only during the muirburn season. (Muirburn is the burning of heather and grass). 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.

27. Clarification was sought why it is appropriate for the new regulation 3A(4) to particularly include functions stated in section 25, when it is sections 23A to 24 of the 1946 Act which provide for the functions of the Scottish Ministers in relation to varying permitted times for muirburn, any extension of the muirburn season, and granting licences for muirburn. Section 24 also concerns functions of Ministers in connection with disputes as to tenants making muirburn.

28. The Scottish Government has agreed that this is a drafting error. The correct reference in the new regulation 3A(4) should have been to sections 23A to 24 of the 1946 Act (rather than sections 23 and 25). This is a patent error, so far as it is sections 23A to 24 which specify the relevant functions of the Scottish Ministers in relation to muirburn, and not sections 23 and 25.

29. The Scottish Government has indicated that it intends to correct the error at the first available opportunity (which the Committee takes to mean when other amendments to the 1994 Regulations are required in future).
Plans for a consolidating instrument

30. The 1994 Regulations are now extremely complex to read as regards the differences in application across Great Britain. They have been amended in relation to Scotland by some 16 instruments, including these Regulations, since 2007. The explanatory memorandum to the Conservation of Habitats and Species Regulations 2010 (SI 2010/490) states (at paragraph 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 [SI 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.”

31. The Committee therefore asked for an update on those plans to undertake a consolidation. The Scottish Government’s response acknowledges that there are good arguments in favour of consolidating the 1994 Regulations (in relation to devolved matters in Scotland) and will do so as soon as is practicable, having regard to the resources that are required.

Breach of the “28 day rule” between laying the instrument and its coming into force

32. Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out the rule that a negative Scottish statutory instrument must be laid before the Parliament as soon as practicable after it is made, and in any event at least 28 days before the instrument comes into force. (Recess periods of more than 4 days do not count in calculating the 28 days). The purposes of the rule are, generally (1) to allow adequate opportunity for public notice of the change in the law before it takes effect, and (2) to allow time for parliamentary scrutiny (and the option of annulment) prior to the Regulations coming into force.

33. A failure to comply with section 28(2) does not render the instrument invalid, but the Scottish Government must explain to the Presiding Officer why the laying requirements have not been complied with.

34. These Regulations were laid on 31 July 2012, and came into force on 16 August 2012 (within the Parliamentary summer recess). They do not therefore comply with section 28(2). The Committee will automatically draw the instrument to the Parliament’s attention on this basis so that the Parliament is aware of the non-compliance and the circumstances in which this occurred. The failure to comply with the rule here has meant that the Regulations were signed, laid and brought into force during the summer recess. This has meant that no days have been allowed for parliamentary scrutiny (and the option of annulment), before the Regulations have been brought into force.

35. The Regulations have been laid in co-ordination with similar provisions in the Conservation of Habitats and Species (Amendment) Regulations 2012 (SI
2012/1927). Those Regulations extend to England and Wales, and Northern Ireland in some respects. They also extend to Scotland, in relation to the imposition of functions and duties which remain reserved to Westminster. Those Regulations were laid both at Westminster and the National Assembly for Wales, on 25 July 2012 and also came into force on 16 August 2012.

36. In its letter of 31 July 2012 to the Presiding Officer, the Scottish Government explains that the Regulations relate to ongoing proceedings brought against the United Kingdom by the European Commission, for alleged deficiencies in domestic transposition of the requirements of EC Directive 2009/147/EC on the conservation of wild birds—

“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.”

37. The letter to the Presiding Officer also refers for explanation of the European Commission proceedings to a Commission press release issued in July 2006. This makes clear that infraction proceedings were initiated in 2006, and appear to have been ongoing since that year.

38. The letter to the Presiding Officer has therefore explained to the Parliament that, for policy reasons, the dates of laying and coming into force of this instrument required to be co-ordinated with those for SI 2012/1927. However, the letter does not explain how those ongoing proceedings, and the decision to co-ordinate the timing of implementation across the UK, have meant that a timetable could not be prepared which would respect the Parliament’s expectation that the “28 day rule” in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 would be complied with. The Committee therefore sought further explanation.

39. In its response to the Committee, the Scottish Government recognises the importance of complying with “the 28 day rule”, and in particular the legitimate interests of the Committee in such matters—

“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 [European Commission] Infraction Chefs meeting in September 2012, with a view to negotiating the outcome that is the most beneficial to Scotland.”
40. The Committee accepts that as a matter of policy it became imperative to have the amendments made by this instrument brought into force on 16 August 2012.

41. The Committee considers that nevertheless the Scottish Government has not explained why in contributing to a UK-wide response to European Commission proceedings begun as long ago as 2006, it was appropriate to adopt a legislative timetable which breached section 28(2).

42. The Committee therefore draws the instrument to the attention of the Parliament on reporting ground (j) as there has been a failure to lay the instrument at least 28 days before it comes into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”).

43. The Committee recognises that for policy reasons it may have been imperative to have the amendments made by this instrument and the Conservation of Habitats and Species (Amendment) Regulations 2012 brought into force by a certain date as part of a co-ordinated response to infraction proceedings against the UK. The Committee recognises that, not having completed the preparation of the regulations prior to the summer recess, a failure to comply with section 28(2) of ILRA became inevitable.

44. In its consideration of the failure to comply with section 28(2) of ILRA, the Committee is not concerned with the contents of the negotiations with the Commission which concern issues of policy and which the Committee understands are sensitive.

45. Rather, the Committee wishes to be reassured that the timetable for responding to infraction proceedings which have been on-going since 2006 was planned so as to respect the Parliamentary procedures for laying and bringing into force all the instruments necessary across the UK. The Committee expects all administrations across the UK to endeavour to respect the different legislative processes which apply where at all possible.

46. The Scottish Government’s response has not supplied that reassurance to the Committee. It is not clear whether the need to legislate over the summer recess was unavoidable as a result of factors beyond the control of the responsible authorities within the United Kingdom or as a result of a failure to take proper account of the respective legislative procedures.

47. The Committee also draws the instrument to the attention of the Parliament on the general reporting ground. There is a drafting error in regulation 4 (inserting regulation 3A(4) of the Conservation (Natural Habitats, &c.) Regulations 1994). That regulation should specifically apply the duty in section 3A(1) to sections 23A, 23B, 23C and 24 of the Hill Farming Act 1946 but does not do so. Instead it applies the general duty specifically to sections 23 and 25 of that Act which was not what was intended.

48. The Committee welcomes that the Scottish Government has undertaken to lay an amendment to correct this error in due course.
49. The Committee also welcomes that the Scottish Government has indicated that there are good arguments in favour of consolidating the Conservation (Natural Habitats, &c.) Regulations 1994 in relation to Scotland, and will do so as soon as is practicable.
NO POINTS RAISED

50. At its meeting on 4 September 2012, the Committee also considered the following instruments and determined that it did not need to draw the attention of the Parliament to any instrument on any grounds within its remit:

**Education and Culture Committee**

Population (Statistics) Act 1938 Modifications (Scotland) Order 2012 [draft]

**Infrastructure and Capital Investment Committee**

Property Factors (Scotland) Act 2011 (Modification) Order 2012 [draft]

Green Deal (Acknowledgment) (Scotland) Regulations 2012 (SSI 2012/214)

**Justice Committee**

Criminal Justice and Licensing (Scotland) Act 2010 (Incidental Provisions) Order 2012 [draft]

Public Services Reform (Scotland) Act 2010 (Commencement No. 6) Order 2012 (SSI 2012/218)

Charities Restricted Funds Reorganisation (Scotland) Regulations 2012 (SSI 2012/219)

Charities Reorganisation (Scotland) Amendment Regulations 2012 (SSI 2012/220)

Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No. 2) 2012 (SSI 2012/221)

**Local Government and Regeneration Committee**

Building (Scotland) Amendment Regulations 2012 (SSI 2012/209)

**Rural Affairs, Climate Change and Environment Committee**

Annual Close Time (Permitted Periods of Fishing) (River Dee (Aberdeenshire) Salmon Fishery District) Order 2012 (SSI 2012/210)
APPENDIX 1

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.
APPENDIX 2

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.
APPENDIX 3

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:


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