



**SUBORDINATE LEGISLATION COMMITTEE**

**AGENDA**

**5<sup>th</sup> Meeting, 2007 (Session 2)**

**Tuesday 6 February 2007**

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

1. **Delegated powers scrutiny:** The Committee will consider the delegated powers provisions in the following bill—

Budget (Scotland) (No.4) Bill.

2. **Delegated powers scrutiny:** The Committee will consider the delegated powers provisions in the following bill—

Adult Support and Protection (Scotland) Bill as amended at Stage 2.

3. **Delegated powers scrutiny:** The Committee will consider a response from the Executive to points raised on the following bill—

Transport and Works (Scotland) Bill as amended at Stage 2.

4. **Executive responses:** The Committee will consider Executive responses in relation to the following—

Licensing (Scotland) Act 2005: Draft Guidance for Licensing Boards and Local Authorities, **(SE/2007/9)**

the Prohibition of Fishing with Multiple Trawls (No. 2) (Scotland) Amendment Order 2007, **(SSI 2007/13)**

the Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2007, **(SSI 2007/14)**

the Tweed Regulation Order 2007, **(SSI 2007/19)**.

5. **Draft instruments subject to approval:** The Committee will consider the following—

the Mental Health (Safety and Security) (Scotland) Amendment Regulations 2007, **(SSI 2007/draft)**

the Transfer of Functions, Property, Rights and Liabilities from the Strathclyde Passenger Transport Executive to the Strathclyde Passenger Transport Authority Order 2007, **(SSI 2007/draft)**.

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

the Adults with Incapacity (Ethics Committee) (Scotland) Amendment Regulations 2007, **(SSI 2007/22)**

the Strathclyde Passenger Transport Authority (Constitution, Membership and Transitional and Consequential Provisions) Amendment Order 2007, **(SSI 2007/23)**

the Police Grant (Variation) (Scotland) Order 2007, **(SSI 2007/24)**

the Sulphur Content of Liquid Fuels (Scotland) Regulations 2007, **(SSI 2007/27)**

the Police (Injury Benefit) (Scotland) Revocation Regulations 2007, **(SSI 2007/28)**

the Sex Discrimination (Public Authorities) (Statutory Duties) (Scotland) Order 2007, **(SSI 2007/32)**.

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

the Local Governance (Scotland) Act 2004 (Commencement No. 4) Order 2007, **(SSI 2007/25)**

the Local Electoral Administration and Registration Services (Scotland) Act 2006 (Commencement No. 2 and Transitional Provisions) Order 2007, **(SSI 2007/26)**

the Specified Animal Pathogens Amendment (Scotland) Order 2007, **(SSI 2007/30)**

the Scottish Schools (Parental Involvement) Act 2006 (Commencement No. 2) Order 2007, **(SSI 2007/31)**.

8. **Inquiry into the regulatory framework in Scotland (in private):** The Committee will consider its draft report.

Ruth Cooper  
Clerk to the Committee  
Tel: 0131 348 5212

**The following papers are relevant to this meeting:**

Agenda Items 1 – 7

Legal brief (Private)

SL/S2/07/05/1

Agenda Item 1

Delegated powers memorandum (circulated to Members only)

Agenda Item 2

Supplementary delegated powers memorandum (circulated to Members only)

Agenda Item 3

Executive response

SL/S2/07/05/2

Agenda Item 4

Executive responses

SL/S2/07/05/3

Agenda Items 5 - 7

Copies of instruments (circulated to Members only)

Agenda Item 8

Draft report (Private)

SL/S2/07/05/4

**SUBORDINATE LEGISLATION COMMITTEE**

**5<sup>th</sup> Meeting, 2007 (Session 2)**

**Tuesday 6 February 2007**

**Executive Response**

**Transport and Works (Scotland) Bill as amended at Stage 2**

1. On 31 January the Committee sought an explanation on the following matters:

**“Section 27: Further provision as regards rules, regulations and orders**

- (i) The Committee noted that subsection (3) as amended would allow delegation of legislative as well as other functions. The Committee queried whether it is appropriate to confer powers to make subordinate legislation on persons other than the Scottish Ministers and asks the Executive to comment. The Committee asks the Executive for clarification as to who this might include.
- (ii) The Committee also noted that in response to its objections at stage 1, the specific power to modify the Act following on the Bill (former subsection 27(8)) was removed. However, the Committee remains unsure as to whether the reference to “any enactment” in subsection (6)(b) would nevertheless include the Act. If the intention is that the power should not be used to amend the Act following the Bill, the removal of subsection (8) may not be sufficient. The Executive is asked to comment.”

2. We were conscious that when bringing forward both of these amendments at Stage 2 they were likely to be of interest to the Committee. We had accordingly attempted to anticipate both of those points in the revised Delegated Powers Memorandum provided to the Parliament on 25 January 2007 following Stage 2. We can appreciate the difficulty however in seeking to identify the changes made to what is a fairly technical document. To facilitate that process however the Executive would like to record that it had provided the revised Delegated Powers Memorandum to the Parliament with all of the changes made following Stage 2 identified by sidelines and italics.

3. Turning to the 2 points raised:

**Sub-delegation**

4. Section 27(6) was amended at Stage 2 to provide that the powers to make subordinate legislation under the Bill could be exercised, amongst others, so as to make provision for the delegation of functions.

5. The Executive had sought to explain the reasons for the inclusion of that amendment at paragraphs 48 and 49 of the revised Delegated Powers Memorandum. For ease of reference these are set out below:

“48. Section 27(6)(aa) allows the Scottish Ministers to make provision for delegation of functions when exercising the powers to make subordinate legislation under the Bill. The power under section 27(6)(b) (which concerns supplemental, incidental etc. provisions) will attract affirmative resolution procedure if exercised so as to modify any Act (except where this is done in an order under section 1 and that section 1 order does not seek to amend a Private Act of the Scottish Parliament).

“49. Significant elements of sub-delegation may be involved in exercising powers under the Bill. An instance might arise, for example, under section 18, the access to land provisions. The authorisation of an applicant to access land may be subject to a range of conditions one of which might be that the applicant is required to obtain agreement on a particular matter with the land owner before access can be taken. A practical example might be coming to an agreement with a farmer regarding the timing of access or the implementation of conditions about the need to be accompanied at all times, so as to ensure that the operation of the farm is not compromised. A further example of sub-delegation might apply in respect of an order made under section 1 giving a power to the Scottish Ministers to extend a time limit to do something under the order. It is difficult to predict when such power might be used under section 1 since it is not known what powers might be required to give effect to matters provided for in an order made under section 1.”

6. The Executive would add that the decision to include the provision was informed by the illustrative draft subordinate legislation under the powers in the Bill which was provided to the Parliament to assist its consideration of the Bill. In view of the experience on that, and in view of the presumption against sub-delegation in the absence of express or sufficiently implied power, we considered it appropriate to include the express provision to anticipate a point that might otherwise be put to us when the subordinate powers under the Bill came to be exercised. The Bill is of course essentially providing a framework under which future projects will be authorised. As therefore explained at paragraph 49 of the revised DPM it is difficult to predict all of the provision which might be required to deliver a particular project.

7. The Executive has, however, no intention of using the power conferred by section 27(6)(aa) to empower the making of subordinate legislation (a section 1 order may authorise the making of byelaws but this is already specifically provided for in paragraph 13 of schedule 1). The Executive very much doubts whether a court would read section 27(6)(aa) as sufficient to authorise provision allowing a third party to make subordinate legislation – something very much more express would be required before a court would come to such a conclusion.

### **Powers being exercised to amend the Bill**

8. The Executive sought to set out its position at paragraphs 53 and 54 of the revised DPM. For ease of reference these are set out below:

“53. The Subordinate Legislation Committee will recall that it raised section 27(8) of the Bill as at introduction as it provided that the supplementary powers

under section 27(6) and (7) could be used to modify the Act following on from the Bill.

“54. For the Committee’s information they will note the Bill was amended at Stage 2 to remove the former subsection (8). This means that the delegated powers under the Bill cannot now be used to make a modification to the Act to follow on from the Bill.”

9. Further at Stage 2 when speaking to this amendment the Minister for Transport stated (Col 4409):

10. “Amendment 47 addresses a different issue. The Subordinate Legislation Committee expressed concern that the powers under section 27(6), read with section 27(8), would allow the modification of the act—not just other enactments—following on from the bill. By removing subsection (8), the amendment ensures that any subordinate legislation that is made under the act cannot be used to modify the act. I am grateful to the Subordinate Legislation Committee for pointing out the problem.”

1 February 2007

**SUBORDINATE LEGISLATION COMMITTEE**

**5<sup>th</sup> Meeting, 2007 (Session 2)**

**Tuesday 6 February 2007**

**Executive Responses**

**Licensing (Scotland) Act 2005: Draft Guidance for Licensing Boards and Local Authorities, (SE/2007/9)**

1. On 31 January 2007 the Committee asked the Executive the following:

The Committee noted the following minor errors in this document—

- (a) the reference to section 97(2) of the 2005 Act in paragraph 194 on page 46 should be to section 97(1); and
- (b) the heading to paragraph 261 reads **“Sending children to obtain alcohol or young persons”** and it is thought the drafter intended to say **“Sending a child or young person to obtain alcohol”** which is the heading to section 109 of the 2005 Act.

The Committee was concerned that there were minor errors in this document, despite its withdrawal for correction. In advance of reporting to the lead committee, the Subordinate Legislation Committee seeks assurances that this second version does not contain more substantial errors which may affect the lead committee’s consideration.

**The Scottish Executive responds as follows**

2. Thank you for your letter of 31 January in which you have raised some queries regarding the draft guidance for Licensing Boards which was submitted to Parliament last week.
3. With regard to the two minor errors highlighted in your letter in paragraph 2(a) and (b), you are correct in determining that these are indeed minor errors. We do apologise for this oversight and can assure the Committee that there are no substantial errors in the document.

1 February 2007

## **The Prohibition of Fishing with Multiple Trawls (No. 2) (Scotland) Amendment Order 2007, (SSI 2007/13)**

1. On 31 January 2007 the Committee asked the Executive the following –
  - (a) to confirm that as this Order replaces an Order that was defectively drafted, the Order will be made available free of charge in the normal way to recipients of the defective Order;
  - (b) to explain why the Explanatory Note does not make clear that the Order replaces an Order that was defectively drafted;
  - (c) to explain the purpose of article 3(a) given that SSI 2003/166 was revoked by SSI 2006/602 and why SSI 2007/13 comes into force on the same date as SSI 2006/602 (the order it revokes) and not the day before; and
  - (d) to explain the drafting of new article 3(2). In particular, whether “or” rather than “and” should have been used at the end of paragraph (2)(c)(iii) as current drafting suggests that all the requirements of sub-paragraphs (a) to (d) must be fulfilled if fishing with 2 trawls is to come within the exception in article 3(2).

### **The Scottish Executive responds as follows:**

#### **Question (a)**

2. The Executive confirms that the Order will be made available free of charge in the normal way to recipients of SSI 2006/602.

#### **Question (b)**

3. The Explanatory Note states that the Order revokes SSI 2006/602. The Executive acknowledges that an explanation was not given in this case for the revocation, and will bear this point in mind when drafting the Explanatory Note in future in similar circumstances.

#### **Question (c)**

4. The intention was to revoke SSI 2006/602, and replace the provisions in that instrument. The Executive considers that that was achieved by bringing SSI 2007/13 into force as at the same time as SSI 2006/602. Article 3(a) of SSI 2007/13 provides for the revocation of SSI 2003/166, given the revocation of SSI 2006/602. The Executive acknowledge also the approach mentioned by the Committee, that in such a case the revoking instrument may be brought into force the day before; and will consider this in any further similar case.

#### **Question (d)**

5. The Executive considers that the drafting of new article 3(2) provides for an exception in respect of each of the cases described in sub-paragraphs (a) to (d), so that the requirements of each of these sub-paragraphs do not have to be fulfilled in order to



come within the exception in article 3(2). It is noted that a similar drafting approach was taken in SSI 2006/602; and in SSI 2000/405. The Executive acknowledges that an alternative drafting approach such as that mentioned by the Committee, using “or” rather than “and”, may also be appropriate to achieve the intention; and consideration will be given to that drafting approach for future cases.

1 February 2007

**The Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2007,  
(SSI 2007/14)**

1. In its letter of 31 January 2007 the Subordinate Legislation Committee asked the Executive:

“to confirm what power in the parent Act authorises the retrospective effect of the Regulations provided for in regulation 2(2).”

**The Scottish Executive responds as follows:**

2. The Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2007 (“the Regulations”) provide for an increase in the fees of solicitors for summary cause cases and update the table of fees chargeable by solicitors in sheriff court cases, both defended and undefended, which are laid down in Schedule 6 to the Regulations providing for an increase in the fees for the more detailed and complex cases. The Regulations have retrospective effect only in so far as they apply to specified inclusive fees for work done in summary cause cases or those provided in Chapters I and II of Schedule 6 in cases which have commenced before 10<sup>th</sup> February 2007 but have not been completed as at that date.

3. The Legal Aid (Scotland) Act 1986 (‘1986 Act’) does not contain an express enabling power allowing for the making of retrospective provision. Relevant to the question of retrospection, there is a general principle that Parliament is presumed not to have intended to alter the law applicable to past events or transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. There is authority for this principle in *Wilson v First County Trust Ltd (No 2)* 2004 1 AC 816.

4. The Regulations provide for an increase of 21 per cent in the fees for solicitors in respect of summary cause proceedings. The inclusive fees contained in the table of fees in Chapters I and II of Schedule 6 that existed prior to the date of commencement of the Regulations are increased or are left unchanged. As the changes do not deprive persons of any rights which may have vested in them prior to the Regulations coming into effect, no Convention issues, namely Article 1 of Protocol 1, fall to be considered. It is accordingly considered that, in light of this House of Lords decision and viewing retrospection from the “unfairness” angle, the 1986 Act powers allow the approach that has been taken in these Regulations.

5. This is consistent with the approach taken in *McCall v The Scottish Ministers* [2005] CSOH 163. In that case, Lord Carloway held that the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005 (SSI 2005/113) were *ultra vires* as

regards the applicability of new fees to work done prior to the commencement of those Regulations solely on the grounds that this was an unfair interference with the Petitioner's right to peaceful enjoyment of the (higher) fees which she had earned before commencement.

1 February 2007

### **The Tweed Regulation Order 2007, (SSI 2007/19)**

1. On 31 January 2007 the Committee asked the Executive the following—
  - (a) to explain why it has chosen to use a combination of powers in this instrument, not all of which are subject to procedure; and
  - (b) to explain why it has chosen to disregard the requirement in article 36(1) regarding citation of instruments made under that provision.

### **The Scottish Executive responded as follows:**

#### **Question (a)**

2. The purpose of the present Order is, so far as possible, to bring together all the subordinate legislation relating to the district, so as to provide the users of the legislation – and of the rivers in the district – with only two pieces of legislation, that is, the principal Order and the present order, to which they will require to refer. Since, as the Committee have observed, there is a variety of procedures in the principal Order, article 77(3) of that Order made the appropriate provision to enable that to be done.

#### **Question (b)**

3. Article 36(1) provides that an order under that article is to be known as an “annual close time order”. That is how the relevant article – article 3 – of the current order is described. While, as the Committee hint, that provision could have been made in a separate order, for the reasons mentioned above it was thought better to include it with the other subordinate provision relating to the district.

1 February 2007