SUBORDINATE LEGISLATION COMMITTEE

AGENDA

2nd Meeting, 2005 (Session 2)

Tuesday 18th January, 2005

The Committee will meet at 10.00am in Committee Room 5.

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

   Transport (Scotland) Bill at Stage 1.

2. **Executive responses:** The Committee will consider a response from the Scottish Executive to points raised on the following—

   the Sweeteners in Food Amendment (Scotland) Regulations 2004, (SSI 2004/548).

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


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

   the Food Labelling (Added Phytosterols or Phytostanols) (Scotland) Regulations 2005, (SSI 2005/1)

   the National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment Regulations 2005, (SSI 2005/3)


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The following papers are relevant to this meeting:

Agenda Items 1-4

Legal Brief (for members only) – to follow

SL/S2/05/2/1

Agenda Item 1

Executive response

SL/S2/05/2/2

Agenda Item 2

Executive response

SL/S2/05/2/3

Agenda Items 3-4

Copies of instruments (circulated to Members only)
Section 1: Establishment of Regional Transport Partnerships

Section 2: Dissolution of RTPs

1. The Committee asks the Executive for clarification as to how it intends section 1 to work in conjunction with section 2. In particular, the Committee seeks comment from the Executive in relation to the full effect of section 1 subsection (1) when read with section 2. The Committee wishes to establish whether once a regional transport authority (RTP) is dissolved under section 2, by virtue of section 1 subsection (1) Ministers must establish a new RTP.

2. The Committee has concerns that section 2 could enable Ministers either directly, or indirectly as read with section 1, to repeal section 1 and render the other provisions of Part 1 ineffective by dissolving all the RTPs. The Committee seeks comment from the Executive in relation to this point.

Section 5: Formulation and content of regional transport strategies

3. The Committee asks the Executive for comment on whether any of the guidance issued under subsection (3) should be laid before the Parliament or subject to some form of Parliamentary scrutiny, given that Partnerships are to be under a duty to have regard to such guidance when preparing their transport strategies.

Section 6: Procedure before and after the drawing up of transport strategies.

4. The Committee asks the Executive for comment on what it considers is the best way to secure proper publication of transport strategies and to ensure that the appropriate level of scrutiny is applied to the approval of a strategy and whether it should be incorporated in a statutory instrument.

Section 8 – Duty of constituent councils and other public bodies as respects transport strategies

5. The Committee asks the Executive which public bodies might be included in an order under this section.

Section 10 – Other transport functions of RTPs

Section 10(1)

6. The Committee notes that the power conferred by section 10(1) is a Henry VIIIth power of considerable width. The Committee asks the Executive whether it considers that some form of super-affirmative procedure might be more appropriate.
7. The Committee also notes that the transfer of functions is one-way only to an RTP. There would not appear to the Committee to be anything in the bill that would allow for functions once transferred to be transferred back unless RTPs are dissolved under section 2. The Committee asks the Executive if this is the policy intention.

Section 11: Manner of performance of RTPs’ functions

8. The Committee notes that paragraph (b) obliges the RTP to comply with the directions of the Scottish Ministers. As such the Committee considered these Ministerial directions, when general directions, to have a degree of legislative effect and asks the Executive for its view on these requirements being incorporated into a more formal legislative document.

Section 17 – The Scottish Road Works Register

Section 17(1), 112B(1) to (4)

9. The Committee notes that Section 112 of the 1991 Act enabled regulations under that section to provide for the charging of a fee for registration. In the absence of an express provision in this section it would not be possible to provide in the regulations for the charging of such a fee. The Committee seeks clarification from the Executive as to whether this omission was intended.

Section 18 - Directions as to timing of road works

10. The Committee notes that section 115 does not contain any provision equivalent to section 115A(5) relating to appeals. The Committee asks the Executive whether this is a deliberate omission.

Section 19 – Directions as to placing of apparatus in roads

Section 19(1), 115A(5)

11. The Committee notes that while section 115 is amended by section 18 of the bill to bring that section partly into line with new section 115A, it is not amended to include a provision on the lines of subsection (5) of section 115A. The Committee asks the Executive whether this is a deliberate omission.

Section 23 – Enforcement of section 119 of 1991 Act

12. The Committee asks the Executive how it intends that this section will operate in practice and asks for the Executive’s views as to why it considers that penalties should be set out entirely in subordinate legislation.
Section 29- Resurfacing: regulations and guidance

Section 29, 132D(1)

13. The Committee notes that new section 132D(3) allows criminal offences to be created in regulations rather than by the Act itself. The Committee is of the view that no power is conferred on Ministers to alter the level of the fine, only a power to create an offence. The Committee asks the Executive whether this was the intention in respect of this provision.

Section 29, section 132E

14. Given that road works authorities and undertakers must have regard to the code of practice when carrying out their functions and that breaches of regulations made under the relevant new sections may attract criminal sanctions, the Committee considers that the code of practice may have some legislative effect. The Committee believes there is a case for the code of practice to be subject to some form of procedure and asks the Executive for comment.

Section 32- Fixed penalty offences:

15. The Committee notes that the new section appears to be defective in that it does not state that an order under the section will be made in the form of a statutory instrument. Section 163 which makes general provision in relation to instruments under the 1991 Act provides only that regulations under the Act are to be statutory instruments. The only order making power (the commencement power) is not of general application. The Committee asks the Executive whether it intends to make an appropriate amendment.

Section 33 - Civil penalties for certain offences under 1991 Act

16. The Committee notes that this provision allows Ministers in effect to decriminalise offences under Part IV of the 1991 Act by subordinate legislation and has the effect of a Henry VIIIth provision. The Committee considers that this should be subject to affirmative procedure rather than negative procedure and asks the Executive for comment.

Section 35 - Fixed penalty offences under the Roads (Scotland) Act 1984

17. The Committee notes that this section is similar in purpose to section 32. However, unlike that section it does not seem to provide for the amendment of the schedule of offences that may be created, rather it permits the Ministers by regulations to select relevant offences from those listed in new Schedule 8A. The Committee considers that this should be subject to affirmative procedure rather than negative procedure and asks the Executive for comment.

Section 36 –Civil penalties for certain offences under the Roads (Scotland) Act 1984

18. The Committee considers that this provision raises issues similar to those raised under section 33. The Committee considers that this is a very wide power
and therefore asks the Executive for comment as to whether this should be subject to affirmative procedure rather than negative procedure.

Section 37 – National travel concession schemes

19. The Committee asks the Executive for clarification in relation to the interaction of subsections (409e) and (6). The Committee appreciates that the two provisions are not identical; that subsection (6) goes wider than subsection (4)(e) and that “enforcement” in subsection (4)(e) would not necessarily encompass prosecution. Nevertheless there does seem to be some overlap between the provisions and the Committee seeks the Executive’s comments.

The Scottish Executive’s response is as follows:

Section 1: Establishment of Regional Transport Partnerships

Section 2: Dissolution of RTPs

The policy intention is that RTPs will be created to cover the whole of Scotland and that flexibility is retained to ensure that they are effective in their task of delivering improvements to transport provision. Once RTPs are created it may prove necessary to amend the regional structure in the light of experience this would necessitate the existing RTP being dissolved and recreated for the new regions. The duties in section 1 to divide Scotland into regions and to create for each an RTP are continuing duties. The policy intention is that RTPs will be created to cover the whole of Scotland and that flexibility is retained to ensure that they are effective in their task of delivering improvements to transport provision. Once RTPs are created it may prove necessary to amend the regional structure in the light of experience this would necessitate the existing RTP being dissolved and recreated for the new regions. The duties in section 1 to divide Scotland into regions and to create for each an RTP are continuing duties. The mandatory division of Scotland into regions does not admit of any part of Scotland not being, or not being in, a region; and the mandatory creation of an RTP for each region does not admit there being a region without an RTP. The Executive refers the Committee to paragraph 9 of Schedule 1 to S.I. 1999/1379-

“9.- (1) Where an Act of the Scottish Parliament ... imposes a duty it is implied, unless the contrary intention appears, that ... the duty is to be performed ... from time to time as occasion requires.”

It is not intended, nor does the Executive believe it would be competent, to use section 2 to dissolve all transport partnerships with the knock-on effect that Part 1 of the Bill becomes ineffective. The provision conferring that power is limited to the restricted administrative, technical purpose of dissolving a particular body or bodies.

Section 5: Formulation and Content of Regional Transport Strategies

It is not intended to lay the guidance issued under section 5 before the Parliament. Although it is not the intention that the guidance will be subject to parliamentary scrutiny it will be published and a copy lodged with SPICE.

Section 6: Procedure before and after the drawing up of Transport Strategies

The manner of publication of a transport strategy is to be left to the individual transport partnerships other than publication being an obligation that the proposed legislation will place on them. The Executive considers that this is appropriate as it is
the transport partnership itself that will know how best to make the contents of its strategy available to the public and to those persons affected by the strategy. The Executive wishes to ensure that transport partnerships have a sufficient amount of flexibility in the conduct of all aspects of their business including in relation to the preparation and publication of their strategies. There is a requirement for transport partnerships to consult its constituent councils and other persons as it thinks fit and the Executive is satisfied that this will ensure that the strategy reflects its own regional transport priorities. Approval of the strategy will be for the Scottish Ministers who will consider it in light of any guidance issued and in terms of the strategy’s contribution to the achievement of national policies. The requirements for the approval of the strategy are considered to be a matter for the Executive taking account of any guidance issued and any national transport policies.

Section 8: Duty of Constituent Councils and other Public Bodies in respect of Transport Strategies

The type of public body envisaged is any public body which carries out any legislative or other function in relation to transport. A list of public bodies is available on the Executive’s website. Relevant examples could include nationalised industries, national parks, or public bodies whose activities involved transport such as those related to health care, tourism or business development.

Section 10: Other Transport Functions of RTPs

The order making power in section 10(1) is subject to affirmative procedures. The Committee has asked whether some form of super affirmative procedure might be more appropriate. This procedure would involve a preliminary stage whereby a draft instrument would be laid before the Parliament with an opportunity to comment on the proposals. If the instrument is to be proceeded with then the normal affirmative procedure would thereafter be followed together with a statement of whether and how the comments have been reflected in the draft. Section 10(5) already contains a statutory requirement for the Scottish Ministers to consult prior to an order under section 10(1) being made. The request for the order under section 10(1) is expected to come from the transport partnership itself and before making the request the transport partnership is also required to also consult its constituent councils by virtue of section 10(3). Section 10(1) also requires that the order is grounded in the regional transport strategy which will itself have been subject to consultation under section 6(1). There are therefore already 3 consultation processes before an order can be made under section 10. It is considered that the only addition that the super affirmative procedure would make is in relation to the lodging of a statement detailing the extent to which any comments obtained through the consultation process had been reflected in the draft. The Executive believes that the normal affirmative process can achieve the same ends through slightly different and less cumbersome means. Both the nature of any consultation and the outcome of this consultation will be reflected in the Executive Note that will be lodged with the draft affirmative instrument. Given that the request for the order is expected to come from the transport partnership itself the Executive does not believe that any additional safeguard in the form of a statement detailing the consultation responses is necessary or appropriate.
The Executive is grateful to the Committee for its comments in relation to the transfer of functions in section 10 and is considering this point further.

**Section 11: Manner of Performance of RTPs Functions**

The Executive is grateful to the Committee for highlighting this point but does not believe that any directions issued require to be contained in a more formal legislative document.

**Section 17: The Scottish Roadworks Register**

The Executive is grateful to the Committee for highlighting this point and will bring forward the appropriate amendment to make provision for the charging of a fee for registration.

**Section 18: Directions as to timing of roadworks**

The Executive is grateful to the Committee for highlighting this point and will bring forward the appropriate amendment.

**Section 19: Directions as to placing of apparatus in roads**

This raises the same point as in section 18.

**Section 23: Enforcement of section 119 of 1991 Act**

The imposition of a penalty by the Road Works Commissioner under section 119 is intended as a last resort provision. This penalty would apply to a statutory undertaker when long term systematic failure to comply with a road works authority, has occurred. Penalties under this provision will be set out under subordinate legislation. A Working Group has been formed with expert representation from both statutory undertakers and road works authorities: with a part remit to look at section 119 enforcement. This will include a recommendation from them as to the most appropriate method for calculating the penalties to be imposed.

**Section 29: Resurfacing: Regulations in Guidance**

Section 29, 132D(1)

The Executive is grateful to the Committee for raising the point and is considering this further.

In relation to section 29, section 132E the Executive notes the Committee’s point that there is a case for the Code of Practice to be subject to some form of procedure. The Code of Practice issued in respect of this section is in addition to other Codes of Practice issued under the 1991 Act some of which already attract criminal sanctions in respect of failures to follow the Code of Practice (see sections 124(3), 130(4)). The Codes of Practice currently contained in the 1991 Act are not subject to any form of procedure. The Executive does not believe that the Code of Practice which is to be issued under section 132E should be treated any differently from the other Codes of Practice already issued under the 1991 Act.
Section 32: Fixed Penalty Offences

The Executive is grateful to the Committee for highlighting that section 32 which incorporates section 154A into the 1991 Act does not provide that the order to be made under this section will be made in the form of a statutory instrument. An amendment to the 1991 Act will be considered to clarify this.

Section 33: Civil Penalties for certain offences under the 1991 Act

The Executive is grateful to the Committee for its views in relation to whether affirmative rather than negative procedure would be more appropriate for decriminalising offences under Part IV of the 1991 Act. The Executive is aware that for other decriminalised regime such as the regime for decriminalised parking offences negative procedure is used and there may be some argument in favour of a fully consistent approach. The Executive is however considering the point raised and may amend the form of procedure outlined in section 33.

Section 35: Fixed Penalty Offences under the Roads (Scotland) Act 1984

The Executive is still considering whether affirmative rather than negative procedure is more appropriate.

Section 36: Civil Penalties for certain offences under the Roads (Scotland) Act 1984

This raises the same point as contained for section 33.

Section 37: National Travel Concession Scheme

The Committee has asked for clarification of the interaction between section 37(4)(e) and (6). These provisions are intended to address different circumstances. Subsection (4)(e) relates to the fact of participation by an operator in a national travel concession scheme. Under this subsection, a scheme will include provision about voluntary or compulsory membership of a scheme by operators. Subsection 6 relates to compliance with a scheme by operators which are part of the scheme. Prosecution is encompassed in this subsection to address the possibility that an operator might seek to evade its obligations and thus negate the objectives of the scheme.
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2\textsuperscript{nd} Meeting, 2005 (Session 2)

Tuesday 18\textsuperscript{th} January, 2005

Executive Responses

- The Sweeteners in Food Amendment (Scotland) Regulations 2004, (SSI 2004/548)
In its letter of 11 January 2005 to Catherine Hodgson, the Committee requested an explanation of the following matter:

“The Committee notes that the principal Regulations amended by this instrument have now been amended 8 times. The Committee asks the Executive what if any progress has been made towards consolidation of this series of Regulations.”

The Food Standards Agency (Scotland) responds as follows:

1. As discussed in the Executive Note which accompanied this instrument, the Agency is aware of discussions within the Commission to produce a formal proposal for new additives framework legislation, which will replace the current legislation on sweeteners, colours and miscellaneous food additives. We understand that this is due to be taken forward during 2005. The Agency therefore considers it prudent to await the issue of the new Community legislation before addressing the question of consolidation of this series of Regulations.

However, if it becomes apparent that any changes to Community legislation will not be forthcoming within a reasonable timescale, and further amendments to the principal Regulations are required, the Agency would reconsider consolidation at that time.