SUBORDINATE LEGISLATION COMMITTEE

AGENDA

6th Meeting, 2005 (Session 2)

Tuesday 22nd February, 2005

The Committee will meet at 9.45am in Committee Room 4.

1. **Delegated powers scrutiny:** The Committee will consider its lodged amendment and correspondence from the Executive in relation to the following Bill—

   the Fire (Scotland) Bill as amended at Stage 2.

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

   the Landfill Allowances Scheme (Scotland) Regulations 2005, *(draft).*

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

   the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.2) (Scotland) Order, *(SSI 2005/69).*

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

   the Housing Revenue Account General Fund Contribution Limits (Scotland) Order 2005, *(SSI 2005/62)*

   the Water (Prevention of Pollution) (Code of Practice) (Scotland) Order 2005, *(SSI 2005/63)*

   the Less Favoured Area Support Scheme (Scotland) Amendment Regulations 2005, *(SSI 2005/64)*

   the Possession of Pesticides (Scotland) Order 2005, *(SSI 2005/66)*
the Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2005, (SSI 2005/67)

the Food (Pistachios from Iran) (Emergency Control) (Scotland) Amendment Regulations 2005, (SSI 2005/70).

5. **Instruments not subject to Parliamentary procedure**: The Committee will consider the following—

   the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Orkney) (No. 3) (Scotland) Order 2004 Revocation Order 2005, (SSI 2005/56)

   the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (Nos. 5 and 9) (Scotland) Orders 2004 Partial Revocation Order 2005, (SSI 2005/68)


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

   Act of Sederunt (Registration Appeal Court) 2005, (SSI 2005/59)


Ruth Cooper
Clerk to the Committee
Tel: 0131 348 5212
The following papers are relevant to this meeting:

**Agenda Items 1-6**

Legal Brief (Private) – to follow

**Agenda Item 1**

Note from the Clerk

Executive response

Letter from Executive in relation to Stage 3 amendments

**Agenda Items 2**

Executive response

**Agenda Items 3-6**

Copies of instruments (circulated to Members only)
Introduction
1. During its consideration of the Fire (Scotland) Bill, as amended at Stage 2, on 8 February 2005, the Committee identified three particular areas of concern. This paper intends to inform the Committee’s further consideration of the issues raised.

Background
2. The deadline for lodging amendments for the Fire (Scotland) Bill at Stage 3 was 10 February 2005, which did not necessarily allow time for the Committee to receive a response from the Executive in relation to its concerns. The Committee therefore agreed to write to the Executive immediately following its meeting but also to lodge an amendment to address issues in relation to three sections of the Bill.

3. The Committee agreed to consider the Executive’s response and its own approach at stage 3 at its meeting of 22 February.

Delegated Powers Provisions

Section 55
4. This section was amended to confer a power on the Scottish ministers to prescribe by regulations subject to annulment further categories of person who may cause temporary suspension of fire duties.

5. The Committee was satisfied that this regulation making power was appropriate but considered that it should be subject to affirmative procedure.

Section 67
6. Section 67(9A) is a Henry VIII provision which allows the Scottish Ministers to make regulations that would amend the Act to disapply section 67(9). It allows Scottish Ministers to make regulations specifying cases where the due diligence defence would not apply. It is necessary to disapply the due diligence defence in some cases to achieve the policy intention of holding employers to the higher standard in those cases. This higher standard is achieved in section 67(11), by placing the onus on the accused to show that it was not reasonably practicable to do more than was done. Section 67(12) applies an even higher standard by placing the onus on the accused to show that it was not practicable to do more than was done.
7. However, the Committee was concerned that as section 67(9A) is not linked to sections 67(11) or (12) the provision could be used to disapply the due diligence defence in other cases, thereby creating strict liability offences, where not even those higher standards of conduct would be enough to avoid conviction.

8. The Committee considered that this was too wide a power and in need of redrafting and, if it was to remain unchanged, it should as a minimum be subject to affirmative procedure.

**Section 72(6) and Section 72(7)**

9. Based on recommendations made by the Committee at Stage 1, section 72(6) was made subject to affirmative procedure, but the Committee noted that the linked power at section 72(7) was not.

10. The Committee considered that section 72(7) should also be subject to affirmative procedure.

**Committee Amendment**

11. Legal Advisers drafted an amendment in the following terms—

“In section 81, page 46, line 3, for “56(7), 72(6)” substitute “55(2)(c), 56(7), 67(9A), (11) or (12), 72(6) or (7)”

12. This amendment was lodged by the Convener on 10 February 2005 and will make the three sections which concerned the Committee subject to affirmative procedure.

**Executive correspondence**

13. Correspondence was issued to the Executive on 8 February 2005 in relation to the Committee's concerns. The Executive's response on the points raised is circulated as a Committee paper.

**Stage 3 Debate**

14. The Stage 3 debate is scheduled for 23 February 2005.

**Consideration**

15. The Committee is invited to consider whether it is content that its concerns have been addressed by the Executive’s response and amendments. If content, the Committee may choose not to move its amendment during stage 3 consideration.

Clerking Team
17 February 2005
Dear Ms Cooper

FIRE (SCOTLAND) BILL as amended at Stage 2

Thank you for your letter of 8 February to Catherine Hodgson in which you sought an explanation on a number of matters contained in the Supplementary Delegated Powers Memorandum. I am happy to deal with each concern in turn below.

Section 55: Special Case: temporary suspension of Chapter 1 duties

I note that whilst the Committee were content with the regulation making power proposed they considered that it should be subject to affirmative procedure. On reflection we acknowledge that the exercise of this power could have a fairly significant effect, and we were therefore content to lodge an amendment on 9 February to that effect.

Section 67: Offences

The Committee commented that the new power at subsection (9A) was a very wide power and also noted that this power was not expressly linked to the exercise of subsection (11) and (12) powers. They indicated that in their view new subsection (9A) should either be linked to subsections (11) and (12) or be made subject to affirmative procedure, and that the affirmative procedure should apply to subsections (11) and (12).

The Committee has also asked whether there might be an overlap between subsections (11) and (12). The Committee’s comments have caused us to look at these provisions again.

Subsection 9A

In response to the Committee’s concerns on subsection (9A), we acknowledge that the power was not linked to the provisions that we intended it to apply to. However on looking at this again, we considered that the policy could be given effect to in a different way which would also deal with the concerns expressed by the Committee. The policy is to remove the due diligence defence in all cases in which the regulations impose a “so far as reasonably practicable” requirement that will give rise to an offence under section 67(3). In passing we should say that we had intimated in the Supplementary Delegated Powers Memorandum that it would also apply in the case of the “so far as practicable” requirement, but this is not in fact the policy.
The policy can be made clear on the face of the Bill without the need for a regulation making power.

An amendment has therefore been lodged replacing section 67(9A) with a revised (9A); a further, linked amendment has been lodged removing wording from section 67(9) in consequence of this revisal.

The deletion of subsection (9A) removes the power of Scottish Ministers to specify in regulations the cases in which the due diligence defence will not apply. The revised subsection (9A) incorporates in paragraph (a) the provision deleted from subsection (9), under which the due diligence does not apply to the offence that may be committed by an employer under section 67(1)(a)(i). Paragraph (b) establishes that the only other situation in which the due diligence will not apply is in relation to offences that may be committed under section 67(3), which involve breach of a requirement or prohibition which concern a duty to do something “so far as is reasonably practicable”.

In order to assist the Justice 2 Committee’s consideration of the Bill at Stage 2, the Executive provided the Parliament with a draft set of fire safety regulations – to be made under powers in sections 53 and 54 - setting out in greater detail the requirements and prohibitions that could result in an offence being committed under section 67(3). Draft regulation 12 (Elimination or reduction of risks from dangerous substances) is the only regulation that imposes a “so far as is reasonably practicable” duty and at present this is the only situation in regulations to which the due diligence defence will not apply. Obviously, if the Executive were to revise the regulations made under section 54 at any point in the future, Parliament would have the opportunity to scrutinise the amending regulations under the negative resolution procedure. The scrutiny would be carried out in the knowledge that if any further fire safety duties concerned “so far as is reasonably practicable” duties, the due diligence defence would not apply. Thus, there is now a clear link in the Bill between the “so far as is reasonably practicable” duty in regulations, the offence in section 67(3) and the disapplication of the due diligence defence. The provision disapplying the due diligence defence is clearly consequential on a duty in regulations which is expressed to apply “so far as is reasonably practicable which gives rise to an offence under section 67(3).

Subsections (11) and (12)

The Committee queried whether there was some degree of overlap between subsections (11) and (12), and proposed that affirmative procedure should apply to subsections (11) and (12). We respond to these points below, as well as explaining the effect of the Executive amendments lodged at Stage 3 that alter subsections (11) and (12).

These subsections, inserted at Stage 2, enabled Scottish Ministers to reverse the burden of proof in relation to offences concerning duties to comply with requirements or prohibitions “so far as is practicable” or “so far as is reasonably practicable”. The amendments to these subsections that have been lodged dispense with the regulation-making powers and replace them instead with a clear provision in the Bill that in any proceedings for an offence under section 67(3) consisting of a failure to comply with a requirement or prohibition that requires to be carried out “so far as is reasonably practicable” or “so far as is practicable”, the onus of showing that it was not reasonably practicable to do more than was done should be on the accused. This is because the policy is that the burden of proof should be reversed in all cases where a requirement or prohibition is limited by a duty to do so only “so far as practicable” or “so far as reasonably practicable” and where this gives rise to an offence under section 67(3).
At present the policy, as reflected in the draft regulations provided to the Justice 2 Committee, is that the only circumstances in which this would apply are the requirements or prohibitions under draft regulations 12(1) (Elimination or reduction of risks from dangerous substances) and 15(2)(a) (Procedures for serious and imminent danger and for danger areas).

It is considered that the automatic reverse burden in these circumstances is justified because the offence provision in section 67(3) will only apply where persons are put at risk of death or serious injury. Furthermore, the person on whom the reverse burden is imposed should, by virtue of the nature of the duty in question, be in possession of all the information that is required in order to meet the burden. In addition, Scottish Ministers are required to act compatibly with ECHR when making regulations that impose such requirements or prohibitions. Scottish Ministers will therefore have to be alert to the applicability of subsections (11) and (12), and the reversed burden of proof, whenever they impose a “so far as is practicable” or “reasonably practicable” limitation, and can only therefore limit the requirement or prohibition in cases where they are satisfied that the accompanying reverse burden would be ECHR compliant.

In response to the Committee’s point on a potential overlap between what is “reasonably practicable” in subsection (11) and what is “practicable” in subsection (12), there is a significant difference between taking measures “so far as is reasonably practicable” and “so far as is practicable”. “Practicable” by itself means that which is feasible or possible. In considering what is “reasonably practicable”, however, the expense and other disadvantages of safety measures must be balanced against the magnitude of the risk. Thus, where the “reasonableness” requirement is incorporated, if there were a gross disproportion between the risk on one hand and the sacrifice involved in averting the risk, precautionary measures in connection with fire safety might not require to be taken.

**Sections 72(6) and 72(7): Meaning of relevant premises**

Again the Committee considered that the section 72(7) power should be subject to affirmative procedure. In his letter of 4 February, the Deputy Minister for Justice indicated that the Executive had been considering further the type of procedure that should apply to the power in section 72(7), in recognition of the fact that its exercise could potentially significantly affect the application of Part 3 of the Bill. The Executive has subsequently decided that the power should be subject to affirmative procedure and lodged an amendment to that effect on 9 February.

Thank you again for your helpful consideration of the Stage 2 amendments, I hope the information in this letter is useful and I attach also for your information a copy of the Stage 3 amendments referred to above. You will perhaps have noted that we have lodged 3 other amendments which introduce new powers or modify existing powers. I intend to write separately on these by 14 February.

I am also copying this letter to the Clerk to the Justice 2 Committee.

Yours sincerely
IAN SNEDDEN
Head of Division
Fire Services Division
Dear Ms Cooper

FIRE (SCOTLAND) BILL: STAGE 3 AMENDMENTS

When I wrote on 10 February in response to the Committee’s queries on our Stage 2 Executive amendments I indicated that I would write separately on three further Executive amendments inserting new delegated powers provisions which we had lodged for Stage 3 consideration.

Two of the amendments introduce new delegated powers and the third modifies an existing delegated power in the Bill. I thought it might be helpful if I were to set out the detail of these amendments.

Regulation-making power under Schedule 4 of the Water (Scotland) Act 1980: Provisions incorporated in order relating to water undertakings

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* negative resolution of the Scottish Parliament

An amendment to Schedule 4 of the Water (Scotland) Act 1980 (“the 1980 Act”) has been lodged. Section 21 of Schedule 4 to the 1980 Act provides that the cost of fire hydrants and of fixing, maintaining and renewing them is to be defrayed by the fire authority. The Executive amendment that appears at number 3 of the Marshalled List would insert a new section 21A into Schedule 4 to the 1980 Act, and would provide Scottish Ministers with a regulation-making power enabling them to set out the circumstances in which and/or the persons from whom a relevant authority could recover costs of fixing, maintaining and renewing fire hydrants, but the provision expressly excludes Scottish Water from being an organisation from whom these costs may be recovered. A consequential amendment is also made to section 22 of Schedule 4 to the 1980 Act.

Section 20(1) of the Bill re-enacts the first part of section 14(3) of the Fire Services Act 1947 in respect of the requirement to provide fire hydrants. Access to the water supply is by connection to a fire hydrant. Hydrants must be fitted by Scottish Water at the request of a relevant authority.

The cost of installing and maintaining hydrants, which has to be borne by fire and rescue authorities and joint fire and rescue boards, can be contentious and the issue was raised by
various parties in Stage 1 evidence. The issue of hydrants was not consulted on as part of the pre-legislation consultation exercise and we therefore intend to carry out the necessary consultation in order to establish to whom and in what circumstances it would be suitable for hydrants costs to be defrayed to other organisations. The new power would then enable Scottish Ministers to make legislative provision on the issue if that was appropriate. This is accordingly why the matter is to be left to subordinate legislation.

Section 101 of the 1980 Act currently sets out that regulations may be made prescribing anything required to be prescribed. The regulations made under this power would be subject to negative procedure, as covered by section 101(2), in line with the standard procedure used for subordinate legislation in the 1980 Act. This is appropriate as the content of the regulations would relate to matters covered by the 1980 Act, and the negative procedure would ensure an adequate level of Parliamentary scrutiny following a period of consultation on the defrayal of such costs.

Regulation-making power under section 54: Fire Safety

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* negative resolution of the Scottish Parliament

An amendment to section 54 has been lodged to ensure that regulations made under section 54(1) can allow persons with fire safety duties in respect of “relevant premises” under Part 3 of the Bill, where those premises form part of a building, to enter into arrangements with owners or occupiers of other parts of the building to enable them to comply with their fire safety duties.

Section 5(3) of the Fire Precautions Act 1971 places a duty on fire authorities which is aimed at ensuring that before issuing a fire certificate for premises within a building (or granting an exemption), the authority should take into account the risk, hazards and precautions in the building as a whole, including the effect on the fire precautions of other occupiers in the building.

With the repeal of the 1971 Act, fire certificates are abolished. However, the “whole building” approach is desirable in the context of fire safety risk assessments and enforcement of fire safety legislation. The amendment therefore makes provision for regulations to specify such an approach to enable those in “relevant premises” which form part of a building to develop fire safety arrangements with others in that building that will enable them to comply with their duties.

The effect of this is to enable co-operation and co-ordination in respect of fire safety matters between all occupiers of a multiple-occupied building, where perhaps only part of that building is defined as “relevant premises” by virtue of Part 3.

The power is subject to the negative procedure on the basis that the section 54 regulation-making power is already subject to the negative procedure due to their detailed and technical nature. These provisions will similarly relate to the detailed fire safety regulations to be made under section 54. The policy intention is to enable the making of arrangements with other owners/ occupiers of multiple-occupied buildings in respect of specific fire safety duties to be set out in regulations. This is therefore also why the power is to be left to subordinate legislation.
Regulation-making power under section 56: the making of arrangements by relevant authorities for the carrying out of their functions

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* negative resolution of the Scottish Parliament

We have lodged an amendment that would introduce a new power at section 56 so that a relevant authority may make arrangements with a person prescribed in regulations for such of the functions conferred on the authority by virtue of Part 3 as may be specified in the arrangements to be carried out (with or without payment) on its behalf by that person in relation to a specified workplace.

Section 56(5) currently only enables such an arrangement to be entered into with the Health and Safety Commission. However this is unduly restrictive as we are aware of changes proposed in other legislation which will result in the need to extend this provision so that a relevant authority may enter into arrangements with other organisations with workplace health and safety functions. A regulation making power provides the necessary flexibility to achieve this and will be subject to the negative procedure on the basis that the power is an administrative one linked to the ways in which relevant authorities, in their capacity as enforcing authorities, may arrange to carry out their operational functions.

Please do not hesitate to contact me if you require any further clarification. I am aware of the time pressures caused by the current recess period, and would therefore hope that the information in this letter is of assistance.

Yours sincerely

Ian A Snedden  
Head of Division
SUBORDINATE LEGISLATION COMMITTEE

6th Meeting, 2005 (Session 2)

Tuesday 22nd February, 2005

Executive Responses

- The Landfill Allowances Scheme (Scotland) Regulations 2005, (draft)
THE LANDFILL ALLOWANCES SCHEME (SCOTLAND) REGULATIONS 2005 (DRAFT)

On 8 February the Committee asked the Executive for an explanation of the following matters-

“1. The Committee notes that the definition of “P” in regulation 19(3) and 19(4) refers to the amount of penalty already paid “under regulation 21”. As regulation 21 provides simply for the method of payment of penalties the Committee asks the Executive for clarification of the meaning and effect of the definition.

2. The Committee asks the Executive to confirm whether, in the definition of European Waste Catalogue in regulation 2(1), the Commission Directive is correctly cited.”

The Scottish Executive responds as follows:

1. “P” in regulation 19(3) and (4) is the amount of any penalty already actually paid by a waste disposal authority following a notification by the Scottish Ministers under regulation 21(1)(b). The policy is that where an authority has paid such a penalty it should be taken account of in assessing any future supplementary penalty. Regulation 21 is referred to, in preference, for example, to regulation 19(1), since the amount of the penalty in the notification may be lower than that assessed under regulation 19 because of the powers of waiver which the Scottish Ministers have under section 26 of the Waste and Emissions Trading Act 2003 (c.33). Those include for example, a power (in section 26(1)(c)(ii) of that Act) to “relieve the waste disposal authority, in whole or in part, from liability to the penalty or any interest on it”.

2. The Executive regrets that the citation of Council Directive 75/442/EEC in the definition of the “European Waste Catalogue” in regulation 2(1) does indeed contain a typographical error, namely, ‘Council Directive 74/442/EEC’ should read ‘Council Directive 75/442/EEC’. There is however, no effect in substance in so far as the definition also includes details of where the European Waste Catalogue can be found. This Directive is correctly cited in the definitions of “disposal” and “recovery” also in regulation 2(1). Subject to the Committee’s views, the Executive would propose that this typographical error be corrected in the version to be signed by the Minister should the Parliament approve these draft affirmative Regulations. The Executive is grateful to the Committee for drawing this to their attention.