The Scottish Parliament

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

13th Meeting, 2005 (Session 2)

Tuesday 26th April, 2005

The Committee will meet at 10.30am in Committee Room 3.

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

   Environmental Assessment (Scotland) Bill at Stage 1.

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

   - the Fire (Scotland) Act 2005 (Relevant Premises) Regulations 2005, *(SSI 2005/draft)*
   - the Miscellaneous Food Additives Amendment (Scotland) Regulations 2005, *(SSI 2005/214)*
   - the Smoke Flavourings (Scotland) Regulations 2005, *(SSI 2005/215)*
   - the Plant Health (Import Inspection Fees) (Scotland) Regulations 2005, *(SSI 2005/216)*.

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

   - the Mental Health (Medical treatment subject to safeguards) (Section 234) (Scotland) Regulations 2005, *(SSI 2005/draft)*
   - the Mental Health (Medical treatment subject to safeguards) (Section 237) (Scotland) Regulations 2005, *(SSI 2005/draft).*
4. **Instruments subject to approval:** The Committee will consider the following—

   the Farm Business Development (Scotland) Variation Scheme 2005, *(SSI 2005/219)*.

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

   the Education (Student Fees and Support) Temporary Protection (Scotland) Amendment Regulations 2005, *(SSI 2005/217)*

   the Production of Bovine Collagen Intended for Human Consumption in the United Kingdom (Scotland) Regulations 2005, *(SSI 2005/218)*

   the Food Labelling Amendment (Scotland) Regulations 2005, *(SSI 2005/222)*.

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

   the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No. 9) (Scotland) Order 2004 Partial Revocation (No. 2) Order 2005, *(SSI 2005/220)*

   the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No. 7) (Scotland) Order 2004 Revocation Order 2005, *(SSI 2005/221)*.

   

   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**

Delegated powers memorandum  
Copy of the Bill and accompanying documents (circulated to Members only)

**Agenda Item 2**

Executive responses

**Agenda Items 3-6**

Copies of instruments (circulated to Members only)
MEMORANDUM ON DELEGATED POWERS
ENVIRONMENTAL ASSESSMENT (SCOTLAND) BILL

Purpose of this Memorandum

1. This Memorandum has been prepared by the Scottish Executive in accordance with Rule 9.4A of the Scottish Parliament’s Standing Orders.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Executive and have not been endorsed by the Scottish Parliament.

3. This Memorandum describes provisions of the Environmental Assessment (Scotland) Bill which confer power to make subordinate legislation. It sets out:

- the persons upon whom, or the body upon which, power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision;
- the Parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

Outline and scope of the Environmental Assessment (Scotland) Bill 2005

4. The Bill makes public sector plans and programmes subject to strategic environmental assessment ensuring that any problems are identified and addressed early in the decision making process. It will revoke and replace The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 (SSI 2004/258) (The Regulations). The Bill will then become the instrument by which EC Directive 2001/42/EC of the European Parliament and Council (The Directive) is implemented, as regards plans and programmes which relate solely to the whole or any part of Scotland.

5. The purpose of this Bill is to introduce an environmental assessment regime. The key policy outcomes desired of this regime are the enhancement of environmental protection, the improvement of public policy making and early, more effective civic participation in the decision making process. By extending the plans and programmes subject to environmental assessment beyond those provided for in the Environmental Assessment of Plans and programmes (Scotland) Regulations 2004, the provisions of the Bill are intended to ensure that these outcomes are achieved and that the Partnership Agreement commitment to environmental assessment is met.
“We will legislate to introduce Strategic Environmental Assessment to ensure that the full environmental impacts of all new strategies, programmes and plans developed by the public sector are properly considered.”

6. The following paragraphs outline the main provisions of the Bill. These notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They are not intended to be a comprehensive description of the Bill’s provisions, they do not form part of the Bill and have not been endorsed by the Scottish Parliament. Further information about the Bill’s provisions are offered in the Explanatory Notes, Policy Memorandum and Financial Memorandum, all of which are available on the Scottish Parliament website.

**Part 1** of the Bill sets out the requirement on Responsible Authorities to secure the carrying out of an environmental assessment on plans and programmes. It defines the term Responsible Authorities for the purposes of the Bill, and contains provisions for establishing which plans and programmes should be subject to the assessment process. It also provides that any reference to plans and programmes in the Bill includes strategies.

**Part 2** of the Bill sets out the requirements for performing, scoping and producing the environmental assessment report. Scoping establishes the subject areas to be included in the environmental assessment report and the degree of detail required in respect of each subject. Part 2 further sets out requirements for consultation and the taking into account of consultation responses in reaching a final decision to adopt a particular plan or programme.

**Part 3** of the Bill makes provision for the announcement of the adoption of any plan that has been subject to environmental assessment. It sets out the arrangements for the monitoring of the implementation of the plan and requirements for forward monitoring and remedial action in respect of unforeseen effects.

**Part 4** of the Bill makes general provisions for order making powers and commencement of the Bill. This part revokes The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 (SSI 2004/ 258).
**Description of Delegated Powers**

**Section 2(4)(f) - Provision for the Scottish Ministers to specify further Responsible Authorities in addition to those listed at section 2(4)**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Statutory Instrument  
**Parliamentary procedure:** Negative resolution procedure

**Section 5(4)** extends the range of public sector plans and programmes subject to environmental assessment beyond that required by the current Regulations to include certain other plans and programmes prepared by the particular Responsible Authorities listed at section 2(4) -

- the Scottish Ministers;
- any holder of an office in the Scottish Administration which is not a ministerial office;
- the Scottish Parliament;
- the Scottish Parliamentary Corporate Body;
- a Scottish public authority with mixed functions or no reserved functions.

It is considered premature to make further specifications of Responsible Authorities to which the duties in respect of this extended range of plans and programmes applies in the Bill at this point. Such additions cannot reasonably be made until after the emergence of evidence from the operation of the environmental assessment regime as provided for in the Bill. Therefore, the Bill makes provision in section 5(4) to allow the Scottish Ministers to specify further Responsible Authorities as the need for that specification is identified. This power will provide an opportunity to ensure that the Partnership Agreement commitment to apply environmental assessment to all public sector plans and programmes is met.

Any further specification of Responsible Authorities in addition to those listed at section 2(4) would be made in respect only of functions of a public character being carried out by a person, body or office holder in Scotland.

The basic principle that further specifications of Responsible Authorities may be made will already have been subject to the Bill procedure. Therefore, it is considered that negative resolution will afford a sufficient level of Parliamentary scrutiny of any order proposing to make further specifications.
Section 5(5) - Provision for the Scottish Ministers to amend schedule 1

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Statutory Instrument  
**Parliamentary procedure:** Negative resolution procedure

Section 5(3)(a) sets out a group of activity areas which, by their nature, mean that plans and programmes relating to them are deemed always to be likely to give rise to significant environmental effects and therefore will always give rise to the requirement to carry out an environmental assessment. Section 5(3)(a)(i) refers to schedule 1, which lists projects by reference to which some of these plans and programmes are defined. Subsection (5) allows the Scottish Ministers to amend and update schedule 1 of the Bill.

It is considered appropriate to delegate these powers to allow the Scottish Ministers to take account of any further amendments that may be made to the Directive. These powers are also necessary to ensure the Bill remains consistent with any new Community and domestic legislation (such as the anticipated Planning Bill) on, or affecting, the subject area of the Bill. They are also necessary to allow changes to be made to schedule 1 to reflect developing case law.

Negative resolution procedure is considered appropriate as the power will be used to take account of case law, or changes in Community or domestic law.

Section 6(1)(b) - Provision for the Scottish Ministers to make additional exclusions

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Statutory Instrument  
**Parliamentary procedure:** Negative resolution procedure

Section 6(1)(b) provides powers for the Scottish Ministers to exclude specified types of plans and programmes from the description of plans and programmes set out in section 5(4). These are the plans and programmes which are prepared by the Responsible Authorities caught by section 2(4), and which are not referred to in section 5(3). The intention of section 6(1)(b) is to ensure that it will be possible to exclude plans and programmes which are considered not to be likely to have significant environmental effects and so to have no need to submit to formal screening or to perform an environmental assessment. The aim here is to ensure that the Scottish Ministers have an ongoing opportunity to ensure that provisions of the Bill are proportionate, targeted, and cost effective.

The proposed power is limited in that it may only be used to exclude plans and programmes which, in the opinion of the Scottish Ministers, are likely to have no effect or minimal effect in relation to the environment.

As the basis on which further exclusions may be made will already have been subject to the Bill procedure it is considered that negative resolution will afford a sufficient level of Parliamentary scrutiny of any order proposing to make further exclusions.
Section 6(2) - Provision for the Scottish Ministers to modify the provisions to exclude plans and programmes

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

Section 6(1)(a) provides that plans and programmes which relate to individual schools are excluded because is not considered that there are any circumstances in which a plan or programme for an individual school is likely to have significant environmental effects. Section 6(2) provides powers for the Scottish Ministers to modify section 6(1)(a). The purpose of this power is to ensure that, should it become clear that any plans and programmes, or some particular aspect of them, which relate to individual schools would be likely to have significant environmental effects then the Bill may be amended accordingly.

The proposed power is limited in that it may only be used to exclude plans and programmes which, in the opinion of the Scottish Ministers, are likely to have no effect or minimal effect in relation to the environment.

The negative resolution procedure is considered an appropriate level of Parliamentary scrutiny because the principles of environmental assessment will already have been subject to Bill procedure and any order made under this provision will simply apply those principles as was intended by the Bill.

Section 7(3) - Provisions for the Scottish Ministers to amend schedule 2 to the Bill

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

In some cases which are not automatically subject to environmental assessment, the Responsible Authority is required to consider whether the plan or programme is likely to have a significant environmental effect before determining whether an environmental assessment is required, whether that be by applying their own judgement (section 7 – Exemptions: pre-screening) or after taking formal advice from the Consultation Authorities (section 8 - Exemptions: screening). In making such a determination the Responsible Authority shall apply the criteria for determining the likely significance of effects on the environment set out in schedule 2. Section 7(3) provides that the Scottish Ministers may amend schedule 2.

These powers are necessary to ensure the Scottish Ministers have an opportunity to ensure that the Bill remains consistent with any new Community or domestic legislation on, or affecting, the subject area of the Bill. They are also necessary to allow changes to be made to schedule 2 to reflect developing case law and scientific thinking on how to assess significant environmental effects.
Negative resolution procedure is considered appropriate as the power will either be used to take account of case law and changes in Community or domestic law or in response to emerging scientific thinking.

Section 14(5) - Provisions for the Scottish Ministers to amend schedule 3 to the Bill

Power conferred on: The Scottish Ministers  
Power exercisable by: Order made by Statutory Instrument  
Parliamentary procedure: Negative resolution procedure

Section 14 (along with schedule 3) provides for the contents of an environmental assessment report. The report should describe and evaluate the likely significant effects on the environment of the proposed plan or programme and of alternative approaches considered. Section 14(5) allows the Scottish Ministers to modify schedule 3.

The powers are necessary to provide the Scottish Ministers with an opportunity to ensure that the Bill remains consistent with any new Community or domestic law on, or affecting, the subject area of the Bill. They are also necessary to allow changes to be made to schedule 3 to reflect developing case law and scientific thinking on how to assess significant environmental effects and the information which should be usefully contained in an environmental report.

Negative resolution procedure is considered appropriate as the power will either be used to take account of case law, changes in Community or domestic law, or in response to emerging scientific thinking.

Section 22 – Provision for the Scottish Ministers to make incidental, supplemental, consequential, transitional, transitory and saving provisions

Power conferred on: The Scottish Ministers  
Power exercisable by: Order made by Statutory Instrument  
Parliamentary procedure: Negative resolution procedure, unless the order amends primary legislation, in which case Affirmative procedure

Section 22 gives powers to make subordinate legislation which is incidental, supplemental, consequential, transitional or savings in respect of the provisions of the Bill itself.

These powers are required to ensure that the Scottish Ministers may modify existing provisions in other legislation, as necessary, to ensure that the provisions of the Bill as enacted are allowed to operate effectively in relation to other pieces of legislation and the general law. For example it may prove necessary, with experience of operating the Bill, to amend existing legislation in areas affected by it. We have not identified such areas yet, but it is considered necessary to have these powers available to ensure that the provisions of the Bill as enacted are allowed to operate effectively in relation to other pieces of legislation and the general law.
Section 23 revokes the Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 (SSI 2004 /258). It is intended to use the powers in section 22 to provide that all plans and programmes falling within the requirements of the Regulations prior to their revocation, will continue to be dealt with under the Regulations.

It is considered that, in general, negative resolution procedure is appropriate for this power. However, where the power is used to amend primary legislation, section 21(4) provides for affirmative procedure to apply.

### Sections 25 - Commencement orders

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<th>Power conferred on:</th>
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<td>Power exercisable by:</td>
<td>Order made by Statutory Instrument</td>
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<td>Parliamentary procedure:</td>
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**Section 25** provides that, except for sections 20, 21, 22, 24 and 25, the provisions of the Bill come into force on a date or dates set by the Scottish Ministers by order. Sections 20, 21, 22, 24 and 25 will come into force on Royal Assent. **Section 25(3)** provides that different days may be appointed for different purposes.

This is a standard order-making power to allow flexibility in commencement of the provisions of the Bill. As is usual for commencement orders, no provision is made Parliamentary scrutiny, as the power is simply to commence provisions that the Parliament has already scrutinised fully.
SUBORDINATE LEGISLATION COMMITTEE

13th Meeting, 2005 (Session 2)

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Executive Responses

- The Fire (Scotland) Act 2005 (Relevant Premises) Regulations 2005, (SSI 2005/draft)
- The Miscellaneous Food Additives Amendment (Scotland) Regulations 2005, (SSI 2005/214)
- The Smoke Flavourings (Scotland) Regulations 2005, (SSI 2005/215)
- The Plant Health (Import Inspection Fees) (Scotland) Regulations 2005, (SSI 2005/216)
The Scottish Executive responds as follows:

The Executive is grateful for the comments made by the Committee, and acknowledges the departure from normal drafting practice in these two respects. The oversight does not, however, affect the validity of the instrument. The Committee can be assured that these technical points will be corrected before the instrument is made.

21 April 2005
In its letter of 19 April 2005 the Committee commented as follows -

“The issue arising in these Regulations was recently raised by the Committee in relation to SSI 2005/92 and SSI 2005/94 and concerns the citation, in the preamble to an instrument, of the obligation under EU law to consult before Regulations are made. If such an obligation arises under domestic statutory law the drafting convention, acknowledged by the Executive on previous occasions, is to narrate that obligation and its fulfilment in the preamble. However, in these Regulations the obligation to consult arises as a result of a provision of EU law (Article 9 of Regulation (EC) 178/2002). The Committee notes that it is the policy of the Executive in these cases to narrate the consultation requirement in the footnote to the preamble rather than in the body of the Regulations itself, though the Committee further notes that no specific reference is made in the relevant footnote to the provision of EU law under which the obligation arises. The Committee recognises that the Executive has previously set out its reasons for this approach but requests clarification of its current position on this matter.”

The Food Standards Agency responds as follows –

The Food Standards Agency is guided on matters of drafting such as this by the Office of Solicitor to the Scottish Executive. The Agency understands that it is not now, and has never been, the policy of the Executive to refer to Community provisions such as article 9 of Regulation 178/2002 in the preamble of Scottish Statutory Instruments. Only requirements contained in domestic legislation are referred to. The Agency is also advised that the absence of a reference to such a Community provision would not of itself render a Scottish Statutory Instrument invalid. The essential element in all such cases is that the Community provision is complied with.

In the present case these regulations were the subject of an extensive consultation prior to their being made. That consultation took place in accordance with the requirements of article 9 of Regulation 178/2002. Reference to that consultation is made in the Executive Note.

However, with a view to providing assistance to the reader, the Agency considered that it would be helpful to include in the footnote concerning the Food Safety Act 1990 a reference to the fact that consultation required by section 48(4) of the Act was disapplied in these cases by virtue of section 48(4C). Section 48(4C) provides that the requirement to consult under section 48(4) does not apply in a case where article 9 (which is directly applicable) requires consultation. This explanation in the footnote was simply to draw the attention of the reader to that fact.

21 April 2005
THE PLANT HEALTH (IMPORT INSPECTION FEES) (SCOTLAND) REGULATIONS 2005, (SSI 2005/216)

On 19th April the Committee asked the Executive for an explanation of the following matter-

- “It is not clear to the Committee, however, upon what basis the 10% increase for exchange rate fluctuations is adopted since the Directive only appears to sanction two methods of calculation of fees: those being the standard fees set out in the Directive or an actual cost basis calculated by reference to specified criteria contained in Article 13(d)(1) of the Directive. The Committee asks the Executive for further information as to basis for adopting a blanket 10% increase.”

The Scottish Executive responds as follows:

2. As the Committee observes, the Directive provides [Article 13d(2)] for two methods of fee calculation: Member States can either “apply the standard fee as specified in Annex VIIIa” of the Directive; or they can set the level of fee “on the basis of a detailed cost calculation” by reference to criteria specified in Article 13d(1) of the Directive.

3. The standard fees in Annex VIIIa are in Euros. The Directive makes no provision for those Member States who have not adopted the Euro as their currency.

4. In these circumstances and considering that Members States may not charge less than the fees set out in Annex VIIIa, the 10% uplift is intended to avoid the situation where, because of exchange rate fluctuations, the fees converted into Sterling might fall below the Euro minimum. DEFRA have advised the Scottish Executive that 10% is the maximum of the range within which the Euro/Sterling exchange rate fluctuated during 2004. The 10% uplift is therefore based on empirical evidence of recent exchange rate fluctuations. Additionally, given that a principal purpose of the Directive is to ensure a degree of consistency of approach to the charging of fees across all Member States, the 10% uplift is reasonable and proportional in order to ensure that fees in Scotland are within the parameters of those charged elsewhere in the European Union.

5. The actual fees in the Schedules to the Regulations have been calculated by converting the fees set out in Annex VIIIa to Sterling using the Sterling/Euro exchange rate (EUR 1 = £0.6878) quoted by the European Central Bank on 3 March 2005, and then applying the 10% uplift. These figures are identical to those specified in DEFRA’s parallel regulations for England (S.I. 2005/906).

6. Article 13d(2) of the Directive says that Member States must “apply the standard fee” and the Executive is of the view that these Regulations represent a reasonable application of the standard fees, taking into account the fact that the Euro is not the currency of the United Kingdom, and given the
need, in the interests of legal accessibility, of expressing the fees in Sterling in our Regulations.

7. The Executive is of course still intending to follow the approach set out in the consultation conducted prior to the making of these Regulations; that is to apply the standard fees for one year until we have sufficient data to assess the actual cost of operating the new regime, and then to move to fees set according to a detailed cost calculation.

21st April 2005