SUBORDINATE LEGISLATION COMMITTEE

AGENDA

15th Meeting, 2009 (Session 3)

Tuesday 5 May 2009

The Committee will meet at 2.15 pm in Committee Room 5.

1. **Decision on taking business in private:** The Committee will decide whether to take item 8 in private.

2. **Flood Risk Management (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

3. **Schools (Consultation) (Scotland) Bill:** The Committee will consider the Scottish Government’s response to points raised on the delegated powers provisions in this Bill at Stage 1.

4. **Criminal Justice and Licensing (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

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

   - the Community Right to Buy (Definition of Excluded Land) (Scotland) Order 2009 (SSI 2009/draft);
   - the Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (Scotland) (No. 2) Order 2009 (SSI 2009/draft);
   - the Local Government and Housing Act 1989 Amendment (Scotland) Order 2009 (SSI 2009/draft).

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

   - the Community Right to Buy (Prescribed Form of Application and Notices) (Scotland) Regulations 2009 (SSI 2009/156);
   - the Crofting Community Body (Prescribed Form of Application and Notice) (Scotland) Regulations 2009 (SSI 2009/160).
7. **Instruments not laid before the Parliament**: The Committee will consider the following—


8. **Draft Interpretation and Legislative Reform Bill**: The Committee will consider evidence on the draft Bill from the Minister for Parliamentary Business, taken at its last meeting.

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The papers for this meeting are as follows—

**Agenda Items 2-7**

Legal Brief SL/S3/09/15/1 (P)

Summary of Recommendations SL/S3/09/15/2

**Agenda Item 2**

Flood Risk Management (Scotland) Bill as Amended

Supplementary Delegated Powers Memorandum

**Agenda Item 3**

Schools (Consultation) (Scotland) bill letter SL/S3/09/15/3

Government Response SL/S3/09/15/4

Schools (Consultation) (Scotland) Bill
Delegated Powers Memorandum

**Agenda Item 4**

Criminal Justice and Licensing (Scotland) Bill
Delegated Powers Memorandum
Summary of Recommendations

The Committee will be invited to consider the following recommendations under consideration at today’s meeting. Decisions are a matter for the Committee.

Agenda Item 2  Flood Risk Management (Scotland) Bill

Directions and Guidance

Section 2(1) – Directions and guidance

Section 9(2) – SEPA to prepare flood risk assessments

Section 18(4), (5) and (6) – Scottish Ministers powers of direction - Flood hazard maps

The Committee may wish to find these powers to issue directions and guidance acceptable.

No procedure

Section 15A(2) to (9) – Powers to direct on the date of preparation of assessments of flood risk from sewerage systems, and determination of their form

The Committee may wish to find the delegated powers in section 15A(2) to (9) to be acceptable, and that it is appropriate they are not expressed as a power to make subordinate legislation.

Negative procedure

Section 5 – Power to designate “responsible authorities”

Section 15A(1)(c) – Power to specify the content of Scottish Water assessments of flood risk from sewerage systems
Section 15B(2) – Powers to specify the content, form and date of preparation of local authority maps of bodies of water and “SUDS”

Section 56(1B)(b) – Power to specify the content and the form of local authority schedules of clearance and repair works

Section 15C(1)(c) – Power to specify the content of SEPA maps of artificial structures and natural features

Section 15C(2)(c) – Power to specify the form of SEPA maps of artificial structures and natural features

Section 29(6) – Power to make further provision in relation to local authorities preparing local flood risk management plans

Section 53C (1) – Power to make provision about the keeping of registers

The Committee may wish to find these powers acceptable and that it is appropriate they are subject to negative procedure.

Affirmative procedure

Section 44(1) – Power to give effect to Community obligations etc.

Section 52(4) – Power to amend flood protection scheme making process

Section 77 – Power to make provision for reporting incidents relating to reservoir safety

Section 77A – Power to make provision for preparing reservoir flood plans

The Committee may wish to find these powers acceptable and that it is appropriate they are subject to affirmative procedure.

Section 82(1) – Ancillary provision

The Committee may wish to find that in the instance of this particular Bill, the ancillary provisions in section 82 are acceptable.

The Committee may wish to report further that in its view the modification of enactments (without textual amendment) using such ancillary powers may be appropriate by negative procedure in limited circumstances such as a transitory provision applying only for a short period, but the Committee would generally expect
that any significant or permanent modification of enactments using this power should be effected by textual amendment, and subject to affirmative procedure.

Agenda Item 3  Schools (Consultation) (Scotland) Bill

Section 20(1) Ancillary provisions etc.

The Committee may wish to find the Scottish Government’s response satisfactory and to consider the proposed power under section 20(1), and the related provision contained in subsections (3) and (4) acceptable. The Committee may also wish to be content with reference to procedure being by negative resolution of the Scottish Parliament unless the instrument amends an Act, in which case affirmative.

Section 22(2) Commencement and short title

The Committee may wish to invite Scottish Government officials to attend Committee in order to provide further clarification (so far as not covered by the reply of 14 April) as to whether it is considered possible that section 22(4)(a) could be used to amend other enactments, and if so, why no procedure is justified for such an order, having regard to the approach in section 20(6)(b).

Agenda Item 4  Criminal Justice and Licensing (Scotland) Bill

Not expressed as a power to make subordinate legislation

Section 5 – Sentencing guidelines

Section 14, so far as inserting section 227ZH(4)(5) of that 1995 Act – power to determine persons in relation to different methods of monitoring

Schedule 1, paragraph 4 – Scottish Sentencing Council – term of office

The Committee may wish to find these powers acceptable and that it is appropriate that they are not expressed as a power to make subordinate legislation.
No procedure

Section 14 (Community payback orders), so far as inserting section 227B(2) of the Criminal Procedure (Scotland) Act 1995 – specification of information to be included in report from local authority officer to court relating to an offender

Section 14, so far as inserting section 227E(6) of the Criminal Procedure (Scotland) Act 1995 – power to make provision for the form of a community payback order by Act of Adjournal

Section 14, so far as inserting section 227Z(2) of that 1995 Act – power to specify the nature of information to be provided by a responsible officer in a report to the court before variation of a Community payback order

Section 57(3), so far as inserting section 113A(4)(c) of that 1995 Act – power to specify classes of persons who may have access to the trial judge’s observations in relation to an expedited appeal

Section 66(1), so far as inserting section 271U(3) of that 1995 Act – power to prescribe procedure for an appeal against a witness anonymity order

Section 148 - commencement

The Committee may wish to find these powers acceptable and that it is appropriate it is subject to no procedure.

Laid only

Section 114(1) - Code of practice on disclosure

The Committee may wish to find this power acceptable and that it is appropriate that it is laid only.

Negative procedure

Section 12 – Business plan of the Scottish Sentencing Council

Section 13(2) – Annual report by the Scottish Sentencing Council

Section 14 (Community payback orders), so far as inserting section 227O(1) of the Criminal Procedure (S) Act 1995 – general power to make rules about unpaid work and other activity
Section 14, so far as inserting section 227ZG of that 1995 Act – application of regulations made under section 245C of that 1995 Act on remote monitoring, to restricted movement requirements

Section 14, so far as inserting section 227ZH(1) of that 1995 Act – regulations making further provision in relation to restricted movement requirements

Section 14, so far as inserting section 227ZJ(2) of that 1995 Act – power to prescribe persons who must be consulted by a local authority in relation to the nature of unpaid work and other activities undertaken by offenders in its area

Section 30(3) – section 1A Crossbows Act 1987 -Power to prescribe documents valid for establishing the age of a purchaser

Section 31(4) – replacement section 141A(4) Criminal Justice Act 1988 -Power to prescribe documents valid for establishing the age of a purchaser

Section 72(7), so far as inserting section 40A(4) of the Antisocial Behaviour etc.(Scotland) Act 2004 –power to add to or otherwise modify the specification of ‘exploitation offences’

Section 79(3) – Power to make further provision about registration under section 120 of the Police Act 1997 by virtue of regulations made under section 120ZB

Section 81 – Amendment of section 28A of the Legal Aid (Scotland) Act 1986 - Power to enable the Scottish Legal Aid Board to employ solicitors for the purpose of providing criminal legal assistance

Section 86(9)(b) – Power to specify bodies which constitute an “investigating agency”

Section 114(3)(c) – Power to specify persons for the purpose of the code of practice on disclosure under section 114

Section 126(2) – new section 41(2)(h) Civic Government (Scotland) Act 1982 - Power to prescribe premises for which a public entertainment licence is not required

Schedule 1, paragraph 2(3) to (5) – Scottish Sentencing Council – procedure for appointment of members

The Committee may wish to find these powers acceptable and that it is appropriate they are subject to negative procedure.
Affirmative procedure

Section 14 (Community payback orders), so far as inserting section 227A(8) and (9) of the Criminal Procedure (Scotland) Act 1995 – power to change the powers of justice of the peace courts to impose requirements on an offender

Section 14, so far as inserting section 227J(3) of the Criminal Procedure (Scotland) Act 1995 – power to make regulations to allow justice of the peace courts to impose a level 2 unpaid work and other activity requirement

Section 14, so far as inserting section 227ZD(6) – power to amend maximum time periods relating to restricted movement requirements in relation to period in section 227ZD(3)

Section 19, inserting new section 9B(5) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 – power to modify the number of days specified in section 9B(1) of the 1993 Act (early removal of short-term prisoners from the UK)

Section 59, inserting section 18B(6) of the Criminal Procedure (Scotland) Act 1995 – power to prescribe lists of relevant offences

Section 79(2), inserting section 113BA(1) of the Police Act 1997 – power to amend the meanings of ‘criminal conviction certificate’; ‘central records’; ‘criminal record certificate’; ‘relevant matter’ and ‘enhanced criminal record certificate’ in Part 5 of that Act

The Committee may wish to find these powers acceptable and that it is appropriate they are subject to affirmative procedure.

Section 14 (Community payback orders) so far as inserting section 227I(6) of the Criminal Procedure (Scotland) Act 1995 – power to vary the minimum and maximum hours of unpaid work or other activity requirement

The Committee may wish to ask the Scottish Government to provide further explanation of the following—

- why the scope of the power requires to be drawn to permit any variation of either the minimum and maximum hours stated in section 227I(3), and the “100” figure in section 227I(4) and (5), rather than a power to vary within defined maximum and minimum limits

- given that this is a Henry VIII power and such a power where justifiable would usually be exercisable by affirmative procedure –particularly where concerned
with levels of maximum penalty – why it is justifiable that negative resolution procedure should apply here?

**Section 14, so far as inserting section 227K(3) of the Criminal Procedure (S) Act 1995 – power to vary the limits of the balance of activity within the unpaid work or other activity requirement**

The Committee may wish to ask the Scottish Government to provide further explanation of the following—

- why the power is required to amend subsection (2) in any respect instead of a power to specify different figures in subsection (2)(a) or (b); and

- given that this is a Henry VIII power enabling amendment of primary legislation which affects a type of sentencing why negative procedure is considered appropriate rather than affirmative procedure.

**Section 14, so far as inserting section 227ZB(12) of that 1995 Act – power to vary the maximum number of months in which a restricted movement order can have effect**

The Committee may wish to ask for confirmation whether the intention is that there is a single overall maximum period of 12 months for which a restricted movement requirement may last (subject to the ability to modify that period). If that is the case, the Scottish Government is asked why the maximum is specified in two places with a separate power to change each figure rather than providing the maximum in one place only – albeit that cross-reference to the maximum may be appropriate elsewhere. Does the provision of two separate powers not give rise to the theoretical risk that they may not be used to maintain parity?

**Section 18(2)(a)(iii) – power to prescribe by order the “prescribed period” for the purposes of certain sentences under Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007**

The Committee may wish to ask for an explanation, in relation to the width of the delegated power in section 18(2)(a)(iii) of the Bill—

- why the power is required to be taken to prescribe any new period whatever, instead of 15 days, and why the parameters of any new period could not be drawn within a minimum and maximum set out in primary legislation?
could the Government explain the “potentially significant” effects of the use of this power in relation to the sentencing of offenders, given that the period could be prescribed at less than 15 days, or substantially more than 15 days – up to a year as the DPM suggests?

Section 70(3), so far as inserting section 26G(1) of the Public Finance and Accountability (Scotland) Act 2000 – power to amend list of persons mentioned in that Act

The Committee may wish to seek clarification from the Scottish Government as to (a) the choice of procedure in relation to this power, and in particular why negative procedure has been preferred to affirmative, having regard to the terms of this power, including the consequences of being on the list, (b) the need for an unlimited power to modify Part 2A in respect of new bodies added to the list (including it would appear the ability to modify the purposes for which data matching may be conducted) and (c) why it is thought necessary for provision for an order under inserted section 26G(1) being able to include (in terms of 26G(2)) such incidental, consequential, supplementary or transitional provision as the Scottish Ministers think fit, and in particular to provide further explanation as to how and in what circumstances it is envisaged that the ancillary power under section 26G(2) might require to be used.

Section 82(1)(a) – Amendment to section 133 of the Criminal Justice Act 1988 - Power to specify further circumstances in respect of which compensation may be paid for a miscarriage of justice

The Committee may wish to consider asking the Scottish Government the following questions—

- The DPM simply states that the purpose of the power is to enable a statutory basis for the existing ex gratia payment scheme to be established. The Committee requests an explanation as to the scope of the current scheme and an explanation as to whether the powers sought extend beyond what is necessary to replicate the current non-statutory arrangements.

- The Scottish Government has not explained why it seeks to use delegated powers to provide a statutory basis for the extended scheme. Given that the scope of the existing statutory scheme is set out in primary legislation the Government is asked to explain why it considers it necessary to use delegated powers for the extended scheme.
Section 82(1)(d) - New section 133(4B) Criminal Justice Act 1988 - Guidance to assessors

The Committee may wish to consider asking the Scottish Government whether it has considered whether the guidance to be issued under this sub-section should be laid before Parliament, and to comment on whether such provision is or is not in its view appropriate given Parliament’s interest in ensuring the independence of assessors and the proper use of public funds.

Section 115 – Power to establish rules of court in relation to Part 6

The Committee may wish to ask the Scottish Government the following question—

Given that the Scottish Government refers to section 305 of the Criminal Procedure (Scotland) Act 1995 as the model for the power to be conferred on the High Court, why the power is an open power to make rules as may be considered necessary or expedient and not restricted to making rules of court or otherwise provision to regulate practice and procedure in relation to criminal proceedings?

Section 121(3) – Power to set mandatory conditions to licences granted under the Civic Government (Scotland) Act 1982

The Committee may wish to ask the Scottish Government the following question—

The DPM states that it is the Government’s intention that the power to prescribe mandatory conditions in respect of licenses under the Civic Government (Scotland) Act 1982 should be subject to affirmative procedure in line with the approach taken to alcohol licensing under the Licensing (Scotland) Act 2005. However, the Committee notes that new section 3A(3) provides for such orders to be subject to annulment. Can the Government clarify its intention and if the power is not to be subject to affirmative procedure to explain why it takes that view?

Section 129(4) – new section 27A Licensing (Scotland) Act 2005 - Power to prescribe those areas in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation

The Committee may wish to ask the Scottish Government the following questions—

- No justification is provided in the DPM as to why it is considered appropriate to use subordinate legislation to enable licensing boards to vary certain licence conditions. If consistency of application is the policy objective can the Scottish
Government explain why this cannot be achieved through primary legislation alone?

- The DPM explains that the present policy intention is to enable the restriction of the sale of alcohol at off-sales premises to persons under 21. If such a restricted policy objective is in view why is a broad discretionary power required? No justification for the breadth of the power is provided in the DPM. Can the Scottish Government provide such justification to the Committee?

Section 140(1) – Power to make provision for the imposition on relevant licence-holders of a social responsibility levy

The Committee may wish to ask the Scottish Government the following question—

Given that the power in section 140 is a significant revenue raising measure, why is it not considered appropriate for the general principles of the proposal (including how the levy is to be calculated and by whom it is proposed to be administered) to be set out in primary legislation leaving only administrative detail for subordinate legislation?

Sections 146 and 147 – ancillary provision

The Committee may wish to ask the Scottish Government for the following additional information—

- Why the DPM provides justification for the powers in section 146 on the basis that a test of “necessity or expediency” is to be applied to their exercise when in fact the Bill provides for a test of what is “appropriate”.

- Whether the Scottish Government considers the “appropriate” standard to be less onerous and why it has chosen this standard in the case of the broader ancillary powers contained in section 146 instead of “necessity or expediency”.

- To give its reasons for considering negative procedure as a sufficient level of parliamentary control in respect of modifications of the statute book using these powers where there is no textual amendment, particularly in the context of the subject matter of the Bill which impacts on individual rights and liberty.

Schedule 2, paragraphs 10(3) and (4) – power to prescribe the length of periods of detention for those under 21 years of age for the purpose of determining if they are serving “short-term custody and community sentences” or “custody and community sentences”
The Committee may wish to ask for an explanation, in relation to the width of the delegated power in paragraphs 10(3) and (4) of Schedule 2—

- why the power is required to be taken to prescribe any new period whatever, instead of 15 days, and why the parameters of any new period could not be drawn within a minimum and maximum set out in primary legislation?

- could the Government explain the “potentially significant” effects of the use of this power in relation to the sentencing of offenders, given that the period could be prescribed at less than 15 days, or substantially more than 15 days – as the DPM suggests?

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**Agenda Item 5**  
**Instruments subject to approval**

The Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (Scotland) (No. 2) Order 2009 (SSI 2009/draft)

The Community Right to Buy (Definition of Excluded Land) (Scotland) Order 2009 (SSI 2009/draft)

The Committee may wish to consider if it is content with these instruments.

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**Agenda Item 6**  
**Instruments subject to annulment**

The Community Right to Buy (Prescribed Form of Application and Notices) (Scotland) Regulations 2009 (SSI 2009/156)

The Crofting Community Body (Prescribed Form of Application and Notice) (Scotland) Regulations 2009 (SSI 2009/160)

The Committee may wish to consider if it is content with these instruments.

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**Agenda Item 7**  
**Instruments not laid before Parliament**

Act of Sederunt (Sheriff Court Rules Amendment) (Sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990) 2009 (SSI 2009/164)

The Committee may wish to consider if it is content with this instrument.
Schools (Consultation) (Scotland) Bill at Stage 1

1. The Subordinate Legislation Committee considered the above Bill on Tuesday 31 March and seeks an explanation of the following matters.

Section 20(1) - Ancillary provisions etc.

The Committee asks the Scottish Government why the power under section 20(1) to make ancillary provision makes specific reference to the ability to “elaborate” on any aspect of the procedure or to make provision as to functions, and in particular to provide further explanation as to how and in what circumstances it is considered that the provision contained in subsections (3) and (4), so far as it relates to the power conferred under section 20(1), might be used.

Section 22(2) - Commencement and short title

The Committee seeks clarification as to the provision contained in section 22(4)(a), with particular reference to what might be contemplated by the phrase ‘in connection with the commencement of this Act’ and for the Scottish Government to explain whether it is considered that such provision may amend other enactments, and if so, why no procedure is justified for such an order given the approach in section 20(6)(b).

2. Please email your response to the shared e-mail address above by 5.00pm on Tuesday 14 April 2009.

Shelagh McKinlay
Clerk to the Committee
14 April 2009

Dear Shelagh

Schools (Consultation) (Scotland) Bill at Stage 1

Thank you for your letter of 1 April addressed to Paul Johnston here regarding aspects of this Bill. Let me deal with the two matters in turn.

Section 20 (1) - Ancillary provisions etc

The regulation making provision in section 20(1) is confined to matters considered necessary or expedient for the purposes of or in connection with the Bill. Much of the Bill is concerned with establishing a new regime of consultation and decision making processes. The detail of such processes is often left to regulation but in this case, because the Bill is so focused on process, it was considered important that the substantive content of the new processes should be set out on the face of the Bill. Section 20(3) and (4) provide though for regulations to elaborate on any aspect of the processes in the first 17 sections of the Bill, or to include provision as to functions - but only of education authorities or the Scottish Ministers - and only in relation to this Bill. This is in line with the OED meaning of “elaborate” of adding more detail to something already said. These are essentially “future proofing” provisions. The Bill as drafted specifies sufficient detail concerning the new processes as to be self standing and operational without ‘requiring’ the making of regulations. Indeed, there is no immediate intention to make such regulations.

It may be though, either during Parliamentary consideration of the Bill or after commencement (as experience grows of how the new legislation is working in practice), that it is considered appropriate to elaborate on some aspect of the processes, at a level of detail more appropriate to subordinate legislation not least because such provision may require amendment from time to time to allow for changes in practice. Regulations would be likely to place new responsibilities, duties or functions on local authorities or the Scottish Ministers, as to how they are required to handle or conduct aspects of the processes. The Committee asks how and in what circumstances the provision contained in section 20(3) and (4) might be used. An example was given in the Delegated Powers Memorandum of specifying in
greater detail how education authorities should notify consultees of proposals under section 6 of the Bill. Other examples might include making further provision elaborating on the detail of the content of proposal papers or consultation reports under sections 4 or 10, or as to their publication and availability under sections 3 or 9, or as to when or where or how public meetings should be held under section 7.

Section 22(2) - Commencement and short title

Because consultation and decision making processes under the existing 1981 Regulations can currently span periods of several months it was considered a priority and matter of some importance that the Bill should signal clearly from the outset how it was intended that local authority consultations that straddled or might otherwise be impacted by the Bill's commencement, should be affected and dealt with. Therefore, although Bills often leave all transitional, transitory and saving provisions to be spelt out in a commencement order, in this case explicit such provisions are set out in Schedule 3. The purpose in so doing is to enable authorities to consider how best to plan and schedule consultations and to enable full Parliamentary engagement in the detail of the provisions. The intention was to ensure that the prospective change in legislation should not result in a period of time during which authorities could in effect not plan and engage in consultations because of uncertainty as to what would happen if the consultation and decision making processes were still under way at the time of the Bill's commencement.

The Committee seeks clarification as to the inclusion also in the Bill of the provision in section 22(4)(a). This is intended to allow for the possibility that as commencement approaches, there may be need to make provision which is additional to the arrangements set out in Schedule 3 in order to ensure that all circumstances which might obtain at the time of commencement are covered. The current 1981 Regulations specify 23 kinds of proposal which must be consulted upon, many of which are only rarely used and so there is little or no experience of what they may in practice entail. If such a rarely-conducted consultation were to be in progress at the time of commencement, that could occasion use of the provision in 22(4)(a), as indeed could some unforeseen aspect of any consultation underway at that time – something which might only become apparent relatively shortly before commencement, and which would warrant being specifically addressed in some form of additional transitional, transitory or saving provision. It is not considered that the 22(4)(a) provision would require direct amendment to the existing 1981 Regulations or other enactments. And it can be noted that the transitional, transitory and saving provision in paragraphs 3 to 6 of schedule 3 do not so amend any enactments.

I hope that these explanations and clarifications are helpful to the Committee.

Yours sincerely

CMR

COLIN M REEVES