SUBORDINATE LEGISLATION COMMITTEE

AGENDA

18th Meeting, 2009 (Session 3)

Tuesday 26 May 2009

The Committee will meet at 2.15 pm in Committee Room 4.

1. **Decision on taking business in private**: The Committee will decide whether to take item 6 in private.

2. **Criminal Justice and Licensing (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.

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

   - the Waste Batteries (Scotland) Regulations 2009 (SSI 2009/draft);
   - the Planning etc. (Scotland) Act 2006 (Consequential Amendments) Order 2009 (SSI 2009/draft);
   - the Town and Country Planning (Charges for Publication of Notices) (Scotland) Regulations 2009 (SSI 2009/draft);
   - the Adoption (Disclosure of Information and Medical Information about Natural Parents) (Scotland) Regulations 2009 (SSI 2009/draft);
   - the Licensing (Scotland) Act 2005 (Consequential Provisions) Order 2009 (SSI 2009/draft);
   - the Renewables Obligation (Scotland) Amendment Order 2009 (SSI 2009/draft);
   - the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2009 (SSI 2009/draft).

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

   - the St Mary’s Music School (Aided Places) (Scotland) Amendment Regulations 2009 (SSI 2009/181);
   - the Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009/182);
the Firefighters’ Pension Scheme Amendment (Increased Pension Entitlement) (Scotland) Order 2009 (SSI 2009/184);
the Local Government Pension Scheme Amendment (Increased Pension Entitlement) (Scotland) Regulations 2009 (SSI 2009/186);
the Education (Fees and Awards for EC Nationals and UK Returners) (Scotland) Regulations 2009 (SSI 2009/188);
the Education (Interest on Student Loans) (Scotland) Regulations 2009 (SSI 2009/189);
the Parental Responsibilities and Parental Rights Agreement (Scotland) Amendment Regulations 2009 (SSI 2009/191);
The Personal Injuries (NHS Charges) (Scotland) Amendment Regulations 2009 (SSI 2009/193).

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

   the Title Conditions (Scotland) Act 2003 (Commencement No.2) Order 2009 (SSI 2009/190).

6. **Hybrid Bills**: The Committee will consider correspondence from the Standards, Procedures and Public Appointments Committee.

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The papers for this meeting are as follows—

**Agenda Items 2-5**

Legal Brief
SL/S3/09/18/1 (P)

Summary of Recommendations
SL/S3/09/18/2

**Agenda Item 2**

Government response - Criminal Justice
SL/S3/09/18/3

**Agenda Items 3-5**

Government Responses
SL/S3/09/18/4

**Agenda Item 6**

Paper from the clerk
SL/S3/09/18/5 (P)
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  Criminal Justice and Licensing (Scotland) Bill

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 report to the lead committee that it welcomes the confirmation provided by the Government in its response that it shall bring forward amendments at Stage 2, to provide limits to the extent to which the minimum and maximum number of hours stated in section 227I(3) can be varied, and to provide limits to the extent to which the “100” figure in section 227I(4) and (5) can be varied.

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 report to the lead committee that it welcomes the Government’s confirmation that it shall bring forward amendments at Stage 2 to vary the powers as drafted in section 14 (so far as inserting new section 227K(3) of the 1995 Act). The Committee understands this to mean that instead of the power permitting the amendment of subsection (2) in any respect, it shall be a power to specify different figures in subsection (2)(a) or (b). The response also confirms that the amendments at Stage 2 shall provide for the application of affirmative resolution procedure, rather than negative 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 report to the lead committee that it welcomes the Government’s confirmation in relation to the delegated powers specified in section 14 of the Bill (inserting new section 227ZB(12) of the 1995 Act) that it shall bring forward amendments at Stage 2 to address the issue raised by the Committee’s question.

This would provide for a single overall maximum period of 12 months for a restricted movement requirement (subject to the ability to modify that period by affirmative regulations).

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 report to the lead committee—

• that the Government has indicated in its response that it will reconsider whether the power requires to be taken to prescribe any new period of custody, instead of 15 days, for the purposes of that section, and will consider whether the scope of this power could be narrowed by setting minimum or maximum limits;

• otherwise, the Committee draws its questions and the Government responses on the scope of, and reasons for, this delegated power to the lead committee in connection with its consideration of the Bill;

• the Committee is content that this power shall be subject to affirmative resolution procedure.

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 report to the lead committee—

• that the Government has indicated in its response that it will reconsider whether the power requires to be taken to prescribe any new period of custody, instead of 15 days, for the purposes of that section, and will consider whether the scope of this power could be narrowed by setting minimum or maximum limits;

• otherwise, the Committee draws its questions and the Government responses on the scope of, and reasons for, this delegated power to the lead committee in connection with its consideration of the Bill;
the Committee is content that this power shall be subject to affirmative resolution procedure.

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 take the view that, having obtained further explanation and justification from the Government, it may find the proposed power under section 70(3), in regard to inserted section 26G(1) of the Public Finance and Accountability (Scotland) Act 2000, to be acceptable in principle, and also that it is subject to negative resolution procedure.

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 draw to the attention of the lead committee and of the Parliament that the proposed power goes beyond what is strictly necessary to achieve the objective stated in the Scottish Government’s Delegated Powers Memorandum, namely to put the ex gratia scheme on a statutory basis, and that, in the opinion of the Committee, no adequate justification has been given by the Scottish Government for the power to extend the scheme beyond that currently operating.

Section 82(1)(d) - New section 133(4B) Criminal Justice Act 1988 - Guidance to assessors

The Committee may wish to note the commitment from the Scottish Government that any guidance issued under this power will be laid before the Parliament. The Committee may accordingly find the proposed power acceptable in principle and that it is subject to no parliamentary procedure.

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

The Committee may wish to draw the breadth and scope of the proposed power to the attention of the lead committee and of the Parliament. The Committee may also wish to report that the Committee considers that insufficient justification has been given by the Scottish Government for the need for a power in these terms, or why the scope of the proposed power should not be limited to matters of criminal practice.
or procedure or other matters within the remit of the High Court given that this is a power which is not subject to parliamentary procedure.

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

The Committee may wish to report to the lead committee that it welcomes the Government’s undertaking to bring forward an amendment at Stage 2 which will require the power setting mandatory conditions in respect of licences under the Civic Government (Scotland) Act 1982 to be subject to affirmative procedure.

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 draw the attention of the lead committee to the Government’s confirmation that it intends to remove section 129 at Stage 2.

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

The Committee may wish to draw the attention of the lead committee to the Government’s confirmation that it intends to remove section 140 at Stage 2.

Sections 146 and 147 – ancillary provision

The Committee may wish to report that it welcomes the Government's undertaking to amend section 146 so as to provide that any modification of enactments is subject to affirmative procedure.

The Committee may wish to report that it accepts section 147 and that only textual amendments will be subject to affirmative procedure but on the understanding that the Committee would expect the Government to bring forward measures in a form that attracts affirmative procedure where the measures impact on individuals’ rights or liberty.
Agenda Item 3   Draft instruments subject to approval

The Waste Batteries (Scotland) Regulations 2009 (SSI 2009/draft)

The Committee may wish to draw this instrument to the lead Committee, for its interest, insofar as it might be seen to involve matters of policy, and legal policy, in relation to the manner in which the instrument seeks to transpose the Batteries Directive, with particular reference to the provision made at regulations 7(4), 9 and 10.

The Committee may also wish to bring this instrument to the attention of the lead Committee and the Parliament, so far as the form and meaning of regulations 9 and 10 could have been made clearer, with reference to the date on which modifications to permit conditions is concerned, but that this lack of clarity is not considered to be such that it is likely to affect the operation of the instrument.

The Planning etc. (Scotland) Act 2006 (Consequential Amendments) Order 2009 (SSI 2009/draft)

The Town and Country Planning (Charges for Publication of Notices) (Scotland) Regulations 2009 (SSI 2009/draft)

The Adoption (Disclosure of Information and Medical Information about Natural Parents) (Scotland) Regulations 2009 (SSI 2009/draft)

The Licensing (Scotland) Act 2005 (Consequential Provisions) Order 2009 (SSI 2009/draft)

The Renewables Obligation (Scotland) Amendment Order 2009 (SSI 2009/draft)

The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2009 (SSI 2009/draft)

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

Agenda Item 4   Instruments subject to annulment

The St Mary’s Music School (Aided Places) (Scotland) Amendment Regulations 2009 (SSI 2009/181)

The Adoptions with a Foreign Element (Scotland) Regulations 2009 (SSI 2009/182)
The Firefighters’ Pension Scheme Amendment (Increased Pension Entitlement) (Scotland) Order 2009 (SSI 2009/184)

The Local Government Pension Scheme Amendment (Increased Pension Entitlement) (Scotland) Regulations 2009 (SSI 2009/186)

The Education (Fees and Awards for EC Nationals and UK Returners) (Scotland) Regulations 2009 (SSI 2009/188)

The Education (Interest on Student Loans) (Scotland) Regulations 2009 (SSI 2009/189)

The Parental Responsibilities and Parental Rights Agreement (Scotland) Amendment Regulations 2009 (SSI 2009/191)

The Personal Injuries (NHS Charges) (Scotland) Amendment Regulations 2009 (SSI 2009/193)

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

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**Agenda Item 5** Instruments not laid before Parliament

The Title Conditions (Scotland) Act 2003 (Commencement No.2) Order 2009 (SSI 2009/190)

The Committee may wish to consider if it is content with this instrument.
Dear Shelagh

Thank you for your letter of 5 May 2009.

You raised a number of questions in respect of the delegated powers within the Criminal Justice and Licensing (S) Bill. Your questions along with our responses are detailed below.

Section 14 (Community payback orders) so far as inserting section 2271(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 asks 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 2271(3), and the “100” figure in section 2271(4) and (5), rather than a power to vary within defined maximum and minimum limits

SG response

We accept the Committee’s observations and will bring forward amendments at Stage 2 to provide limits to the extent to which the minimum and maximum hours stated in section 2271(3) can be varied and to provide limits to the extent to which the “100” figure in section 2271(4) and (5) can be varied.

• 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?

SG response

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We consider that the variation of the number of hours within the defined minimum and maximum number of hours is a matter of detail which is unlikely to require a debate. However, the negative procedure instrument would still afford the Parliament the opportunity to debate variations if they had objections.

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 asks 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

SG response

We accept the Committee's observations and will bring forward amendments at Stage 2 to provide that these powers, as to be amended, will be exercisable by affirmative resolution procedure.

- 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.

SG response

Variation of the existing balance between the unpaid work and other activity requirement components of the order is a matter of detail and it was not considered that a debate in the Parliament would be required. However, the use of negative procedure still affords the Parliament the opportunity to debate any variation that they were opposed to.

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 asks 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?

SG response

We accept the Committee’s observations and will bring forward an amendment at Stage 2 so that the maximum is provided for in one place only.

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 asks 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?

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 asks 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?

SG response

The intention behind these powers is to set the length of sentence where the custody and community sentence provisions apply. It may prove, on the basis of future data (and in the light of the benefits of the investment in the prisons estate and the community payback strategy), that custody and community sentences are more effective for sentences of a longer period than the 15 days currently prescribed for. The power allows the demarcation line to be set on the basis of evidence but without the need for new primary legislation to allow the Scottish Ministers to respond effectively and promptly to changing circumstances in sentence management. The powers will also allow the Scottish Ministers to make changes, if required, to respond effectively to trends.

The affirmative resolution will require a full Parliamentary debate before the period, which would be evidence-based, could be prescribed. On that basis, we accept that this power could be narrowed without losing the desired effect by setting a limit beyond which the demarcation line could not be moved. Further consideration will be given to what that demarcation point might be. This maintains the desired degree of flexibility whilst we hope answering the Committee’s concern about the breadth of the power.

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 asks for an explanation, in relation to the width of the delegated power in section 18(2)(a)(iii) of the Bill—

- 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?
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 asks for an explanation, in relation to the width of the delegated power in paragraphs 10(3) and (4) of Schedule 2—

• 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.

SG response

The powers would have no effect in relation to the sentence handed down to offenders. It is not about introducing a new sentencing option but rather is about managing offenders from the beginning of their sentence through to the end. It will provide a workable and proportionate sentence management regime that will reflect the risk and needs of all offenders and focus on reducing reoffending. The new measures will see all offenders subject to some form of restriction for the full length of the sentence whether it is being served in custody or in the community on licence.

In practice this will mean that offenders who receive a sentence of below the demarcation line will be released on licence at the halfway point of their sentence but will be restricted and supported in the community for the second part of the sentence. For offenders who receive a sentence above the demarcation line, their suitability for release at the end of the custody part of the sentence will be informed by the joint risk assessment and on release he or she will be subject to statutory supervision by a criminal justice social worker. The level of supervision and intervention will vary from offender to offender and will be informed, as above, by the nature of the offence and the offender’s response to work begun in custody.

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 seeks 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.

SG response

As noted in the Delegated Powers Memorandum, the list of bodies in section 26C is fairly comprehensive, and would automatically include any new public bodies whose accounts are audited by the Auditor General. The power is a narrow one to allow for additional public
bodies to be added in future. It can apply to a limited range of bodies, i.e. those whose functions are functions of a public nature, or include such functions, but which are not automatically covered by virtue of having their accounts audited by the Auditor General. In light of that narrowness, negative procedure is considered appropriate. We note that the related powers for England, Wales and Northern Ireland inserted by the Serious Crime Act 2007 are subject to draft affirmative procedure. However those powers are wider, and include power to add further purposes for which data matching can be used.

The power to modify the application of Part 2A in relation to bodies that are added, and to make incidental, consequential &c provision gives flexibility and is considered necessary so that appropriate arrangements can be made for particular bodies. As the Committee has identified, this would include power to modify Part 2A so that data cannot be used for certain data matching circumstances. As noted above, the limited range of bodies in respect of which the power could be used are effectively those at the fringes of the public sector, for which the full data matching provisions may not be appropriate. Without this power a body which has only limited public functions may not be willing to come within the scope of section 26C, requiring reliance instead on the voluntary provision of data under section 26B. While section 26C disapplies restrictions on disclosure of data, the power to make incidental or consequential provision could be useful to remove any apparent inconsistencies in other legislation or instruments.

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 asks 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.

SG response

The circumstances in which an individual may be eligible for compensation under the ex gratia scheme were set out in a statement by the then Secretary of State (Malcolm Rifkind) in a Written Answer to a Parliamentary Question in January 1986 (Hansard, 23 January 1986, cols 237-8). This statement is similar in its content to the one made by the then Home Secretary in November 1985 (Hansard, 29 November 1985, cols 689-90).

The Secretary of State stated that he was-

"prepared to pay compensation to people who ... have spent a period in custody following a wrongful conviction or charge, where I am satisfied that this has resulted from serious default on the part of a member of a police force or of some other public authority; and there may be exceptional circumstances that justify compensation in cases outside these categories. I will not, however, be prepared to pay compensation simply because at the
trial or on appeal the prosecution was unable to sustain the burden of proof beyond reasonable doubt in relation to the specific charge that was brought."

As set out in the Explanatory Notes, this power will be used to replace the ex gratia scheme by placing it on a statutory footing with the existing statutory scheme. It is intended to correspond to the existing ex gratia criteria. Strictly, the power is not limited to placing the ex gratia scheme on a statutory basis, and no need has been identified to do so – Ministers may in future wish to recognise further circumstances in which compensation should be available, and without some flexibility in the power the only way to do so would be through the creation of another ex gratia scheme.

We anticipate that in preparing an order under this power, detailed consideration will have to be given to the terms used in the 1986 Written Answer, eg what constitutes a “public authority” and “exceptional circumstances”, rather than simply repeating the terms of the written answer verbatim. That might better be done in secondary legislation. A distinction can also be drawn between the provisions of the existing statutory scheme, which are required to meet international obligations, and those of the ex gratia scheme which, to the extent that they go beyond the statutory scheme, are not required by international obligations and which could currently be modified or revoked by Ministers at will. Placing the ex gratia scheme on a statutory basis by way of an order making power retains some of this flexibility, but introduces an element of Parliamentary control that is currently absent.

Section 82(1)(d) - New section 133(4B) Criminal Justice Act 1988 - Guidance to assessors

The Committee asks 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.

SG response

We do not consider that a statutory requirement to lay guidance before the Parliament is necessary. As set out in the Explanatory Notes, it is necessary to have a statutory basis for this guidance as the assessor is discharging a quasi-judicial role. Doing so provides greater transparency. We are however content to give a commitment that any guidance that is issued under this power will be laid before the Parliament.

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

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?

SG response

We have reflected on our comment that section 115 “mirrors similar provision” in section 305 of the 1995 Act. It does not actually “mirror” that provision, and on reflection we consider that this is potentially misleading.

In preparing the draft Bill, we considered whether section 305 was sufficient for our purposes and considered that it was appropriate to create a new power. We required to consider what
powers would be necessary given that this is the first time the Disclosure scheme has been put into statute and concluded that we needed flexibility to enable the High Court to do everything we thought it would be likely to require to do in ensuring the statutory scheme worked efficiently. In any event we consider that section 115 is not an entirely open power in that it is limited by the wording of section 115 to only those aspects required in consequence of or giving full effect to, only Part 6 itself, which deals only with the Disclosure of information in criminal matters.

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

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?

**SG response**

We can confirm that it is our intention that the affirmative procedure should apply and we will bring forward an amendment at Stage 2.

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

- 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

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?

**SG response**

*In a letter to the Justice Committee and Health Committee on 24 March 2009, we advised of our intention to introduce a new health bill to take forward provisions on a range of measures, including those currently set out in sections 129 and 140 of the Bill. As a consequence, we intend to seek to remove these sections from the Bill at Stage 2.*
Sections 146(2) and 147(2) – ancillary provision

The Committee asks the Scottish Government for the following additional information—

- 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.

**SG response**

*We can appreciate the Committee's concern that the Bill deals with the rights and liberty of individuals. We have considered again the question of the appropriate level of parliamentary scrutiny in relation to orders under sections 146 and 147 which would modify the effect of – but not textually amend or repeal – enactments.*

*Given the subject matter of this Bill we acknowledge that the effect of a modification could be just as significant as the effect of a textual amendment. We think that there is a case for adjusting the level of scrutiny in relation to section 146 and we will bring forward amendments at Stage 2 to increase the level of parliamentary scrutiny in any case where an enactment is modified.*

*In our view, however, the position is different in relation to section 147. In that case, the modification is made in the context of a move from the old law to the new. The modification is temporary in nature and it is very focused and tightly drawn. The power is exercisable only for transitory, transitional or saving purposes and it is clearly linked to the coming into force of a particular provision of the Bill. We consider that, for these reasons, the current level of parliamentary scrutiny is appropriate.*

I hope this is helpful.

Yours sincerely

Philip Lamont
Criminal Justice and Licensing (S) Bill Team

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SUBORDINATE LEGISLATION COMMITTEE

18th Meeting, 2009 (Session 3)

Tuesday 26 May 2009

Scottish Government Responses

Waste Batteries (Scotland) Regulations 2009 (SSI 2009/draft)

On 14th May the Scottish Government was asked:

1) to clarify (and with reference to the requirements of the Batteries Directive) the basis upon which 1st January 2010 is identified, within regulations 7(4), 9 and 10, as the relevant date for the purposes of the matters to which the provisions concerned relate; and

2) in regard to regulations 9 and 10, which refer to licences or permits which are in force on 1st January 2010 being modified (so as to include new conditions, as specified) to indicate when those modifications are to take effect, having regard to the regulations themselves coming into force on 6th July 2009 and, in particular, in the event that it is intended that the modifications concerned are only to take effect from 1st January 2010, whether it is considered that this is sufficiently clear from the terms of regulations 9 and 10 as drafted.

The Scottish Government responds as follows:

1. The date of 1st January 2010 is not referred to in the Directive itself. It has been settled on by the Scottish Government in order to ensure that economic operators are able to make alternative arrangements for disposal of industrial and automotive batteries before banning incineration and landfill of them (especially as breach of permit conditions banning incineration/landfill, as with breach of other permit conditions, will be a criminal offence). Suitable alternatives will not be fully available until the producer responsibility arrangements required by the Directive are in place and operating in the UK.

A copy of the (UK) Waste Batteries and Accumulators Regulations 2009 is attached. The provisions of these regulations relating to producer responsibility schemes throughout the UK came into force on 5th May. The prohibition on landfill and incineration of waste industrial and automotive batteries in England and Wales will come into force on 1st January 2010, at the same time as our equivalents and following an interval which will allow sufficient time for the producer responsibility schemes to get up and running (see regulation 1(2) of the UK Regulations).

It is accepted that the date of 1st January 2010 represents late transposition of the relevant provisions of the Batteries Directive (as indeed does the coming into force date of 6th July 2009 for the Regulations as a whole, bearing in mind that the Directive deadline for transposition was 26th September 2008).
We do not consider that anything turns on the fact that the UK Regulations have different coming into force dates, whereas these regulations have one coming into force date but with the text of the relevant provisions on landfill and incineration specifying that the bans only take effect from 1\textsuperscript{st} January 2010. In both cases, the relevant obligation under the Directive is fully transposed, but from a date which amounts to late transposition. In the case of the Scottish regulations, the late transposition can be seen from the text of the provision itself, whereas in the UK regulations it is necessary to look at the regulation which deals with commencement, but the result is the same. We note that there are precedents for including an effective date amounting to late transposition in the text of the provision itself. For example, regulation 12B of the Waste Management Licensing Regulations 1994 (as inserted by regulation 6 of the Waste Management Licensing Amendment (Waste Electrical and Electronic Equipment) (Scotland) Regulations 2007) places a duty on SEPA in relation to the granting or variation of site licences on or after 30\textsuperscript{th} March 2007, although the transposition deadline for the WEEE Directive (2002/96 EC; O.J. L 37, 13.12.2003, p.24) was 13\textsuperscript{th} August 2004.

2. It is intended that the modifications to permit conditions will take effect from 1\textsuperscript{st} January 2010.

And, as the licence or permit requires to be in force on 1\textsuperscript{st} January 2010 in order to be modified, we consider the Regulations are clear that the relevant modifications cannot take place until 1\textsuperscript{st} January 2010. On 6\textsuperscript{th} July 2009, it cannot be known whether the licence or permit will be in force on 1\textsuperscript{st} January 2010. Where regulations 9 and 10 say that the licence or permit “is modified”, that clearly means modified on 1\textsuperscript{st} January 2010. The question is whether there is any possibility that the modification might take place on 1\textsuperscript{st} January 2010 but have effect from 6\textsuperscript{th} July 2009- in other words, that the “new” permit condition inserted on 1\textsuperscript{st} January 2010 might be “new but retrospective”.

We do not consider that regulations 9 and 10 can be interpreted in this way, and this is not the Scottish Government’s intention. The “new” conditions to be inserted on 1\textsuperscript{st} January 2010 are expressed prospectively and we do not think that backdating these conditions because the regulations came into force earlier would be a natural reading of regulations 9 and 10. In any case, breach of a licence or permit condition is a criminal offence. (See section 33(1)(a) and (b) and (6) of the Environmental Protection Act 1990 for waste management licences and regulation 30(1)(b) of the Pollution Prevention and Control (Scotland) Regulations 2000). The effect of regulations 9 and 10 is therefore to criminalise the landfill or incineration of waste industrial and automotive batteries by holders of the relevant licences and permits. We do not think there is any need to specify that this is not intended to apply retrospectively, so as to penalise action taken before the permit was actually modified. Even where retrospective application is competent, the intention to provide for it needs to be clearly indicated.