SUBORDINATE LEGISLATION COMMITTEE

AGENDA

34th Meeting, 2010 (Session 3)

Tuesday 7 December 2010

The Committee will meet at 2.15 pm in Committee Room 6.

1. **Decisions on taking business in private:** The Committee will decide whether to take items 6, 7, 8 and 9 in private.

2. **Instruments subject to approval:** The Committee will consider the following—
   
   the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2010 (SSI 2010/370).

3. **Draft instruments subject to approval:** The Committee will consider the following—
   
   the Sale of Tobacco (Registration of Moveable Structures and Fixed Penalty Notices) (Scotland) Regulations 2010 (SSI 2010/draft);
   the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2011 (SSI 2010/draft).

4. **Instruments subject to annulment:** The Committee will consider the following—
   
   the Beef and Veal Labelling (Scotland) Regulations 2010 (SSI 2010/402);
   the Community Health Partnerships (Scotland) Amendment Regulations 2010 (SSI 2010/422).

5. **Instruments not laid before the Parliament:** The Committee will consider the following—
   
   the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 6, Transitional and Savings Provisions) Order 2010 (SSI 2010/413 (C. 28));
   Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendment) (No .2) 2010 (SSI 2010/416);
6. **Reservoirs (Scotland) Bill**: The Committee will consider the contents of a draft report.

7. **Certification of Death (Scotland) Bill**: The Committee will consider the contents of a draft report.

8. **Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Bill**: The Committee will consider the contents of a draft report.

9. **Forth Crossing Bill**: The Committee will consider the contents of a draft report.

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The papers for this meeting are as follows—

Legal Brief (private) SL/S3/10/34/1
Summary of Recommendations SL/S3/10/34/2

**Agenda Items 2, 3, 4 and 5**

Instrument Responses SL/S3/10/34/3

**Agenda Item 6**

**Reservoirs (Scotland) Bill (as introduced)**
Draft Report (private) SL/S3/10/34/4
Correspondence from the Scottish Government SL/S3/10/34/5

**Agenda Item 7**

**Certification of Death (Scotland) Bill (as introduced)**
Draft Report (private) SL/S3/10/34/6
Correspondence from the Scottish Government SL/S3/10/34/7

**Agenda Item 8**

**Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Bill (as introduced)**
Draft Report (private) SL/S3/10/34/8
Correspondence from the Scottish Government SL/S3/10/34/9

**Agenda Item 9**

**Forth Crossing Bill (as amended at Stage 2)**

**Supplementary Delegated Powers Memorandum**
Draft Report (private) SL/S3/10/34/10
Summary of Recommendations

The Committee will be invited to consider the following recommendations at the meeting. Decisions are a matter for the Committee.

**Agenda Item 2  Instruments subject to approval**

The Sexual Offences Act 2003 (Remedial) (Scotland) Order 2010 (SSI 2010/370)

The Committee may wish to take the view that a satisfactory response has been provided by the Scottish Government in relation to the matter raised concerning the interaction between paragraphs (a) and (f) of inserted section 88C(4), and to be content with this instrument.

The Committee draws to the attention of the lead committee section 88H and the power to amend the maximum notification periods. The Committee notes that the power can be used to extend the period as well as to shorten it and suggests the lead committee may wish to explore the need for this.

**Agenda Item 3  Draft instruments subject to approval**

The Sale of Tobacco (Registration of Moveable Structures and Fixed Penalty Notices) (Scotland) Regulations 2010 (SSI 2010/draft)

The Committee may wish to report that-

(1) it considers that the meaning and effect of the definition of “moveable premises” in regulation 1(2) when read with regulation 2 could have been clearer. This is in the respect that-

(a) regulation 2 applies the whole of Chapter 2, Part I of the Act to “moveable premises” (subject to modifications in regulation 3 and 4 concerning section 11),

(b) “moveable premises” are defined as restricted to premises “from which the applicant proposes to carry on a tobacco business”, but

(c) sections 13-16 and 19 – 21 of the Act extend to premises where such a business is carried on, rather than proposed to be carried on;
(2) it draws to the attention of the lead committee considering the instrument the effect of regulation 7 and the Schedule to the Regulations. Regulation 7 and the Schedule prescribe amounts of fixed penalty for any offences under Chapters 1 and 2 of Part 1 of the Act (other than sections 5 and 7) which continue after 5 contraventions within a 2 year period. This is in increments of £200 for each additional previous enforcement action, and without any maximum amount. However the offences to which the fixed penalty scheme applies in sections 1, 3, 4, 6, and 20 all have a maximum level of fine with reference to the standard scale of fines. This could result in a fixed penalty that is greater than the limit set by the Parliament for the criminal offence.

(3) it draws to the attention of the lead committee the effect of regulation 7(4), as explained in the response from the Government. “Enforcement action” for the purpose of the escalating amounts of fixed penalties in the Schedule for tobacco retailing offences under Part 1 of the Act shall include any convictions for the offences under sections 5 and 7 of the Act (purchase of tobacco by a person under 18; confiscation of tobacco products from persons under 18), in the previous 2 years.

The Committee also notes in that respect that it appears, while section 27(2) of the Act prevents a fixed penalty notice being issued to anyone under 16 years of age, that the tobacco retailing provisions and offences in Chapter 2 appear have no restrictions in relation to age.

The Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2011 (SSI 2010/draft)

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

Agenda Item 4 Instruments subject to annulment

The Beef and Veal Labelling (Scotland) Regulations 2010 (SSI 2010/402)

The Committee may wish to report that if the intention is that enforcement powers should not be available in relation to domestic premises then this could be more clearly expressed in regulation 7(1).

The Committee may wish to report that it is content with the explanation provided by the Scottish Government as regards the enforcement notice procedure.
The Community Health Partnerships (Scotland) Amendment Regulations 2010 (SSI 2010/422)

The Committee may wish to be content with the Regulations.

Agenda Item 5  Instruments not laid before the Parliament

The Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 6, Transitional and Savings Provisions) Order 2010 (SSI 2010/413 (C. 28))

The Committee may wish to report that, while the Committee accepts this Order is intra vires, in general where an enabling Act provides for a particular power to make transitional or savings provisions in connection with the coming into force of the provisions of the Act (such as in section 205(1)), then it would expect that power to be used to make such provisions, rather than any more general powers (such as in section 201(2)(a)).

The Committee notes that, as a result of the Government’s choice of power, there is no Parliamentary scrutiny of the ancillary provisions when section 205(1) provides for negative procedure.

Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No. 2) 2010 (SSI 2010/416)

Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2010 (SSI 2010/417)

Act of Adjournal (Criminal Procedure Rules Amendment No. 4) (Miscellaneous) 2010 (SSI 2010/418)

The Sheep Scab (Scotland) Order 2010 (SSI 2010/419)

The Committee may wish to consider if it is content with these instruments.
INSTRUMENTS SUBJECT TO APPROVAL

The Sexual Offences Act 2003 (Remedial) (Scotland) Order 2010 (SSI 2010/370)

On 25 November 2010 the Scottish Government was asked:

In relation to inserted section 88C(4) of this instrument, which sets out matters which must be taken into account by the relevant chief constable when deciding whether to make a notification continuation order, the Scottish Government is asked whether the reference in paragraph (f) to offences ‘committed’ in terms of paragraph (a) is accurately stated?

In particular, is it not the case that some of the matters which are referred to in subparagraphs (i) to (iv) of paragraph (a) relate to relevant conduct which was objectionable having been committed, as distinct from an offence (or offences) actually having been committed? If that is the case, is it sufficiently clear from the wording of paragraph (f), in the reference which it makes to the offence (or offences) in paragraph (a) which was (or were) committed, that a relevant chief constable is to take account of the seriousness of the offence (or offences) described in all four subparagraphs (i) to (iv) of paragraph (a), albeit these may not necessarily relate to an offence or offences which has or have been committed?

The Scottish Government responded as follows:

It is clear from section 88C(4)(a)(i) to (iv) that a relevant sex offender may commit an unlawful act or conduct which constitutes an offence but will not in all cases be convicted of that offence. All categories of relevant sex offenders who fall into subparagraph (a) will have carried out unlawful criminal conduct which constitutes an offence. The reference to “offence” in section 88C(4)(a) therefore catches any unlawful act or conduct which constitutes an offence, irrespective of whether the relevant sex offender is convicted of that offence. The reference to commission of the “offence (or offences)” in sub-paragraph (4)(f) refers back to the seriousness of the offence which the relevant chief constable will be considering under sub-paragraph (4)(a). Therefore, the reference to commission of the offence or offences in sub-paragraph (f) is referring to the time at which the unlawful conduct which constitutes the offence was committed.

Accordingly, the Scottish Government take the view that it is clear from section 88C(4)(a) and (f) that a relevant chief constable is required to take into account the age of the sex offender at the time he or she committed unlawful conduct which constituted the offence which they are considering under subsection 4(a), irrespective of the disposal that was made in relation to that offence. Thus, if a sex offender committed the offence of rape but was found to have a disability and was not convicted of this offence, it is clear that the relevant chief constable would be required to take into account the age of the relevant sex offender at the time at which that offender committed that rape.
DRAFT INSTRUMENTS SUBJECT TO APPROVAL

The Sale of Tobacco (Registration of Moveable Structures and Fixed Penalty Notices) (Scotland) Regulations 2010 (SSI 2010/draft)

On 26 November 2010 the legal adviser asked for an explanation of certain matters on the initial draft instrument, laid on 22 November. The issues raised and the responses are appended in the Annex.

As a result of our enquiries, the draft Regulations were withdrawn and re-laid on 1 December. It is proposed that no further questions are raised on the corrected draft.

The re-laid draft corrects the instrument in relation to our questions (3) and (4). Having considered the response to our Question (1), in our view the Committee could report a matter in connection with that issue. (The re-laid draft Regulations are not amended in relation to that issue.)

There are 2 areas where we suggest the Committee could draw certain matters on the effects of the provisions, to the attention of the lead committee, as detailed below. One of these relates to the response to our Question (2).
INSTRUMENTS SUBJECT TO ANNULMENT

The Beef and Veal Labelling (Scotland) Regulations 2010 (SSI 2010/402)

On 25 November the Scottish Government was asked:

1. *Can the Government explain why the powers of entry conferred in regulation 7(1) permit entry to any premises whereas warrant for access may only be granted for non-domestic premises under regulation 7(3) and the previous regulations (SSI 2008/418) did not authorise access to domestic premises.*

2. *Can the Government explain why this is considered to be compatible with article 8 ECHR?*

3. *Can the Government explain why contravention of a notice served under regulation 5 prohibiting the exposure for sale of beef or veal until it has been relabelled or processed has not been made an offence whereas contravention of an equivalent notice under SSI 2008/418 was a criminal offence?*

4. *Does regulation 5 provide an effective enforcement regime sufficient to implement the EU obligations to which these regulations relate in the absence of any sanction for non-compliance?*

The Scottish Government responded as follows:

Given the links between questions 1 and 2 and, separately, 3 and 4, I thought it might be helpful if my answers would deal with them together. I hope that this is ok.

**Questions 1 and 2 - regulation 7: powers of entry to premises**

Although there is a general power of entry to premises under regulation 7(1), if admission is refused or where any of the other circumstances mentioned in regulation 7(3) apply, then a judicial warrant is required. Reading regulation 7 as a whole, paragraph (3)(a), however, makes it clear that a warrant for forceable entry can only be sought in respect of entry to premises other than those used as dwellings. So as with the 2008 SSI, there is, in effect, no right of forceable entry to dwellings. In any event, given the purpose of the Regulations is to ensure enforcement of applicable EU rules concerning labelling and marketing of beef and veal, powers of enforcement in practice would only be used in respect of commercial premises, for example food retailers, and not in respect of dwellings. There is therefore no intention to change enforcement policy in that regard and, for the avoidance of any doubt, the guidance for authorised officers, which is in the course of being updated in light of these Regulations, will make it clear that the powers of entry apply in respect of premises other than dwellings. In any event, as with the exercise of any enforcement powers under the Regulations, these would of course have to be exercised compatibly with relevant ECHR rights, including article 8. So we are therefore satisfied that the powers as drafted are ECHR compatible.

**Questions 3 and 4 - regulation 5: service of notices**

By virtue of regulation 4(1), non compliance with the applicable EU labelling and marketing requirements (as listed) is a criminal offence. Regulation 5(1), however, confers a power on an authorised officer to serve a non compliance notice in appropriate cases, where the officer has reasonable suspicion that there is non compliance. This would give the operator an opportunity to take steps to rectify the breach, for example, by re-labelling the beef or veal, subject to a right of review. Failure
to take steps to remedy the underlying breach could result in the matter being reported to the prosecutor to consider whether there should be prosecution for the underlying offence in regulation 4(1) for non-compliance with the applicable EU requirements. In the circumstances, it was therefore considered unnecessary to provide for an additional criminal sanction for non-compliance *per se* with the terms of any notice. In cases of more serious breach, it would however be open to authorised officers to directly refer the case to the procurator fiscal to consider prosecution for the underlying offence, without requiring to serve a notice. We think this is sufficient overall to ensure effective enforcement of the applicable EU Rules.
INSTRUMENTS NOT LAID BEFORE THE PARLIAMENT

The Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 6, Transitional and Savings Provisions) Order 2010 (2010/413 (C.28))

On 26 November 2010, the Scottish Government was asked:

Could it be explained why, in relation to the transitional and savings provisions in articles 3 to 8, the powers contained in section 205(1) of the Criminal Justice and Licensing (Scotland) Act 2010 have not been relied upon, as that subsection provides the tailored power to make transitional and saving provisions in connection with the coming into force of the provisions in the Act (and by section 201(3) the use of this power is subject to negative resolution procedure)?

The Scottish Government responds as follows:

Section 206(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (“the Act”) provides that certain provisions of the Act are to be commenced by the Scottish Ministers by order. Such an order is not subject to any parliamentary procedure (section 201(3) of the Act). Section 201(2)(a) of the Act provides that any power to make an order under the Act, and that would include a commencement order under section 206(1), includes the power to make “incidental, supplementary, consequential, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient”.

The Scottish Government takes the view that this power is sufficient to make transitional and savings provisions in a commencement order, where those provisions relate directly to the coming into force of the Act. The Scottish Government considers that the transitional and saving provisions in articles 3 to 8 of this Order are necessary to make clear when and how the provisions of the Act come into force and it is therefore appropriate to include them in this Order rather than a separate order made under section 205(1).
ANNEX

Questions raised by legal adviser on initial draft Sale of Tobacco (Registration of Moveable Structures and Fixed Penalty Notices) Regulations 2010, and Government responses

Questions

(1) Regulation 2 applies Chapter 2 of Part 1 of the Act to “moveable premises”, which are defined in regulation 1(2) as premises consisting of a vehicle or other moveable structure from which the applicant proposes to carry on a tobacco business, but excluding a vessel.

Could the meaning or effect of this definition be clearer, so far as it appears that sections 13, 14, 15, 16, 19, 20 and 21 in Chapter 2 extend to premises at which a tobacco business may be carried on, rather than proposed to be carried on?

(2) Regulation 7(4) defines previous “enforcement action” for the purpose of increases in the level of fixed penalties as set out in the Schedule. Is it intended (as paragraph (4) provides) that enforcement action includes the conviction of any offence under Chapter 1 or 2 of Part I of the Act, or is it intended that this should exclude any conviction for offences under sections 5 or 7 of the Act?

(3) Should the removal of the words in regulation 3(1) also remove “the” where it first occurs in section 11(2)(b) and (c) of the Act? What is the effect of this apparent error considered to be?

(4) In regulation 4(ii), is it intended to make the provision that “address” in section 13(1)(a) is to be read in accordance with the substitutions in regulation 3, so far as those substitutions refer to addresses of premises where a tobacco business is carried on or proposed, but the reference in that paragraph (a) (when read with the references to “name and address” in section 11) appear to refer to a registered person’s home address?

The Scottish Government responded –

Question 1

“In our view the definition of “moveable premises” as those from which the applicant “proposes to carry on a tobacco business” is appropriate.

While Regulations made under section 24 of the 2010 Act may modify any part of Chapter 2 to apply to moveable structures, these Regulations relate to the application process provided for in section 11 of the Act. The definition reflects the wording in section 11(2)(b), 11(2)(c), 11(4)(b) and 11(5) that the applicant “proposes to carry on a tobacco business”.

Question 2

Regulation 7 provides for the amount of the fixed penalty for offences under Chapter 1 and 2 of the Act other than offences under section 5 (purchase of tobacco by a person under 18) and section 7 (confiscation of tobacco products from persons under 18). Other than the purchase of tobacco on behalf of under 18s these are the tobacco retailing offences. It is only in respect of these fixed penalties for these offences that
the escalator applies. The other limitation is in section 27(2) which provides that a person may only be given a fixed penalty if aged 16 or over.

In view of this we consider it would be highly unusual in practice for circumstances to arise where a person is being given a fixed penalty notice for one of these offences and to have a conviction for an offence under sections 5 or 7 within the previous two years.

If however those unusual circumstances did arise, we can confirm that the policy view at present is that given the person has again offended, any convictions for the offences under sections 5 and 7 in the previous two years are to count towards the escalation of the penalty for the offence which he or she has now committed.

Question 3
We agree that the word “the” where it first occurs should also be substituted out of section 11(2)(b) and (c).

Whilst our view is that the error does not impact on the effect of the regulations (the meaning and effect is still clear), we intend to withdraw the instrument and re-lay it in the light of your Question 4, and we will therefore take the opportunity to substitute the word “the” out of section 11(2)(b) and (c) in regulation 3.

Question 4
We agree that the reference in section 13(1)(a) of the Act is to a person’s personal address rather than the address of the premises from which they conduct their tobacco business. Accordingly this reference should not be read subject to the substitution in Regulation 3.

As noted above, we intend to withdraw this instrument and re-lay it so that we can remove the reference to section 13(1)(a) in regulation 4. Our intention is to re-lay this instrument on 1st December. As the changes outlined above are the only substantive changes which will appear in the re-laid version, we hope it is possible for the re-laid version of the Regulations to be considered by the Committee as originally planned on 7 December."
RESERVOIRS (SCOTLAND) BILL – STAGE 1 DELEGATED POWERS

I am writing further to the Committee Clerk’s letter of 16 November to Elspeth MacDonald in which you requested an explanation of certain delegated powers for the above Bill. I hope this response will assist members with their scrutiny.

Section 1(4) – Power to specify whether individual structures or combinations of structures are to be treated as a controlled reservoir

The Committee asks the Scottish Government to explain why this power by order is subject to negative resolution procedure, when the power in section 1(6)(a) is proposed to be subject to draft affirmative procedure, given that the effect of both orders would be to amend the Bill to include reservoirs (or combinations of them) in the Bill controls, though not meeting the 10,000 cubic metre threshold. The Committee asks why it is not considered appropriate to include any minimum cubic metre threshold.

The power in s.1(6)(a), if used, could significantly alter the number of reservoirs subject to the Act. Alterations to the volume threshold under that section would have universal application, potentially bringing a large number of reservoirs under the regime of the Act (if lowered) or excluding large numbers from it (if raised). That power is accordingly subject to affirmative procedure.

The power in s.1(4), by contrast, is intended only to be used in exceptional circumstances in relation to individual structures where, notwithstanding that the reservoir in question is below the volume threshold, a particular risk is identified.

I do not consider it appropriate to require an affirmative resolution of the Scottish Parliament to bring individual reservoirs within the regulatory regime of the Bill.

I do not consider it appropriate to specify a minimum cubic metre threshold because the purpose of the provision is to allow the Scottish Ministers to provide for individual exceptions to the minimum threshold of 10,000 cubic metres already set by section 1(2).

Section 1(6)(a) – Power to substitute a different volume of water to the 10,000 cubic metres of water currently specified

The Committee asks the Scottish Government why, although the power to change the 10,000 cubic metre threshold for controlled reservoirs may be required if engineering advice on the minimum threshold changes in future, it is considered necessary to have an unqualified power to amend the Bill with any different volume, without—

(a) any minimum or maximum threshold being stated, or
(b) any requirement to have regard to advice from ICE, for example, or the safety matters set out in section 1(5)

It is considered necessary to have the power to amend the Bill by the substitution of a different threshold volume to “future-proof” the Bill against changes in our understanding of the risk that reservoirs may pose. The ethos of the Bill is that regulation should be risk-based, so the Bill sets a relatively low threshold (in comparison to the 1975 Act) above which SEPA must carry out an assessment of the risk posed by each reservoir. However, scientific understanding of the risk reservoirs pose and public acceptance of levels of risk can change over time, so the power to alter the threshold has been included. The exercise of that power will be subject to Parliamentary scrutiny under the draft affirmative procedure.

It would be difficult to state with any precision the volume below which no risk whatsoever could be posed, or the volume above which there will always be a risk, without those figures being at such extreme ends of the spectrum as to be meaningless, so no maximum or minimum threshold has been specified.

Ministers would no doubt wish to consult the Institution of Civil Engineers or an equivalent body before making any such change. I am happy to consider amending the Bill such that the power has to exercised with regard to advice from ICE.

Section 25 – Power to establish panels of reservoir engineers

The Committee asks the Scottish Government for further explanation of the intended effect of the power in section 25(a) to “specify by order the sections of this Part under which the members of any such panel may be appointed.” The Committee asks if it is intended that the order may only specify the relevant sections, which then have effect for that purpose and, if so, if it can be clarified why negative procedure should apply to the power rather than no procedure. Or, the Committee asks, is it intended that the order may also specify the parameters within which the members of a particular panel may be appointed under section 26? If so, the Committee asks whether this could be made clearer.

The panel structure, and the specific functions under the Bill that engineers from a particular panel will be permitted to exercise, are yet to be determined. Flexibility is essential to allow coordination with the equivalent panel structure in England and Wales (failing which the limited pool of appropriately qualified UK-based engineers may be dissuaded from becoming members of the Scottish panels).

The Bill itself sets out the roles the panel engineers will fulfil – the purposes for which they will be appointed – for example as construction engineers (section 31), inspecting engineers (section 43), supervising engineers (section 47) and to make recommendations to SEPA about emergency measures to be taken (section 75). To be appointed under any of these sections, an engineer must be a member of a panel of engineers established under section 25 – and must also be entitled to be appointed under the particular section (sections 31(4)(a), 43(3)(a), 47(3), 75(4)). The intention is that an order under section 25 will determine entitlement to be appointed under any particular section, by specifying the sections of the Act under which members of any particular panel may be appointed. This will enable the Scottish Ministers to ensure that only panel engineers with the appropriate level of qualification and experience will be able to be appointed to particular roles.
Although a relatively technical matter, the panel structure and the roles that panel engineer are to perform are important elements of the regulatory regime, as they will determine the qualification and experience levels required to perform the various engineer roles that the Bill provides for. It is thought more appropriate to give the Parliament the opportunity to scrutinise these matters through the negative procedure rather than having no procedure.

I hope this clarifies the position for the Committee.

Section 52(1) – Power to make provision for reporting incidents to SEPA relating to reservoir safety

The Committee asks the Scottish Government, in relation to section 52(2)-

- why is it necessary to extend the power to make regulations to provide that another person (apart from SEPA operating the reporting scheme) may specify the criteria for incidents to be reported, or that that person may determine whether a reservoir meets the criteria? Would it be possible or appropriate to restrict this power to another person acting for SEPA?

- why is it necessary for the provision in relation to ensuring remedial action is taken after an incident report, to include the power to amend the Act (apart from section 52) or to apply the Act with modifications? Could examples be provided as to how this power could be used?

Section 52(2) merely describes indicatively what regulations made under s.52(1) may provide for. It does not extend the power contained in s.52(1). The actual content of the regulations will be subject to Parliamentary scrutiny under the affirmative procedure.

The reason for providing that regulations made under s.52(1) may, among other things, provide that a person other than SEPA may specify the criteria for incidents to be reported or may determine whether a reservoir meets the criteria, is that ICE or panel engineers, rather than SEPA, have the necessary experience and expertise to do so. It is envisaged, for example, that an engineer may be engaged by SEPA to specify appropriate criteria, but it may be that Ministers will wish the regulations to provide that panel engineers will determine whether a reservoir meets the criteria for incident reporting – without any involvement of SEPA.

The reason for including in s.52(2)(k) that the regulations may include provision amending the Act or applying it with modifications is that the Bill already contains certain provisions where reservoir managers can be compelled to take action, and if those provisions are to be applied (with or without adaptation) to remedial action following an incident report, it may be necessary to textually amend or modify them.

Section 53(1) – Power to make provision for preparing reservoir flood plans

The Committee asks the Scottish Government for an explanation why the power to amend the Act or apply it with modifications in section 53(3)(n) is necessary, given that this section appears to make particular provision for the preparation of flood plans for controlled reservoirs, and otherwise it appears that flood plan provisions do not extend through the Bill.
The Act already provides for referral of certain matters to a referee (in Chapter 8), for SEPA to step in and take certain actions and recover costs (e.g. sections 65, 69, 75 and 86), and for SEPA to exercise powers of entry (s.88 et seq.). As Ministers may wish to make further provision in these areas when making regulations under s.53, it was thought desirable to allow for the possibility that Ministers may wish to amend or modify the Act as regards these matters. If it was decided to apply these provisions in connection with flood plans, textual amendment of them may be required.

Section 71(1) – Power to make provision for SEPA to give stop notices to reservoir managers of controlled reservoirs

Section 76(1) – Power to make provisions for SEPA to accept an enforcement undertaking from a reservoir manager

Section 77(1) – Power to impose fixed monetary penalties on reservoir managers

Section 80(1) – Power to make provisions about the imposition of further enforcement measures on reservoir managers

The Committee asks the Scottish Government whether, generally, in relation to sections 71(1), 76(1), 77(1) and section 80(1), it can be explained and clarified why it is necessary or appropriate to provide for most of these enforcement measures, to enforce the rest of Part 1 of the Bill, in discretionary order-making powers which Scottish Ministers can either implement as a whole, or partially, or not, as they determine. The Committee asks why the approach has been taken that Parliament is asked to approve all the provisions in these sections (and related sections) but thereafter the decision to implement the provisions will be discretionary, by order.

The Committee asks, in relation to sections 80(4)(a) and 83(1), for an explanation why it is necessary to delegate powers in an order to SEPA to impose on reservoir managers (a) an amount of penalty as a further enforcement measure which is potentially unlimited by the enabling power, and (b) a non-compliance penalty which is again potentially unlimited? Could any maximum limits be specified? Can the Government provide any analogous examples of enforcement powers of SEPA (or other Scottish public bodies) which are potentially unlimited in amount?

In particular, can it be clarified why SEPA should be given discretion over the penalty amount, when they are not responsible directly to the Parliament?

I have considered the Committee’s various questions on the “civil sanctions” that the Bill proposes to create. Chapter 9 of the Bill is intended to set out the framework for SEPA's civil enforcement powers in relation to reservoirs. It was not thought appropriate for the Bill to directly empower SEPA, which is not directly accountable to Parliament, to immediately be able to deploy all of these enforcement powers. Rather, having obtained the approval of the Parliament in principle to the use of the various powers, the intention is that the Scottish Ministers will decide which powers to pass on to SEPA, having consulted such persons as they consider appropriate under s.84. Ministers will do so in light of experience in England and Wales, where the Environment Agency has recently been given similar powers via the Regulatory Enforcement and Sanctions Act 2008 as implemented by the Environmental Civil Sanctions (England) Order 2010 and an
equivalent order for Wales. The Scottish Parliament will, of course, have the opportunity to scrutinise any such Order using the affirmative procedure.

In relation to s.80(4)(a) and 83(1) the reason for SEPA being able to determine the amount of the penalty is that SEPA is considered to be best-placed to determine the amount of the penalty that will act as an appropriate deterrent for a particular offender in a particular case. However, I am happy to consider the insertion of appropriate maximum penalty amounts.

**Section 87(1) – Power to permit SEPA to publish information**

In relation to section 87(1), the Committee asks the Scottish Government why this order-making power is necessary or appropriate, given that, in the Committee’s view, as drafted it permits SEPA to publish information and the power does not specify any further matters which could be set out in an order.

The order-making power in s.87(1) was intended to give Ministers discretion whether or not to permit SEPA to publish information about enforcement action it has taken.

I am happy to consider amending the provision so that it enables the Scottish Ministers to require SEPA to publish such information about the enforcement action it has taken as Ministers may specify. That will enable Ministers to exercise more control over what SEPA publishes and allow Parliament the opportunity to scrutinise that control.

**Section 103 – Power to make offences inserted into section 22 of the Water Environment and Water Services (Scotland) Act 2003 to be triable and subject to specific liabilities**

The Committee asks the Scottish Government for clarification whether the Delegated Powers Memorandum is correct to state that the power in section 103 is proposed to be subject to negative procedure, as section 36(5) of the 2003 Act appears to provide that regulations under section 22 are subject to the “open” procedure of either negative resolution or draft affirmative.

The Committee asks whether, given that regulations under this section of the Bill may create offences, including those triable on indictment and subject to a term of prison of up to 1 or 2 years (as the case may be), such provision should be subject to draft affirmative procedure.

The Committee are correct that regulations under s.22 of the Water Environment and Water Services (Scotland) Act 2003 are, by virtue of s.36(5), subject to the “open” procedure of either negative resolution or draft affirmative. The Delegated Powers Memorandum was inaccurate in describing the provision as being subject to the negative resolution procedure, although Ministers are free to choose whichever of the two Parliamentary procedures they consider appropriate when making regulations under s.22 of the 2003 Act.

The power to make regulations under s.20 of the 2003 Act includes the power to create offences but allows Ministers a choice of procedure. Rendering regulations creating offences under s.22 subject to affirmative procedure only would be inconsistent.
Ministers will, of course, give careful consideration as to whether to utilise the draft affirmative procedure if and when they make regulations that create offences under s.103 of the Bill, but it is not thought appropriate to restrict Ministers to the use of the affirmative procedure given the inconsistency that this would introduce into the 2003 Act and given that the underlying policy of s.22 (to allow SEPA to require persons to undertake remedial or restoration measures) has already been approved by Parliament.
Certification of Death (Scotland) Bill at Stage 1

Thank you for your letter of 23 November in relation to the above Bill, which has been passed to me for reply.

Section 2: Suspension of referral of certificates for review during emergencies

The Committee asks:

- Q – Given that this power is designed for an emergency situation, why has it been considered appropriate to propose negative procedure in place of the “Class 3” emergency affirmative procedure?

The Scottish Government notes the Committee’s comment that the “Class 3” procedure could be used to bring an order into force immediately without breaching the 21 day rule, allowing it to remain in force for a sufficiently long period (including that of a long Parliamentary recess) before requiring approval.

Whilst the Scottish Government had considered the application of “Class 3” emergency procedure, it understood that it would be an unusual use of that procedure to allow an order to remain in force for longer than 28 to 40 days without being approved by the Scottish Parliament (indeed it is understood that orders using this procedure are often referred to as “28 day orders” because, in most cases, they stipulate a period of 28 days).

As the objective here was to ensure that an order could be made and come into force at any time without requiring Parliamentary approval, including during a long period of recess, the Scottish Government considered that Class 3 procedure might not be suitable as the order might have to be made at the beginning of the summer Parliamentary recess (it is noted, for example, that the most recent summer recess lasted 62 days).

However, it appears that the Committee would consider the use of Class 3 procedure appropriate in these circumstances and the Scottish Government therefore plans to amend subsection (9) of section 24A (as inserted by section 2 of the Bill) accordingly (discounting periods of recess from the period before approval).

Section 4(7): Suspension of applications under section 4 during emergencies

The Committee asks:

- Q – Given that this power is designed for an emergency situation, why has it been considered appropriate to propose negative procedure in place of the “Class 3” emergency affirmative procedure?
For the same reasons as set out above in relation to section 2, the Scottish Government intends to amend the procedure applicable to the exercise of the power in section 4(7) from negative to “Class 3” emergency procedure.

Section 23(3): Fees

The Committee asks:

- **Q - Why has affirmative procedure been applied to the power to make regulations to set the amount of fees and prescribe arrangements for collection of those fees, rather than negative procedure?**

The Scottish Government had considered that affirmative procedure might be appropriate here as there may be particular sensitivities for bereaved families regarding the manner in which the fee is to be collected (for example, one of the options is for registrars to collect the fee from the person seeking to register a death; but the Association of Registrars of Scotland has commented that the recently bereaved may find it difficult to take on board the necessary information relating to payment of the fee at the point of registration).

However, the Scottish Government notes the Committee’s comment that the prescription of fee levels and collection arrangements are more usually subject to negative procedure and in the light of this, it intends to amend section 28 of the Bill accordingly.
Correspondence from Scottish Government dated 26 November 2010

Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Bill

I am writing in response to the Subordinate Legislation Committee’s letter of 23 November regarding the above Bill.

In the letter the Scottish Government was asked for a fuller explanation as to why it has chosen negative rather than affirmative procedure in relation to the power under section 3(7) (c) and to explain whether it considers that guidance made under section 11 should be laid before the Scottish Parliament in the interests of transparency and in order that the Parliament is aware of its terms.

Section 3(7) (c) - Power to specify a person, or a person falling within a description of persons, as a relevant third party

Ministers consider it important to get the balance right in setting out who has an automatic right to apply for an order as opposed to requiring leave of the court. Those third parties having the automatic right are those who are likely to be granted leave by the court as a matter of course. Other third parties will still need to satisfy the court that it is appropriate for them to be allowed to apply, having regard to all the circumstances of the particular case.

The power in section 3(7)(c) to add to the list of third parties having the automatic right to apply is likely to be used only rarely and, in practice, it is envisaged that perhaps only the police would be a candidate. Any such proposed change will depend on how often a third party applies and whether they are invariably granted leave.

Since the proposed change may be non-controversial, it was not thought appropriate to require a debate on every occasion. Members will either agree or disagree with the proposal and, if they disagree, negative procedure will allow Members to force a debate as appropriate.

Section 11 – Guidance

Guidance may be provided under section 11 on any matter relating to forced marriage but the main focus will be to facilitate the implementation of the provisions in Part 1. There is a statutory obligation on those exercising public functions to have regard to it, but it was not thought appropriate to have it laid before Parliament.

The circumstances in which it may also be appropriate to require guidance to be laid before the Scottish Parliament will depend on its scope and effect. The Licensing (Scotland) Act 2005, for example, required the first set of draft guidance to Licensing Boards to be laid before, but also approved by resolution of, the Scottish Parliament.
Where the effect of the guidance is less far-reaching but still critical to the effective delivery of the relevant provisions, it may be appropriate to require a copy to be laid before Parliament after it is issued. See, for example, section 31 (duties to provide information) of the Public Services Reform (Scotland) Act 2010. In other cases, it is rare to require guidance to be laid before Parliament. See, for example, section 113 (guidance on user focus) and section 114 (duty of cooperation) of the same Act.

Given the limited scope and effect of guidance under section 11, and the fact that separate guidance may be issued from time to time and for different purposes, it is not thought to be appropriate to require such guidance to be laid before the Scottish Parliament. However, Ministers would propose to submit a final draft of the first such substantive guidance to the Equal Opportunities Committee for consideration, once it has gone through the formal public consultation process, prior to its publication and wider dissemination.