



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Subordinate Legislation Committee**

**16th Report, 2012 (Session 4)**

## **Police and Fire Reform (Scotland) Bill**

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Pàrlamaid na h-Alba

## **Subordinate Legislation Committee**

### **Remit and membership**

#### **Remit:**

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

(Standing Orders of the Scottish Parliament, Rule 6.11)

#### **Membership:**

Chic Brodie  
Nigel Don (Convener)

James Dornan (Deputy Convener)  
Mike MacKenzie  
Michael McMahon  
John Pentland  
John Scott

**Committee Clerking Team:**

Clerk to the Committee  
Irene Fleming

Assistant Clerk  
Rob Littlejohn

Support Manager  
Daren Pratt



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## Subordinate Legislation Committee

### 16th Report, 2012 (Session 4)

### Police and Fire Reform (Scotland) Bill

The Committee reports to the Parliament as follows—

#### INTRODUCTION

1. At its meetings on 28 February and 20 March 2012, the Subordinate Legislation Committee considered the delegated power provisions in the Police and Fire Reform (Scotland) Bill (“the Bill”) at Stage 1. The Committee submits this report to the Justice Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)<sup>1</sup>.
3. In the consideration of the Bill at its meeting on 28 February, the Committee agreed to write to the Scottish Government to raise questions on the following delegated powers in the Bill.
4. This correspondence is reproduced in the Annexe.

#### OVERVIEW OF THE BILL

5. The Police and Fire Reform (Scotland) Bill was introduced in the Scottish Parliament on 16 January 2012. It is a Government Bill which seeks to create a single police service and a single fire and rescue service. It sets out the governance arrangements and framework for the new services.
6. The Bill abolishes the existing police authorities and fire authorities. Throughout much of Scotland (with the exception of Fife and Dumfries and Galloway), the individual authorities have been brought together to form joint boards, which will also be abolished.

<sup>1</sup> Police and Fire Reform (Scotland) Bill, Delegated Powers Memorandum:  
[http://www.scottish.parliament.uk/S4\\_Bills/Police%20and%20Fire%20Reform%20\(Scotland\)%20Bill/Police\\_and\\_Fire\\_Reform\\_\(Scotland\)\\_Bill\\_-\\_delegated\\_powers\\_memorandum.pdf](http://www.scottish.parliament.uk/S4_Bills/Police%20and%20Fire%20Reform%20(Scotland)%20Bill/Police_and_Fire_Reform_(Scotland)_Bill_-_delegated_powers_memorandum.pdf)

7. Part 1 of the Bill deals with the police service. It largely repeals the Police (Scotland) Act 1967 and creates a single police force, to be known as the Police Service of Scotland (“the Police Service”), and a single police authority, the Scottish Police Authority (“the Authority”). The Bill sets out a comprehensive framework for the organisation, structure, principles, governance and funding of the Police Service and the Authority, and provides for the reconstitution of the Police Complaints Commissioner as the Police Investigations and Review Commissioner. Further, the Bill sets out the functions, powers and duties of Her Majesty’s Inspectors of Constabulary in Scotland, and restates offences in relation to assaulting or impeding police officers, escapes from custody and the impersonation of police officers.

8. Part 2 of the Bill deals with the fire and rescue service. It amends the Fire (Scotland) Act 2005 to establish a single Scottish Fire and Rescue Service (“SFRS”), and to transfer to it fire-fighting, fire safety and other functions under that Act. Though one service is created, no substantive changes are being made to the functions of the fire service in comparison with the existing functions of councils and joint boards as fire and rescue authorities under the 2005 Act.

9. Part 3 of the Bill contains general provisions. Finally, there are seven schedules which set out detailed arrangements in relation to various areas under the Bill.

#### DELEGATED POWERS

10. The report considers each of the delegated powers in the Bill.

11. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers contained in the following sections (as they are listed in the DPM)—

sections 10(2); 11(5); 15(2); 63 (new section 33A); 65; 67; 71(2); 97(1) (paragraph (e) of definition of “international joint investigation team”); 99 (new schedule 1A, paragraph 2(4)); 99 (new schedule 1A, paragraph 3(d)); 112 (new section 41A(6)); 117 (new section 43A); schedule 1, paragraph 2(4); schedule 1, paragraph 3(h); schedule 3, paragraph 4; schedule 4, paragraph 2(1); schedule 5, paragraph (1); and schedule 6, paragraph 22(13)(b).

12. The Committee’s comments and, where appropriate, recommendations on the other delegated powers are detailed below.

13. Where a power is taken in Part 1 of the Bill in relation to the police service and an equivalent power is taken in Part 2 in relation to the fire and rescue service, these have been grouped together for the purposes of the Committee’s consideration and of this report. This applies to sections 5(1) and 116 (direction-making powers), and to the powers contained in paragraphs 11(1), 16(1) and 17 of schedule 4, together with the powers contained in paragraphs 3, 5 and 6 of schedule 5 (powers to make staff and property transfer schemes).

**Section 5(1) The Authority must comply with any direction (general or specific) given by the Scottish Ministers**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: direction**

**Parliamentary procedure: no procedure**

**Section 116, new section 42A – Power to give SFRS general or specific directions**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: direction**

**Parliamentary procedure: no procedure**

*Background*

14. Section 5(1) requires the Scottish Police Authority (“the Authority”) to comply with any direction given by the Scottish Ministers.

15. The power cannot be used for directions in relation to a specific operation being or to be carried out by the Police Service, or the way in which the Police Service is carrying out (or is to carry out) a specific operation.

16. Section 116 inserts section 42A into the 2005 Act. The provision enables the Scottish Ministers to give the Scottish Fire and Rescue Service (“SFRS”) general or specific directions.

17. Directions made under these powers require to be published by the Scottish Ministers, and must be laid before the Parliament (although they are not subject to any further parliamentary scrutiny).

*Comment*

18. The Committee considers that directions under these powers might conceivably be made in relation to a very wide range of issues, subject to the restriction in section 5(2) on making directions about operational police matters. It accepts, however, that it is not uncommon to take general direction-making powers of this nature when establishing a new public body by statute. The Scottish Government indicates that the powers might be used to ensure that the Authority and SFRS comply with general Government policy, for example on pay and workforce issues, or take action on recommendations from bodies such as the Auditor General, parliamentary committees and public inquiries.

19. The Scottish Ministers acknowledge that they could not direct either the Authority or SFRS to act contrary to the requirements of any other enactment. They also confirm that, if an appropriate power to act is contained elsewhere in legislation, then it would be used in preference to the more general power of direction.

20. The Committee notes the explanation given by the Scottish Ministers, and in particular their stated intention to use specific powers to require the Authority and SFRS to act in particular ways where those powers exist, rather than relying on the general power of direction. They also note Ministers’ intentions to use these

powers rarely and only where all other appropriate routes to secure the same outcome have been exhausted.

**21. Accordingly, the Committee is satisfied that it is appropriate to delegate these powers, and that they be exercised in the form of directions.**

**Section 49 – Power to make regulations as to the governance, administration and conditions of service of constables and police cadets**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations**

**Parliamentary procedure: negative procedure**

*Background*

22. Chapter 8 of Part 1 provides for the governance and administration of police. In particular, section 49 gives the Scottish Ministers a general power to make regulations for the governance, administration and conditions of service of constables (including special constables) and police cadets, and they are required to do so.

23. That general power is supplemented by sections 50 to 54, which set out in more detail the areas in which regulations may be made. These cover appointments, promotions, probation, efficiency and effectiveness, restrictions on private life or business interests, resignation, and retirement (section 50); conditions of service (section 51); duties (section 52); disciplinary procedures (section 53); and personal records (section 54).

24. Section 55 requires the Scottish Ministers to consult and share a draft of the regulations with the Chief Constable, the Authority, the staff associations and where appropriate the Police Negotiating Board for the United Kingdom. Section 56 allows regulations to make provision for the delegation of functions. It also confirms that, in the absence of express provision, nothing in Part 1 affects the generality of the powers conferred in section 49.

*Comment*

25. The power in section 49 (as supplemented by the rest of Chapter 8) is a very wide one. The governance and administration of the police service is, by virtue of it, almost entirely to be set out in delegated legislation. The Committee notes, however, that a similar system pertains under the 1967 Act, and the DPM indicates that the first set of regulations made under section 49 will largely be the same as those currently made under the 1967 Act.

26. As the DPM states, it is likely that these regulations will be detailed, technical and (in some respects) administrative in nature. On balance, given the detailed nature of the matters which are to be dealt with in delegated legislation, the Committee finds the delegation of these matters to be acceptable in principle. However, the Committee draws the breadth of the regulation-making power to the attention of the lead committee so that it may consider whether it would be more

appropriate for any of the subject matter of Chapter 8 to be dealt with in the Bill itself.

27. In doing so, the Committee also recommends that consideration be given to the appropriateness of the first set of regulations being largely the same as those made under the 1967 Act. In particular, it is concerned that the context in which the regulations will operate is quite different. For example, the differences arising from the establishment of a single police authority may have implications for the use of this power. Furthermore, a number of years have elapsed since the original power was created and, again, the Committee has concerns that changes may have arisen in, for example, the administration of the police service during the intervening period which could also have an impact on the operation of the regulations. In such a case, a simple translation of the original regulations to the new regime may not be appropriate.

28. Regulations made under these provisions will be subject to negative procedure. The Committee is content that this represents an appropriate level of scrutiny. In reaching that view, it has considered the nature and detail of these regulations, and the potential for regular amendment, against the significant matters with which the regulations will deal. The Committee observes, however, that any regulations would be subject to the consultation requirements in regulation 55 which help to ensure that those affected by the regulations would have their views taken into account.

**29. Given the breadth of the power in section 49, the Committee draws it to the attention of the lead committee. In doing so, the Committee recommends that the lead committee give consideration to the context in which the power will be exercised.**

**30. It is otherwise content that the exercise of the power be subject to the negative procedure.**

**Section 84(1)(b) – Power to specify the type of goods and services the SPA may provide**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: order**

**Parliamentary procedure: negative procedure**

#### *Background*

31. Section 84 makes provision for the Authority to provide goods and services to any other public body or office-holder. Subsection (1)(b) provides the Scottish Ministers with power to specify the type of goods and services that may be provided to persons other than public bodies or office-holders, and the persons to which they may be provided.

#### *Comment*

32. The Committee was concerned that this power appeared to be very general in its terms, and (at its broadest) might be taken to enable the Scottish Ministers to make regulations permitting the Authority to supply goods and services of any

description to any person. Given that supplying goods and services does not appear to be within the ordinary functions of a police authority, the Committee asked the Scottish Ministers to explain the circumstances in which it is envisaged that this power might be used.

33. The Scottish Ministers indicate that this power would only be exercised where they were satisfied that it was appropriate for particular goods or services to be supplied to particular categories of person, and that by making it exercisable by subordinate legislation then the Parliament also has an opportunity to satisfy itself as to the appropriateness of what is proposed. They envisage that the power might be used, for example, to enable the Authority to charge overseas governments and police forces for the provision of forensic services.

34. The Committee considers that, if this power is intended only to be used in relation to goods and services which are in some way connected to the functions of the Authority (such as the forensic services mentioned in the example), then it is appropriate to delegate that power. However, the power in section 84(1)(b) is not expressly restricted in that manner and the Committee considers that it would be possible in the future to specify goods and services of whatever nature under this provision, regardless of the intentions of the Scottish Ministers at present.

**35. The Committee considers that the power in section 84(1)(b) is capable of being exercised in a particularly broad manner so as to specify goods and services of any nature. Given that the apparent intention of the Scottish Ministers is to permit the Scottish Police Authority to supply goods and services which are connected with its functions, it takes the view that the power ought to be drafted so as to reflect that intention.**

**36. The Committee considers that the negative procedure provides sufficient opportunity for the Parliament to scrutinise the exercise of this power.**

**Section 84(3)(b) – Power to specify the type of goods and services the Police Service may provide**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: order**

**Parliamentary procedure: negative procedure**

*Background*

37. This power broadly mirrors the power in section 84(1)(b), and differs from it only in that it relates to the Authority making arrangements for the supply of goods and services by the Police Service, rather than directly providing them itself.

*Comment*

38. The Committee was similarly concerned as to the very general nature of this power, and asked the Scottish Ministers to explain the circumstances in which they envisaged that the power might be used.

39. The Scottish Ministers again indicate that this power would only be exercised where they were satisfied that it was appropriate for particular goods or services to be supplied to particular categories of person, and that by making it exercisable by subordinate legislation then the Parliament also has an opportunity to satisfy itself as to the appropriateness of what is proposed. Specific examples envisaged include providing driver training to foreign police forces and private companies, and the letting of facilities at the Scottish Police College to private sector organisations for conferences.

40. Again, the Committee considers that, if this power is intended only to be used in relation to goods and services which are in some way connected to the functions of the Police Service (such as the examples given), then it is appropriate to delegate that power. However, the power in section 84(3)(b) is not expressly restricted in that manner and the Committee considers that it would be possible in the future to specify goods and services of whatever nature under this provision, regardless of the intentions of the Scottish Ministers at present.

**41. The Committee considers that the power in section 84(3)(b) is capable of being exercised in a particularly broad manner so as to specify goods and services of any nature. Given that the apparent intention of the Scottish Ministers is to permit the Scottish Police Authority to make arrangements for the supply of goods and services by the Police Service which are connected with its functions, it takes the view that the power ought to be drafted so as to reflect that intention.**

**42. The Committee considers that the negative procedure provides sufficient opportunity for the Parliament to scrutinise the exercise of this power.**

**Section 120(1)(b) – bolt-on powers to make ancillary provision in relation to the exercise of all powers to make orders, regulations and rules**

**Power conferred on: the Scottish Ministers  
Power exercisable by: orders, regulations and rules  
Parliamentary procedure: dependent on the procedure applicable to the main power being exercised**

**Section 121 – Ancillary Provision**

**Power conferred on: the Scottish Ministers  
Power exercisable by: order  
Parliamentary procedure: affirmative where making textual amendments to primary legislation and otherwise negative**

**Section 122 – Transitional Provision**

**Power conferred on: the Scottish Ministers  
Power exercisable by: order  
Parliamentary procedure: negative procedure**

**Section 124 – Commencement**

**Power conferred on: the Scottish Ministers  
Power exercisable by: order**

**Parliamentary procedure: to be laid before the Scottish Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010**

*Background*

43. This Bill contains a number of mechanisms by which ancillary powers may be exercised.

44. Section 120(1)(b) provides for “bolt on” powers to make supplementary, incidental, consequential, transitional, transitory or saving provision when exercising any power to make orders, regulations and rules under the Bill. The inclusion of “bolt on” provision does not alter the level of parliamentary scrutiny which applies.

45. Section 121 is a standalone power to make supplementary, incidental or consequential provision for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision made by or under the Bill. An order under section 121 may modify any enactment, including the Bill itself: if it does so then the order is subject the affirmative procedure. Otherwise it will be subject to the negative procedure.

46. Section 122 is a further standalone power to make transitional, transitory or saving provision for the purposes of, or in connection with, the coming into force of any provision of the Bill. Although an order under section 122 may modify any enactment, including the Bill, it will always be subject to the negative procedure.

47. Section 124 enables the Scottish Ministers to appoint a day (or days) for the coming into force of Parts 1 and 2, and section 123, of the Bill. A commencement order made under section 124 may also contain transitional, transitory or saving provision. Orders under section 124 will be laid before the Parliament but are not subject to further parliamentary control.

*Comment*

48. The Committee acknowledges that it is frequently considered appropriate to confer power on the Scottish Ministers to make ancillary provision of one kind or another. However, the Committee considers that it should examine whether the particular scheme of ancillary powers proposed in any Bill is appropriate to its circumstances. In particular, the Committee considers carefully what level of scrutiny is to be applied to the exercise of the powers and whether different options for the exercise of ancillary powers are proposed.

49. The Scottish Ministers consider that the power in section 120(1)(b) may be distinguished from the other powers in that it is intended to cover the situation where ancillary, transitional, transitory or saving provisions are required in connection with subordinate legislation made under the Bill. The Committee observes that this power overlaps to an extent with section 121, under which ancillary provision may be made for the purposes of, or in connection with, or for the purposes of giving full effect to any provision made under the Bill. However, the same cannot be said for section 122 which appears to be confined to making

transitional provision for the purposes of, or in connection with, the coming into force of any provision of the Bill itself.

50. The Committee observes that the power in section 120(1)(b) enables the Scottish Ministers to make ancillary and transitional provision in the same instrument as the related substantive provisions, and acknowledges that this may improve transparency and clarity for the end user. However, it does not consider that this should be determinative of the appropriate level of parliamentary scrutiny.

51. In relation to the power in section 121, the Scottish Ministers acknowledge that the existing police and fire and rescue services have powers, duties and responsibilities under a wide range of legislation. They advise that, although a substantial exercise has been undertaken to identify all relevant references (Schedule 6 contains minor and consequential amendments in consequence), it is always possible that some may have been missed and will emerge at a later date. The Ministers accordingly consider it appropriate that they be able to make incidental, consequential or supplementary provision to deal with these matters without resorting to further primary legislation. The Committee recognises that this is acceptable in principle. It considers it appropriate, where such an order amends primary legislation, that it be subject to the affirmative procedure, and otherwise subject to the negative procedure.

52. The Committee notes that the inclusion of an ancillary order-making provision which allows for the making of transitional, transitory and saving provisions is quite normal in a Bill. As with any Bill, the Committee can see that circumstances may arise, necessitating adjustments of the nature outlined by the Scottish Ministers. However, the Committee does not accept the Scottish Ministers' view that negative procedure would always be appropriate for the exercise of this power, given that it may modify any enactment, including the Bill itself. The Ministers have not indicated in what circumstances they anticipate making transitional, transitory or saving provision which would require the modification of primary legislation. The Committee considers that, where textual amendment of primary legislation is contemplated, the order should be subject to the affirmative procedure.

**53. The Committee accordingly finds the powers in sections 120(1)(b), 121, 122 and 124 acceptable in principle. Subject to the following comments, it also finds the parliamentary procedure applied acceptable.**

**54. The Committee recommends that, as is the case with the power under section 121, the power in section 122 should be subject to the affirmative procedure where it is used to make textual amendments to primary legislation, and to the negative procedure otherwise.**

**55. In general, the Committee recommends that, where there is a choice available to the Scottish Ministers as to which of the mechanisms to use to make a particular provision it should have regard to the complexity and effect of the provision proposed and should afford the Parliament the opportunity for a higher level of parliamentary scrutiny in complex cases or where the exercise of the power affects individual rights.**

**Schedule 4, paragraph 11(1) – Power to make a staff transfer scheme (police)**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: scheme**

**Parliamentary procedure: no procedure**

**Schedule 4, paragraph 16(1) – Power to make a police property transfer scheme**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: scheme**

**Parliamentary procedure: no procedure**

**Schedule 4, paragraph 17 – Power to make a local authority property transfer scheme (police)**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: scheme**

**Parliamentary procedure: no procedure**

**Schedule 5, paragraph 3 – Power to make a staff transfer scheme (SFRS)**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: scheme**

**Parliamentary procedure: no procedure**

**Schedule 5, paragraph 5 – Power to make an SFRS property transfer scheme**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: scheme**

**Parliamentary procedure: no procedure**

**Schedule 5, paragraph 6 – Power to make a local authority property transfer scheme (SFRS)**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: scheme**

**Parliamentary procedure: no procedure**

*Background*

56. These six powers make provision for the making of staff and property transfer schemes in respect of the Authority and SFRS, and include power to make schemes transferring property and staff from local authorities.

*Comment*

57. As the Authority and SFRS will take over the functions previously discharged by local authorities in their roles as police and fire authorities, the Committee considers it appropriate that provision be made for transferring relevant staff and property to the new bodies, and that this be done by subordinate legislation instead of being expressed in the Bill itself.

58. However, the Committee notes that this is to be done by way of a “scheme”. This form of subordinate legislation is not a Scottish statutory instrument and will be subject to no parliamentary scrutiny at all. Nor will these schemes be subject to

the normal publication requirements which apply to Scottish statutory instruments. The Scottish Ministers confirm that they do not intend that these schemes should be Scottish statutory instruments. They express the view that these are purely administrative matters and that it would be an inappropriate and inefficient use of parliamentary time to scrutinise these schemes. The Scottish Ministers express further concerns that the publication of these schemes would enable the identification of individuals to whom the staff transfer schemes apply, and that this would breach confidentiality. This concern appears to apply in particular to the staff of the Scottish Police Services Authority (“SPSA”) and of the Scottish Crime and Drug Enforcement Agency (“SCDEA”).

59. The Committee does not share the Scottish Ministers’ concerns. It observes that it is usual practice for staff and property transfer provision either to appear on the face of a Bill or for it to be made by order, and for those orders to be subject to the negative procedure. The Committee observes, indeed, that this approach has previously been adopted in relation to policing matters: section 31 of and Schedule 3 to the Police, Public Order and Criminal Justice (Scotland) Act 2006 provide for the making of staff transfer orders transferring staff to SPSA and SCDEA. Indeed, the Committee notes that the power contained in paragraph 2(1) of Schedule 3 was then exercised by the Scottish Ministers when they made the Scottish Police Services Authority (Staff Transfer) Order 2007 (SSI 2007/88).

60. Although paragraph 2(4) of Schedule 3 provides for the making of a scheme in relation to the transfer of staff, this only applies where a staff transfer order under section 2(1) requires one to be made. The transfer of staff is effected by the staff transfer order itself, which is subject to parliamentary scrutiny. It is then possible, if considered necessary, to make an unpublished and unscrutinised scheme containing the fine detail.

61. The Committee accordingly considers that the form of these six powers is inappropriate and does not allow for adequate (or, indeed, any) parliamentary scrutiny. These powers represent a departure from normal practice in this area and the Scottish Ministers have not advanced any reason for this departure which the Committee considers convincing.

**62. Accordingly, the Committee recommends that the powers contained in paragraphs 11(1), 16(1) and 17 of Schedule 4, and in paragraphs 3, 5 and 6 of Schedule 5 ought to be exercised in the form of a Scottish statutory instrument so that they will be subject to parliamentary scrutiny, and that they should be subject to the negative procedure.**

**63. In addition, the Committee draws to the attention of the lead committee to the example found in Schedule 3 of the Police, Public Order and Criminal Justice (Scotland) Act 2006. It considers that the approach adopted in that enactment adequately balances the need for parliamentary scrutiny of the transfer of staff and property with the operational need to maintain confidentiality.**

## **ANNEXE**

### **Scottish Government Response to Subordinate Legislation Committee**

#### **POLICE AND FIRE REFORM (SCOTLAND) BILL AT STAGE 1**

1. Thank you for your letter of 29 February to Tim Ellis, which sought further clarification of some of the powers in the Police and Fire Reform (Scotland) Bill. Tim passed your letter to me, as the Bill Team Leader for the Police and Fire Reform (Scotland) Bill, for reply.

2. Your questions, and the Scottish Government's response to them, are set out below:

#### **Section 84(1)(b) – Power to specify the type of goods and services the SPA may provide**

##### *SLC question*

3. The Committee asks the Scottish Government to explain the circumstances in which it envisages using this power. In particular—

- What types of goods and services might the Authority be authorised to supply?
- What descriptions of persons might the Authority be authorised to make such a supply to?

##### *Scottish Government response*

4. The Scottish Government envisages using this power in those instances where it is persuaded that it would be appropriate for the Scottish Police Authority (SPA) to supply certain types of goods or services to the general public, to overseas governments or to the private sector; the provision of goods and services by the SPA to other parts of the public sector is already permitted under Section 84(1)(a).

5. The Scottish Government considers there is a good case for permitting the provision of certain kinds of goods and services to such categories of people but does not consider this should be unfettered. The purpose of the enabling power is to allow constraints to be placed on that provision so that Ministers and Parliament can be satisfied on the appropriateness of the service being provided, the categories of person they are being provided to and that providing these services would not impact on the ability of the service to carry out its core functions effectively.

6. One example of where this provision might be used is the provision of forensic services to overseas government/police services on a repayment basis. Section 31 of the Act allows the SPA to provide forensic services to anybody it considers appropriate but under section 84 Ministers could specify the categories of forensic service that SPA can charge for. An example of this would be the provision of training or specialist forensic services to third parties, either within the

UK or overseas. A further example might relate to the development of a scientific technology or process. Enabling the SPA and the Police Service of Scotland to provide quality services to third parties based on the professionalism and expertise within Scottish policing has the potential to enhance the reputation of Scotland's police service and forensic service all over the world.

**Section 84(3)(b) – Power to specify the type of goods and services the Police Service may provide**

*SLC question*

7. The Committee asks the Scottish Government to explain the circumstances in which it envisages using this power. In particular—

- What types of goods and services might the Authority be authorised to make arrangements for the Police Service to supply?
- What descriptions of persons might the Authority be authorised to make arrangement for the Police Service to provide such a supply to?

*Scottish Government response*

8. The Scottish Government intends to use this power in those instances where it is persuaded that it would be appropriate for the SPA to make arrangements for the Police Service of Scotland to supply certain types of goods or services to the general public, to overseas governments or to the private sector; the provision of goods and services by the Police Service of Scotland to other parts of the public sector is already permitted under Section 84(3)(a). The purpose of the enabling power is to allow constraints to be placed on that provision so that Ministers and Parliament can be satisfied on the appropriateness of the service being provided, the categories of person they are being provided to and that providing these services would not impact on the ability of the service to carry out its core functions effectively.

9. Examples of the sorts of goods and services that might be provided under this provision include driver training. This could include driver training for overseas police forces and/or private companies where drivers could be driving heads of state, VIPs and other people potentially at risk of attack, kidnapping etc.

10. Other examples include renting out facilities at the Scottish Police College at Tulliallan or the Jackton Training Centre in East Kilbride to private sector organisations for conferences, training events etc.

**Section 120(1)(b) – Bolt on powers to make ancillary provision in relation to the exercise of all powers to make orders, regulations and rules**

*SLC question*

11. This provision is not treated separately in the Delegated Powers Memorandum, and no commentary is provided on the need for these powers in relation to the individual powers to which the “bolt on” provision applies.

12. The Committee therefore asks the Scottish Government to explain why this power is required in addition to separate standalone powers to make ancillary

provision provided in sections 121 and 122 and the further power to make transitional, transitory or saving provision in connection with commencement under section 124.

13. The Committee also asks the Government to explain why it is considered that the negative procedure would be sufficient level of parliamentary scrutiny for supplementary, incidental or consequential provision.

*Scottish Government response*

14. The powers provided in sections 121, 122 and 124(3) enable ancillary, transitional, transitory and saving provisions to be made in connection with provisions of the Bill. Provision may be made in the context of commencement of those provisions or to give those provisions full effect. Section 120(1)(b) is intended to cover the slightly different scenario where ancillary, transitional, transitory and saving provisions are required in connection with subordinate legislation made under the provisions of the Bill. For example:

- If the Scottish Ministers used their power in section 11(5) to remove a particular rank, transitional provision would be required to determine what future rank officers in that rank would move to, arrangements for pay protection and so on. Consequential provision might also be needed to amend legislation which reserves particular powers to officers of a certain rank or above.
- If new regulations relating to conduct were made under section 49, transitional provision would be required to set out how cases would be managed which were in progress when the new regulations came into force.

15. The procedure for supplementary, incidental or consequential provision in these cases is determined by the power under which the order, regulations, or rules are made, since the ancillary provision is dependent on the main provisions of the instrument. In this context any supplementary, incidental or consequential provision remains parasitic on another power and should remain subject to the same procedure deemed appropriate for the other power.

**Section 121 – Ancillary Provision**

*SLC question*

16. The DPM does not provide any indication as to when the Scottish Ministers consider that this power may have to be exercised.

17. The Committee therefore asks the Scottish Government to explain what further supplementary, incidental or consequential provision might be required under the power in section 121.

*Scottish Government response*

18. Both police and fire and rescue services have powers, duties and responsibilities under a wide range of legislation, with many interdependencies. A substantial exercise has been undertaken to identify all relevant references, and we intend to bring forward amendments at Stage 2 to make the necessary

adjustments to primary legislation, in addition to those included in the Bill at introduction. However, it is always possible that some points may be missed, in other legislation or in the Bill itself, or that amendments may be made at Stage 3 which need to be reflected elsewhere. The Scottish Government considers it appropriate that powers are available to make incidental, supplementary or consequential amendments to ensure the new services can operate effectively without the need for further primary legislation.

19. Due to the size of the project, we also propose to make consequential changes to secondary legislation through an order under section 121.

## **Section 122 – Transitional Provision**

### *SLC question*

20. The DPM does not provide any indication as to when the Scottish Ministers consider that this power may have to be exercised. Furthermore, although it is subject to the negative procedure, this power may be used to modify any Act, including this new Act.

21. The Committee therefore asks the Scottish Government to explain what further transitional, transitory or saving provision might be required under the power in section 122, and to explain why it is considered appropriate that this be subject to negative procedure even if modifying primary legislation.

### *Scottish Government response*

22. The purpose of the Bill is to create a single police service and a single fire and rescue service for Scotland, abolishing the current 8 regional services. Inevitably, significant transitional and saving provisions will be needed to ensure a smooth transfer, wind up the current services and ensure that conditions are protected for all staff and officers. We intend to bring forward a number of amendments at Stage 2 to facilitate the transition process, but there may be issues which are not agreed at that stage or which are later found to need adjustment. It is therefore appropriate to take a power to make further transitional, transitory and saving provisions by order.

23. It is necessary for this power to include the power to modify the effect of certain provisions of the Bill and other enactments. The Bill extensively amends the Fire (Scotland) Act 2005 and the Police, Public Order and Criminal Justice (Scotland) Act 2006, and largely repeals the Police (Scotland) Act 1967, and it is likely that transitional and saving provisions will be required to maintain parts of these until the transfer to the new services is complete. It is also important to ensure there is no gap in enforcement, for example where fire and rescue authorities are consulted on licensing applications or can issue enforcement notices. We consider it is appropriate to use negative procedure for all transitional provisions, since these cannot make permanent changes to primary legislation.

**Schedule 4 paragraph 11(1) – Power to make a staff transfer scheme (police)**

**Schedule 5 paragraph 3 – Power to make a staff transfer scheme (SFRS)**

**Schedule 4 paragraph 16(1) – Power to make a police property transfer scheme**

**Schedule 5 paragraph 5 – Power to make an SFRS property transfer scheme**

**Schedule 4 paragraph 17 – Power to make a local authority property transfer scheme (police)**

**Schedule 5 paragraph 6 – Power to make a local authority property transfer scheme (SFRS)**

*SLC question*

24. The schemes made under these powers may effect significant transfers of property, particularly from local authorities to the SPA and the SFRS. Similarly, they have the potential substantially to affect individuals' terms of employment by altering their employers.

25. The Committee therefore asks the Scottish Government to confirm whether the schemes made under these powers are not intended to be Scottish statutory instruments and, if so, to explain why it is considered appropriate to make significant provision of this nature in an instrument that is not subject to the publication and laying requirements which apply to a Scottish statutory instrument.

*Scottish Government response*

26. The schemes made under these powers are not intended to be Scottish statutory instruments. The schemes are an administrative mechanism for giving effect to the transfer of employees and property to the new services, in line with the policy and principles set out in the provisions of the Bill, which are themselves subject to Parliamentary scrutiny. The schemes will consist of administrative detail, listing buildings, other assets and staff, rather than any substantive policy. It is therefore considered unnecessary for those schemes to be subject to Parliamentary procedure, and indeed it is considered that to require Parliamentary scrutiny of this type of administrative detail would be an inappropriate and inefficient use of Parliamentary time.

27. Further, the staff transfer schemes would enable the identification of individuals to which the staff transfer schemes applied and, as was the case in the transfer of staff to the SPSA and Scottish Crime and Drug Enforcement Agency (SCDEA), we consider that this would breach confidentiality. We also believe that the nature of certain assets that will be transferred by scheme, for example, equipment used for covert police operations, makes an administrative transfer preferable to an SSI.

28. The Bill already makes clear that staff transferring to the new services will do so on the same terms and conditions of service. There are also specific requirements in the Bill for consultation with those potentially affected by the staff transfer scheme, while the transfer of property will be subject to agreement

between all parties involved, with provisions for compensatory payments if necessary.

**Section 5(1) – The Authority must comply with any direction (general or specific) given by the Scottish Ministers**

**Section 116, new section 42A – Power to give SFRS general or specific directions**

*SLC question*

29. It appears that the directions under these powers might conceivably be made in relation to a very wide range of issues, subject to the restriction in section 5(2) on making directions about operational police matters.

30. The Committee therefore asks the Scottish Government in what circumstances it envisages exercising its direction-making powers and the matters to which that exercise might relate.

31. The Committee also asks whether directions may be made which conflict with subordinate legislation made under other powers in the Bill and whether, in that scenario, the directions or the subordinate legislation would prevail.

*Scottish Government response*

32. General powers of direction for Ministers are a common feature of the public body landscape. Indeed, such powers are included in the legislation for 11 of the 13 statutory bodies established by Acts of the Scottish Parliament. In the case of both the SPA and Scottish Fire and Rescue Service (SFRS) the Scottish Ministers envisage exercising these powers rarely and only when all other appropriate routes to securing the same outcome have been exhausted. Such powers could, for example, be used to ensure that the SPA and SFRS comply with general Government policy that applies across the whole of the public sector, such as policy on pay and workforce issues. The power could also be used to ensure that the SPA and SFRS take action on recommendations arising from the work of external, independent bodies such as the Auditor General, Parliamentary Committees and public inquiries. The Scottish Ministers may also direct the SPA or SFRS in circumstances where it is necessary to do so to exercise the will of Parliament.

33. Ministers would never direct SFRS or SPA to act in a manner which is contrary to how those services are required to act by virtue of any other enactment. Such a direction would be ultra vires and unenforceable. Conversely, if there is an appropriate power contained elsewhere in legislation which would allow Ministers to require SFRS or SPA to act in a certain manner, then that particular power would be used rather than any broader power of direction.

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