



The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

12th Meeting, 2012 (Session 4)

Tuesday 8 May 2012

The Committee will meet at 2.30 pm in Committee Room 5.

1. **Decision on taking business in private:** The Committee will decide whether to take item 9 in private.

2. **Instruments subject to affirmative procedure:** The Committee will consider the following—

[Official Statistics \(Scotland\) Amendment Order 2012 \[draft\];](#)
[Property Factors \(Code of Conduct\) \(Scotland\) Order 2012 \[draft\].](#)

3. **Instruments subject to negative procedure:** The Committee will consider the following—

[Planning etc. \(Scotland\) Act 2006 \(National Parks\) \(Consequential Provisions\) Order 2012 \(SSI 2012/117\);](#)
[Bankruptcy Fees etc. \(Scotland\) Regulations 2012 \(SSI 2012/118\);](#)
[Food Additives \(Scotland\) Amendment Regulations 2012 \(SSI 2012/119\);](#)
[Snares \(Training\) \(Scotland\) Order 2012 \(SSI 2012/124\);](#)
[Education \(Provision of Information as to Schools\) \(Scotland\) Revocation Regulations 2012 \(SSI 2012/129\);](#)
[Town and Country Planning \(General Permitted Development\) \(Fish Farming\) \(Scotland\) Amendment Order 2012 \(SSI 2012/131\).](#)

4. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

[Wildlife and Natural Environment \(Scotland\) Act 2011 \(Commencement No. 3\) Order 2012 \(SSI 2012/116\);](#)
[Act of Adjournal \(Criminal Procedure Rules Amendment\) \(Miscellaneous\) 2012 \(SSI 2012/125\);](#)
[Act of Sederunt \(Rules of the Court of Session Amendment No. 2\) \(Miscellaneous\) 2012 \(SSI 2012/126\).](#)

5. **Long Leases (Scotland) Bill:** The Committee will consider the Scottish Government's response to its report on the delegated powers provisions in the Bill.
6. **Police and Fire Reform (Scotland) Bill:** The Committee will consider the Scottish Government's response to its report on the delegated powers provisions in the Bill.
7. **Local Government Finance (Unoccupied Properties etc.) (Scotland) Bill:** The Committee will consider its approach to the delegated powers provisions in this Bill at Stage 1.
8. **Social Care (Self-directed Support) (Scotland) Bill:** The Committee will consider its approach to the delegated powers provisions in this Bill at Stage 1.
9. **Working practices:** The Committee will consider its approach to a review of its working practices.

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The papers for this meeting are as follows—

Agenda Items 2, 3 and 4

Legal Brief (private) SL/S4/12/12/1 (P)

Agenda Item 3

Instrument Responses SL/S4/12/12/2

Agenda Item 5

[Long Leases \(Scotland\) Bill - DPM](#)

[Long Leases \(Scotland\) Bill - SLC Report](#)

Briefing Paper SL/S4/12/12/3

Agenda Item 6

[Police and Fire Reform \(Scotland\) Bill - DPM](#)

[Police and Fire Reform \(Scotland\) Bill - SLC Report](#)

Briefing Paper SL/S4/12/12/4

Agenda Item 7

[Local Government Finance \(Unoccupied Properties etc.\) \(Scotland\) Bill - DPM](#)

Briefing Paper (private) SL/S4/12/12/5 (P)

Agenda Item 8

[Social Care \(Self-directed Support\) \(Scotland\) Bill - DPM](#)

Briefing Paper (private) SL/S4/12/12/6 (P)

Agenda Item 9

Briefing Paper (private) SL/S4/12/12/7 (P)

SUBORDINATE LEGISLATION COMMITTEE

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Instrument Responses

INSTRUMENTS SUBJECT TO THE NEGATIVE PROCEDURE

Snares (Training) (Scotland) Order 2012 (SSI 2012/124)

On 11 April 2012, the Scottish Government was asked:

1. The Scottish Gamekeepers Association is listed as an approved body in the Schedule to the Order. However, footnote (d) describes it as comprising two “parts”, a company limited by guarantee and a charitable trust. According to Companies House, two companies limited by guarantee exist: the Scottish Gamekeepers Association (No.SC386343) and the Scottish Gamekeepers Association Charitable Trust (No.SC386344). The Scottish Government is asked:

a. to explain which of these bodies is the approved body for the purposes of the Order, and whether it considers the reference to “Scottish Gamekeepers Association” to be sufficiently clear, given that the footnote reference refers to both companies;

b. why the Order states that the Scottish charity number of the Scottish Gamekeepers Charitable Trust is SC386344, when that is instead its registered company number, and how it intends to correct this error.

The Scottish Government responded as follows:

a. The approved body for the purposes of the Order is the “Scottish Gamekeepers Association”. The footnote makes it clear that this entry refers to both the company of that name (company no. SC386843) and also the associated “Scottish Gamekeepers Association Charitable Trust”, (company no. SC386844), which provides the approved training. The Scottish Government therefore considers it sufficiently clear that the provision of training by the associated “Scottish Gamekeepers Association Charitable Trust” is also approved for the purposes of the Order.

b. It is unfortunate that the footnote refers to the Scottish Gamekeepers Charitable Trust’s “charity number” as opposed to correctly referring to the “registered company number”. However, the Scottish Government consider that the error is not so grave as to merit a correction slip at this time. The footnote refers to the correct company number and there can be no doubt that it includes a reference to the charitable arm of the Scottish Gamekeepers Association.

The Scottish Government would add that it is likely that other bodies will seek to become approved bodies under the Snares (Training) (Scotland) Order 2012 and at that time, these bodies will require to be added to the Schedule to the Order. The Scottish Government undertakes to amend the reference to the Scottish Gamekeepers Association at that time so as to allay any concerns over clarity.

SUBORDINATE LEGISLATION COMMITTEE

12th Meeting, 2012 (Session 4)

Tuesday 8 May 2012

Long Leases (Scotland) Bill – Response from the Scottish Government

Background

1. The Subordinate Legislation Committee reported on the delegated powers in the Long Leases (Scotland) Bill on 23 February 2012 in its [9th Report of 2012](#).
2. The Minister for Environment and Climate Change has responded to the report. His letter is reproduced in the appendix.

Government response

3. In its Stage 1 report, the Committee determined that it needed to draw the Parliament's attention to only two of the delegated powers provisions in the Bill.
4. On section 78(5), the Committee accepted that the negative procedure provides sufficient opportunity for the Parliament to object to the Scottish Government's proposals, but only provided that the instrument is laid at least 40 days in advance of the date on which it is proposed that it come into force.
5. In the response, the Minister notes the point and confirms that the Scottish Government will comply with the statutory requirements in laying any order made under this power and will aim to lay any order as soon as practicable before it is due to come into force. In addition, he confirms that the Scottish Government will consult on any draft order and follow its consultation good practice guidance when consulting
6. On section 81(1), the Committee stated that, where the Scottish Government may choose which mechanisms to use to make a particular provision, it should have regard to the complexity and effect of the provision and, in complex cases or where the exercise of the power affects individual rights, choose the mechanism that provides for a higher level of parliamentary scrutiny.
7. In the response, the Minister notes the point and confirms that the Scottish Government will aim to afford the Parliament the opportunity for a higher level of parliamentary scrutiny in such cases. He also acknowledges that any instrument made under the Bill that textually amends primary legislation should be subject to the affirmative procedure.
8. Unless amendments are made to the Bill at Stage 2 that affect the delegated powers provisions, the Committee will not consider it again. Members are therefore invited to make any comments they wish on the Bill at this stage.

Recommendation

9. Members are invited to note the Government's response on the Bill and to make any comments they wish at this stage.

Appendix

Correspondence from the Minister for Environment and Climate Change dated 19 April 2012

Long Leases (Scotland) Bill: Report by the Subordinate Legislation Committee

Introduction

1. I am grateful to the Subordinate Legislation Committee for its report. I am also grateful to you, Convener, for the work you have put in on this Bill: I am aware that you were on the Justice Committee which considered this Bill previously in the last Parliament.

2. I am responding separately to the Rural Affairs, Climate Change and Environment Committee in relation to their Report. This letter responds to the points made in your Report.

Section 78(5) - Power to prescribe a date or period after which notices and agreements determined registrable by the courts or the Lands Tribunal cannot be registered and to provide that applications to the courts must be made within a specified period for the notices and agreements to be registrable

3. I have noted the point made in paragraph 13 of your Report that the subject-matter of this power is of more importance than other procedural matters given that the exercise of the power would have the effect of limiting the period during which applications to a court or the Lands Tribunal could be made and would prevent persons from registering notices and agreements which a court or the Tribunal had determined to be registrable. I can confirm that we will comply with the statutory requirements in laying any order made under this power and will aim to lay any order as soon as practicable before it is due to come into force. In addition, as indicated in our correspondence with the Committee, we will consult on any draft order and follow our consultation good practice guidance when consulting.

Section 82 - "Bolt on" powers to make ancillary provision in relation to the exercise of all powers to make regulations and the power under section 78(5).

4. We have noted the points made and will aim to 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. We acknowledge that any instrument made under the Bill which textually amends primary legislation should be subject to the affirmative procedure.

Conclusion

5. I am, of course, happy to discuss any points arising.

6. I am copying this letter to Rob Gibson MSP, the Convener of the Rural Affairs, Climate Change and Environment Committee.

Stewart Stevenson

SUBORDINATE LEGISLATION COMMITTEE

12th Meeting, 2012 (Session 4)

Tuesday 8 May 2012

**Police and Fire Reform (Scotland) Bill – Response from the
Scottish Government**

Background

1. The Subordinate Legislation Committee reported on the delegated powers in the Police and Fire Reform (Scotland) Bill on 22 March 2012 in its [16th Report of 2012](#).
2. The Scottish Government has responded to the report. The cover letter from the Cabinet Secretary for Justice and the Scottish Government's response are reproduced in the appendix.

Government response

3. In its report, the Committee raised points on sections 5 and 116, 49, 84, 120 to 122 and 124. It also made recommendations on the powers to make transfer schemes in schedules 4 and 5.
4. The Scottish Government response provides detailed consideration of the Committee's points and confirms that it will lodge an amendment at Stage 2 to meet the Committee's concern about the power in section 122. It has not, however, agreed to take forward any of Committee's remaining recommendations.
5. The Committee will give further consideration to the delegated powers contained in the Bill after Stage 2.

Recommendation

6. **Members are invited to note the Government's response on the Bill and to note that the Committee will reconsider the Bill after Stage 2.**

Appendix

Correspondence from the Cabinet Secretary for Justice dated 30 April 2012

POLICE AND FIRE REFORM (SCOTLAND) BILL: SUBORDINATE LEGISLATION COMMITTEE REPORT TO THE JUSTICE COMMITTEE

This letter responds to the Subordinate Legislation Committee's report to the Justice Committee on the Police and Fire Reform (Scotland) Bill, which was published on 22 March 2012.

Firstly, I would like to thank the Committee for its detailed consideration of the delegated power provisions in the Bill.

The Committee has made comments and recommendations in relation to a number of those powers. The Scottish Government's response to the Committee's findings is attached as an annex to this letter.

I hope that this response is helpful, and am of course happy to provide any further information or other assistance which might help the Parliament and its committees in its consideration of the Bill. I look forward to working further with Committee members throughout the remaining Parliamentary stages of the Bill.

I am sending a copy of this letter to the Convener and Clerk to the Justice Committee, and to the Clerk of the Subordinate Legislation Committee.

KENNY MACASKILL

SCOTTISH GOVERNMENT RESPONSE TO ISSUES RAISED IN THE REPORT

Section 5(1) and section 116 (inserts section 42A into the Fire (Scotland) Act 2005) – Powers for the Scottish Ministers to give general or specific directions to the SPA and SFRS

Section 5(1) of the Bill enables the Scottish Ministers to give general or specific directions to the SPA, with which the SPA must comply. Subsection (2) restricts this power so that it may not be exercised in relation to specific police operations.

Section 116 inserts section 42 into the Fire (Scotland) Act 2005, to enable the Scottish Ministers to give general or specific directions to SFRS, with which SFRS must comply.

In its letter to the Scottish Government of 29 February, the Subordinate Legislation Committee queried the circumstances and matters in relation to which these powers might be used and whether directions may be made which conflict with subordinate legislation made under other powers in the Bill. In its response to that letter, the Scottish Government explained that the powers would be used rarely and only when all other appropriate routes had been exhausted. The Scottish Government further explained that any directions made could not conflict with any other statutory requirements on the services.

I note that the Committee has accepted our assurances on this matter and is content that these powers may be delegated to the Scottish Ministers.

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

Section 49 of the Bill enables the Scottish Ministers to make regulations in relation to the governance, administration and conditions of service of constables and police cadets. Sections 50 to 56 make further provision about those regulations, including requirements for consultation.

The Subordinate Legislation Committee has expressed concerns about this power and has drawn it to the attention of the Justice Committee for further consideration. I understand the Committee's concerns relate to the breadth of the power, however there appears also to be a suggestion that the power is potentially not suited to the new structure of the Police Service, as well as a concern that regulations made under the power should not simply replicate existing police regulations. The Committee has not previously queried this power, therefore the Scottish Government would like to take this opportunity to clarify its purpose and intended use.

Section 49 mirrors closely section 26(1) of the Police (Scotland) Act 1967. Sections 50 to 56, while not expressly limiting in their nature, are illustrative of the sorts of matters which must or may be dealt with in regulations under section 49. Regulations made under section 49 can delegate functions to others as appropriate, including the Scottish Ministers, the SPA and the chief constable, among others. Again, this mirrors the powers in the 1967 Act.

The purpose of these powers is to allow the Scottish Ministers to determine the balance to be struck between Ministerial regulation of aspects of administration of the police (generally terms and conditions and frameworks for assessing conduct, discipline and performance) and leaving the day to day administration to the SPA, the chief constable and others as appropriate. It is the Scottish Government's view that this applies equally under a single service model as under the current 8 force structure. It is not clear from the Committee's report why the new structure could make the approach in section 49 potentially unsuitable, nor is there any indication of the issues currently dealt with in regulations that the Committee considers should instead be dealt with in the Bill.

It therefore remains the Scottish Government's view that the power as framed in the Bill is appropriate and strikes the right balance in the context of a single Police Service. I welcome the Committee's comment that it agrees that negative procedure is appropriate.

Section 84 – Power to specify types of goods and services the SPA may provide

Section 84 of the Bill confers a power on the Scottish Ministers to specify by order the types 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. Section 84(1)(b) provides for this in relation to provision by the SPA. Section 84(3)(b) provides for this in relation to arrangements made by the SPA for provision by the Police Service.

In its letter of 29 February, the Subordinate Legislation Committee queried the scope of this power and, in particular, the circumstances in which it may be used. In its response to that letter, the Scottish Government explained that the power would only be exercised where Ministers were satisfied that it was appropriate for particular goods or services to be supplied to particular categories of person, and that the reason for taking the power to specify this by order was to enable Parliamentary scrutiny of any such proposals.

The Scottish Government notes that the Committee accepts this explanation, but that the Committee considers that the power is nonetheless capable of being exercised in a broad manner, for example so as to enable the SPA and Police Service to supply goods and services which are unconnected with its functions. The Committee suggests that the Bill should be amended to clarify the intention that the power would only be exercisable in connection with functions of the SPA and Police Service.

It is the Scottish Government's view that this is already the position, without the need for amendment to the Bill. I hope that the Committee will find the following explanation helpful.

The powers in section 84(1)(b) and (3)(b) may be wide enough to allow the Scottish Ministers to specify that goods and services of any nature may be supplied to any person who is not a public body or office-holder. It should be noted that the intention

is to retain some Ministerial control over the types of goods and services that may be provided by the SPA and Police Service outside the Scottish public sector.

While the power to specify the types of goods and services which might be provided is not subject to specific constraints, the SPA's power to provide goods and services (and make arrangements for their provision by the Police Service) is itself constrained. In particular, section 84(2) makes clear that the SPA can only provide such goods and services as may be specified under subsection (1)(b) if it considers the provision of those goods and services to be "appropriate and consistent with the proper carrying out of its functions".

Section 84(4) makes clear that arrangements may be made for the provision of goods and services specified under subsection (3)(b) where this is consistent with the proper carrying out of police functions. It is by this mechanism that the Bill seeks to ensure that goods or services are provided only where there is a connection with the functions of the SPA and police service.

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

Section 121 – Ancillary Provision

Section 122 – Transitional Provision

Section 124 – Commencement

Section 120(1)(b) enables the Scottish Ministers to make supplementary, incidental, consequential, transitional, transitory or savings provisions in connection with subordinate legislation made under the provisions of the Bill.

In its letter of 29 February, the Committee queried why this power is required in addition to separate standalone powers to make ancillary provision provided in sections 121 and 122 and the power to make transitional, transitory or saving provision in connection with commencement under section 124, and why the negative procedure was considered appropriate. In response, the Scottish Government explained that section 120(1)(b) is intended to cover the slightly different scenario to these powers, i.e. where such provisions are required in connection with subordinate legislation made under the provisions of the Bill. The Scottish Government further explained that the appropriate procedure will be determined by the power under which such subordinate legislation is made.

I note that the Committee has accepted this explanation of the need for section 120(1)(b), and finds the power and parliamentary procedure acceptable in principle, and is of the view that the procedure to which particular provisions which could be made under section 121 or section 120(1)(b) are subject should not simply be determined by the related substantive provisions, but also by the individual circumstances of each case.

Section 121 enables the Scottish Ministers to make supplementary, incidental or consequential provision for the purposes of, or in consequence of, or for giving full effect to, any provision made by or under the Bill. An order made under this section which contains a provision which adds to, omits or replaces any part of an Act is subject to the affirmative procedure. Any other order made under this section is subject to the negative procedure.

In its letter of 29 February, the Committee queried when such a power might be exercised. In its response, the Scottish Government indicated that it was conducting a substantial exercise to identify all relevant references to police and fire and rescue services in other legislation, and that this power was simply intended to cover anything missed, or to take account of any amendments made at Stage 3. I note that the Committee is content with this explanation and the Scottish Government's approach on the correct form of parliamentary procedure.

Section 122 enables the Scottish Ministers to make transitional, transitory and savings provisions in connection with the coming into force of any provision made by or under the Bill. This power is restricted by the fact that only transitional and transitory provision can be made, and is therefore subject to the negative procedure.

In its letter of 29 February, the Committee queried when such a power might be exercised, and why the Scottish Government felt it should be subject to the negative procedure. In response, the Scottish Government indicated that the power is required as there may be issues not agreed in time for, or arising after, Stage 2. The negative procedure is considered appropriate for all transitional provisions, since these cannot make permanent changes to primary legislation.

I note that the Committee is content with this power, but recommends that 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.

It is the Scottish Government's view that the temporary nature of transitional provisions means that the negative procedure would be appropriate. However, we acknowledge the merit to a consistent approach to textual modification between sections 121 and 122. The Scottish Government will therefore lodge an amendment at Stage 2 with the intention that an order under section 122 which makes textual amendments to primary legislation would be subject to the affirmative procedure.

Section 124 enables the Scottish Ministers to appoint days on which the provisions in the Bill come into force (other than sections 120, 121, 122 and 125 which come into force on the day after Royal Assent). The power will be subject to no procedure.

I note that the Subordinate Legislation Committee finds the power in section 124 acceptable in principle.

Schedule 4, paragraph 11(1) – Power to make a staff transfer scheme (police)
Schedule 4, paragraph 16(1) – Power to make a police property transfer scheme
Schedule 4, paragraph 17 – Power to make a local authority property transfer scheme (police)
Schedule 5, paragraph 3 – Power to make a staff transfer scheme (SFRS)
Schedule 5, paragraph 5 – Power to make an SFRS property transfer scheme
Schedule 5, paragraph 6 – Power to make a local authority property transfer scheme (SFRS)

In its letter of 29 February, the Committee asked the Scottish Government to confirm and explain why the schemes made under these powers would not be Scottish Statutory Instruments (SSI), and therefore would not be subject to the publication and laying requirements applying to a SSI. In its response, the Scottish Government confirmed that the schemes made under these powers would not be SSIs, and that they would not be subject to parliamentary scrutiny because they are purely administrative matters, and for reasons of confidentiality.

I note that the Committee does not share this view, and is recommending that these powers should be exercised in the form of a Scottish Statutory Instrument so that they will be subject to parliamentary scrutiny, and subject to the negative procedure. It has also drawn the attention of the Justice Committee to the approach adopted in Schedule 3 of the Police, Public Order and Criminal Justice (Scotland) Act 2006, which provided for the making of staff transfer orders transferring staff to SPSA and SCDEA, which it feels adequately balances the need for parliamentary scrutiny of the transfer of staff and property with the operational need to maintain confidentiality.

The Scottish Government understands these concerns, but notes that the majority of staff (all constables, all joint board staff, all SPSA staff, police cadets, HMICS staff and joint fire board staff) are transferred directly by the Bill (Schedule 4, paragraphs 3 to 10, 13 and 15 and Schedule 5, paragraph 2). Provision is also made about the terms of transfer. The majority of staff transfers are therefore subject to Parliamentary scrutiny.

A staff transfer scheme may be made only in respect of staff of local authorities and, in the case of fire, civil servants. For police, the power is simply to identify such staff who are to be treated as police employees. The transfer itself will be given effect by paragraph 10 of Schedule 4 to the Bill and on the terms specified in that paragraph. The nature of the transfers and the principles which will apply are therefore provided for in primary legislation and also subject to Parliamentary scrutiny. It therefore remains the Scottish Government position that it is appropriate for the transfer itself to be given effect administratively, without the need for further legislation.

The transfer of property, rights and liabilities by administrative scheme rather than by statutory order is not unique or unusual. There is no distinction in this respect between the powers conferred by the Bill and the powers conferred by paragraph 6 of Schedule 3 to the Police, Public Order and Criminal Justice (Scotland) Act 2006, which enabled the transfer of property, etc administratively. There was no provision in that Act for the transfer of property by Order.