



The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

30th Meeting, 2012 (Session 4)

Tuesday 18 December 2012

The Committee will meet at 10.30 am in Committee Room 6.

1. **Decision on taking business in private:** The Committee will decide whether to take item 5 in private.
2. **Instruments subject to negative procedure:** The Committee will consider the following—

[Town and Country Planning \(Miscellaneous Amendments\) \(Scotland\) Regulations 2012 \(SSI 2012/325\);](#)
[Children's Hearings \(Scotland\) Act 2011 \(Child Protection Emergency Measures\) Regulations 2012 \(SSI 2012/334\);](#)
[Children's Hearings \(Scotland\) Act 2011 \(Rights of Audience of the Principal Reporter\) Regulations 2012 \(SSI 2012/335\);](#)
[Children's Hearings \(Scotland\) Act 2011 \(Appeals against Dismissal by SCRA\) Regulations 2012 \(SSI 2012/337\);](#)
[Act of Sederunt \(Fees of Sheriff Officers\) \(Amendment\) \(No. 2\) 2012 \(SSI 2012/341\).](#)

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

[Police and Fire Reform \(Scotland\) Act 2012 \(Commencement No. 2, Transitory and Transitional Provisions and Appointed Day\) Order 2012 \(SSI 2012/333 \(C.32\)\);](#)
[Act of Sederunt \(Fees of Messengers-at-Arms\) \(Amendment\) \(No. 2\) 2012 \(SSI 2012/340\).](#)

4. **Water Resources (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.
5. **Aquaculture and Fisheries (Scotland) Bill:** The Committee will consider a draft report to the Rural Affairs, Climate Change and Environment Committee.

SL/S4/12/30/A

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The papers for this meeting are as follows—

Agenda Items 2 and 3

Legal Brief (private)

SL/S4/12/30/1 (P)

Agenda Item 2

Instrument Responses

SL/S4/12/30/2

Agenda Item 4

[Water Resources \(Scotland\) Bill \(as introduced\)](#)

[Water Resources \(Scotland\) Bill
\(Delegated Powers Memorandum\)](#)

[Water Resources \(Scotland\) Bill \(SLC Stage 1 Report\)](#)

Briefing Paper

SL/S4/12/30/3

Agenda Item 5

[Aquaculture and Fisheries \(Scotland\) Bill \(as introduced\)](#)

[Aquaculture and Fisheries \(Scotland\) Bill
\(Delegated Powers Memorandum\)](#)

Briefing Paper (private)

SL/S4/12/30/4 (P)

SUBORDINATE LEGISLATION COMMITTEE

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Instrument Responses

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Town and Country Planning (Miscellaneous Amendments) (Scotland) Regulations 2012 (SSI 2012/325)

On 6 December 2012, the Scottish Government was asked:

The Regulations make purely consequential amendments, consequential on the draft Public Services Reform (Planning) (Local Review Procedure) (Scotland) Order 2013, and the draft Public Services Reform (Planning) (Pre-application consultation) (Scotland) Order 2013, which have both been laid in draft under the powers in section 17 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”).

Section 17(9) provides a specific ancillary power, for an order under that section to contain such consequential, etc. provisions as Ministers consider appropriate. The Parliament has determined that such an order is subject to the “super-affirmative” procedures set out in sections 25 to 27 of that Act. These consequential Regulations (made under enabling powers in relation to planning applications etc. in the 1997 Act which are subject to the negative procedure) are made on the assumption that the Parliament by the “super-affirmative” procedure will approve the modifications to sections 35A and 43A of the 1997 Act proposed in those 2 draft Public Services Reform Orders.

Please explain therefore:

1. Why has it been considered appropriate to make these provisions under the powers in the 1997 Act which are cited in the preamble, given that at the date of making this instrument the Parliament has yet to approve the proposed amendments to sections 35A and 43A of the 1997 Act, which amendments enable the purely consequential provisions in these Regulations?
2. Why the Scottish Government has not made these provisions under the specific power in section 17(9) of the 2010 Act (by adding them to the 2 draft Public Services Reform Orders), which attracts the “super-affirmative” procedure - but has chosen to make the provisions under the powers in the 1997 Act which are subject to the lesser scrutiny procedure?

The Scottish Government responded as follows:

The amendments made by the Regulations to the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 and Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008 (together referred to below as “the 2008 Regulations”) are made in anticipation of changes being made to the Town and Country Planning (Scotland) Act 1997 (“1997 Act”) by the provisions of the draft Public Services Reform (Planning) (Local Review Procedure) (Scotland) Order 2013, and the draft Public Services Reform (Planning) (Pre-application consultation) (Scotland) Order 2013 (together referred to below as “the PSR Act Orders”) should the PSR Act Orders be approved by Parliament.

It was and is recognised that section 17(9) of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”) enables an order made under section 17 to include consequential provisions to amend enactments and that this would have enabled the changes to the 2008 Regulations to have been included in the PSR Act Orders.

The proposed drafts of the PSR Act Orders laid in Parliament in accordance with section 26(2)(a)(i) of the 2010 Act did not, however, include such consequential provisions. The consultation undertaken as required by section 26(1) of the 2010 Act did not raise the need for these consequential changes. To avoid any issues arising as to whether or not changes to the PSR Act Orders to include the consequential provisions would or would not be ‘as a result of consultation’ (section 26(4) of the 2010 Act) and given highly technical nature of the proposed consequential amendments and the availability of other powers to make the desired changes to the 2008 Regulations, it was considered appropriate to make the amendments to the 2008 Regulations by these Regulations.

It is desirable that the amendments to the 2008 Regulations to be made by these Regulations should come into force on the same date as changes are made to the 1997 Act by the PSR Act Orders (if approved). In making these Regulations the possibility that the Parliament would not approve the PSR Act Orders was recognised.

If the PSR Act Orders are not approved then the amendments made by the Regulations would be unnecessary. The amendments made by the Regulations could then be revoked, however, they would not in the meantime adversely impact on the operation of the planning system.

Regulation 2(2) of these Regulations makes a consequential amendment to regulation 11 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 to remove the requirement for applications under section 42 of the 1997 Act for national or major development to be accompanied by a pre-application consultation report. The requirement to prepare a pre-application consultation report is set out in section 35C(1). In the event that changes to the 1997 Act contained in the draft Public Services Reform (Planning) (Pre-application consultation) (Scotland) Order 2013 were not to be made then the requirement to prepare a pre-application consultation report would remain in place. An applicant would in practice still have to submit the report with the application as,

in terms of section 39(1A), the planning authority must decline to determine the application if there has been a failure to comply with pre-application consultation requirements. A pre-application consultation report would either be submitted to provide evidence of compliance with the pre-application consultation requirements or the planning authority could request the applicant to provide a pre-application consultation report under section 39(1B).

The changes made by regulation 2(3) to regulation 26 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 and by regulation 3(2) to regulation 2 of the Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2008 would have no practical effect if the changes proposed by the draft Public Services Reform (Planning) (Local Review Procedure) (Scotland) Order 2013 are not made. These changes both relate to the possibility of an extension to a prescribed period being agreed between the applicant and the person appointed to deal with the application. Such agreement is only possible if the Order is made.

SUBORDINATE LEGISLATION COMMITTEE

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Water Resources (Scotland) Bill

Response from the Scottish Government

Background

1. The Subordinate Legislation Committee reported on the delegated powers in the Water Resources (Scotland) Bill on 1 November 2012 in its [48th Report of 2012](#).
2. The response from the Scottish Government to this report is reproduced in the appendix.
3. The Stage 1 debate is due to take place on Wednesday 19 December 2012.

Scottish Government response

Section 2 – Power to direct public bodies

4. In its Stage 1 report, the Committee concluded that there is a public interest in the terms of directions to public authorities on how they operate with a view to developing the value of Scotland's water resources. Accordingly, the Committee recommended that the Scottish Government consider whether such directions, while not exercisable as subordinate legislation, should be subject to consultation and publication requirements.
5. In its response, the Scottish Government indicates that any directions issued to public authorities must be in line with the proper exercise of the functions of the designated body concerned.
6. The Scottish Government feel that a requirement for such directions to be subject to public consultations would be "unduly burdensome." However, they further state that public authorities would be consulted in advance of any directions being made.
7. Therefore, whilst agreeing that directions to public authorities may be of public interest, the Scottish Government does not believe that such directions should be subject to consultation and publications requirements.

Section 14(1)(c) – grounds for suspension and revocation

8. In its report, the Committee concluded that setting out the grounds on which consents granted for large scale abstraction may be suspended or revoked is a matter of importance in which there is a significant public interest. It therefore recommended that the power to set additional grounds which will empower Ministers to suspend or revoke consents should be subject to the affirmative procedure.

9. In its response, the Scottish Government accepted this recommendation, acknowledging the reasons stated by the Committee to be valid.

Section 19(4) – control of water abstraction: references to Controlled Activities Regulations

Section 31 – references to priority substances

Section 34 – common maintenance – references to Controlled Activities Regulations

Section 46 – water shortage orders – references to Controlled Activities Regulations

10. The Committee considered these four powers together as they all raise the same issue.

11. In its report, the Committee concluded that the existing power in section 20 of the Water Environment and Water Services (Scotland) Act 2003 is sufficient to deliver the Scottish Ministers' policy objective. Accordingly, it did not consider it necessary to confer the further powers proposed. The Committee observed that to do so would authorise a reduction in the parliamentary scrutiny of such provisions from that previously established by the Parliament and did not consider this to be appropriate. It therefore recommended that the powers should be removed from the Bill.

12. The Scottish Government does not agree with the Committee's recommendation. They believe that the provisions in these powers provide an appropriate level of parliamentary scrutiny in the specific circumstances of minor amendments to primary legislation consequential on changes to the Controlled Activities Regulations being required.

13. The Scottish Government acknowledge that powers in the Water Environment and Water Services (Scotland) Act 2003 could be used in these circumstances. However, they believe that doing so would not be an appropriate use of Parliament's time.

14. As a result, they have created a new power in the Bill, which is subject to negative procedure, to make such consequential amendments.

Conclusion

15. Unless amendments that will affect the delegated powers provisions are made to the Bill at Stage 2 the Committee will not consider it again. Members are therefore invited to make any comments they wish on the Bill at this stage.

Recommendation

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

Appendix

Correspondence Dave Brown, Water Industry Team dated 26 November 2012

Section 2 – Power to direct public bodies

Given the public interest in water as a commodity for general use the Committee considers that there is a public interest in the terms of directions to public authorities on how they are to operate with a view to developing the value of Scotland's water resources. Accordingly the Committee recommends that the Scottish Government considers whether such directions, while not exercisable as subordinate legislation, should be subject to consultation and publication requirements.

Scottish Government response

We are not minded to accept. We agree that there could be public interest in the terms of directions issued to public authorities about this agenda. However, the power to direct the bodies concerned is only "as to the exercise of their functions". As such, any direction issued under this power must be consistent with the proper exercise of the functions of the designated body concerned. We think that it would be unduly burdensome to require such directions to be the subject of public consultation. However, any designated body which is to be the subject of such a direction will be consulted in advance of a direction being made.

Section 14(1)(c) – grounds for suspension and revocation

The Committee is of the view that setting out the grounds on which consents granted for large scale abstraction may be suspended or revoked is a matter of importance in which there is a significant public interest. It therefore recommends that the power to set additional grounds which will empower Ministers to suspend or revoke consents should be subject to the affirmative procedure.

Scottish Government response

We are minded to accept this recommendation, as we accept that varying the grounds on which consents for large scale abstraction may be suspended or revoked would be of sufficient public interest to merit Parliamentary scrutiny by the affirmative procedure.

Section 19(4) – control of water abstraction: references to Controlled Activities Regulations

Section 31 – references to priority substances

Section 34 – common maintenance – references to Controlled Activities Regulations

Section 46 – water shortage orders – references to Controlled Activities Regulations

The Committee... concludes that the existing power in section 20 of the Water Environment and Water Services (Scotland) Act 2003 is sufficient to deliver the Scottish Ministers' policy objective. Accordingly it is not necessary to confer the further powers proposed. The Committee observes that to do so would authorise a reduction in the parliamentary scrutiny of such provisions from that previously established by the Parliament and does not consider that this is appropriate. It therefore recommends that these unnecessary powers are removed from the Bill.

Scottish Government response

We do not agree this recommendation. We believe that the additional powers conferred by the provisions of sections 19(4), 31, 34 and 46 provide the level of Parliamentary scrutiny which is appropriate in the specific circumstances of requiring to make minor amendments to primary legislation consequential on changes to the Controlled Activities Regulations. Although the much wider powers of section 20 of the Water Environment and Water Services (Scotland) Act 2003 could be used for this purpose, we do not think that it would be an appropriate use of Parliament's time to scrutinise purely consequential amendments through the affirmative procedure that section 20 attracts. We therefore have therefore created a new power in the Bill, which attracts the negative procedure, to make such consequential amendments.