



SUBORDINATE LEGISLATION COMMITTEE

AGENDA

17th Meeting, 2005 (Session 2)

Tuesday 24th May, 2005

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

1. **Delegated powers scrutiny:** The Committee will consider a response from the Executive on the delegated powers provisions in the following bill—

Housing (Scotland) Bill at Stage 1.

2. **Delegated powers scrutiny:** The Committee will consider a response from the Executive on the delegated powers provisions in the following bill—

Licensing (Scotland) Bill at Stage 1.

3. **Protection of Children (Scotland) Bill:** The Committee will consider correspondence from the Deputy Minister for Justice, Hugh Henry MSP.

4. **Prohibition of Female Genital Mutilation (Scotland) Bill:** The Committee will consider correspondence from the Deputy Minister for Justice, Hugh Henry MSP.

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

the Criminal Justice (Scotland) Act 2003 (Amendment of Police (Scotland) Act 1967) Order 2005, **(SSI 2005/draft)**

the Fire (Scotland) Act 2005 (Consequential Modifications and Amendments) Order 2005, **(SSI 2005/draft)**

the Mental Health (Safeguards for Certain Informal Patients) (Scotland) Regulations 2005, **(SSI 2005/draft)**.

6. **Instruments subject to approval:** The Committee will consider the following—

the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.4) (Scotland) Order 2005, **(SSI 2005/260)**.

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

the Common Agricultural Policy Single Farm Payment and Support Schemes (Scotland) Amendment Regulations 2005, **(SSI 2005/257)**

the Mental Welfare Commission for Scotland (Appointment of Medical Commissioners) Regulations 2005, **(SSI 2005/261)**

the Mental Health (Conflict of Interest) (Scotland) Regulations 2005, **(SSI 2005/262)**

the Additional Support for Learning (Appropriate Agency Request Period and Exceptions) (Scotland) Regulations 2005, **(SSI 2005/264)**

the Additional Support for Learning (Changes in School Education) (Scotland) Regulations 2005, **(SSI 2005/265)**

the Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Regulations 2005, **(SSI 2005/266)**

the Additional Support for Learning (Publication of Information) (Scotland) Regulations 2005, **(SSI 2005/267)**

the St. Mary's Music School (Aided Places) (Scotland) Amendment Regulations 2005, **(SSI 2005/269)**

the Education (Assisted Places) (Scotland) Amendment Regulations 2005, **(SSI 2005/270)**.

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

the Water Environment and Water Services (Scotland) Act 2003 (Commencement No.3) Order 2005, **(SSI 2005/256)**

the Education (Additional Support for Learning) (Scotland) Act 2004 (Commencement No.2) Order 2005, **(SSI 2005/263)**

Act of Sederunt (Rules of the Court of Session Amendment No.7) (Miscellaneous) 2005 **(SSI 2005/268)**.

9. **International conference:** The Committee will consider a proposal that the Parliament hosts an international conference on the scrutiny of delegated legislation.

Ruth Cooper
Clerk to the Committee
Tel: 0131 348 5212

The following papers are relevant to this meeting:

Agenda Items 1-8

Legal Brief (Private) – to follow SL/S2/05/17/1

Agenda Item 1

Executive response SL/S2/05/17/2

Agenda Item 2

Executive response SL/S2/05/17/3

Agenda Item 3

Letter from the Deputy Minister for Justice SL/S2/05/17/4

Note from Legal Advisers/Clerk (Private) SL/S2/05/17/5

Copy of the bill as amended at Stage 2 (circulated to Members only)

Agenda Item 4

Letter from the Deputy Minister for Justice SL/S2/05/17/6

Note from Legal Advisers/Clerk (Private) SL/S2/05/17/7

Copy of the bill as amended at Stage 2 (circulated to Members only)

Agenda Items 5 to 8

Copies of instruments (circulated to Members only)

Agenda Item 9

Note from the Clerk SL/S2/05/17/8

The following is circulated for information in relation to the Committee's inquiry into the regulatory framework in Scotland:

Executive summary of the Hampton Review final report: No number given
"Reducing administrative burdens: effective inspection and – circulated to
enforcement" Members for
information only

The full report is available online at http://www.hm-treasury.gov.uk/media/AAF/00/bud05hampton_641.pdf

SUBORDINATE LEGISLATION COMMITTEE**17th Meeting, 2005 (Session 2)****Tuesday 24th May, 2005****Executive Response****Housing (Scotland) Bill at Stage 1**

The Subordinate Legislation Committee considered the Housing (Scotland) Bill at Stage 1 at the meeting of the Committee on 17 May 2005. The Scottish Executive responds to the points raised by the Committee as follows.

Section 11(3): power to issue guidance in relation to tolerable standard

2. The Committee has sought further explanation from the Executive as to why it proposes to create the power to issue guidance in relation to the tolerable standard, how it envisages it will be used, why it considers it a suitable matter for guidance and whether it considered amending the 1987 Act instead.

3. The power in the Bill is to allow guidance in relation to construing reference to the tolerable standard. The guidance is, as the Committee correctly suggests, to be seen as an aid to interpretation. It is not intended to define the standard. The criterion of the standard is set out in section 86 of the Housing (Scotland) Act 1987. The Bill adds 2 more criteria. The Bill also says that any more additions to the criterion in the 1987 Act will be subject to affirmative procedure.

4. A power already exists in the 1987 Act to make changes to the criteria to the tolerable standard by administrative order (section 86(1) of the 1987 Act). The Executive felt that while it is appropriate to continue to allow changes to the criteria, it was inappropriate that such changes would not be subject to any parliamentary scrutiny. For this reason section 11(4) of the Bill allows that changes can still be made to the criteria but that the order making procedure to do so is subject to affirmative procedure.

5. The tolerable standard is the minimum standard that it is expected that houses should meet. A house adjudged to fail the standard may be the subject of statutory intervention. It is important that the standard is applied and interpreted consistently both within and across local authorities. Inconsistency of interpretation has two particular effects: similar houses in different areas may be treated differently; and local authorities may not identify houses below tolerable standard which need action. The Executive consider that the issuing of guidance is a major way to ensure this consistency.

6. Consistency may also be difficult to achieve where the standard is defined in a technical way. In the case of whether a house has a WC this is straightforward, but electrical safety is likely to be defined by reference to industry standards and norms. As these vary and develop over time and are also subject to interpretation, guidance

provides a flexible and responsive approach to inform local authority work. Local authorities have welcomed the potential for such guidance.

7. The guidance approach was recommended by the Housing Improvement Task Force, which brought together a range of housing interests. In addition, the guidance approach was the subject of a question in the consultation paper on proposals for the Bill - Maintaining Houses Preserving Homes. 93% of respondents supported this approach.

Section 20(2): power to issue guidance on written information to be provided by a landlord to a tenant at the start of the tenancy

8. The Committee considers that the power to issue guidance should be subject to parliamentary scrutiny as landlords will be under a legal duty to provide the information and asks the Executive for comment. The Committee also noted that the bill does not contain any enforcement mechanism for failure to provide the information and asks the Executive for comment. The Committee has also invited the Executive to comment on why it feels this power should be exercised by guidance rather than by regulations.

9. The Executive considers that it is important that the tenant be informed of the landlord's repairing obligation and the means of enforcing it. The Bill creates a self-standing obligation on the landlord to provide written information to the tenant. The intention is that the guidance will indicate good practice. It is likely to provide a suitable form of wording in plain English for explaining the provisions of Chapter 4 of the Bill and to indicate when and in what form the information should be provided to the tenant, taking equalities considerations into account. The Executive feel that given the nature of the proposed content of guidance that it is not appropriate that such guidance be subject to parliamentary procedure. For the same reasons the Executive feel that it would not be appropriate for the power to be exercised by regulations.

10. It is envisaged that the requirement to provide written information will be enforced through the operation of landlord registration under the Antisocial Behaviour etc (Scotland) Act 2004. A failure by the landlord to provide written information would be relevant material when the local authority was considering whether the landlord is fit and proper to be letting houses. This is thought to be a more effective and appropriate route than a separate offence and penalty for failing to provide information.

Section 50(8): power to issue guidance to local authorities on their exercise of a new power to contribute to the maintenance costs of private owners

11. The Committee was concerned that the guidance issued under section 50(8) could be considered mandatory. The Committee has invited comments on whether, should that be the case, some form of parliamentary scrutiny might be appropriate.

12. The policy position in relation to section 50 is that guidance rather than legislation is more appropriate. The intention is not to regulate and set out when a local authority has to contribute missing shares. Section 50(3) says that it is at the

discretion of the local authority to meet a missing share payment. That is why the Bill does not make any express provision on this point. Local Authorities must show that they have had regard to the guidance in any decision they reach.

13. The Executive view is that guidance is merely a guide and is not mandatory. There is no compulsion to follow it if other factors in particular circumstances make it reasonable not to follow it.

Section 51(3): right to adapt rented houses to meet the needs of disabled occupants

14. The Committee has asked for an explanation of the circumstances when a landlord may reasonably withhold consent in terms of section 51(3) and whether guidance is to be issued.

15. Section 52(1) sets out some specific considerations that the landlord may take into account in deciding whether it is reasonable to consent. That list is not intended to be exhaustive. It may, for example, lead to the following examples of a reasonable withholding of consent:

- the work is not necessary as it is a cosmetic change that does not make the house more suitable for the accommodation, welfare or employment of the disabled occupant.
- the proposed works are to a part of the property used by other households, and would restrict their use of that area. For example, a stairlift reduces the width of the stair and could be a dangerous obstruction in some cases.
- the works have consequential costs for the landlord. For example, the tenant may seek consent to remove a wall on the basis that the landlord will bear the cost of strengthening other parts of the structure in consequence.
- the works affect the value of the house or its suitability for sale or let. For example, if the tenant wanted to install specialised bathroom fittings that most prospective tenants would reject, the landlord could reasonably refuse if the tenant was not willing to make adequate arrangements for the reinstatement of the bathroom at the end of the tenancy.
- the house would not be capable of reinstatement. For example, if architectural features were to be removed it might not be feasible to replace them.

16. The examples above are as the Executive see the position at present. They are not intended to set out definitive situations where the withholding of consent is reasonable. Each discussion of a situation in which consent is refused will turn on the specifics of that situation.

17. In addition sections 52(4) and 52(5) provide that a refusal of consent is reasonable if the landlord by consenting would lay him or herself open to legal sanction. In this case the landlord must have taken reasonable steps to try to obtain the right to give consent without legal sanction. For example there might be title conditions that the other parties in a tenement refused to relax despite the genuine efforts of the landlord.

18. The Executive intends to ensure that suitable guidance is made available.

Section 88(4): power to make regulations amending a definition and setting terms for loans

19. The Committee considered that the power to amend the definition of designated lender at section 88(4)(a) by regulation should be subject to affirmative procedure.

20. The Executive appreciates the Committee's concern that the power to amend the definition of "designated lender" could remove and replace the current requirements in their entirety. The idea of local authorities making loans through non-profit lending organisations is in its infancy, and flexibility in the definition is required to allow for new types of organisation that may develop or move into this area of business. However, the Executive appreciate the argument that the possibility of such amendments should perhaps be subject to affirmative procedure. The Executive undertake to consider the possibility of such a change, and if they decide to do so, will lodge an amendment at stage 2 of the Bill.

Section 91(1): power to issue directions to local authorities in relation to the provision of assistance under Part 2

21. The Committee asked the Executive to comment on the Committee's view that the use of directions under section 91(1) would appear to undermine the framework of responsibility set up in Part 2.

22. Part 2 of the Bill substantially widens the powers available to local authorities to assist house owners and provides them with significantly more flexibility in their use of those powers. This should help local authorities to be more effective in matching the delivery of assistance to individual needs and local priorities.

23. The Executive aims to ensure that the way the local authority's powers in Part 2 are used is fair, transparent and reasonably consistent across the country and also supports national priorities. The requirement for local authorities to publish their criteria (section 69) and the arrangements for providing local authorities with the necessary funding both support these aims, but these are not ideal mechanisms for reacting quickly to particular circumstances or correcting specific inconsistencies of practice. The direction-making power is intended to fill this gap.

24. The Committee asked for examples of how it envisages the power of direction being used. Although no decisions have been made about the potential use of the powers, illustrative examples might be:

- where there was damage to a number of houses in an area from an unusual occurrence, for example through flooding or mine subsidence, Ministers might direct the local authority for that area on the nature and level of assistance to make to the owners of those houses.
- where this happened in an area crossing local authority boundaries, Ministers might use directions to ensure a consistent approach.

25. Turning to the alternatives approaches identified by the Committee, the Executive would comment as follows:

(1) Issuing guidance is not alternative as such a power already exists under section 91(4) and may well have been issued prior to the exercise of the power to give directions.

(2) Limiting the direction-making power to only some aspects of the scheme would reduce the effectiveness of the power in achieving the aims referred to above.

(3) The power to make directions allows active checks and balances within the statutory framework, if necessary at a local level, and with the flexibility to do so at speed. The example of situations in the foregoing paragraph shows where such flexibility would be advantageous.

Section 102: power to make regulations exempting certain persons from the duty to provide information under Part 3 and setting out exceptions to that duty

26. The Committee asked for comment, firstly, on whether the exemption of certain persons should not be on the face of the Bill and, secondly, if not should the regulations exempting not be subject to affirmative procedure.

27. The main policy aim of Part 3 of the Bill is to improve the information available to prospective purchasers, with the additional aim of addressing multiple surveys and artificially low upset prices. This information will relate to the condition of property.

28. The policy intention on the use of the power is to allow the exemption of persons and exceptions to the duties in circumstances where it is appropriate. Examples of where it will be appropriate will emerge once the provisions are coming into force. However to give an idea of how the power might be used it may be felt that it is appropriate to consider excepting new build properties. This could be appropriate as a structural report on the condition of a new property could be seen to add nothing to informing the purchaser. Other cases or circumstances may emerge over time.

29. The Executive believe that the ability to make exemptions and exceptions requires the flexibility provided by a regulation making power. However, the Executive appreciate the Committee's point that the regulation making power should perhaps be subject to affirmative procedure. The Executive undertake to consider the possibility of such a change, and if they decide to do so, will lodge an amendment at stage 2 of the Bill.

Section 120(1): power to order that local authorities may exempt certain types of HMO from the requirement to be licensed

30. The Committee asked for comments as to why the power in section 120(1) is subject to negative procedure, bearing in mind the power in section 119(2) is subject to affirmative procedure.

31. The Committee also sought clarification in relation to HMOs which would be exempted from the requirement to be licensed due to the ASB Act. The Committee

also asked about the effects and differences of using the ASB Act provisions rather than the HMO provisions and specifically whether fire authorities would be involved.

32. The power in section 120(1) is intended to be used to allow local authorities to remove the burden of licensing where it is satisfied that the tenant is sufficiently protected by other means. The mechanism allows Ministers to ensure that this is not done to an extent or in circumstances that would undermine the purpose of HMO licensing. In particular, it is likely to be used in relation to categories of HMO which are considered to be adequately controlled by landlord registration under the ASB Act 2004. The Executive undertake to consider the possibility of making the procedure affirmative, and if they decide to do so, will lodge an amendment at stage 2 of the Bill.

33. Registration under the ASB Act will involve a check that the landlord is a fit and proper person to manage rented property, plus a list of the houses they let, but it will not require physical inspection of the properties. A key factor in determining categories that could allow exemption by local authorities under this power will therefore be whether there is a continuing need for physical inspection.

34. Under the Fire (Scotland) Act 2005, responsibility for the enforcement of fire safety in licensable HMOs will lie with fire and rescue services rather than the licensing authority. Exemption of a category of HMOs from licensing will remove that category from the definition of “relevant premises” for the purposes of the Fire (Scotland) Act 2005.

Section 126(2): power to order local authorities to include certain conditions in HMO licences

36. The Committee considered that it might be useful for Ministers to consult with local authorities, or their representative bodies before exercising the power to make standard conditions by order.

37. The Executive would expect to consult with relevant bodies before introducing mandatory licensing conditions, building on extensive consultation which has already taken place to produce good practice guidance under the present HMO licensing system. However the Executive do not feel that it is necessary to make consultation a requirement on the face of the Bill.

Section 155(3): amends Antisocial Behaviour etc. (Scotland) Act 2004 to provide a code of practice for landlords

38. The Committee asks what would happen if a landlord is deemed not to be a fit person.

39. Under section 84(3) and (4) of the Antisocial Behaviour etc (Scotland) Act 2004, the local authority must refuse to register a landlord or agent if it is not satisfied that he or she is a fit and proper person. It is an offence for a person who is not registered to let property, and the local authority may also serve a notice that no rent is payable.

40. The Committee asks for clarification of the status of the code and the consequences of a breach.

41. Section 85 of the Antisocial Behaviour Act sets out matters to which a local authority shall have regard (among other things) in determining whether a person is fit and proper to let property. Those matters include any breaches of relevant law and the code would be a further matter. Any evidence that a person had failed to comply with the code would not automatically bar them from registration, but would be taken into account by the local authority in combination with other evidence. There is no direct consequence to a landlord of a breach of the code.

Schedule 4 paragraph 3(5): power to direct local authorities regarding the requirement to display HMO applications on premises

42. The Committee asks for examples of the intended use of this power.

43. An applicant for an HMO licence must display a notice outside the premises informing neighbours of the application. Under the current legislation this requirement is waived for women's refuges, because the residents could be at risk if the location of the refuge was made public. The provision in the Bill is more general, because it is considered that other types of accommodation, such as accommodation for ex-prisoners, could also benefit from the exemption. Ministers propose to use the direction power to identify women's refuges and other specific organisations or types of accommodation which should always be exempt from displaying a notice.

SUBORDINATE LEGISLATION COMMITTEE

17th Meeting, 2005 (Session 2)

Tuesday 24th May, 2005

Executive Response

Licensing (Scotland) Bill at Stage 1

1. In their letter of 17 May 2005, the Subordinate Legislation Committee asks the Executive for explanation of the following matters:.

Section 81(2): power to specify which Licensing Board is to exercise functions under Part 6

(a) The Committee noted that section 81(1) gave the Scottish Ministers power, by order, to provide for any function exercisable by a Licensing Board under Part 6 of the Bill to be exercisable instead by a Licensing Board of such other description as may be specified in the order. Subsection (2) provides that such an order may modify the Act and make different provision in relation to different functions. The Committee considered that it was not clear why it would be necessary for the Executive to take a power to modify any part of the Act to achieve this aim.

The Committee was also concerned that the proposed power to modify the Act, conferred by section 81(2) is not subject to affirmative procedure.

Therefore, the Committee sought an explanation from the Executive as to the need for this power, why the power was not subject to draft affirmative procedure, and whether the Executive considered that the policy aim could be achieved by an order under section 135.

***Section 91:
Regulations as to closure orders***

(b) The Committee considered that there was some ambiguity in the drafting of section 91(a). The introductory part of section 91 provided that the Scottish Ministers may by regulations make further provision as to the procedure to be followed in connection with the making of closure orders and extensions to such orders, including, in particular, provision as set out in paragraphs (a) to (c). This suggested that the types of provision listed at paragraphs (a) to (c) may be made only in relation to closure orders. Paragraphs (a) and (b), however, referred to applications and notices "under this Part". It was not clear, therefore, whether the power at section 91 was exercisable in relation to applications or notices under Part 7, which are not connected with closure orders (for example an application for an exclusion order under section 85(3)). The Executive was asked for an explanation of the purpose of this provision.

The Committee also noted that section 91(c) allowed regulations to make provision for the holding of hearings by Licensing Boards before making closure orders or

extensions to them. As the hearings are not referred to elsewhere, it appeared to the Committee that the Executive was leaving the question as to whether such hearings should take place to subordinate legislation. The Committee was concerned that the existence or otherwise of this right of appeal was being left to subordinate legislation and asks the Executive for its comments.

***Section 115(3)(b):
Excluded premises***

(c) The Committee noted that this power amended an order-making power at section 8 of the Roads (Scotland) Act 1984, which allowed for amendment of a schedule to that Act.

The Committee questioned whether this power was necessary, as the power at section 115(5) allows for amendment of the definition of “excluded premises” set out at subsection (2). The Committee considered that it would be possible for the Executive to use that power to take account of any amendments to Schedule 3 to the 1984 Act, without the need to alter the power at section 8 of that Act. The Executive was asked to comment.

***Section 115(5):
Excluded premises***

(d) The Committee noted that this was a Henry VIII power, which would allow amendment of section 115(2) of the Bill. As this was a power to amend the definition of “excluded premises” the Committee considered that it is effectively a power to widen or narrow the practical application of the Bill. The Committee noted that there was nothing in the power to restrict its application to premises connected with roads or the motor trade. For this reason, the Committee considered that affirmative procedure would be more appropriate and asks the Executive for comment.

***Section 130:
Remote sales of alcohol***

(e) The Committee recognised that the supply of alcohol from outwith Scotland may present certain difficulties in relation to the licensing regime within Scotland. However, the Committee noted that the power at subsection (3) is very wide. In addition, subsection (4) means that the regulations may amend and disapply provisions of the Act, making it a “Henry VIII” power. The Committee would normally argue that such a wide power should be subject to affirmative procedure. The Executive is asked to comment.

***Schedule 3, paragraph 8(4) and Schedule 4, paragraph 7(4):
Irresponsible drinks promotions***

(f) Similarly to the above point, the Committee generally considers that affirmative procedure should be used for Henry VIII powers and therefore asks the Executive for an explanation of its choice of negative procedure for the Henry VIII powers contained at schedule 3 paragraph 8(4) and schedule 4 paragraph 7(4) of the bill.

Consultation

(g) The Committee noted that extensive consultation has already taken place on the issues addressed by the Bill. It acknowledges that consultation will take place on “all regulations under the Bill” and that Licensing Boards and the licensed trade will be consulted before licensing conditions are finalised. The Committee, however, questioned why, given that the Executive will continue to seek advice from the National Licensing Forum, and to liaise with bodies such as Alcohol Focus Scotland and all interested parties, it has not put a consultation requirement on the face of the bill. The Executive was asked to comment.

2. The Scottish Executive answers the Committee’s points as follows:

Section 81(2): power to specify which Licensing Board is to exercise functions under Part 6

(a) The Scottish Executive considers that the power in section 81 will enable the Executive by regulation to re-determine which Licensing Boards should deal with which matters under Part 6. If for example a National Database is set up to which all Boards have access, it won’t be necessary to require that certain matters are referred to the Licensing Board which issued a personal licence – any Licensing Board would be able to deal with the matter. The Executive considers it appropriate to reflect any such redetermination in the text of the legislation itself and that is what the power to modify in subsection (2)(a) is for. It may require consequential changes to other Parts of the Bill and that is why it is not confined to Part 6. The Executive considers that it would not be appropriate to use section 135 (which is mainly about provision ancillary to the Bill rather than the exercise of a power under the Bill) for this purpose.

Section 91: Regulations as to closure orders

(b) The Scottish Executive accepts the Committee’s point. The references to “Part” are a hangover from earlier drafts when the closure order provisions were in a Part by themselves. The Executive shall in the light of this helpful point bring forward amendments to make it clear that the provisions are confined only to applications and notices relating to closure orders.

As regards appeals, all rights of appeal are going to be spelt out in the appeals section(122) by an amendment to be introduced at Stage 2. This provision concerns only whether a board must have a formal hearings to consider applications for closure.

Section 115(3)(b): Excluded premises

(c) The provisions reflect the current provision in section 28 of the 1976 Act. Whilst there may be argument that an order under section 115(5) could make the necessary change, the Executive thinks it would be more convenient that the change be made at the same time, and in the same instrument, as an order under the 1984

Act. If section 115(5) orders are made affirmative then, if Ministers were to rely only on section 115(5) to make the change, it would have to be in a separate instrument as the procedure would be different from that to which orders under section 8 of the 1984 Act are subject.

***Section 115(5):
Excluded premises***

(d) On reflection the Executive agrees with the Committee and will bring in an amendment at Stage 2 to make the provision subject to an affirmative procedure.

***Section 130:
Remote sales of alcohol***

(e) On reflection the Executive agrees with the Committee and will bring in an amendment at Stage 2 to make the provision subject to an affirmative procedure.

***Schedule 3, paragraph 8(4) and Schedule 4, paragraph 7(4):
Irresponsible drinks promotions***

(f) The Executive considers that the powers taken in schedule 3 paragraph 8(4) and schedule 4 paragraph 7(4) concern only the descriptions of types of promotional material in licensed premises and that changes of such descriptions cannot properly be characterised as Henry VII type powers. The changing of descriptions of promotions are not considered the type of legislative change that would require an affirmative vote procedure. In any event, this is the type of regulation that might have to be brought in quickly making affirmative procedure inappropriate. Please note that the Executive intends to bring in an amendment at stage 2 to make affirmative procedure the powers in section 25(2) of the Bill to amend schedule 3.

Consultation

(g) The Executive considers that it would be unnecessary to spell such a requirement on the face of the Bill. The whole legislative exercise has been characterised at all stages with extensive consultation, which will continue.

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Our ref: CPA 7/22/6
18 May 2005

PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) BILL

The Minister for Justice, Cathy Jamieson, wrote to you in November 2004 setting out the subordinate legislative powers conferred on Scottish Ministers by the above Bill. The Subordinate Legislation Committee provided a report on these proposals to the Justice 1 Committee at stage 1.

As you will recall, the Bill creates a new offence of "grooming" a child for the purpose of committing a sexual offence. As the Bill stands, the offence would occur when, following prior meetings or communication with a child under 16, a person then meets or travels to meet that child with the intention of committing a "relevant offence" against the child. "Relevant offences" are set out in schedule 1 to the Bill. This schedule lists offences of a sexual nature that could be committed against children.

The Bill confers power on Scottish Ministers to modify the list of offences in schedule 1 by statutory instrument. This would allow additional offences to be added in the light of experience or if new relevant offences are created. The Bill provides for any order made under this section to be subject to annulment in pursuance of a resolution of the Parliament.

However, concerns have been expressed by Crown Office that, while the evidence might make it clear that an accused person intended to engage in sexual activity with the child, it might be difficult for the Crown to prove the particular offence that the accused intended to commit. It is therefore our intention to lodge an amendment at stage 3 which would remove schedule 1 from the Bill together with the related powers to amend the schedule by statutory instrument. Rather than providing that the person intended to commit a relevant offence, section 1 will then be amended so that the Crown requires to prove that the person intended to engage in sexual activity with the child.

The Committee will wish to be aware that, if these amendments are accepted, the only subordinate legislative powers conferred by the Bill will be in respect of commencement orders.

I hope that the Committee finds this helpful.

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Our ref: CPA/7/23
17 May 2005

I am writing to you to set out the Executive's proposals to amend the Prohibition of Female Genital Mutilation (Scotland) Bill at stage 3 to confer a power on the Scottish Ministers to amend aspects of section 1 of the Bill by order subject to the affirmative resolution procedure. I hope you will be able to consider these proposals before stage 3 of the Prohibition of Female Genital Mutilation (Scotland) Bill on 26 May.

The principle of creating such powers was suggested by the Equal Opportunities Committee at stage 2 of the Bill and they lodged an amendment for this purpose at stage 2. I was sympathetic to their proposal but I had to resist their amendment for a number of technical reasons. I undertook to return to the matter at stage 3. I am bringing forward the proposals outlined in this letter as a result of the consensus that we reached at stage 2 that powers to amend aspects of the offence were desirable.

I propose to create an order making power for Scottish Ministers to amend section 1 of the Bill with regard to certain aspects of the offence of female genital mutilation and the circumstances in which no offence is committed by order subject to the draft affirmative procedure. I have attached a working draft of these amendments for the Committee's consideration.

I am seeking these powers because of two factors likely to impact on the offence of female genital mutilation in future: future developments in and regulation of elective genital surgery, piercing or tattooing, and the future revision of the World Health Organisation definition of FGM. Some forms of elective genital surgery can be similar to some forms of FGM. There has been much development in elective genital procedures in the past 20 years since the Prohibition of Female Circumcision Act 1985 was passed, and the extent and type of such procedures are likely to continue to change in future. Further regulation of such procedures may also be introduced. I am therefore seeking powers to ensure that section 1 can be amended to take account of any future developments in elective genital procedures or future regulation of such procedures.

The second reason for seeking these powers is that the World Health Organisation is currently re-considering its definition of FGM in light of new information about changing practices. That definition may be expanded to include procedures which may not currently be offences under the Bill. I am therefore seeking powers to amend the offence in future so that we can ensure that such procedures are unlawful if that is considered appropriate at the time.

Given the pressures on the Parliament to find legislative slots, it could be difficult to find time to introduce the primary legislation that would otherwise be required to amend the Bill to take into account these changes, particularly as the numbers of women and girls who are either at risk of FGM or who choose to have elective genital procedures are very small. I consider that the affirmative resolution procedure would be the most appropriate way to amend the Bill and provide sufficient scrutiny by the Parliament.

I have enclosed a number of papers which I hope you and the Committee will find helpful in considering these proposals: a working draft of the proposed Executive amendments for stage 3, the amendment proposed by the Equal Opportunities Committee at stage 2, extracts from the Official Report of stage 2 which discuss this amendment, a copy of the Prohibition of Female Genital Mutilation (Scotland) Bill as amended at stage 2 and the accompanying documents. If you need any further information about FGM to enable you to consider these proposals, please contact my office.

I have copied this letter to Cathy Peattie MSP, Convener of the Equal Opportunities Committee.

HUGH HENRY

WORKING DRAFT OF PROPOSED EXECUTIVE AMENDMENT AT STAGE 3

Prohibition of Female Genital Mutilation (Scotland) Bill – Stage 3

Section 1

Hugh Henry

- 1 In section 1, page 1, line 4, leave out <excises, infibulates or otherwise mutilates> and insert <performs an action mentioned in subsection (1A) in relation to>

Hugh Henry

- 2 In section 1, page 1, line 6, at end insert—
<(1A) Those actions are—
(a) excising it;
(b) infibulating it; or
(c) otherwise mutilating it.>

Hugh Henry

- 3 In section 1, page 1, line 7, after <performs> insert <an action mentioned in subsection (2A).
(2A) Those actions are>

Hugh Henry

- 4 In section 1, page 1, line 13, leave out <operation> and insert <action>

Hugh Henry

- 5 In section 1, page 1, line 13, leave out <(2)> and insert <(2A)>

Hugh Henry

- 6 In section 1, page 1, line 15, leave out <operation> and insert <action>

After section 1

Hugh Henry

- 7 After section 1, insert—
<**Modification of section 1**
(1) The Scottish Ministers may by order modify section 1 so as to—
(a) add or remove an action to or from those actions for the time being listed in subsection (1A) of that section;
(b) vary an action for the time being listed in that subsection;

- (c) add an action to those for the time being listed in subsection (2A) of that section and, in relation to that action, define “approved persons”;
 - (d) remove an action added under paragraph (c) and any related definition of “approved persons”; or
 - (e) vary—
 - (i) an action added under paragraph (c); or
 - (ii) any related definition of “approved persons”.
- (2) An order under this section is to be made by statutory instrument.
- (3) No such order is to be made unless a draft of it has been laid before and approved by a resolution of the Scottish Parliament.>

Section 2

Hugh Henry

- 8** In section 2, page 1, line 24, leave out <excise, infibulate or otherwise mutilate> and insert <perform an action mentioned in section 1(1A) in relation to>

Hugh Henry

- 9** In section 2, page 2, line 8, leave out <a surgical operation falling within section 1(2)> and insert <an action mentioned in section 1(2A)>

Hugh Henry

- 10** In section 2, page 2, line 9, leave out <operation> and insert <action>

Section 3

Hugh Henry

- 11** In section 3, page 2, line 15, leave out <a surgical operation falling within subsection (2)> and insert <an action mentioned in subsection (2A)>

Hugh Henry

- 12** In section 3, page 2, line 17, leave out <operation> and insert <action>

EQUAL OPPORTUNITIES COMMITTEE AMENDMENT AT STAGE 2

Cathy Peattie, on behalf of the Equal Opportunities Committee

13 In section 1, page 1, line 19, at end insert—

<(5) The Scottish Ministers may by order—

(a) amend the definition of the offence of female genital mutilation set out in subsection (1);

(b) add to, or remove from, the list of circumstances, as set out in subsection (2), where no offence is committed (including amending the definition of “approved person” in subsection (3)).

(6) The power of the Scottish Ministers under subsection (5) to make an order is exercisable by statutory instrument.

(7) An order under subsection (5) above is not made unless a draft has been laid before, and approved by resolution of, the Parliament.>

EXTRACTS FROM STAGE 2 OFFICIAL REPORT RELATING TO ORDER MAKING POWERS (3 MAY 2005)

Hugh Henry:

Col 905

Amendment 13 would create an order-making power. We have all worked hard to try to construct a definition of the offence of FGM that includes all the forms of FGM set out by the World Health Organisation and does not criminalise various elective genital procedures that consenting adults may request. I recognise that the task has been difficult. We are satisfied that the bill deals with those issues, but I am conscious that several changes could occur in future that could give rise to the need to amend the offence of FGM or the exclusions from that offence. For example, the World Health Organisation has said that it will revise its definition of FGM; new cosmetic genital procedures may be developed; the regulation of cosmetic surgery may change; and new forms of FGM may be discovered.

I understand what the committee is trying to achieve by anticipating the future. However, I am concerned that the committee's amendment 13 is too wide in scope and would not limit ministers' powers to amend the bill. An order-making power to change a criminal offence is extremely unusual. A more focused power would be more appropriate and would be likely to be more acceptable to the Parliament. Several technical drafting concerns also need to be addressed.

I assure the committee that we will consider the matter further. Before stage 3, we will reflect on what could be lodged to address the committee's concerns. On the basis of that assurance, I hope that Shiona Baird will not move amendment 13—I think that amendment 13 is in her name.

Col 906

Shiona Baird (North East Scotland) (Green): Amendment 13 addresses concerns that have been raised about future flexibility. The committee suggested a number of changes to the bill in relation to what constitutes the offence of FGM, while acknowledging that the law in the area is developing. We wanted to ensure that other procedures could be dealt with in future and we decided that the Scottish ministers should have an order-making power to update the definition of the offence. Amendment 13 would allow Scottish ministers to do that by adding a new procedure or by adding a new exception to the offence—for example, a new cosmetic surgical procedure. Scottish ministers could also update the definition of "approved persons" for the purposes of section 1(3)—for example, in relation to any future legislation to regulate body piercing.

The order for which amendment 13 provides would be subject to the affirmative procedure, so it would undergo the strict scrutiny of the Subordinate Legislation Committee and the Parliament before changes could be made to the primary legislation. The order could also be considered by the Equal Opportunities Committee. Amendment 13 has important implications and would enable us to adapt to changes. I urge the Executive to accept the amendment, which would give the bill the flexibility that the minister thinks it does not currently have.

Ms Sandra White (Glasgow) (SNP): I thank the minister for his explanation and for his offer to provide further clarification on some of the matters that are raised by the amendments. However, I am concerned by the Executive's approach to amendments 5, 14 and 13.

Col 907

Amendment 13 would give the ministers powers to change the definition of "approved persons" if circumstances changed. There would also be the protection that the order would have to come to the Parliament, where members would be able to see exactly what was happening. The amendment is good and I ask the minister to look again at it. I hear what he is saying, but I ask him to look at the issues that I have raised and to give further clarification.

Hugh Henry:

Col 908

I am sympathetic to Shiona Baird's wider point about amendment 13, which is why I suggested that we return to the matter at stage 3. There are two reasons why I urge the committee not to accept amendment 13 at this stage. First, there are technical problems with its drafting, which we would need to consider. Secondly, we want to ensure not only that the bill is technically competent, but that whatever we do is proportionate. The Subordinate Legislation Committee and the Parliament would be cautious about introducing—even through an affirmative procedure—something that, ordinarily, would require significant primary legislation.

I recognise that, because of the pressures on the Parliament to find legislative slots, it could be difficult in future to find time to introduce the primary legislation that would be required to make the changes that are being discussed. Both the Subordinate Legislation Committee and the Parliament may want to reflect on whether there is a balance to be struck, in terms of proportionality, in using the affirmative procedure to effect change. We will return to the issue at stage 3 and, I hope, come up with something that is acceptable not just to the committee, but to the Parliament as a whole.

Col 917

Shiona Baird: I will not move amendment 13, with the caveat that I understand that the minister will reconsider the matter before stage 3.

Amendment 13 not moved.

SUBORDINATE LEGISLATION COMMITTEE

17th Meeting, 2005 (Session 2)

Tuesday 24th May, 2005

International conference on delegated legislation

Introduction

1. The Subordinate Legislation Committee has in previous years discussed the possibility of the Scottish Parliament hosting an international conference on the scrutiny of delegated legislation. The current Committee has recently considered this matter, following the Clerk's attendance at the Ninth Australasian and Pacific Conference on Delegated Legislation and the Sixth Australasian and Pacific Conference on the Scrutiny of Bills in Canberra this year.

Background

2. The Subordinate Legislation Committee's predecessor Committee considered the possibility of hosting an international conference following attendance at conferences in Sydney in 2001 and Toronto in 2002. Members' attendance at these conferences highlighted the importance of outlining the experiences and views of the Committee to an international, specialist audience and, in turn, learning from practices developed in other legislatures.

3. Further to this, the Committee more recently used the scrutiny of legislation conference in Canberra this year to inform its inquiry into the regulatory framework in Scotland. The Committee noted the potential for the Committee to discuss its scrutiny role with a range of legislatures, should it host a similar conference in the near future.

Decision

4. The Committee is invited to consider whether it recommends that the Scottish Parliament should host an international conference on delegated legislation in the summer of 2006 or 2008 (which would correspond with the timetable of Australasian and Pacific conferences), subject to the necessary time and resources being available.

**Clerk to the Committee
19 May 2005**