This document relates to the Aquaculture and Fisheries (Scotland) Bill as amended at Stage 2
(SP Bill 67A)

AQUACULTURE AND FISHERIES (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This supplementary Memorandum has been prepared by the Scottish Executive to accompany the Aquaculture and Fisheries (Scotland) Bill following Stage 2 consideration of that Bill, which concluded on 31 January. It has been produced in accordance with Rule 9.7.10 of the Parliament’s Standing Orders to assist consideration by the Subordinate Legislation Committee in accordance with Rule 9.7.9.

2. It explains changes to the powers to make subordinate legislation under the Aquaculture and Fisheries (Scotland) Bill made as a consequence of amendments at Stage 2 where these add new powers to make subordinate legislation or substantially alter powers which were already in the Bill. It does not form part of the Bill and has not been endorsed by the Parliament. This supplementary Memorandum should be read in conjunction with the original Memorandum.

INTERPRETATION

3. In this Memorandum:
   “the 1937 Act” means the Diseases of Fish Act 1937;
   “the 2003 Act” means the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

FURTHER AND AMENDED DELEGATED POWERS

Section 16 – amendment of section 31(1) of the 2003 Act (salmon fishing: general regulations)

4. This section was deleted at Stage 2.

5. Section 16 of the Bill (as introduced) inserted a new paragraph (g) into section 31(1) of the 2003 Act, permitting the Scottish Ministers to make regulations providing for the closure or alteration of means for the passage of salmon through, round or over dams, lades or water wheels. However, during Stage 1 of the Bill it was pointed out that the effect of section 16 was to insert powers to close fish passes and provide powers beyond those required in relation to dealing with any outbreak of Gyrodactylus salaris; in effect, it allowed for the closure of fish passes for any reason, which was not the policy intention. The Executive subsequently put forward an amendment to section 15 of the Bill on the creation of barriers to ensure that the
section applies also to the closure of fish passes, and thus limit the power to close fish passes to the purposes set out in inserted sections 5A(1)(a) and 5A(1)(b) of the 1937 Act. Consequently, section 16 of the Bill became redundant, and the Executive brought forward an amendment to delete section 16.

Section 19 – Gyrodactylus salaris: Scottish Ministers’ power to make payments

New section 5F of the 1937 Act

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

6. Section 19 inserts new section 5F of the 1937 Act, which gives the Scottish Ministers power, in accordance with a scheme made by them by order, to make payments in respect of such matters as may be specified by them by order in relation to the exercise of their powers in relation to Gyrodactylus salaris (that is, their powers under inserted sections 2ZA, 2ZB, 5A, 5B, 5C and 5E of that Act). Section 19 has been amended to reflect Scottish Executive policy not to make payments for losses arising as a result of the exercise of powers under new sections 2ZA and 2ZB of the 1937 Act which relate to movement controls in areas designated under section 2 of the 1937 Act and the preliminary designation of areas suspected of being infected with Gyrodactylus salaris. References to 2ZA and 2ZB in section 19 have therefore been removed.

Reason for taking the power and choice of procedure

7. These remain the same as in the original Delegated Powers Memorandum.

Section 25A(2)(b) – Power to specify relevant notices

Powers conferred on: the Scottish Ministers
Powers exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

8. Sections 25A to 25G inclusive of Part 3A of the amended Bill bring in a system of administrative penalties for certain sea fisheries offences. The Scottish Executive desires to bring in the proposed system for the following main reasons:

- to improve the effectiveness of sanctions and to provide suitable deterrence;
- to conserve vulnerable fish stocks and promote compliance;
- to divert fisheries offences from the court system where appropriate and so reduce uncertainty for fishermen and legal costs to the fishing industry;
- to provide an alternative approach to prosecution in the courts for minor offences so allowing individuals to make amends without incurring a criminal record;
- to increase consistency and transparency;

2
This document relates to the Aquaculture and Fisheries (Scotland) Bill as amended at Stage 2 (SP Bill 67A)

- to protect those who observe the rules and hence protect the communities for whom fishing is an important part of the economic fabric.

Provision

9. Section 25A(2)(b) enables the Scottish Ministers to specify, by order, the offences under enactments relating to sea fish or sea fishing in respect of which a British sea-fishery officer may issue a fixed penalty notice under section 25A(1).

Reason for taking power

10. Section 25A provides warranted British sea-fishery officers with the powers to issue a fixed penalty notice to a person whom the officer has reasonable grounds for suspecting to have committed a relevant offence. Section 25A(2)(b) provides for the Scottish Ministers to specify in an order what constitutes a relevant offence, from within the corpus of offences relating to sea fish and sea fishing. It is appropriate that relevant offences are specified by subordinate legislation for two reasons. First, the choice of offences to be considered relevant demands a flexibility which could not be achieved were the offences to be specified directly in primary legislation. Second, future enactments may create new offences which would require to be added to the list of relevant offences. This is more readily achieved through secondary legislation.

Choice of procedure

11. Any order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate because an order under section 25A(2)(b) will merely supply technical detail within the policy set out in section 25A, and the power requires to be exercised in respect of matters (such as, for example, technical variations to EC fisheries legislation) which would not have any policy implications such as to warrant the devotion of Parliamentary time to an affirmative resolution.

Section 25B(3) – Power to prescribe the form of fixed penalty notices

Powers conferred on: the Scottish Ministers
Powers exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

12. Section 25B(3) enables the Scottish Ministers to prescribe the form of a fixed penalty notice.

Reason for taking power

13. When issuing a fixed penalty notice, it is important to be able to specify the detail that should be contained therein. This would include inter alia the penalty itself, the time available to pay the penalty, by what means it is to be paid, a statement to the effect that no criminal proceedings shall be commenced against a person who has paid the fixed penalty amount, and so forth. The form of the notice itself is not as critical to the legal delivery of the policy as the
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(SP Bill 67A)

mandatory legal content of the notice (which is set out in the Bill); hence Parliament’s
involvement in scrutinising the form of the notice need not be during the passage of the Bill
itself. Different forms of notice might be required for different circumstances. Including such
level of detail in the Bill would make it congested with several different versions of forms that
would themselves be subject to frequent change in the future, for example, developments in
technology are likely to result in changes to the means of making any payments. Taking the
power means that the required flexibility is provided while still retaining a level of Parliamentary
involvement.

Choice of procedure
14. Any order made under this section will be subject to annulment in pursuance of a
resolution of the Scottish Parliament. The negative resolution procedure is considered
appropriate as the power to specify the form of fixed penalty notices merely fills in
uncontroversial detail in relation to the different forms of notices that will be required for
different circumstances.

Section 25B(5) – Power to specify period for paying shorter than 28 days in relation to
different cases and categories of case

Powers conferred on: the Scottish Ministers
Powers exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision
15. Section 25B(5) enables the Scottish Ministers to provide for the penalty notice period for
paying to be reduced from 28 days in certain circumstances by order.

Reason for taking power
16. There may be certain circumstances when the 28 day notice period for paying the fixed
notices may need to be reduced. Such circumstances are envisaged, for example, where the
alleged offenders are domiciled outside the UK. Shortening the period of notice would be
appropriate because this would allow an alleged offence to be dealt with swiftly, without the
need for a foreign-registered vessel or non-UK domiciled person to remain in Scotland for longer
than was necessary to process the case. Whilst the principle of shortening the period is
appropriately set out in the Bill itself, by their very nature the exact circumstances as to when
that will be exercised cannot be comprehensively predicted. It is initially envisaged that a 7 day
period would be used when dealing with non-UK persons. However, experience in the field may
lead to different time periods being used in different circumstances, for example to take into
account differences in national banking systems. Therefore, it is essential to take a power to do
this as and when the circumstances and categories of case emerge and change.

Choice of procedure
17. Any order made under this section will be subject to annulment in pursuance of a
resolution of the Scottish Parliament. The negative resolution procedure is considered
appropriate since the power is to make provision for particular cases and categories of case, but
always within the policy set out on the face of section 25B.
Section 25C(1) – Power to prescribe scale of fixed penalties

Powers conferred on: the Scottish Ministers
Powers exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision
18. Section 25C(1) enables the Scottish Ministers, by order, to prescribe a scale of fixed penalties for offences for which a fixed penalty notice may be issued.

Reason for taking power
19. It is necessary, where there are powers for making fixed penalties, that these penalties can be specified. It is appropriate that this is done by subordinate legislation to give the Scottish Ministers the flexibility to provide a scale of fixed penalties such that the circumstances of individual cases can be taken into account.

Choice of procedure
20. Any order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate because of the restricted levels of the likely fines and the fact that there is an intention to consult with sea fishing interests in line with Scottish Executive good practice on subordinate legislation. It is intended that the maximum of the scale will be £2,000.

Section 25C(3) – Power to specify address at which, and methods by which, fixed penalty shall be payable

Powers conferred on: the Scottish Ministers
Powers exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision
21. Section 25C(3) enables the Scottish Ministers, by order, to specify the method of payment for the fixed penalty and the address to which it should be sent.

Reason for taking power
22. It is necessary to have the flexibility to specify the place and means at which payment must take place.

Choice of procedure
23. Any order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate because of the technical nature of the power.
Section 25E(2)(b) – Power to specify person and address to which intimation of non payment may be made

Powers conferred on: the Scottish Ministers
Powers exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

24. Section 25E(2)(b) enables the Scottish Ministers, by order, to specify the person to whom an intimation of non payment is to be made and the address to which it is to be sent.

Reason for taking the power

25. It is important that a person on whom a fixed penalty notice has been served can intimate before the expiry date of the fixed penalty that they do not intend to pay. In order to facilitate this, the power is required for the Scottish Ministers to specify where and how such intimation should be delivered. It is appropriate that this be done by secondary legislation because of the need for flexibility in specifying how such intimation be delivered.

Choice of procedure

26. Any order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate because of the limited nature of the power and the fact that there is an intention to consult with sea fishing interests before its use, in line with Scottish Executive good practice on subordinate legislation.

Section 27 – Power to specify marine waters adjacent to Scotland as “specified areas”, and power to specify areas of marine or inland waters from which fish may not be moved into specified areas without permission of the Scottish Ministers

New section 2C (1), (3) and (4) of the 1937 Act

Powers conferred on: the Scottish Ministers
Powers exercisable by: order/regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

27. Section 27 inserts a new section 2C into the 1937 Act, allowing the Scottish Ministers to specify areas of marine waters into which live fish (of such species as may be specified, and from such salt waters as may be designated) may only be introduced with the prior written consent of the Scottish Ministers. Section 2C(1) allows the Scottish Ministers by order to specify areas of marine waters adjacent to Scotland as “specified areas”. Section 2C(3) allows the Scottish Ministers by order to specify the species of fish and the waters of origin to which the requirement of Scottish Ministers’ consent for introduction into specified areas will apply. Section 2C(4) permits the Scottish Ministers by regulations to provide, amongst others, for the form and timing of an application for consent, and to specify the information to be provided and any assessment to be made as part of an application for consent.
28. Concerns were raised by the industry about the power of the Scottish Ministers to define “specified areas” without any formal mechanism for consulting interested parties, even though the Scottish Ministers would normally, as a matter of good practice, consult before using such a power. The Executive accepted that an amendment should be brought forward that would provide a requirement for consultation. Section 27 has therefore been amended to require the Scottish Ministers to consult before making a statutory instrument defining a “specified area”.

Reason for taking the power and choice of procedure

29. These remain the same as in the original Delegated Powers Memorandum.

Section 29(1) – Payments in respect of fish destroyed

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

30. Section 29(1) gives the Scottish Ministers power to make an order establishing a scheme by which they may make payments in respect of any fish destroyed in pursuance of the exercise of such of their powers as may be specified by them by order. However, the provisions in section 29 applied only to fish, and not to shellfish. This was an oversight. Sections 29(1) & 29(3) have therefore been amended such that the Scottish Ministers have power to provide for payments also to be made for shellfish destroyed.

Reason for taking the power and choice of procedure

31. These remain the same as in the original Delegated Powers Memorandum.

Schedule, paragraph 1(d)(i) – modifications of section 9 of the 1937 Act

Power conferred upon: n/a
Power exercisable by: n/a
Parliamentary procedure: n/a

32. Paragraph 1(d)(i) of the schedule amends section 9 of the 1937 Act to exempt the new powers in the Act from the provision to prescribe regulations (which is not required because the Bill specifies that these powers will be made by Statutory Instrument). Paragraph 1(d)(i) has been amended to reflect the recommendations of the Subordinate Legislation Committee in its report to the lead Committee at Stage 1. The SLC recommended that for consistency, the consequential amendment in the schedule made for section 14 should be amended to extend it so that the relevant order making powers provided for in section 19 (new section 5F) and section 27 (new sections 2C(1), 3(a) and (c)(i) and (ii)) are also excluded from the provisions of section 9 of the 1937 Act.
AQUACULTURE AND FISHERIES (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM