SUPPLEMENTARY MEMORANDUM TO THE SUBORDINATE LEGISLATION COMMITTEE BY THE SCOTTISH EXECUTIVE

FIRE (SCOTLAND) BILL

Purpose

1. This memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.7.9 of the Parliament’s Standing Orders, of the Fire (Scotland) Bill. This memorandum refers to the Bill as amended at Stage 2. It describes the purpose of those provisions conferring power to make subordinate legislation which were amended or added at Stage 2, explains why the newly delegated matters are to be left to subordinate legislation and why the stated parliamentary procedure applying to each power has been chosen as the most appropriate option in each case. This memorandum supplements the Executive’s previous memorandum to the Subordinate Legislation Committee, in connection with the Bill as introduced.

Delegated Powers following Stage 2

2. Consideration of the Bill at Stage 2 resulted in a number of amendments across the Bill. In particular amendments to sections 67, 72, 81 and new section 54A have the effect of altering or extending existing subordinate legislation powers contained in the existing sections of the Bill, whilst amendments to sections 53 and 54 removed powers, and amendments to 5, 55 and 56 have the effect of conferring new powers. The rationale for these changes is set out below.

Section 2(1): Schemes to constitute joint fire and rescue boards

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

3. The Parliamentary procedure applicable to section 2(1) has been altered. Section 2(1) of the Bill allows Scottish Ministers by order to combine fire and rescue authorities for the purposes of carrying out the functions of a fire and rescue authority.

4. In response to concerns raised during the Stage 1 evidence sessions, the Deputy Minister for Justice gave assurances that whilst the detail of the amalgamation scheme provisions was properly a matter for subordinate legislation, the power would be amended so that it would become subject to the affirmative resolution procedure of the Scottish Parliament, in order to ensure a greater level of parliamentary scrutiny. An amendment to subsection (4) of section 81 (Orders and regulations) was accordingly made at Stage 2.

Section 5(3): Power to transfer staff, property, rights or liabilities of a joint fire board

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution procedure
5. New subsection (3) has been added to section 5. As set out above, section 2 of the Bill allows for the combining of the areas of two or more fire and rescue authorities in an amalgamation scheme. This may be done by the Scottish Ministers by order, where such an order appears to them to be in the interests of greater efficiency, effectiveness and economy. Schedule 1 also relates to the powers of joint fire and rescue boards. Similar schemes already exist under section 147 of the Local Government (Scotland) Act 1973. Section 5 provides that these schemes will continue to have effect despite the repeal of the Fire Services Act 1947 and section 147 of the Local Government (Scotland) Act 1973 and that they will be deemed to be section 2(1) schemes under this Bill.

6. Section 5 was amended at Stage 2 to insert at subsection (3) a new transitional provision giving Ministers the power by order to transfer the property, rights, liabilities or staff of existing joint fire boards made under existing administration schemes to joint fire and rescue boards made under section 2(1) of the Bill. The power is an administrative one which will enable existing joint fire boards constituted by the schemes set out in section 5(1) to have a smooth transition when becoming joint fire and rescue boards under section 2(1). For this reason, it is thought appropriate to leave the matter to subordinate legislation.

7. New amalgamation schemes under section 2(1) are subject to consultation and to the affirmative resolution procedure. Consistent with this, the new power in section 5(3) is also to be exercised using the affirmative resolution procedure (per section 81(4)(za) as amended at Stage 2).

Section 53(2)(f): Power to specify intervals at which reviews must be carried out

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* negative resolution procedure

8. Section 53(2)(f) was removed at Stage 2. Section 53(1) provides that the Scottish Ministers may make regulations in relation to the carrying out of fire safety risk assessments and reviews of those assessments under sections 49 (Duties of employers to employees) and 50 (Duties in relation to relevant premises). Subsections (2)(a) – (f) of section 53 had detailed matters that may in particular be addressed in those regulations.

9. Section 53(2)(f) had established that the power at section 53(1) in particular enabled Scottish Ministers to make provision specifying intervals at which reviews must be carried out. It is intended that these powers will be exercised to ensure that assessments are undertaken regularly and it is unlikely in policy terms, at least in the short-term, that there will be a need to specify precise timescales.

10. On further reflection, the Executive has concluded that the general enabling power at 53(1) will be sufficient for both of these purposes. The power at 53(2)(f) has therefore been deleted on the basis that it is no longer deemed necessary.

Section 54(2)(l): Power to create criminal offences and specify rules as to the burden of proof in relation to such offences

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument
Parliamentary procedure: negative resolution procedure

11. Section 54(2)(l) was removed from the Bill at Stage 2. Under section 54(1), the Scottish Ministers may make regulations about fire safety in premises covered by the Bill. The power is modelled on section 12 of the Fire Precautions Act 1971. Subsection (2)(l) provided that Scottish Ministers may make provisions in regulations creating criminal offences, and may also specify rules as to the burden of proof in relation to those offences.

12. This power was the subject of correspondence between the Scottish Executive and the Subordinate Legislation Committee. In particular, the Executive’s letters of 23 September and 30 September 2004 elaborated the policy behind the power.

13. It had been the Executive’s intention to include in fire safety regulations made under the power in section 54, provisions in relation to electrical luminous tube signs. The current provisions are contained in the Electrical Luminous Tube Signs (Scotland) Regulations 1990 S.I. 1990/683. These include an offence provision where there is failure to comply either with the requirements of the Regulations or with any notice issued under the Regulations.

14. Following discussion with colleagues in the Scottish Building Standards Agency who have responsibility for issuing Scottish Building Regulations it was agreed that their legislation was a much more appropriate vehicle for these provisions. As a result this offence-creation power, which was only included for the purpose of replicating the 1990 Regulations, is no longer required.

Section 54A: Power to make further provision for protection of fire-fighters

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution procedure

15. The new section 54A, which was added at Stage 2, extends the power exercisable under section 54(1). Stage 2 amendments have been brought forward to section 72 and to the long title of the Bill which clarify and further define the “relevant premises” to which the Part 3 fire safety regime extends. These amendments were necessary because at introduction the regime extended to all shared or common areas of domestic premises. This would have resulted in, for example, a shared driveway between two private homes being subject to the regime. This was not the intention. The amendments clarify that private dwellings and their common areas are excluded from the definition of “relevant premises”.

16. However, this exclusion results in a gap in relation to the ability to impose maintenance requirements on fire safety equipment or facilities which are located in the common areas of private dwellings and which are provided for the express purpose of ensuring the safety of firefighters. For example, many blocks of flats have facilities such as dry riser inlets or firefighters’ lifts which need to be properly maintained in order to protect fire-fighters when they are responding to operational incidents and fires.

17. The Bill has therefore been amended to enable the extension of this one aspect of the regulations made under Part 3 to the common areas of private dwellings. It is therefore intended that regulations under section 54 will make provision ensuring the proper maintenance of such equipment and facilities specifically required to ensure the safety of fire-
fighters. This provision enables Scottish Ministers also to apply such a provision to common areas of private dwellings, where such equipment is often located. The power has been left to subordinate legislation because of its close link to the duty to be set out in subordinate legislation.

18. This safeguarding provision is the only provision under Part 3 which is currently intended to extend to common parts of ‘private dwellings’.

19. The amendment amounts to an extension of the existing subordinate legislation provisions at section 54(1). The powers are exercisable under the negative resolution procedure, which is the procedure applied to section 54 regulations.

Section 55: Special case: temporary suspension of Chapter 1 duties

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* negative resolution procedure

20. Section 55 has been amended to confer a power on Scottish Ministers to prescribe by regulations further categories of persons who may cause temporary suspension of fire duties. The purpose of section 55 is to ensure that fire safety duties imposed in Part 3 and in regulations made under Part 3 are not a barrier to the military and emergency services responding to operational incidents. Accordingly it provides that where the application of the Chapter 1 duties would prevent a listed person from carrying out their duties, the Chapter 1 duty in question would not apply for the requisite period.

21. This section was amended at Stage 2 to make it clearer that the emergency service personnel listed require to be undertaking “operational duties”, as defined, before the suspension would be triggered. The suspension provision should not apply when such personnel are not carrying out duties connected with their work. On introduction, the personnel who could trigger such a suspension were listed as being a member of the armed forces of the Crown or a visiting force and a constable or any other member of a police force.

22. A Stage 2 amendment removed the reference to a “member of a police force” on the basis that the meaning of “member of a police force” has arguably become broader through its use in other legislation. We wished to ensure that it was clear that the provision in section 55(2)(b) applies only to police constables (and special constables) and does not apply to, for example, other employees of a police authority, such as police civilian drivers or control room operators etc. who would have no such aegis in these circumstances.

23. As terminology is subject to change it was also considered that a regulation-making power would be helpful to enable the persons covered by this section to be added to. It is also anticipated that this power will be used to extend the provision to, for example, the ambulance service. The power will be used to adjust the application of the provision, and the descriptions of those who should be affected and the administrative nature of this provision, in addition to the need for flexibility in its use, make it appropriate to be set out in subordinate legislation and subject to the negative procedure.
Section 56: Enforcing authorities

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

24. A new power has been added at section 56(7) of the Bill, enabling Scottish Ministers by regulations to modify section 56(6). Section 56(6) sets out those organisations that are enforcing authorities for the purposes of Part 3 of the Bill. There is a power in section 72(6) enabling the amendment of the types of premises to which Part 3 applies. It is possible that if this power is exercised, consequential changes would have to be made to section 56(6). It is also likely that, for other unforeseen reasons, the identities of enforcing authorities for relevant premises will require to be amended in the fullness of time.

25. It is considered appropriate to incorporate a clear and specific power for this purpose into the Bill, given that the power could significantly change the content of section 56(6). A consequential amendment has also been made to section 81 to ensure that the new regulation-making power is subject to the affirmative resolution procedure, in recognition that a greater degree of Parliamentary scrutiny would be appropriate for a power that, as set out above, could alter section 56(6) of the Bill. It also aligns the procedure applicable to section 56(7) with that applicable to the section 72(6) power.

Section 67: Offences

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution procedure

26. A number of changes have been made to section 67 at Stage 2 that modify and extend delegated powers. Section 67 sets out offences and associated penalties in respect of the provisions contained in Part 3 of the Bill.

27. As originally drafted, subsection (10) reversed the burden of proof for the offence that could be committed in relation to the duty in section 49; section 67(1)(a)(i) provides that it is an offence for an employer to fail to carry out his or her duty to ensure, so far as is reasonably practicable, the safety of the employer’s employees. Other duties which should be carried out to the same “so far as is reasonably practicable” standard will be set out in regulations. There will also be duties in regulations that should be carried out to the “so far as is practicable” standard.

28. The Stage 2 amendment that has become section 67(11) enables regulations to reverse the burden of proof concerning the “so far as is reasonably practicable” standard in relation to specified offences. Consequently it will be for the accused to prove that it would not have been reasonably practicable for him or her to do more than was in fact done. Similarly, the Stage 2 amendment that has become section 67(12) enables regulations to reverse the burden of proof in relation to the “so far as is practicable” duty in specified offences. Regulations will therefore make clear that where a fire safety duty is placed on a person “so far as is practicable”, in proceedings for the connected offence the onus of showing that it was not practicable to do more than was done shall be on the accused.
29. A linked Stage 2 amendment has been made to section 67(9), and a new section 67(9A) has been inserted. Section 67(9) had provided that in every offence under section 67, other than that which could be committed by the employer under section 67(1)(a)(i), a due diligence defence was available. Therefore the only situation in which the defence was not available was where the employer bore the reverse burden of proof and had to show that it was not reasonably practicable for him or her to do more than was done. As it is the policy intention also to reverse the burden of proof where fire safety duties in regulations consist of a duty to do something “so far as is practicable” or “so far as is reasonably practicable”, the due diligence defence is also to be disapplied to these offences. It was accordingly necessary to insert an amendment enabling Scottish Ministers, by regulations, to disapply the due diligence defence to offences caused by breaches of duties set out in regulations.

30. The modification and extension of these powers are required to reflect the fact that the detailed duties, for example in relation to dangerous substances, are to be contained in fire safety regulations and the use of the negative procedure is considered appropriate for regulations under this section as their exercise will be closely linked to existing regulation-making provisions at section 54 which are subject to the negative procedure, and the exercise of the power will result, as with the exercise of the section 54 power, in provisions of a detailed and technical nature.

**Section 69(b): Employee’s act or omission not to afford employer defence**

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* negative resolution procedure

31. A new regulation-making power has been added at section 69(b). Section 69 makes provision for an employee’s acts or omissions not to be used by an employer as a defence in any proceedings under sections 67 or 68. A new power has been added at section 69(b) to enable Scottish Ministers, by regulations, to extend this provision to persons of a description specified in regulations. It is currently intended that regulations under section 54 will enable an employer to assign fire safety assistance duties to competent persons. Such competent persons would then assist the employer in meeting his or her fire safety duties under the Bill. Consequently, Scottish Ministers may wish to specify in regulations that the employer cannot put forward a defence to proceedings brought under sections 67 or 68 relying on the acts or omissions of such competent persons.

32. The use of the negative procedure is considered appropriate as the exercise of the power under section 69(b) would therefore be closely linked to the exercise of the power in section 54, to which the negative resolution procedure applies.

**Sections 72(6) and 72(7): Meaning of “relevant premises”**

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* affirmative resolution procedure (for section 72(6)) & negative resolution procedure (for section 72(7))
Section 72(6), by virtue of an amendment to section 81(4)(b), has been made subject to affirmative resolution procedure. A new linked power has also been added at section 72(7) enabling the consequential modification of Part 3 when new premises are brought within its ambit by the section 72(6) power.

Section 72 sets out the premises which are subject to the fire safety regime in Part 3 of the Bill. Under subsection (6), the Scottish Ministers may make regulations to modify (by addition or deletion) the list of premises subject to the regime.

When the Bill was introduced the Subordinate Legislation Committee (SLC) queried the use of the negative resolution procedure in respect of the order making power at section 72(6) given that this power will be used to amend primary legislation. Following further consideration of the point, we wrote to the SLC agreeing that affirmative resolution procedure would be more appropriate, enabling closer Parliamentary scrutiny of any exercise of the power, and confirming that we would bring forward an amendment at Stage 2 to this effect.

Section 72 has been further amended by the addition of subsection (7) to provide a power by regulations by which Scottish Ministers can modify the application of Part 3 to premises which become “relevant premises”, in any way which the Scottish Ministers consider necessary or expedient. This grants the Scottish Ministers a modification power, so that Part 3 can be applied, if required, in a modified form to different categories of relevant premises. It is thought that such a power could be necessary where a provision in Part 3 should apply in some respects, but not all. The power to modify Part 3 would therefore enable Scottish Ministers to clarify the applicable law, and avoid doubt and uncertainty, and possibly inappropriate consequences, where new types of premises are to be brought within the definition of “relevant premises". At the time of instructing the amendment it was considered that the detailed nature of the provisions that would be prepared under section 72(7) meant that the negative resolution procedure was appropriate. However, the Executive has been considering further the type of procedure that should apply to the power in section 72(7), in recognition of the fact that its exercise could potentially significantly affect the application of Part 3 of the Bill.