Subordinate Legislation Committee

10th Report, 2007 (Session 2)

Transport and Works (Scotland) Bill as amended at Stage 2
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Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

   (a) any-

      (i) subordinate legislation laid before the Parliament;

      (ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter,

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation; and

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Dr Sylvia Jackson (Convener)
Janis Hughes
Mr Adam Ingram
Mr Kenneth Macintosh (Deputy Convener)
Mr Stewart Maxwell
Euan Robson
Murray Tosh
Committee Clerking Team:

Clerk to the Committee
Ruth Cooper

Senior Assistant Clerk
David McLaren

Assistant Clerk
Jake Thomas

Support Manager
Andrew Proudfoot
Transport and Works (Scotland) Bill as amended at stage 2

The Committee reports to the Parliament as follows—

1. At its meetings of 31 January and 6 February 2007, the Committee considered the inserted or substantially amended delegated powers provisions in the Transport and Works (Scotland) Bill as amended at Stage 2. The Committee reports to the Parliament on such provisions under Rule 9.7.9 of Standing Orders.

2. Under Rule 9.7.10, the Executive provided the Parliament with a revised delegated powers memorandum.

3. Correspondence with the Executive is published in the Annex to this report.

Delegated powers

4. The Committee considered all of the powers as set out in the Revised DPM and is content with sections: 1, 7, 8, 12, 23, 24 and 29.

Section 27 – Further provision as regards rules, regulations and orders

5. The Committee noted that subsection (6)(aa) enables orders etc under the Act to sub-delegate functions. It recognised the need for this type of sub-delegation but was concerned that it could be interpreted as including a power to confer a power to make subordinate legislation.

6. In correspondence to the Committee, the Executive confirmed that it has no intention of using the power conferred by section 27(6)(aa) to empower the making of subordinate legislation. However, the Committee was concerned that any future Executive would not necessarily take this view. The Executive also considered that a court would not read this section as sufficient to authorise provision allowing a third party to make subordinate legislation but it seemed preferable to the Committee for the bill to include a provision to put the position beyond doubt. In oral evidence the Executive assured the Committee that in its view the drafting “is
sufficient to show that there is no means of passing on the power to make subordinate legislation."\textsuperscript{2}

7. The Committee also sought clarification of the reference to “any enactment” in section 27(6)(b) and whether this would include the Act itself.

8. Similarly to the position that it had put forward in relation a point on the Aquaculture and Fisheries (Scotland) Bill, the Executive considered that "explicitly stating that the power does not extend to amending the parent Act would cast doubt upon the meaning of numerous provisions in existing Acts of the Scottish Parliament."\textsuperscript{3}

9. The Committee did not doubt the stated intention of the Executive in relation to these powers but agreed that the attention of the Parliament should be drawn to the assurances received in oral evidence from the Executive at the Committee’s meeting on 6 February 2007.

\textsuperscript{2} Official Report: 6 February 2007 (5th Meeting, Session 2 (2007)), Col. 2275
\textsuperscript{3} Official Report: 6 February 2007 (5th Meeting, Session 2 (2007)), Col. 2277
ANNEX

RESPONSE FROM THE SCOTTISH EXECUTIVE

1. On 31 January the Committee sought an explanation on the following matters:

“Section 27: Further provision as regards rules, regulations and orders

1. The Committee noted that subsection (3) as amended would allow delegation of legislative as well as other functions. The Committee queried whether it is appropriate to confer powers to make subordinate legislation on persons other than the Scottish Ministers and asks the Executive to comment. The Committee asks the Executive for clarification as to who this might include.

2. The Committee also noted that in response to its objections at stage 1, the specific power to modify the Act following on the Bill (former subsection 27(8)) was removed. However, the Committee remains unsure as to whether the reference to “any enactment” in subsection (6)(b) would nevertheless include the Act. If the intention is that the power should not be used to amend the Act following the Bill, the removal of subsection (8) may not be sufficient. The Executive is asked to comment.”

2. We were conscious that when bringing forward both of these amendments at Stage 2 they were likely to be of interest to the Committee. We had accordingly attempted to anticipate both of those points in the revised Delegated Powers Memorandum provided to the Parliament on 25 January 2007 following Stage 2. We can appreciate the difficulty however in seeking to identify the changes made to what is a fairly technical document. To facilitate that process however the Executive would like to record that it had provided the revised Delegated Powers Memorandum to the Parliament with all of the changes made following Stage 2 identified by sidelines and italics.

3. Turning to the 2 points raised:

Sub-delegation

4. Section 27(6) was amended at Stage 2 to provide that the powers to make subordinate legislation under the Bill could be exercised, amongst others, so as to make provision for the delegation of functions.

5. The Executive had sought to explain the reasons for the inclusion of that amendment at paragraphs 48 and 49 of the revised Delegated Powers Memorandum. For ease of reference these are set out below:

“48. Section 27(6)(aa) allows the Scottish Ministers to make provision for delegation of functions when exercising the powers to make subordinate
legislation under the Bill. The power under section 27(6)(b) (which concerns supplemental, incidental etc. provisions) will attract affirmative resolution procedure if exercised so as to modify any Act (except where this is done in an order under section 1 and that section 1 order does not seek to amend a Private Act of the Scottish Parliament).

“49. Significant elements of sub-delegation may be involved in exercising powers under the Bill. An instance might arise, for example, under section 18, the access to land provisions. The authorisation of an applicant to access land may be subject to a range of conditions one of which might be that the applicant is required to obtain agreement on a particular matter with the land owner before access can be taken. A practical example might be coming to an agreement with a farmer regarding the timing of access or the implementation of conditions about the need to be accompanied at all times, so as to ensure that the operation of the farm is not compromised. A further example of sub-delegation might apply in respect of an order made under section 1 giving a power to the Scottish Ministers to extend a time limit to do something under the order. It is difficult to predict when such power might be used under section 1 since it is not known what powers might be required to give effect to matters provided for in an order made under section 1.”

6. The Executive would add that the decision to include the provision was informed by the illustrative draft subordinate legislation under the powers in the Bill which was provided to the Parliament to assist its consideration of the Bill. In view of the experience on that, and in view of the presumption against sub-delegation in the absence of express or sufficiently implied power, we considered it appropriate to include the express provision to anticipate a point that might otherwise be put to us when the subordinate powers under the Bill came to be exercised. The Bill is of course essentially providing a framework under which future projects will be authorised. As therefore explained at paragraph 49 of the revised DPM it is difficult to predict all of the provision which might be required to deliver a particular project.

7. The Executive has, however, no intention of using the power conferred by section 27(6)(aa) to empower the making of subordinate legislation (a section 1 order may authorise the making of byelaws but this is already specifically provided for in paragraph 13 of schedule 1). The Executive very much doubts whether a court would read section 27(6)(aa) as sufficient to authorise provision allowing a third party to make subordinate legislation – something very much more express would be required before a court would come to such a conclusion.

Powers being exercised to amend the Bill

8. The Executive sought to set out its position at paragraphs 53 and 54 of the revised DPM. For ease of reference these are set out below:

“53. The Subordinate Legislation Committee will recall that it raised section 27(8) of the Bill as at introduction as it provided that the
supplementary powers under section 27(6) and (7) could be used to modify the Act following on from the Bill.

“54. For the Committee’s information they will note the Bill was amended at Stage 2 to remove the former subsection (8). This means that the delegated powers under the Bill cannot now be used to make a modification to the Act to follow on from the Bill.”

9. Further at Stage 2 when speaking to this amendment the Minister for Transport stated (Col 4409):

10. “Amendment 47 addresses a different issue. The Subordinate Legislation Committee expressed concern that the powers under section 27(6), read with section 27(8), would allow the modification of the act—not just other enactments—following on from the bill. By removing subsection (8), the amendment ensures that any subordinate legislation that is made under the act cannot be used to modify the act. I am grateful to the Subordinate Legislation Committee for pointing out the problem.”
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