This document relates to the Regulatory Reform (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 27 March 2013

REGULATORY REFORM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Regulatory Reform (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The Regulatory Reform (Scotland) Bill was announced by the First Minister in the Programme for Government in September 2012 and takes forward the 2011 commitment to improve further the way regulations are applied in practice across Scotland. The primary purpose of the Bill is to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment. It will protect our people and environment, help businesses to flourish and create jobs.

4. The Scottish Government’s Better Regulation and Better Environmental Regulation programmes are distinct agendas with a number of synergies. This Bill combines them where legislation is required and is made up of four primary elements:

   • Enterprise
   • Environmental regulation
   • Marine energy
   • Planning

Enterprise

5. The Bill enables regulations to be made to encourage or improve consistency in the exercise of regulatory functions by a regulator in schedule 1 (a “listed regulator”).

6. It imposes a duty on listed regulators to exercise regulatory functions in a way that contributes to sustainable economic growth.
7. It provides for a code of practice in relation to the exercise of regulatory functions.

8. Section 39(4) of the Civic Government (Scotland) Act 1982 is amended so that the certificate to be produced in relation to a street trader’s licence application for a mobile food business must be from a food authority that has registered it.

**Environmental regulation**

9. The Bill will simplify and update the wide range of objectives given to SEPA by different legislative regimes into a new statutory purpose to reflect the sort of environmental regulator Scotland needs for the future.

10. The Bill will enable the integration of the permissioning arrangements of SEPA’s four main regimes (water, waste, radioactive waste and pollution prevention and control) and simplify the regulatory procedures.

11. The Bill will also enable the Scottish Ministers to provide SEPA with a more strategic range of enforcement tools, including additional enforcement measures such as fixed and variable monetary penalties and enforcement undertakings. The Bill will also provide criminal courts with a wider range of sentencing options including the power to impose publicity orders and compensation orders and to order that significant environmental harm be remediated in addition to, or instead of, imposing any other sanction.

**Marine energy**

12. The Bill will extend statutory review mechanisms to decisions by Ministers under sections 28 and 29 of the Marine (Scotland) Act 2010 similar to those set out in the Planning Acts, relating to those offshore marine energy projects with a permitted capacity of over 1 megawatt. The review will be by the Inner House of the Court of Session.

**Planning**

13. The Bill will contain provisions to amend the Town and Country Planning (Scotland) Act 1997, as amended. The amendment aims to allow Scottish Ministers to vary planning application fees based on the performance of a planning authority.
RATIONAL FOR SUBORDINATE LEGISLATION

14. The Bill contains a number of provisions which delegate powers to Scottish Ministers. The Scottish Government has considered whether each provision is best managed on the face of the Bill or through subordinate legislation. In consideration of this, and in determining the appropriate level of scrutiny, the Scottish Government has had regard to:

- the need to achieve the appropriate balance between the importance of the issue and the need to ensure sufficient flexibility to respond to changing circumstances without having to resort to primary legislation;
- the need to make proper use of Parliamentary time;
- the likely frequency of amendment; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by Parliament.

15. The delegated powers relating to the Bill are listed below. These detail what the power does, why the power was taken and the reason for the Parliamentary procedure used.

DELEGATED POWERS

Section 1 – Power as respects consistency in regulatory functions

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

16. Section 1 (read with section 2) confers a power on the Scottish Ministers to make regulations containing any provision which they consider will encourage or improve consistency in the exercise of regulatory functions by a regulator in schedule 1 (“a listed regulator”). It includes power to make different provision for different purposes (section 44(1)) and power to modify any enactment apart from sections 1 to 3 and 7 (section 44(2)).

17. The regulations may require a listed regulator to impose, set, secure compliance with or enforce any requirement, restriction, condition, standard or outcome (a “regulatory requirement”), including a newly created one, to the extent that the regulator has the power to do so. In addition to imposing a new regulatory requirement, the regulations may also amend or remove a requirement that was imposed or set at the discretion of a regulator.

18. However, if an enactment requires a regulatory requirement to be imposed or set by the regulator, that requirement can only be amended or removed if the regulations include provision that has an equivalent effect to that enactment (section 2(4)). The regulations cannot therefore amend or remove a mandatory regulatory requirement which the regulator must, by law, impose or set unless alternative provision is made having equivalent effect.
Reason for taking power

19. The reason for seeking this power is to provide sufficient flexibility to enable measures to encourage or improve regulatory consistency to be taken quickly and efficiently in response to changing circumstances without having to resort to primary legislation.

20. For example, if regulatory inconsistency is found to be having an unnecessary adverse impact on regulated business activities, measures can be taken quickly to require a regulator to impose, set or enforce a consistent regulatory requirement or to standardise procedures for dealing with applications for permits in relation to the regulated activity.

21. These provisions seek to achieve an appropriate balance between the importance of the issue and the need to make proper use of Parliamentary time, having regard to the likely frequency of amendment and the need to anticipate the unexpected. In particular, although targeted measures can be taken quickly if regulatory inconsistency is having an adverse impact, any existing regulatory requirement which must by law be imposed or set can only be changed or removed if the new measures have an equivalent effect to that law.

Reason for choice of procedure

22. There is a business and public interest in the way regulatory functions are carried out. Draft regulations containing provision to encourage or improve regulatory consistency are therefore thought to merit the approval of Parliament before they can be made. Section 44(4) therefore provides that regulations under section 1 are subject to the affirmative procedure.

Section 7 - Power to modify schedule 1

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure, unless the order adds a regulator to schedule 1 or adds (or extends) a regulatory function of a regulator in that schedule, in which case affirmative procedure

Provision

23. Section 7 confers a power on the Scottish Ministers to modify schedule 1 (regulators for the purposes of Part 1) so as to add a person having regulatory functions to the list, to remove or amend an entry and to specify that a function is or is not to be a regulatory function for the purpose of section 1 (power as respects regulatory consistency), section 4 (Regulators’ duty in respect of sustainable economic growth) or section 5 (code of practice on exercise of regulatory functions).
Reason for taking power

24. The reason for seeking this power is to provide sufficient flexibility to enable the entries in schedule 1 to be kept up-to-date, and to enable any other person that exercises regulatory functions to be added so that those functions can be brought within the scope of the power in section 1 and so that any such person can be required to comply with the duty in section 4 and the code under section 5, without having to resort to primary legislation.

Reason for choice of procedure

25. Sections 1, 4 and 5 apply only in relation to a person, body or office-holder in schedule 1. Any modification of schedule 1 that adds an entry or adds (or extends) a regulatory function for the purposes of those sections may therefore extend the scope of the power in section 1, or extend the application of the duty in section 4 or the code under section 5.

26. Where an order under section 7 contains any such modification, it is considered to merit the approval of Parliament before it can be made. Section 44(3)(b) and (c) therefore provides that, where this is the case, the order is subject to the affirmative procedure.

27. Where an order under this section only removes (or updates the name of) an entry or otherwise removes (or narrows) a regulatory function, it will not extend the scope or application of the provisions in Part 1. It is therefore considered appropriate that any such order is subject only to the negative procedure. Section 44(5) provides for this.

Environmental regulation

Section 10 – Regulations relating to protecting and improving the environment

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<td>Parliamentary procedure:</td>
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Provision

28. Section 10(1) allows the Scottish Ministers, by regulations, to make provision for any of the purposes specified in Part 1 of schedule 2.

29. Regulations may for example provide for the scope and extent of environmental activities and regulated activities, for a prohibition on carrying on any activity (described in the schedule as a “regulated activity”), for a prohibition on carrying on an activity without authorisation, for different levels of authorisation (permit, registration, notification or compliance with general binding rules), for procedural requirements, for administrative charges by regulators for public registers, for enforcement powers (including statutory notices), for offences for failure to comply with regulatory requirements. regulated activities, and for measures equivalent to those that might be made under the European Communities Act 1972 or on waste under the Environmental Protection Act 1990.
30. Section 10(3) sets out that, in accordance with section 8, the provision that may be made is provision for or in connection with protecting and improving the environment, including provision regulating environmental activities, and provision implementing any EU or international obligation relating to protecting and improving the environment (for example, the Water Framework Directive (Directive 2000/60/EC), the Waste Framework Directive (Directive 2008/98/EC), the Basic Safety Standards Directive (Directive 96/29/Euratom), and the Industrial Emissions Directive (Directive 2010/75/EU)).

31. Ministers must before making any regulations consult any body on whom functions will be conferred, and such other persons as they think fit.

32. The powers in this section are supplemented by the order making powers in schedule 2, as considered below.

Reason for taking power

33. The power will enable the regulation of activities that might impact on the environment, or if subject to regulation might improve the environment.

34. It is intended in particular that regulations made under the power will simplify and rationalise a wide range of existing measures relating to protection of the water environment, integrated pollution control, waste management, and radioactive substances. The aim is to move towards a single regulatory structure that will be significantly easier to use for both SEPA and businesses carrying on regulated activities.

35. The new structure will be a significant improvement on the present measures, which can be complex and hard for businesses to use. Some existing measures are included in older primary legislation such as the Radioactive Substances Act 1993 and the Environmental Protection Act 1990, both of which have been amended on numerous occasions. Other existing measures are included in statutory instruments made under a range of Acts, or indeed more than one Act.

36. Measures regulating, for example, environment activities will contain a lot of detailed technical provision that would be inappropriate in a Bill. Such measures would also need to be regularly updated to take account for example of technical developments, and new EU and international obligations. The flexibility that is needed in this area would not be available if the relevant measures were specified directly in primary legislation.

Choice of procedure

37. Regulations made under this power will provide for the detailed regulation of environmental activities, often for the purposes of transposing or implementing EU obligations.

38. It is not thought that technical measures of that kind need in general to be approved in advance by Parliament. However, some regulated activities will be economically significant, or may present a serious risk to the environment. It is therefore appropriate for Parliament to be able to scrutinise such measures, and they are therefore subject to negative procedure.
39. In some cases however the regulations will modify or repeal primary legislation, and it is thought that it is appropriate for Parliament to approve such measures in advance. Regulations that include such measures will therefore be subject to affirmative procedure.

**Section 12 – Fixed Monetary Penalties**

- **Power conferred on:** Scottish Ministers
- **Power exercisable by:** Order made by Scottish statutory instrument
- **Parliamentary procedure:** Affirmative procedure

**Provision**

40. Section 12(1) enables the Scottish Ministers to make provision by order for the imposition by SEPA of a fixed monetary penalty in relation to a relevant offence. What constitutes a relevant offence is for Ministers to determine in an order under section 39. The order under section 12(1) must provide that SEPA may not serve any such notice unless it is satisfied on the balance of probabilities that an offence has been committed. The maximum amount of the penalty that may be specified in the order is an amount equivalent to level 4 on the standard scale (£2,500). This section must be read with section 23(1) where the Lord Advocate may issue guidance to SEPA on the exercise of its functions relating to enforcement measures (including fixed monetary penalties). Under section 23(2) SEPA must comply with that guidance.

41. Certain procedural requirements that an order under section 12(1) must include are set out in section 13. Section 14 requires Ministers, if making an order under section 12(1), to provide that, where a fixed monetary penalty has been imposed upon a person in relation to an act or omission, no criminal proceedings may be commenced against that person for the same act or omission. Such an order must also provide that if the person is prosecuted at a later date for the original offence then the period between service of notice of intent and the deadline for receiving representations is not counted for any period within which criminal proceedings should be commenced (section 14(1)(b)).

42. By virtue of section 23(4), any order made under section 12(1) must require SEPA to issue guidance about the use of the powers conferred by the order. Section 24(2) enables Ministers to make provision requiring SEPA to publicise cases where it has imposed fixed monetary penalties in accordance with an order made under section 12(1).

43. Section 20 also requires that any provision under section 12(1) includes safeguards against the imposition of a fixed monetary penalty in combination with other sanctions.

**Reason for taking power**

44. Fixed monetary penalties, as may be provided for in an order under section 12(1), are intended to be one of several enforcement options available to SEPA in the event of regulatory non-compliance. The Bill sets out the broad principles of the fixed monetary penalty regime that may be created under section 12(1), and imposes certain fundamental safeguards (such as the opportunity to make representations, the opportunity to appeal, and a prohibition on criminal proceedings being commenced against someone for the same act or omission in relation to which a fixed monetary penalty has been imposed). The Bill having set out this framework, the detailed processes and procedures regarding the imposition by SEPA of fixed monetary penalties
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is a relatively technical matter that, it is submitted, is more appropriate for subordinate legislation. Further, it is desirable to have flexibility to amend or refine the exact processes for imposing a fixed penalty and to amend the level of fixed monetary penalties over time as monetary values change (within the limits prescribed in the Bill) without having to amend primary legislation.

Choice of procedure

45. Although the Bill sets out certain procedural safeguards that an order under section 12(1) must include, the imposition by SEPA of fixed monetary penalties in relation to certain offences is a serious matter with adverse financial consequences for persons not complying with regulatory requirements. It is accordingly considered appropriate that any order made under these provisions should be subject to the greater level of parliamentary scrutiny that the affirmative procedure provides.

Section 15 – Variable Monetary Penalties

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

46. Section 15(1) enables the Scottish Ministers to make provision by order for the imposition by SEPA of a variable monetary penalty in relation to a relevant offence. What constitutes a relevant offence is for Ministers to determine in an order under section 39. The order under section 15(1) must provide that SEPA may not serve any such notice unless it is satisfied on the balance of probabilities that an offence has been committed. The maximum amount of the penalty that may be imposed by SEPA in the majority of cases is the maximum fine that can be imposed on summary conviction. In a limited number of cases, where an offence is not triable summarily or is not punishable on summary conviction by a fine, the maximum amount is specified as £40,000. Section 15(7) enables the Scottish Ministers by order to substitute another sum for that amount. This section must be read with section 23(1) where the Lord Advocate may issue guidance to SEPA on the exercise of its enforcement functions relating to enforcement measures (including variable monetary penalties). Under section 23(2) SEPA must comply with that guidance.

47. Certain procedural requirements that an order under section 15(1) must include are set out in section 16. These include provision that an undertaking may be offered by a person in response to a notice of intent. Section 17 requires Ministers, if making an order under section 15(1), to provide that, where a variable monetary penalty has been imposed upon a person or an undertaking under section 16 accepted from them in relation to a particular act or omission, then criminal proceedings may not be commenced against that person for the same act or omission. Such order must provide that if the person is prosecuted at a later date for the original offence then the period between service of notice of intent and the deadline for receiving representations is not counted for any period within which criminal proceedings should be commenced (section
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17(3)), and may also provide for a non-compliance penalty notice to be issued if any such undertaking is not complied with (section 18).

48. Provision made under section 15 may also include provision for SEPA to require a person served with a variable monetary penalty notice to pay costs incurred by SEPA in relation to the notice, including investigation costs, administration costs and costs of expert advice (section 22). Certain procedural safeguards must be included in any such provision by virtue of section 22(2).

49. By virtue of section 23(4), any order made under section 15(1) must require SEPA to issue guidance about the use of the powers conferred by the order. Section 24(2) enables Ministers to make provision requiring SEPA to publicise cases where it has imposed variable monetary penalties in accordance with an order made under section 15(1).

50. Section 20 also requires that any provision under section 15(1) includes safeguards against the imposition of a variable monetary penalty in combination with other sanctions.

Reason for taking power

51. Variable monetary penalties, as may be provided for in an order under section 15(1), are intended to be one of several enforcement options available to SEPA in the event of regulatory non-compliance. The Bill sets out the broad principles of the variable monetary penalty regime that may be created under section 15(1), and imposes certain fundamental safeguards (such as the opportunity to make representations, the opportunity to appeal, and a prohibition on criminal proceedings being commenced against someone for the same act or omission in relation to which a variable monetary penalty has been imposed). The Bill having set out this framework, the detailed processes and procedures regarding the imposition by SEPA of variable monetary penalties is a relatively technical matter that, it is submitted, is more appropriate for subordinate legislation. Further, it is desirable to have flexibility to amend or refine the exact processes for imposing a variable monetary penalty without having to amend primary legislation.

Choice of procedure

52. Notwithstanding that the Bill sets out certain procedural safeguards that an order under section 15(1) must include, the imposition by SEPA of variable monetary penalties in relation to certain offences is a serious matter with adverse financial consequences for persons not complying with regulatory requirements. It is accordingly considered appropriate that any order made under these provisions should be subject to the greater level of Parliamentary scrutiny that the affirmative procedure provides.
Section 18(2)(b) – Undertakings under section 16: non-compliance penalties

Power conferred on: Scottish Ministers  
Power exercisable by: Order made by Scottish statutory instrument  
Parliamentary procedure: Negative procedure

Provision

53. Section 15 enables the Scottish Ministers to make provision for the imposition by SEPA of a variable monetary penalty in relation to a relevant offence, including provision for an undertaking to be accepted in response to a notice of intent regarding a variable monetary penalty. Such provision may also provide for a non-compliance penalty notice to be issued if any such undertaking is not complied with (section 18).

54. Provision made under section 15 may also provide, inter alia, for the amount of the non-compliance penalty to be calculated by reference to criteria specified by order by the Scottish Ministers.

Reason for taking power

55. It is thought that in order to make appropriate use of Parliamentary time having regard to the level of detail involved in setting down specific criteria, it is appropriate for such criteria to be delegated to secondary legislation. In addition, there needs to be flexibility to amend the specific criteria for calculating a non-compliance penalty in order to respond to changing circumstances without having to resort to primary legislation.

Choice of procedure

56. The negative procedure is considered appropriate for these powers as the main parameters for SEPA accepting an undertaking and then, if provided for, imposing a non-compliance penalty are set out in primary legislation and the detail of the criteria for determination of a non-compliance penalty may therefore be dealt with by negative procedure.

Section 19(1) – Enforcement Undertakings

Power conferred on: Scottish Ministers  
Power exercisable by: Order made by Scottish statutory instrument  
Parliamentary procedure: Negative procedure

Provision

57. This section enables the Scottish Ministers to make provision by order for SEPA to accept an enforcement undertaking from a person where it has reasonable grounds to suspect that the person has committed a relevant offence. What constitutes a relevant offence is for Ministers to determine in an order under section 39. The order under section 19(1) may provide that the
acceptance of an enforcement undertaking is to have certain consequences for subsequent enforcement measures and proceedings that may be taken against that person. The consequences include that (unless the person fails to comply with the undertaking) no criminal proceedings may be commenced against that person in respect of the act or omission for which the undertaking was offered, and that SEPA may not impose a fixed or variable monetary penalty in respect of that act or omission.

58. This section must be read in conjunction with section 23(1) where the Lord Advocate may issue guidance to SEPA on the exercise of its functions relating to enforcement measures, which include the acceptance of an enforcement undertaking. Under section 23(2) SEPA must comply with that guidance. In addition section 23(4) requires that an order made by the Scottish Ministers for the ‘imposition’ of an enforcement undertaking by SEPA must also require SEPA to publish guidance on those measures and have regard to that guidance in exercising its functions. Section 24(2) provides that an order made by the Scottish Ministers for the acceptance of an enforcement undertaking by SEPA may also provide for SEPA to publish information on the cases where it has accepted an enforcement undertaking.

Reason for taking power

59. Enforcement undertakings, as may be provided for in an order under section 19(1), are intended to be one of several enforcement options available to SEPA in the event of regulatory non-compliance. The Bill sets out the broad principles of how enforcement undertakings are intended to operate. The Bill having set out this framework, the detailed processes and procedures regarding the acceptance by SEPA of an enforcement undertaking, and the monitoring of compliance with such an undertaking, are relatively technical matters that, it is submitted, are more appropriate for subordinate legislation. Further, it is desirable to have flexibility to amend or refine the exact processes for the acceptance and monitoring of enforcement undertakings without having to amend primary legislation.

Choice of procedure

60. The negative procedure is considered appropriate for an order made under this section as enforcement undertakings cannot be imposed upon a person SEPA believes has committed a relevant offence. Rather, they must be voluntarily offered by the person concerned. As such, they are not thought to merit the same level of Parliamentary scrutiny as orders under sections 12 (fixed monetary penalties) and 15 (variable monetary penalties), where penalties may be imposed upon persons against their will, and for which it is proposed that the affirmative procedure is appropriate. Mindful of the need to make proper use of Parliamentary time, it is submitted that the negative procedure is appropriate for an order under section 19(1).
Section 19(3) – Enforcement Undertakings

Power conferred on: Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

61. Section 19 enables the Scottish Ministers to make provision for SEPA to accept an enforcement undertaking. Paragraph (c) of subsection (3) enables the Scottish Ministers to make provision by order describing specific types of action that an enforcement undertaking may specify.

Reason for taking power

62. While there are types of action that an enforcement undertaking may specify identified, in broad terms, in section 19(3), an order under section 19(3)(c) would allow further, more specific requirements to be added. The ability to add further or alternative actions gives flexibility to tailor the operation of enforcement undertakings to meet policy objectives.

Choice of procedure

63. The negative procedure is considered appropriate for these powers as by this provision the subordinate legislation will be setting additional parameters for an enforcement tool that is voluntarily offered by the person who is believed by SEPA to be responsible for committing a relevant offence, and has enforcement consequences only if accepted by SEPA. As such, they are not thought to merit the same level of Parliamentary scrutiny as orders under sections 12 (fixed monetary penalties) and 15 (variable monetary penalties), where penalties may be imposed upon persons against their will, and for which it is proposed that the affirmative procedure is appropriate. Mindful of the need to make proper use of Parliamentary time, it is submitted that the negative procedure is appropriate for an order under section 19(3).
Section 26(5) – Compensation orders against persons convicted of relevant offences

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

64. Section 26 makes provision for section 249 of the Criminal Procedure (Scotland) Act 1995 to extend to any conviction for a relevant offence. What constitutes a relevant offence is for Ministers to determine in an order under section 39. This will allow the courts to make compensation orders requiring offenders to make payment of compensation to SEPA, local authorities or an owner or occupier of land in respect of costs incurred in preventing, reducing or remediating, or mitigating the effects of harm to the environment resulting from a relevant offence. In section 26(4)(a), the prescribed sum that is specified as a maximum amount for the purposes of a compensation order made in relation to a conviction for a relevant offence is £50,000. Section 26(5) allows the Scottish Ministers by order to substitute a different maximum amount.

Reason for taking power

65. In order to ensure that the provision for compensation orders remains effective, it may be necessary to vary the maximum amount from time to time. It is desirable that Ministers have the flexibility to do so without having to amend primary legislation.

Choice of procedure

66. It will be for the courts to make compensation orders in relation to relevant offences where they consider it appropriate to do so. Section 26(5) simply allows Ministers to vary the maximum amount for which a compensation order may be made by the courts. Given the role the courts will play in determining the actual amount of any compensation order, and mindful of the need to make proper use of Parliament’s limited time, the lesser degree of Parliamentary scrutiny offered by negative procedure is considered appropriate for an order under section 26(5).
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Section 30(6) – Liability where activity carried out by arrangement with another

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

67. This subsection relates to the provision in section 30 for vicarious liability where a person (A) commits an offence and A is at that time carrying on a regulated activity for another person, B. Section 30 provides that, in those circumstances, B is also guilty of the offence. Section 30(6) enables Ministers to extend the scope of this section to apply to activities other than those that are “regulated activities” (as defined in section 9(3)).

Reason for taking power

68. Regulated activities are environmental activities in respect of which regulations under section 10 of the Bill make provision. However, it is important to ensure that it is possible to apply the section 30 vicarious liability provisions to activities regulated under existing legislation pending the introduction of the new permissioning framework under section 10. As a transitional measure Scottish Ministers require flexibility to extend this to cover activities currently regulated under regulations made under, for example, the Pollution Prevention and Control Act 1999 and Water Environment and Water Services (Scotland) Act 2003. Such provision is considered to be most appropriately made in subordinate legislation.

Choice of procedure

69. The negative procedure is considered appropriate for these powers as it is simply a mechanism for specifying which activities may be covered by the new provision on vicarious liability. If the Scottish Parliament approves the principle of vicarious liability where an activity is carried out by arrangement with another, the activities to which it applies can, it is submitted, appropriately be considered under the negative procedure.
Section 31(6) – Significant environmental harm: offence

Power conferred on: Scottish Ministers  
Power exercisable by: Order made by Scottish statutory instrument  
Parliamentary procedure: Negative procedure

Provision

70. This subsection relates to the new criminal offence of causing or permitting significant environmental harm. Section 31(6) provides that it is a defence for a person charged with the significant environmental harm offence to show that the acts or failures alleged to constitute the offence were authorised by regulations made under section 10, or by an authorisation given under such regulations. To allow for the possibility of the provisions under section 31 coming into force before regulations under section 10 are in force, section 31(6) provides that it is also a defence if such act or failure was authorised under an enactment designated by the Scottish Ministers for this purpose by order. That will allow Ministers to designate existing enactments, so that an authorisation under such an enactment can be a defence under section 31(6).

Reason for taking power

71. The reason for taking this power is in order to ensure that a wide range of existing statutory authorisations can be included, without setting these out in detail in the primary legislation. It is submitted that the listing of such enactments is best dealt with in subordinate legislation.

Choice of procedure

72. Negative procedure is considered appropriate for this power as it is a mechanism for specifying which existing forms of authorisation may provide a basis for a statutory defence. It merely clarifies the scope of the defences available under section 31(6) rather than creates a new defence.

Section 31(9) – Significant environmental harm: offence

Power conferred on: Scottish Ministers  
Power exercisable by: Order made by Scottish statutory instrument  
Parliamentary procedure: Negative procedure

Provision

73. This subsection relates to the new criminal offence of causing or permitting significant environmental harm. Section 31(9) provides that environmental harm can be treated as “significant” not only if it has serious adverse effects, but also if (regardless of the seriousness of the adverse effects) it is caused to an area that is designated by order. Section 31(9) allows the Scottish Ministers to specify any such area and section 31(10) allows the Ministers to specify different areas, and to specify different types of significant environmental harm in relation to different areas.
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Reason for taking power

74. In order to ensure that areas in relation to which the significant environmental harm offence will apply may be designated to reflect changing environmental priorities and local or national sensitivities, a degree of flexibility is required to allow areas to be designated, modified or de-designated. It is not considered appropriate to specify these areas in primary legislation, which would then require amendment whenever they required to be updated or changed. Rather, a delegated power is considered appropriate.

Choice of procedure

75. The negative procedure is considered appropriate for this power as the particular areas in relation to which the significant environmental harm offence will apply may require frequent amendment.

Section 39 – Meaning of “relevant offence” and “SEPA” in Part 2

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Provision

76. In Part 2 of the Bill, there are a wide range of provisions which only or may only apply in respect of a “relevant offence”. These include the offences in relation to which provision for fixed monetary penalties, variable monetary penalties and enforcement undertakings may be made, and the offences in relation to which compensation orders, the vicarious liability offence, or the significant environmental harm offence may apply, as well as the offences in respect of which the courts must have regard, when imposing a fine, to the financial benefits that accrued to the accused. This subsection allows the Scottish Ministers to specify which offences constitute a “relevant offence” for the various purposes of Part 2. When read in conjunction with section 44(1), the Scottish Ministers may specify different offences for different purposes so that, for example, a limited range of offences may be specified as a relevant offence for the purposes of the fixed monetary penalty provisions, with a wider range of offences specified in relation to which compensation orders may be made.

Reason for taking power

77. Relevant offences will be drawn initially from the wide range of environmental offences present under various pieces of existing environmental legislation. Once the different provisions within this Part and provisions in regulations made under section 10 are brought into force, it will be necessary for new offences created under those provisions to be added. It is therefore likely that what constitutes a relevant offence will be subject to frequent change. Given this, a delegated power is considered appropriate, as such a power will ensure that there is a suitable
level of flexibility to add (or remove) offences when this is required. Without such a power, frequent amendments to primary legislation would be required.

**Choice of procedure**

78. The negative procedure is considered appropriate for these powers. The subordinate legislation will not be creating new offences but will instead be designating to which offences it is appropriate to apply the various provisions of Part 2. Negative procedure will provide a sufficient degree of Parliamentary scrutiny as regards the matter of which offences they apply to.

**Section 41 – Planning authorities’ functions: charges and fees**

*Power conferred on:* The Scottish Ministers  
*Power exercisable by:* Order made by Scottish statutory instrument  
*Parliamentary procedure:* Negative procedure

**Provision**

79. Section 41 inserts new provision into section 252 of the Town and Country Planning (Scotland) Act 1997. The new provision in subsection (1A) enables Scottish Ministers to make regulations for the charge or fee payable to different planning authorities to be of different amounts. This can only be done under the new provision where Scottish Ministers are satisfied that the functions of an authority are not being performed satisfactorily. Section 41 (c) removes subsections (5) and (6) so that all regulations made under section 252 are subject to negative parliamentary procedure.

**Reason for taking power**

80. This is amending the Scottish Ministers existing powers to set planning fees. This amendment is to allow Scottish Ministers to set planning fees based on the performance of the planning authority.

**Reason for choice of procedure**

81. The intention is that the provision should be exercisable at the discretion of Scottish Ministers if they are satisfied that a planning authority is under performing. The decision to reduce fees would be taken following an assessment process. It is not intended to tie the power to make regulations directly to the outcome of a particular assessment process. It is not the intention that the provision should specify how a planning authority’s performance is to be assessed or that this should be specified in regulations.

82. Under section 252(5) regulations made under section 252(1) or (2) are subject to affirmative procedure, unless they are amendments consequential upon changes in the cost of living, the retail prices index or an inflation index or they specify the person by whom the calculation is to be made, in which case they are subject to the negative procedure. The
This document relates to the Regulatory Reform (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 27 March 2013

proposed policy is that all regulations made under section 252 should be subject to the negative procedure which would bring these regulations in line with most other SSIs that set fees.

**Section 45(1) – Ancillary provision**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Parliamentary procedure:** Negative procedure, unless the order modifies or repeals primary legislation, in which case affirmative procedure

**Provision**

83. Section 45(1) enables the Scottish Ministers, by order, to make any incidental, supplemental, consequential, transitional, transitory or saving provision they consider necessary or expedient for the purposes of, in consequence of, or for giving full effect to, the Bill.

**Reason for taking power**

84. This is to provide sufficient flexibility to enable incidental, supplemental, consequential, transitional, transitory or saving provision to be made for the purposes of, in consequence of, or for giving full effect to, the Bill without having to resort to primary legislation.

**Choice of procedure**

85. Where a draft order under section 45(1) contains provision that add to, replaces or omits any part of the text of an Act it is thought to merit the approval of Parliament before it can be made. Accordingly, section 44(3) provides that an order under this section which contains any such provision is subject to the affirmative procedure. If an order under this section contains no such textual amendments, section 44(5) provides it is instead subject to the negative procedure.

**Section 47(2) – Commencement**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Parliamentary procedure:** Laid in Parliament

**Provision**

86. This provides that the provisions of the Bill (other than sections 44 to 48) comes into force on such day or days as the Scottish Ministers may by order appoint. Any such order may include transitional, transitory or saving provision.
Reason for taking power

87. This is to provide flexibility to enable the provisions of the Bill to be brought into force in a coordinated and managed way, along with any transitional, transitory or saving provision as may be required, so as to give proper effect to the Bill without having to resort to primary legislation.

Choice of procedure

88. It is thought to be sufficient that any order under this section is laid before Parliament as soon as practicable after it is made (and before it comes into force). This is provided for by virtue of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

Schedule 2 – Specification of an EU instrument as one that is or contains an obligation relating to protecting and improving the environment

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
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</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Laid in Parliament</td>
</tr>
</tbody>
</table>

Provision

89. Paragraph 29 of schedule 2 enables the Scottish Ministers, by order, to specify an EU instrument as one that is or contains an EU obligation relating to protecting and improving the environment.

Reason for taking power

90. An EU obligation may relate partly to the environment and partly to other matters, or there may be doubt as to the extent to which it relates to the environment. The power may be exercised to clarify that regulations under section 10 may, by virtue of paragraph 22 of schedule 2, make provision in connection with a particular EU obligation.

Choice of procedure

91. The power will only be used to clarify the scope of the main power in section 10. It is not therefore thought to be appropriate to take up Parliamentary time scrutinising the exercise of the power, particularly as regulations made under section 10 in connection with a specified instrument will be subject to separate scrutiny.
Schedule 2 – Substitution of new maximum fine for a summary offence

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative procedure

Provision

92. Paragraph 30(4) of schedule 2 enables the Scottish Ministers, by order, to substitute a sum other than £40,000 as the maximum amount of the fine that may be imposed where regulations provide for an offence to be punishable on summary conviction by a fine.

Reason for taking power

93. Over time inflation may reduce the real value of the maximum fine that may be imposed, so reducing the deterrent effect of a criminal conviction for a summary offence. The power will be exercised to ensure that the maximum fine is adjusted to reflect changes in the value of money.

Choice of procedure

94. The power relates to criminal penalties so Parliament should be able to scrutinise that power. It is thought that negative procedure is appropriate given that the power can only be exercised in limited circumstances.
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REGULATORY REFORM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM