REGULATORY REFORM (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Supplementary Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Regulatory Reform (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 7B(1)(b) – Power as respects specification of “relevant functions” for the purposes of Part 1A (Primary Authorities)

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

2. Part 1A of the Bill (sections 7A to 7H) which makes provision for primary authorities was introduced at Stage 2.

3. Section 7A provides that Part 1A applies where a person carries on an activity in the area of two or more local authorities and each of those authorities has the same “relevant function” in relation to that activity. Section 7B confers a power on the Scottish Ministers to specify by order any regulatory function (as defined in section 1(5) of the Bill) exercised by a local authority which constitutes a “relevant function” for these purposes.

Reason for taking power

4. Local authorities exercise a very wide range of regulatory functions, and it is neither appropriate nor practicable to limit the scope of the primary authority measures to functions specified on the face of the Bill. The objective of ensuring better regulation is best served by conferring a power on Ministers to specify in delegated legislation the functions in respect of which primary authorities may be nominated.
Reason for choice of procedure

5. The choice of functions in respect of which primary authorities may be nominated impacts on all local authorities and provides flexibility to enable primary authority to be developed to deliver consistent regulation which meets the needs of local communities, business and local authorities. It is therefore appropriate for the order specifying the functions to be subject to the higher level of scrutiny that the affirmative procedure will provide.

Section 7E(1) – Power as respects further provision about exercise of relevant functions by primary authorities for the purposes of Part 1A

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6. Section 7E confers a power on the Scottish Ministers to make further provision about the exercise of relevant functions for the purposes of Part 1A by primary authorities, including, for example, requiring a local authority to notify the primary authority before taking enforcement action, or specifying the circumstances where an enforcing authority may not take enforcement action against a regulated person.

Reason for taking power

7. Local authorities have many regulatory functions, and many of those functions operate in a complex regulatory framework (both legal and administrative). It will be necessary for the Scottish Ministers to put in place measures that will support the operation of primary authority functions within such a framework. Implementing measures of that kind will vary considerably, and are likely to need to be adjusted from time to time, so that they are best left to delegated powers.

Reason for choice of procedure

8. The measures that may be put in place under the proposed power include matters of considerable significance to both regulators and regulated persons, such as whether or when enforcement action can be taken for regulatory breaches. It is therefore appropriate for orders to be subject to the higher level of scrutiny that the affirmative procedure will provide.

Section 12 – Fixed Monetary Penalties

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9. Sections 12 to 14 of the Bill were amended at stage 2.
10. Those sections provide for, and make provision in respect of, the power of the Scottish Ministers to make by order provision for or about the imposition by SEPA of a fixed monetary penalty on a person in relation to a relevant offence (see section 39 of the Bill for the meaning of “relevant offence”). The effect of the changes in respect of any fixed penalty that might be imposed is that more than one fixed penalty may be imposed, or criminal proceedings might be taken, in respect of further offences committed by reason of the same act or omission (where for example the offence is of an ongoing nature). Where a fixed penalty has been imposed upon a person in relation to an offence constituted by an act or omission no criminal proceedings may be commenced against a person for an offence constituted by that act or omission (and that if the person is prosecuted at a later date for that offence constituted by that act or omission 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). The changes also clarify what is meant by “criminal proceedings” for that purpose.

Reason for taking power

11. The reason for taking the powers remains the same as the reason set out at paragraph 44 of the Delegated Powers Memorandum on the Bill as introduced (the “DPM”).

Reason for choice of procedure

12. The amendments made at stage 2 do not impact on the choice of procedure set out at paragraph 45 of the DPM.

Section 15 – Variable Monetary Penalties

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

13. Sections 15 to 17 of the Bill were amended at stage 2.

14. Those sections make the same provision for variable monetary penalties as is made by sections 12 to 14 for fixed monetary penalties, and the changes made at stage 2 in respect of variable penalties have the same purpose and effect as the changes made for fixed penalties.

Reason for taking power

15. The reason for taking the powers remains the same as the reason set out at paragraph 51 of the DPM.

Reasons for choice of procedure

16. The amendments made at stage 2 do not impact on the choice of procedure set out at paragraph 52 of the DPM.
Section 18(2)(b) - Undertakings under section 16: non-compliance penalties

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary Procedure: negative procedure

17. Section 18 allows for provision to be made for a non-compliance penalty notice to be issued if any undertaking pursuant to section 16(5) is not complied with.

18. The Bill enables the Scottish Ministers to provide, by negative procedure order under section 18(2)(b), for the amount of a non-compliance penalty to be calculated by reference to criteria specified in the order. The Bill as introduced did not set a limit on the amount of a non-compliance penalty.

19. Paragraphs 87 and 88 of the Delegated Powers and Law Reform Committee’s Report set out that the Committee “would be content that, if a suitable maximum is specified in the Bill, the negative procedure could be applied to the exercise of the power by order to provide for the more detailed criteria by which a non-compliance penalty is calculated”.

20. Section 18 was therefore amended at Stage 2 to insert subsection (2A) which introduces a maximum amount of any such non-compliance penalty, linked to the maximum amount of the variable monetary penalty applicable to the particular case. This ensures consistency with provision made in respect of variable monetary penalties in section 15.

Reason for Taking the Power

21. The reason for taking the power in section 18(2)(b) remains the same as the reason set out at paragraph 55 of the DPM.

22. The amendment requested by the Delegated Powers and Law Reform Committee has been made.

Reason for Choice of Procedure

23. The amendments made at stage 2 do not impact on the choice of procedure set out at paragraph 56 of the DPM.

Section 19(1) – Enforcement Undertakings

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

24. An 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. Section 19(4) was amended at Stage 2 so that the consequences include that (unless the person fails to comply with the undertaking) no criminal proceedings may be
commenced against the person from whom the enforcement undertaking is accepted in respect of an offence constituted by an act or omission if the undertaking relates to that offence constituted by that act or omission.

25. Section 19 was also amended at Stage 2 to include alternative forms of disposal by the procurator fiscal.

**Reason for taking power**

26. The reason for taking the powers remains the same as the reason set out at paragraph 59 of the DPM.

**Reason for choice of procedure**

27. The amendments made at stage 2 do not impact on the choice of procedure set out at paragraph 60 of the DPM.

**Section 30(6) – Liability where activity carried out by arrangement with another**

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28. Section 30(6) enables Ministers to extend the scope of the offence in section 30 (which provides that where a person (A) commits an offence and A is at that time carrying on a regulated activity for another person (B) then B is also guilty of the offence) so that it applies to activities other than “environmental activities” that are “regulated activities” (both as defined in section 9(3)).

29. Paragraph 94 of the DPLRC Report observed that the power is framed more widely, to enable an order to specify any activities as “regulated activities” for the purposes of section 30, beyond “environmental activities” as defined in section 9. The Scottish Government undertook to consider lodging an amendment at Stage 2 to ensure that only “environmental activities” within the meaning of section 9(1) can be specified.

30. This section was therefore amended at Stage 2 by the insertion of subsection (7) with the effect that the new offence may apply to any environmental activity as defined in section 9 of the Bill whether or not regulations have been made under section 10 in respect of that activity, but may not apply to any other type of activity.

**Reason for taking power**

31. The reason for taking the powers remains the same as the reason set out at paragraph 68 of the DPM.
Reason for choice of procedure

32. The amendments made at stage 2 do not impact on the choice of procedure set out at paragraph 69 of the DPM.

Section 32B Inserting section 88A(3) of the Climate Change (Scotland) Act 2009 – Offences relating to supply of carrier bags: fixed penalty notices

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

33. Section 88 of the Climate Change (Scotland) Act 2009 (“the 2009 Act”) enables the Scottish Ministers by affirmative procedure regulations to make provision requiring suppliers for goods to make a minimum charge for a single use carrier bag. Regulations made under that section are generally subject to affirmative procedure (see section 96(4) of the 2009 Act).

34. The first regulations made under section 88 of the 2009 Act are however subject to ‘super-affirmative’ procedure, and a draft of the first proposed regulations was laid before the Scottish Parliament on 12 September 2013 for pre-laying scrutiny in accordance with section 97 of the 2009 Act. It is intended that the final draft will be laid for approval by the Parliament early in 2014. The Regulations will provide for it to be an offence for a person to fail to apply the minimum charge.

35. The Scottish Government consulted on carrier bag charging in June 2012, and it was proposed that local authorities could impose a fixed penalty as an alternative to criminal proceedings under the Regulations (as is the case under the equivalent powers in the UK Climate Change Act 2008). The policy objective was to enable ‘light touch’ enforcement in appropriate cases. None of the responses to the consultation commented adversely on this proposal.

36. The enabling provision in section 88 of the 2009 Act does not however include a power to make provision for fixed penalty notices. New section 32B, which inserts section 88A of the 2009 Act, was therefore inserted into that Act at stage 2, with the effect that where Regulations under section 88 of the 2009 Act provide for offences then the enforcement authority may issue a fixed penalty notice to a person they have reason to believe has committed such an offence.

37. Section 88A(3) of the 2009 Act enables the Scottish Ministers to make further provision about fixed penalties. This power is subject to affirmative procedure by virtue of section 96(4) of the 2009 Act.

38. Section 88A(5) of the 2009 Act introduces schedule 1A to that Act which makes further provision about fixed penalties, including provision as regards matters that may be prescribed under section 88 of that Act (and so subject to affirmative procedure as set out above).

39. Paragraph 1 of schedule 1A defines “prescribed” to mean prescribed by Regulations made under section 88 of the 2009 Act. Paragraph 3 provides that a fixed penalty notice may not be given after such time as may be prescribed. Paragraph 4(1) provides that the amount of the
penalty and the discounted amount are such amounts as may be prescribed (subject to the 
maximums in paragraph 4(2) and (3)). Paragraph 11 provides that the regulations may prescribe 
forms of notices, the circumstances in which a notice may not be given, and methods of 
payment.

Reason for taking power

40. Fixed monetary penalties, as may be provided for in regulations under section 88A, are 
intended as a proportionate enforcement option to be available to enforcement authorities in 
the relation to a failure to charge for carrier bags. Schedule 1A contains procedural safeguards but 
the detailed processes and procedures regarding the issue of fixed monetary penalties by those 
authorised to do so by enforcement authorities is a relatively technical matter appropriate for 
subordinate legislation. Further, it is desirable to have flexibility to amend or refine the exact 
processes for issuing a fixed penalty and to amend the level of fixed monetary penalties over 
time as monetary values change (within the limits prescribed in paragraph 4 of Schedule 1A) 
without having to amend primary legislation.

Reason for choice of procedure

41. The giving of a fixed penalty as an alternative to prosecution, and the amount of such a 
penalty, raises significant policy issues. It is therefore appropriate for regulations making 
provision to the effect to be subject to affirmative procedure.

Schedule 3 para 11(2)(g) and (h) Amending section 33A of the Environmental Protection Act 1990 (fixed penalty notices for contraventions of section 33(1)(a) and (c))
Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish Statutory Instrument
Parliamentary Procedure: negative procedure

42. The Bill amends the provisions of section 33A of the Environmental Protection Act 1990 
(fixed penalty notices for contraventions of section 33(1)(a) and (c)). The amendments arise 
from the Scottish Government’s National Litter Strategy that has been consulted upon over the 
summer. Enforcement has a key role in deterring flytipping and the amendments extend the 
ability to issue fixed penalties to Loch Lomond & the Trossachs National Park which has long-
running flytipping issues.

43. The amendment at Schedule 3 para 11(2)(g) provides a power that allows the Scottish 
Ministers to add other authorities by a negative procedure order to the definition of “authorised 
person”.

44. The amendment at Schedule 3 para 11(2)(h) inserts new subsections (13A) and (13B), 
which allow the Scottish Ministers to modify by order, as they consider necessary or expedient, 
the provisions of section 33A in connection with the specification of an “authorised person” 
under the power described in the preceding paragraph. The order can also provide for provisions 
not to apply to such an authorised person.
Reason for taking powers

45. The power gives the flexibility to Scottish Ministers to add other authorities to the definition of “authorised person” in the future and to adapt the other procedural provisions in the section accordingly. This allows Ministers to adapt to evolving circumstances in relation to flytipping issues without the need for primary legislation.

Reason for choice of procedure

46. The negative procedure is considered appropriate for adding to the authorities within the definition of “authorised person” in the future. This will largely be an administrative decision for the Ministers looking at the circumstances of each case and the appropriateness and need for an authority to have access to these powers. On balance it is not felt to be an appropriate use of Parliamentary time to use the affirmative procedure.

47. The negative procedure is considered appropriate for modifying the provisions of the section in connection with an order specifying an “authorised person”. On balance it is not felt to be an appropriate use of Parliamentary time to use the affirmative procedure.

Schedule 3 para 11(4)(f) and (g) Amending section 88 of the Environmental Protection Act 1990 (fixed penalty notices for leaving litter)

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish Statutory Instrument
Parliamentary Procedure: negative

48. The Bill amends the provisions of section 88 of the Environmental Protection Act 1990. The amendments arise from the Scottish Government’s National Litter Strategy that has been consulted upon over the summer. Enforcement has a key role to play in deterring littering and the amendments extend the ability to issue fixed penalties to Loch Lomond & the Trossachs National Park which has long-running litter issues. The amendments are analogous to those made to section 33A in relation to fly-tipping, as described above.

Reason for taking power

49. The power gives the flexibility to Scottish Ministers to add other authorities to the definition of “authorised person” in the future and to adapt the other procedural provisions in the section accordingly. This allows Ministers to adapt to evolving circumstances in relation to litter issues without the need for primary legislation.

Reason for choice of procedure

50. The negative procedure is considered appropriate for adding to the authorities within the definition of “authorised person” in the future. This will largely be an administrative decision for the Ministers looking at the circumstances of each case and the appropriateness and need for an authority to have access to these powers. On balance it is not felt to be an appropriate use of Parliamentary time to use the affirmative procedure.
51. The negative procedure is considered appropriate for modifying the provisions of the section in connection with an order specifying an “authorised person”. On balance it is not felt to be an appropriate use of Parliamentary time to use the affirmative procedure.

PROVISIONS CONFERRING OTHER DELEGATED POWERS INTRODUCED AT STAGE 2

Section 37A – Smoke control areas: authorised fuels and exempt fireplaces

Power conferred on: the Scottish Ministers
Power exercisable by: list made by the Scottish Ministers
Parliamentary procedure: none

52. Section 20 of the Clean Air Act 1993 (the “1993 Act”) provides for it be an offence where a building or chimney emits smoke in a smoke control area, although it is a defence to show the smoke was emitted by an authorised fuel. Section 20(6) of that Act enables the Scottish Ministers to declare, by regulations subject to negative procedure, that a fuel is an authorised fuel.

53. Section 21 of the 1993 Act enables Ministers, by order subject to negative procedure, to exempt any class of fireplace from the provisions of section 20 of that Act, if satisfied that such fireplaces can be used for burning fuel other than authorised fuels without producing any smoke or a substantial quantity of smoke.

54. The Smoke Control Areas (Exempt Fireplaces) (Scotland) Order 2010 (SSI 2010/272), for example, list 236 fireplaces, stoves and boilers that may be used in a smoke control area.

Reason for taking power

55. The proposed changes will allow the Scottish Ministers to exempt any class or description of fireplace from the provisions of section 20 by publishing a list of authorised fuels or of such fireplaces, instead of requiring such fuels and fireplaces to be exempted by order or regulations.

56. This is a technical matter that is more appropriate for an administrative process that will reduce delays in approval of products for the exempted list. It does not raise any risk of harm to human health or the environment as fuels or fireplaces will be added to the list on passing the same technical tests as apply where fuels or fireplaces are approved by statutory instrument.

57. Further, it is desirable to have flexibility to amend and update the list of fireplaces without having to do so by order.

Reason for choice of procedure

58. The administrative process will deliver transparency and legal certainty given the requirements to publish the list or lists under sections 21(3) and (4) of the 1993 Act as inserted by the Bill. It is not therefore considered that parliamentary oversight is required or appropriate for that reason, and because of the highly technical nature of the lists proposed to be published.
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