



The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

48th Report, 2012 (Session 4)

Water Resources (Scotland) Bill

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Pàrlamaid na h-Alba

Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

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;

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

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

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48th Report, 2012 (Session 4)

Water Resources (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 2 October and 30 October 2012, the Subordinate Legislation Committee considered the delegated power provisions in the Water Resources (Scotland) Bill (“the Bill”) at Stage 1. The Committee submits this report to the Infrastructure and Capital Investment Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”¹).

OVERVIEW OF THE BILL

3. The Water Resources (Scotland) Bill was introduced in the Scottish Parliament on 27 June 2012 by the Scottish Government. This Bill contains a range of measures which generally pursue the aim of enhancing the manner in which Scotland utilises its water resources by encouraging the sustainable development of their value and responsible use.
4. The Bill is split into eight parts. Part 1 supports the overall aim of the legislation by placing a duty on Ministers to take reasonable steps to develop the value of Scotland’s water resources in a way that is both appropriate and sustainable. Importantly, this part of the Bill ensures accountability by including a provision requiring the Ministers to report to the Parliament after three years on how they have fulfilled this duty to promote sustainable development of water resources in Scotland. Powers are given to Ministers to direct public bodies to contribute to the fulfilment of the development duty.
5. Part 2 provides for control by Ministers of large-scale water abstractions, whilst part 3 places a duty on Scottish Water to do all it considers necessary to develop the value of Scotland’s water resources, mirroring the duty placed on

¹ Water Resources (Scotland) Bill. Delegated Powers Memorandum. Available at:
[http://www.scottish.parliament.uk/S4_Bills/Water%20Resources%20\(Scotland\)%20Bill/DPM.pdf](http://www.scottish.parliament.uk/S4_Bills/Water%20Resources%20(Scotland)%20Bill/DPM.pdf)

Ministers. It also places an obligation on Scottish Water to promote the use of its assets for the generation of renewable energy. Parts 4, 5 and 6 deal with the monitoring of the quality of raw water, deemed contracts for water and sewerage services where no such contracts are in place and control of priority substances and pollutants in public sewers respectively. Part 7 brings in a new system for dealing with temporary water shortages by means of “water shortage orders”, replacing the system of “drought orders” under the Natural Heritage (Scotland) Act 1991. Finally, Part 8 provides general provisions relating to matters such as definitions and commencement.

6. At its meeting on 2 October, the Committee agreed to write to the Scottish Government for further information relating to some of the delegated powers in the Bill.

7. This correspondence between the Committee and the Scottish Government is reproduced in the Annex.

Delegated powers provisions

8. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers contained in the following sections: 3(2), 7(6), 8(1)(b) and (2), 9(2), 12(1)(b), 16(1) and (2), 26 (substituting new section 14(2) into the Water Services etc. (Scotland) Act 2005), 27 (inserting new section 76R(1) into the Water (Scotland) Act 1980) and 30 (inserting new sections 20C(4) and 20D(4) into the Water Services etc. (Scotland) Act 2005).

Section 2 – Power to direct public bodies

Power conferred on:	the Scottish Ministers
Power exercisable by:	direction – not an SSI function
Parliamentary procedure:	none

9. Section 1 places a duty on the Scottish Ministers to take steps to ensure the development of the value of Scotland’s water resources. Section 2 allows the Scottish Ministers to give any of the “designated bodies” directions as to the exercise of the body’s functions in order to contribute to the delivery of the development duty. Designated bodies are required to comply with any direction made.

10. The designated bodies are listed in section 3(1). They are Scottish Water, the Scottish Environment Protection Agency, Scottish Natural Heritage, Scottish Enterprise and Highlands and Islands Enterprise. Section 3(2) confers power on the Scottish Ministers to add further public bodies to the list of designated bodies or to remove bodies from the list. That power is subject to the negative procedure.

11. The Committee sought further information from the Scottish Government as to why the power to issue directions applied to all functions of designated bodies and why this power is not exercisable in the form of subordinate legislation and therefore subject to publication requirements and parliamentary control.

12. While the power would apply to all of the particular body’s functions the Scottish Government considers that the stated purpose of the power is suitably

narrow. Section 2 limits its exercise to the purpose of securing the body's participation in development of the value of Scotland's water resources. It cannot be used for a wider or unrelated purpose. The Scottish Government is also of the view that the power cannot be exercised in a manner which would be inconsistent with the proper exercise of the body's other functions.

13. The Committee finds the Scottish Government's comments on the restrictions which would apply to the power of direction helpful and recognises that the subject matter of such directions maybe more amenable to administrative rather than legislative action. However, the Committee notes that the benefits of consultation and publication which are integral to the legislative process would not apply to these directions.

14. Given the public interest in water as a commodity for general use the Committee considers that there is a public interest in the terms of directions to public authorities on how they are to operate with a view to developing the value of Scotland's water resources. Accordingly the Committee recommends that the Scottish Government considers whether such directions, while not exercisable as subordinate legislation, should be subject to consultation and publication requirements.

Section 14(1)(c) – grounds for suspension and revocation

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	negative procedure

15. Section 14 gives the Scottish Ministers the power to suspend or revoke an approval for large scale water abstraction but only on specified grounds. Various grounds on which they may do so are already set out in section 14. These are if the holder requests them to do so, if there has been a breach of any conditions attached to an approval or if the holder has failed to provide a report on their activities or pay the fee set under section 12.

16. Section 14(1)(c) allows the Scottish Ministers to prescribe other circumstances in which they may suspend or revoke an approval. Regulations which do so are subject to the negative procedure. Given that the power specifies other circumstances in which the Ministers are authorised to deprive persons of water abstraction rights the Committee asked the Scottish Government for further justification for the choice of the negative procedure.

17. The Scottish Government points out that the exercise of the power in section 14(1)(c) would not actually deprive any person of their right to abstract water but would simply set out further circumstances in which the Ministers could do so and that the Ministers would be required to act reasonably in the exercise of their powers. The suspension/revocation process also provides an opportunity for the person affected to make representations to ministers before the suspension or revocation is imposed. Given that the regulations will not themselves deprive any person of abstraction rights the Scottish Government considers that the negative procedure is an appropriate level of scrutiny for the exercise of this power.

18. The Committee recognises that the regulations themselves will not deprive any individual of their rights. Nevertheless the Committee considers that the grounds on which Ministers are empowered to take administrative action to do so are a significant feature of the abstraction licensing regime introduced by the Bill. That this raises an important issue of principle appears to have been recognised by the Government in setting out the initial grounds for suspension or revocation on the face of the bill rather than leaving the matter entirely to subordinate legislation. In so doing it has provided the Parliament with the opportunity to debate the initial grounds fully in the course of the legislative process. It is not clear why subsequent grounds introduced would be of less importance.

19. The Committee is of the view that setting out the grounds on which consents granted for large scale abstraction may be suspended or revoked is a matter of importance in which there is a significant public interest. It therefore recommends that the power to set additional grounds which will empower Ministers to suspend or revoke consents should be subject to the affirmative procedure.

Section 19(4) – control of water abstraction: references to Controlled Activities Regulations

Section 31 – references to priority substances

Section 34 – common maintenance – references to Controlled Activities Regulations

Section 46 – water shortage orders – references to Controlled Activities Regulations

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	negative procedure

20. The Committee considered these four powers together since they all raise the same issue. The impact of water abstraction on the water environment is controlled under the Controlled Activities Regulations (CAR) (SSI 2011/209) made under section 20 of the Water Environment and Water Services (Scotland) Act 2003 (WEWS). The principal objective of these regulations is to implement the requirements of the European Union Water Framework Directive (WFD) which ensures standards of environmental water quality are not prejudiced by water use. Various aspects of water regulation for other purposes which are established or amended by the bill have an interface with the CAR and WFD regime.

21. *Section 19(4)*: The policy objective of the authorisation scheme under the bill is to control qualifying abstraction for the purpose of developing the value of Scotland's water resources.

22. Large-scale water abstraction is already regulated for the purposes of environmental protection by the CAR regime. Section 7(1) of the bill provides that a qualifying abstraction which is already approved under CAR when section 7(1) comes into force will be exempt from the requirement to obtain Ministers' consent

under the bill. Subsequent qualifying abstractions which require a CAR consent will also require Ministers' consent.

23. Consent under this part and consent under CAR are therefore linked although their underlying policy objectives are different. A power is given to Ministers in section 19(4) to modify sections 19(1) to (3) and 7(1) but only if Ministers consider it necessary or expedient to make these modifications in consequence of any revocation or amendment of CAR or any subsequent regulations which replace CAR and are made under section 20 of WEWS. The power is subject to the negative procedure.

24. *Section 31* amends the Sewerage (Scotland) Act 1968 to enable new trade effluent consents granted under that Act to include conditions relating to the elimination or diminution of "priority substances" or "pollutants". New section 29A sets out definitions of "priority substance" and "pollutant" for this purpose. The definitions which currently apply are those set out in CAR and the WFD.

25. Section 29A(2) gives the Scottish Ministers power to change the definitions where they consider it to be necessary or expedient in consequence of any revocation or amendment of CAR, the WFD or any other regulations made under section 20 of WEWS which relates to the same subject-matter as the WFD. The power is subject to the negative procedure.

26. *Section 34* introduces new provisions concerning private sewage treatment works into the Sewerage (Scotland) Act 1968. It only affects private sewage treatment works which require authorisation under CAR. New section 38G therefore sets out the link to CAR by setting out various definitions. Section 38G(2) allows the Scottish Ministers to modify the provisions which refer to CAR but only in connection with the revocation or amendment of CAR or regulations made under section 20 of WEWS.

27. *Section 46* concerns the relationship between CAR and water shortage orders. The requirement for authorisation under CAR is not affected by a water shortage order but any CAR authorisation is subject to any restriction or prohibition concerning water abstraction which is set out in a water shortage order.

28. The Committee recognises that there is therefore an inter-relationship between the above provisions and any successor to the CAR regime which requires to be maintained over time. The Committee also recognises that subordinate legislation is a suitable mechanism for doing so. However, the Committee was of the view that sufficient powers already exist to achieve this using subordinate legislation. It was therefore not clear to the Committee why the Scottish Government sought additional powers which appeared to be superfluous. The Committee also observed that the existing powers are subject to the affirmative procedure when they modify primary legislation in the manner proposed by these new powers. The Bill therefore sought to downgrade the level of parliamentary scrutiny which would apply.

29. The Scottish Government has confirmed that the existing power in section 20 of WEWS is sufficient to provide *vires* for what the Scottish Government wishes to achieve here. It seems clear from the Scottish Government's response that the

only objective in taking the four new powers listed is to allow these modifications to be made using the negative procedure instead of the more onerous affirmative procedure. The Scottish Government considers that the powers proposed in the Bill are more limited in scope and as a result the negative procedure is appropriate for these more minor consequential modifications.

30. The Committee is not persuaded by the Scottish Government's argument. It notes that the existing power in section 20 of WEWS is sufficient to modify primary legislation in the manner which the Scottish Ministers consider necessary or expedient on account of the CAR regime or implementation of the WFD being amended. The Committee also notes that the circumstances in which the proposed powers would operate are such that new regulations would be being brought forward under section 20. Section 20 is subject to "open procedure" in the sense that when making such regulations the Scottish Ministers can elect to adopt either the affirmative or the negative procedure save where the regulations amend primary legislation. In such cases they are required to use the affirmative procedure.

31. The Committee notes that the powers proposed are more limited than section 20 in that they only permit textual amendments which are necessary or expedient on account of changes to the CAR regime. However, the power is not restricted to maintaining the same form of interface between the two regimes as is currently set out in the Bill. Ministers can alter the manner in which these regimes inter-relate if they consider that necessary or expedient.

32. The Committee also notes that the views expressed here about the procedure applicable to textual amendment of primary legislation are not consistent to the approach adopted in relation to section 49 considered below or those previously expressed by the Parliament in WEWS.

33. The Committee therefore concludes that the existing power in section 20 of the Water Environment and Water Services (Scotland) Act 2003 is sufficient to deliver the Scottish Ministers' policy objective. Accordingly it is not necessary to confer the further powers proposed. The Committee observes that to do so would authorise a reduction in the parliamentary scrutiny of such provisions from that previously established by the Parliament and does not consider that this is appropriate. It therefore recommends that these unnecessary powers are removed from the Bill.

Section 49 – ancillary regulations

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative procedure if they textually amend an Act; otherwise negative procedure

34. This power allows the Scottish Ministers to make supplemental, incidental, consequential, transitional, transitory or saving provision which they consider necessary or expedient for the purposes of or in connection with the Act. Such regulations are affirmative if they textual amend primary legislation (including the

Act itself) for these purposes. Otherwise they are subject to the negative procedure.

35. The Committee always gives careful consideration to the parliamentary procedure which applies to the exercise of ancillary powers. It is possible to predict the nature of the provision which will be made through their exercise. However, because of the width of the power, it is not possible to predict the detail of what might be done through their use. There must of course be some connection to the purposes of the Act itself and the exercise of such powers must be consistent with its overall scheme.

36. However at this stage it is not possible for the Committee to identify what provisions of significance could be brought forward under these powers. The level of parliamentary scrutiny which applies to the exercise of such powers and the justification provided for the choice made by the Scottish Government is therefore a matter of some importance in ensuring an appropriate level of parliamentary supervision. The Committee pays particular attention to the power to make supplemental provision since it considers that this has the potential to introduce new provision of a kind which could merit close scrutiny.

37. In this case the DPM justified the application of the negative procedure to instruments which do not textually amend primary legislation on the basis that incidental, consequential, transitional, transitory or savings provisions of this kind are more limited in scope and effect, more minor in nature and therefore should not be subject to a disproportionate level of parliamentary consideration.

38. The Committee observed that supplemental provision was not treated by the DPM as falling into the same category. It noted that the DPM provided no justification at all for the choice of procedure applicable to this power in cases where primary legislation was not being amended. The Committee therefore asked the Scottish Government for justification of the parliamentary control applicable to the power sought.

39. The Scottish Government expresses the view that the negative procedure is always adequate for the scrutiny of ancillary provision. It draws comparisons with other Acts which have adopted this approach and highlights that the power is exercisable only for the purposes of or in connection with the Bill.

40. The Committee does not accept the proposition that the negative procedure is a sufficient level of scrutiny of ancillary powers which do not textually amend primary legislation in all cases. It is evident to the Committee that supplemental provision could quite easily achieve significant effects through standalone provision which would not require the textual amendment of primary legislation. Such provision while connected to the Bill could be such that merited close consideration by the Parliament.

41. The Committee is therefore not able to accept the justification put forward by the Scottish Government for its choice of procedure. However, having considered the nature of the Bill and the likely level of sensitivity which would attach to such provision it is content with the procedure proposed in this case.

42. The Committee is content with the power to make ancillary provision and that the power is subject to the negative procedure save where primary legislation is textually amended in which case it is subject to the affirmative procedure.

Section 51 – commencement

Power conferred on:	the Scottish Ministers
Power exercisable by:	order
Parliamentary procedure:	section 30 of ILRA applies – laid only

43. Section 51 allows the Scottish Ministers to bring the Act into force by order except for those general provisions which come into force on the day after Royal Assent. Such an order is not subject to any procedure but must be laid before the Parliament. An order can include transitional, transitory or saving provision.

44. Section 51 does not impose any qualifying criteria for the nature of the transitional, transitory or saving provision which can be made in a commencement order. Specifically it does not refer to such provision being connected to or for the purpose of the commencement of provisions by the order and which is often set out in powers of this kind.

45. The Committee asked the Scottish Government for clarification of the effect of the omission of a condition of this nature on the scope of the powers which would be conferred.

46. The Scottish Government does not consider that the presence or absence of qualifying words of this kind is critical to the matter. It considers that where powers of this kind are tied to a power to commence provisions the natural inference is that anything done by way of such provision must relate to the commencement being effected by the particular order.

47. The Committee welcomes this helpful clarification of the intended scope of the power and is content with the scope of the power and that it is not subject to either the negative or the affirmative procedure.

ANNEX

Scottish Government Response to Subordinate Legislation Committee

1. Thank you for your letter of 2 October seeking further information as a result of the Subordinate Legislation Committee's Stage 1 consideration of the Water Resources (Scotland) Bill.

Section 2: Power to direct public bodies

2. The Committee has asked why the power to issue directions in section 2 of the Bill applies to all functions of the designated authorities, and why the power is expressed as a power to give directions rather than to create subordinate legislation.

3. Part 1 of the Bill is about the development of Scotland's water resources. This Part concerns the Hydro Nation programme of work. Section 1 places a duty on the Scottish Ministers to take such reasonable steps as they consider appropriate for the purpose of ensuring the development of the value of Scotland's water resources. Section 2 allows the Scottish Ministers to give a designated body directions for the purpose of its participation in the development of the value of Scotland's water resources as part of that programme. Five public bodies are designated in section 3 and Ministers may alter the list of designated bodies by regulations.

4. It is not uncommon for Ministers to have powers to issue directions to public bodies under statutory provisions. In this context, an example would be the wide-ranging power of direction in relation to Scottish Water in section 56 of the Water Industry (Scotland) Act 2002. The power in section 2 of the Bill is much narrower in that it enables Ministers to direct the specified bodies solely in relation to the purpose stated in that section. As the power is to direct the bodies "as to the exercise of their functions", any such directions could not be inconsistent with the proper exercise of the body's other functions and, because the power has a stated purpose, it could not be used for a wider or unrelated purpose.

5. The Scottish Government believes that direction-giving is the appropriate way for Ministers to act administratively if required to secure the involvement of the designated bodies in the Hydro Nation programme (rather than by law-making through subordinate legislation), noting that there must be consultation with any body to which the directions would apply.

Section 14: Grounds for suspension and revocation

6. The Committee has asked whether the affirmative procedure would be more suitable than the negative procedure for regulations made under section 14(1)(c) of the Bill.

7. Section 14 of the Bill concerns the powers of suspension and revocation of Ministerial approval of a qualifying abstraction. Ministers can act at the request of the holder of the approval, if there is a breach of the conditions attached to the approval or if the holder fails to comply with other requirements. Section 14(1)(c) allows Ministers to prescribe other circumstances in which they may suspend or revoke their approval.

8. The prescription of additional grounds upon which an approval may be suspended or revoked does not remove the rights in question, but prescribes the circumstances in which they can be removed. Ministers are bound to exercise all their functions reasonably. Before suspending or revoking an approval, section 14(2) requires Ministers to inform the holder of their intention, give them reasons, and afford them the opportunity to make representations. If, following this, their approval is revoked, the holder has a right of appeal under section 15 of the Bill. Given that the regulations will not directly deprive anyone of an approval, and are subject to the safeguards mentioned, the Scottish Government believes that the negative procedure offers an appropriate level of Parliamentary scrutiny.

Sections 19(4), 31, 34 and 46

9. These powers permit the modification of the Bill, or other provisions in primary legislation being inserted by the Bill, where necessary or expedient in consequence of changes to the Controlled Activities Regulations. The Committee has asked why the existing power in section 20 of the Water Environment and Water Services (Scotland) Act 2003 is not sufficient.

10. Although section 20 of the 2003 Act does give the necessary *vires* to modify the Bill or other primary legislation in consequence of changes to the Controlled Activities Regulations, it is a very wide power which could potentially be used to make wide-ranging changes to primary legislation for which the affirmative procedure would be appropriate. The powers of modification in the Bill are very limited in scope when compared to the wide powers of section 20 of the 2003 Act. The Scottish Government considers that the affirmative procedure, as required by section 36(6) of the 2003 Act for any regulations under section 20 which modify primary legislation, would be inappropriate for such consequential modifications. As a result, separate enabling powers have been created by the Bill to make minor consequential modifications, subject to the negative procedure.

Section 49: Ancillary Regulations

11. The Committee has asked why the Scottish Government has selected the negative procedure as the appropriate level of scrutiny of regulations which make supplemental provision but do not textually amend primary legislation.

12. The Scottish Government believes that it is appropriate for ancillary provision that amends the text of an Act to be subject to the affirmative procedure, given the importance of primary legislation. In other cases, the Scottish Government believes that the negative procedure allows for adequate scrutiny of ancillary

provision. This approach is intended to strike the right balance in the use of the two procedures, and is consistent with that for ancillary provision under many existing Acts of the Scottish Parliament (in which the use of the negative or affirmative procedure depends upon whether there are textual changes being made to primary legislation). We would also highlight that the power to make supplemental or other ancillary provision is exercisable only for the purposes of or in connection with the Bill.

Section 51: Commencement

13. The Committee has noted that the power to make transitional, transitory or saving provision at commencement is not subject to any qualification by reference to commencement itself and has asked whether that means that the power may be used to make provision which is not connected to the commencement of provisions by the order.

14. While such qualification appears in some Acts of the Scottish Parliament, the Scottish Government does not believe that the presence or absence of qualifying words is critical. As regards the power to make commencement orders – to which the power to make transitional, transitory or saving provision is tied – the natural inference is that anything done by way of such provision must relate to the commencement being effected by the particular order. The Scottish Government would observe that all except one of the current Bills before the Parliament allow for such provision in commencement orders, and none of them has qualifying words by reference to commencement itself.

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