



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

5th Report, 2015 (Session 4)

Air Weapons and Licensing (Scotland) Bill at stage 1

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Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (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.
 - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

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John Mason (Deputy Convener)
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Stewart Stevenson

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Delegated Powers and Law Reform Committee

5th Report, 2015 (Session 4)

Air Weapons and Licensing (Scotland) Bill at stage 1

The Committee reports to the Parliament as follows—

1. At its meetings on 25 November, 16 December 2014 and 20 January 2015 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Air Weapons and Licensing (Scotland) Bill at stage 1 (“the Bill”)¹. The Committee submits this report to the 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”)².

OVERVIEW OF BILL

3. This Government Bill was introduced on 14 May 2014, by Kenny MacAskill MSP. The lead committee is the Local Government and Regeneration Committee. Stage 1 of the Bill is to be completed by 3 April 2015.
4. Broadly, Part 1 of the Bill aims to protect public safety by creating a new licensing regime for air weapons. Parts 2 and 3 aim to strengthen and improve aspects of locally led alcohol and civic government licensing, to preserve public order and safety, reduce crime, and to advance public health. A number of the provisions in Parts 2 and 3 are directed at improving the efficiency of the operation of the licensing regimes, aiming to contribute to creation of a better regulatory environment for business.
5. Alongside the regulation of air weapons, the Bill amends the Licensing (Scotland) Act 2005 (*‘the 2005 Act’*, licensing alcohol) and the Civic Government (Scotland) Act 1982 (*‘the 1982 Act’*, covering other local licensing regimes). The provisions include, in outline:

¹ Air Weapons and Licensing (Scotland) Bill [as introduced] available here: [http://www.scottish.parliament.uk/S4_Bills/Air%20Weapons%20and%20Licensing%20\(Scotland\)%20Bill/b49s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Air%20Weapons%20and%20Licensing%20(Scotland)%20Bill/b49s4-introd.pdf)

² Air Weapons and Licensing (Scotland) Bill Delegated Powers Memorandum available here: http://www.scottish.parliament.uk/S4_Bills/Air_Weapons_DPM.pdf

- Giving local authorities the power to regulate sexual entertainment venues in their areas, with the aim that both performers and customers benefit from a safe, regulated environment;
- Closing a loophole which allows adults to supply under-18s with alcohol for consumption in a public place;
- Extending the breadth of information available to Licensing Boards, with the aim of enabling them to make better alcohol licensing decisions;
- Removing an exemption from licensing for metal dealers with a larger turnover; banning cash payments for metal by metal dealers or itinerant metal dealers; Removing the mandatory requirement that metal dealers should not process metal for 48 hours after receiving it;
- Allowing licensing authorities to refuse private hire car licences on the basis of over-provision, and to require testing of private hire car drivers. The Bill will also remove an exemption from licensing for hire cars used on contract;
- The creation of a new role - the 'Civic Licensing Standards Officer' - with specific functions to provide information and guidance, check compliance, provide mediation and take appropriate action on perceived breaches of conditions to a licence provided under the 1982 Act.

DELEGATED POWERS PROVISIONS

6. The Committee considered each of the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provisions:

- Section 2(4) – Requirement for air weapon certificate
- Section 8(3) – Duration of air weapon certificate
- Section 20(3) – Duration of approval of an air weapon club
- Section 39 – Guidance
- Section 55 (inserting section 9A(6) and (7) of the Licensing (Scotland) Act 2005) – Duty of Licensing Boards to produce annual financial report
- Section 59 – Form etc. of communications under the 2005 Act
- Section 62(4) – Power to specify further exemptions to the licensing regime for taxis and private hire cars
- Section 65 – Acceptable forms of payment for metal
- Section 66(3) (inserting section 33B(6) of the 1982 Act) – Power to make provision about metal dealers' records

- Section 70(2) and (3): Power to make provision about hearings of licensing authorities
- Section 78 – Commencement

7. At its meeting of 25 November, the Committee agreed to write to the Scottish Government to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the **Annex**.

8. In light of the written responses received, the Committee agreed that it was content with the following delegated powers and did not need to comment on them further:

- Section 36(1) – Power to prescribe fees
- Section 71 (inserting sections 45D and 45E of the 1982 Act) – Mandatory and standard licensing conditions

Recommendations

9. The Committee's comments, and where appropriate, recommendations on the remaining delegated powers in the Bill are detailed below.

Section 37(1) – Power to make further provision

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative Procedure

Provision

10. Section 37 enables the Scottish Ministers to make further provision for the purposes of Part 1. In particular, this enables further provision for the application and approvals process for air weapon certificates, police permits, visitor permits, event permits, or club approvals. This includes prescribing the mandatory conditions that will attach to certificates, permits, or air weapon club approvals.

11. Various other provisions state that such matters may be “prescribed”, which refers to prescription by regulations under this section. This applies at sections 4(1), 6(1), 7(2), 13(9), 14(2), 15(1), 17(6), and 18(2) and (4).

Comment

12. The Delegated Powers Memorandum explains that this power is broadly framed, to allow the “administrative minutiae” of the air weapons regime to be set out in secondary legislation. This will include, for example, setting out application forms for certificates, permits, and air weapon club approvals, setting out the standard format for these certificates, permits and approvals, and information that must accompany applications. Regulations may also set out details such as mandatory conditions to be attached to all air weapon certificates, permits and club approvals.

13. The Committee asked the Scottish Government for explanation of how this general power to make further provision for the purposes of Part 1 relates to the general ancillary powers contained in sections 75 and 76. The Committee asked what provision this power to make further provision could enable, that would not be enabled by those ancillary powers in section 75 and 76.

14. The Scottish Government responded that while this power to make further provision will enable specific matters to be prescribed as set out in sections 4(1) and 6(1) for example, section 37(2) indicates what further provision might be made using the power. For example, to prescribe the form and contents of certificates, permits and approvals under Part 1 of the bill, and the conditions that may be attached. Again for example, further provision might be made in due course to enable on-line applications.

15. The Committee accepts that the Scottish Ministers may require a power to make further provision on the matters which are set out in section 37(2)(a) and (b). That is, about the application processes under Part 1, and in relation to the certificates, permits and approvals of air weapon clubs under Part 1.

16. However the Government's aim underlying section 37 appears (in the scheme of things) to be quite defined. It is to specify the application processes, and more provision for certificates, permits and approvals. The Committee considers that the proposal for a broad power to make any further provision for the purposes of Part 1 of the bill, combined with the ancillary powers to make provision that may be supplemental, incidental or consequential to that further provision, extends the powers to an uncertain scope. The Committee doubts whether such a broad power to make further provision is required to achieve the objective of setting out the application, certificate, permit and approval processes in regulations.

17. The Committee accepts therefore that the power may be required in principle to set out further provision for the application, certificate, permit and approval processes under Part 1 of the Bill. Such provision is set out in section 37(2)(a) and (b).

18. However, the aim of section 37 as explained in the **Delegated Powers Memorandum** is to enable the "administrative minutiae" of those processes to be set out in regulations. The Committee considers that it should be sufficient (to achieve that objective) to specify what types of provision are enabled - without a broad power to make any further provision for the purposes of Part 1. That specification appears to be achieved by sections 4(1), 6(1), 7(2), 13(9), 14(2), 15(1), 17(6), 18(2) and (4), and 37(2)(a) and (b) of the bill.

19. The Committee therefore invites the Scottish Government to amend the bill to remove the broad power to make any further provision, while keeping the specification of those types of provision which are enabled. If the Government considers that, as a result of removing the broad power, more types of provision would need to be specified beyond all those set out across sections 4(1) to 37(2), then these should be proposed by amendment.

Section 68(3) – Power to specify premises that are not sexual entertainment venues

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

Section 68(3) – Power to provide for descriptions of performances or descriptions of displays of nudity which are not to be treated as sexual entertainment

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

Provisions

20. These powers are considered together, as raising a similar issue.
21. Section 68 creates a new licensing regime for sexual entertainment venues (by adding section 45A to the 1982 Act). Section 45A(2) to (7) define what is meant by a “sexual entertainment venue”. This is any premises at which sexual entertainment is provided before a live audience for (or with a view to) the financial gain of the organiser.
22. Definitions are also supplied of ‘audience’, ‘financial gain’, ‘organiser’, ‘premises’, ‘sexual entertainment’ itself, and ‘display of nudity’. (“Any live display of nudity” is used within the definition of sexual entertainment – new section 45A(3)).
23. “Premises” for these purposes includes any vehicle, vessel or stall, but not any private dwelling to which the public is not admitted.
24. “Sexual entertainment” means “(a) any live performance, or (b) any live display of nudity, which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means).”
25. “Performance” for these purposes is not further defined. “Display of nudity” is defined in new section 45A(4).
26. Sex shops are specifically *not* “sexual entertainment venues” as they are separately licensable under the 1982 Act (new section 45A(7)(a)).
27. The power at new section 45A(7)(b) allows the Ministers to prescribe other types of premises that are *not* sexual entertainment venues. New section 45A(11) of the 1982 Act allows the Ministers to prescribe descriptions of performances or “displays of nudity” that are not to be treated as “sexual entertainment” for the purposes of the licensing regime.

Comment

28. The Committee asked for an explanation why it has been considered appropriate for those powers to be drawn broadly to enable the exemption of any premises, or descriptions of performance or display of nudity, as may be specified by order, and why the powers could not be drawn more narrowly to define the “very limited circumstances” (or range of performances or displays) that might potentially be exempted. The Committee also asked why it was not possible to avoid the need for this power by using more appropriate or clearer definitions in the new section 45A of the 1982 Act, to remove the possibility that certain types of performance or display could inadvertently be caught within the licensing regime.

29. The response to the Committee has explained that the number of premises that are expected to be subject to the new licensing regime is very limited – around 20 across Scotland. It is not expected that the power to exempt particular types of premises would either be extensively used or required beyond “very limited circumstances”. It has been considered that the exact circumstances where an exemption might arise in future are hard to define, in advance of the scheme becoming fully operational. It has also been explained to the Committee that the Scottish Government would be most concerned if theatrical and other forms of artistic performance were caught by the provisions.

30. The Committee notes that the proposed powers of exemption are drawn in a “blanket” form, which technically enables other types of premises or performance to be exempted in future from the new licensing regime – beyond the types of artistic/theatrical performance which the Scottish Government envisages might require exemption, and sex shops which are separately regulated.

31. The Committee also notes, however, that policy considerations underlie how these powers are drawn. The Scottish Government’s response to the Committee has indicated that the precise nature of the types of premises or performance which might be exempted in future has not yet been proposed or identified. They are expected only to be identified once the proposed new licensing scheme has become fully operational. The Committee therefore reports on these powers, as follows.

32. The power in the new section 45A(7)(b) enables the Ministers to prescribe other types of premises, that are not sexual entertainment venues (apart from sex shops which are separately regulated). The new section 45A(11) of the 1982 Act also allows the Ministers to prescribe descriptions of performances or “displays of nudity” that are not to be treated as “sexual entertainment” for the purposes of the licensing regime.

33. The Committee has a concern that these powers may be drawn more broadly than may be required. The powers enable the exemption from licensing of any other premises (apart from sex shops), or descriptions of performance or displays of nudity. The Scottish Government has explained however that the policy intention is to possibly exempt a very limited range and number of premises, performance or display, which might include some types of theatrical or artistic performance. The intention is only to exempt a very limited range and number of premises, etc., if it transpires that they are inadvertently included within the licensing regime. The Scottish Government has explained to the Committee however that policy considerations underlie

the approach taken. In particular the precise exemptions that could be required may only become apparent once the new regime is fully operational.

34. The Committee therefore draws the Government's response on these powers (reproduced in the Annex to this report) to the attention of the Local Government and Regeneration Committee.

Section 68(3) (inserting section 45B of the 1982 Act) – Licensing of sexual entertainment venues- local authority powers

Power conferred on:	a local authority
Power exercisable by:	Resolution/ determination
Parliamentary procedure:	None, but published

Power conferred on:	Scottish Ministers
Power exercisable by:	Guidance
Procedure:	None

Provision

35. The new section 45B of the 1982 Act would require a resolution by a local authority for sexual entertainment venue licensing to have effect in their area. (That is, by applying schedule 2 of that Act as modified by section 45B to their area.) This confers power on the local authority, though not in a form of subordinate legislation. A resolution would not have effect until a specified date (which cannot be less than 1 year after the resolution is passed). It must be publicised either electronically or in a local newspaper.

36. The section also allows a local authority to determine an appropriate number of sexual entertainment venues for their area. The appropriate number so determined must be publicised then the determination must be publicised in a manner considered appropriate by the local authority.

37. Section 45B also provides that local authorities (in carrying out functions conferred by the section), must have regard to any guidance issued by the Ministers.

38. In relation to the powers in the new section 45B of the 1982 Act (inserted by section 68(3) of the Bill), the Committee is content with the powers conferred on each local authority to issue resolutions and determinations in relation to sexual entertainment venues.

39. The Committee considers, in relation to the new section 45B(7), that the Bill should provide that any guidance issued by the Scottish Ministers to local authorities must be published, and a copy laid before the Parliament on issue.

Section 76 – Ancillary provision

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations

Parliamentary procedure: **Affirmative where regulations textually amend primary legislation, otherwise negative**

40. Section 76 confers powers to make ancillary provisions in “stand alone” regulations. The Scottish Ministers may make incidental, supplementary, consequential, transitional, transitory or saving provision, as the Ministers consider necessary or expedient for the purposes of, or in consequence of, or for giving full effect to any provision of the Act *or any provision made under it*.

41. The Committee queried why those additional words (in italics above) are appropriate, and can be justified by the Scottish Government as properly being added within the ancillary provision.

42. The Scottish Government in its response has indicated that the wording is considered to reflect the fact that a number of enabling powers are proposed in the Bill, to enable the detail of the regulatory schemes to be set out in subordinate legislation. The wording aims to “allow the flexibility of picking up any necessary ancillary provision that might be identified after the main set of regulations has been made”.

43. The Committee notes initially that those additional words are very unusual in bill ancillary powers. Certain recent bills which contain regulatory powers of potentially wider scope than this bill contain ancillary powers which do not have these words – for instance, the Public Services Reform (Scotland) Act 2010 and the Regulatory Reform (Scotland) Act 2014.

44. The precise effect of the additional words is not wholly clear to the Committee. It appears to the Committee that they could have the effect that ancillary provisions (including supplemental provisions) would be enabled on two levels. First, ancillary provision by regulation is enabled for the purposes of any provision in the Bill. Second, ancillary provision is enabled for the purposes of any provision made in secondary legislation under the Bill. As for example it is proposed in section 37 that regulations could make any further provision for the purposes of Part 1, it appears to the Committee that there may be doubt as to what is enabled by ancillary powers which are for the purposes of, or to give full effect to, such further provision made in regulations. The ancillary power seems to be of uncertain scope, and seems to be potentially very broad.

45. If, on the other hand, the additional words have no further effect on the ancillary powers, then in the Committee’s view it is undesirable that the wording should differ from the comparable ancillary provisions in other bills as mentioned above. The Committee considers that the Scottish Government has not justified why the additional wording in italics should be added for this particular bill.

46. **Section 76(1) confers power to make incidental, supplementary, consequential, transitional, transitory or saving provision, as the Ministers consider necessary or expedient for the purposes of, or in consequence of, or for giving full effect to any provision of the Act *or any provision made under it*. The Committee notes that those words in italics are unusual, in comparison with recent Acts containing a comparable number of regulatory**

powers, or powers of potentially wider scope than contained in this bill. (See for example, the ancillary powers in the Public Services Reform (Scotland) Act 2010, the Regulatory Reform (Scotland) Act 2014, and the Reservoirs (Scotland) Act 2011).

47. The Committee considers that the Scottish Government has not sufficiently justified why those words in italics should be added within the ancillary powers in this particular bill. It therefore invites the Scottish Government to remove these words by amendment at Stage 2.

ANNEX

Correspondence with the Scottish Government—

On 25 November 2014, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

Section 36(1) – Power to prescribe fees

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative Procedure

1. Section 36(1) allows Ministers to make provision for the charging of fees by the chief constable in respect of applications under Part 1 of the Bill, and otherwise in respect of the performance of functions by the chief constable under Part 1.

2. The Committee notes that Sections 32 and 35 of the Firearms Act 1968 initially specified the fee levels payable for the grant, renewal, variation etc. of a firearm certificate or shot gun certificate, or for registration as a firearms dealer, though fees are variable by order.

3. The Committee therefore asks the Scottish Government why a comparable approach is not taken, to specify on the face of the Bill the initial fee levels proposed for an application for air weapon certificate and other functions chargeable by the chief constable in connection with the air weapon licensing regime?

Section 37(1) – Power to make further provision

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative Procedure

4. Section 37 enables the Scottish Ministers to make further provision for the purposes of Part 1. In particular, this enables further provision for the application and approvals process for air weapon certificates, police permits, visitor permits, event permits, or club approvals. This includes prescribing the mandatory conditions that will attach to certificates, permits, or air weapon club approvals.

5. Specific matters may be prescribed by regulations under section 37(1), as provided for in sections 4(1), 6(1), 7(2), 13(9), 14(2), 15(1), 17(6), 18(2) and (4). Beyond that, section 37(1) enables any further provision for the purposes of Part 1 of the Bill.

6. The Committee asks the Scottish Government what is enabled by that power to make further provision, which would not (in the absence of such power) be enabled by the ancillary powers to make incidental, supplementary or consequential provisions in sections 75 and 76? How might this power be used, beyond prescribing those matters which are set out in those sections 4(1) to 18(4)?

Section 68(3) – Power to specify premises that are not sexual entertainment venues

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

7. Section 68 creates a new licensing regime for sexual entertainment venues by adding section 45A to the Civic Government (Scotland) Act 1982 (“the 1982 Act”) Section 45A(2) to (7) define what is meant by a “sexual entertainment venue”.

8. The power in section 68(3) of the bill (which adds new section 45A(7)(b) of the 1982 Act) enables the Scottish Ministers to prescribe other types of premises which would not be “sexual entertainment venues”.

9. The Delegated Powers Memorandum explains that this power is intended to have a very narrow focus and would be used in very limited circumstances, if sexual entertainment venues are inadvertently caught within the licensing regime in section 68.

10. The Committee therefore asks the Scottish Government:

- **Why it has been considered appropriate for this power to be drawn broadly to enable the exemption of any other premises as specified by order? Why could it not be drawn more narrowly to define the “very limited circumstances” (or range of premises) which might potentially be exempted, and**
- **Why is it not possible to avoid the need for this power by using more appropriate or clearer definitions in the new section 45A of the 1982 Act, to remove the possibility that certain types of venue or premises could inadvertently be caught within the licensing regime? In general terms, what might be inadvertently included?**

Section 68(3) – Power to provide for descriptions of performances or descriptions of displays of nudity which are not to be treated as sexual entertainment

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

11. New section 45A(11) of the 1982 Act allows the Ministers to prescribe descriptions of performances or “displays of nudity” that are not to be treated as “sexual entertainment” for the purposes of the licensing regime.

12. The Delegated Powers Memorandum explains that this power is also intended to have a very narrow focus and would be used in very limited

circumstances, if certain types of performance are inadvertently caught within the licensing regime in section 68.

13. The Committee asks Scottish Government:

- **Why has it been considered appropriate for this power to be drawn broadly to enable the exemption of any descriptions of performances or descriptions of displays of nudity, as specified by order? Why could it not be drawn more narrowly to define the “very limited circumstances” (or range of performances or displays) which might potentially be exempted, and**
- **Why is it not possible to avoid the need for this power by using more appropriate or clearer definitions in the new section 45A of the 1982 Act, to remove the possibility that certain types of performance or display could inadvertently be caught within the licensing regime? In general terms, what might be inadvertently included?**

Section 68 (inserting section 45B of the 1982 Act) – Licensing of sexual entertainment venues- local authority powers

Power conferred on:	a local authority
Power exercisable by:	Resolution/ determination
Parliamentary procedure:	None, but published

Power conferred on:	Scottish Ministers
Power exercisable by:	Guidance
Procedure:	None

14. The new section 45B of the 1982 Act confers powers by resolution upon a local authority, for sexual entertainment venue licensing to have effect in their area. The authority may resolve that Schedule 2 of the 1982 Act (as modified by section 45B) is to have effect in their area. The section also confers power on a local authority to determine an appropriate number of sexual entertainment venues for their area, which determination must be publicised by the local authority.

15. Section 45B also provides that local authorities (in carrying out functions conferred by the section), must have regard to any guidance issued by the Ministers.

16. The Committee asks the Scottish Government:

- **Why those powers are appropriate, and why it is appropriate for them to be exercised by means of published resolution and determination,**
- **Why the power of Ministers to issue guidance is appropriate, and why there appears to be no provision for the guidance to be published but a resolution or determination by a local authority under the section would be published?**

Section 71 (inserting sections 45D and 45E of the 1982 Act) – Mandatory and standard licensing conditions

Power conferred on: Scottish Ministers (for mandatory conditions)
Power exercisable by: Order
Parliamentary procedure: Affirmative Procedure

Power conferred on: a local authority (for standard conditions)
Exercisable by: Determination
Procedure: None, but published

17. Section 71 (inserting section 45D of the 1982 Act) allows the Ministers to set mandatory conditions that would apply to all licences issued under Part 3 of the 1982 Act. This includes the regime for sexual entertainment venues (inserted by section 69), and sex shops.

18. By inserting section 45E of the 1982 Act, Section 71 also confers a power on a local authority to determine standard conditions to which such licences are to be subject. Any such conditions must be published, and they must be consistent with any mandatory conditions set by Ministers.

19. The Committee asks the Scottish Government:

- **Why has it been considered appropriate that any mandatory conditions set in regulations under section 37 in relation to an air weapons certificate or permit should be subject to Parliamentary scrutiny by the negative procedure, but any mandatory conditions set by regulations in relation to sex shops and sexual entertainment venues would be subject to scrutiny by the affirmative procedure?**
- **Why the powers conferred on a local authority in section 71 (inserting section 45E of the 1982 Act) are appropriate, and why it would be appropriately exercised by informal, published determination?**

Section 76 – Ancillary provision

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative where regulations textually amend primary legislation, otherwise negative

20. Section 76(1) confers power to make incidental, supplementary, consequential, transitional, transitory or saving provision, as the Ministers consider necessary or expedient for the purposes of, or in consequence of, or for giving full effect to any provision of the Act or any provision made under it. The words 'or any provision made under it' expand the scope of the ancillary powers and are unusual, in comparison with recent Acts containing a comparable number of delegated powers, or powers of potentially wider scope than contained in this bill.

21. The Committee therefore asks the Scottish Government why, for this particular bill, that proposed expansion of the ancillary powers has been considered to be necessary?

On 3 December 2014, the Scottish Government responded as follows:

Section 36(1) – Power to prescribe fees

1. **“The Committee notes that Sections 32 and 35 of the Firearms Act 1968 initially specified the fee levels payable for the grant, renewal, variation etc. of a firearm certificate or shot gun certificate, or for registration as a firearms dealer, though fees are variable by order. The Committee therefore asks the Scottish Government why a comparable approach is not taken, to specify on the face of the Bill the initial fee levels proposed for an application for air weapon certificate and other functions chargeable by the chief constable in connection with the air weapon licensing regime.”**

2. When the Firearms Act 1968 was introduced it created a licensing regime with a limited range of fees, and it was common at that time to set fees on the face of primary legislation. In the intervening 46 years the legislation has been amended and expanded in various ways, and a number of new fees have been introduced. For example, rifle club approvals, visitor permits and museum authorities have all been introduced and all attract a fee. Opportunities to reduce fees in certain circumstances, such as the coterminous grant of firearm and shotgun certificates, have also been created.

3. The Air Weapons and Licensing (Scotland) Bill seeks to create a new tariff of fees which broadly matches the existing fees regime. In line with more modern practice, the Scottish Government considers it appropriate to set those fees in secondary legislation. This provides the flexibility to adjust the fees as required, while striking a balance between ensuring sufficient parliamentary scrutiny and making the most effective use of valuable parliamentary resources. As stated in the Delegated Powers Memorandum at paragraph 22, fees are typically set in secondary legislation subject to the negative procedure, for example fees set under section 25 of the Marine (Scotland) Act 2010 or section 136 of the Licensing (Scotland) Act 2005. In addition to this general approach, the Bill was drafted and introduced at a time of uncertainty with regard to possible changes to the existing firearms regime. On 27 November 2014 the Home Office published a consultation paper setting out a new tariff of proposed fees. This consultation, and consideration of the outcomes, will proceed in parallel with the progress of the Air Weapons and Licensing (Scotland) Bill and its outcome is likely to impact on decisions by Scottish Ministers as to the level of fees to be set for air weapons matters. This again means that it would be more appropriate to set the initial fee levels in secondary legislation.

4. A copy of the Home Office consultation may be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/379787/FirearmsFeesCon.pdf

Section 37(1) – Power to make further provision

- **“The Committee asks the Scottish Government what is enabled by that power to make further provision, which would not (in the absence of such power) be enabled by the ancillary powers to make incidental, supplementary or consequential provisions in sections 75 and 76? How might this power be used, beyond prescribing those matters which are set out in those sections 4(1) to 18(4)?”**

5. As paragraph 24 of the Delegated Powers Memorandum to the Bill notes, section 37(1) is a broadly framed power that allows the Scottish Ministers to make the provision required to flesh out the air weapons licensing regime. Beyond prescribing specific matters for the purposes of sections 4(1), 6(1), 7(2), 14(2), 15(1), and 18(4), section 37(2) indicates what further provision might be made using this power (for example prescribing the form and content of certificates, permits and approvals granted under Part 1 and the conditions which may be attached).

6. The intention is to use these powers to set out the detail of the processes and procedures which will underpin the licensing regime, and to update these as licensing practices evolve to become more efficient. For instance, it is envisaged that firearms licensing processes generally will, in due course, move to allow for applications to be made and processed on-line, along with the associated payments of fees etc. While development is at an early stage, the powers set out in section 37 would enable the Scottish Ministers to specify requirements without the need for new primary legislation.

7. The Scottish Government considers it appropriate to provide for this power within the context of Part 1 of the Bill as it is specific to air weapons regulation. This makes it clearer for users of the legislation, and those affected by it, that the licensing regime will be underpinned by further regulatory provision. This broadly mirrors the approach taken in the existing firearms legislation where such regulatory detail is set out in the Firearms Rules 1998 as amended (with which many of those affected by Part 1 will be familiar). Regulations made under section 37 are likely to follow the Firearms Rules closely. They will, however, be subject to the negative procedure, whereas the Firearms Rules are set by the Secretary of State without being subject to any formal parliamentary procedure.

8. By contrast, the powers provided in sections 75 and 76 apply for the purposes of the whole Bill. Although section 75(1) provides for the Scottish Ministers to make ancillary provision, it is not a stand-alone power. It allows incidental, supplementary and consequential etc. provision to be made in connection with the exercise of a particular regulation-making power under the Bill, like section 37. Given the breadth of the power in section 37(1), the incidental and supplementary aspects of section 75(1) may be less significant than for other delegated powers under Part 1 (for example, section 2(4)). However, it is envisaged that it will enable the Scottish Ministers to make ancillary provision to deal with, say, any missed consequential amendments. Where any ancillary provision for the purposes of (or in consequence of) Part 1 requires to modify an enactment, the Scottish Ministers may exercise the general stand-alone power in section 76.

Section 68(3) – Power to specify premises that are not sexual entertainment venues,

- **“Why it has been considered appropriate for this power to be drawn broadly to enable the exemption of any other premises as specified by order? Why could it not be drawn more narrowly to define the “very limited circumstances” (or range of premises) which might potentially be exempted, and**
- **Why is it not possible to avoid the need for this power by using more appropriate or clearer definitions in the new section 45A of the 1982 Act, to remove the possibility that certain types of venue or premises could inadvertently be caught within the licensing regime? In general terms, what might be inadvertently included? “**

Section 68(3) – Power to provide for descriptions of performances or descriptions of displays of nudity which are not to be treated as sexual entertainment

- **“Why has it been considered appropriate for this power to be drawn broadly to enable the exemption of any descriptions of performances or descriptions of displays of nudity, as specified by order? Why could it not be drawn more narrowly to define the “very limited circumstances” (or range of performances or displays) which might potentially be exempted, and**
- **Why is it not possible to avoid the need for this power by using more appropriate or clearer definitions in the new section 45A of the 1982 Act, to remove the possibility that certain types of performance or display could inadvertently be caught within the licensing regime? In general terms, what might be inadvertently included? “**

9. The Scottish Government anticipates that the number of premises that will be subject to licensing is very limited – approximately 20 across Scotland. We do not expect the power to exempt particular types of premises to be either extensively used or required beyond ‘very limited circumstances’. The exact circumstances where such an occurrence might arise are hard to define in advance of the scheme becoming fully operational with licensing authorities actually using the regime and making decisions and businesses responding to the new environment in terms of how they conduct business.

10. In general, we would be most concerned if theatrical and other forms of artistic performance were caught by the legislation. Whilst we feel the current definitions mean this is unlikely, a delegated power to create specific exemptions provides reassurance that emerging problems can be dealt with. To achieve this, a power is taken to exclude certain types of premises from licensing and similarly to exclude particular displays of nudity.

Section 68 – Licensing of sexual entertainment venues – local authority powers

- **“Why those powers are appropriate, and why it is appropriate for them to be exercised by means of published resolution and determination,**
- **Why the power of Ministers to issue guidance is appropriate, and why there appears to be no provision for the guidance to be published but a resolution or determination by a local authority under the section would be published?”**

11. The Committee also asked about the new section 45B of the 1982 Act which confers powers by resolution upon a local authority, for sexual entertainment venue licensing to have effect in their area. The authority may resolve that Schedule 2 of the 1982 Act (as modified by section 45B) is to have effect in their area. The section also confers power on a local authority to determine an appropriate number of sexual entertainment venues for their area, which determination must be publicised by the local authority.

12. The overarching view of the Scottish Government is that licensing is best dealt with locally. Many of the civic licensing regimes from window cleaner licensing to second hand dealer licensing requires a positive decision by the local authority that licensing is appropriate for their area. Additionally, broad discretion is provided so that they can determine the conditions under which licensing takes place with reference to providing exclusions and exemptions. In that spirit, the new regime provides maximum discretion to local licensing authorities to make the decisions that are right for their area, including a broad power to control overall numbers of sexual entertainment venues by setting a ‘desirable number’ that would limit proliferation and over provision. In terms of consistency with other civic licensing regimes and in the interests of transparency it is required that these decisions are made by resolution of the council and that they are published. It is reasonable that steps are required to ensure that businesses affected by licensing should be made aware of licensing requirements.

13. The Scottish Government anticipates that guidance will be necessary to assist in the transition to the new licensing regime. In accordance with current practice, any guidance would be drawn to the attention of licensing clerks and to Parliament and would be published on the Scottish Government website.

Section 71 – mandatory and standard licensing conditions

- **“Why has it been considered appropriate that any mandatory conditions set in regulations under section 37 in relation to an air weapons certificate or permit should be subject to Parliamentary scrutiny by the negative procedure, but any mandatory conditions set by regulations in relation to sex shops and sexual entertainment venues would be subject to scrutiny by the affirmative procedure?”**
- **Why the powers conferred on a local authority in section 71 (inserting section 45E of the 1982 Act) are appropriate, and why it would be appropriately exercised by informal, published determination?”**

14. Mandatory conditions for air weapon certificates, which will be set out in regulations made under section 37, are likely to be purely administrative. By way of example, the mandatory conditions for a section 1 firearms certificate issued under the Firearms Act 1968 require the certificate holder to: sign the certificate in ink; inform the police of any theft, loss or destruction of firearms or ammunition; inform the police if they change address; and store and use the firearms and ammunition securely. Mandatory conditions on air weapon certificates are likely to follow this model. Changes to these mandatory conditions are likely to be similarly administrative and functional, and it would not be the best use of Parliament's time to consider such minor, detailed amendments.

15. Under section 71 mandatory conditions may be prescribed by order for Part 3 licences (sex shops and sexual entertainment venues) of the Civic Government (Scotland) Act 1982. Any such order would be subject to the affirmative procedure. This is primarily because there already exists in 1982 Act sections 3A and 3B. These sections are replicated by 45D and 45E inserted by section 71. The existing sections permit Scottish Ministers to by order prescribe mandatory conditions for Part 2 licences under the 1982 Act. Such an order is to be subject to affirmative procedure. Therefore section 71 has likewise adopted the requirement for affirmative procedure to ensure that there is consistency throughout the 1982 Act with regards to similar provisions related to Part 2 and Part 3 licences.

16. The power provided in 45E to allow local authorities to determine standard conditions for Part 3 licences (sex shops and sexual entertainment venues) is appropriate in that it offers local licensing authorities the means to conveniently impose a standard condition across all similar premises throughout its areas rather than having to individually vary the conditions on a case by case basis for each such premise. This power replicates that existing in section 3B of the 1982 Act, which is applicable in respect of Part 2 licences. It is considered that the local authority is best placed to determine how details of standard conditions applicable to particular licence types should be publicised and disseminated.

Section 76 – ancillary provision

- **“The Committee therefore asks the Scottish Government why, for this particular bill, that proposed expansion of the ancillary powers has been considered to be necessary?”**

17. The scope of this power is broad in reflection of the fact that the Bill confers a number of enabling powers to enable the detail of the regulatory schemes to be set out in subordinate legislation. Given this, it is considered necessary that we have sufficient flexibility to develop over time the detail of the various regulatory regimes. It is important to bear in mind that the section 76(1) power is a stand-alone power, unlike section 75(1) (b) which only allows ancillary provision to be included in substantive regulations under a particular power. Therefore section 76(1) allows the flexibility of picking up any necessary ancillary provision that might be identified after the main set of regulations has been made.

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