Subordinate Legislation Committee

62nd Report, 2012 (Session 4)

Aquaculture and Fisheries (Scotland) Bill

Published by the Scottish Parliament on 18 December 2012
Subordinate Legislation Committee

Remit and membership

Remit:

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

(a)  
   (i)  subordinate legislation laid before the Parliament;
   
   (ii) any Scottish Statutory Instrument not laid before the Parliament but classed as general according to its subject matter;

and, in particular, to determine whether the attention of 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;

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Nigel Don (Convener)
Jim Eadie
Mike MacKenzie
Hanzala Malik
John Pentland
John Scott
Stewart Stevenson (Deputy Convener)

Committee Clerking Team:

Clerk to the Committee
Euan Donald
Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
Subordinate Legislation Committee

62nd Report, 2012 (Session 4)

Aquaculture and Fisheries (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 4 and 18 December 2012 the Subordinate Legislation Committee considered the delegated powers provisions in the Aquaculture and Fisheries (Scotland) Bill at Stage 1 (“the Bill”). The Committee submits this report to the Rural Affairs, Climate Change and Environment 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”).

OVERVIEW OF THE BILL

3. The Aquaculture and Fisheries (Scotland) Bill was introduced in the Scottish Parliament on 3 October 2012 by the Scottish Government. The Bill makes provision on a number of matters in relation to the management structures for farmed and wild fisheries, and to enhance the regulatory framework for those fisheries.

4. The Bill is divided into 4 parts and 2 schedules. Part 1 relates to aquaculture (dealing with fish farming and shellfish farming, and not any other type of product, such as kelp, which may be produced by aquaculture).

5. Part 2 is mainly concerned with salmon fisheries. Part 3 makes provision in relation to sea fisheries, and Part 4 relates to shellfish. Part 5 has miscellaneous provisions, including in section 50, powers to charge in connection with fisheries functions. Part 6 has general provisions. This includes on subordinate legislation in

---

1 Aquaculture and Fisheries (Scotland) Bill available at: Aquaculture and Fisheries (Scotland) Bill - Parliamentary Business : Scottish Parliament

section 52, interpretation provisions in section 53 and powers to make ancillary provisions in section 54.

6. In the consideration of the DPM at its meeting on 4 December, the Committee agreed to write to Scottish Government officials to raise questions on the delegated powers. This correspondence is reproduced in the Annex.

DELEGATED POWERS PROVISIONS

7. The Committee considered each of the delegated powers in the Bill.

8. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in section 1(2) (inserting section 4A(6) of the Aquaculture and Fisheries (Scotland) Act 2007); sections 5, 8, 9, 14, 20 (inserting section 46G of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003; sections 25, 26, 28(3), 34(11), 47, 48, 51(2), 54 and 56.

9. The Committee’s comments and, where appropriate, recommendations on the other delegated powers are detailed below.

Section 1(2) – (inserting section 4A(2), (3) and (5) of the Aquaculture and Fisheries (Scotland) Act 2007) - the Code of Good Practice for Scottish Finfish Aquaculture

Power conferred on: The Scottish Salmon Producers’ Organisation (“SSPO”)

Power exercisable by: Code of Practice

Parliamentary procedure: None

Background

10. Section 1(2) gives statutory effect to the issue by the Scottish Salmon Producers’ Organisation (SSPO) of the Code of Good Practice for Scottish Finfish Aquaculture (“the Code”), as revised from time to time.

11. The effect of that power in the new section 4A(2) to (5) of the Aquaculture and Fisheries (Scotland) Act 2007 (“the 2007 Act”) is that farm management agreements and statements must reflect so far as possible any recommendations in the Code, and so including recommendations on the various matters set out in subsection (4) such as fish health management. The Code also defines the farm management areas in which the requirements apply.

12. The Code of Good Practice recommends good practice measures for fish farming. Section 1(2) is designed to achieve that farm management agreements and statements will require to reflect such good practice.

Comment

13. The Committee considers that the powers of the SSPO to issue the Code, with the effects in section 1(2), are a form of delegated power since the section confers on the Code and its authors the function of setting out good practice standards, with which fish farmers must endeavour to comply.
14. The Committee accepts however that the proposed power of the SSPO to issue the Code is part of the policy and substance underlying section 1(2), on which the Committee does not form a view. The Committee also accepts that the policy intention is for the SSPO to continue to define farm management areas, per the Code. It is however for the Committee to draw the attention of the lead committee to the effects of section 1(2).

15. The written response to the Committee confirms that the policy intention is to avoid a situation where the Government becomes involved in day to day management of fish farms, but instead seeks to ensure that good practice is adopted by all members of the aquaculture industry (this being presently determined by the SSPO).

16. The Committee however has considered the scope of this power, in relation to the intended policy as so confirmed. The inserted section 4A of the 2007 Act contains no explanation or restriction that the Code must set out matters of good practice. Farm management agreements and statements must reflect so far as possible any recommendations made in the Code, including recommendations on the various matters set out in subsection (4), such as fish health management.

17. Any such recommendations in the Code at the time of making an agreement or statement will need to be reflected in agreements and statements. An agreement or statement will require review at least every 2 years (inserted section 4A(4)(c)). The Committee considers it appropriate to draw the scope of this power to the attention of the lead Committee considering the Bill.

18. The Committee notes from the written response that the reference to the Code as set out in the inserted section 4A(5) is not accurate, and that Scottish Ministers shall lay amendments to correct this at Stage 2. (The written response does not clarify the detail of the proposals to correct the reference, and this is not immediately apparent from the version of the Code which is available at www.thecodeofgoodpractice.co.uk.)

19. So far as that relates to the detailed reference to the Code, the Committee is content to consider those amendments further after Stage 2.

20. The Committee draws the status conferred on the Code of Good Practice for Scottish Finfish Aquaculture, issued by the Scottish Salmon Producers’ Organisation to the attention of the lead Committee. It notes that any recommendations of the Code must (so far as possible) be reflected in farm management agreements and statements.

21. It observes that the policy intention as confirmed in the written response from the Scottish Government is to seek to ensure that good practice is adopted by members of the aquaculture industry, by means of the farm management agreements and statements. The inserted section 4A of the Aquaculture and Fisheries (Scotland) Act 2007 contains no explanation or restriction that the Code must set out matters of good practice.
22. The Scottish Government has also confirmed that the reference to the Code in the inserted section 4A(5) of the 2007 Act will be amended at Stage 2. The Committee will consider that amendment further after Stage 2.

Section 3 – power to prescribe technical requirements for equipment used in fish farming
Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

Background
23. Section 3(1) of the Bill creates a power for the Scottish Ministers to make regulations prescribing technical requirements for equipment to be used for, and in connection with, fish farming. Further provision can be made to ensure such requirements are complied with.

24. Section 3(4)(b) provides that the regulations may “confer functions on any person in relation to the prescribing of requirements”.

25. The regulations may by section 3(3)(g), and (5) to (7) create criminal offences for failures to comply with the regulations. Section 3(6) provides that the regulations may provide for continuing offences, and for any such offences to be punishable by a daily or other periodic fine, of an amount to be specified in the regulations. Unlike the provision for the maximum penalty for a single criminal offence in section 3(5), no maximum amount of daily or periodic fine is stated in section 3(6).

Comment – section 3(4)(b)
26. The Committee asked the Scottish Government how it is anticipated that the power in section 3(4)(b) above would be exercised, and by whom. The response confirms that-

“It is considered appropriate that Scottish Ministers define [the technical] standards to ensure that all practitioners are covered by the standard. Scottish Ministers will ensure compliance through audit undertaken by a recognised regulatory body. Details are still being finalised and it is recognised that there are a number of potential options – Scottish Government in-house experts…3rd party experts on behalf of Scottish government, industry in-house expertise, or industry “external” experts such as… Food Certification International….It is therefore appropriate that persons other than the Scottish Ministers may be given functions in respect of setting requirements as they will provide the necessary expertise and assistance in setting the technical standards.”

27. The Committee considers that this explains why the powers in section 3(4)(a) (but not (b)) are required, to possibly delegate to another person or persons in the regulations powers to determine the appropriate technical requirements, or how those requirements are to be agreed and set. Other persons may have the requisite expertise to determine or agree on the appropriate standards.
28. The Committee is concerned however as to the wide scope of section 3(4)(b) as framed. The wording is very general. The Committee considers that potentially it enables any delegation of the function of prescribing in law the technical requirements for the equipment to be used in fish farming – and whether all or part of that function.

29. The Committee considers that a clear distinction should be made between the power delegated to the Scottish Ministers (alone) to prescribe by regulations the requisite standards, and on the other hand functions that may be delegated to other persons in those proposed regulations, as to how the standards will be agreed and set. It is significant that the Scottish Ministers (alone) should have the function of prescribing the requirements by the subordinate legislation to follow the Bill, given that the obligations in the regulations may attract criminal penalties and other sanctions if breached. The DPM and the written response to the Committee have not suggested that a power is sought to delegate to other persons the prescribing of the requirements by another form of subordinate legislation (such as rules).

30. The Committee considers that that distinction is not clearly respected by paragraph (b) of section 3(4) as drafted. Evidently by the first line of paragraph (a), it is the regulations to be made by the Scottish Ministers which shall “prescribe requirements”.

Comment – section 3(6)

31. The written response by the Scottish Government provides further explanation why the power in section 3(6) to provide in the regulations for daily or periodic fines is considered necessary. Maximum fines at level 4 on the standard scale (£2,500) would be appropriate in most cases, but-

“There may well be circumstances (for example a chronic failure of containment leading to a preventable large scale escape) where a significantly higher penalty would be more appropriate…To address such significant failings we do not think it would be helpful to determine what would effectively be an arbitrary maximum penalty.”

32. The Committee accepts the explanation that the potential consequences of a breach of the proposed regulations in some circumstances may be such that a high level of fine could be appropriate. However, by section 3(5) any criminal offence created in the regulations must provide for the offence to be triable under summary procedure and punishable by a fine not exceeding level 4 (£2,500).

33. The Committee is not clear why, given that a maximum level 4 penalty is specified as the punishment for an offence created by the regulations, some appropriate maximum level of fine cannot be specified for continuing offences as a daily or other periodic fine.

34. The Committee therefore asks the Scottish Government to consider this further, in responding to this Report.

35. The Committee therefore draws to the attention of the lead committee that section 3(4)(b) provides that regulations under section 3(1) may “confer
functions on any person in relation to the prescribing of requirements.” The Committee has concerns as to the scope of this power, so far as it could enable the regulations to confer functions on other persons apart from the Scottish Ministers to prescribe (by a form of subordinate legislation under the regulations) the technical requirements for equipment used in fish farming.

36. The Committee recommends that the Scottish Government consider for Stage 2 how section 3(4) could more clearly distinguish between the power proposed to be delegated to the Scottish Ministers (only) to prescribe by subordinate legislation the requisite standards or how they would be set; and on the other hand functions which may be delegated to other persons in the regulations, in relation to how the technical requirements will be agreed and set.

37. The Committee also recommends that the Scottish Government considers in advance of Stage 2, in relation to section 3(6), whether this power could specify some appropriate maximum level of a daily or other periodic fine as the punishment for continuing offences which may be created in the regulations.

Section 20 – (inserting section 46F of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003) – Ministerial power to modify the good governance requirements

Power conferred on: the Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Affirmative procedure

Background

38. Section 20 of the Bill introduces good governance obligations on district salmon fishery boards. It does so by amending section 44 of, and inserting new sections 46A to 46G into, the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (“the 2003 Act”).

39. The inserted section 46F confers a power enabling the Scottish Ministers to modify by order, the good governance requirements placed on District Salmon Fishery Boards (“DSFBs”), and to impose additional requirements for specified purposes (section 46F(1)). Those purposes are to ensure that the boards’ affairs are conducted in (1) an open and accountable manner and (2) to appropriate standards of propriety and good governance (inserted section 46F(2)).

Comment

40. The Scottish Government’s written response to the Committee acknowledges that the powers to modify the good governance requirements are only intended to be used for those purposes described in the inserted section 46F(2).

41. The “basic” governance requirements in section 44(1) of the 2003 Act are for DSFBs to prepare an annual report and an audited statement of accounts, relating to the activities of the board, and for the clerk to call an annual meeting of qualified proprietors in the district, for the purposes of considering the report and accounts.
42. The Scottish Government has undertaken to consider an amendment at Stage 2 to reflect the correct policy intention.

43. The Committee notes that the Scottish Government has undertaken to consider an amendment at Stage 2 in relation to the powers in section 20 (inserting section 46F of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003). The Government has noted that as drafted the repeal of the good governance requirements placed on district salmon fishery boards, including the “basic” requirements in section 44(1) of the 2003 Act would be competent, and this is not the policy intention. The power of modification is intended to be used only for the purposes set out in the inserted section 46F(2) of the 2003 Act.

44. The Committee shall consider the Bill as amended in this respect after Stage 2.

Section 22 – salmon carcass tagging
Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

Background
45. Section 22 of the Bill inserts a new section 21A into the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

46. The regulation-making power in section 21A(1) of that 2003 Act will enable the Scottish Ministers to put in place a statutory scheme for carcass tagging of wild salmon.

47. New section 21A(3) states that the regulations may make “such modifications of Part 5 of this Act as the Scottish Ministers think fit”. Part 5 of the 2003 Act deals with enforcement matters, including the powers of constables and water bailiffs under that Act, and offences provisions. The powers in section 22 will allow any modifications to that Part 5 in its application to the salmon carcass tagging regime, which are thought appropriate to enable enforcement of the new regime.

48. The Committee asked the Scottish Government to reflect on whether the power should be subject to the affirmative procedure, where primary legislation was being amended. The Government has considered that it will amend the Bill to achieve this.

49. The Committee is content with the powers in section 22 in principle.

50. The Committee notes that after reflection the Scottish Government has decided that the affirmative procedure would be a more appropriate level of scrutiny for regulations under the inserted section 21A of the 2003 Act, where the power in section 21A(3)(c) to modify Part 5 of the 2003 Act is used. It will bring forward an amendment at Stage 2. The Committee will consider this amendment after Stage 2.
Section 50 – power to charge in connection with fisheries functions

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

**Background**

51. Section 50(1) confers a power on the Scottish Ministers which will enable them to make regulations for or about the imposition of charges in connection with the carrying out of fisheries functions, which will also be specified in the regulations.

52. Section 50(2) defines the functions in relation to which the Scottish Ministers may impose a charge (if the regulations specify the function or functions). These are functions of the Scottish Ministers under any legislation relating to fish or shellfish farming, salmon or freshwater fisheries, or sea fishing. It also covers functions of persons appointed or authorised by Ministers to enforce the legislation, such as sea fishery officers. It extends to functions under domestic and EU legislation.

53. The regulations will set out the proposed amount of charges, by whom payable and when, including setting down the circumstances in which charges may be reduced or waived, and any exemptions.

54. Section 50(4) contains some restrictions. The charges may only require a person to pay so far as the person is someone in relation to whom a fisheries function has been carried out. The charge may not exceed the reasonable costs incurred in carrying out the function, in the particular case (so charges should not generate a profit).

**Comment**

55. The Committee queried in the written correspondence, in connection with the scope of these powers, why the Bill could not prescribe the specific functions for which the charging regime would apply, possibly with a power to modify or add to them.

56. Given that these are significant new powers to impose charging across a wide range of fisheries and fishing functions, explanation was also sought on why the negative rather than the affirmative procedure has been considered to offer a more suitable level of scrutiny by the Parliament of the exercise of these powers. The written response from the Scottish Government did not comment on this second aspect.

57. The response explains that in developing policy in this area, Scottish Ministers have not yet made any firm determination about which specific functions (within the very wide range in section 50(2)) will be subject to any future charging regime. This will be consulted on before the powers to make the regulations are exercised (for
which the Bill makes provision in section 50(5)). The powers in section 50 are therefore framework powers, which permit charging arrangements in connection with functions to be specified later, and with the further detail to be set out in the regulations, after consultation.

58. The Committee considers that the powers to charge in connection with fisheries functions in section 50 are significant powers. The proposed regulations would specify which functions the charging regime will relate to within the wide range of functions described in subsection (2) of that section, the persons to be subject to charge, the amounts of charge, and other matters as listed in section 50(3).

59. Accordingly the Committee considers that the exercise of the powers in section 50 to make regulations should be subject to the affirmative procedure. The Committee considers that the Scottish Government should consider this further in advance of Stage 2.
ANNEX

Correspondence with the Scottish Government

On 4 December 2012, the Subordinate Legislation Committee wrote to The Scottish Government as follows:

Aquaculture and Fisheries (Scotland) Bill at Stage 1

1. The Subordinate Legislation Committee considered the above Bill on Tuesday 4 December and seeks an explanation of the following matters

Section 1(2) – (inserting section 4A(2), (3) and (5) of the 2007 Act) - power to modify the definition of the Code of Practice
Power conferred on: The Scottish Salmon Producers’ Organisation (“SSPO”)
Power exercisable by: Code of Practice
Parliamentary procedure: None

2. Section 1(2) enables the Scottish Salmon Producers’ Organisation (SSPO) to issue the Code of Good Practice for Scottish Finfish Aquaculture.

3. The effect of that power in the new section 4A(2) to (5) of the Aquaculture and Fisheries (Scotland) Act 2007 is that farm management agreements and statements must reflect so far as possible any recommendations in the Code, and so including recommendations on the various matters set out in subsection (4) such as fish health management. The Code also defines the farm management areas in which the requirements apply.

4. The Committee asks for an explanation as to:

• Why it has been considered appropriate to confer this power on the SSPO by issue of a Code of Practice (rather than the powers to regulate these matters being exercisable by regulations by Scottish statutory instrument), and so not subject to scrutiny by the Parliament, nor attracting the drafting and publication requirements which apply to a statutory instrument?
• Why it has been considered appropriate that power is conferred on SSPO to define the farm management areas for the purposes of this regime, rather than these being prescribed by Scottish statutory instrument which again could allow scrutiny by the Parliament?

5. The Code of Good Practice recommends good practice measures for fish farming, and an intention of section 1(2) appears to be that farm management agreements and statements will require to reflect such good practice.
6. The Committee asks for an explanation as to:

- Why it has been considered appropriate to enable the Code to include any recommendations determined by the SSPO which the agreements and statements must reflect so far as possible, there being no provision that the Code (or any later document) shall specify good or best practice measures to be reflected in the agreements and statements?

Section 3 – power to prescribe technical requirements for equipment used in fish farming

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

7. Section 3(1) of the Bill creates a power for the Scottish Ministers to make regulations prescribing technical requirements for equipment to be used for and in connection with fish farming. Further provision can be made to ensure such requirements are complied with.

8. Section 3(4)(b) provides that the regulations may “confer functions on any person in relation to the prescribing of requirements”.

9. The Committee asks for an explanation as to:

- How it is anticipated that this power would be exercised, and by whom?

10. The minimum requirements to be prescribed by regulations shall attract the criminal penalties and other official enforcement measures which will also set out further in regulations.

11. The Committee asks for an explanation as to:

- Why it is considered appropriate that persons apart from the Scottish Ministers (in regulations subject to Parliamentary procedure) could be given functions in relation to prescribing these requirements?

12. Section 3(6) provides that the regulations could provide for continuing offences, and for any such offences to be punishable by a daily or other periodic fine, of an amount to be specified in the regulations. Unlike the provision for the maximum penalty for a single criminal offence in section 3(5), no maximum amount of daily or periodic fine is stated in section 3(6).

13. The Committee asks for an explanation as to:

- Why this has been considered appropriate, or whether a maximum level of penalty could be specified in section 3(6)?
Section 9 – movement of species, etc.
Power conferred on: the Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative procedure

14. Section 9(1) enables provisions to prohibit or control the movement of any commercially damaging species present or suspected of being present in any body of water.

15. Section 9(2) provides for the matters that may be contained or provided for in an order under section 9.

16. There is no provision in section 9 for any maximum time period for provisions for or about the prohibition or control of the movement of species, etc. Nor does the list of matters which may be included in an order as set out in section 9(2) include provision as to the authorised period of the controls.

17. The Committee asks for an explanation as to:

- Why it is considered appropriate not to include in the Bill any such provisions as to the time periods for which the prohibition or control of the movement of species, etc. will apply?

Section 14 – Control schemes
Power conferred on: the Scottish Ministers
Power exercisable by: Scheme (not made by Scottish statutory instrument)
Parliamentary procedure: None

18. Section 14 provides a power for Scottish Ministers to make control schemes for the control of commercially damaging species on fish and shellfish farms. The orders are not statutory instruments and are not subject to parliamentary controls.

19. Section 14(5)(c) states a control scheme may include incidental, supplemental, consequential, transitional, transitory or saving provision.

20. The Committee asks for an explanation as to:

- In relation to section 14(5)(c) why it considers a power to make incidental, supplemental, consequential, transitional, transitory or saving provisions in a control scheme is required, the circumstances in which such powers may be exercised, and why no parliamentary control nor the formal requirements of a Scottish statutory instrument are considered appropriate for such provisions?
Section 20 – (inserting section 46F of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003) – Ministerial power to modify the good governance requirements

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Affirmative procedure</td>
</tr>
</tbody>
</table>

21. Section 20 of the Bill amends section 44 of, and inserts new sections 46A to 46G into, the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, to introduce good governance obligations on district salmon fishery boards.

22. The Committee asks for an explanation as to:
   - Why the power in section 20 (inserting section 46F of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003) is necessary, so far it enables any modification- including repeal- of section 44(1) of the 2003 Act, which has the “basic” requirement for a district salmon fishery board to prepare annual reports and audited statements of accounts relating to the activities of the board, and an annual meeting to consider the report and accounts, and
   - How it is envisaged that that power shall be exercised?

Section 22 – salmon carcass tagging

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative procedure</td>
</tr>
</tbody>
</table>

23. Section 22 of the Bill inserts a new section 21A into the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

24. The regulation-making power in section 21A(1) of that 2003 Act will enable the Scottish Ministers to put in place a statutory scheme for carcass tagging of wild salmon.

25. New section 21A(3) states that the regulations may make “such modifications of Part 5 of this Act as the Scottish Ministers think fit”. Part 5 confers powers on Ministers by regulations to impose charges in connection with the carrying out of fisheries functions.

26. The Committee asks for an explanation as to:
   - Why the power in the new section 21A(3)(c) of the 2003 Act to make “such modifications of Part 5 of this Act as the Scottish Ministers think fit” is appropriate, why it could not be framed as a power to make modifications which are consequential on making regulations under the new section 21A(1), and how it is envisaged this power could be used?
Given that the power is to modify provisions in the Act, whether the affirmative procedure is a more suitable level of scrutiny for the exercise of this specific power?

**Section 28(3) – power to modify salmon fishery boards’ functions under section 33A**

- **Power conferred on:** the Scottish Ministers
- **Power exercisable by:** Regulations
- **Parliamentary procedure:** Negative procedure

Section 28(3) inserts a new section 33B into the 2003 Act. This enables the Scottish Ministers to make provision by regulations to recall to Scottish Ministers, or restrict, DSFB functions when consenting to the introduction of salmon or salmon spawn into inland waters, under section 33A of the 2003 Act.

28. The Committee asks for an explanation as to:

- In relation to the powers in section 28(3), how section 33A(3A) was added to that Act. Section 33A was added by the Aquaculture and Fisheries (Scotland) Act 2007, but that addition did not include a subsection (3A).

**Section 50 – power to make regulations to impose charges for the carrying out of certain fishery functions.**

- **Power conferred on:** the Scottish Ministers
- **Power exercisable by:** Regulations
- **Parliamentary procedure:** Negative procedure

29. Section 50(1) confers a power on the Scottish Ministers which will enable them to make regulations for or about the imposition of charges in connection with the carrying out of fisheries functions; which will also be specified in the regulations.

30. Section 50(2) defines the functions in relation to which the Scottish Ministers may impose a charge. These are functions of the Scottish Ministers under any legislation relating to fish or shellfish farming, salmon or freshwater fisheries, or sea fishing. It also covers functions of persons appointed or authorised by Ministers to enforce the legislation, such as sea fishery officers. It extends to functions under domestic and EU legislation.

31. The Committee asks for an explanation as to:

- Why is it necessary for the scope of the powers to extend widely to all the types of functions set out in section 50(2) under domestic and EU legislation, given that the Delegated Powers Memorandum suggests that the regulations will impose charges “in connection with certain specific fishery functions”; and so why would it not be appropriate for the Bill to prescribe those specific functions for which there would be charging, possibly with a power to modify or add to them?
• How is it envisaged that these powers would be exercised, and in relation to which functions (beyond the list of matters that can be covered in regulations in section 50(3);

• Given that these are significant new powers to impose charging across a wide range of fisheries and fishing functions, why the affirmative procedure would not offer a more appropriate level of scrutiny by the Parliament of the exercise of the powers rather than the proposed negative procedure – in particular for the selection of the specific functions to which the charging regime would apply?

Section 51(2) – power to modify definition of “relevant offence” and descriptions of persons.

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

32. The power in section 51(2) (inserting section 25(2B)(a) of the Aquaculture and Fisheries (Scotland) Act 2007) permits any amendment of the definition of “relevant offence” for the purposes of the fixed penalty notice provisions in that section 25.

33. The Committee asks:

• Given that the Delegated Powers Memorandum does not explain why the power to amend the definition of “relevant offence” in any way is required, could the scope of this power be drawn more narrowly?

The Scottish Government responded as follows:

Section 1(2) – power to modify the definition of the Code of Practice

The Scottish Government would not characterise the powers in section 1(2) as one which confers a power on the SSPO in connection with the Code of Good Practice.

Instead the new provision is intended to place an obligation upon all those engaged in the business of fish farming to adhere to farm management agreements or statements which reflects aspects of good industry practice. Such standards are currently contained in a voluntary industry code.

The Scottish Government considers that farm management areas are best determined by those engaged in the business of fish farming. Such areas are already set out in the voluntary code. Please see the following link for ease of reference:

http://www.thecodeofgoodpractice.co.uk/cogp/3-5-area-management#Section87

Farm management agreements will be drawn up between farmers according to the industry standards and against the existing farm management areas (subject to the minimum standards set out in inserted section 4A (4) (b).
The provision reflects a policy intention to avoid a situation where government becomes involved in day to day management of farms, but instead seeks to ensure that good practice is adopted by all members of the aquaculture industry.

It has been brought to the Scottish Government’s attention that the reference to the Code of Good Practice, set out in inserted section 4A (5) is not accurate and Scottish Ministers will be bringing forward amendments to correct this at stage 2.

Section 3 – power to prescribe technical requirements for equipment used in fish farming

The detail of the proposed technical standard is being developed by an expert containment technical standards group whose membership includes fish farmers, trade associations, equipment providers & manufacturers, insurers, engineers, research institutes, Scottish Government (policy and fish health inspectorate) and other regulators. The overall intention of the Scottish Technical Standard (STS) would be to help prevent escapes from technical failure and related issues at Scottish finfish farms. To achieve that end all fin fish farms operating in Scotland should have equipment appropriate for the environmental conditions in which they operate - nets, pens, moorings etc - and which effectively contain fish and prevent escapes. The intention, therefore, is that the regulations will prescribe those standards.

The STS will apply to all Scottish freshwater and marine finfish farms and cover nets, pens and mooring systems. It will also cover land-based facilities for screens and flood risk. It will set standards for the design, construction, materials, manufacture, installation, maintenance and size of equipment and be flexible to take into account environmental conditions of different site locations – taking into account, for example, wave height, wind and current speeds as well as flood risk assessments for land-based, pond and raceway sites. It will cover site surveys (measurements and monitoring of current, wave height and speed over time and pertinent geographical features) and take account of historical weather and tidal conditions - allowing for predictions of wind, wave and current conditions that might be expected at that site over the lifetime of the equipment. Consideration of current particularly tidal and wind generated, is crucial given it usually generates the greatest forces on equipment. The standard will also cover mooring systems - in terms of holding the equipment together, maintaining the structure of the fish farm and anchoring it to the seabed. This includes the type of seabed (rock, mud etc), type, size and weight of anchor and fitness to withstand the expected loads and forces the structure will be subjected to.

The standard also includes pen design and construction both in terms of connecting together but also material type and strength, net design and construction again in terms of material but also breaking strength and mesh size (to prevent fish escaping through the net). There will also be requirements on fish farm operators, employees and agents to keep records, for example of net testing, equipment replacement and also report equipment failures, for example where a particular of mooring has failed or where nets have degraded or damaged easily.

It is expected that following further consultation the regulations will come into force by summer 2014. It is recognised that there will also need to be an appropriate lead-in
period to allow for existing equipment to be replaced. This will be determined as part of the consultation process. It should be stressed that this will not represent a requirement to renew all finfish farm infrastructure; given the significant investment in recent years it can be expected that a significant proportion of existing or planned replacement infrastructure will meet the STS once introduced.

It is considered appropriate that Scottish Ministers define standards to ensure that all practitioners are covered by the standard. Scottish Ministers will ensure compliance through audit undertaken by a recognised regulatory body. Details are still being finalised and it is recognised that there are a number of potential options - Scottish Government in-house experts such as the Fish Health Inspectorate, 3rd party experts on behalf of Scottish Government; industry in-house expertise, or industry “external” experts such as their independent auditors of the CoGP – Food Certification International. This issue will be progressed through the STS steering group, but we will look to take opportunities to dovetail compliance assessment with existing inspection and audit procedures. It is therefore appropriate that persons other than the Scottish Ministers may be given functions in respect of setting requirements as they will provide the necessary expertise and assistance in setting the technical standards.

Under existing powers in the Aquaculture and Fisheries (Scotland) Act 2007 Marine Scotland inspects fish farm sites to ensure that measures are in place to contain fish and prevent escapes. Non-compliance carries a maximum fine of level 4 on the standard scale. Our current view is that small breaches - for example failure to replace incorrect or poorly maintained equipment (e.g nets of incorrect mesh size) - would incur fines on the same scale. Failure to remedy the situation (after further discussion with inspectorate) would incur periodic fines on the same scale for as long as deemed necessary and until the situation is remedied. We would envisage this to be appropriate in most circumstances. However, there may well be circumstances (for example a chronic failure of containment leading to a preventable large scale escape) where a significantly higher penalty would be more appropriate. That example might give rise to the loss of a whole mooring and pen system and loss of tens of thousands of fish. To address such significant failings we do not think it would be helpful to determine what would effectively be an arbitrary maximum penalty.

Section 3(7) of the Bill also provides that the sanctions that may be specified in the regulations may include the suspension or revocation of any authorisations required by fish farm operators to operate as such, for example, an authorisation under the Aquatic Animal Health (Scotland) Regulations 2009 (SSI 2009/85).

In view of the technical nature of the requirements we considered it appropriate that the development of the standard was informed by an expert group (membership set out above) to ensure the measures will be proportionate to the risk of escape, and correct for the Scottish industry and environment.

We consider that the level of early and ongoing stakeholder involvement in the project will ensure that the standard will be appropriate, proportionate and will be fit for purpose for the industry operating in Scotland.
Section 9 – movement of species

It is the Scottish Government’s view that it is not necessary or desirable to include in the bill provisions as to time periods etc. for which the prohibition or control of the movement of species etc. will apply.

It is possible to identify the presence of a commercially damaging species and to take appropriate action in response, but it is not possible to determine with any degree of certainty what length of time the prohibition or control of the movement of species would required to be in place. On that basis, we consider that a precautionary approach remains appropriate.

The necessity for prohibitions or controls under section 9 will be monitored. Scottish Ministers have the ability to amend and revoke orders when necessary in response to new information about the effect and extent of such controls.

Section 14 – control schemes

These provisions will only be able to be made once a species has been specified as a commercially damaging species, as provided by section 8 of the Bill. As species require to be specified by Order, Parliament will have had the opportunity to scrutinise the decision to specify the species as a commercially damaging species and will therefore have determined that the species is of concern.

In situations where a control scheme is considered necessary, speed may be paramount as delays could lead to the species spreading further and resulting in greater impacts. The power is appropriate in this regard as it will allow action to be undertaken quickly as opposed to having an enabling power exercisable by SSI which could unduly delay action and result in greater spread of the commercially damaging species.

In addition control schemes will have a localised effect in relation to those in a particular specified area. It is thought that since the schemes have a limited local interest that a scheme rather than an enabling power exercisable by SSI is an appropriate power in these circumstances.

The powers to make incidental, supplemental, consequential etc. provision have been inserted to allow the scheme to be flexible and adaptable over time, particularly since a scheme can be varied from time to time, replaced or revoked.

This is consistent with the approach taken in the Wildlife and Countryside Act 1981, as amended by the Wildlife and Natural Environment Act 2011, in relation to invasive non-native species which may be similar in terms of impacts and actions required (although the scope of these provisions are narrower as they relate only to aquaculture businesses as opposed to the wider environment).

Section 20 – Ministerial power to modify the good governance requirements

The Committee asks why the power in section 20 (inserting section 46F of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003) is necessary
and how it is envisaged it be used. The power to modify the good governance requirements is to allow the provisions to be adapted to respond to any future changes in the landscape of good governance in the public sector. The policy intention is for the power to be available to update and add to the good governance requirements, not to dilute them.

It is noted that, as currently drafted, repeal of the good governance requirements, including 'basic' requirements under section 44(1) would be competent under 46F (1) (a). The power of modification is intended to be used only for the purposes in section 46F (2); the Scottish Government will consider an amendment at Stage 2 to reflect this.

Section 22 – Salmon carcass tagging

At paragraph 24 the Committee notes that regulations under new section 21A(3) of the Salmon and Freshwater Fisheries (Consolidation)(Scotland) Act 2003 may make "such modifications of Part 5 of this Act as Scottish Ministers think fit". Paragraph 24 further states that Part 5 confers powers on Ministers by regulations to impose charges in connection with the carrying out of fisheries functions. To clarify, the reference in new section 21A(3) is to Part 5 of the 2003 Act which deals with enforcement matters; the power to impose charges in connection with the carrying out of fisheries functions is at Part 5 of the Aquaculture and Fisheries Bill.

The Committee asks why the power to modify Part 5 of the 2003 Act is appropriate and how it is envisaged it is used. Regulations under new section 21A may make provision for the appointment of authorised persons to carry out enforcement functions for a carcass tagging scheme. The nature of enforcement will depend on the type of scheme created, but examples of authorised persons might be Marine Scotland compliance officers, staff in local fishery offices or from Marine Scotland Science. However, it is intended that the existing enforcement provisions available in Part 5 of the 2003 Act also be available for the carcass tagging scheme.

Part 5 provides for powers of constables and water bailiffs and it may be considered desirable for the carcass tagging regime to be enforced by these persons. For example in remote areas it may be impractical to appoint persons for the specific purpose of enforcing and ensuring compliance with the regulations, so Ministers may wish to extend the existing powers of water bailiffs and constables for these purposes. The provision, as drafted, will allow any modifications to Part 5 of the 2003 Act, in its application to the new regime, which are thought necessary or desirable to enable enforcement of the carcass tagging regime. For example, existing section 55 (1) of the 2003 Act might be amended to insert reference to inspection of carcass tags or records associated with carcass tagging.

The Committee also asks whether the power might be framed as a power to make modifications which are consequential on making regulations under new section 21A (1). The Scottish Government's view is that the drafting of the provisions at section 21A is such that the power at section 21A (3) (c) is necessarily in consequence of the creation of the new regulatory regime at section 21A (1). The power could not be used otherwise and therefore no amendment is required.
The Committee further asks whether, as the power is to modify primary legislation, affirmative procedure is a more suitable level of scrutiny for its exercise. The Scottish Government agrees, on reflection, that affirmative procedure is more appropriate for regulations under new section 21A where subsection (3) (c) is used. Accordingly, the Scottish Government will undertake to bring forward an amendment at Stage 2 to achieve this.

Section 28 (3) – power to modify salmon fishery boards’ functions under section 33A

The Committee asks in relation to the powers in new section 28(3), how section 33A(3A) was added to the 2003 Act. New section 28 makes various amendments to the 2003 Act. Subsection (2) makes amendments to existing section 33A. New subsection (3A) of section 33A of the 2003 Act is inserted by section 28(2)(b) of the Bill.

Section 50 – power to make regulations to impose charges for the carrying out of certain fishery functions

In developing policy in this area, Scottish Ministers have not yet made any firm determination about which functions will be subject to any future charging regime. This is a matter which will be consulted upon before the powers conferred by section 50 are exercised (this is built into the Bill at Section 50 (5).

The primary purpose for charging is to promote the efficient use of resources. There are also compelling arguments for charging for public services provided in competition with the private sector or where a direct economic benefit accrues to the user or, where practicable, in order to recover the costs of regulating commercial activities.

For illustrative purposes, the Policy Memorandum and accompanying documents to the Bill outline a number of existing activities where the introduction of a charging regime might be considered appropriate where it is possible to demonstrate a clear link between the activity and the benefit to an individual stakeholder or group of stakeholders.

However, as specific functions have not been identified, the Bill has been drafted to provide Scottish Ministers with sufficient scope to develop a charging regime after a full consultation exercise is undertaken.

Section 51(2) – power to modify definition of relevant offence and descriptions of persons

Section 51 (2) of the bill will repeal and replace the definition of a “relevant offence” in section 25 (2) of the Aquaculture and Fisheries (Scotland) Act 2007. Such offences are those with respect to which a fixed penalty notice may be offered.

The new definition set out in section 51(2) (ii) will define offences with reference to enactments and persons with certain enforcement functions. Since it is likely that such legislation and enforcement functions are liable to change in the future, it is
thought that the power inserted by 51(2) in section 25(2B) (a) is necessary to allow the definition of offence to keep pace with other legislative change. The use of fixed penalty notices is an important enforcement tool and it is thought desirable that such changes should not have to wait for changes to be made using primary legislation.

Against this background, the Scottish Government does not consider that the power requires to be drawn more narrowly.
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.