Delegated Powers and Law Reform Committee

40th Report, 2013 (Session 4)

Regulatory Reform (Scotland) Bill

Published by the Scottish Parliament on 25 June 2013
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:

Christian Allard
Nigel Don (Convener)
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
INTRODUCTION

1. At its meetings on 7 May, 28 May and 25 June 2013 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Regulatory Reform (Scotland) Bill at stage 1 (“the Bill”)\(^1\). The Committee submits this report to the Economy, Energy and Tourism 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”)\(^2\).

OVERVIEW OF BILL

3. This Bill was introduced on 27 March 2013. The Economy, Energy and Tourism Committee is the lead Committee. The Rural Affairs, Climate Change and Environment Committee is a secondary Committee (for the provisions relating to SEPA and environmental regulation (Part 2), and other parts of the Bill relevant to the Committee’s remit).

4. The Bill takes forward the 2011 Scottish Government commitment to improve the way regulations are applied in practice across Scotland, and to take forward the Government’s Better Regulation agenda. The primary purpose is described in the DPM as “to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment.”

---

\(^1\) Regulatory Reform (Scotland) Bill available here: [http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd.pdf)

5. At its meeting of 7 May the Committee agreed to write to Scottish Government officials to raise questions on the delegated powers. This correspondence is reproduced at Annex A. At that same meeting, the Committee agreed to take oral evidence on other aspects of the delegated powers from Scottish Government officials.

6. The oral evidence session took place 28 May 2013. Following the evidence session the Committee agreed to write to the Scottish Government in order to further clarify certain points. The correspondence is reproduced at Annex B.

7. This report considers each of the delegated powers contained within the Bill. The report is structured, so that it first considers those provisions with which the Committee is content, before considering separately Parts 1 and 2 of the Bill. Commentary on Parts 1 and 2 of the Bill is split into views on the generality of the powers within the respective Parts and more specific comments on the individual powers within those Parts.

DELEGATED POWERS PROVISIONS

8. As noted above the Committee considered each of the delegated powers in the Bill.

9. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

   Section 7- Power to modify list of regulators in schedule 1
   Section 12 – fixed monetary penalties
   Section 15 – variable monetary penalties
   Section 19(1) – enforcement undertakings
   Section 19(3) – enforcement undertakings
   Section 26(5) – compensation orders against persons convicted of relevant offences
   Section 31(6) – significant environmental harm: offence
   Section 31(9) – significant environmental harm: offence
   Section 47(2) – commencement
   Schedule 2, paragraph 29 - power to specify EU instruments for the purposes of paragraph 22
Schedule 2, paragraph 30(4) – substitution of new maximum fine for a summary offence

10. Subsequently, in light of the evidence received by the Committee, it agreed that it did not need to draw the Parliament’s attention to the following delegated power:

Section 3(2) – Power to direct regulator who fails to comply with regulations

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

PART 1 (REGULATORY FUNCTIONS)

12. The Committee took evidence from officials at its meeting on 28 May 2013 when it considered the delegated powers in Part 1 and the powers to make regulations in Part 2. The evidence taken on Part 2 is considered separately. Consideration of Part 1 in this report begins with a summary of the Committee’s main recommendations as regards this part; followed by general exposition of this section; and finally, commentary on the delegated powers within Part 1.

Part 1 – summary of recommendations

13. Set out below is a summary of the recommendations on Part 1. These are explored in greater detail later in the report.

- The powers in sections 1 and 2 are broad powers, to make any provisions which the Scottish Ministers consider will encourage or improve consistency in the exercise by the various regulators listed in schedule 1, of regulatory functions as those are defined in section 1.

- The Committee has some concern that the powers in sections 1 and 2 are drawn more widely than the policy objectives for the powers, as those objectives have been explained by officials in evidence. It considers that the Scottish Government has not fully justified the proposed scope of these powers. The Committee recommends that this should be considered by the lead committee and Parliament in the further scrutiny of the Bill.

The Bill for example includes powers to amend or remove existing regulatory requirements, or to create new ones in respect of which a regulator will have regulatory functions, and to require regulators to enforce compliance with new requirements. The policy justification as it has been explained to the Committee is more limited to an intention to introduce national standards of regulation for consistency, which are appropriate for specific areas of business which have yet to be fully identified.

- The Committee agrees that the powers in sections 1 and 2 should be subject to the affirmative procedure and subject to the
consultation requirements in section 1(3), if the Parliament determines that the powers are acceptable in principle.

- The Committee also draws to the attention of the lead committee, however, that if the regulations were to propose to substantially amend, remove or create new regulatory requirements overseen by a regulator, the affirmative procedure will not enable the Parliament to amend specific provisions in the proposed instrument, as could be done if primary legislation was necessary. A “super-affirmative” form of procedure would enable the Parliament to consider and report on draft provisions, before an instrument is laid for approval.

- The Committee has some concern that the matters which regulators will require to have regard to, in relation to contributing to the achievement of sustainable economic growth in the exercise of functions and in regard to the exercise of their regulatory functions more generally, will be set out across both the guidance under section 4 and the code of practice under section 5.

Quite different procedures for Parliamentary scrutiny would apply to these documents, with the guidance not being subject to any scrutiny, and the section 5 code requiring to be approved by resolution and subject to consultation requirements. The Committee accordingly draws this to the attention of the lead committee.

- The Committee considers that there should be provision in the Bill that the guidance to regulators which would be issued under section 4, and the code of practice which would be issued under sections 5 and 6, must be published both on issue, and when any revisions are made.

Part 1 – outline of provisions

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

15. The affirmative procedure applies to the powers in section 1 (by section 44(4)(a)).


17. Section 2 sets out in considerable detail what further provisions may be contained in the regulations. This is, however, without prejudice to the general
power to make provisions that Ministers consider will encourage or improve consistency in the exercise by regulators of regulatory functions.

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

19. However, if a current enactment requires a regulatory requirement to be imposed or set by the regulator, that requirement can only be amended or removed if the regulations include provision that has an equivalent effect to that enactment (section 2(4)). The regulations cannot therefore amend or remove a mandatory regulatory requirement which the regulator must (by law) impose or set, unless alternative provision is made having equivalent effect (section 2(3) and (4)).

20. Requirements to encourage or improve consistency, as above, may be in the way particular regulators, their employees or agents impose, set or secure compliance with regulatory requirements, or in the way in which different regulators, their employees or agents, so impose or secure compliance (section 1(4)).

21. Before making regulations, Ministers must consult—

(a) the regulators to which they would apply;

(b) such persons or bodies as appear to Ministers to represent the interests of persons substantially affected by the proposals;

(c) such other persons or bodies as Ministers consider appropriate.

22. The definitions of “regulatory functions” and “regulatory requirements” for the purposes of Part 1 are contained in section 1(5) and (6).

23. Section 4(1) places a duty on each regulator listed in schedule 1, in the exercise of its regulatory functions, to contribute to achieving sustainable economic growth, except to the extent that that would be inconsistent with the exercise of those functions.

24. Section 4(2) provides that the Scottish Ministers may give guidance to regulators with respect to the carrying out of that duty. Regulators must have regard to the guidance.

25. Section 7 confers a power on the Scottish Ministers by order to modify the list of regulators in schedule 1, to add a person, body or office-holder having regulatory functions to the list, (or a description of such persons); to remove or amend an entry; or to specify that a function is or is not to be a regulatory function for the purpose of section 1 (power as respects regulatory consistency), section 4 (Regulators’ duty in respect of sustainable economic growth) or section 5 (code of practice on exercise of regulatory functions).
26. Negative procedure applies to an order under section 7, unless it adds a regulator to schedule 1 or adds (or extends) a regulatory function of a regulator, in which case affirmative procedure applies. This is on the basis that only an addition will extend the scope of the provisions, to other bodies or functions.

Part 1 – commentary

Sections 1 to 3- powers as respects consistency in regulatory functions

27. The policy justifications as provided by the Scottish Government in oral evidence to the Committee are narrower in scope than the powers as framed in sections 1 to 3. The Delegated Powers Memorandum gives as the reason for seeking these powers—

“…to provide sufficient flexibility to enable measures to encourage or improve regulatory consistency to be taken quickly and efficiently in response to changing circumstances without having to resort to primary legislation”.

28. In evidence, however, the Scottish Government officials explained that—

“In broad terms, the background to part 1 of the bill is to promote consistency in regulation across Scotland and to empower regulators to take into account, in the performance of their duties, economic considerations, in addition to their other statutory functions, so that there is an element of equity.

We propose to take powers to make regulations that would represent national standards of regulatory practice in areas that are yet to be identified.”

29. The Committee notes that, in the definition of “regulatory functions” in section 1(5) for the purposes of Part 1, such functions extend beyond setting standards or outcomes for activities, to other requirements, restrictions or conditions, guidance, or the enforcement of requirements, restrictions, etc. Similarly, “regulatory requirements” in terms of section 1(5) extends beyond standards or outcomes to include any requirement, restriction, or condition, in respect of which a regulator listed in the Bill, has regulatory functions.

30. Accordingly, sections 1 and 2 include powers to amend or remove existing regulatory requirements, or to create new ones in respect of which a regulator will have regulatory functions, or to require regulators to enforce compliance with new requirements where presently they may have discretion as to methods of enforcement. This is in addition to powers to secure consistency in how regulators enforce standards (or existing requirements) in particular business areas. “Regulatory functions” of a regulator in terms of section 1(6) also include providing goods and services, and employing persons.

---


31. The evidence from the Scottish Government officials also indicated that the policy intention is more to provide regulatory consistency for a particular area of business in Scotland, rather than consistency across various or all areas of regulation. A specific example was given of a national standard for the inspection of mobile food vans, and possibly wider in relation to local authority licensing of activities. The full scope of the areas of regulatory practice which could be subject to the regulations is yet to be identified.

32. The Committee takes the view that ultimately the policy justifications for the powers in sections 1 and 2, and whether they will be acceptable by the Parliament, are not matters for the Committee to rule on.

33. The Committee also considered the scrutiny procedures applied to the exercise of the powers. The Government officials indicated that no consideration was given to whether a “super-affirmative” form of procedure could be an appropriate level of scrutiny for any proposals in regulations to create new regulatory requirements. The Committee agrees that the powers in sections 1 and 2 should be subject to the affirmative procedure, and subject to the consultation requirements in section 1(3), if the Parliament determines that the powers are acceptable. This is however subject to the following comment in relation to the use of “super-affirmative” procedure.

34. Any “regulatory requirements” which could be amended, removed or newly created by regulations under these powers need to be requirements in respect of which a regulator listed in the Bill has regulatory functions conferred by or under enactment. However, such proposals have the potential to be very significant, and the scope of activities to which the powers could be applied is as yet uncertain.

35. If the regulations were to propose to substantially amend or remove existing regulatory requirements overseen by a regulator, or create new ones, the affirmative procedure will not enable the Parliament to amend specific provisions in the proposed instrument, as could be done if primary legislation was necessary. A “super-affirmative” form of procedure would have a benefit (compared with the affirmative procedure) of enabling the Parliament to consider and report on draft proposed regulations, and the Scottish Government would require to consider the views of Parliament on the draft proposals, before finalised regulations are laid for approval. The Committee therefore draws this to the attention of the lead committee for consideration.

36. The Committee would not go so far as to recommend, however, that the exercise of all powers under sections 1 and 2 should be subject to a “super-affirmative” form of procedure. That procedure would, however, have the benefit outlined above, were the proposals to have significant effects, such as substantially amending, removing or creating new regulatory requirements overseen by a regulator. It is noted that to be within the scope of the powers, Ministers must properly consider that the regulations will encourage or improve the consistent exercise by regulators of regulatory

---

functions. Therefore, the powers do not enable any amendment, removal or new creation of regulatory requirements to be proposed, without that test being satisfied.

Section 2(7) – power to direct modifications to the regulations

37. Section 2(7) confers a power on the Scottish Ministers, if they consider it necessary or expedient, to direct that for a period no longer than 6 months from the day on which the direction is given, a provision in the regulations is not to apply to a regulator, or is to apply with any modifications or conditions specified in the direction.

38. The Explanatory Notes to the Bill (paragraph 22)\(^7\) state that this power is to enable the regulations to be adjusted quickly to take account of unforeseen circumstances. However, the power permits any such modification to how the regulations apply to a regulator and such modification is not subject to Parliamentary scrutiny. Any modification is also not for a “trial period” of up to 6 months from when the regulations would come into force. The period will have effect from the date when Ministers determine to issue a direction.

39. As above, in the view of the Committee whether the specific power in section 2(7) to direct modification of how the regulations apply to a regulator should be given to Ministers is a matter of policy for determination by the Parliament.

40. The Committee draws to the attention of the lead committee that a power in this form, permitting any such modification for a period of up to 6 months from date of direction, is very unusual. The exercise of the power is not proposed to be subject to Parliamentary scrutiny.

41. The Committee considers that any such direction must be published on being made.

Section 4 – regulators’ duty in respect of sustainable economic growth

42. The Committee queried, in the evidence session with the Scottish Government officials, how Ministers intend to use the power in section 4 to issue guidance to regulators with respect to the duty of each regulator to contribute to sustainable economic growth.

43. The evidence from the officials indicated that it is expected that the principal source of guidance to regulators in relation to the exercise of their regulatory functions will be the code of practice provided for in sections 5 and 6.\(^8\) The intention is for Ministers to give guidance under section 4 on “ad hoc issues” when that is required. The written correspondence from the Scottish Government on this power, of 17 May 2013, also indicates that section 4 is intended to enable

\(^7\) Regulatory Reform (Scotland) Bill Explanatory Notes (SP Bill 26-EN), Session 4 (2013), paragraph 22. Available at: http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd-en.pdf

Ministers to give additional, more specific guidance to regulators, supplemental to the code under section 5.

44. The Committee observes that, despite the intention that the guidance will be supplemental to the code of practice, each will relate to differing duties of regulators. The code will, in terms of section 5, relate to the exercise of regulatory functions by a regulator, depending on which regulators and functions are specified in it. The guidance will relate to the carrying out of the new duty proposed in section 4(1). In exercising its regulatory functions, each regulator listed in Schedule 1 (from time to time) must contribute to achieving sustainable economic growth, except where it is inconsistent with those functions to do so.

45. “Contribution to achieving sustainable economic growth” is not defined for the purposes of section 4, nor what this means in connection with the functions of a specific regulator. Accordingly, the guidance will provide the content for the meaning of this duty, as it applies to each regulator and regulators must have regard to the guidance in exercising their regulatory functions.

46. The evidence provided by the Scottish Government officials, and the written correspondence to the Committee of 17 May and 5 June 2013, did not provide further information on how the guidance could expand on the contents of this duty, apart from that it will give guidance on additional “ad hoc issues”. There is no provision in the Bill that the matters in guidance under section 4 will be supplemental or ancillary to the matters in the code under section 5.

47. Accordingly, the whole contents of the matters which regulators will require to have regard to in relation to contributing to the achievement of sustainable economic growth, and in connection with the exercise of their regulatory functions more generally, will be set out between the guidance and the code of practice. However only the section 5 code is subject to Parliamentary scrutiny and approval. The guidance is not subject to any such scrutiny.

48. The Committee therefore has some concerns as to this assimilation of the contents of matters which regulators will need to have regard to, between 2 documents to which quite different levels of Parliamentary scrutiny will apply (with none at all proposed in the case of the section 4 guidance). The Committee accordingly draws this to the attention of the lead committee.

49. The Committee also considers that both the section 4 guidance and the section 5 code of practice must be published, on issue and when any revisions are made.

PART 2 - ENVIRONMENTAL REGULATION

50. As noted previously, the Committee also took oral evidence from Scottish Government officials as regards Part 2 of the Bill. This section explores the Committee’s views on Part 2 insofar as the delegated powers within that Part are concerned. As with the approach to Part 1, this section of the report begins with a summary of the Committee’s recommendations on this Part; followed by an exposition this Part; and finally commentary on the delegated powers in Part 2.
51. The order-making powers in Part 2 in relation to enforcement, and the powers in Part 3 (miscellaneous) were considered by written correspondence (Annex A). Those powers are therefore addressed separately below.

Part 2 – summary of recommendations

52. Set out below is a summary of the recommendations on Part 2. These are explored in greater detail later in the report.

- The powers in Part 2 of the Bill are very broad powers which would enable the Scottish Ministers to make provisions for, or in connection with, protecting and improving the environment, by regulations under section 10 if they so propose. The powers would include the ability to define and regulate new “environmental activities”, defined in section 9 to mean any activities that are capable of causing or liable to cause environmental harm, and activities connected with those activities.

The Committee draws to the attention of the lead committee that in its view, the effect of these proposed powers would be that the Scottish Ministers could propose that subordinate legislation could make any provisions for, or in connection with, protecting and improving the environment, in general. This would remove the necessity for primary legislation in those circumstances where it is currently required. It would also however remove the ability of the Parliament to insist on primary legislation in those circumstances, (where the Scottish Ministers propose subordinate legislation under the Bill rather than new primary legislation), and the Parliament’s corresponding ability to amend the proposals, as opposed to being restricted to a right to either approve or annul them.

In such circumstances where provisions which currently require primary legislation are replaced by delegated powers, a “super-affirmative” form of procedure would enable the Parliament to consider and report on draft provisions, before an instrument is laid for approval. While scrutiny by “super-affirmative” procedure is not recommended for the exercise of all powers under section 10, in the view of the Committee this should be considered further in relation to those circumstances where the need for primary legislation will be removed by Part 2 of the Bill. Given the considerable list of possible provisions which could be made by regulations under section 10 and schedule 2, this is a complex matter.

- The Committee also has some concerns as to whether the procedures proposed in relation to the powers in section 10 and schedule 2 provide for full and adequate Parliamentary scrutiny of the respective regulations in all cases.

The Committee therefore recommends that the Scottish Government should also fully consider in advance of Stage 2 in which circumstances the exercise of the powers would be more
appropriately scrutinised by the Parliament by means of the affirmative procedure, rather than the negative procedure. Again given the width of the powers, this is a complex matter. The Committee considers that there should be a general review, but it should include proposals which:

(a) further define “environmental activities” under the Bill, or specify other activities as such under paragraph 1 of Part 1, Schedule 2, and then prohibit or regulate them in some manner;

(b) provide for an emissions scheme under paragraphs 2 and 24 of that Part;

(c) provide for schemes for fees or charges under paragraphs 9, 13 or 28 of that Part;

(d) create new offences in terms of paragraph 19 of that Part;

(e) permit provisions in terms of paragraph 22 corresponding or similar to provisions made by or under Part 2 of the Environmental Protection Act 1990 (waste on land), subject to such modifications as the Scottish Ministers consider appropriate, or provisions which modify the effect of the Radioactive Substances Act 1993.

- The Committee accepts, however, that where the application of the affirmative procedure would result in a “trading up” of the scrutiny procedure compared with that provided for in existing legislation which could (prior to the Bill) regulate similar activities in a similar manner, then the existing procedure could be retained.

- The Committee agrees that where regulations would textually amend an Act, the affirmative procedure would apply.

- The Scottish Government has indicated in a letter to the Committee of 5 June 2013 that it proposes to amend section 44 at Stage 2 to provide that the first set of regulations to be made under section 10 would be subject to the affirmative procedure, but subsequently the negative procedure would apply. The Committee is not content with this proposal for the reasons set out in paragraphs 68 and 69 of this report.

- The Scottish Government has not provided the Committee with sufficient justification why the power in paragraph 22(1)(b) of Part 1, Schedule 2 is either necessary or appropriate. The powers in section 2(2) of the European Communities Act 1972 already enable provisions by regulation to be made by the Scottish Ministers, in implement of EU obligations generally.
The Committee also draws to the attention of the lead committee that those powers in section 2(2) are exercisable subject to a choice of Parliamentary scrutiny by the affirmative or the negative procedure, and the Scottish Government is accountable to the Parliament for making the appropriate choice. The exercise of the power in paragraph 22(1) is however subject to the negative procedure, unless the proposals textually amend an Act. The exercise of powers under section 2(2) are also subject to certain restrictions, which are not included in the Bill.

It is not clear to the Committee why the exercise of the power in paragraph 22(1) should differ in those respects from the exercise of the powers under the 1972 Act.

Part 2 - outline of provisions

53. Section 10(1) allows the Scottish Ministers by regulations to make provision relating to protecting and improving the environment generally. This includes for any of the purposes listed in Part 1 of schedule 2.

54. It is proposed that the negative procedure will apply to regulations, unless there is textual amendment of primary legislation, when the affirmative procedure applies (section 44(4) and (5)).

55. Regulations may, for example, provide for the scope and extent of environmental activities. “Regulated activities” are environmental activities in respect of which the regulations make provision. Regulations may provide for a prohibition on carrying on specified regulated activities, for a prohibition on carrying on an activity without authorisation; for different levels of authorisation (permit, registration, notification, or compliance with general binding rules); for procedural requirements; for administrative charges by regulators for public registers; for enforcement powers (including statutory notices); for offences for failure to comply with regulatory requirements; and for measures equivalent to those that might be made under the European Communities Act 1972.

56. “Environmental activities” are defined in section 9 to mean activities that are capable of causing, or liable to cause, environmental harm, and activities connected with such activities. They are also defined to include provision implementing any EU or international obligations relating to protecting and improving the environment (for example, the Water Framework Directive (Directive 2000/60/EC), the Waste Framework Directive (Directive 2008/98/EC), the Basic Safety Standards Directive (Directive 96/29/Euratom), and the Industrial Emissions Directive (Directive 2010/75/EU)).

57. This proposes therefore a general power to implement EU or international obligations (by regulations always subject to the negative procedure, except where textual amendment is proposed to primary legislation).

58. Ministers must before making any regulations consult any regulator on whom functions will be conferred, and such other persons as they think fit (including
persons representative of the interests of local government, industry, agriculture, fisheries or small business, as considered appropriate) (section 11).

**Part 2 - commentary**

The policy justifications provided by the Scottish Government for the broad powers to make environmental regulations

59. The officials from the Scottish Government explained in evidence to the Committee that the Bill seeks to simplify the legislative landscape in relation to powers to make environmental regulations. In particular the approach taken proposes to combine the broad powers which are available in the Pollution Prevention and Control Act 1999 ("the 1999 Act") to regulate pollution control and prevention with a more proportionate scheme of regulation (compared with that in that Act), which allows for different types of regulation apart from permits. The Water Environment and Water Services (Scotland) Act 2003 ("the 2003 Act") contains, in respect of control of the water environment, a more proportionate scheme, so far as enabling other types of controls apart from permits, such as licensing or registration schemes, or under general binding rules.  

60. The officials also explained that the proposed new powers are intended to replace and consolidate the waste regimes in the Environmental Protection Act 1990 (Part 2) and the Radioactive Substances Act 1993.

61. The Committee takes the view that ultimately the policy justifications for the proposed enhanced powers to make regulations under section 10 and schedule 2, and whether they will be acceptable by the Parliament, are not matters for the Committee to rule on.

62. The Committee notes, however, that in proposing the approach which is outlined above, the powers to make environmental regulations would be considerably broadened, as well as consolidated. Indeed in the view of the Committee, the effect would be that the Scottish Ministers could propose that subordinate legislation could make any provisions for, or in connection with, protecting and improving the environment, in general. This would remove the necessity for primary legislation in those circumstances where it is currently required. It would also, however, remove the ability of the Parliament to insist on primary legislation in those circumstances, where the Scottish Ministers propose subordinate legislation under the Bill rather than new primary legislation, and the Parliament’s corresponding ability to amend the proposals, as opposed to having the right to either approve or annul them.

63. The officials sought to reassure the Committee in evidence that any proposals for regulations would be fully consulted on. Attention was drawn to the recent, detailed scrutiny of regulations made under the Pollution Prevention and Control Act 1999.  

---

10 Ibid
64. The Committee considers, however, that with the proposed widening of the powers to enable the regulation of environmental activities for any of the purposes listed in schedule 2 of the Bill, the provisions raise a matter of principle, as to the ability of the Parliament to scrutinise or amend any proposals coming forward in detail. Under the proposals, regulations could for example propose to further define “environmental activities” under the Bill, or specify other new activities as such (under paragraph 1 of Part 1, Schedule 2), and then prohibit or regulate them in some manner. The recommendations above therefore draw this to the attention of the lead committee and the Parliament.

The Parliamentary scrutiny procedure applied to regulations under Part 2 (section 10 and schedule 2)

65. The regulations under section 10 and schedule 2 are proposed to be subject to Parliamentary scrutiny by the negative procedure in all cases, except where they propose to textually amend an Act (section 44(4)). With the proposed widening of the powers, the Committee has concerns as to whether the procedures proposed in relation to the powers in section 10 and schedule 2 provide for full and adequate Parliamentary scrutiny of the respective regulations in all cases. The Scottish Government officials suggested in evidence that it has been adequate to date that specific activities have been regulated using powers in existing legislation which have been subject to scrutiny by the negative procedure.\(^{12}\)

66. The Committee considers that this is not a matter of being bound by the precedent of previous examples. The Committee is concerned that the negative procedure may not be appropriate in all cases of the exercise of the powers under sections 8 to 10 and schedule 2 of the Bill, particularly given the considerable list of purposes for which regulations may be proposed. The assessment of the appropriate scrutiny procedure is complex, given the width of the powers proposed.

67. Where provisions which currently require primary legislation are replaced by delegated powers, a “super-affirmative” form of procedure would enable the Parliament to consider and report on draft provisions, before an instrument is laid for approval. While scrutiny by “super-affirmative” procedure is not recommended for the exercise of all powers under section 10, in the view of the Committee this should be considered further in relation to those circumstances where the need for primary legislation would be removed by Part 2 of the Bill. Given the considerable list of possible provisions which could be made by regulations under section 10 and schedule 2, this is a complex matter. The Committee draws this to the attention of the lead committee.

68. The Committee also recommends that the Scottish Government should give further, full consideration to the significance of the powers and purposes in section 10 and schedule 2, and whether it would be more appropriate for some of them to be exercisable subject to the affirmative, rather than the negative, procedure.

---

69. The recommendations above highlight particular, significant purposes of the regulations as listed in schedule 2. In the view of the Committee, the exercise of these significant powers (on the assumption they are agreed in principle by the Parliament) could merit scrutiny under the affirmative procedure, on account of their potential significance and effects.

70. This is again, however, made more complex by the considerable list of purposes for which regulations could be made, as set out in schedule 2. For example, it could be more appropriate for the exercise of the powers to make a new fee or charging scheme for certain environmental activities subject to the affirmative procedure, while the further exercise of the powers only to uprate the fees or charges in line with the value of money might more appropriately be subject to the negative procedure.

71. The Committee considers therefore that the Scottish Government should review in advance of Stage 2 all the purposes for which the regulations may be proposed, and consider further in which circumstances the affirmative procedure (rather than the negative procedure) could be more appropriate for the scrutiny of the exercise of the powers, on account of their specific subject matter or effects.

72. The Scottish Government has indicated in a letter to the Committee dated 5 June 2013 (following the oral evidence session with officials) that it proposes to amend section 44 of the Bill at Stage 2. It is intended to provide that the first set of regulations to be made under section 10 would be subject to the affirmative procedure, but subsequently the negative procedure would apply. The reason given is that it is likely that the first set will amend primary legislation.

73. The Committee is not content with that proposal. It considers that the provision in section 44(4)(b), that the affirmative procedure will apply if the regulations textually amend an Act, is acceptable. Difficulties arise in connection with the suggested mechanism of the first exercise of the powers being subject to affirmative procedure, as applied to the powers under section 10.

74. For example, it would be possible for this power to be exercised on the first occasion to make minor provision for one specific purpose within the list of purposes in schedule 2. The Committee considers it to be obvious that the first exercise of the power need not necessarily be the only significant use of the power throughout the intended “lifetime” of the power.

Paragraph 22(1)(b) of Part 1, Schedule 2 (implementing EU obligations relating to protecting and improving the environment)

75. The Committee sought an explanation in the evidence session with the Scottish Government officials as to why the power in paragraph 22(1)(b) of Part 1, Schedule 2 is considered appropriate. The power allows the regulations to make provision that, “subject to any modifications that the Scottish Ministers consider appropriate”, corresponds or is similar to any provision made, or capable of being made, under section 2(2) of the European Communities Act 1972 in connection with an EU obligation relating to protecting and improving the environment.
76. It is not clear to the Committee why the power in paragraph 22(1)(b) is appropriate, nor why the exercise of the power should be different in those respects from the exercise of the powers under the 1972 Act to implement EU obligations. The Committee asks the Scottish Government for further explanation of this, in response to this Report.

77. The officials explained that paragraph 22(1)(b) has a predecessor provision in paragraph 20(1)(b) of schedule 1 to the 1999 Act, and there is a similar power in the 2003 Act. It was explained that the provision is intended to enable the implementation of EU obligations by using the one power in this Bill only.\(^\text{13}\)

78. The Committee was not convinced by that explanation. It appears that that provision in the 1999 Act is not repealed by the Bill provisions – it remains in force to be used apart from this Bill, if that is considered desirable. It was not explained to the Committee what the power in paragraph 22(1)(b) adds, and why that is appropriate, compared with the general powers under section 2(2) of the European Communities Act 1972 to implement EU obligations. The Committee does not consider it to be sufficient explanation that an existing power in the 1999 (Westminster) Act, which relates to pollution control and waste, is duplicated but extended to the implementation of EU obligations relating to protecting and improving the environment in general.

79. The Committee considers that the Scottish Government has not provided sufficient justification to it why the power in paragraph 22(1)(b) of Part 1, Schedule 2 is either necessary or appropriate. The existing powers in section 2(2) of the European Communities Act 1972 enable provisions by regulation to implement EU obligations generally.

80. The Committee notes that those powers are exercisable subject to a choice of Parliamentary scrutiny by the affirmative or the negative procedure, and the Scottish Government is accountable to the Parliament for making the appropriate choice. The exercise of the power in paragraph 22(1) is however subject to the negative procedure, unless the proposals textually amend an Act. The exercise of powers under section 2(2) are also subject to certain restrictions (stated in schedule 2 to the 1972 Act) which are not included in the Bill.

**Order-making powers in Part 2 and Part 3**

81. As explained earlier, the report now considers those delegated powers in Part 2 and Part 3 of the Bill that were explored with the Scottish Government by way of written correspondence.

**Part 2**

**Section 18(2)(b) – Undertakings under section 16: non-compliance penalties**

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

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

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

Comment
84. The Scottish Government in its written response in Annex A to this Report has confirmed that as the Bill does not set out any maximum amount for a non-compliance penalty under section 18, it will consider whether it is appropriate to amend the provisions to cater for such a maximum amount.

85. The Scottish Government considers that the negative procedure is suitable for an order setting out the calculation criteria, because no penalty can be imposed using those criteria until the provision for the penalty is approved by order, which is subject to the affirmative procedure.

86. If a suitable maximum amount of non-compliance penalty is stated in the Bill, the Committee would be content that the criteria by reference to which the exact level of such a penalty is determined could be specified by order subject to the negative procedure. The Scottish Government could also consider in advance of Stage 2 whether a maximum amount stated in the Bill could be amendable by order subject to the affirmative procedure. (This would be comparable to the provision for a variable penalty in section 15(7)).

87. The Committee notes that the Scottish Government has undertaken in advance of Stage 2 to consider whether it is appropriate for the Bill to specify an appropriate maximum amount which could be imposed as a non-compliance penalty in terms of section 18(2). The Committee considers that in principle a power should not be conferred to specify such a penalty of an unlimited amount. The Committee will consider the amendment after Stage 2.

88. The Committee would be content that, if a suitable maximum is specified in the Bill, the negative procedure could be applied to the exercise of the power by order to provide for the more detailed criteria, by which a non-compliance penalty is calculated.
Section 30(6) – Liability where activity carried out by arrangement with another

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

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

Comment
90. The Committee observed in the correspondence with the Scottish Government (Annex A) that the policy objective of this power as explained in the DPM is “to ensure that it is possible to apply the section 30 vicarious liability provisions to activities regulated under existing legislation, pending the introduction of the new permissioning framework under section 10. As a transitional measure Scottish Ministers require flexibility to extend this to cover activities currently regulated under regulations made under, for example, the Pollution Prevention and Control Act 1999 and the Water Environment and Water Services (Scotland) Act 2003.”

91. The Committee observed that the power is framed more widely, to enable an order to specify any activities as “regulated activities” for the purposes of section 30, beyond “environmental activities” as defined in section 9.

92. The Scottish Government has explained in its response (Annex A) that it agrees that the power is framed more widely than is indicated by the explanation of the policy intention in the DPM. It does not consider, however, that it is wide enough to cover the specification of any kind of activity. The Scottish Government has undertaken to consider lodging an amendment at Stage 2, to ensure that only “environmental activities” within the meaning of section 9(1) can be specified.

93. The Scottish Government has also explained that it considers that this power is necessary, beyond the separate powers to make transitional provisions, as it may be exercised before any provision in respect of “regulated activities” under the Bill is enacted.

94. The Committee notes that the Scottish Government has undertaken to consider lodging an amendment at Stage 2 to ensure that only “environmental activities” within the meaning of section 9(1) can be specified as “regulated activities” under section 30(6)(b). The Committee agrees that this would be appropriate. It will consider the amendment after Stage 2.
Section 39 – Meaning of “relevant offence” in Part 2

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

Provision

95. In Part 2 of the Bill, there are a wide range of provisions which only, or may only, apply in respect of a “relevant offence”. These include the offences in relation to which provision for fixed monetary penalties, variable monetary penalties and enforcement undertakings may be made. It also includes the offences in relation to which compensation orders, the vicarious liability provisions in sections 29 and 30, or the new significant environmental harm offence may apply.

96. Section 39 allows the Scottish Ministers to specify which offences constitute a “relevant offence”. When read in conjunction with section 44(1), the Scottish Ministers may specify different offences for different purposes so that, for example, a limited range of offences could be specified as a relevant offence for the purposes of the fixed monetary penalty provisions, and a wider range of offences specified in relation to which compensation orders could be made.

Comment

97. The DPM explains that the policy objective of this power is that “relevant offences” for the purposes of the various enforcement provisions in Part 2 will be drawn initially from the wide range of offences present under various pieces of existing environmental legislation. Once the different provisions in this Part and provisions in regulations made under section 10 are brought into force, it will be necessary for new offences created under those provisions (related to “environmental activities” as defined in section 9) to be added.

98. The Committee queried in correspondence (Annex A) that the power is framed to permit any type of offence to be specified by order, without this being limited to offences under currently relevant environmental legislation, or in relation to “environmental activities” under Part 2.

99. The Scottish Government has responded that section 39 allows the Scottish Ministers to specify that a “relevant offence” means an offence specified in an order made for “the purposes of this Part”. It is contended that the purpose of Part 2 is environmental regulation, and that context imposes limits on the type of offences that may be specified under this power. It is not intended that the power will be used to specify offences relating to non-environmental activities.

100. The Committee considers that it is not free from doubt that this power could only be used competently to specify offences relating to either currently relevant environmental legislation, or “environmental activities” as defined in Chapter 1 of Part 2. While that Chapter defines “environmental activities” and the Part is headed “Environmental regulation”, some provisions in Chapters 3 and 4 on court powers and vicarious liability which relate to “relevant offences” are not clearly limited to relate only to environmental activity offences.
101. It is not considered to be wholly clear therefore that the definition of “relevant offence” mentioned above means that only environmental activity offences could competently be specified.

102. The Committee therefore notes that the policy objective of the power to specify “relevant offences” by order under section 39, for the purposes of the various enforcement provisions in Part 2, is that these will be drawn initially from the wide range of offences under various pieces of existing environmental legislation. Once the different provisions in Part 2 and provisions in regulations made under section 10 are brought into force, it will be necessary for new offences created under those provisions (related to “environmental activities” as defined in section 9) to be added.

103. The Committee considers that it is not wholly clear in the Bill that only offences related to those environmental activities could competently be specified as “relevant offences”- for example in connection with the compensation order and fines provisions in sections 26 and 27, or the vicarious liability provisions in sections 29 and 30. It appears possible therefore that the power as drafted could be used for wider purposes than those indicated by the stated policy objectives.

104. The Committee therefore asks the Scottish Government to consider this further, in advance of Stage 2.

Part 3

Section 41 – Planning authorities’ functions: charges and fees
Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative

Provision
105. Section 41 inserts new provision into section 252 of the Town and Country Planning (Scotland) Act 1997. The new provision in subsection (1A) enables Scottish Ministers to make regulations for the charge or fee payable to different planning authorities to be of different amounts. This can only be done under the new provision where Scottish Ministers are satisfied that the functions of an authority are not being performed satisfactorily.

106. Section 41(c) removes subsections (5) and (6) of section 252, so that all regulations made under section 252 are subject to the negative procedure. (Currently section 252(5) provides for negative procedure only where the regulations provide for the calculation of the charge or fee, and the amendments result from changes in the cost of living, the retail prices index or an inflation index, or specify the person by whom the calculation is to be made.)

Comment
107. The Committee queried in correspondence (Annex A) that the reason provided in the DPM for the proposed downgrading of the level of Parliamentary scrutiny of the regulations from affirmative to negative procedure is simply that this
is a change in the proposed policy. In response, the Scottish Government referred to other instruments containing powers to set fee levels for other activities, where the scrutiny of the instrument is subject to the negative procedure.

108. While such comparison might be useful, the Committee considers that Parliament, in considering which level of scrutiny is appropriate for regulations setting the levels of planning charges, has no requirement to apply a level of scrutiny which has been assessed previously to be appropriate in other legislation relating to fees chargeable for different types of activity.

109. The Committee draws to the attention of the lead Committee in connection with section 41 that the powers to set planning fees and charges in section 252 of the Town and Country Planning (Scotland) Act 1997 were amended and extended by section 31 of the Planning etc. (Scotland) Act 2006. The Parliament considered in passing the 2006 Act that, with specified exceptions, the affirmative procedure would be an appropriate level of Parliamentary scrutiny for the exercise of these powers.

110. The Committee considers that the Scottish Government has not provided sufficient justification to it for the provision in section 41(c) that all regulations made under section 252 of the Town and Country Planning (Scotland) Act 1997 in connection with planning fees and charges should be subject to the negative procedure, or why the level of scrutiny enacted in the Planning etc. (Scotland) Act 2006 should be departed from.

111. The Committee asks the Scottish Government to comment further on this, in its response to this Report.

Section 44(1) (subordinate legislation)

112. Section 44(1) provides that any powers of the Scottish Ministers to make an order or regulations under this Act includes the power to make (a) different provision for different purposes and (b) incidental, supplemental, consequential, transitional, transitory or saving provisions.

113. The Committee explored in evidence with the Scottish Government officials why the ancillary powers in this Bill are required.

114. The Committee draws to the attention of the lead committee that it has a concern as to the potentially wide and uncertain scope of the power in section 44(1) to make supplemental provision, as ancillary to the powers to make regulations under sections 1 and 10 (and schedule 2) of the Bill. Section 1(1) enables Ministers to make any provision they consider will encourage or improve consistency in the exercise by regulators of regulatory functions. Section 10 enables regulations which make provision for any of the many purposes set out in Schedule 2. Those powers would be wide and to some extent uncertain in their possible scope, without adding a further power to make supplemental provisions.
Section 45 – Ancillary provision
Power conferred on: Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative procedure, unless the order modifies or repeals primary legislation, in which case affirmative procedure

115. Section 45(1) contains further powers to make ancillary provisions. The Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of the Act (if passed). Such an order may modify any enactment (including the Act itself), instrument or document.

116. The Committee draws to the attention of the lead committee that it also has a concern as to the potentially wide and uncertain scope of the power in section 45 to make supplemental provisions in an order under the section, as ancillary to the powers to make regulations under sections 1 and 10 (and schedule 2) of the Bill.
ANNEX A

Correspondence with the Scottish Government

On 7 May, the Subordinate Legislation Committee wrote to The Scottish Government as follows:

Section 4 (Power to give guidance to regulators as to the carrying out of the duty described in section 4(1))

1. In relation to the power to issue guidance which regulators must have regard to in section 4, the Committee asks for explanation of these matters—

- So far as the guidance will give content to the scope and detail of the duty placed on regulators listed in schedule 1 to contribute, in exercising their regulatory functions, to achieving sustainable economic growth, could it be explained what the guidance could cover, with reference to examples related to the listed regulators (including local authorities), so that the Committee can further understand how this power could be exercised?

- Why has it been considered not appropriate to require the guidance to be laid in Parliament for approval, or for section 4 to provide that specified persons must be consulted on the draft (which is in contrast with the requirements in section 6(4) to (6) as regards the code of practice in relation to regulatory functions)?

Section 18(2)(b) – Undertakings under section 16: non-compliance penalties

2. The Committee asks the Scottish Government for an explanation of the following matter—

- Can the Scottish Government explain why the negative procedure is considered a suitable level of scrutiny for prescribing the amount payable for a non-compliance penalty under section 18(2), given that the affirmative procedure is considered appropriate for the scrutiny of fixing the amount of fixed and variable monetary penalties under sections 12 and 15; and in the case of section 18(2) the Bill does not set any maximum amount of non-compliance penalty that may be set in an order?

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

3. The Committee asks the Scottish Government for an explanation of the following matters, in relation to the power in section 30(6).

4. The policy objective of this power as explained in the DPM is “to ensure that it is possible to apply the section 30 vicarious liability provisions to activities
regulated under existing legislation, pending the introduction of the new permissioning framework under section 10. As a transitional measure Scottish Ministers require flexibility to extend this to cover activities currently regulated under regulations made under, for example, the Pollution Prevention and Control Act 1999 and Water Environment and Water Services (Scotland) Act 2003.”

5. However the power is framed wider than this, to enable an order to specify any activities at all as “regulated activities” for the purposes of section 30, beyond “environmental activities” (as defined in section 9(3)) – and with no restriction as to transitional provision.

- Could it be explained why the power could not be drawn more narrowly, when the intention is to specify further activities under the relevant existing legislation only, and as a transitional measure?

- Is this power necessary, given the scope to make transitional provisions by order proposed to be available in sections 44 and 45?

Section 39 – meaning of “relevant offence” in Part 2

6. The Committee asks, in relation to the power to specify “relevant offences” by order in section 39, for an explanation of the following matter—

7. The DPM explains that the policy objective of this power is that “relevant offences” for the purposes of the various enforcement provisions in Part 2 will be drawn initially from the wide range of offences present under various pieces of existing environmental legislation. Once the different provisions in this Part and provisions in regulations made under section 10 are brought into force, it will be necessary for new offences created under those provisions (related to “environmental activities” as defined in section 9) to be added.

8. However the power is framed to permit any type of offence to be specified by order, without this being limited to offences under currently relevant environmental legislation, or in relation to “environmental activities” under Part 2. For example, it appears that the power is capable of being used to specify offences related to non-environmental activities, for the purposes of the vicarious liability provisions in sections 29 and 30.

- Given the policy objective as set out above, why is it considered appropriate for the power to be drawn that widely? Would it be possible to narrow the scope of the power to encompass currently relevant environmental offences, or offences related to “environmental activities” as defined in section 9?

Section 41 - Planning authorities functions: charges and fees

9. The Committee seeks an explanation of the following in relation to the powers in section 41.

10. Section 41 (c) removes subsections (5) and (6) of section 252 of the 1997 Act, so that all regulations made under section 252 to set fees and charges payable to a planning authority are subject to the negative procedure. The
explanation given in the DPM for this change is simply that it is a change in the proposed policy.

11. However, the powers to set planning fees and charges in section 252 were amended and extended by section 31 of the Planning etc. (Scotland) Act 2006. The Parliament considered in passing the 2006 Act that, with specified exceptions, the affirmative procedure is an appropriate level of Parliamentary scrutiny of the exercise of these powers.

- Further explanation is sought as to the reasons why this downgrading of the level of scrutiny is considered to be appropriate, to assist the Committee to consider the power further.

The Scottish Government responded as follows:

**Section 4 (Power to give guidance to regulators as to the carrying out of the duty described in section 4(1))**

The principal and most comprehensive document for regulators will be the Code of Practice issued under section 5, which will of course be subject to Parliamentary approval. The Scottish Government believes strongly that any such code of practice must be developed by regulators and stakeholders and is therefore establishing a short-life group with the following remit:

- Develop a draft Scottish Regulators’ Code of Practice, for consultation later in 2013, providing guidance which regulators would have regard to when determining policies, setting standards or giving guidance in relation to their duties. The draft code should address and take account of the inter-relationship between: supporting sustainable economic growth; risk assessment; information, advice and inspections; compliance and enforcement actions; and accountability. The draft code should also support consistent regulation at policy and operational levels.
- The Group will be encouraged to involve wider stakeholders through pre-consultation discussion.

The power in subsection (2) of section 4 enables the Scottish Ministers to give additional and more specific guidance to regulators with respect to the carrying out of the economic duty, and subsection (3) requires regulators to have regard to it. The guidance can be in any form but it would be supplementary to any relevant material within a Code of Practice issued under section 5. Unlike the Code, guidance under section 4 can (under present drafting of the Bill) be issued without being approved in draft by the Parliament. This therefore provides flexibility to quickly adjust or supplement guidance which is specific to the duty, for example in response to a specific request from a regulator.

**Section 18(2)(b) - Undertakings under section 16: non-compliance penalties**

The Scottish Government considers that negative procedure is suitable for an order setting out the calculation criteria because no penalty can be imposed using
those criteria until the provision for the penalty is approved by an affirmative order. In context, setting the criteria can be seen as an ancillary measure for which negative procedure is appropriate.

The Scottish Government agrees that Bill does not set out any maximum amount for a non-compliance penalty, and will consider whether it is appropriate to amend the variable penalty measures at stage 2.

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

Section 30(6) allows the Scottish Ministers to specify "regulated activities" in an order made "for the purposes of this section". The policy intention is, as commented, to use the power to specify activities regulated under existing environmental legislation such as the Pollution Prevention and Control (Scotland) Regulations 2012.

The Scottish Government agrees that the power is framed more widely than that, but does not consider that it is wide enough to cover the specification of any kind of activity. The specified activity will need to be an environmental activity of some kind, as is consistent with the policy intention. While any attempt to use the power to apply the section 30 provisions to activities unrelated to the environment would undoubtedly be subject to adverse comment from the committee, we would be happy to consider an amendment to ensure that only “environmental activities” within the meaning of section 9(1) can be specified.

The Scottish Government considers that the power is necessary, even given the scope of the separate power to make transitional provisions, as it may be exercised before any provision in respect of regulated activities under the Bill is enacted.). We consider it to be a transitional power in that broad sense, rather than in the more narrow sense appropriate to transitional measures under section 44 and 45 relating to a revocation and re-enactment in respect of a particular activity.

Section 39 - meaning of "relevant offence" in Part 2

Section 39 allows the Scottish Ministers to specify that a “relevant offence” means an offence specified in an order made for “the purposes of this Part”. The purpose of this Part is environmental regulation, and that context imposes limits on the type of offences that may be specified. It is not intended that the power will be used to specify offences relating to non-environmental activities. The provisions on vicarious liability in sections 29 and 30 are still within Part 2 so the type of offences that may be specified under these provisions must also relate to environmental regulation. As above, any attempt to use the power to apply the vicarious liability provisions, or any of the other enabling provisions dependent on the “relevant offences” definition in section 39, to activities unrelated to the environment would undoubtedly be subject to adverse comment from the Committee.

During drafting of this provision, consideration was given to the model in section 38 of the Regulatory Enforcement and Sanctions Act 2008. In the context of a
system applying to multiple regulators the power to permit them to use civil sanctions is restricted to “relevant offences”, i.e. those offences for which the regulator has an enforcement function. The model was considered to be unnecessarily complicated for provisions that apply only to SEPA.

The Scottish Government does not therefore consider that it is necessary, or appropriate, to narrow the scope of the power in section 39.

Section 41 – Planning authorities functions: charges and fees

It appears that it is usual for SSIs which set fees to be subject to negative procedure. For example in 2011 and 2012 instruments setting fees for the following subjects were laid before the Scottish Parliament and subject to negative procedure—

- Marine licensing (S.S.I. 2011/78, made under section 67(2) of the Marine and Coastal Access Act 2009 and section 25(1)(b) of the Marine (Scotland) Act 2010 and subject to negative parliamentary procedure under sections 316(8) of the 2009 Act and section 165(4) of the 2010 Act),
- Bankruptcy (S.S.I. 2012/118, made under section 69A of the Bankruptcy (Scotland) Act 1985 and subject to negative parliamentary procedure under section 72(1) of that Act),
- Private landlord registration (S.S.I. 2012/151 made under sections 83(3) and 878(2C) of the Antisocial Behaviour etc. (Scotland) Act 2004 and subject to negative parliamentary procedure under section 141(1) of that Act),
- Road work inspections (S.S.I. 2012/250, made under section 134 of the New Roads and Street Works Act 1991 and subject to negative parliamentary procedure under section 163(2) of that Act), and
- the Public Guardian (S.S.I. 2012/289, made under section 7(2) of the Adults With Incapacity (Scotland) Act 2000 and subject to negative parliamentary procedure under section 86(1) of that Act).

Further, section 56 of the Finance Act 19973 provides that regulations prescribing fees chargeable by Scottish Ministers regarding implementation of EU obligations are subject to negative procedure.

In these circumstances we consider that it is reasonable that instruments setting fees for planning applications should be brought into line with other fees regimes and therefore should be subject to negative procedure.
ANNEX B

Correspondence with the Scottish Government

On 30 May, the Subordinate Legislation Committee wrote to The Scottish Government as follows:

In relation to part 1 of the Bill, the Committee noted that the power in section 4 to give guidance to regulators is not subject to any Parliamentary procedure. The Committee expressed its preference that the guidance should be published and therefore seeks clarification from the Scottish Government as to whether it intends to do so.

In relation to part 2 of the Bill, Paragraph 22 of schedule 2 allows the regulations to make provisions that are capable of being made under the European Communities Act 1972. The Committee asked the Scottish Government why the power was appropriate, given that the 1972 act is the general enabling provision that allows the implementation of EU obligations by subordinate legislation. In his response, Mr Burgess stated that this is a similar power to that in paragraph 20 of Schedule 1 of the Pollution Prevention and Control Act 1999 (PPCA). Whilst the Committee agrees that the power in the PPCA is similar, it notes that it is limited to the implementation of the “relevant directives”.

Further to this, the Committee noted that different scrutiny procedures apply to the regulations. In section 44 of the Bill, the regulations are subject to the negative procedure, except where there is textual amendment of an Act. Sections 2(7) to (9) of the PPCA provide that the affirmative procedure must apply to the first regulations which apply in relation to Scotland. Thereafter the regulations are subject to the negative procedure except in cases where: they create an offence, they increase a penalty for an existing offence or they make textual amendments to Acts. Section 2(7) of the PPCA further states that, except from in instances where the affirmative procedure must apply, Ministers have the discretion to choose to apply either the negative or affirmative procedure to regulations. The Committee invites the Scottish Government to confirm the level of scrutiny that is to be applied to regulations under section 44 of this Bill.

Finally, during the evidence session some Members expressed concern in relation to the Bill’s consistency with European legislation. The Committee invites further reflection on this matter.

The Scottish Government responded as follows:

Part 1 – Section 4 – Regulators’ duty in respect of sustainable economic growth

In relation to the Committee’s question about guidance to regulators not being subject to any Parliamentary procedure, I would stress that substantive statutory guidance will take the form of the Code of Practice also proposed in part 1. This
will be subject to Parliamentary approval. As regards publication of the guidance, I can confirm that it is the Scottish Government’s intention that the Code itself will be published and, having consulted Ministers, also that ad hoc ministerial guidance relevant to the economic duty will also normally be published.

Schedule 2 – Paragraph 22

The Committee is correct to note that the similar power in paragraph 20 of Schedule 1 to the Pollution Prevention and Control Act 1999 is limited to “relevant directives”. However, in addition to the two Directives referred to in paragraph 20(1)(a) and (b), the definition of “relevant directives” includes “any other directive…. designated by [Ministers] for the purposes of this paragraph by order made by statutory instrument”. That power to designated directives has been used frequently, most recently in making the Pollution Prevention and Control (Designation of Industrial Emissions Directive) (Scotland) Order 2011 (SSI 2011/423) as a precursor to the implementation of the Industrial Emissions Directive in the Pollution Prevention and Control (Scotland) Regulations 2012. The order designating directives, while a statutory instrument, is not subject to any parliamentary procedure. In the view of the Scottish Government, this requirement to designate directives by order adds little to transparency or oversight. That is why paragraph 22 of Schedule 2 to the Bill takes the different approach of referring generally to EU obligations relating to protecting and improving the environment, with the power in paragraph 29 for Ministers by order to specify an EU instrument as one containing such an obligation – as explained in the Delegated Powers Memorandum, this is intended to deal with cases of doubt.

Scrutiny Procedures

We assume that this question is directed to regulations under section 10. This issue was addressed in Committee (cols. 947 and 948).

The Scottish Government accepts that the scrutiny of the section 10 power differs in some respects from what is provided for in sections 2(7) to (9) of the Pollution Prevention and Control Act 1999, although it notes that the Bill provides for the same level of scrutiny as is the case under section 36 of the Water Environment and Water Services (Scotland) Act 2003.

We think that the proposed level of scrutiny is appropriate, but accept that in practice it is likely that the first set of regulations will amend primary legislation and be subject to affirmative procedure for that reason. That being so we propose to amend section 44 at stage 2 to replicate the requirement in the PPCA that the first set of regulations made under section 10 should be subject to affirmative procedure.

In evidence to the Committee, Dr Burgess suggested that the Interpretation and Legislative Reform (Scotland) Act 2010 would allow the affirmative procedure to be used even if only the negative procedure is mandated, and that this provided flexibility to use either affirmative or negative procedure depending on the subject-matter of the instrument. Unfortunately on closer consideration of the legislation it
appears that this ability to use affirmative rather than negative procedure only applies where two or more powers are combined in a single instrument.

**Consistency with European Legislation**

The Scottish Government considers that the Bill is fully consistent with European legislation. The Bill has been certified by the Presiding Officer and by the Cabinet Secretary for Finance, Employment and Sustainable Growth as being within the legislative competence of the Parliament, one of the tests in this connection being whether or not the Bill is compatible with EU law.
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.