

The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

8th Report, 2010 (Session 3)

**Marine (Scotland) Bill as amended
at Stage 2**

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Published by the Scottish Parliament on 28 January 2010



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Subordinate Legislation Committee

Remit and membership

Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

(a) any-

(i) subordinate legislation laid before the Parliament;

(ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter;

(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; and

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

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Jackson Carlaw
Margaret Curran
Bob Doris
Helen Eadie
Rhoda Grant
Ian McKee (Deputy Convener)

Jamie Stone (Convener)

Committee Clerking Team:

Clerk to the Committee

Douglas Wands

Assistant Clerk

Jake Thomas

Support Manager

Stephen Fricker



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8th Report, 2010 (Session 3)

Marine (Scotland) Bill as amended at Stage 2

The Committee reports to the Parliament as follows—

1. At its meeting on 26 January 2010, the Subordinate Legislation Committee considered the delegated powers provisions in the Marine (Scotland) Bill as amended at Stage 2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.
2. The Scottish Government provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill (“the supplementary DPM”)¹. The Committee considered the powers set out in the supplementary DPM.

Delegated Powers Provisions

3. The Committee considered all the powers as set out in the supplementary DPM and is content with sections: 17(3), 17A, 17B, 17C, 24(1), 27(1C), 59(1A) and 85(2A).

Section 29(1) - Power to make provision for any person who applies for a marine licence to appeal against a decision made under section 22; and

Section 52(1) - Power to make provision for any person to whom a notice listed in subsection (2) is issued to appeal against that notice

4. The Committee accepts that the *details* of appeal procedures can be left to subordinate legislation, provided that the core elements or outline of any appeals mechanism are established in the Bill. It is acknowledged that details of appeals procedures may require to be adjusted in the light of experience. However, there is no substantive provision for appeals in the Bill, only a requirement for an appeals mechanism to be put in place by regulations. The Committee considers that that is neither sufficient nor appropriate.

¹ [Supplementary Delegated Powers Memorandum](#)

5. While the Committee would not anticipate that detailed rules of procedure would be set out in primary legislation, it would expect the appeal body to be specified in the Bill. Provision should also be made in the Bill for matters such as the grounds of appeal, the legal consequences of an appeal being initiated, and the jurisdiction and powers of the appellate body.

6. The Committee acknowledges that the Parliament will be able to scrutinise an affirmative instrument, but the scrutiny afforded by affirmative procedure is not the same as that afforded by primary legislation. The Committee notes that the Bill prevents the licensing regime from coming into force until an appeals mechanism is in place, but the Committee cannot examine the appeals mechanism at this stage.

7. The Committee expresses dissatisfaction that important elements of the appeal regime are not expressed in primary legislation. However, the Committee accepts that affirmative procedure affords a reasonable degree of Parliamentary control.

Section 141A - Extension of modifications relating to the Sea Fish (Conservation) Act 1967

Powers to make an order under Sections 1, 3 and 5 of the Sea Fish (Conservation) Act 1967

8. The Committee considers that the drafting is complex. The Committee notes that to understand the position proposed in the Bill it is necessary to read the Sea Fish (Conservation) Act 1967, which has been significantly amended.

9. The Committee notes that none of these powers is a new power as such, but is a refinement which broadens the scope of an existing power available to the Scottish Ministers. The Committee considers that the increased scope of each power is not significant in the overall context of the power or the purpose of the relevant provision. The Committee considers that the scope of each power is limited to what is specified in the provision and agrees that each of these “new” powers may properly be considered as a fine tuning of existing powers for a legitimate purpose. The Committee is therefore content with each of these powers in principle.

10. The Committee notes that the supplementary DPM states that negative procedure is applicable in each case. However, the Committee considers that that is not the case. The relevant procedures are set out in section 20 of the 1967 Act. Section 20(2) provides that any power conferred by sections 1, 3 or 5 is exercisable by statutory instrument. Section 20(3) provides that orders under sections 1 or 3 require to be laid before Parliament. They are not subject to any Parliamentary procedure. Section 20(5) provides that an order under section 5 is subject to negative procedure, but section 20(6) provides that where an order under section 5(1) is made so as to have effect in relation to salmon or migratory trout (whether or not it is made so as to have effect in relation to any other type of fish), it is subject to affirmative procedure.

11. The Committee notes that the applicable procedures have not changed in consequence of the amendments at Stage 2. The Committee notes that what is

stated in the supplementary DPM with respect to sections 1 and 3 is incorrect and that what is stated in the supplementary DPM with respect to section 5 has to be qualified as set out above.

12. The Committee reports that it is content with the amendments to the powers in sections 1, 3 and 5 of the Sea Fish (Conservation) Act 1967 in consequence of section 141A and 141B of the Bill in principle. The Committee notes that, contrary to what is stated in the Delegated Powers Memorandum, the powers are subject to no procedure, no procedure and negative procedure respectively, with the qualification that any order under section 5(1) which has effect in relation to salmon or migratory trout is subject to affirmative procedure.

13. The Committee also considers that the complexity of the drafting seriously inhibits transparency and understanding of the scope of the powers, by whom they are exercisable and the Parliamentary procedure to which they are subject in their application to Scotland.

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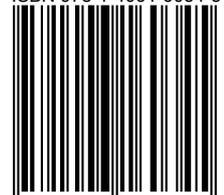
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ISBN 978-1-4061-6034-5

ISBN 978-1-4061-6034-5



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