DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

18th Meeting, 2018 (Session 5)

Tuesday 22 May 2018

The Committee will meet at 10.00 am in the Adam Smith Room (CR5).

1. Decision on taking business in private: The Committee will decide whether to take items 6, 7 and 8 in private.

2. Instruments subject to affirmative procedure: The Committee will consider the following—

- Environmental Authorisations (Scotland) Regulations 2018 [draft];
- Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2018 [draft];
- ILF Scotland (Miscellaneous Listings) Order 2018 [draft].

3. Instruments subject to negative procedure: The Committee will consider the following—

- Ethical Standards in Public Life etc. (Scotland) Act 2000 (ILF Scotland) Order 2018 (SSI 2018/148);
- National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2018 (SSI 2018/151);
- Housing (Scotland) Act 2014 (Commencement No. 8, Savings, Transitional and Supplemental Provisions) Order 2018 (SSI 2018/153 (C.14));
- Short Scottish Secure Tenancies (Notice) Regulations 2018 (SSI 2018/154);
- Short Scottish Secure Tenancies (Proceedings for Possession) Regulations 2018 (SSI 2018/155);
- Scottish Secure Tenancies (Proceedings for Possession) (Form of Notice) Amendment Regulations 2018 (SSI 2018/156).

4. Instruments not subject to any parliamentary procedure: The Committee will consider the following—

- Wild Animals in Travelling Circuses (Scotland) Act 2018 (Commencement) Regulations 2018 (SSI 2018/149 (C.13));
5. **Planning (Scotland) Bill:** The Committee will consider the Scottish Government’s response to its Stage 1 report.

6. **Management of Offenders (Scotland) Bill:** The Committee will consider the contents of a report to the Justice Committee.

7. **Housing (Amendment) (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

8. **Annual report:** The Committee will consider a draft annual report for the parliamentary year from 12 May 2017 to 11 May 2018.

Andrew Proudfoot
Clerk to the Delegated Powers and Law Reform Committee
Room T1.01
The Scottish Parliament
Edinburgh
Tel: 0131 348 5212
Email: andrew.proudfoot@parliament.scot
The papers for this meeting are as follows—

**Agenda Items 2, 3 and 4**

Briefing on Instruments (private)  
DPLR/S5/18/18/1(P)

**Agenda Item 2**

Instrument Responses  
DPLR/S5/18/18/2

**Agenda Item 5**

DPLR Committee, 11th Report, 2018: Planning (Scotland) Bill at Stage 1  
Briefing Paper  
DPLR/S5/18/18/3

**Agenda Item 6**

Management of Offenders (Scotland) Bill - As Introduced  
Management of Offenders (Scotland) Bill - Delegated Powers Memorandum  
Draft Report (private)  
DPLR/S5/18/18/4(P)

**Agenda Item 7**

Housing (Amendment) (Scotland) Bill - As Amended  
Housing (Amendment) (Scotland) Bill - Supplementary Delegated Powers Memorandum  
Briefing Paper (private)  
DPLR/S5/18/18/5(P)

**Agenda Item 8**

Draft Annual Report (private)  
DPLR/S5/18/18/6(P)
DELEGATED POWERS AND LAW REFORM COMMITTEE

18th Meeting, 2018 (Session 5)

Tuesday 22 May 2018

Instrument Responses

INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE

Environmental Authorisations (Scotland) Regulations 2018 [draft]

On 11 May 2018, the Scottish Government was asked:

1. Regulation 61 allows SEPA to treat a regulated activity under one type of authorisation as being an activity which should be carried on under another type of authorisation. If SEPA decides to do this, the holder of the authorisation is due to pay a fee under a charging scheme for the replacement authorisation having potentially paid a fee in respect of the original authorisation.

Under Rule 10.3.1(g) of the Parliament's Standing Orders, the Committee is required to determine whether the attention of the Parliament should be drawn to an instrument on, among others, the ground that the instrument, or any provision of it, has been made by what appears to be an unusual or unexpected use of the powers conferred by the parent statute.

So far as there appears to be a duplication in the charges for authorisations, please clarify why this provision is considered as a usual or expected use of the powers to make charging schemes in paragraph 13 of schedule 2 of the Regulatory Reform (Scotland) Act 2014?

2. Paragraph 11 of schedule 2 provides that a person granting an off-site right has to make a claim for compensation within a period of (a) six months of the first exercise of the off-site right; or (b) twelve months of the off-site right being granted, whichever is later. Please explain why these periods are considered to achieve a fair balance between the aim of enabling off-site conditions to be met and the interference with the grantor's rights under Article 1 of Protocol 1 of the Convention?

3. (a) Please explain whether it is considered that the provisions for the recovery of charges for the disposal of radioactive waste contained in paragraph 38 of schedule 8 would be made within the powers to make charging schemes contained in paragraph 13 of schedule 2 of the 2014 Act, and if so, the basis on which that is considered? Alternatively, please explain the power which is relied on to make the provision.

(b) In that respect, paragraph 38 relates to special precautions for the disposal of radioactive waste, which may either be taken in compliance with the conditions of an authorisation for the disposal of such waste, or taken with the prior approval of SEPA as precautions which ought to be taken by the authority. So far as subparagraph (ii) of paragraph 13(a) of schedule 2 of the 2014 Act enables charges in respect of the variation of a permit or the conditions to which it is subject, and paragraph 13(e) enables charges in respect of "other specified matters", is it considered that
paragraph 38 may be made by virtue of the power in paragraph 13(e) of schedule 2? If so, is there any omission from the Regulations in respect that they do not appear to specify the matters for which a charging scheme is made, for the purposes of paragraph 13(e)?

The Scottish Government responded as follows:

1. Paragraph 13(1) of schedule 2 makes provision for regulators to make, vary and revoke schemes for the charging by regulators of fees in relation to, among other things, the grant of a permit.

However, paragraph 11(5)(c) of schedule 2 makes provision for the specification in regulations of circumstances in which a person may be deemed to be authorised to carry on a regulated activity without having applied for a permit or registration or having given notification. Scottish Government considers that this power is to be exercised to make the provision contained in regulation 61(2). Scottish Government does not consider that it is providing for a charging scheme in regulation 61(2), and so paragraph 13(1) of schedule 2 of the 2014 Act is not engaged.

Regulation 2(1) of the Regulations defines the charging scheme as “a charging scheme made in accordance with section 41 of the Environment Act 1995” (1995 c.23). The Regulations do not confer any new powers on SEPA to make charging schemes, and SEPA will use the powers conferred by section 41 of the 1995 Act to make the charging scheme that will apply to these Regulations.

The effect of regulation 61(2) is not to make a charging scheme but to specify that in these circumstances a fee, if one is specified in the charging scheme, will be payable.

Scottish Government does not consider this to be an unexpected or unusual approach. For example, it is consistent with the Water Environment (Controlled Activities)(Scotland) Regulations 2011 which are another Scottish environmental regime which allows for escalation of authorisations. Regulation 10(2)(a) of the 2011 Regulations also provides that a charge is payable in these circumstances. The charging scheme (The Environmental Regulation (Scotland) Charging Scheme 2018) provides for a charge for an imposed authorisation that is 25% higher than the normal application charge.

However, that charge would only apply where an authorised person was refusing to apply for the correct authorisation. In the situation where an authorised person has applied for the wrong type of authorisation, the charging scheme envisages that the original application fee would be refunded (minus a sum equal to 20% of the charge, up to a maximum of £1500, to cover SEPA’s costs). In practice, a person is not required to pay two full application charges. Please note that SEPA requires to make another charging scheme under section 41 of the 1995 Act for these Regulations.

2. Scottish Government considers that the interference with a grantor’s rights under Article 1 of the First Protocol can be analysed as follows.

The grant of an off-site condition would constitute an interference with the grantor’s peaceful enjoyment of his or her property in that there would be a control imposed on his or her use of property.

The off-site condition would be contained in secondary legislation and thus be provided for by law.
Off-site conditions are part of a system for environmental protection and are therefore a legitimate aim in the general public interest. The European Court of Human Rights has recognised environmental protection as a legitimate interest (for example Fredin v Sweden). It has also stated that:

“The Court will respect a national legislature’s judgement as to what is in the public interest when implementing social and economic policies unless that judgement is manifestly without reasonable foundation” (James v UK at paras 46-47)

The ECtHR has also considered that environmental conservation policies confer on the state a margin of appreciation that is greater than when exclusively civil rights are at stake (Chapman v UK [GC] paragraph 83).

It is clear that an interference with a right must meet the requirement of proportionality. In Sporrong and Lonnroth the requirement of proportionality was stated to require, “a fair balance between the protection of the right of property and the requirements of the general interest.”

Scottish Government considers that the scheme for off-site conditions, taken as a whole, meets these requirements. The following protections have been provided for a grantor:-

i. Off-site conditions are only provided for in circumstances where there is a risk of greater impact on the environment. An off-site condition can be provided for in a permit (which will be required for activities with the greatest potential environmental impact), but not in a registration, notification or general binding rule. An off-site condition can also be contained in a regulatory notice, but a regulatory notice may only be granted in the circumstances set out in regulation 46(1)(a) (which stipulate the prevention of environmental harm, the restoration of the environment, or the occurrence of an offence or other breach of the regulations). An off-site condition can be included in a revocation or surrender notice, a circumstance in which it is desired to have an authorised person remEDIATE environmental harm caused by its activity.

ii. SEPA can only impose an off-site condition where it considers it necessary to (a) prevent or mitigate environmental harm (b) monitor the impact of an activity on the environment or human health or (c) restore the environment affected by the regulated activity.

iii. SEPA must give notice to a grantor of a proposal to impose an off-site condition, and the grantor has a 28 day period in which to make representations which SEPA is required to consider.

iv. A grantor can appeal against an off-site condition to the Scottish Ministers.

v. A grantor is entitled to compensation.

The ECtHR has made clear that compensation is a relevant factor in assessing whether an interference with an individuals’ property right is proportionate and thus compliant with Article 1 of Protocol 1 (James v UK at para 54; Papachelas v Greece at para 48; Lithgow and Others v UK at para 120).

As a general rule, where an individual is deprived of his property this can only be proportionate where the individual is given compensation that is related to the market value of the property in question. (James v UK at para 54; Papachelas v Greece at para 48; Lithgow and Others v UK at para 120).
The off-site condition scheme does allow for compensation at market value (paragraph 12(2) of schedule 2 of the regulations, as read alongside section 12(2) of the Land Compensation (Scotland) Act 1963).

Scottish Government was specifically asked why the periods set out in paragraph 11 of schedule 2 are considered to achieve a fair balance between the aim of enabling off-site conditions to be met and the interference with the grantor’s rights under Article 1 of Protocol 1 of the Convention.

The selection of these time periods is part of the exercise of striking a fair balance between the protection of the right of property and the requirements of the general interest, including a balance between giving the grantor a reasonable period of time to claim compensation and allowing the authorised person (or SEPA where paragraph 8 of schedule 2 is engaged) the certainty of having the extent of their liability determined.

By allowing claims to be submitted by the later of 12 months from the date that the entitlement to compensation arises, Scottish Government would be allowing a 12 month period where the off-site right is exercised soon after the grant of the right. If the authorised person delays the exercise of the right, then the grantor would be allowed an extended period of up to 6 months from the date of the first exercise to make a claim.

The periods of time chosen by Scottish Government are the same as those in:

i. the Water Environment (Controlled Activities)(Scotland) Regulations 2011 (S.S.I. 2011/209) (see paragraph 2 of schedule 7). These regulations provide a permitting regime for activities capable of having an adverse impact on the water environment, and contains provision for off-site conditions; and

ii. the Pollution Prevention and Control (Scotland) Regulations 2012 (S.S.I. 2012/360) (see paragraph 5 of schedule 6). These regulations provide a permitting regime for specified industrial activities capable of having an adverse impact on the environment, and contains provision for off-site conditions;

For information, although neither of these regimes are established by an S.S.I.:

i. In Scotland, the permitting regime for waste disposal is established by the Environment Protection Act 1990 and the Waste Management Licensing (Scotland) Regulations 2011 (S.S.I. 2011/228). SEPA is entitled to include an off-site condition in a waste management licence. The provisions relating to compensation to the grantor of an off-site condition are set out in the Waste Management Licences (Consultation and Compensation) Regulations 1999 (S.I. 1999/481). Regulation 6(1) specifies an application for compensation must be made within the same periods as in paragraph 11 of schedule 2;

ii. In England and Wales, a similar environmental permitting regime to that set out in the draft Environmental Authorisations (Scotland) Regulations 2018 is created by the Environmental Permitting (England & Wales) Regulations 2016 (S.I. 2016/1154). EPR provides for the imposition of off-site conditions, and again the period of time in which an application for compensation must be made is the same as in paragraph 11 (see para 5 of part 2 of schedule 5 of EPR).

Scottish Government considers that, in all the circumstances, the periods of time in paragraph 11 of schedule 2 constitute a fair balance between the protection of the right of property and the requirements of the general interest.
3(a) Paragraph 38, which is broadly equivalent to section 29 of the Radioactive Substances Act 1993, would provide for a scenario where an authorisation requires radioactive waste to be disposed of at a place provided by a local authority. Were SEPA to include such a condition in an authorisation, the local authority would be required by paragraph 37 to deal with the waste in accordance with the authorisation. As a result, the local authority would be entitled to charge the authorised person for the disposal.

Scottish Government does not consider this provision to be the making of a charging scheme as envisaged by paragraph 13 of schedule 2 of the 2014 Act. Scottish Government is not proposing to authorise SEPA, or any other regulator, to make a charging scheme in these Regulations. Rather, the charging scheme associated with these Regulations will continue to be made by SEPA under section 41 of the Environment Act 1995. For information, the current scheme made by SEPA under section 41 is the Environmental Regulation (Scotland) Charging Scheme 2018.

Scottish Government considers that paragraph 38 of schedule 8 would be made within the powers contained in paragraph 17 of schedule 2 of the 2014 Act. Paragraph 17(2)(a) provides for “conferring power on regulators (a) to arrange for preventive or remedial action to be taken at the expense of persons carrying on regulated activities”. Paragraph 17(4) provides for “regulating the procedure under which regulators may make arrangements, or impose requirements, such as are mentioned in sub-paragraph (2).”

Scottish Government considers that requiring a local authority to take special precautions would be preventive action, most likely action to prevent the disposal of the waste in a way that is harmful to the environment and/or human health. Paragraphs 37 and 38 are a procedure, as envisaged by paragraph 17(4), by which SEPA and local authorities may impose the requirement to take action and recover the cost from the person carrying on the radioactive waste activity.

3(b) Scottish Government does not consider that paragraph 38 is a charging scheme which would be made the powers contained in paragraph 13.
Response from the Scottish Government to the Committee’s Stage 1 report

BACKGROUND

1. The Committee reported at Stage 1 on the delegated powers in the Planning (Scotland) Bill (the “Bill”) on 13 March 2018, in its 11th Report, 2018 Session 5.¹

2. The Local Government and Communities Committee has considered the Bill as lead committee and on Thursday 17 May published its Stage 1 report.

3. The Scottish Government has already responded to this Committee’s report. This response can be found here.

4. This paper sets out the provisions in the Delegated Powers Memorandum on which the Committee raised recommendations in its Stage 1 report and the Government’s response to those recommendations. Additional detail can be found in the Committee’s Stage 1 report and in the Scottish Government’s response.

DELEGATED POWERS PROVISIONS

Regulation-making powers

Section 7(2), inserting new section 3CA(3) into the 1997 Act – Amendment of National Planning Framework

- Power conferred on: Scottish Ministers
- Power exercisable by: Regulations made by Scottish statutory instrument
- Parliamentary procedure: Negative

Provisions

5. Section 7(2) of the Bill inserts new section 3CA into the 1997 Act. Section 3CA(1) provides the Scottish Ministers with the power to amend the National Planning Framework ("NPF") at any time. This is in the context of section 1 of

¹ The Bill, as introduced, is available here.
the Bill, which amends the timescales in the 1997 Act for revising the NPF from within five years to within 10 years.

6. New section 3CA(3) of the 1997 Act allows the Scottish Ministers to make further provision in regulations about amendments to the NPF. Such regulations may in particular make provision about: the procedures to be followed; the consultation to be undertaken on proposed amendments; when the amendments take effect; the publication of the amended framework; and the laying of the amended framework before the Scottish Parliament.

Committee consideration and recommendations

7. The Committee recognised that the procedures applicable to scrutinising amendments to the NPF within the new 10 year cycle should be manageable and proportionate to the amendments being made. However, the Committee considered that significant amendments to the NPF resulting in a change to the overall policy should be subject to specific public and parliamentary consultation requirements set out on the face of the Bill rather than in secondary legislation. This would allow the Parliament to maintain sufficient control over its scrutiny procedures.

8. The Committee considered that the consultation requirements applying to policy amendments to the NPF could be similar to the cyclical review process currently set out in existing sections 3A to 3C of the 1997 Act. They could include a requirement to consult publicly and for the amendments to be laid before the Parliament in draft for a period of 90 days. The Scottish Ministers could also be required to lay a report on the consultation they undertook and provide a statement giving details of any changes which they made in light of the public consultation and any report or resolution made by the Parliament.

9. The Committee therefore called on the Government to amend the Bill so that significant amendments to the NPF resulting in a change to the overall policy become subject to specific public and parliamentary consultation requirements set out on the face of the Bill.

10. On the basis that these amendments were made, the Committee was content that the negative procedure applies to setting the procedure for minor amendments to the NPF. However, the Committee’s preference was that any provision for periodic parliamentary consideration of such minor issues was set out on the face of the Bill.

11. If the Government were not willing to set the threshold on the face of the Bill, the Committee considered that the Government should apply the affirmative procedure to the scrutiny of regulations, made under new section 3CA(3) inserted by section 7(2) of the Bill, setting the scrutiny procedures. However, the Committee considered this secondary option to be unsatisfactory as it should not be for Ministers in regulations to decide the form of parliamentary scrutiny that will apply to the NPF.
Scottish Government response

12. As the Minister explained in his evidence to the Committee on 20 February, it is hoped in future to use innovative approaches and new technology to allow for rapid updating of the NPF in response to real-time data. This requires flexibility in the procedures for amendments. However, the Scottish Government understands the Committee’s concern that other amendments could make significant changes to policy, and therefore should be subject to greater scrutiny.

13. We welcome the Committee’s recognition of this distinction between major and minor amendments to the NPF. We will bring forward amendments to the Bill at Stage 2 to place procedures for significant amendments to the NPF on the face of the Bill, and will consider how to make appropriate arrangements for minor amendments.

Section 10(2) and (3), inserting schedule 5A, paragraph 3(1) and (2) into the 1997 Act – Land that cannot be included in a scheme

• Power conferred on: Scottish Ministers
• Power exercisable by: Regulations made by Scottish statutory instrument
• Parliamentary procedure: Affirmative

Provisions

14. Paragraph 3(1) and (2) of new schedule 5A of the 1997 Act, inserted by section 10(2) of the Bill, provide that the Scottish Ministers can make regulations restricting the type of land that can be included in an SDZ scheme or an SDZ scheme as altered. The restrictions apply to land at the time the scheme is made.

15. Paragraph 3(3) clarifies that if land is included in a zone that an SDZ scheme relates to and that land subsequently becomes land of a description specified in regulations under paragraph 3, that land is not excluded from the zone to which the scheme relates.

Committee consideration and recommendation

16. The Committee considered that it would improve the transparency of the legislation if the types of land that may not be included in an SDZ scheme were initially set out on the face of the Bill, with a power included to add or remove entries by regulations subject to the affirmative procedure.

17. The Committee accepted the Scottish Government’s undertaking to amend the Bill at Stage 2 to set out on the face of the Bill the types of land that may not be included in an SDZ scheme, with a power included to add or remove entries by regulations subject to the affirmative procedure.
Scottish Government response

18. The Scottish Government welcomes the Committee’s acceptance of the undertaking.

Section 21 – Fees for planning applications etc.

- Power conferred on: Scottish Ministers
- Power exercisable by: Regulations made by Scottish statutory instrument
- Parliamentary procedure: Negative

Provisions

19. Existing section 252 of the 1997 Act enables the Scottish Ministers to make regulations about the payment of fees or charges to planning authorities for the performance of planning functions. Section 21 of the Bill amends these powers in a number of relatively technical ways, including as follows.

Power for Scottish Ministers to waive/reduce fees

20. In terms of new section 252(1A)(e) and (ea) of the 1997 Act (inserted by section 21(6) of the Bill), it appears that it is only the planning authority (rather than the Scottish Ministers) that have the power to waive or reduce a fee.

Surcharge

21. Section 21(7) of the Bill, inserting subsection (1D) into section 252 of the 1997 Act, provides that regulations may provide for a surcharge to be imposed on retrospective planning applications.

Committee consideration and recommendations

Power for Scottish Ministers to waive/reduce fees

22. The Committee accepted the Scottish Government’s undertaking to consider further whether the Scottish Ministers should also have a power to waive or reduce a fee that they charge.

Surcharge

23. The Committee considered whether it would be more appropriate for either the Bill to set a cap on the level of surcharge that can be imposed in the regulations or for the affirmative procedure to be applied to those regulations (or some other measure to ensure sufficient oversight).

24. The Scottish Government undertook to consider further whether additional restrictions or greater scrutiny should be applied to the surcharge provisions.

25. The Committee noted in its Stage 1 report that, as the Scottish Government’s Delegated Powers Memorandum recognises at paragraph 125, any penalty will
need to be set at a reasonable level to comply with the European Convention on Human Rights.

26. Accordingly, the Committee encouraged the Scottish Government’s to consider applying additional restrictions and greater scrutiny to the surcharge provisions in section 21 of the Bill.

Scottish Government response

27. The Scottish Government is grateful to the Committee for highlighting this point. We agree that it would be helpful for the Scottish Ministers to have a power to waive or reduce a fee that they charge, and will bring forward amendments to put this in place.

28. The Committee mentions the requirement, noted in the Delegated Powers Memorandum, for any penalty to be set at a reasonable level to comply with the European Convention on Human Rights. To be clear, that consideration of compliance would take place when the penalty is set in regulations, and does not of itself require any further restriction in the primary legislation. The Scottish Government will however give further consideration to the Committee’s recommendation in this regard.

Section 26, inserting new section 251B(3) into the 1997 Act – National planning performance co-ordinator

• Power conferred on: Scottish Ministers
• Power exercisable by: Regulations made by Scottish statutory instrument
• Parliamentary procedure: Negative

Provisions

29. New section 251B(1) of the 1997 Act inserted by section 26(1) of the Bill provides that the Scottish Ministers may appoint a person to monitor the performance by planning authorities of their functions. The appointed person may also provide advice to planning authorities as to how they may improve the performance of their functions. In terms of new section 251B(2), the appointed person must submit reports to the Scottish Ministers on their activities under subsection (1) and on any recommendations the person has as a result.

30. New section 251B(3) provides, among other things, that the Scottish Ministers may by regulations make further provision about the functions of a person appointed as the National Planning Performance Co-ordinator. No equivalent provision was made in existing Part 12A of the 1997 Act, inserted by section 30 of the Planning etc. (Scotland) Act 2006, which has not been commenced.

Committee consideration and recommendations

31. The only provision made about the functions of the National Planning Performance Co-ordinator is that made in new section 251B(1) and (2) of the
1997 Act, inserted by section 26(1). This provides generally that those functions are to monitor the performance by planning authorities of their functions, to advise planning authorities on how they may improve their performance, and to report to the Scottish Ministers on these activities and any recommendations stemming from them.

32. The Committee considered that it is unusual for a power to be taken to make further provision about the functions of a person where limited detail is contained on the face of the legislation about the functions of that person.

33. By way of example, the functions of the Scottish Information Commissioner are set out in detail in Part 3 of the Freedom of Information (Scotland) Act 2002. Likewise, the Commissioner for Children and Young People (Scotland) Act 2003 makes detailed provision about the functions of the Commissioner for Children and Young People in Scotland. Similarly, section 7 of the Prisons (Scotland) Act 1989 provides for the functions of Her Majesty's Chief Inspector of Prisons for Scotland in detail. It is not clear why more detailed provision about the functions of the National Planning Performance Co-ordinator could not be set out on the face of section 26(1) of the Bill rather than in regulations.

34. The Committee considered that it is also relevant that section 31 of the Bill already provides a power by regulations to make supplementary provision which the Scottish Ministers consider appropriate for the purposes of, or in connection with, or for giving full effect to the Bill as enacted or any provision made under it. Such regulations could therefore make supplementary provision about the National Planning Performance Coordinator. The power in section 31 would also allow the Scottish Ministers to make supplementary provision about the provision made in the regulations made under new section 251B(3).

35. **The Committee recommended that the Bill is amended at Stage 2 to ensure that the functions of the National Planning Performance Coordinator are set out in full on the face of the Bill.**

36. **If the Scottish Government does not lodge an amendment to the Bill to set out the functions of the National Planning Performance Co-ordinator in full, the Committee considered that the affirmative procedure should be applied to the regulation-making power in new section 251B(3).**

**Scottish Government response**

37. While the regulations are intended primarily to set out how the National Planning Performance Coordinator will carry out their functions of monitoring and advising on performance, the Scottish Government considers that it is preferable also to have the ability to amend the Coordinator’s functions. This will allow them to be updated in response to changes in performance monitoring developed in discussion with stakeholders. However, given the level of concern expressed on this issue we will bring forward an amendment to the Bill at Stage 2 to make these regulations subject to the affirmative procedure.
Section 27 – Power to provide for infrastructure levy

- Power conferred on: Scottish Ministers
- Power exercisable by: Regulations made by Scottish statutory instrument
- Parliamentary procedure: Affirmative

Provisions

38. Section 27(1) of the Bill provides that the Scottish Ministers may by regulations establish, and make provision about, an infrastructure levy. An infrastructure levy is defined as a levy payable to a local authority, in respect of development wholly or partly within the authority’s area, the income from which is to be used by local authorities to fund, or contribute towards funding, infrastructure projects. Schedule 1 of the Bill sets out what provision may be made in the “infrastructure-levy regulations”.

Committee consideration

39. The Committee recognised generally that providing for the infrastructure-levy in regulations would allow flexibility as economic circumstances change, including market conditions affecting land values, investment and development. The Committee noted that the Scottish Government intends to undertake further consultation to define a practical model.

40. In a number of respects, however, the powers to make infrastructure-levy regulations are drawn very widely to accommodate choices on significant matters. The Committee considered that the following infrastructure-levy powers in schedule 1 of the Bill are particularly wide and inhibit the Parliament from conducting line by line scrutiny of policy as would be the case if such matters were set out on the face of the Bill:

(a) Powers to make provision in regulations for criminal penalties are set at the maximum permissible amounts by virtue of paragraph 17 of schedule 1 of the Bill. The Committee recognised that penalties must be an effective deterrent. However, given the significance of penalties to the rights of individuals and companies, the Committee expected to see the levels of the penalties set out on the face of the Bill, as opposed to in a regulation-making power, if powers to set the penalties are not to be meaningfully capped.

(b) The linking of powers to modify planning legislation in paragraph 16 of schedule 1 of the Bill to the effectiveness of the infrastructure levy as a means to raise revenue to fund infrastructure projects does not meaningfully limit their scope.

(c) The Scottish Government's policy on the relationship between other funding mechanisms such as those under section 75 of the 1997 Act and the infrastructure levy should be developed first and set out on the face of the Bill. A power could be taken in paragraph 16 of schedule 1 of the Bill
to amend those provisions in light of experience or changing priorities and practice in due course.

41. Previous powers to provide in regulations for a levy have been subject to a form of super-affirmative procedure. For example, section 14 of the Alcohol etc. (Scotland) Act 2010 contains a power for the Scottish Ministers to make regulations for the imposition on licence-holders of a social responsibility levy. Section 15 of the 2010 Act makes provision to the effect that regulations made under section 14 are subject to a form of super-affirmative procedure. The Committee’s view was that this is indicative that an enhanced level of scrutiny beyond the affirmative procedure is appropriate for levy-raising powers.

Committee recommendation

42. Accordingly, the Committee recommended that a form of super-affirmative procedure would be appropriate to guarantee a requirement to consult publicly and to ensure that the Parliament can control the exercise of the very wide powers in schedule 1 to make infrastructure-levy regulations.

Scottish Government response

43. We welcome the Committee’s recognition that providing for the infrastructure levy in regulations will allow flexibility to adapt to changes in economic circumstances. The Scottish Government does not agree that super-affirmative procedure would be appropriate in this situation. However, we note the Committee’s concern to ensure public consultation on the use of these powers, and would be happy to bring forward an amendment at Stage 2 introducing a statutory requirement for public consultation prior to the Scottish Ministers laying any regulations under these provisions.

Committee recommendation

44. In addition, the Committee called on the Scottish Government to reconsider the powers identified at paragraphs 40(a) to 40(c) above with a view to ensuring that those powers are framed more clearly and that the powers are no more than are necessary and proportionate.

Scottish Government response

45. In relation to (a) criminal penalties, as set out in the Scottish Government’s written response to the Committee’s questions, attempts to evade the levy on major developments could deprive the infrastructure fund of significant sums, and it is therefore appropriate to have substantial penalties available for such offences. Further consideration and consultation is required, prior to making regulations, as to whether any additional offences should be provided for that would justify penalties capped at a lower level.

46. (b) and (c) refer to powers to make provision about how other powers relating to planning or development may be exercised. It is not possible to provide detail on the face of the Bill about the relationship between the infrastructure
levy and other legislation before the final model for the levy has been
determined. The Scottish Government considers that the provision in
paragraph 16(2)(a) of Schedule 1, limiting the power to provisions that enhance
the effectiveness of the infrastructure levy, does appropriately limit the scope of
the powers provided by paragraph 16(1).

Committee recommendation
47. The Committee also noted that this is another example of a Bill being
introduced with framework powers where significant policy matters have
not been developed and further consultation is necessary. In the
Committee’s view, such an approach undermines the Parliament’s ability
to scrutinise policy on a line by line basis on the face of the Bill. The
application of the affirmative procedure limits the Parliament to accepting
or rejecting regulations in their entirety that make provision on
substantive policy matters.

Scottish Government response
48. The Scottish Government notes the Committee’s views in this matter.

Section 30 – Power to change meaning of “infrastructure”

• Power conferred on: Scottish Ministers
• Power exercisable by: Regulations made by Scottish statutory instrument
• Parliamentary procedure: Affirmative

Provisions
49. Section 30 allows the Scottish Ministers by regulations to modify section 29 so
as to change or clarify the meaning of "infrastructure" for the purposes of Part 5
(infrastructure levy) of the Bill as enacted and “the schedule”.

Committee recommendation
50. The Committee accepted the Scottish Government’s undertaking to
amend section 30 of the Bill at Stage 2 to refer to "schedule 1" rather than
"the schedule".

Scottish Government response
51. The Scottish Government welcomes the Committee’s acceptance of this
undertaking.
Direction-making powers

Oversight for significant direction-making powers generally

Provisions

52. In its written and oral questions the Committee asked the Scottish Government about the direction-making powers under sections 7(3) (direction to amend local development plans), 10(2) and (3) (duty to seek to make or alter a SDZ scheme when directed to do so), 25(1) (power to transfer functions where insufficient trained persons) and 26 (directions to planning authority following an assessment of performance).

53. In particular, the Committee asked the Government to give consideration to applying more safeguards to the exercise of these more significant powers. Specifically, the Committee asked the Government whether it would be appropriate to impose a requirement to publish any directions given and the reasons for making those directions (where no such requirements were set out in the Bill), and a requirement to report to the Parliament on the use of these powers.

Committee consideration and recommendations

54. The Committee welcomed the Minister’s commitment to lay directions before SPICe.

55. The Committee noted that section 26 of the Bill, inserting new section 251G into the 1997 Act, already contains a requirement to publish directions requiring a planning authority to take action following an assessment of performance by the National Planning Performance Coordinator. Likewise, section 7(3) of the Bill, inserting new section 20AA(2), specifically requires that a direction requiring an amendment to the local development plan must set out the Scottish Ministers’ reasons for doing so.

56. In the Committee’s view, a requirement to publish directions that are made, together with an additional duty to provide reasons, on the face of the Bill would aid public transparency and would be preferable to relying on the Government’s current practice, which may change in the future. The Committee considered that this view is strengthened by the fact that there are already requirements on the face of the Bill to publish or give reasons for particular directions.

57. The Committee recognised that no special form of scrutiny applies to the current direction-making powers exercised under the 1997 Act. However, the Committee considers that the following direction-making powers contained in the Bill are particularly significant:

(a) Section 7(3) of the Bill - Direction to planning authority to amend local development plans;
(b) Section 10(2) and (3) of the Bill – Duty of planning authority to seek to make or alter a SDZ scheme when directed to do so;
(c) Section 25(1) of the Bill - Power of Scottish Ministers to transfer planning functions where insufficient trained persons; and
(d) Section 26 of the Bill - Directions to planning authority following an assessment of performance.

58. It is not clear at this stage how often these more significant powers would be exercised. However, the Committee considered that it would be proportionate to apply a periodic requirement to report on the exercise of these powers. This would enable the Parliament to periodically review the Government's actions in these significant areas.

59. In light of the above, the Committee recommended that there should be a requirement on the face of the Bill to publish all directions made under the provisions in the Bill and to give reasons for making those directions.

60. The Committee also called on the Scottish Government to amend the Bill to include a requirement for it to periodically report to the Parliament on the use of the more significant direction-making powers contained in the Bill identified in paragraphs 57(a) to 57(d) above.

Scottish Government response

61. As has been made clear, all directions made under existing planning legislation are routinely published and include the reasons for making them as a matter of good practice. If a statutory requirement to do so is to be introduced, the Scottish Government’s view is that it would more appropriately apply to all directions made under powers in the 1997 Act, not just those introduced by the Bill. We will bring forward amendments at Stage 2 to put such a requirement in place.

62. The Scottish Government does not consider it appropriate to require the Scottish Ministers to report to Parliament on the use of direction-making powers. All directions are in the public domain, and this will be guaranteed by a requirement to publish, and the Parliament can call the Planning Minister to account for their use at any time.

Recommendations on particular direction-making powers

Section 25(1) – Power to transfer functions where insufficient trained persons

- Power conferred on: Scottish Ministers
- Power exercisable by: Direction
- Parliamentary procedure: None

Provisions

63. Section 24 of the Bill provides that where a member of a planning authority has not fulfilled training requirements specified in regulations made by the Scottish Ministers, that member is prohibited from exercising any of the authority’s functions that are specified in regulations.
64. Section 25(1) confers a direction-making power on the Scottish Ministers where a planning authority are unable to exercise a function because of the prohibition created by section 24. The Scottish Ministers may allow the function to be exercised on the authority’s behalf by another planning authority or the Scottish Ministers. This is known as a “transfer of functions direction”, which may be modified or revoked and may make different provision for different purposes.

Committee consideration

65. The Committee considered that a requirement to give reasons for the choice of body that the functions are transferred to is appropriate to ensure that there is transparency in relation to the reasons for transferring the functions to a particular planning authority over another or to the Scottish Ministers. The Committee welcomed the Minister's undertaking to reconsider this point.

66. In addition, the Committee considered that if the Ministers are to provide reasons with the direction explaining the choice of body the functions are transferred to, it would seem appropriate that they are also required to explain why they consider that it has become necessary to make a transfer of functions direction in the first place. This is particularly the case given that it is the Scottish Ministers, rather than the planning authority, that exercises the power to make a transfer of functions direction.

Committee recommendation

67. Accordingly, the Committee encouraged the Minister to include a requirement in the Bill for the Scottish Ministers to give reasons for the choice of body that the functions are transferred to under a "transfer of functions direction" made in terms of section 25(1) of the Bill.

Scottish Government response

68. The Scottish Government notes the Committee’s concern that there should be transparency over the choice of body the functions are transferred to. As explained by the Minister in his evidence to the Committee, on the rare occasion that the power may need to be used, the choice is expected to depend on a range of factors such as the capacity and characteristics of the planning authority, to ensure the authority receiving the functions has similar experience of relevant issues. We are content to bring forward amendments at Stage 2 to implement this recommendation.

Committee recommendation

69. Further, the Committee recommended that as a matter of transparency there should also be a requirement on the face of the Bill for the Scottish Ministers to publish an explanation setting out the circumstances that have led to the transfer of functions direction being made.
Scottish Government response

70. The Scottish Government would reiterate that the Scottish Ministers could only make a transfer of functions direction where a planning authority was unable to exercise its functions because it did not have sufficient elected members who had undergone the required training. The reason for making the direction would be the lack of trained members in the authority. It will be for the planning authority to ensure that their elected members are aware of the requirements and have the opportunity to undertake the training, and only the planning authority could explain the circumstances that resulted in their inability to exercise their functions. Any requirement to publish an explanation would therefore need to be based on a statement made by the authority, rather than by the Scottish Ministers.

Provision in SDZ schemes

Section 10(2), inserting section 54C into the 1997 Act – Scheme may also control advertisements

- Power conferred on: Planning authorities / Scottish Ministers
- Power exercisable by: Making or altering an SDZ scheme
- Parliamentary procedure: None

Provisions

71. Section 10 of the Bill inserts new sections 54A to 54F into the 1997 Act. Section 54C(1) provides that a SDZ scheme may disapply any regulations for restricting or regulating the display of advertisements made under section 182 of the 1997 Act and apply instead in that zone any provision included in the scheme that restricts or regulates the display of advertisements.

72. New section 54C(2) states that such provision included in a scheme is to be treated, for the purposes of sections 184, 185, 186 and 187 of the 1997 Act, as though it were provision in regulations made under section 182. However, any such provision must be capable of being included in regulations made under section 182.

Committee consideration and recommendation

73. The fact that alternative provision on advertising to that made in regulations under section 182 of the 1997 Act can be made either by a planning authority or the Scottish Ministers in a SDZ scheme, rather than in regulations laid before the Parliament under the negative procedure, as is currently the case, means that the Parliament will not be able to conduct oversight of any such alternative provision.

74. No further explanation was forthcoming in the evidence session as to how the Scottish Government intends to address the removal of parliamentary oversight. It is not clear what approach would be taken to this issue given that provision
governing advertising consent is made in regulations. The Committee therefore considered that it would be useful to have further clarity on this point.

75. The Committee therefore called on the Scottish Government to provide further explanation as to how it intends to address the issue of the removal of parliamentary oversight that would result from an SDZ scheme both disapplying provision contained in the advertising regulations made under section 182 of the 1997 Act and making any alternative provision.

Scottish Government response

76. The Scottish Government’s intention in including advertisement consent in SDZs is to reduce the number of separate applications a developer needs to make for different consents. It is not intended that an SDZ scheme should be able to grant consent for advertisements that would not be allowed elsewhere under the provisions of the advertising regulations, but it should be able to grant consent within those provisions, which may be subject to additional conditions or limitations appropriate to the type of development permitted by the scheme. This would be similar to the way in which an SDZ scheme grants planning permission, road construction consent and listed building and conservation area authorisation, under section 54B(3) of the 1997 Act, inserted by section 10 of the Bill. We are working to bring forward amendments to more accurately reflect this intention and to remove the reference to disapplying regulations made under section 182.