

## **PUBLIC HEALTH ETC. (SCOTLAND) BILL**

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### **SUPPLEMENTARY DELEGATED POWERS MEMORANDUM**

#### **PURPOSE**

1. This supplementary memorandum has been prepared by the Scottish Government in accordance with Rule 9.7.10 of the Parliament's Standing Orders, in relation to the Public Health etc. (Scotland) Bill, to assist consideration by the Subordinate Legislation Committee in accordance with Rule 9.7.9.
2. It explains changes to the powers to make subordinate legislation under the Bill, made as a consequence of amendments at stage 2. It describes the purpose of each of the new subordinate legislation provisions that were added to the Bill at stage 2 and outlines the reasons for seeking the proposed power. This memorandum should be read in conjunction with the Delegated Powers memorandum provided at introduction, the Explanatory Notes (as revised to reflect changes made at Stage 2) and the Policy Memorandum.
3. In deciding whether to adopt negative or affirmative resolution procedure, careful consideration has been given to the degree of parliamentary scrutiny that is felt to be required for the regulations, balancing the need for the appropriate level of scrutiny, with the need to avoid using up parliamentary time unnecessarily.

#### **INTERPRETATION**

4. In this Memorandum—
  - 'The Parliament' means the Scottish Parliament
  - 'The Bill' means the Public Health etc. (Scotland) Bill
  - 'The 1990 Act' means the Environmental Protection Act 1990
  - 'The 1897 Act' means the Public Health (Scotland) Act 1897
  - 'The 2005 Act' means the Water Services etc. (Scotland) Act 2005
  - 'The CNE Act' means the Clean Neighbourhoods and Environment Act 2005.
  - 'IHR 2005' means the International Health Regulations 2005.

## **AMENDMENTS TO DELEGATED POWERS**

### **PART 4 - PUBLIC HEALTH FUNCTIONS OF HEALTH BOARDS**

#### **Section 66 – Power to make regulate and prescribe the procedure and practice to be followed in any application or appeal under Part 4 of the Bill**

**Power conferred on:** Court of Session

**Power exercisable by:** Act of Sederunt

**Parliamentary Procedure:** None

5. Section 66 as amended provides that the power of the Court of Session under the Sheriff Courts (Scotland) Act 1971 to regulate and prescribe the procedure and practice to be followed in any application or appeal under Part 4 of the Bill, may in particular make provision for the manner in which and time within which notice of applications for orders and notice for orders is given, where such applications and order are made in relation to persons under 16, the persons to whom notice of such applications and order must be given, the circumstances in which the sheriff or sheriff principal may determine whether a hearing should be held, and if so where, and the places or types of place at which a hearing may be held.

6. This amendment helps to clarify that the existing powers of the Court of Session to regulate procedures in the courts should apply for applications made under the Bill, and that these powers may extend to regulating the matters contained in section 66(1A) of the Bill. This has only a modest effect on the scope of the rule making power already exercisable by the Court of Session.

7. Rules providing for the regulation and prescription of procedure in court are administrative and procedural. In the same way that there is no need for Scottish Ministers to make them, there is no need for the Parliament to approve or annul them. It is therefore appropriate for them to be made by Act of Sederunt and not therefore subject to any parliamentary procedure.

### **PART 7 - INTERNATIONAL HEALTH REGULATIONS**

#### **Section 89 – International Health Regulations – Power to make regulations for the purposes of, or in connection with, giving effect to the International Health Regulations, and any other international agreements relating to the spread of infectious disease or contamination and for protecting public health from risks arising from vehicles arriving or leaving Scotland**

**Power conferred on:** Scottish Ministers

**Power exercisable by:** Statutory instrument

**Parliamentary procedure:** Affirmative resolution of the Scottish Parliament

8. Section 89 has been amended to allow the Scottish Ministers to make regulations for the purpose of, or in connection with, giving effect to the International Health Regulations, and any other international agreements relating to the spread of infectious disease or contamination. It

also gives the power to make regulations to protect public health from risks arising from vehicles arriving in or leaving Scotland.

9. Regulations may include provisions for persons to be medically examined, quarantined, and detained and for persons to be required to provide information or answer questions, including information or questions relating to health. Restrictions or prohibitions on the entry or departure of persons may also be made. Persons may also be disinfected, disinfested or decontaminated.

10. Regulations under this section may also provide for prohibition or restrictions on the entry and departure of things and vehicles and for both things and vehicles to be inspected, tested detained, disinfected, disinfested or decontaminated and for things to be destroyed.

11. Finally, the regulations may provide for the imposition of obligations on masters of ships, pilots of aircraft, other persons on board vehicles and owners and managers of ports and airports.

*Reason for taking power*

12. The powers to make Regulations under section 89 are of necessity very wide ranging. It is anticipated that Regulations made under this power will replace the existing Public Health (Ships) (Scotland) Regulations 1971, as amended and the Public Health (Aircraft) (Scotland) Regulations 1971, as amended, which are both made under sections 1 and 3 of the Public Health (Scotland) Act 1945, and which are currently used to both implement the International Health Regulations of 1969 and to make provisions regarding restrictions on vehicles entering and leaving Scotland, for the purpose of protecting public health. The 1945 Act will be repealed by the Bill. To ensure the continued protection of public health in Scotland from risks arising from travellers, it is essential that new regulations in this area not only contain the same powers as are available at present within the existing Ships and Aircraft Regulations, but also create new provisions to reflect the increased risks to public health that modern travel presents.

13. Furthermore, it is important that the powers to make provision relating to the implementation of the International Health Regulations and international travel generally are the same, as far as possible, as those available to Ministers in other parts of the UK. It could present a significant risk to public health in Scotland if the powers to make regulations relating to international travel were narrower than those elsewhere. To that end we have ensured that the provisions in section 89 closely reflect the provisions to implement the International Health Regulations and those making provision for international travel in the Health and Social Care Bill, which extends to England and Wales and is currently proceeding through the Westminster Parliament.

14. Regulations made under this section will be the subject of extensive consultation. Officials from the Scottish Government, together with colleagues from local authorities who govern ports in Scotland, and airport officials, are participating in a UK wide working group to ensure consistency of approach throughout the UK. Following conclusion of the working group's discussions, draft regulations will be consulted on widely.

*Choice of procedure*

15. Regulations made under this procedure will be subject to affirmative procedure in the Scottish Parliament. It is considered that given the wide ranging nature of the power to make regulations it is appropriate that this increased level of scrutiny, and the opportunity for debate is afforded to the Scottish Parliament. However there may be circumstances in which it will prove necessary to make emergency regulations, such as in cases where the World Health Organisation issues recommendations relating to the cross border spread of disease which require to be acted on immediately. Provision is made in new subsections (5) to (9) of section 102 for those few urgent matters to be dealt with by emergency procedure in Parliament, whereby the regulations will come into force immediately on being laid but will expire after 28 days unless they have been approved by a resolution of the Parliament.

16. We anticipate that this emergency procedure will be used extremely rarely, but it is essential, for the protection of public health in Scotland, to ensure that regulations, in an emergency situation can be made quickly and effectively. We consider that by making affirmative procedure the norm for regulations made under this section, with the option of emergency procedure if required, we are striking the right balance between affording the Parliament the proper level of scrutiny for regulations, which are, of necessity made under wide ranging powers, and ensuring that public health can be protected quickly and effectively in an emergency situation.

**PART 8 – INFORMATION ON HEALTH EFFECTS OF SUNBEDS**

**Section 90(4)(c) – Power to prescribe other documents (apart from passport or photocard driving licence) to satisfy proof of age requirement**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

17. Section 90(2) provides that in proceedings against an operator for the offence of allowing an under 18 to use a sunbed on sunbed premises, it is a defence for the operator to show that the operator believed the person to be 18 or over and had taken reasonable steps to establish the person's age. Under section 90(3), the operator is to be treated as having taken reasonable steps to establish the person's age if and only if the operator was shown any of the documents in subsection (4) The documents mentioned in subsection (4) are a passport, photocard driving licence or such other document (or description of document) as may be prescribed. Section 104 of the Bill defines "prescribed" as "prescribed by the Scottish Ministers by regulations".

*Reason for taking power*

18. This will give the Scottish Ministers the ability to prescribe documents, other than a passport and European Union photocard driving licence, as acceptable forms of ID for establishing the defence in section 90(2).

*Choice of procedure*

19. Regulations made under these sections will deal with the minor administrative matter of the documents apart from a passport and photocard driving licence that may establish proof of age for the purposes of the defence in section 90(2) It is therefore thought that negative procedure affords the appropriate level of Parliamentary scrutiny.

**Section 90A(5)(c) – Power to prescribe other documents (apart from passport or photocard driving licence) in relation to proof of age requirement in relation to defence**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Statutory instrument**  
**Parliamentary procedure: Negative resolution of the Scottish Parliament**

20. Section 90A(3) provides that in proceedings against an operator for the offence of prohibition on sale or hire of sunbeds to persons under 18, it is a defence for the operator to show that the operator believed the person to be 18 or over and had taken reasonable steps to establish the person’s age. Under section 90A(4), the operator is to be treated as having taken reasonable steps to establish the person’s age if and only if the operator was shown any of the documents in subsection (5). The documents mentioned in subsection (5) are a passport, photocard driving licence or such other document (or description of document) as may be prescribed. Section 104 of the Bill defines “prescribed” as “prescribed by the Scottish Ministers by regulations”.

*Reason for taking power*

21. This will give the Scottish Ministers the ability to prescribe documents, other than a passport and European Union photocard driving licence, as acceptable forms of ID for establishing the defence in section 90A(3).

*Choice of procedure*

22. Regulations made under this section will deal with the minor administrative matter of the documents apart from a passport and photocard driving licence that may establish proof of age for the purposes of the defence in section 90A(3.) It is therefore thought that negative procedure affords the appropriate level of Parliamentary scrutiny.

**Section 90D – Power to make provision regarding the application of Part 8 to sunbeds used for medical purposes**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Statutory instrument**  
**Parliamentary procedure: Negative resolution of the Scottish Parliament**

23. Section 90N of the Bill defines “sunbed” as “an electrically-powered device designed to produce tanning of the skin by the emission of artificial ultraviolet radiation.” It also defines “sunbed premises”. Section 90D allows the Scottish Ministers to make provision regarding the application of Part 8 to sunbeds used for medical purposes by making regulations. Such regulations may make provision as to what is and what is not a sunbed, what are and are not

sunbed premises and as to the circumstances in which the provisions of Part 8 do and do not apply. The power includes power to modify any enactment including the Act itself.

*Reason for taking power*

24. It is generally accepted that ultraviolet radiation has certain genuine medical and therapeutic uses. This power will allow Ministers to exempt from the scope of the Part 8 provisions genuine medical use of sunbeds. It will also allow Ministers to address the potential problem of sunbed manufacturers and operators seeking ways to circumvent the legislation, if the need arises.

*Choice of procedure*

25. Any regulations made under this power would be of a technical nature rather than about the principle of genuine medical use itself. As the Act already contains a definition of “sunbed” and “sunbed premises” the power to modify the Act necessarily requires to be included in the power to make regulations. Notwithstanding this fact it is considered that negative procedure is appropriate because any regulations made under this power would be of a technical nature rather than about the principle of medical use.

**Section 90E – Power to prescribe information to be provided to sunbed users**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Statutory instrument**  
**Parliamentary procedure: Negative resolution of the Scottish Parliament**

26. Section 90E(2) obliges sunbed operators to provide a person who proposes to use a sunbed on sunbed premises with such information regarding the effects on health of sunbed use as may be prescribed. Section 104 of the Bill defines “prescribed” as “prescribed by the Scottish Ministers by regulations”. Under section 90E(5), the Scottish Ministers may prescribe the information which is to be provided and the form and manner in which that information is to be provided.

*Reason for taking power*

27. This will help to ensure that adults are able to make an informed decision about whether or not to use a sunbed. The detail of the information to be prescribed will be set out in regulations which will be subject to consultation.

*Choice of procedure*

28. The purpose of this power is to set out the detail of the health information to be provided to sunbed users and this will be subject to the consultation requirement in section 102. Over time, and with the advancement of scientific knowledge, it is likely that the information to be provided will require to be changed. It is therefore considered that negative procedure is appropriate balancing the need for flexibility against the need for scrutiny.

## **Section 90F – Power to prescribe information to be contained in notice**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

29. Section 90F requires an operator of sunbed premises to display a notice containing such information as may be prescribed, in a position where it is readily visible to persons proposing to use a sunbed on the premises. Section 104 of the Bill defines “prescribed” as “prescribed by the Scottish Ministers by regulations”. Under section 90F(4), the Scottish Ministers may prescribe the information which the notice is to contain and the form and manner of display of the notice.

### *Reason for taking power*

30. This will help to ensure that adults are able to make an informed decision about whether or not to use a sunbed. The detail of the information which the notice is to contain will be set out in regulations which will be subject to consultation.

### *Choice of procedure*

31. The purpose of this power is to set out the detail of the information which the notice is to contain and this will be subject to the consultation requirement in section 102. Over time, and with the advancement of scientific knowledge, it is likely that the information in the notice will require to be changed. It is therefore considered that negative procedure is appropriate balancing the need for flexibility against the need for scrutiny.

## **Section 90K – Power to make regulations in relation to fixed penalty notices**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Statutory instrument  
**Parliamentary procedure:** Affirmative resolution of the Scottish Parliament

32. Section 90K provides for fixed penalties for the offences of allowing the use of sunbeds by persons under 18, allowing unsupervised use of sunbeds, failing to provide the prescribed information to sunbed users and failing to display the prescribed information notice.

33. Section 90K(11) provides that the Scottish Ministers may by regulations provide that fixed penalty notices may not be given in such circumstances as may be prescribed, the form of fixed penalty notice, the method or methods by which fixed penalties may be paid, that subsections (4) and (5) may be modified so as to substitute different amounts and periods of time for the amounts and periods of time specified in those subsections and provide for the keeping, preparation and publications of statements of account. In terms of section 102(4) regulations under this subsection are subject to affirmative resolution procedure.

### *Reason for taking power*

34. This power will allow the Scottish Ministers to make provision about the fixed penalty system. The power covers both administrative matters as well as a power to increase the amount of the fixed penalty, subject to an upper limit of £500.

*Choice of procedure*

35. Affirmative resolution procedure is thought to be appropriate because the exercise of the regulation making power in relation to the fixed penalty regime for sunbeds may alter the amount of the fixed penalty (as well as the period for payment). It also ensures consistency with the regulation making power in section 95 in relation to fixed penalties in Part 9 of the Bill.

**PART 9 STATUTORY NUISANCES**

**Section 91 – Power to prescribe places to which the amendment to the 1990 Act regarding insect nuisance will not apply**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Statutory instrument**  
**Parliamentary procedure: Negative resolution of the Scottish Parliament**

36. Section 91(2) of the Bill inserted a new paragraph (faa) into section 79(1) of the 1990 Act to add to the matters that constitute a statutory nuisance, ‘insects emanating from premises and being prejudicial to health or a nuisance’. Section 91(3) inserts new subsections (5AA) to (5AD) into section 79 which enable the Scottish Ministers by regulations to prescribe other places or types of place which are not included in the definition of premises in the 1990 Act and which will thus be exempt from the scope of the insect statutory nuisance provisions in new section 79(1)(faa) of that Act. This power has been amended to make it subject to a duty to consult, where it is reasonably practicable to do so, such associations of local authorities or other persons as Scottish Ministers consider appropriate, before making the regulations. This amendment was introduced following a recommendation by the Health and Sport Committee. The reasons for taking the power and the choice of procedure are unchanged from introduction of the Bill.

**Section 94 – Power to make further provision regarding statutory nuisances**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Statutory instrument**  
**Parliamentary procedure: Affirmative resolution of the Scottish Parliament**

37. Section 94 (2) of the Bill inserted a new subsection (1ZA) into section 79 of the 1990 Act to allow Scottish Ministers to make regulations to prescribe additional matters which constitute statutory nuisances for the purposes of Part III of the 1990 Act, to vary the description of any matter which constitutes a statutory nuisance and to amend the 1990 Act and any other enactment to make incidental etc. provision as the Scottish Ministers think fit in consequence of such prescription or variation. This power has been amended to make it subject to a duty to consult, where it is reasonably practicable to do so, such associations of local authorities or other persons as Scottish Ministers consider appropriate, before making the regulations. This amendment was introduced in response to a recommendation by the Health and Sport Committee. The reasons for taking the power and the procedure are as at introduction of the Bill.

## **Section 95 – Power to make provision regarding fixed penalty notices**

**Power conferred on:** Scottish Ministers

**Power exercisable by:** Statutory instrument

**Parliamentary procedure:** Affirmative resolution of the Scottish Parliament

38. Section 95(3) of the Bill inserted a new section 80ZA into the 1990 Act to make provision in relation to fixed penalty notices (“FPN”). Section 80ZA(11) of the 1990 Act provides for a regulation making power for the Scottish Ministers to make provision about the fixed penalty system, including provision for the form of any FPN, the methods by which penalties may be paid and modification of the amount of any fixed penalty. Section 95(3) has been amended to include, in section 80ZA(11), a power for Scottish Ministers to make regulations to provide for the amount of the fixed penalty to be different in different cases or descriptions of case. One use of this new power could be the creation of a system of tiered penalties to provide a further deterrent to persistent offenders. Section 95(3) has also been amended to include a duty to consult, where it is reasonably practicable to do so, such associations of local authorities or other persons as Scottish Ministers consider appropriate, before making regulations under section 80ZA (11). This amendment was in response to a recommendation by the Health and Sport Committee.

### *Reason for taking power*

39. It is intended that availability of fixed penalties will assist in ensuring compliance with abatement notices and will provide an effective deterrent to non compliance. However, as with any new regime, there may be a need to adapt the FPN process in certain circumstances. The power to change the amount of fixed penalty in different cases or descriptions of cases will enable Scottish Ministers, if they consider it necessary, to strengthen the fixed penalty scheme by creating a system of tiered penalties, where the amount of fixed penalty offered may increase on a subsequent offence (subject to an upper limit of £500), providing an extra deterrent to persistent offenders.

### *Choice of procedure*

40. Section 95A has been introduced at Stage 2, in response to a recommendation made by the Subordinate Legislation Committee. Section 95A of the Bill inserts a new subsection (2B) into section 161 of the 1990 Act. As a result, regulations made under section 80ZA (11) of the 1990 Act will now be subject to affirmative resolution procedure. This is considered to provide the appropriate degree of parliamentary scrutiny, given the powers provided for under new section 80ZA(11), in particular the powers to alter the amount of a fixed penalty and the period for payment of a FPN. Affirmative resolution procedure will ensure that there is opportunity for parliamentary debate in respect of any such changes.

## **Section 98 – Disclosure of information – Power to modify meaning of relevant authority**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Statutory instrument  
**Parliamentary Procedure:** Negative resolution of the Scottish Parliament

41. Section 98 outlines the circumstances under which information held under the Bill by a relevant authority may be disclosed. Section 98(7) lists the relevant authorities for the purposes of the section and section 98(8) provides that the Scottish Ministers may by regulations modify the meaning of relevant authority. This was amended at stage 2 so that the power under section 98(8) includes the power to modify any enactment including the Bill.

### *Reason for taking power*

42. Under this section, information held by a relevant authority may be disclosed as set out in subsections (2) and (3). In order to accommodate possible changes in the future, it is necessary to provide a means for amending the list of relevant authorities without recourse to primary legislation.

### *Choice of procedure*

43. The power to modify the meaning of relevant authority is a narrow power, which would simply reflect changes that may be made to the way the protection of public health is carried out in general, and, in more specific terms, the persons who will carry out those functions. Negative Resolution is considered to be appropriate for this type of narrow, technical regulation.

## **Section 101A – Power to prescribe the form of any application or order under the Act**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Statutory instrument  
**Parliamentary Procedure:** Negative resolution of the Scottish Parliament

44. This provision gives the Scottish Ministers the power to prescribe the form of any application or order under the Act.

### *Reason for taking power*

45. There will be a number of applications and orders made under the Bill. It is quite usual for the forms of applications, notices and orders to be provided by rules of court, but in this instance, it is considered more appropriate for the detail of these notices and orders to be provided by Ministers. The reason behind this is that the persons who will be using the forms, such as health board and local authority competent persons, may not have immediate access to legal advice and it is important that the forms be as accessible to the users as possible.

### *Choice of procedure*

46. The regulations will prescribe the form of any application or order to be made under the Bill. These regulations will be of a technical nature and will not impact on the delivery of policy. Negative procedure is the most appropriate procedure for technical orders of this kind.

## **Section 102 – Regulations and Orders**

47. Although this section as amended does not confer any new power on the Scottish Ministers to make regulations, section 102(2A) provides that before making any regulations under the Act, the Scottish Ministers must, in so far as it is reasonably practicable to do so, consult such persons as they consider appropriate. This change was made in response to a recommendation by the Health and Sport Committee at stage 2 and will apply to all regulations made under the Bill.

*This document relates to the Public Health etc. (Scotland) Bill as amended at Stage 2 (SP Bill 3A)*

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