



The Scottish Parliament

Subordinate Legislation Committee

26th Report, 2008 (Session 3)

Public Health etc. (Scotland) Bill as amended at Stage 2

For information in languages other than English or in alternative formats (for example Braille, large print, audio tape or various computer formats), please send your enquiry to Public Information Service, The Scottish Parliament, Edinburgh, EH99 1SP.

You can also contact us by fax (on 0131 348 5601) or by email (at sp.info@scottish.parliament.uk). We welcome written correspondence in any language.

©Parliamentary copyright. Scottish Parliamentary Corporate Body 2008.

Applications for reproduction should be made in writing to the Licensing Division, Her Majesty's Stationery Office, St Clements house, 2-6 Colegate, Norwich NR3 1BQ Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley
Scottish Parliamentary Corporate Body publications.



The Scottish Parliament

Subordinate Legislation Committee

26th Report, 2008 (Session 3)

**Public Health etc. (Scotland) Bill as
amended at Stage 2**

Published by the Scottish Parliament on 9 June 2008



The Scottish Parliament

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,

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:

Jackie Baillie
Jackson Carlaw
Helen Eadie
Ian McKee
John Park
Gil Paterson (Deputy Convener)
Jamie Stone (Convener)

Committee Clerking Team:

Clerk to the Committee

Shelagh McKinlay

Senior Assistant Clerk

David McLaren

Assistant Clerk

Jake Thomas



The Scottish Parliament

Subordinate Legislation Committee

26th Report, 2008 (Session 3)

Public Health etc. (Scotland) Bill as amended at Stage 2

The Committee reports to the Parliament as follows—

1. At its meetings on 6 May, 13 May and 3 June 2008, the Committee considered the inserted or substantially amended delegated powers provisions in the Public Health etc. (Scotland) Bill as amended at Stage 2. The Committee reports to the Parliament on such provisions under Rule 9.7.9 of Standing Orders.
2. The Committee also took oral evidence from Scottish Government officials at its meeting on 3 June 2008¹.
3. Under Rule 9.7.10, the Government provided the Parliament with a supplementary delegated powers memorandum (“DPM”).²

Delegated powers

4. The Committee considered all of the powers as set out in the supplementary DPM and is content with sections: 66, 90(4)(c), 90A(5)(c), 90E, 90F, 90K(11), 91, 98, 101A and 102.
5. The Committee is also content with the following delegated powers referred to in the supplementary DPM for the reasons below—

Section 12: lists of notifiable diseases and notifiable organisms

6. During Stage 1 of the Bill, the Committee expressed concern as to whether the expression “any other clinically significant pathogen found in blood” listed at the end of the list of notifiable organisms in Part 2 of schedule 2 was ambiguous. It sought justification from the Government for the inclusion of the term. Having considered the Government’s response however, the Committee remained concerned about the potential ambiguity as a result of the inclusion of the term, and reported this to the lead committee in its Stage 1 report³.

¹ [Official Report](#)

² [Supplementary Delegated Powers Memorandum](#)

³ [Stage 1 Report](#)

7. **The Committee was pleased to note that in response to concerns it raised in its Stage 1 report, the Government agreed to remove reference to the expression “any other clinically significant pathogen found in blood” from the list of notifiable organisms in part 2 of schedule 1 to the Bill, at Stage 2.**

Section 25 – Investigatory powers - supplementary

8. In its Stage 1 report, following correspondence with the Government, the Committee drew the attention of the lead committee to the following concerns—

- (a) that in its view the scope of the power was too broad in that it could permit the substance of the investigatory powers to be altered in a manner inconsistent with the powers conferred by Parliament in the Bill; and
- (b) that should the power be accepted in principle, it would recommend that any exercise of the power which has the effect of amending primary legislation should be subject to affirmative procedure.

9. In its response to the Committee’s Stage 1 report⁴ (Annex 1), the Government did not accept the Committee’s view in relation to point (a), indicating that it “considered it prudent to enable Ministers to supplement the powers given to investigators, by regulations, should it become clear, as investigations take place on the ground, that investigations are hampered in some way because the provision in the Bill did not anticipate a particular set of circumstances”. The Government added that “any new powers, rather than conflicting or undermining powers, would supplement them”.

10. On point (b), the Government considered that in its view negative procedure was appropriate, citing statutory provisions that it believed were in similar terms and which also attract negative procedure (section 115(3)(j) of the Environmental Protection Act 1990 and section 108(4)(m) of the Environment Act 1995). However, the Committee noted that, whilst these provisions similarly provide for the conferral of additional enforcement powers, they do not appear to contain a supplementary power to amend primary legislation.

11. The Committee did not accept the Government’s position and agreed to lodge an amendment at Stage 2 to insert the word “supplementary” before the word “powers” to ensure that the use of the delegated power could not alter the substance of the existing enforcement powers conferred on investigators by Parliament, which are set out on the face of the Bill. The amendment was withdrawn however by the Convener during the Stage 2 debate on 7 May 2008⁵ on the basis that the Minister provided an assurance to give further consideration to the limitation of the power.

⁴ [Government response to stage 1 report](#)

⁵ [Health and Sport Committee stage 2 \(7 May 2008\)](#)

12. In its response to the Committee of 21 May on this point⁶ (Annex 2), the Government agreed to bring forward an amendment at Stage 3 to use affirmative procedure for all regulations made under section 25(3) whether they modify an enactment or not unless the regulations require to be made in an emergency, in which case, they would be subject to Class 3 affirmative procedure.

13. Whilst the Government has not agreed to limit the extent of the power in section 25(3) to confer additional powers on investigators, the Committee welcomes the commitment it has made to bring forward the aforementioned amendment at Stage 3. This higher level of scrutiny will enable the Parliament to satisfy itself as to the extent of any new powers which are proposed to be conferred on investigators for public health investigation purposes. This enhancement of the Parliament's scrutiny role allays the Committee's concerns about the width of the delegated power.

14. The Committee is content with the power in section 25(3) and that this is subject to affirmative procedure for all regulations made under this section, whether they modify an enactment or not, unless the regulations require to be made in an emergency, in which case, they will be subject to Class 3 (emergency affirmative) procedure.

Section 89 – International Health Regulations (IHR)

15. The Committee expressed concern in its Stage 1 report about the broadly framed power in this section, which is subject to affirmative procedure. It sought clarification from the Government as to its intention for delivery of the IHR obligations and how the power would be exercised. In particular, the Committee sought information as to any proposals to amend the power at Stage 2 in order to clarify the extent of the power or the proposed method of implementation of the IHR on the face of the Bill. In its response to the Stage 1 report, the Government indicated that it was important to ensure consistent implementation of the IHR in relation to its application at points of entry throughout the UK and that it was liaising with the UK Government on this. It therefore intended to bring forward amendments at Stage 2 to ensure consistency with the legislative approach being taken in England and Wales.

16. The Committee noted that the amendments to subsection (2) provided further detail of the type of provision that Ministers *may* make in these regulations and does not inherently limit the power. However, it considers that this detail is likely to provide individuals and the courts with a greater understanding of the kind of provisions which may be made in these regulations.

17. In addition, the Committee finds it appropriate that the amount of any penalties as a result of the commission of an offence under any regulations made under section 89(1) is provided on the face of the Bill.

18. The Committee considers it appropriate that the power is subject to affirmative procedure, unless (as per new section 102(5)) the Scottish Ministers

⁶ [Scottish Government letter \(21 May 2008\)](#)

consider that the regulations need to be made urgently, in which case Class 3 (emergency affirmative) procedure will apply.

19. The Committee is content with the power in section 89 and that this is subject to affirmative procedure, unless the regulations require to be made in an emergency, in which case, they will be subject to Class 3 (emergency affirmative) procedure.

Section 90D – Medical use of sunbeds

20. The Committee noted that at Stage 2, amendments lodged by Ken Macintosh MSP, supported by the Government, were agreed to in relation to the regulation of provision of sunbeds.

21. It noted that section 90D confers a new delegated power on the Scottish Ministers to provide that they may, by regulations, make provision regarding the application of Part 8 of the Bill (relating to the regulation of the provision of sunbeds) to sunbeds used for medical purposes.

22. Subsection (2) provides that these Regulations may, in particular, make provision relating to the following—

- what is (and is not) a sunbed;
- what are (and are not) sunbed premises; and
- the circumstances in which the provisions of Part 8 of the Bill do (and do not) apply.

23. The Committee was concerned to note that subsection (3) provides that regulations made under this power may modify any enactment (including the Bill), but that these would be subject only to negative procedure.

24. The Committee was also concerned that the power was wide ranging and had the scope to greatly affect the operation of Part 8 of the Bill. In particular, it noted that it allows the Scottish Ministers to make regulations amending the definition of “sunbed” and “sunbed premises” (both central to the operation of Part 8 of the Bill) and to provide when Part 8 of the Bill is and is not to apply. The only restriction of the power is that the provision in regulations must relate to the use of sunbeds for “medical purposes”. However, the modification of the application of Part 8 of the Bill to sunbeds used for a specific purpose (i.e. medical) could enable a means of removing the controls under Part 8 to activities which Ministers consider are for a medical purpose. There is no definition of medical purpose and the Committee was concerned that this is a very broad power which would appear to afford Ministers a very broad appreciation of what is a medical purpose.

25. The Committee noted that, in addition to the wide delegated power, there is an associated power that any such regulations may modify *any* enactment (including the Bill). The Committee considers, however, that such a modification would have to relate to the application, modified application or disapplication of Part 8.

26. The Committee was also concerned that Parliament was not being afforded the higher level of Parliamentary scrutiny offered by affirmative procedure, particularly as the delegated power includes an associated power permitting the modification of primary legislation. There is a presumption in favour of affirmative procedure where subordinate legislation is enabled to amend primary legislation (a “Henry VIII power”). The Committee is of the view that sound justification should be given for any reduction in the level of scrutiny in such cases.

27. The Committee did not find that sound justification had been provided by the Government in the supplementary DPM which simply stated that “it is considered that negative procedure is appropriate because any regulation made under this power would be of a technical nature rather than about the principle of medical use”. Moreover, the Committee did not consider that the supplementary DPM explained clearly how the Government intends to use this delegated power and, in particular what kind of “medical purpose” should be excluded from the operation of Part 8 of the Bill which regulates the provision of sunbeds.

28. The Committee invited Government officials to its meeting on 3 June to discuss these concerns further. The Committee was pleased to note that in response to its concerns, the Scottish Government had reconsidered its position on the Parliamentary procedure to apply to any regulations made under the delegated power in section 90D and that affirmative procedure should apply to any such regulations. The Government agreed to lodge an amendment at Stage 3 to this effect, which will ensure that there is an appropriate level of Parliamentary scrutiny of any regulations.

29. The Committee is content with the power and welcomes the Government’s commitment to lodge an amendment at Stage 3 so that regulations under section 90D will be subject to affirmative procedure.

Section 94 – Power to make further provision regarding statutory nuisance

30. In its Stage 1 report, the Committee considered that local authorities should be consulted prior to the Government bringing forward draft regulations on the basis of the impact of the creation of additional forms of statutory nuisance on local authorities’ duties and the exercise of their functions under the Environmental Protection Act 1990.

31. In its response, the Government indicated that it would lodge an amendment at Stage 2 which would oblige Scottish Ministers to consult with local authority associations and other persons (where practicable) in advance of making regulations. The amendment was agreed to at Stage 2. The Committee welcomes the change which it considers is likely to increase stakeholder engagement in the exercise of the delegated power.

32. The Committee is content with the power, as amended at Stage 2, and that this is subject to affirmative procedure.

Section 95 – Enforcement of statutory nuisances - fixed penalty notice

33. In its Stage 1 report, the Committee expressed concern that, whilst most of the provisions in this section can be made by regulations under the power conferred by new section 80ZA(11) of the Environmental Protection Act 1990 (“EPA”) were of an administrative nature, the power set out in new section 80ZA(11)(e) of the EPA could substitute a new time period of payment and that this was essentially a matter of principle rather than of administration. In particular, the Committee considered that any reduction of the 14 day period for payment set out on the face of the Bill is a matter for Parliamentary approval.

34. The Committee was not satisfied with the Government’s response to its concerns and therefore recommended in its Stage 1 report that the lead committee should press the Government to bring forward an amendment at Stage 2 to provide that the exercise of the power proposed in the new section 80ZA(11)(e) should be subject to affirmative procedure.

35. The Government lodged the following amendments at Stage 2 (which were agreed by the lead committee)—

- (a) to provide that any regulations made under the new section 80ZA(11) of the EPA are subject to the higher degree of Parliamentary scrutiny of affirmative procedure;
- (b) to introduce a requirement to consult with such associations of local authorities and such other persons as the Scottish Ministers consider appropriate (where practicable) before making regulations under section 80ZA(11) of the EPA; and
- (c) to insert a new power into section 80ZA(11) of the EPA to provide that regulations made by the Ministers may also provide for the amount of the fixed penalty to be different in different cases or descriptions of case. (The supplementary DPM explains that one use of this power could be the creation of a system of tiered penalties to provide a further deterrent to persistent offenders.)

36. In relation to amendment (a), the Committee welcomed the amendment at Stage 2 to provide that the exercise of the power under any element of section 80ZA(11) of the EPA (and not just sub-paragraph (e)) is subject to the higher level of Parliamentary scrutiny of affirmative procedure.

37. In relation to amendment (b), the Committee welcomed the imposition of a duty on the Scottish Ministers to consult with local authority associations and other persons (where practicable) in advance of making regulations excluding premises from which insects emanate from the statutory nuisance regime. Again, the Committee considers that this change is likely to increase stakeholder engagement in the exercise of this delegated power.

38. In relation to amendment (c), the Committee found that the amendment to the power allowing the Scottish Ministers to make Regulations to provide for the

amount of the fixed penalty to be different in different cases or descriptions of case to be acceptable.

39. The Committee is satisfied with the power and that this is subject to affirmative procedure.

ANNEX 1

Scottish Government response to Subordinate Legislation Committee's Stage 1 report

1. The Committee asked the Scottish Government to reply to the issues raised in the Sublegislation Committee's Stage 1 report on 23 April. The Committee had already indicated in its Stage 1 report that it was content with the Scottish Government responses on the majority of issues raised. The responses below relate to the outstanding issues that were referred to the lead committee. These are considered in turn.

Section 12: Lists of notifiable diseases and notifiable organisms

2. The Committee wished to draw the attention of the lead committee to the potential ambiguity of including "any other clinically significant pathogen found in blood" in Schedule 1, recommending that it be given further examination.

The Scottish Government response is as follows—

3. The Scottish Government has noted the Committee's concerns, and recognises that the description is wide and could include organisms that are not intended to be reported. In light of the concerns raised by the Sub-ordinate Legislation Committee (and also by the lead committee), the Scottish Government plans to lodge amendments at Stage 2 to remove this from the list of notifiable organisms.

Section 25: Investigatory powers – supplementary

4. The Committee wished to draw the attention of the lead committee to its concerns—

- that the scope of the power is too broad in that it could permit the substance of the investigatory powers to be altered in a manner inconsistent with the powers conferred by Parliament in the Bill; and
- that should this power be accepted in principle, it recommends that any exercise of the power that has the effect of amending primary legislation should be subject to affirmative procedure.

The Scottish Government responds as follows—

5. The Scottish Government adheres to the justification for this power to be subject to negative resolution. It is prudent to enable Ministers to supplement the powers given to investigators, by regulations, should it become clear, as investigations take place on the ground, that they are hampered in some way because the provisions in the Bill did not anticipate a particular set of circumstances. Any new powers, rather than conflicting or undermining existing powers, would supplement them. The Scottish Government would draw attention to section 115(3)(j) of the Environmental Protection Act 1990 and section 108(4)m

of the Environment Act 1995, both of which make provision in very similar terms to section 25 (3) of the Bill, and both of which attract negative procedure.

Section 89: International Health Regulations (IHR)

6. The Committee wished to draw to the attention of the lead committee the very broadly framed power outlined in section 89 of the Bill, which is subject to affirmative procedure. It also wished to draw attention to the Scottish Government's commitment to bring forward alternative proposals at Stage 2. The Committee considered that if such amendments were not forthcoming by the Scottish Government at Stage 2, then it would give further consideration to limiting the scope of the power, as currently drafted, given that affirmative procedure offers no opportunity for consideration of amendments, but only approval or rejection of the draft regulations brought forward.

The Scottish Government responds as follows—

7. It is important to ensure that implementation of the IHR, as it applies at points of entry into the UK, is carried out in a uniform manner. The Scottish Government will be bringing forward amendments at Stage 2 which will ensure a consistency of approach with provision in the UK Health and Social Care Bill (currently going through the Westminster Parliament), and which will implement the IHR in England and Wales. We will also continue to work with the Department of Health and our own stakeholders in the development of regulations that will be made under the powers in section 89, and which will be subject to comprehensive consultation.

Section 95: Enforcement of statutory nuisances – fixed penalty notice

8. The Committee recommended to the lead committee that it press the Scottish Government to bring forward an amendment to provide that the exercise of the power proposed in section 80ZA(11)(e) of the 1990 Act should be subject to affirmative procedure following the model of the Smoking, Health and Social Care (Scotland) Act 2005.

The Scottish Government responds as follows—

9. The Scottish Government has noted the Committee's concerns with regard to providing for negative procedures and the similar example provided in the Smoking, Health and Social Care (Scotland) Act 2005. We will therefore lodge an amendment at Stage 2 to provide that the exercise of this power be subject to affirmative procedure.

ANNEX 2

Correspondence between the Committee and the Scottish Government

The Public Health etc. (Scotland) Bill at Stage 2

1. On 16 May the Committee wrote to the Scottish Government following reconsideration, at its meeting on 13 May, of the amendments it had lodged in relation to sections 25(3) and 102 of the Bill.

Section 25(3)

2. On 7 May, the Convener moved the amendment in relation to section 25(3) to insert the word 'supplementary' before the word 'powers' to ensure that the use of the delegated power cannot alter the substance of the existing enforcement powers conferred on investigators by Parliament, which are detailed on the face of the Bill. The amendment was subsequently withdrawn on the basis that the Minister gave an assurance to give further consideration to the limitation of the power. The Committee has indicated that it would welcome notification of the outcome of the Minister's deliberations in good time prior to Stage 3.

Section 102

3. On 13 May, the Committee agreed, in the current circumstances, that the Convener should not move the related amendment to section 102 (to provide that where regulations made under the power in section 25(3) modify an Act of Parliament or an Act of the Scottish Parliament, they are subject to affirmative procedure) on 14 May.

4. Whilst the Committee acknowledges the concerns expressed by the Minister on 7 May relating to the potential delay associated with affirmative procedure being attached to the power in section 25(3), the Committee's view remains that when the power is used to modify primary legislation, it should be subject to affirmative procedure. However, it now appears to the Committee that the procedural approach used for regulations made under section 89, i.e. Class 3 affirmative procedure in urgent situations, could address both its concerns and those of the Government.

5. The Committee therefore seeks the Government's view in relation to the adoption of affirmative procedure, but permitting Class 3 affirmative procedure to be applied in cases of urgency in relation to the delegated power in section 25(3) to which section 25(4) relates.

The Scottish Government responds as follows—

6. The Scottish Government welcomes the suggestion set out in paragraph 5 above and agrees that it meets our concerns with regard to the ability to make regulations speedily should the need arise because of the circumstances of the public health incident. We will bring forward amendments to section 102 at Stage 3 to effect the necessary changes.

7. The Scottish Government considers that the amendments to allow for Class 3 affirmative procedure to be applied to the delegated power in section 25(3) in respect of all regulations made under that section, will also address the Committee's concerns with regard to the wording in that section and remove the need for the word 'supplementary' to be included. The introduction of affirmative procedure will afford the Parliament the highest level of scrutiny available and should enable the Parliament to satisfy itself as to the extent of any new powers being proposed. In these circumstances, we do not consider there is a need to bring forward any amendment to section 25(3) at Stage 3.

Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.

Published in Edinburgh by RR Donnelley and available from:

Blackwell's Bookshop

**53 South Bridge
Edinburgh EH1 1YS
0131 622 8222**

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

**Telephone orders and inquiries
0131 622 8283 or
0131 622 8258**

**Fax orders
0131 557 8149**

**E-mail orders
business.edinburgh@blackwell.co.uk**

**Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk**

Scottish Parliament

**RNID Typetalk calls welcome on
18001 0131 348 5000
Textphone 0845 270 0152**

sp.info@scottish.parliament.uk

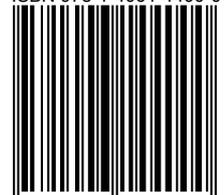
All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

ISBN 978-1-4061-4400-0



9 781406 144000