



The Scottish Parliament
Pàrlamaid na h-Alba

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Planning (Scotland) Bill at Stage 1

The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 30 January. The Committee agreed to seek oral evidence from the Minister for Local Government and Housing on 20 February. In advance of that evidence session, the Committee would be grateful for a written explanation of a number of issues in the Delegated Powers Memorandum.

The issues that the Committee wish to explore are divided into two sections. Section 1 sets out questions which the Committee may also wish to explore in the oral evidence session. Section 2 sets out questions to which the Committee would be happy to receive a written response only.

The Committee would be grateful to receive a written response to all questions by Friday, 9 February.

Section 1: Issues that the Committee would wish a written response to and may also wish to explore during the evidence session with the Minister

Part 1 – Development planning

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

Section 7(2) of the Bill inserts new section 3CA into the Town and Country Planning (Scotland) Act 1997 (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 the Bill, which amends the timescales in the 1997 Act for revising the NPF from within five years to within 10 years.

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.

The Delegated Powers Memorandum (DPM) explains that the ability to amend the NPF is a new process being introduced, which will enable parts of the document to be amended without revisiting the whole document. The Scottish Government argues that as this is a new stage in the process, it may be necessary to adjust the detail of making an amendment in the light of experience or to tailor it in relation to the nature of the proposed amendment. Arrangements for consultation and publication may also need to be adjusted in the light of future developments in technology.

The DPM also argues that the negative procedure is considered appropriate on the basis that the regulations relate to a level of detail on the practical and administrative matters set out in the primary legislation.

The National Planning Framework is a document of significant public interest. Detailed provision is made for the current process of preparing and revising the NPF in existing sections 3A to 3C of the 1997 Act.

The Committee therefore asks the Scottish Government to explain why it is appropriate that the Scottish Ministers should have the power in new section 3CA of the 1997 Act, as inserted by section 7(2) of the Bill, to make provision for the laying of the amended framework before the Scottish Parliament, and that such provision is only subject to the negative procedure. As part of this, the Committee also asks the Scottish Government to explain further why provision on process of the sort currently made in existing sections 3A to 3C cannot be made on the face of the Bill.

Section 7(3), inserting new section 20AA(2) into the 1997 Act – Direction to amend local development plans

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

Section 7(3) of the Bill inserts new section 20AA into the 1997 Act, which provides that a planning authority may at any time amend a local development plan constituted for their district.

The delegated power contained in new section 20AA(2) appears to be significant, as it allows the Scottish Ministers to direct a planning authority to exercise their power to amend a local development plan in relation to matters specified in the direction. Such a direction must set out the Scottish Ministers' reasons for requiring an

amendment to the local development plan. The DPM explains that it may be appropriate to amend a local development plan to address a nationally significant economic challenge.

The Committee asks the Scottish Government whether it would be more appropriate that additional safeguards apply to a power of this nature, such as: (a) a requirement to publish any directions given; and (b) a requirement to report to the Parliament on the use of the power.

Part 2 – Simplified Development Zones

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

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

Currently section 54 of the 1997 Act provides that a simplified planning zone scheme cannot be designated within certain categories or descriptions of land, which are listed in the 1997 Act. The DPM explains that this has caused some difficulty because having the restrictions prescribed in primary legislation limits the opportunity to make changes or additions to the list to respond to other designations that could come forward. The Scottish Government also argues that it may be necessary to amend the restrictions to reflect changes in development practice and local needs.

The Committee asks the Scottish Government to consider whether it would improve the transparency of the provisions relating to SDZ schemes in section 10 of the Bill (as it amends the 1997 Act) if the types of land that may not be included in an SDZ scheme were set out on the face of the primary legislation (as they are currently for simplified planning zones), with a power included to add or remove entries by regulations subject to the affirmative procedure.

Section 10(2) and (3), inserting schedule 5A, paragraphs 6 and 19 into the 1997 Act – Duty to seek to make or alter a scheme when directed to do so

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

Paragraph 6(1) of new schedule 5A inserted into the 1997 Act by section 10 of the Bill enables the Scottish Ministers at any time to direct a planning authority to make

or alter an SDZ scheme in such terms or manner as the Scottish Ministers consider appropriate.

At present, the Scottish Ministers can only direct that a simplified planning zone scheme is made or altered if a person requests the planning authority to make or alter such a scheme and the planning authority refuses to do so or fails to decide whether to do so within three months from the date of the request (schedule 5 of the 1997 Act).

By way of contrast, the power of direction to make or alter an SDZ scheme in paragraph 6(1) of new schedule 5A of the 1997 Act contained in the Bill appears to be significant as it can be exercised at any time by the Scottish Ministers. It is also significant that paragraph 19 of new schedule 5A allows the Scottish Ministers to make or alter the scheme themselves following a local inquiry or other hearing which establishes that the planning authority has not complied with the direction within a reasonable period.

The Committee asks the Scottish Government whether it would be more appropriate that additional safeguards apply to the power in paragraph 6(1) of new schedule 5A, such as: (a) a requirement for the Scottish Ministers to provide reasons for giving such a direction; (b) a requirement to publish any directions given; and (c) a requirement to report to the Parliament on the use of the power.

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

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

Section 10 of the Bill inserts new sections 54A to 54F into the 1997 Act.

Section 54C(1) provides that an 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.

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(3).

The fact that such provision can be made either by a planning authority or the Scottish Ministers, but will not be made 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 changes made.

The Committee asks the Scottish Government to explain why it considers these provisions to be appropriate in terms of the removal of parliamentary oversight.

Part 4 – Other matters

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

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

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 by the Scottish Ministers.

Section 25(1) of the Bill provides a direction-making power to 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.

A transfer of functions direction relates to functions which are, prior to the direction being made, exercised by members elected for a particular area. In light of this, the Committee asks the Scottish Government whether it would be more appropriate that additional safeguards apply to a power of this nature, such as: (a) a requirement for the Scottish Government to explain the circumstances that have led to the planning authority being unable to exercise a function because of a prohibition created by section 24(1); (b) a requirement to publish any directions given; and (c) a requirement to report to the Parliament on the use of the power.

Section 25(5) – Power to transfer functions where insufficient trained persons

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Section 25(5) of the Bill grants the Scottish Ministers a power to make regulations providing for *any* enactment to apply subject to such modifications as the Scottish Ministers *consider appropriate* in connection with a transfer of functions direction or a direction modifying or revoking such a direction. This appears to be a particularly wide power.

The Committee therefore asks the Scottish Government to consider whether the modifications that can be made should be limited to: (a) enactments that are specified on the face of the Bill; and (b) those that are *necessary* in connection with a transfer of functions direction (or such a direction as modified or revoked).

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

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.

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.

As the functions of the person appointed are specified broadly in new sections 251(1) and (2), the Committee asks the Scottish Government whether it would be more appropriate for the enhanced oversight afforded by the affirmative procedure to apply to regulations which would make such further provision.

Section 26 – Directions to planning authority following an assessment of performance

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

Section 26(1) of the Bill inserts new section 251G into the 1997 Act. This is a significant power, which allows the Scottish Ministers to direct a planning authority to take action where (among other things) they are not satisfied that the planning authority's proposals will effectively implement the recommendations contained in a performance assessment report.

The Committee asks the Scottish Government whether it would be more appropriate that additional safeguards apply to a power of this nature, such as: (a) a requirement to provide reasons explaining why the direction is being issued; (b) clarifying that the steps that may be required are limited to those recommended in the performance assessment report; and (c) a requirement to report to the Parliament on the use of the power.

Part 5: Infrastructure levy

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

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".

The Committee has identified the following three issues in respect of the power to make infrastructure-levy regulations:

- (a) Paragraph 17 of schedule 1 sets the cap on penalties that can be created under the infrastructure-levy regulations. However, these are set at the maximum permissible amounts; i.e. level 5 on the standard scale for a summary-only offence and the statutory maximum for an either-way offence. The maximum term of imprisonment is 12 months on summary conviction and, for an either-way offence, 12 months on summary conviction or two years on conviction on indictment.

The Committee therefore asks the Scottish Government, in the absence of any explanation in the DPM, to explain why it is appropriate that these limits are set at these high levels.

- (b) Paragraph 16(1) of schedule 1 provides that infrastructure-levy regulations may make provision about how related planning legislation may or may not be exercised. These powers appear to be particularly broad.

The Committee therefore asks the Scottish Government to provide examples of when the Scottish Ministers might consider it expedient to modify legislation to enhance the effectiveness of the infrastructure levy as a means to raise revenues.

Similarly, it appears that provision preventing or restricting the use of other planning powers where Ministers consider the power to charge infrastructure levy more appropriate is a significant issue.

The Committee therefore asks the Scottish Government to consider if it would be appropriate for primary legislation to define, for example, when it would be appropriate for an agreement under section 75 of the 1997 Act (as amended by the Bill) to impose a planning obligation requiring payment of a sum and when the infrastructure levy should be used instead.

- (c) The infrastructure-levy regulations will define fundamental elements of the levy such as the kinds of development for which the levy will be payable, who is liable to pay, when liability arises and the amount to be paid. It will also make important provision about the purposes for which levy income may be used by local authorities.

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. Such regulations are, by virtue of section 15 of that Act, subject to a form of “super-affirmative” procedure.

The Committee therefore asks the Scottish Government to consider whether a form of super-affirmative procedure would be appropriate for the infrastructure-levy regulations to allow appropriate consultation of those affected and enhanced parliamentary scrutiny of the proposed policy to be adopted.

Section 2: Issues of detail on which the Committee is content to receive a written response only

Part 3 – Development Management

Section 16 – Schemes of delegation: Inserted section 43AB(2)(c) – further provision and guidance - directions

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

New section 43AB(2)(c) of the 1997 Act inserted by section 16 of the Bill provides that regulations under section 43AB(1) (about the form and content of, and procedures for preparing, a scheme of delegation) may include requirements for planning authorities to comply with directions from the Scottish Ministers about the form, content or procedures for a scheme of delegation.

This power of direction is in addition to the power in new section 43AB(2)(b) for those regulations to require the planning authority to make any modifications specified by the Scottish Ministers before adopting a scheme.

The Committee asks the Scottish Government to explain why new section 43AB(2)(b) is expressed as a power in regulations for the Scottish Ministers to specify modifications that a planning authority are required to make to a draft scheme of delegation and why a different approach has been taken to the direction-making power in new section 43AB(2)(c).

Part 4 – Other matters

Section 21 – Fees for planning applications etc.

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

The Committee has identified the following issues in respect of the powers in section 21 of the Bill:

- (a) Section 21(3) of the Bill (inserting section 252(1ZA)(b) into the 1997 Act) provides a power in regulations for the Scottish Ministers to charge fees for anything done by them which is calculated to facilitate, or is conducive or incidental to, the performance of a planning function. This power is in addition to the provision made in new subsection (1ZA)(a) to recover the costs in respect of the Ministers' performance of their functions under the planning Acts or any subordinate legislation made under them.

The Committee asks the Scottish Government to explain why new section 252(1ZA)(b) is necessary and in what circumstances it is envisaged that it would be used instead of the power in new section 252(1ZA)(a).

- (b) 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. However, as amended by section 21(4) of the Bill, section 252(1A) of the 1997 Act refers to regulations made under subsection (1ZA), which relates to regulations making provision for the payment of a charge or fee to the Scottish Ministers.

The Committee asks the Scottish Government whether it is intended that the Scottish Ministers should also have the new power to waive or reduce a fee and could this provision be clearer.

- (c) 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. 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.

The Committee asks the Scottish Government to explain 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 the affirmative procedure to be applied to those regulations (or some other measure to ensure sufficient oversight).

Part 5 – Infrastructure levy

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

Section 30 provides that the Scottish Ministers may by regulations modify section 29 so as to change, or clarify, the meaning of “infrastructure” for the purposes of Part 5 of the Bill and “*the schedule*” (emphasis in italics).

The Committee asks the Scottish Government, as a minor point of technical clarity, whether the reference to the "schedule" in section 30 would be clearer if it referred to schedule 1 ("infrastructure-levy regulations")?

Please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Friday 9 February.

Thank you.

Euan Donald

Clerk to the Delegated Powers and Law Reform Committee