

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 10 May 2005

Session 2

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## SUBORDINATE LEGISLATION COMMITTEE

15<sup>th</sup> Meeting 2005, Session 2

### CONVENER

\*Dr Sylvia Jackson (Stirling) (Lab)

### DEPUTY CONVENER

\*Gordon Jackson (Glasgow Govan) (Lab)

### COMMITTEE MEMBERS

\*Mr Adam Ingram (South of Scotland) (SNP)

\*Mr Stewart Maxwell (West of Scotland) (SNP)

\*Christine May (Central Fife) (Lab)

\*Mike Pringle (Edinburgh South) (LD)

\*Murray Tosh (West of Scotland) (Con)

### COMMITTEE SUBSTITUTES

Alex Johnstone (North East Scotland) (Con)

Maureen Macmillan (Highlands and Islands) (Lab)

Stewart Stevenson (Banff and Buchan) (SNP)

\*attended

### CLERK TO THE COMMITTEE

Ruth Cooper

### ASSISTANT CLERK

Bruce Adamson

### LOCATION

Committee Room 4



## Scottish Parliament

### Subordinate Legislation Committee

*Tuesday 10 May 2005*

[THE CONVENER *opened the meeting at 10:30*]

#### Item in Private

**The Convener (Dr Sylvia Jackson):** I welcome members to the 15<sup>th</sup> meeting in 2005 of the Subordinate Legislation Committee. I have received no apologies so I am waiting with bated breath for a glut of members to arrive.

Under agenda item 1, I ask members to agree to take in private item 6, which is on the committee's draft annual report. Is that agreed?

**Members** *indicated agreement.*

## Delegated Powers Scrutiny

### Management of Offenders etc (Scotland) Bill: Stage 1

10:31

**The Convener:** Item 2 is delegated powers scrutiny of the Management of Offenders etc (Scotland) Bill. You will remember that we wrote to the Executive to confirm its intention with regard to consultation on draft orders under sections 2(1), 5(12), 7(2) and 14(1)(b) of the bill. Such orders would be subject to the affirmative resolution procedure. The Executive has confirmed that, in relation to each power, it intends to consult interested parties before laying a draft order. However, it says that there might be circumstances in which consultation is unnecessary or inappropriate and, accordingly, does not consider that a statutory requirement to consult would be appropriate. Do members agree with those points?

**Mr Stewart Maxwell (West of Scotland) (SNP):** Yes. We were not necessarily asking for the inclusion in the bill of a statutory requirement to consult; we simply asked the Executive to confirm its intention in that regard, which it has done. That is fairly clear and I expect us to find it acceptable.

**The Convener:** I now welcome the glut of MSPs who have just walked into the room: Murray Tosh and Adam Ingram.

**Murray Tosh (West of Scotland) (Con):** We are feeling enormously flattered by the warmth and finesse of your welcome, convener.

I agree with Stewart Maxwell. The point that we made last week was not a demand for a statutory requirement for consultation in the bill; we were simply inviting the Executive to address an issue that I am sure it must have thought we would raise and which might have been made clearer to us at the outset. I agree that we should be happy enough with the response.

**The Convener:** You will also note that the Executive's response provides more explanation about sections 7(2) and 7(3). We will report on the basis that members are content with the response.

## Executive Responses

### Water Environment (Controlled Activities) (Scotland) Regulations 2005 (draft)

10:33

**The Convener:** First, the Executive confirmed that all the powers cited will be commenced before the regulations are made, which I am sure we are happy about. Do members agree to pass that information on to the lead committee?

*Members indicated agreement.*

**The Convener:** The second point is that we asked for an explanation as to how regulation 20 is intended to operate. The Executive advises that regulation 12 is applied in regulation 20 to ensure that the Scottish Environment Protection Agency can recover a charge in respect of a variation initiated by it. That is in line with SEPA's general duty to recover the costs associated with its regulatory functions and complies with the polluter pays principle of Community environmental law. Is the committee happy with that? Do members think that we should report to the lead committee the fact that the drafting could have been clearer?

**Christine May (Central Fife) (Lab):** In legislative terms, we should be content with the information that we got on the commencement of the enabling powers and on regulation 20. A policy issue is raised, which I will pursue in a different forum. I know that there is contention around SEPA's charging for actions that it has imposed on companies, but that is a policy matter and is not for this committee. I agree that we should report to the lead committee on the two substantive legal points.

**The Convener:** Is that agreed?

*Members indicated agreement.*

### Horse Passports (Scotland) Regulations 2005 (SSI 2005/223)

**The Convener:** We asked the Executive for an explanation as to why the enabling power at section 2(2) of the European Communities Act 1972 was used in preference to powers in the Animal Health Act 1981. The Executive has said that because the issue is to do with horses entering the human food chain, it has used the human health side, rather than the animal health side, of legislation to deal with the matter. Is that explanation acceptable?

**Christine May:** It is acceptable, even if the Executive only thought of that reason after we asked our question.

**The Convener:** To be fair, having been a member of the cross-party group in the Scottish Parliament on animal welfare, I know that the issue with horse passports is to do with horses getting into the food chain. That is a reasonable explanation.

We now welcome Gordon Jackson.

**Gordon Jackson (Glasgow Govan) (Lab):** I am sorry I am late, but I had a puncture. So there.

**The Convener:** We are on horse passports, Gordon. The second point that we raised was on the definition of "horse" and why there was a difference between European Council directive 90/426/EEC and the regulations in Scotland, which contain no reference to wild horses. The reason given for that is that there seem to be no wild horses in Scotland. Stewart Maxwell said last week that he thought that that was the reason.

The third point that the Executive explains is that European Commission decision 2000/68/EC was implemented late, first because of the extensive consultation, which I know about because I am on the cross-party group, and secondly because there was a diversion of resources to deal with the foot-and-mouth crisis.

**Christine May:** I have to say that I find the second reason slightly difficult to accept. As I recall, the foot-and-mouth crisis was in 2001. If one's teenage daughter was that late, she would have reached her age of majority by the time that the decision was implemented. The excuse is fairly weak.

**The Convener:** We now welcome Mike Pringle. We are on horse passports, Mike. We were saying that the Commission decision was implemented late because of the extensive consultation. The Executive also said that resources were diverted to deal with the foot-and-mouth crisis rather than following through certain regulations. However, as Christine May said, that crisis was quite a long time ago.

**Mr Maxwell:** I accept that there might well have been extensive consultation, but Christine May is quite right: foot-and-mouth was four years ago. Four years' consultation is fairly extensive.

**The Convener:** We will put it down to extensive consultation, which I guarantee has taken place. Does everyone agree that those points should be passed on to the lead committee for its information?

*Members indicated agreement.*

### **Land Management Contracts (Menu Scheme) (Scotland) Regulations 2005 (SSI 2005/225)**

**The Convener:** At last week's meeting we pointed out an error in regulation 3(1); the Executive has agreed that the reference to paragraph (4) should be to paragraph (2) and said that the error will be corrected at the next opportunity. I am sure that we are happy about that. We will certainly report the defective drafting.

The committee also asked for clarification as to whether regulation 21(3) means that criminal proceedings may not be commenced later than six months after an offence is committed. The Executive has got back to say that that is how we should read the regulations. Are we happy about that?

**Mr Maxwell:** The drafting could have been clearer and we had to seek an explanation.

**The Convener:** Absolutely. The committee also asked why a regulatory impact assessment was not prepared in respect of the regulations. According to the Executive, there is no negative impact on businesses as a result of the regulations and therefore there was no need for an RIA. However, our legal advice is that the regulations are in fact part of a wider package. We do not have the exact details, but RIAs could have been undertaken on the wider package. We had a bit more background information than the Executive provided.

**Mr Maxwell:** If a package of RIAs covers this area, it would have been helpful for the Executive to have told us about that. We are effectively taking it on trust that there is no negative impact on business. If RIAs cover the matter, that should have been indicated to us. The best that we can say is that we do not know.

**The Convener:** You mean that we do not know whether there will in fact be a negative impact.

**Mr Maxwell:** Yes. We do not know, as we have no evidence to prove the matter one way or the other.

**The Convener:** I suggest that, in our feedback to the lead committee, we say that we have received an explanation from the Executive, but that we are concerned that we do not have the evidence to back it up. It would have been useful had we known a bit more about whether RIAs apply to the wider package of measures.

*Members indicated agreement.*

### **Plant Health (Import Inspection Fees) (Scotland) Regulations 2005 (SSI 2005/216)**

**The Convener:** We come now to agenda item 4, a further Executive response. The regulations

use a 10 per cent uplift in the standard fee that is charged. We discussed the matter last week and sent a report to the lead committee and the Parliament about the vires of the regulations. We have received a further update, and we put it on the agenda because the regulations illustrate a general issue that we should keep an eye on. We should perhaps also address matters around European directives in general as part of our inquiry. Should we simply note the update? We have reported on the regulations.

**Mr Maxwell:** We have already reported on the regulations, so there is nothing else that we can do with respect to the lead committee or the Parliament. The further explanation before us only reiterates the practical reasons for the route that the Executive chose to take. I am no more convinced now than I was when we discussed the regulations previously that they are correct. There is still some serious doubt about their vires, and we should put that on the record.

The Executive refers to two previous Scottish statutory instruments on the same subject. In one case, there was clearly provision for the action taken under the regulations, which implement a European directive, but I am not so sure about the other case. Given that there is a difference of opinion coming through in various SSIs, we should address the matter under our inquiry. We cannot refer the specific matter anywhere else now.

**The Convener:** I tend to agree. The regulations indeed come from a European directive, which was different from the directive referred to by the two previous instruments. We should keep our eye on such instances. The directive changed, and that has led to the Executive and the United Kingdom Government dealing with the matter in a different way.

**Murray Tosh:** I am not sure whether the final sentence in our paper on the Executive response is commentary by our clerking staff or the Executive's own comment.

**The Convener:** It is the Executive's comment.

**Murray Tosh:** It states:

"It is not thought that the advice of the European Commission was sought in relation to either SSI 2002/445 or 2003/145."

I cannot understand why the Executive would not know whether it has sought the Commission's advice on the previous SSIs. Surely the Executive must know whether it asked for that advice or not. The Executive should know whether that was appropriate, unless it is relying on advice having been sought on the parent statutory instrument—if we can call it that—going through Westminster, with the SSI before us being considered as a daughter instrument, on which there has been no direct liaison with the European Commission. If

that is the case, the Executive has been relying entirely and unquestioningly on advice from elsewhere. There are issues there, on which it would be pertinent to seek further information and insight on what are effectively the Executive's working practices.

**The Convener:** We touched on this last week. We wanted to know what consultation, discussion or liaison had happened between here and the Commission, between Westminster and the Commission and between here and Westminster.

10:45

**Mr Maxwell:** Am I correct in recalling that the regulations before us are different from the English regulations? Are the two different or identical?

**The Convener:** They are the same.

**Mr Maxwell:** I am sorry; I thought that they were different—they often are. Murray Tosh is quite right. If the Executive is simply accepting what is handed down to it—and perhaps then making changes without knowing the background, which would be even worse—that is puzzling and worrying. If that last line of our paper is in the Executive's own words, we should pursue the matter.

**Christine May:** My point is much the same. I asked last week what advice had been sought from the Commission because I find it inconceivable that a method of fee arrangement that did not fit neatly into either of the two existing guidance systems or mirror what had been provided for under other directives would not have been queried, by either a phone call or an e-mail to someone at the Commission. Someone could have asked whether the Commission saw any potential problem with the Executive's proposed approach. That last sentence smacks of nobody having time to find out about the matter or of no record having been kept. Either of those would worry me.

**The Convener:** We should follow up what Stewart Maxwell, Murray Tosh and Christine May have been saying and ask what the working practices are in relation to such regulations. We should ask in particular about liaison with the European Commission and Westminster. Is that agreed?

**Members indicated agreement.**

## Instruments Subject to Annulment

### Materials and Articles in Contact with Food (Scotland) Regulations 2005 (SSI 2005/243)

10:46

**The Convener:** The regulations raise the issue of failing to cite in the preamble the consultation requirement under article 9 of regulation 178/2002 of the European Parliament and of the Council.

We have previously raised this on-going matter and we are awaiting the Executive's reply. We suggested an alternative route, using a footnote. I gather that that is on the agenda for next week and we will hopefully take the matter a little further then, when we have the Executive's response.

I suggest that for now we simply draw the regulations to the attention of the lead committee and the Parliament on the basis of defective drafting.

Also, the Executive has been inconsistent in how it expresses revocations in the regulations. Regulation 16 revokes two of the amending instruments, but not the third, which is the Food Safety Act 1990 (Consequential Modifications) (No 2) (Great Britain) Order 1990 (SI 1990/2487), despite the fact that it is mentioned in a footnote. We think that that is an oversight, and we will raise the matter with the Executive. Is that agreed?

**Members indicated agreement.**

### Fireworks (Scotland) Amendment Regulations 2005 (SSI 2005/245)

**The Convener:** We mentioned a few issues about the amending regulations and the principal regulations. The first point is that section 2(3) of the Fireworks Act 2003 requires ministers to consult various bodies before making regulations under that section. The issue is how that affects the Crown. The requirement to consult was narrated in the principal regulations, and is also narrated in the amending regulations before us. That has all been sorted.

**Members indicated agreement.**

**The Convener:** Secondly, section 2(4) of the 2003 act requires ministers to issue a full regulatory impact assessment detailing the financial, social and environmental impact of the proposed regulations. That requirement was fulfilled and narrated in the principal regulations, but it has not been narrated in the amending regulations. We might wish to ask the Executive to explain why there is no reference anywhere in the



regulations to the requirement under section 2(4) of the 2003 act to issue a full regulatory impact assessment. Is that agreed?

**Members** *indicated agreement.*

**The Convener:** There is also a minor drafting point, which we can deal with by informal letter.

**Members** *indicated agreement.*

**Feed (Corn Gluten Feed and Brewers Grains) (Emergency Control) (Scotland) Regulations 2005 (SSI 2005/246)**

**The Convener:** The regulations breach the 21-day rule. The letter accompanying the regulations explains that, in the view of the Food Standards Agency Scotland, the breach was justified because the enforcement of the Commission decision in Scotland was a matter of urgency.

**Members** *indicated agreement.*

**The Convener:** The clerk has reminded me to move into private session for the last item on the agenda, our draft annual report, which we will deal with very quickly.

10:50

*Meeting continued in private until 10:52.*



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