

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 20 December 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

36th 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 Kenneth Macintosh (Eastwood) (Lab)

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

*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Mr Ted Brocklebank (Mid Scotland and Fife) (Con)

Maureen Macmillan (Highlands and Islands) (Lab)

Stewart Stevenson (Banff and Buchan) (SNP)

*attended

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 20 December 2005

[THE CONVENER *opened the meeting at 10:31*]

Item in Private

The Convener (Dr Sylvia Jackson): I open the 36th and last meeting of 2005. I have received no apologies. I remind members to switch off their mobile phones.

Members will note that item 8 on the agenda is consideration of the draft report of our inquiry on the regulatory framework. We would like to take that in private. Is that agreed?

Members *indicated agreement.*

Delegated Powers Scrutiny

Animal Health and Welfare (Scotland) Bill: Stage 1

10:32

The Convener: Part 1 of the bill amends the Animal Health Act 1981. Section 1 adds schedule 3A to the 1981 act. Paragraphs 6 and 8 of that new schedule contain order-making powers relating to slaughter for preventing the spread of disease and to compensation for slaughter.

We will start with the proposed new schedule's provisions on the power of slaughter for preventing the spread of animal diseases. Paragraph 6 provides an order-making power to enable Scottish ministers to specify a disease and type of animal, bird or amphibian to be slaughtered with a view to preventing the spread of the disease in question. Orders made under paragraph 6 will usually be subject to the draft affirmative procedure, but provision is also made for 28-day emergency orders.

I will summarise what a 28-day emergency order is, or at least my interpretation of the procedure—I am sure that the clerk and the legal advisers will tell me if I go wrong. Ministers can sign off orders that will last for 28 days and that need not come before Parliament. If the minister wishes to extend the period of 28 days, he can do so by one of two methods. Before the 28-day period has elapsed, he can come before the Parliament and ask for its agreement to an extension. Alternatively, the initial 28-day period is allowed to elapse and another 28-day period is brought into being using the same procedure as before, with the minister signing off a further order.

Ruth Cooper (Clerk): I should clarify that, for such an instrument to be approved and to remain in force, the minister would have to come before the lead committee during the 28-day period. That would be the normal procedure.

The Convener: I invite members' views. Many of the delegated powers that we are considering make use of the 28-day emergency order.

Mr Kenneth Macintosh (Eastwood) (Lab): In my limited experience, the 28-day procedure is not often used. It would certainly be worth exploring with the Executive why it has adopted this course of action. There are pluses and minuses about using the 28-day emergency order. The procedure could be used, not quite to avoid parliamentary scrutiny, but perhaps to minimise it. It could also, in actual fact, lead to excessive parliamentary scrutiny. It is important that we discuss with the Executive why it has opted for this procedure. For emergencies, why not opt for a simple negative procedure?

Mr Stewart Maxwell (West of Scotland) (SNP):

I am concerned that the 28-day order is used fairly extensively in the bill. That is pretty unusual. I understand the necessity for dealing with certain events as emergencies. I also understand how it might be helpful to use such an order during recess, when there is nobody here, to allow orders to be renewed; there would be no problem with that. However, I am concerned that, if a contentious issue arose—such as has arisen concerning the slaughter of animals—either the current Executive or a future one could avoid parliamentary scrutiny by using a 28-day order, letting it lapse and renewing it, until such time as the emergency was over. Parliament would have no opportunity to be involved.

I understand emergency orders being brought in quickly, but emergencies can last for many months in some cases. I am not sure that it would be appropriate for any Executive continually to renew an order and not come before the Parliament over a period of many months. We should ask the Executive at least to explain its thinking behind the use of the 28-day emergency order.

The Convener: I want to return to Ken Macintosh's point. The amnesic shellfish poisoning orders, for example, attract considerable debate in committee and MSPs are aware of the issues they raise. Those orders are dealt with under an existing protocol for such matters. Our problem is whether that protocol will be used in future. We seek reassurance about that, and we want to know why the bill provides for the 28-day emergency order to such an extent.

Murray Tosh (West of Scotland) (Con): I cannot remember the mechanics of how foot-and-mouth disease was dealt with, but I recall that ministers regularly came to the chamber to answer questions. The Minister for Environment and Rural Development also held informal meetings about the progress that was being made. I do not think that our concern is necessarily that ministers will avoid scrutiny. They submitted to a lot of scrutiny during that outbreak.

The 28-day orders concentrate our minds on the issues that we will discuss later in connection with our report on the regulatory framework. We are possibly pressing for an emergency procedure to be used to streamline other processes, and it seems odd that the Executive should produce such a massive piece of work challenging many of the assumptions that might underpin our eventual conclusions. I agree that we should ask why the Executive has taken this approach.

The issue with amnesic shellfish poisoning orders, which have regularly been issued and reissued under the affirmative procedure, also arises under the bill before us. The Executive might be reluctant to tie itself into a regular

renewal of orders under the affirmative procedure, but there are ways in which it could handle the situation without a minister having to trot along to committees at regular intervals when that is not necessary. The Executive does not seem to have used those ways of proceeding with the amnesic shellfish poisoning orders. The Executive needs to do a lot of thinking about how such matters are handled.

The Convener: On section 1, there is the general issue of the 28-day emergency order, which relates to paragraph 6 of proposed new schedule 3A to the 1981 act. The other issue relates to paragraph 8 of the proposed new schedule, and concerns compensation. Orders under that paragraph will not require to be laid before the Parliament. We should ask why the Executive thinks that it would not be necessary to lay such orders before the Parliament. I imagine that sensitive issues might be involved.

Mr Macintosh: We should draw our points on section 1 and section 2 to the attention of the lead committee, which may have a view on whether it wishes to be consulted about levels of compensation, or on whether it feels that the Parliament should be consulted.

The Convener: The Executive's memorandum on delegated powers suggests that having no parliamentary procedure for compensation is in keeping with the provisions of the Animal Health Act 1981. However, the legal adviser notes that that act is inconsistent with regard to the methods of determining compensation. We should ask the Executive about that.

Mr Maxwell: Are we suggesting that the Parliament should become involved in determining the level of compensation?

Mr Macintosh: No, we are just asking the lead committee to consider whether it should.

The Convener: We are raising questions about inconsistencies on the subject of compensation. Ken Macintosh is suggesting that we should raise such questions with the lead committee. It will be concerned with policy and with what should be decided either by the Parliament or by the lead committee.

Mr Maxwell: Are we specifically raising the issue of parliamentary procedure determining levels of compensation? That is odd, because the value of a beast at the time of slaughter is not for the Parliament, but for the market to determine. I would like some clarification on the administrative matters, because I am confused as to why the Parliament would be involved.

Murray Tosh: I do not think that the Parliament would ever want to be involved in determining levels of compensation, but it is surely reasonable

for the Parliament to scrutinise the mechanisms for determining those levels. There should be some form of parliamentary procedure to allow that.

The Convener: The clerk has just pointed out to me that, because of how the bill is drafted, this subject would not go to the lead committee for consideration.

Mr Maxwell: I accept that; I just wanted to be clear.

The Convener: It is just as Murray described it.

Mr Maxwell: That is fine.

The Convener: Section 2 inserts section 16B into the 1981 act, including section 16B(4) on the slaughter of treated animals and section 16B(6) on compensation. The same arguments apply as apply to section 1, so I think that we will raise the same issues.

Members indicated agreement.

The Convener: Section 3, on biosecurity codes, will insert section 6C into the 1981 act. The biggest issue that arises is whether we feel that section 6C(1) distinguishes sufficiently between what is guidance and what are mandatory requirements.

Mr Macintosh: The bill creates criminal offences and requires ministers to draw up a code, but there is confusion over whether breaking that code constitutes a criminal offence. We should ask for clarification on that.

The Convener: Do members agree that we should seek to clarify the vagueness about what is guidance and what are the mandatory requirements that link in with the penalties?

Members indicated agreement.

The Convener: Section 5, on animal gatherings, seeks to insert section 8A(1) into the 1981 act. We have discussed the issue before. Should the bill contain more detail? For example, should there be a duty of appeal in the bill, and should there be clarification of the charging of fees for licences? I gather that such issues are covered in the 1981 act.

Mr Maxwell: It may be that the lead committee will wish to take up this issue with the minister, but the definition of an animal gathering is fairly wide. As our legal briefing points out, such a gathering could include gatherings in a domestic setting, which I presume is not the intention.

10:45

The Convener: Section 7 seeks to insert section 36ZA(1) on the seizure of carcasses, and to insert section 36ZB(3) and section 36ZB(6) on

compensation for seizure. Not many issues arise on section 7; it seems to sit well with the existing provisions. Do members agree?

Members indicated agreement.

Mr Maxwell: Some of the same issues arise as have arisen with other sections, but there is nothing particular about section 7.

The Convener: Section 8, on specified diseases, seeks to insert section 28I(2). The section provides for the list of diseases in new schedule 2B to be changed by order to include any previously unknown disease. The diseases listed are known to be very fast-spreading diseases, the outbreak of which can have a significant impact. Again, the 28-day procedure is used. That is one way of dealing with an emergency, but could there be cases where the new disease might require longer-term provisions? Should we ask about that?

Mr Maxwell: We should ask the same question again. It is entirely appropriate and legitimate that ministers have the power to amend the list to include any new diseases that come along. However, I presume that, like me, you would presume that once diseases are identified they will go on the list permanently. We are not saying that they should go on the list temporarily before being taken off again.

The Convener: Gordon?

Gordon Jackson (Glasgow Govan) (Lab): No, I am fine. I am sorry—I am sitting here looking like a zombie because I am loaded with the cold. If I seem spaced out, it is because I am spaced out.

The Convener: Join the club.

Are members happy with what we have said about section 8?

Members indicated agreement.

The Convener: Section 10 seeks to insert section 36N(1) on the power to specify livestock genotypes and TSEs. Although I am a scientist, it is difficult to pronounce what TSE stands for.

Mr Maxwell: Transmissible spongiform encephalopathy.

Members: Oh!

The Convener: Well done, Stewart.

No substantive points have been raised on this section. Do members wish to raise any other issues?

Members indicated disagreement.

The Convener: Section 10 also seeks to insert section 36O(1), which is on ascertaining genotypes and identifying livestock.

Gordon Jackson: If I knew what a genotype was, I would be able to comment.

The Convener: We can explain in full later.

Mr Macintosh: It is not a type of car.

The Convener: Section 10 also seeks to insert section 36V(1) on compensation. Section 36V obliges Scottish ministers to pay compensation for livestock that has been slaughtered and properly destroyed in accordance with a restriction notice. The amount of compensation is to be specified by order. The provision is currently not subject to any parliamentary procedure. Do we want to ask why not?

Members indicated agreement.

The Convener: We move now to part 2 of the bill. Section 14 is on animals to which part 2 applies. Section 14(3) confers on Scottish ministers the power to amend the definition of “animal”—quite a wide power—for the purposes of part 2 of the bill, and to specify the stages of development of the animal at which the animal welfare provisions of the bill will apply. The power is also subject to a general consultation duty.

Are there any questions? Gordon?

Gordon Jackson: No, I was just laughing at the description of an animal as

“a vertebrate other than man.”

That is fairly generous to one or two people I know.

The Convener: Do members wish to raise any other points?

Members indicated disagreement.

The Convener: Section 18 is on mutilation, which is a sensitive issue. The section prohibits all mutilation involving interference with the sensitive tissues or bone structure of an animal unless it is for medical treatment. Section 18(3) provides a regulation-making power to allow ministers to permit certain procedures to be carried out in certain circumstances. We should note that clause 5 of the equivalent English Animal Welfare Bill includes a statutory duty to consult. We might ask why the Scottish bill does not contain that duty, although I am not saying that we should necessarily follow what is happening in England and Wales. Is that agreed?

Members indicated agreement.

Mr Maxwell: I note that the legal briefing talks about good animal husbandry and certain actions that are performed on farm animals, for want of a better term. Could the provision be used for the docking of dogs’ tails?

The Convener: Yes. That is a sensitive issue.

Mr Maxwell: So the provision can be used for that. The legal brief does not mention tail docking, so I wondered. That is okay.

The Convener: That is why I think that we should ask about the statutory duty to consult.

As that is agreed, we move on to section 23(1), which is a provision for securing the welfare of animals. The section confers a power on Scottish ministers to make regulations for the purposes of, and in connection with, securing the welfare of any animals and their progeny for which a person is responsible. It is a wide power about offspring, breeding and all the rest of it. Are we content that the power is being delegated?

Members indicated agreement.

The Convener: Are there any other issues?

Mr Maxwell: We should ask the Executive about the width and balance of the power. Perhaps the Executive could explain why it has leaned towards secondary rather primary legislation.

The Convener: Are members happy that the regulations under this section can create offences and specify penalties, although they will be limited by section 42(3) of the bill?

Mr Macintosh: The sentence in England and Wales will be double the sentence in Scotland. Perhaps we should ask why.

The Convener: We will ask that question.

Section 23(2)(e) permits the regulations to confer powers of entry and create offences of obstruction. It might be helpful to find out how that power interacts with the powers of entry in schedule 1 to the bill.

Members indicated agreement.

The Convener: Sections 24(1), 24(2) and 24(5) are about the licensing of activities involving animals. Sections 24(1) and (2) confer power on the Scottish ministers to require a range of activities involving animals to be licensed for the purpose of securing the welfare of animals for which a person is responsible. Section 24(5) allows Scottish ministers to make provisions about licences and registration. Again, the powers are very wide.

Stewart, would you like the committee to ask the same question as earlier?

Mr Maxwell: I think that we should. This is important. The legal brief mentions Christine Grahame’s original member’s bill proposal. There is widespread concern about the transportation of puppies.

The Convener: Although I do not want to refer too much to the English bill, paragraph 148 of the legal brief says that the

"English Bill states categorically that 'no person shall carry on an activity to which the section applies except under authority of a licence for the purpose of the section'."

It could therefore be argued that the Scottish bill is tighter. There is a principle there for Christine Grahame.

Mr Maxwell: I am sure that she would be interested in this.

The Convener: Perhaps we should ask why there is a difference between the two bills and why Scottish ministers have chosen the route that they have.

Members indicated agreement.

Mr Maxwell: That would be helpful.

The Convener: Section 25 is about prohibitions on keeping certain animals. Section 25(1) gives ministers the power to make regulations to prohibit the keeping of certain types of animal at domestic or other specified premises, for the purposes of ensuring animal welfare. Has the Executive made the case for this power to be delegated?

Gordon Jackson: Oh aye. We could start listing in the primary legislation things like four-legged ocelots.

The Convener: So you are quite happy with the provision.

Gordon Jackson: I do not think that the primary legislation could be that specific.

The Convener: Yes; the legislation needs to be flexible.

Gordon Jackson: I could be wrong.

Mr Maxwell: I accept what Gordon has said, but we are talking about a very wide power. I am not suggesting that we list the myriad possible pets, but the power could be used to—

Gordon Jackson: Stop people having dogs and cats.

Mr Maxwell: Or hamsters or goldfish. Many people object to budgies being kept in cages. There is no doubt that there is a debate about keeping small animals in domestic circumstances. Should we ask about the width of the power and get the Executive to confirm its views and intentions?

The Convener: Is it agreed that we should seek a bit more clarification of the provision? I do not think that that will hurt.

Gordon Jackson: No, it will not. I am biased because there is no animal that they could stop people keeping in their houses that would upset me.

The Convener: I welcome Adam Ingram, who has joined the meeting. To keep you in the picture,

Adam, we are moving on to discuss the delegated powers in sections 33(1) and 33(2) of the Animal Health and Welfare (Scotland) Bill. Section 33 is about animal welfare bodies. It is suggested that we might want to seek information on how the Executive envisages that the powers will be used. Is that agreed?

Members indicated agreement.

The Convener: Section 34 is about animal welfare codes and section 34(1) will confer on ministers the power to make, revise and revoke codes of practice for providing practical guidance in respect of the provisions of part 2 and any regulations made under part 2. Are there any issues?

Mr Maxwell: I have no particular objection to the power; it is reasonable. I note that the legal brief says that the Executive does not say how the power is to be exercised. We might want to ask about that.

The Convener: Okay. It is also suggested that we might ask the Executive how it will consider or have regard to the results of the consultation on the codes of practice, and how the power to revoke a code will be exercised. We could use some of Stewart's examples. Is that agreed?

Members indicated agreement.

The Convener: There do not appear to be any points about sections 48(1) and 50 in part 3 of the bill. Is that agreed?

Members indicated agreement.

The Convener: Good. That did not take as long as it might have done.

Executive Responses

Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) (Scotland) Order 2005 (SSI 2005/581)

10:57

The Convener: We asked the Executive to clarify the drafting of article 16(6) and the use of the word "or" instead of "on". The Executive has acknowledged the typographical error. I suggest that we draw the order to the attention of the lead committee and the Parliament on the basis of defective drafting. Are we agreed?

Members *indicated agreement.*

Adults with Incapacity (Management of Residents' Finances) (Scotland) Regulations 2005 (SSI 2005/610)

The Convener: We noted that the citation of the Adults with Incapacity (Scotland) Act 2000 in regulation 2 omitted the word "Scotland". The Executive has again acknowledged the error. We should draw that to the attention of the lead committee and the Parliament on the ground of defective drafting as acknowledged by the Executive. Is that agreed?

Members *indicated agreement.*

Plant Health (Scotland) Order 2005 (SSI 2005/613)

The Convener: We raised two points on the order, which are set out in the Executive's response. Given that response, we should draw the attention of the lead committee and the Parliament to the order on the ground of defective drafting, or that the drafting could be clearer, in relation to the first point; and on the ground that the drafting of article 7(3) could be clearer. As there are no other specific points on the Executive's response, is that agreed?

Members *indicated agreement.*

Official Feed and Food Controls (Scotland) Regulations 2005 (SSI 2005/616)

The Convener: We asked the Executive several questions and we have its response. We could draw the regulations to the attention of the lead committee and the Parliament on the grounds that clarification was required of the drafting; that there was doubt as to whether regulations 18(4) and (5) were *intra vires*; and that regulation 43(2)(a) was defectively drafted. Those points were acknowledged by the Executive and it is moving to correct them. Is there anything else?

Members: No.

Rural Stewardship Scheme (Scotland) Amendment Regulations 2005 (SSI 2005/620)

The Convener: We raised two points with the Executive. I suggest that the committee draws the attention of the lead committee and the Parliament to the regulations on the grounds that regulation 3(e) was defectively drafted, and that the meaning of regulation 10(b) could have been clearer. Is that agreed?

Members *indicated agreement.*

Less Favoured Area Support Scheme (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/624)

The Convener: Members will remember that the regulations are to be made available free of charge to recipients of the principal regulations, but that that information is not present in the headnote. Do members agree to report that failure to follow proper legislative practice?

Members *indicated agreement.*

Proposed Subordinate Legislation

Student Fees (Specification) Order 2006

11:00

The Convener: Agenda item 4 is proposed subordinate legislation. A minor point arises that we will raise informally with the Executive, but no other points arise.

Draft Instruments Subject to Approval

Budget (Scotland) Act 2005 Amendment Order 2006 (draft)

11:00

The Convener: Agenda item 5 is draft instruments subject to approval. No points arise on the first draft order, but members will note that it was withdrawn and has now been re-laid. We welcome the fact that our points were picked up.

Police Act 1997 Amendment (Scotland) Order 2006 (draft)

The Convener: Do members accept that the enabling power provides sufficient vires for the draft order, or do we want to report it on the ground of an unusual use of the power? We could do both.

Mr Macintosh: It would not do any harm to bring the matter to the attention of the lead committee.

The Convener: Do members agree to do that?

Members *indicated agreement.*

Instruments Subject to Annulment

Adults with Incapacity (Supervision of Welfare Guardians etc by Local Authorities) (Scotland) Amendment Regulations 2005 (SSI 2005/630)

Adults with Incapacity (Countersignatories for Application for Authority to Intrude) (Scotland) Amendment Regulations 2005 (SSI 2005/631)

11:01

The Convener: Agenda item 6 is instruments subject to annulment. No points have been identified on either of these sets of regulations.

Gordon Jackson: This is a policy matter, but I am curious to know, in relation to SSI 2005/630, why the periods between visits have been extended. Perhaps that is not our business.

The Convener: It is not our business, I am sorry to say.

Gordon Jackson: I know.

Fossil Fuel Levy (Scotland) Amendment Regulations 2005 (SSI 2005/641)

Products of Animal Origin (Third Country Imports) (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/645)

The Convener: No points arise on the regulations, apart from minor drafting issues.

Avian Influenza (Preventive Measures) (Scotland) Amendment Regulations 2005 (SSI 2005/646)

Avian Influenza (Preventive Measures in Zoos) (Scotland) Amendment Regulations 2005 (SSI 2005/647)

The Convener: No points have been identified.

Instruments Not Laid Before the Parliament

11:02

Meeting continued in private until 12:35.

**Act of Sederunt (Rules of the Court of
Session Amendment No 9)
(Civil Partnership Act 2004 etc) 2005
(SSI 2005/632)**

**Act of Sederunt (Ordinary Cause Rules)
Amendment (Civil Partnership Act 2004)
2005 (SSI 2005/638)**

11:02

The Convener: No substantive points arise, although we will point out some minor drafting issues to the Executive. Is that agreed?

Members *indicated agreement.*

The Convener: As agreed earlier, we now move into private.

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