

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 25 April 2006

Session 2

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CONTENTS

Tuesday 25 April 2006

| | Col. |
|--|------|
| TEMPORARY CONVENER | 1733 |
| DELEGATED POWERS SCRUTINY | 1734 |
| Crofting Reform etc Bill: Stage 1 | 1734 |
| EXECUTIVE RESPONSE | 1741 |
| Avian Influenza (H5N1 in Wild Birds) (Scotland) Order 2006 (SSI 2006/196) | 1741 |
| DRAFT INSTRUMENTS SUBJECT TO APPROVAL | 1742 |
| Joint Inspections (Scotland) Amendment Regulations 2006 (draft) | 1742 |
| Private Water Supplies (Notices) (Scotland) Regulations 2006 (draft) | 1742 |
| Public Appointments and Public Bodies etc (Scotland) Act 2003 (Treatment of Office or Body as Specified Authority) Order 2006 (draft) | 1742 |
| INSTRUMENTS SUBJECT TO ANNULMENT | 1743 |
| Private Water Supplies (Scotland) Regulations 2006 (SSI 2006/209) | 1743 |
| Private Water Supplies (Grants) (Scotland) Regulations 2006 (SSI 2006/210) | 1743 |
| INSTRUMENTS NOT LAID BEFORE THE PARLIAMENT | 1744 |
| Act of Adjournal (Criminal Procedure Rules Amendment No 2) (Financial Reporting Orders) 2006 (SS1 2006/205) | 1744 |
| Act of Sederunt (Rules of the Court of Session Amendment No 3) (Family Law (Scotland) Act 2006) 2006 (SSI 2006/206) | 1744 |
| Act of Sederunt (Ordinary Cause Rules) Amendment (Family Law (Scotland) Act 2006 etc) 2006 (SS1 2006/207) | 1744 |
| INTERESTS OF MEMBERS OF THE SCOTTISH PARLIAMENT BILL: STAGE 3 | 1745 |

SUBORDINATE LEGISLATION COMMITTEE

13th Meeting 2006, 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)

Mr Jamie Stone (Caithness, Sutherland and Easter Ross)
(LD)

*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

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

Maureen Macmillan (Highlands and Islands) (Lab)

Ms Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Margaret Macdonald (Adviser)

CLERK TO THE COMMITTEE

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 25 April 2006

[THE OLDEST COMMITTEE MEMBER *opened the meeting at 10:30*]

Temporary Convener

Murray Tosh (Oldest Committee Member): Good morning everybody, and welcome to the 13th meeting of the Subordinate Legislation Committee in 2006. We have received apologies from Sylvia Jackson, Gordon Jackson and Jamie Stone. As neither the convener nor the deputy convener is present today, under rule 12.1 of the standing orders, the committee must choose a temporary convener for the meeting. I am content to act in that capacity today, if members are content for me to do so.

Murray Tosh was chosen as temporary convener.

The Temporary Convener (Murray Tosh): That is agreed. Thank you.

I am told that we do not have to agree to take item 7 in private, as that was covered under a previous decision.

Delegated Powers Scrutiny

Crofting Reform etc Bill: Stage 1

10:31

The Temporary Convener: As members are aware, the Crofting Reform etc Bill seeks to modernise crofting and creates a new constitution for the Crofters Commission. It contains a number of delegated powers and a number of other powers that appear to be of legislative character.

Section 1 inserts new section 1A into the Crofters (Scotland) Act 1993, on the Crofters Commission's general duties, setting out the functions of the commission. New section 1A(1)(b) authorises ministers to confer other "general duties" on the commission. Those duties will not be incorporated in a Scottish statutory instrument, but there is a requirement that they be communicated to the commission "in writing". It is suggested that there are two issues for consideration by the committee. First, would the power to add to the general functions benefit from publication in the form of an SSI to allow Parliament the opportunity for scrutiny, perhaps through the negative procedure, if members think that appropriate? Secondly, does the committee wish to ask the Executive how it is envisaged that the power will be used, given that the term "general duties" is nowhere defined?

Mr Kenneth Macintosh (Eastwood) (Lab): We should write to the Executive raising both those points. We should ask it to clarify what it needs the power for and whether it would agree to using an SSI as the procedure for directing the commission, rather than just doing so "in writing"?

The Temporary Convener: Are we all agreed with that?

Mr Stewart Maxwell (West of Scotland) (SNP): Yes. This seems rather odd. We have seen plenty of previous SSIs that involved adding to lists in primary legislation. We would benefit from a better understanding of why the Executive thought that unnecessary in this case.

The Temporary Convener: Fine—we will do that.

Section 2 of the bill inserts new section 2A, "Regulating crofting: local policy", into the 1993 act. It gives the commission the power to set policies for separate local areas, following consultation on boundaries, and to establish local policy panels to advise the commission. It also provides that the arrangements for consulting, setting up local panels and so on will be specified in regulations and must be approved by ministers. It is proposed that the powers be subject to the

negative procedure. Are members content with that?

Members indicated agreement.

The Temporary Convener: Section 2 of the bill also inserts new section 2B, "Directions by the Scottish ministers", into the 1993 act. The new section confers a power on ministers to direct the commission on the discharge of its functions. The power is similar to that in section 1(3) of the 1993 act, which is replaced by section 1 of the bill. The significant difference is that the original power was restricted to directions of a general nature, whereas the new power enables ministers to give specific directions to the commission. The power isprecedented. Are members content with the proposal?

Members indicated agreement.

The Temporary Convener: That takes us to section 4, which inserts new section 42A, "Power of the Commission to make schemes and arrangements for grants", into the 1993 act. The new section confers power on the commission to make schemes and arrangements for grants to crofters and others. Although the schemes are subject to the approval of ministers, they are not subject to parliamentary scrutiny. Members will be aware from paragraph 18 of the legal brief that a similar power in the 1993 act is exercisable in the form of a statutory instrument subject to the negative procedure, whereas in this case there is no provision for parliamentary scrutiny. The issue, therefore, is whether there should be some form of parliamentary scrutiny, perhaps through an SSI, which is something that we could raise with the Executive if members felt that that was appropriate.

Mr Maxwell: I think that that is entirely appropriate, particularly given that there is no comment in the Executive's delegated powers memorandum, leaving us with no understanding of why there seems to have been a shift in its thinking. It would be helpful if we could get an explanation of that.

The Temporary Convener: We will add that to our letter. The briefing also raises a style point that we can raise in our letter.

Section 5 inserts new section 58A, "Obtaining Commission approval or consent", into the 1993 act. That new section sets down the process by which the majority of applications to the commission will be determined. The power to amend the general and special conditions by means of a statutory instrument enables ministers to change the conditions if in future it is found that they require to be changed. The power is subject to the affirmative procedure.

A number of issues arise, the first of which is whether that is an appropriate delegation of

legislative power. If we are agreed that that is the case, the next issue is whether we are happy with the affirmative procedure. Do members have any points?

Mr Adam Ingram (South of Scotland) (SNP): You rightly question whether this should be subordinate legislation or part of the bill. The process by which applications are determined by the commission is central to the bill, and we should query the Executive's decision to take this into subordinate legislation rather than putting it in a bill.

The Temporary Convener: Do other members agree that we should query the decision?

Mr Macintosh: We should certainly ask the Executive the question and, more important, we should also flag up the matter to the lead committee, because the issue seems to concern the policy itself. The Executive can suggest why it thinks that the matter could or should be dealt with in subordinate legislation. However, given how central it is, that would mean that subordinate legislation could change one of the key aspects of the legislation, and it is important that the lead committee is aware of that and is aware of our concerns about such a central part of an act being subject to change by subordinate legislation.

The Temporary Convener: We will hold flagging it up to the lead committee until we conclude our views on the matter, in the light of the Executive's response.

Mr Maxwell: That may well be appropriate, as it may be complex and there could be changes. At this stage, we simply want to ask the question and get a fuller explanation of the thinking behind it.

The Temporary Convener: Should we also hold over the question about the procedure to be used until we have the Executive's response?

Mr Maxwell: I think so.

The Temporary Convener: We are all agreed on that.

Section 8 inserts new section 41A, "Maps and scheme of charges", into the 1993 act. The new section would allow ministers to make regulations to confer on the commission powers to require the supply of maps, and specifies that they should be held in the register of crofts. The issue for us to decide is whether we are content with the power and content that it is subject to the negative procedure. We should also consider a further item relating to section 8, which would insert new section 41B into the 1993 act, whereby ministers would, after consultation with the commission, have powers to make an instrument containing the rules governing fees to be charged for searching in the register of crofts and for providing information from the register. New section 41B

also confers powers on the commission to make a scheme for charging fees in respect of the maintenance of the register. Unlike the earlier powers, however, there is no requirement for the scheme to be incorporated in a statutory instrument or for its approval.

Mr Macintosh: It is all straightforward, except for the fees issue. Our legal advice is that subordinate legislation is the best way to deal with maps and schemes of charges, although it is quite complex. I think that it would be normal practice for a fees scheme to be made as a statutory instrument and subject to approval, so I would like to ask the Executive why the scheme is not made as an SSI.

The Temporary Convener: Are we happy to do that?

Members indicated agreement.

The Temporary Convener: That takes us to section 10, which will insert new section 3A, "New crofts", into the 1993 act. The section will empower the Crofters Commission to constitute land or a holding as a croft in response to an application from the owner or tenant of the land. That can be done only outwith the crofting counties in an area specified by an order that is subject to the affirmative procedure. The Executive has indicated that the exercise of the power could prove highly controversial and that it will provide the Subordinate Legislation Committee and the lead committee with a draft SSI in connection with this provision before stage 2 of the bill.

There are a number of issues here, including whether a case has been made for the use of delegated powers, and the level of scrutiny.

Mr Maxwell: On balance, the proposed powers probably should be exercised by subordinate legislation. The controversy will surround policy matters rather than the area with which we deal. There is a suggestion of using the super-affirmative procedure, but I am not sure that that would necessarily be an improvement or make the issue more substantive. The issue is more of a policy one, but I am happy for it to be dealt with through subordinate legislation. The affirmative procedure will probably be enough.

The Temporary Convener: What do you make of the fact that, under this power, there would apparently be no statutory requirement for prior consultation before an order was laid?

Mr Maxwell: I am not sure about that. I would prefer to have further explanation of the Executive's thinking on this one. It is difficult to envisage a situation in which there would not be an exchange and discussion of views prior to an order being laid. There might not be a statutory

requirement for that, but I am not sure that there necessarily needs to be one. Again, that strays into the policy area of how important the lead committee feels the issue is. I am not on the lead committee and I do not know enough about the bill, so I hesitate to say anything about that.

Mr Macintosh: The Executive recognises the sensitivity of section 10. It is not trying to create crofts all over Scotland, but it wants the ability to create crofts. I always thought that there were crofts in West Lothian. Perhaps I have been labouring under a misapprehension. I will have to find out one day.

Mr Maxwell: There might be a "Croft Bar".

Mr Macintosh: That is not part of the crofting regulations.

The Temporary Convener: Do you wish any work to be done on that?

Mr Macintosh: I will spare the clerks that.

Obviously, when crofting legislation is imposed, it makes quite a change to land-holding rights that affect landowners, property holders, tenant farmers and so on. The Executive recognises that the power to create crofts is important; I would have thought that we would always want to consult on that. I cannot imagine a situation in which we would think of deeming an area suitable for applying crofting legislation without consulting everybody who would be affected by that. I do not think that there would be a problem with imposing a statutory requirement for consultation.

As I said, the Executive has flagged up that it is aware of the sensitivity of section 10; the lead committee will also be aware of that. Perhaps we can make the point to the Executive that prior consultation and the super-affirmative procedure seem to us to be the appropriate mechanisms in this situation. We can ask for the Executive's response to that. I take it that we will have a second go at this when the draft SSI is prepared for us.

The Temporary Convener: We will have a second go in two weeks' time.

Mr Ingram: I agree with Ken Macintosh that we need to raise the question of consultation. It is interesting that the Executive will produce a draft SSI. Discussing that should particularly help the lead committee to tease out the issues.

10:45

The Temporary Convener: We are therefore agreed that the use of delegated powers is reasonable. We are interested in the level of scrutiny and wish to explore with the Executive the advantage of using a super-affirmative procedure. In any event, we wish to raise with it the question

of consultation and ask why it has not considered statutory consultation given that, as Ken Macintosh says, it is hard to imagine any circumstances in which it would not consult in practice. That will flush out some statement about consultation that might satisfy our requirements when we look at the matter a second time in a couple of weeks.

Section 12, "Complaint as respects breach of the statutory conditions", proposes to insert new section 5B into the 1993 act. New sections 5B(10) and 5B(11) give ministers the power to amend by order the definition of the word "neglects" in the event that the provisions of the regulations to which they refer become redundant, are superseded or are substantially modified.

However, the power is wider than simply updating references and could be used to alter the nature of what constitutes "neglects" in more radical ways that might have implications for both tenant and landlord. We must consider whether a case has been made for the use of delegated powers. It is suggested in the legal briefing that we could ask the Executive for its views on whether it might be possible to achieve the policy objective by way of a more general provision, which would avoid the need to use delegated powers. We also need to consider the level of scrutiny.

Mr Maxwell: Why do we not just put that very point to the Executive?

The Temporary Convener: Are members content to do that?

Members indicated agreement.

The Temporary Convener: That takes us to section 30, "Use of common grazing". The section proposes to introduce a number of changes connected with common grazings and their uses. The power in new section 50A(8)(b)(ii) in relation to specifying grants is subject to the negative procedure.

Are members happy with the power and that it is subject to the negative procedure?

Members indicated agreement.

The Temporary Convener: Section 36 inserts new section 46A, "Regulations concerning loans", into the 1993 act. The new section would provide for ministers to make regulations governing the provision of loans to crofters, cottars and owners of holdings.

New section 46A(2)(f) provides for the arrangements for recovery of any part of a loan when the borrower dies. It is not clear why death has been singled out, and whether there are other circumstances where part of the loan can be recovered. It is also unclear whether the reference to the recovery of "part" of the loan precludes

recovery of the whole loan. It is suggested that the section is otherwise straightforward, but that we might wish to seek clarification from the Executive on the implications of subsection (2)(f). Are we agreed?

Members indicated agreement.

The Temporary Convener: Section 45, "Transitional provision etc", would give ministers power to make SSIs to deal with incidental, supplemental and other minor consequences of the bill.

There is a technical drafting point that we should raise about section 45(4) and the use of the words "any enactment", subject to members' agreement.

Members indicated agreement.

The Temporary Convener: Section 47, on commencement, is straightforward. Are we all happy with it?

Members indicated agreement.

The Temporary Convener: We come to schedule 1, paragraphs 3(1)(d) and 3(2), on general powers. The provision would give the commission power to charge for services. Are we content with the power and that it should be subject to the negative procedure?

Members indicated agreement.

Executive Response

Avian Influenza (H5N1 in Wild Birds) (Scotland) Order 2006 (SSI 2006/196)

10:49

The Temporary Convener: Members will recall that we raised eight points on the order last week. The Executive's response is included with our papers and members have been given an updated copy.

The suggestion is that we draw the attention of the Parliament to the order on the following grounds: further information was required from and supplied by the Executive on points 1 and 2; defective drafting was acknowledged by the Executive in points 3, 5, 6 and 7; and points 4 and 8 indicate that meaning could have been clearer. The Executive has acknowledged that in relation to point 8, although there appears still to be a degree of ambiguity on point 4.

Are members happy to report on that basis?

Members indicated agreement.

Mr Macintosh: I am particularly pleased that we now know that an SPF egg is a specific-pathogen-free egg. I knew that, but I did not want to say it at the previous meeting.

The Temporary Convener: Indeed. It is amazing how widely one's horizons are extended by service on this committee.

Draft Instruments Subject to Approval

Joint Inspections (Scotland) Amendment Regulations 2006 (draft)

10:50

The Temporary Convener: No substantive points arise on the regulations. The draft regulations correct an error that we identified in the principal regulations. It is a slightly unusual procedure to follow in that the amendment regulations correct an instrument that is still in draft before Parliament and has yet to be made. However, there is no difficulty here, other than a minor point, which we can raise informally.

Mr Maxwell: Do we know why the Executive has done it this way, rather than withdrawing the original regulations and re-laying them?

Margaret Macdonald (Adviser): Timing.

Mr Macintosh: Those of us on the Education Committee know about this. The regulations are part of the new child protection scheme. There is quite a degree of sensitivity over the timetable, some of which was initially delayed. The Executive is keen that things should move forward smoothly, but it recognised the embarrassing flaw that this committee pointed out at our previous meeting. The Executive was happy to fix that flaw, but it did not want to delay the timetable.

The Temporary Convener: Thank you for that explanation.

Private Water Supplies (Notices) (Scotland) Regulations 2006 (draft)

The Temporary Convener: No substantive points arise, although it is pointed out for the interest of members that the enabling power for the regulations is an open power, in which the parent act has allowed for a choice of procedures. In this instance, the Executive has chosen the affirmative procedure. There is a minor point, which can be raised informally. Are members happy with that?

Members indicated agreement.

Public Appointments and Public Bodies etc (Scotland) Act 2003 (Treatment of Office or Body as Specified Authority) Order 2006 (draft)

The Temporary Convener: It is suggested that we might wish to ask the Executive when it intends to make the order and to bring it into force. That will be critical in terms of the vires of the order. Are members happy to do that?

Members indicated agreement.

Instruments Subject to Annulment

Private Water Supplies (Scotland) Regulations 2006 (SSI 2006/209)

10:52

The Temporary Convener: It is not clear why the words:

"With effect from 3rd July 2006",

in regulation 37(1) are necessary, as the regulations as a whole come into force on that date. We might wish to ask the Executive to explain that, as well as picking up a couple of minor points.

Members indicated agreement.

Private Water Supplies (Grants) (Scotland) Regulations 2006 (SSI 2006/210)

The Temporary Convener: No substantive points arise on the regulations, although there are a number of minor points that we can raise informally with the Executive. Are members happy to do that?

Members indicated agreement.

Instruments Not Laid Before the Parliament

Act of Adjournal (Criminal Procedure Rules Amendment No 2) (Financial Reporting Orders) 2006 (SSI 2006/205)

10:53

The Temporary Convener: No points arise on the act of adjournal. Are members happy with it?

Members indicated agreement.

Act of Sederunt (Rules of the Court of Session Amendment No 3) (Family Law (Scotland) Act 2006) 2006 (SSI 2006/206)

The Temporary Convener: No substantive points have been identified, although there are some minor points to be raised informally. Are members happy to proceed on that basis?

Members indicated agreement.

Act of Sederunt (Ordinary Cause Rules) Amendment (Family Law (Scotland) Act 2006 etc) 2006 (SSI 2006/207)

The Temporary Convener: No substantive points arise, but there are minor points, which can be raised with the Executive informally. Are members agreed?

Members indicated agreement.

Interests of Members of the Scottish Parliament Bill: Stage 3

10:54

The Temporary Convener: As members are aware, the bill is a committee bill, which provides for the establishment of a register of members' interests. The stage 3 debate is being held tomorrow. A number of amendments have been lodged, including an amendment conferring power on the Parliament by determination to make any modifications to the schedules to the bill that the Parliament considers necessary or expedient.

As this is a delegated power, in the sense that the Parliament is delegating to itself the power to amend the act by way of determination rather than primary legislation, the non-Executive bills unit has referred the power to the committee for information. It is an unusual procedure, but it is suggested that there is nothing in the amendment that should give rise to concern.

Mr Macintosh: What does it mean, to change something by power of determination? Does it just mean that we have voted it through Parliament?

The Temporary Convener: I have asked about that and I understand that no procedures are laid down at present. It would be necessary for procedures to be defined through changes to the standing orders, which would presumably charge a committee with the responsibility for bringing forward a resolution. The definitive event would be that the Parliament would pass, amend or reject that resolution and that would constitute the level of determination.

Are we content to note the memorandum from NEBU and to do nothing further on the item?

Members indicated agreement.

10:56

Meeting continued in private until 11:46.

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