SUBORDINATE LEGISLATION COMMITTEE

Tuesday 23 May 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
17th 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)

THE FOLLOWING ALSO ATTENDED:

Margaret Macdonald (Adviser)

CLERK TO THE COMMITTEE

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 2

Scottish Parliament

Subordinate Legislation Committee

Tuesday 23 May 2006

[THE CONVENER *opened the meeting at 10:33*]

Delegated Powers Scrutiny

Criminal Proceedings etc (Reform) (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome members to the 17th meeting in 2006 of the Subordinate Legislation Committee. I have received apologies from Gordon Jackson, who is chairing an event in his constituency. I remind members to switch off their mobile phones.

The first item is delegated powers scrutiny of the Criminal Proceedings etc (Reform) (Scotland) Bill at stage 1. We considered the bill two weeks ago and asked the Executive a number of questions. We must report to the lead committee this week, so this is our final look at the bill.

I welcome Murray Tosh to the meeting and inform him that we are on the first item.

The first of the delegated powers appears under section 7(2). It is the power for ministers to make provision in relation to the use of electronic documentation, storage and communication in accordance with the new section 305A that section 7 inserts into the Criminal Procedure (Scotland) Act 1995. We asked the Executive to comment on concerns that had been expressed about definitions in relation to section 7(2) and in subsections (8) and (9) of new section 305A of the 1995 act. Members will have seen the Executive's response and noted that the Executive is giving further consideration to the points that we raised.

Are members content to draw the Executive's response to the attention of the lead committee and the Parliament and to monitor the position at stage 2? The Executive is looking into the issue, but there is still a lot to do from its point of view.

Members *indicated agreement*.

The Convener: Are members content for the use of the power in section 7(2) to be subject to the negative procedure?

Members *indicated agreement*.

The Convener: We raised two points on the power in section 35(4) to increase the maximum term of imprisonment to 12 months.

First, we asked the Executive why the generic translation in section 35(2) cannot be applied to powers in acts as well as to actual penalties. The Executive has said that it will reconsider the drafting of the provision to see whether the generic translation should be applied to powers in acts as well as to actual penalties. Are members content with the Executive's response and to monitor the position at stage 2?

Members *indicated agreement*.

The Convener: Secondly, we asked about the definition of "relevant power" in section 35(6). Members will have seen from the Executive's response that it is satisfied that the drafting covers the point that we made. We could draw the Executive's response to the attention of the lead committee and the Parliament. Do members want to do anything else?

Murray Tosh (West of Scotland) (Con): We can certainly draw the Executive's response to the attention of the lead committee and the Parliament, but paragraph 14 of our legal brief suggests that

"an amendment may be required."

The Convener: I am sorry, Murray, but I cannot hear you very well.

Murray Tosh: And you are sounding very tinny, convener. Our sound engineer is doubtless wrestling manfully with those difficulties.

The Convener: To which power were you referring?

Murray Tosh: Paragraph 14 of the legal brief suggests that

"an amendment may be required."

I wonder whether we should think of an amendment or whether it would be better to write to the Executive to suggest that it should consider the matter. Perhaps the latter option would be the speedier way of effecting the necessary change.

The Convener: I agree. We should flag up the matter to the lead committee and the Executive.

Mr Stewart Maxwell (West of Scotland) (SNP): Yes. The bill is at stage 1, so the Executive has plenty of time to reconsider the matter.

The Convener: Okay. We will mention the amendment that may be required. We could say what paragraph 14 of the legal briefing says.

On sections 36(1) and 36(2), we asked the Executive why it had delegated the powers, given that they are significant. Members will have seen the rationale from the Executive's response. It intends to ensure flexibility and that any order be subject to a cap. Are members content with the Executive's response—I see Stewart Maxwell

nodding—and that the power be subject to the affirmative procedure?

Members *indicated agreement*.

The Convener: Section 39(1)(f), on the power to make provision for fixed penalty discounts, will insert new section 302(7A) into the Criminal Procedure (Scotland) Act 1995. Members may remember that we asked the Executive whether the use of the word "may" in paragraph (a) of new section 302(7A) would preclude the order requiring a discount to be applied in appropriate circumstances. Members will have seen from the Executive's response that it has agreed to consider whether an amendment is needed. Are members content with the response and to monitor developments at stage 2?

Members *indicated agreement*.

The Convener: Are members content that the power be subject to the negative procedure?

Members *indicated agreement*.

The Convener: I welcome Jamie Stone to the meeting.

We move on to section 39(2), on the power to prescribe the maximum level of compensation offer. We were content that the Executive had made a case for delegating the power, but asked why the affirmative procedure was not deemed to be appropriate. Members will have seen the Executive's response and reference to precedent in the provisions relating to fiscal fines and to consistency. Are members content with the Executive's response and that the power be subject to the negative procedure?

Mr Kenneth Macintosh (Eastwood) (Lab): The Executive's response should simply be referred to the lead committee. The matter is a policy matter. I am content that the power be subject to the negative procedure.

The Convener: Okay. Section 43 deals with the power to make further provision as to fines enforcement officers—FEOs—and their functions. Members will remember that we asked the Executive for more details on the proposed contents of any regulations that are made under the power and that sample regulations be made available to the Parliament. You will have seen that the Executive has supplied further information on the contents of regulations. It has said that it is not possible to provide sample regulations, but that the intention is to refine functions and responsibilities in the light of practice. The Executive also says something about experience and evaluation. The process will be an on-going one.

Are members content with the response and that the power be subject to the affirmative procedure?

Mr Macintosh: Obviously, it is unfortunate that we do not have sample information at this stage. The Executive did not explain why we do not.

I am content that the use of the power is subject to the affirmative procedure. I think that we should pass on the response to the lead committee.

The Convener: Do we agree with Ken Macintosh?

Members *indicated agreement.*

The Convener: Section 43 inserts into the Criminal Procedure (Scotland) Act 1995 new section 226F(6), which includes the power to make detailed provision regulating the execution of relevant diligences by a fines enforcement officer.

We asked the Executive to provide further explanation of why it considers the negative procedure to be appropriate; and to give an indication of the types of diligence that might be included in the regulations.

The Executive's response says that the power to extend the types of diligence is limited. Bearing it in mind that the power is subject to the negative procedure, do we agree that we are content with that response?

Members *indicated agreement.*

The Convener: Section 50(2) concerns the power to provide that a justice of the peace court be constituted by one JP only. We raised two points on the section.

We asked why the Executive has decided that changes to the JP bench should be contained in subordinate legislation and not on the face of the bill. We asked the Executive to comment on our view that the change should be commenced in stages through a series of commencement orders.

The Executive has indicated that it has not yet decided whether JP courts definitely will be constituted by one JP only. It would like to decide whether to make that change once the impact of other changes to the JP court can be assessed. It does not want to include the provision in primary legislation since it might not be commenced and it wants to retain flexibility.

Murray Tosh: It strikes me that this is an odd way to go about what the Executive wants to do. It thinks that it wants single-JP courts but it is not sure. I would have thought that it should set out a clearer policy approach towards that end. Later, if the Executive feels, in the light of experience, that it does not want single-JP courts, it will not need to commence the relevant section. I think that it would be more appropriate for the Executive to make up its mind on the matter by stage 2, rather than at some point in the indefinite future.

The Convener: Are we all agreed that we would like more information on this before stage 2?

Mr Maxwell: I agree with Murray Tosh. It seems an odd approach to have a section in the bill that confers the power to provide that a JP court is to be constituted by one JP only and then say, "We haven't decided whether we will constitute a court using one JP." If that is the Executive's decision, it should just go ahead and put it in the bill. As Murray Tosh has said, if, in the light of experience, it decides not to go down that route, it does not need to commence the relevant section. That seems to be an entirely reasonable way to proceed. For the Executive to say at this stage that it is not sure seems bizarre.

Mr Macintosh: The Executive could have gone either way. The section confers a power to provide that a JP court is to be constituted by one JP only; it does not say that a JP court is to be constituted by one JP only. That is a small point, but the fact is that the Executive is flagging up the fact that it has not made up its mind but would like to have that power at a later stage if necessary.

However, if the policy intention is to introduce single-JP courts, perhaps it might be clearer if that were included in the bill and a commencement order was used at the point at which it was decided that that policy should be implemented.

I think that the best thing to do is to flag the matter up to the lead committee. In essence, the matter relates to the best way in which to implement the policy. Clearly, the Executive has some doubts about whether it would be wise to introduce the policy with any speed, but that is a question for the lead committee to discuss.

Murray Tosh: There is an interesting point in all of this that we might like to ponder. It appears that the use of the word, "power", implies a lack of any decision or clear policy.

The Convener: I am sure that there is more that we could say about that.

It is important that we pass on everything that we said, especially Ken Macintosh's point that the lead committee should try to tease out what the policy is.

10:45

Mr Maxwell: I do not disagree. I thought that Ken Macintosh made a valiant attempt to defend the Executive's position but, frankly, I was not convinced.

I agree that a policy decision may need to be made about whether a JP court is to be constituted by only one JP, but surely it is our responsibility to discuss whether such a decision should be implemented through the bill or through regulations. We should certainly point out the matter to the lead committee.

I would like us to say to the Executive that we are not convinced by the arguments that it has advanced. I cannot understand why it has taken the view that it has and I am surprised by the vein in which it has written to us. I think that the Executive should decide, and say how it intends to proceed. That will enable us to say whether we agree. The Executive should argue one way or the other at this stage, rather than wait until the bill becomes an act.

The Convener: One could argue that the Executive is saying that, because it cannot decide until other developments have taken place, it needs to put in place a provision that will allow it to adopt the proposed policy.

Mr Macintosh: We have made clear our concern. We are more worried about the policy than the subordinate legislation. If the Executive goes down the route that it intends to go down, we are content with the proposed method of subordinate legislation. Our view is that, as a matter of policy, it might be preferable for the Executive to choose a different route. Is that not our role?

The Convener: I go back to my understanding of the situation. At the moment, the Executive does not think that it is in a position to decide, but it wants to put in place a provision that will allow it to come back and do what has been proposed at a future date. That may be a valid approach.

Mr Maxwell: The Executive says that it wants to make the proposed change in stages, but I would have thought that it would have been more reasonable for it to state its policy position and to admit that that position might change in the light of experience. The Executive could choose to implement its proposal through a series of commencement orders, but that would not matter if the relevant sections were not commenced.

Murray Tosh: I agree with that. I do not think that we are encroaching on the policy position; we are entirely neutral on the policy position. We are saying that the Executive should state a policy, provide for it in the bill and control its implementation in the way that it did with the Title Conditions (Scotland) Act 2003. We think that that is the proper way to proceed, which the Executive should emulate.

The Convener: Are we agreed that that is what we will write to the Executive about?

Members *indicated agreement*.

The Convener: The second point on which we asked for clarification was how the Executive intends that the functions that are contained in section 50(5) will be conferred. The Executive has

told us that ministers' ability to confer functions on clerks of court allows them to make practice directions, which are largely administrative. In other words, we are talking about other functions, so to speak.

Murray Tosh: But by taking that line, the Executive is surely making the case for the use of an instrument that is subject to the negative procedure.

The Convener: Yes.

Murray Tosh: That is usually the case that is advanced in such circumstances. However, I do not think that the Executive intends to do that on this occasion; it intends there to be no parliamentary scrutiny.

The Convener: That is right—that is the big issue. Are we saying that ministers' ability to confer such functions should be dealt with in an instrument that is subject to the negative procedure?

Murray Tosh: It strikes me that that would be consistent with the position that we have taken in other circumstances in which powers have been of an administrative nature. We usually argue that the use of an affirmative instrument would be unnecessary, but would it not be reasonable to say that a negative instrument should be used to define, or to change, the duties in question?

The Convener: I tend to agree. What do other members think?

Mr Maxwell: I do not have a strident view one way or the other. I accepted the Executive's argument that, because only minor administrative changes were at stake, the making of an instrument was not necessary, although I understand Murray Tosh's point about consistency. I would be happy for us to ask for further explanation or to flag up the matter to the lead committee—it is not an issue that I would die in a ditch over.

The Convener: We could just bring the issue to the attention of the lead committee. Do members have any other thoughts?

Mr Macintosh: I thought that the functions were administrative matters concerning the courts. The Executive follows different routes for similar matters, which are sometimes issued in guidance and sometimes dealt with in subordinate legislation. The issue does not strike me as particularly important.

The Convener: There is nothing to stop our asking the lead committee to follow up the issue. Although it may not be of much concern, we could ask the lead committee to ask the Executive why directions are necessary. Is that agreed?

Members *indicated agreement*.

The Convener: On section 51(4)—which provides powers to repeal provisions of the District Courts (Scotland) Act 1975—and on sections 51(5), 51(6) and 51(7), we raised points about the fact that the powers are wide and unrestricted and are subject to the negative procedure.

As members will see from the Executive's response, all the powers are directly associated with facilitating the disestablishment of district courts with the effect that such courts will cease to exist at the end of the transitional period. The Executive has agreed to consider further whether the limited purpose of the order-making powers requires to be set out in the bill. On the use of the negative procedure, the Executive's response states that the powers are likely to be exercised a number of times—we asked whether that would be the case—and that the instruments are likely to be similar in content.

Are members content to note the response and to monitor the issue at stage 2?

Members *indicated agreement*.

The Convener: On section 54(5), which provides powers to regulate the procedure and consultation to be followed in certain appointment processes for justices of the peace, we asked three questions of the Executive.

First, we sought clarification of the Executive's intentions, as it was unclear from the delegated powers memorandum whether ministers intend to exercise the power under 54(5), as there is no obligation to do so. The Executive has confirmed that it intends to exercise the power and has provided a copy of the draft order, which is attached to the Executive's response. Members should note that the draft order combines powers under section 54(5) with powers under section 56. However, orders under section 56 are not subject to the affirmative procedure. That is where there is an issue.

If we wish to recommend the affirmative procedure for the powers under section 54, unless the procedure is also changed for orders under section 56, it will not be possible to combine the two powers in the same instrument. Do members have any comments on that? Having seen that the draft order includes provisions on training as well as on appointments, should we recommend that some thought be given to changes to the bill so that the order can be subject to the affirmative procedure?

Murray Tosh: When we discussed section 54(5) last time, did we consider that the powers should be exercised subject to the affirmative procedure?

The Convener: Yes, we did. The issue is whether we want to ask for consistency across the board.

I will give members a few seconds to read paragraphs 52 to 54 of the legal brief.

Murray Tosh: Why has the draft order been constructed in such a way that it combines powers under sections 54 and 56, given that there is a case—although that is our position rather than the Executive's position—for using a different level of procedure for each power? If we were to press the need for an affirmative procedure for powers under section 54, would that be unreasonable? What would that require the Executive to do?

The Convener: I think that the Executive would then need to make two separate instruments.

Mr Macintosh: Sorry, I did not catch that.

The Convener: Margaret Macdonald will clarify.

Margaret Macdonald (Adviser): The Executive would need either to make two separate instruments or to change the procedure for section 56.

Murray Tosh: What would it entail for the Executive if it had to introduce two separate instruments?

Margaret Macdonald: I suppose that it would involve a bit of extra work for the Executive and for the Parliament, as there would be two instruments instead of one.

Murray Tosh: Would having two separate instruments result in any operational difficulties for anybody who was affected by them, or affect the efficacy of the powers?

Margaret Macdonald: I suppose that it would be difficult to have one without the other. If there was an affirmative instrument and a negative one, there might be operational problems if one failed and the other did not.

Murray Tosh: Is harmonising the procedure more important than arguing the case for the powers under section 54 to be subject to the affirmative procedure, given that it seems that the powers under section 56 ought to be subject to the negative procedure?

Margaret Macdonald: Probably, yes.

The Convener: I think that that is the crux of the matter. Shall we write to the Executive to ask about the need to harmonise? We need either to have two separate instruments, as outlined by the legal adviser, or to proceed in another way. I think Margaret said that there is a second option.

Margaret Macdonald: To exercise both powers in the same instrument, one would need either to stick with the negative procedure for the power on appointments or to change to the affirmative procedure for the power on training.

The Convener: Yes. So there are two separate options. We should ask about the possibility of changing either of the two procedures in order to harmonise things.

Mr Maxwell: I am not following you. The crux of the issue is that the two powers have to be combined in the same instrument because there could be operational problems if they were separated into two instruments and one went through but the other did not. If we accept that, surely there is nothing to write to the Executive about. We accept its view that it is reasonable for the powers to be combined in the same instrument.

Murray Tosh: Yes, but the question is whether we still wish the affirmative procedure to apply to the powers under section 54. If we do, we would have to argue that the affirmative procedure should also be used for the powers under section 56. I think that that is perhaps excessive in the circumstances and that we should accept the use of the negative procedure for both.

Mr Maxwell: Exactly.

The Convener: So what you are saying, Stewart, is that we should accept the negative procedure for both.

Mr Maxwell: Yes.

The Convener: Okay. So we are moving away from what we said previously, then.

Murray Tosh: Sometimes we do that in the light of responses, convener.

The Convener: I am just checking.

Murray Tosh: Indeed, I think that our record of flexibility is probably better than the Executive's.

The Convener: To be clear, we are saying that we do not need to use the affirmative procedure for the powers under section 54 and that the negative procedure is sufficient.

Murray Tosh: We thought that we should use the affirmative procedure but, on balance, it is preferable for the powers under the two sections to use the same procedure. That outweighs the disadvantages of not applying the affirmative procedure to the powers under section 54. Therefore—with reluctance and reservations—we accept the Executive's argument that the negative procedure should be applied in both cases.

The Convener: Are we agreed?

Members *indicated agreement*.

The Convener: We accept what the Executive says and agree to the negative procedure.

We raised a point about exemptions. Members will see from the Executive's response that that seems to be okay. Do members want to raise any other issues?

Members *indicated disagreement*.

The Convener: Section 54(7)(a) contains the power to specify the date on which the appointment of justices of the peace will cease to have effect. We asked the Executive why it has not included a date on which JPs' appointments will cease. The Executive has provided further clarification. Are members happy with the response and with the fact that the power is subject to the negative procedure?

Members *indicated agreement*.

The Convener: On section 55, "Conditions of office", we considered it odd that a scheme for the payment of allowances to JPs should be determined by ministers. We also noted that section 17 of the District Courts (Scotland) Act 1975 contains a similar provision but that, in that case, the power is exercisable by way of a statutory instrument subject to the negative procedure.

Members will note that the Executive's view is that alterations to the scheme are likely to be minor and that they can therefore be made without the need for parliamentary approval. It is worth noting, however, that there are precedents in other areas in which the negative procedure is used. Do members have views on that? Are we happy that the provision is not subject to parliamentary procedure? The legal brief shows that there are precedents both ways.

11:00

Mr Maxwell: The power is okay. Again, it will relate to minor, administrative matters. We should not clog up parliamentary business unnecessarily.

Mr Macintosh: Yes. The scheme will be for the payment of allowances, not salaries, so it will relate to mileage rates and other such matters.

The Convener: Are we happy with the Executive's response?

Members *indicated agreement*.

The Convener: Section 58(6) will confer on the Scottish ministers a power to make provision for tribunals for the removal of justices of the peace. We asked the Executive first for further justification for choosing the negative procedure, given that the provision will replace a power in the 1975 act that is subject to the affirmative procedure. The Executive responded that the provisions would be largely technical, but said that it will give further consideration to which procedure is to be used. Are members content with that response or do you want to emphasise the need for use of the affirmative procedure?

Murray Tosh: We note and welcome the fact that the Executive will reconsider the procedure. We will await the outcome of the Executive's deliberations.

The Convener: Secondly, we asked the Executive whether it proposes to list the tribunal in schedule 1 to the Tribunals and Inquiries Act 1992. The Executive said that it will consider the matter further and consult the Scottish Committee of the Council on Tribunals. That is also welcome. Are members content with the response?

Members *indicated agreement*.

The Convener: We will monitor the situation at stage 2.

Section 61(9) will confer on the Scottish ministers a power to regulate consultation on, and the procedure that is to be followed in, the appointment of stipendiary magistrates. We asked the Executive two questions that raise the same issues as arose in relation to section 54(5), which we discussed. First, we asked for clarification of the effect of the requirement on ministers to comply with the provisions of an order. The Executive said that ministers intend to use the order-making power and that an order could include exemptions from its own provisions. We should think about the balance that must be struck between the approach to technical matters and the importance of judicial appointments.

Secondly, we questioned the detail of the appointments process for justices of the peace and asked why use of the negative procedure had been deemed appropriate. The Executive's response refers to the power being used to set out technical issues on procedure and consultation, but the Executive agreed to give further consideration to the matter. Are members content with the power, or should it be upgraded to be subject to the affirmative procedure?

Mr Macintosh: The Executive gave an example of an exemption in its response to our questions on section 54(5). It said that it might waive the requirement to re-advertise a post that had been advertised only three months earlier, if the first advertisement had generated a shortlist of suitable candidates and there was no need to go through the whole procedure again. That is a fairly sensible approach, so I am happy with the provision.

The Convener: Are we generally happy with the power? I will give members a few more minutes to look at the papers, which contain a lot of meat this week.

Mr Macintosh: On the second point that we raised, the Executive said that it would reconsider the matter and acknowledged the importance of the process whereby judicial appointments are made. We should refer the matter to the lead committee, so that it can consider how much

parliamentary input there should be and whether the affirmative or negative procedure should be used. The issue is a policy matter.

Murray Tosh: There are a number of areas in the bill on which the Executive has not yet made up its mind, as we know. The Executive says that it will give further consideration to section 61(9), which might be fruitful, so we should simply note the Executive's response. I presume that the Executive will advise us about the decision that it reaches, at which point we can form an opinion.

The Convener: We will consider the matter again at stage 2. In the meantime, we will report on the Executive's response and pass it to the lead committee for consideration. As Ken Macintosh said, many policy issues arise from the response.

Mr Macintosh: That is right. If the Executive wishes the matter to be dealt with under the negative procedure, it should be up to the lead committee to signal that the issue should have more significance.

The Convener: The issue is difficult, particularly when we do not know any policy details. Stewart, do you have any thoughts on this matter?

Mr Maxwell: I have nothing in particular to say, given that the Executive has said that it will reconsider the matter.

The Convener: We should leave things as they are for the moment.

Mr Maxwell: Indeed—or at least until we get a definite answer. I am not particularly convinced one way or the other on the matter.

The Convener: We will keep an eye on what happens at stage 2.

On section 61(12), which sets out the power to specify the date on which the current appointment of stipendiary magistrates ceases to have effect, we asked for clarification on the question whether "the day" that is mentioned in subsection (12)(b) is the same day that is mentioned in subsection (12)(a). The Executive has indicated that it will consider the point further and lodge an amendment if clarification is needed. We should keep an eye on this matter at stage 2. Are members agreed?

Members *indicated agreement*.

The Convener: Are members happy that the provision will be subject to the negative procedure?

Members *indicated agreement*.

Animal Health and Welfare (Scotland) Bill: as amended at Stage 2

The Convener: The stage 3 debate on the Animal Health and Welfare (Scotland) Bill will be held on Thursday 31 May, so we will be able to consider it again next week. However, because of the Edinburgh holidays at the end of this week, the Executive will not have a long time to look at our recommendations.

On section 1, "Slaughter for preventing spread of disease", which will insert new schedule 3A into the Animal Health Act 1981, two changes have been made as a result of our recommendation that the level of scrutiny be enhanced. First, are members happy with the provisions in new paragraph 8(3) of new schedule 3A, which relates to compensation and will be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Secondly, are members content with the provisions in new paragraph 9(6A) of new schedule 3A, which relates to specifying diseases and will be subject to the affirmative procedure?

Members *indicated agreement*.

The Convener: At this point, my brief refers to

"(Class 1, or if an emergency order, Class 3)".

[*Interruption.*] I have just been informed that under class 3 an order will cease to have effect if it is not approved by Parliament within 28 days.

Murray Tosh: Are we now on section 2?

The Convener: Yes. Did you have any questions about section 1, Murray?

Murray Tosh: No. Section 1 is fine.

The Convener: Two amendments to section 2, "Slaughter of treated animals", which will insert new section 16B into the 1981 act, are in response to concerns that we expressed at stage 1 about enhancing the level of parliamentary scrutiny. Are we content with new section 16B(7A), which relates to prescribing compensation and is subject to the negative procedure?

Members *indicated agreement*.

The Convener: We move to new section 16B(11A), which again relates to the slaughter of treated or vaccinated animals. Unlike the amendment to section 1, there is no requirement for the procedure to apply only to emergency situations. As a result, the opportunities for scrutinising any order that will be made under the power will be curtailed. Does the amendment address members' concerns about use of the affirmative procedure?

Murray Tosh: I do not know what the timescale is for this, but are we able to seek further clarification from the Executive on how it would ensure that the procedure would be used only in emergencies or that a different procedure would be used in non-emergencies? Would the Executive be able—and, indeed, willing—to lodge an amendment to that effect? After all, it would be better if such an amendment came from the Executive.

Mr Macintosh: I welcome the fact that the Executive has amended the bill to reflect our concerns. Unfortunately, it seems to have left a door open, perhaps inadvertently. I certainly do not think that it means for the power to apply in non-emergency situations. I suggest that we draw the matter to the Executive's attention before stage 3. Is that right?

The Convener: Yes. We hope to receive a response that will clear the matter up before next week's meeting. Is that agreed?

Members *indicated agreement*.

The Convener: We move on to section 3, "Biosecurity codes". Three amendments are involved. First, we have the amendment to proposed new section 6C(2), which section 3 will insert into the 1981 act. We also have an amendment to proposed new section 6D(1). Given that the amendments are largely of a drafting or cosmetic nature, I assume that they are okay. Are members content?

Members *indicated agreement*.

The Convener: Thirdly, proposed new section 6D(6) has been amended in response to the recommendation that we made at stage 1 to enhance the level of parliamentary scrutiny. The amendment is similar in nature to those that were made to the previous sections. Are members content?

Members *indicated agreement*.

The Convener: I clarify that the class 1 affirmative procedure will be used, and the class 3 procedure will be used in the case of emergency orders.

We move on to section 5, "Animal gatherings". Again, three amendments are involved. Under section 5, the bill will add new section 8A to the 1981 act. The first amendment is to section 8A(3); it clarifies the extent of the proposed powers and relates to matters of policy. Are we content that the negative procedure will be used?

Members *indicated agreement*.

The Convener: Secondly, proposed new section 8A(6A) has been added to new section 8A by way of a non-Executive amendment. It provides that an order "must prohibit the charging of any fee".

Are we content simply to note the amendment? I refer members to paragraph 105 in our legal brief.

Mr Maxwell: It seems to be rather odd that the Executive accepted the point, given that it is clearly unnecessary. I do not know what happened at stage 2, but it is strange that we have ended up with a superfluous amendment.

The Convener: Yes.

Murray Tosh: If it bans something that is not possible, does not that make it declaratory? In general, does not the Executive resist all declaratory amendments?

The Convener: That is what our brief highlights.

Murray Tosh: It also says that the amendment does no harm. However, ministers would normally say that they do not want this sort of provision in a bill. Given the declaratory nature of the amendment, it might be useful for us to ask the Executive whether it intends to let it stand. The Executive may detect a meaning in the amendment that our legal advisers have not found. Although that is almost impossible to conceive of, I note it anyway.

The Convener: Is that agreed?

Members *indicated agreement*.

The Convener: We move to section 7, "Seizure of carcases etc". Two amendments are involved, both of which are policy related. They reflect the wider focus of the bill in preventing the spread of disease. However, the reference to "creatures" in proposed new section 36ZB of the 1981 act does not sit well with the wording in new section 36ZE, in which the phrase "animal, bird or amphibian" is used, with the word "animal" defined in new section 36ZA(5). Are we content to note the amendments or should we raise with the Executive the points that our legal adviser has made on the references? I refer members to paragraph 111 of the legal brief.

Murray Tosh: Does the reference to "creatures" bring humans into the scope of the bill?

Margaret Macdonald: No.

The Convener: No. Our adviser is shaking her head.

Mr Maxwell: Is "creatures" defined in the bill?

The Convener: No.

Mr Maxwell: The point is pertinent. If the bill includes a definition of "animal" in terms of "animal, bird or amphibian", it is odd that it does not also define the word "creatures", which it introduced. We are being given the hint that there is a difference between "creatures" and "animal". Perhaps we should write to the Executive and ask

for clarification. We will have to do so before stage 3.

The Convener: Okay. Are we agreed that we will ask for a clarification on the point in question?

Members *indicated agreement*.

The Convener: We move on to section 8, "Specified diseases". The amendment to the section was made in response to our recommendation at stage 1 that the level of parliamentary scrutiny of class 3 orders be enhanced. The issue that is raised is similar to that which we discussed earlier in relation to new section 2 of the 1981 act, which is that the effect of the provision would be to limit the opportunity for parliamentary scrutiny. The recommendation is that, in this case, we take the same view that we took to the amendment of section 2. Are members content to do that? Is the amendment sufficient to address the concerns that we expressed? The class 3 affirmative procedure will be used.

Murray Tosh: We should take the same course of action that we agreed earlier.

The Convener: Okay. Is that agreed?

Members *indicated agreement*.

11:15

The Convener: There are two amendments to section 10, "Livestock genotypes: specification, breeding and slaughter". The first will insert new section 36O into the 1981 act, which provides for regulation-making powers for identifying genotypes and livestock, which are to be exercisable by statutory instrument. The second relates to new section 36W of the 1981 act, in response to recommendations that we made at stage 1 to enhance the level of parliamentary scrutiny in relation to compensation orders. Are members happy with the amendments and that the powers in section 36 are to be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Two amendments have been made to section 18, "Mutilation", by the insertion of new subsections (5)(b) and (6). The first relates to offences and the second introduces a statutory consultation requirement.

The first amendment is especially important, as it involves the delegation of broad powers to prescribe matters relating to animal welfare. Members will note that, at Westminster, it was felt that such a delegation to subordinate legislation was not appropriate. There was also some debate on the issue in the lead committee at stage 2. The power is subject to the affirmative procedure, but the question for the committee is whether the correct balance has been struck between primary and secondary legislation. I ask for the committee's views on the subject.

Mr Maxwell: I note the inclusion of a statutory requirement for consultation. The power is subject to the affirmative procedure, but there is also a statutory requirement for consultation.

The Convener: Yes, there is. Section 18(6) introduces the statutory requirement for consultation. Are there any other views on the matter?

Murray Tosh: The argument about whether the correct balance has been struck between primary and secondary legislation is something that the lead committee might wish to decide.

The Convener: It can do so in its on-going debate.

Mr Macintosh: This is one of the most controversial elements of the bill, but this is as much scrutiny as we can give subordinate legislation. The question is simply whether it is a matter for primary legislation, which can be amended by members as well as by the Executive. That is a matter for the lead committee and the Executive to ponder further.

Mr Maxwell: I agree. As far as subordinate legislation is concerned, this is as much scrutiny as we can give it. The statutory requirement for consultation is very important. If Parliament decides at stage 3 to support an amendment that puts the matter back into the bill rather than into regulation, that is fine; it is not really for us to decide.

The Convener: Right. We will leave that where it is at the moment.

There are two amendments to section 25, "Prohibition on keeping certain animals", which respond to concerns that were expressed at stage 1. The first relates to subsection (2) and the exclusion of zoos from the term "other premises". The second amendment is the new subsection (4A), which relates to adequate care being available for animals. At stage 1, we were concerned about the width of the power. It remains a wide power, but the lead committee seems to be content with it. Are members content with the two amendments and that the power will be subject to the affirmative procedure?

Mr Macintosh: The lead committee is clearly happy with the amendments, and although the affirmative procedure is not onerous, it requires a degree of parliamentary scrutiny beyond the normal scrutiny. I am content from that point of view.

Mr Maxwell: I agree with Ken Macintosh. I welcome the exclusion of zoos from the definition of "other premises". That seems to be perfectly sensible.

The Convener: Okay. We will leave it at that.

Section 34, "Animal welfare codes", has, following a recommendation from the committee, been amended to ensure that the draft affirmative procedure will apply to the revocation as well as to the making of an animal welfare code. There is, however, an issue about whether subsection (6) should also be amended to provide for the publicising of the revocation of a code in the same way as for the publicising of the making of a code. The committee may wish to note that there is no provision for prior consultation on the revocation of a code, which there is for the making of a code. Do members want to raise any of those points, or is the committee content with the amendments?

Murray Tosh: There is a stronger case for asking for the revocation of a code to be notified if a new code comes in. If one was to consult on a new code, would one wish to conduct a separate consultation on revocation of the former code? That seems to be a bit oppressive.

Mr Maxwell: The publicising of the fact that a code has been revoked is important. We should raise that issue.

The Convener: The only change from what I said is that, rather than conduct a consultation, it would be sufficient merely to publicise the revocation of the code.

Mr Maxwell: Is it possible that a code would be revoked and not replaced by another code? It is not just a case of one finishing and a new one starting. A code could be revoked without anything replacing it. Perhaps a reasoned argument can be made about consultation.

Murray Tosh: The suggestion is that consultation on the removal of the old code would be implicit in consultation on a new code, and that the requirement to consult on the removal of a code would apply in circumstances in which a code was being removed but a new one was not being introduced. That is a legal point that is worth pursuing. It is almost as savoury as double negatives.

The Convener: We will write to ask for more clarification on that point.

Members *indicated agreement*.

The Convener: Section 46, "Regulations", has been amended so that different provisions may be made for different cases and classes of case. Are members content with the amendment? The power will be subject to the affirmative procedure.

Members *indicated agreement*.

The Convener: Members have received a copy of the correspondence that we received from the Kennel Club. It relates to the policy matter of shock collars. I bring the issue to members' attention, but it will be dealt with by the lead committee.

Murray Tosh: It would be appropriate to write and explain that, rather than simply ignoring the correspondence. The Kennel Club approached us in good faith, not understanding entirely what our role is in respect of the legislation. It would be appropriate for that organisation to be told how the system works, so that it can e-mail members about stage 3 amendments, which is the proper way for it to exert pressure.

The Convener: As chair of the cross-party group in the Scottish Parliament on animal welfare, I second that.

Murray Tosh: Have you e-mailed us, convener?

The Convener: Not directly.

Police, Public Order and Criminal Justice (Scotland) Bill: as amended at Stage 2

The Convener: The next item is delegated powers scrutiny of the Police, Public Order and Criminal Justice (Scotland) Bill, as amended at stage 2. Members will recall that, after last week's meeting, we raised one issue with the Executive. We need to report on the bill after today's meeting because the stage 3 debate will take place on Thursday.

New section 72C, "Information about release: power to require giving of specified information", affects section 96 of the Sexual Offences Act 2003, which concerns information about release or transfer. We asked the Executive to provide further clarification of why it considers the negative procedure to be appropriate in this case, given that the power raises sensitive issues, particularly in relation to confidentiality, and can be extended. The Executive's response suggests that it is aiming for parity with the United Kingdom legislation on the subject, although there is no reason why instruments that are made under similar powers should be subject to a similar procedure. I make that point before Stewart Maxwell does. The power has precedent, so the committee may feel able to accept it in the light of the information that it has received. Are we content that the negative procedure should be used, or do we want to continue to raise the issue?

Murray Tosh: Given that the power apparently has precedent, we can be more confident about the European convention on human rights implications.

Mr Maxwell: The stage 3 debate on the bill will take place this Thursday, so there is nothing that we can do about it. A manuscript amendment could be lodged, but I doubt that it would be accepted.

The Convener: I suppose that we could stand up and raise the issue.

Mr Maxwell: We could make the point, but I do not see the point of that.

The Convener: Are members content that the power should be subject to the negative procedure?

Members *indicated agreement*.

Executive Responses

Public Transport Users' Committee for Scotland Order 2006 (SSI 2006/250)

11:24

The Convener: We asked the Executive to explain the purpose of the words

"from the date of coming into force of this Order"

in article 3. From the response, members will see that the Executive accepts that the order has been defectively drafted. I suggest that we report the order to the lead committee and the Parliament on that ground. Is that agreed?

Members *indicated agreement*.

Licensing (Scotland) Act 2005 (Commencement No 1 and Transitional Provisions) Order 2006 (SSI 2006/239)

The Convener: We pointed out that, although the Executive note states that the pilot scheme is to take place in the Fife constabulary area, there is nothing in the order that restricts the authorisation of enforcement to that area. Members will have seen the response from the Executive. Do members think that there remain doubts about the vires of the order?

Mr Maxwell: The Executive's answer is not unprecedented. On a number of occasions, the Executive has answered a question that we have not asked and failed to answer the question that we have asked. This letter is a classic example of that.

The Executive has completely ignored the points that we raised. I think that it has done so for a good reason, from its point of view, in that we are right in saying that the parent act does not allow the Executive to define the geographical region and that the Executive has, therefore, tried to draft its way around the problem. That is probably the basic situation. The Executive should have been more honest and should have come clean in its response. However, as the legal brief says—and as we said at the end of our discussion last week—the situation will probably be okay in practical terms. However, it is a rather cack-handed way to go about things.

The Convener: That is a fair summary. We will pass that on to the Parliament, if we are agreed.

Members *indicated agreement*.

Mr Maxwell: Will we include "cack-handed"?

The Convener: No. We will use appropriate language. Basically, we have been given reassurances that the situation will be perfectly okay, but we have concerns about how the order has been drafted.

Draft Instrument Subject to Approval

Management of Offenders etc (Scotland) Act 2005 (Supplementary Provisions) Order 2006 (draft)

11:26

The Convener: The order makes supplementary provisions in consequence of the establishment of community justice authorities and the appointment of their chief officers and staff. It seems that the order makes fairly substantial and substantive provisions, not only in relation to staff but in other miscellaneous areas, which it would be difficult to characterise as supplementary or incidental. Do members share that view?

Members *indicated agreement.*

The Convener: A second point relates to the vires of articles 6 and 7 of the order, given the reservations, respectively, in sections H1(a) and B2 of part II of schedule 5 to the Scotland Act 1998.

Mr Maxwell: I have absolutely no problem with this bit. Frankly, I commend the Executive for attempting to push the boundaries of its powers. Good luck to it.

Murray Tosh: Mr Maxwell would like to know the theoretical underpinning of the approach.

Mr Maxwell: I am quite keen on a creative use of our powers.

Murray Tosh: He likes the policy, but the procedure must be scrupulous.

The Convener: Do we agree to ask the Executive about those two points?

Members *indicated agreement.*

Instruments Subject to Annulment

Divorce (Religious Bodies) (Scotland) Regulations 2006 (SSI 2006/253)

Divorce and Dissolution etc (Pension Protection Fund) (Scotland) Regulations 2006 (SSI 2006/254)

Parental Responsibilities and Parental Rights Agreement (Scotland) Amendment Regulations 2006 (SSI 2006/255)

11:28

The Convener: No points arise on the regulations.

Mr Macintosh: I might add that the first instrument is particularly well drafted and welcome.

The Convener: We will note that.

Instrument Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 11) (Scotland) Order 2005 Revocation Order 2006 (SSI 2006/260)

11:28

The Convener: No points arise on the order.

Instrument Not Laid Before the Parliament

Housing (Scotland) Act 2006 (Commencement No 2) Order 2006 (SSI 2006/252)

11:29

The Convener: No points arise on the order.

Interests of Members of the Scottish Parliament Bill: as amended at Stage 3

11:29

The Convener: Our final agenda item concerns a provision of the Interests of Members of the Scottish Parliament Bill that confers a power to make amendments by a resolution of the Scottish Parliament

Members will recall that an amendment was lodged at stage 3 to allow the Parliament to make by determination any modification to the schedule and that concerns were expressed in the chamber about how such a determination would work.

Members will note that the terminology in the amendment has been adjusted to refer to a "resolution" of the Parliament rather than a "determination". The draft amendment included with members' papers has been adjusted to remove subparagraph (3) after discussion between the committee's legal advisers and the non-Executive bills unit and after comments from Her Majesty's Stationery Office. It has also been adjusted to include provisions to allow for the publication of the resolution as if it were a Scottish statutory instrument. This is precedented in the House of Commons Members' Fund Act 1948. Are members content to note the power?

11:30

Mr Maxwell: The new wording is more helpful. Perhaps if the word "resolution" had been used the first time round we would not have had the difficulty in the stage 3 debate. I also welcome the fact that the resolution will be published as if it were an SSI. That is helpful.

I want to ask a question about paragraph 189 of the legal brief. What in particular has been adjusted? The paragraph says that the amendment in our papers

"has been adjusted in particular to remove subparagraph (3) after discussion between"

the various bodies that you mentioned, convener. What was the particular problem?

Margaret Macdonald: The reason was purely technical; it was so that they did not have to put in the "Scottish Statutory Instruments" heading. That is it, there. It was just the banner heading—

Mr Maxwell: Yes, but I just wondered why that was a particular problem.

Margaret Macdonald: It was just telling HMSO about an operational detail that—

Mr Maxwell: But it did not like it.

Margaret Macdonald: It did not like it.

Murray Tosh: You cannot just flourish a paper—you have to narrate it so that it can be taken down by the official reporters for the benefit of the avid readership of the deliberations of this committee.

The Convener: I am assured that we have the copy.

Mr Maxwell: The copy of what? You have to tell the official reporters.

The Convener: Margaret, would you just say that again for the benefit of the *Official Report*? What happened in the discussions?

Margaret Macdonald: Subparagraph (3) said that the copy of the resolution that is sent to the Office of the Queen's Printer for Scotland shall not be required by article 5(2) of the transitional order to have the heading, "Scottish Statutory Instruments". It was felt that that was an operational detail that did not have to go in legislation.

The Convener: Thank you.

Mr Macintosh: What is the difference between a resolution and a determination? I am happy for there to be a clarification, but to me a resolution is exactly the same as a determination.

The Convener: I am assured that there is no difference in this context.

Mr Macintosh: So what exactly are we saying by using the word "resolution" that we were not saying earlier by using the word "determination"? Does it mean that we would have to have a vote in Parliament? It does not, does it? We would have to have agreement.

Mr Maxwell: Yes, but there would have been agreement the first time round as well.

Mr Macintosh: Yes, but there does not have to be a vote; there could be agreement by consensus.

Murray Tosh: Yes, but there is still a vote. It would be a decision at decision time. Members would agree verbally, as they do. Even if there is not a negative answer to the question and then a formal vote, there is still a vote—the decision is taken. Whether that is called a determination or a resolution, there still has to be a parliamentary decision.

Mr Macintosh: In either case, it is exactly the same as a determination, is it not? Parliament determines in a number of ways, but the meaning is that Parliament agrees, and therefore votes.

Murray Tosh: The word "resolution" is just meant to be a bit clearer and more reassuring. Obviously, not every member was as confident about this as Ken was. He spoke splendidly on behalf of the committee during the debate on amendments at stage 3. Indeed, he saved the day.

Mr Macintosh: Thank you, Murray.

The Convener: The stage 3 debate is on Thursday of this week. The committee does not report—any issues will have to be raised during the debate on Thursday. Only the member in charge of the bill can lodge amendments.

The next meeting of this committee will be on Tuesday 30 May.

Meeting closed at 11:34.

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