

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 12 September 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

24th 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

CLERK TO THE COMMITTEE

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 12 September 2006

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

Delegated Powers Scrutiny

Aquaculture and Fisheries (Scotland) Bill: Stage 1

The Deputy Convener (Gordon Jackson): Good morning and welcome to the Subordinate Legislation Committee's 24th meeting of 2006. Apologies have been received from Sylvia Jackson and Adam Ingram.

Item 1 is scrutiny of the delegated powers in the Aquaculture and Fisheries (Scotland) Bill. In general, all powers to make delegated legislation under the bill will be exercisable by statutory instruments that are subject to the negative procedure, except if a power allows an act to be amended, when the affirmative procedure will be used.

An order that is made under the power in section 1(1) to require information about parasites on fish farms and shellfish farms will be subject to the negative procedure and will be the subject of consultation with stakeholders, although consultation is not a statutory requirement. Are we content with the power?

Members: Yes.

The Deputy Convener: Good. Section 1(3) provides the power to require information about the containment of fish on, and the escape of fish from, fish farms and about the recovery of escaped fish. The same arrangements as those that we just discussed apply, so I take it that this power is also okay.

Members indicated agreement.

The Deputy Convener: Section 4(2) concerns one of the great philosophical questions of the universe: what is the meaning of "parasite"? The provision will enable ministers to modify the definition of "parasite"—I am trying not to laugh, but it is not easy. The use of a delegated power appears to be justified. However, an issue arises about the use of the term "modify", which allows ministers to restrict or extend the definition. Do we want to ask how the Executive intends to exercise that power and whether it will restrict the existing

definition or alter it to make a generic reference to all fish parasites?

We normally expect the affirmative procedure to be used when a power allows the text of an act to be amended. However, the Executive says that a change in the definition would relate to technical and scientific matters, so the negative procedure is enough. What do we say?

Mr Stewart Maxwell (West of Scotland) (SNP): The answer to the second question depends on the answer to the first question. If we have a fuller explanation of the definition of modifying, perhaps we will know whether the affirmative or negative procedure is more appropriate.

The Deputy Convener: We will ask for that explanation. In doing that, we might even point out that we would normally recommend changing the procedure to the affirmative procedure. We will point out the link.

Subsections (1) and (3) of section 7 contain powers to approve a code of practice by making orders, after consultation, that will be subject to the negative procedure. Is that okay?

Members indicated agreement.

The Deputy Convener: Section 13 will introduce proposed new section 2ZA of the Diseases of Fish Act 1937, which is on additional powers when designating an area under section 2 of the 1937 act. The new section amends the existing power to make designation orders under the 1937 act, which are not subject to parliamentary procedure. The Executive thinks that the existing procedure has worked okay and has not sought to modify it. Are we content with the extension of powers under section 2 of the 1937 act as proposed, with the existing procedure, or do we need a new statutory instrument?

Mr Maxwell: I thought that the provision was all right.

The Deputy Convener: It is pointed out to me that members may wish to note the link to the recommendation in the draft report on our regulatory framework inquiry that local instruments should no longer be made as statutory instruments. The provision is an example of that.

Section 14—

Murray Tosh (West of Scotland) (Con): Let us hear your pronunciation.

The Deputy Convener: I am taking a deep breath before I say "preliminary". Was that okay?

Section 14 introduces powers in subsections (1) and (3) of proposed new section 2ZB of the 1937 act, "Preliminary designation of area: *Gyrodactylus salaris*". An order that is made under that section will have an initial duration of 30 days, which will

be extendable by further order to 60 days. Any order will be made by statutory instrument that is not subject to parliamentary procedure. The Executive says that that is okay given that such orders are temporary and urgent. Is that okay or might a 28-day order procedure be more appropriate? We might also want to ask the Executive what happens when an emergency continues beyond 60 days.

Mr Kenneth Macintosh (Eastwood) (Lab): I am not sure why the Executive has used that procedure. There is nothing particularly controversial about the order, but it could affect people's livelihoods. The procedure that we usually follow is that the Executive would lay the order and it would fall if it were not given parliamentary approval. A role for Parliament would not go amiss. I do not understand why the Executive is using a power that gives Parliament no role.

The Deputy Convener: We will ask the Executive to justify that.

Section 16 amends section 31(1), "Salmon fishing: general regulations", of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 by creating new section 31(1)(g) of the 2003 act. The amendment introduced by the section does not alter the existing procedure for making regulations under section 31(1) of the 2003 act, which is that they are subject to the negative procedure. The committee will note that the exercise of the power is not limited to the control of that other one that was mentioned previously.

Murray Tosh: Gyrodactylus—

The Deputy Convener: *Gyrodactylus salaris*. Are we content with the power?

Members indicated agreement.

The Deputy Convener: Section 19 is yet again about gyro whatever it is: "*Gyrodactylus salaris*: Scottish Ministers' power to make payments". It inserts new section 5F into the Diseases of Fish Act 1937.

Orders under new section 5F of the 1937 act will be made as statutory instruments and be subject to the affirmative procedure. Orders under the 1937 act are not made as statutory instruments. Accordingly, if they are to receive effect arrangements must be made for their publication. Section 9 of the 1937 act provides for the publication requirements to be prescribed by regulations. It is not clear why the additional power to make regulations under section 9 in relation to the manner in which orders under new section 5F are published is necessary, as such orders will be made by statutory instrument and therefore will be

published under the provisions of the SI transitional order. I hope that that is now clear.

I ask members whether they are content with the power and the fact that it is subject to the affirmative procedure. Do they wish to question the Executive further on the additional power?

Murray Tosh: It would be good to question the Executive further on the matter.

The Deputy Convener: Okay. Section 23 introduces new section 17A, "Weekly close time for freshwater fish", into the 2003 act. Orders made under section 17A will be made by statutory instrument subject to annulment. There is also a statutory obligation on ministers to consult before making an order. Section 23 also introduces new section 17B, "Annual close time for freshwater fish other than trout", into the 2003 act. The same procedure applies in relation to that power.

Section 25(1) provides the power to make regulations for the conservation of freshwater fish. Such regulations are to be made by statutory instrument subject to annulment. There is also a statutory obligation on ministers to consult before making regulations. Is that okay?

Murray Tosh: Yes.

The Deputy Convener: Section 27 contains the power to specify marine waters adjacent to Scotland as "specified areas" and the power to specify areas of marine or inland waters from which fish may not be moved into specified areas without the permission of the Scottish ministers.

Orders made under the section are made by statutory instrument subject to annulment. I am to "Ask if the Committee is content with the power and that it is subject to negative procedure."

I am reading the words from the brief.

It is suggested that a consequential amendment may be needed to the amendments to the Diseases of Fish Act 1937 that are contained in paragraph 1 of the schedule to the bill and relate to the publication of orders. Will we write to the Executive on that point?

Mr Macintosh: Yes.

The Deputy Convener: Mr Tosh asks how we will stop the fish moving, but I do not think that the Executive will be of much assistance on that matter.

The power in section 29(1), "Payments in respect of fish destroyed", is very wide. Orders under the section are subject to the draft affirmative procedure as they involve payment from public funds. It is appropriate that the Parliament has an opportunity fully to scrutinise any proposed scheme before it comes into operation. Are we content?

Members indicated agreement.

The Deputy Convener: Section 31 provides the power to require the provision of information on the economic, social and environmental aspects of fish farming and shellfish farming. Orders under the section are subject to the negative procedure. Any order would be made following the recommendation of the ministerial working group, which has everybody concerned on it. That would seem to be okay.

Section 35(1) provides a power to make

“incidental, supplemental, consequential, transitional, transitory or saving”

provisions. There is the usual problem with section 35(2): it contains a power to “modify any enactment”, which we thought might extend to the bill itself. Will we pursue the matter in this case, or have we pursued it sufficiently in relation to previous such occasions?

Mr Macintosh: I do not think that we have had a reply following our previous correspondence.

The Deputy Convener: We are getting the answer next week. We will—

Murray Tosh: Hold fire.

The Deputy Convener: We will hold fire and let the matter go.

Mr Maxwell: It is the same question as before, and we should raise the point in this instance, too.

The Deputy Convener: We will not bring in officials from the Scottish Executive Environment and Rural Affairs Department as well.

Mr Maxwell: No.

The Deputy Convener: We will just tell the Executive that we are discussing the issue next week with other officials. Is that okay?

Mr Maxwell: Yes.

The Deputy Convener: Section 38(2), which contains a power to appoint the day upon which the provisions of the bill will come into force, seems pretty normal.

Paragraph 5(3) of the schedule amends section 31(5)(b) of the 2003 act, which specifies the weekly close time for salmon. That does nothing to alter the existing procedure for making regulations.

Paragraphs 5(6) to 5(8) of the schedule to the bill modify schedule 3 to the 2003 act. That is a tidying-up exercise, and does not alter anything.

Executive Responses

Construction Contracts (Scotland) Exclusion Amendment Order 2006 (draft)

10:41

The Deputy Convener: We asked the Executive to clarify a drafting point. Are we content with the answer? We can draw the attention of the lead committee and the Parliament to the draft order on the ground that further information was requested from and supplied by the Executive. That is fairly routine.

Members indicated agreement.

Robert Gordon University (Scotland) Amendment Order of Council 2006 (SSI 2006/404)

The Deputy Convener: Members will remember that there was a gap—the university had effectively taken a few gap weeks. We asked the Executive to explain the practical effect of a gap in provision: the order came into effect on 21 July whereas the revocation of the previous order took effect on 28 June. Because of that drafting error, the university was left without a constitution during those gap weeks. However, the good news is that it did not seem to matter.

Murray Tosh: If any officers of the university took important decisions under delegated powers during that time, are they covered?

The Deputy Convener: I do not know.

Murray Tosh: Presumably, given the circumstances, the university would be wise to seek some form of homologation after the event—if it is not too much of a supererogatory expression to say “homologation after the event”.

The Deputy Convener: If indeed the university knows.

Murray Tosh: It might be interesting to ask those at the university what they did to cover decisions taken in that circumstance.

The Deputy Convener: We have to report on the order to the lead committee and the Parliament in any case. Do you want me to suggest something further? Should we tell the people at the university? They might not even know.

Mr Macintosh: Why not draw the matter to their attention?

The Deputy Convener: The fact that the university had no constitution for that period?

Murray Tosh: Would that be a reasonable thing for us to do under our remit? It might be more appropriate to ask the Executive if it has discussed the issue with the university and satisfied itself that anything that was done by the university during that period is appropriately authorised—tempting as it is to start communicating with the wider world.

The Deputy Convener: If we are not careful, people might quickly come to know that we exist, and we do not want that to happen.

Members will notice that we received a more general response to our request for further information on why we got the various university instruments in a piecemeal fashion. That item is on next week's agenda, so you can hold your breath.

TSE (Scotland) Amendment (No 3) Regulations 2006 (SSI 2006/430)

The Deputy Convener: We asked the Executive to provide clarification of the amendment to regulation 33 of the principal regulations. Members will have seen the response from the Food Standards Agency Scotland. We should draw the attention of the lead committee and the Parliament to the regulations either on the ground that their meaning could have been clearer or that they were defectively drafted.

10:45

Mr Maxwell: Was this the algebraic problem of whether it was subparagraph (a), (b), (c) or whatever?

The Deputy Convener: Yes.

Murray Tosh: I think that we established last week that when we say "either/or", we mean "both".

The Deputy Convener: Yes, in a sense we are saying to the Executive, "Either way."

National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment (No 3) Regulations 2006 (SSI 2006/440)

The Deputy Convener: We put three questions to the Executive on the regulations and the committee will have seen the response. I suggest that we draw the regulations to the attention of the lead committee and the Parliament on the grounds that further explanation of the breach of the 21-day rule was requested from and supplied by the Executive; defective drafting was acknowledged by the Executive, but is not such as to affect the operation of the regulations; and information was requested from and supplied by the Executive on the progress of consolidation.

As far as consolidation is concerned, do we wish to write again to the Executive to encourage it, once decisions have been taken, to consolidate the series of instruments of which the regulations form part? I do not suppose that it would do any harm to say that it would be good of the Executive to do that and to ask it to consolidate soon.

Members indicated agreement.

Instruments Subject to Annulment

Road Traffic (Permitted Parking Area and Special Parking Area) (City of Glasgow, Perth and Kinross Council, Aberdeen City Council, Dundee City Council and South Lanarkshire Council) Designation Amendment Order 2006 (SSI 2006/446)

Cereal Seed (Scotland) and Fodder Plant Seed (Scotland) Amendment Regulations 2006 (SSI 2006/448)

Plant Protection Products (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/449)

10:46

The Deputy Convener: No points arise on the instruments.

Animals and Animal Products (Import and Export) (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/450)

The Deputy Convener: The regulations breached the 21-day rule, but that does not seem to be unreasonable. There are only informal, minor points to report.

Pig Carcase (Grading) Amendment (Scotland) Regulations 2006 (SSI 2006/451)

The Deputy Convener: No substantial points arise on the regulations, but there is a minor point for informal discussion.

Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD): That is a pity, in a way.

The Deputy Convener: Yes, it is a shame really about that one.

Regulation of Care (Social Service Workers) (Scotland) Amendment Order 2006 (SSI 2006/453)

The Deputy Convener: No points arise on the order.

Fire Safety (Scotland) Regulations 2006 (SSI 2006/456)

The Deputy Convener: We should ask the Executive to explain the reference in regulation 15(2) to

“the information required by regulation 14(1)(a)”,

given that the latter provision does not appear to require any such information. We should also ask

about the meaning of regulation 24(2) and, in particular, the persons to whom the duty to maintain the safety measures referred to in that provision is intended to apply.

Those seem like serious questions that we should ask the Executive.

Mr Maxwell: That is particularly the case on the second point. The Executive has had several goes at regulation 24(2) and I agree with the legal brief that it is almost impossible to understand the regulation. There could be a reference to owner and occupier, or owner or occupier, or some other persons. It is difficult to appreciate what is intended. Given the nature of the statutory duty that is placed on those people, I think that clarity would be helpful.

The Deputy Convener: Yes. Among all the nonsense that we have been doing, the regulations are quite serious. I do not mean nonsense as such; I am referring to all the minor points. All the instruments are very serious, let me hasten to add, but the questions on the fire safety regulations are particularly serious.

Fire (Scotland) Act 2005 (Consequential Modifications and Savings) (No 2) Order 2006 (SSI 2006/457)

The Deputy Convener: We will ask the Executive to explain the background to the drafting of article 3. There is also a minor point that we can raise informally.

Instruments Not Laid Before the Parliament

Water Services etc (Scotland) Act 2005 (Commencement No 4) Order 2006 (SSI 2006/445)

10:48

The Deputy Convener: No points arise on the order.

Scottish Schools (Parental Involvement) Act 2006 (Commencement No 1) Order 2006 (SSI 2006/454)

The Deputy Convener: We should perhaps ask the Executive to explain the vires for making this order as a statutory instrument in view of the failure to commence section 22(1) of the parent act—the Scottish Schools (Parental Involvement) Act 2006—before the order was made. It is another question for the Executive.

Mr Maxwell: It is well worth asking that one.

Teaching Council (Scotland) (Legal Assessor) Rules 2006 (SSI 2006/455)

The Deputy Convener: No points arise on the rules.

Fire (Scotland) Act 2005 (Commencement No 3 and Savings) Order 2006 (SSI 2006/458)

The Deputy Convener: No substantive points arise on the order, but two minor points can be raised informally.

Executive Correspondence

International Criminal Court (Enforcement of Fines, Forfeiture and Reparation Orders) (Scotland) Regulations 2004 (SSI 2004/360)

10:49

The Deputy Convener: The committee considered the regulations in 2004 and the Executive revoked them following reservations expressed by this committee and the Justice 1 Committee. The reservations were about the appropriateness of appointing the Lord Advocate as the person to act on behalf of the International Criminal Court with regard to the matters in the regulations.

The Executive is drawing up new regulations to allow the Scottish ministers to appoint a person to act on their behalf. That would bring us into line with counterpart regulations elsewhere and allow us to comply with international obligations. The minister has taken the rather odd course of asking the committee for support for the new regulations in advance of making them. However, as the minister says, I understand that they would

“allow Scotland to play its full part in taking action against those found guilty of various heinous crimes ... which the ICC was established to deal with.”

For what it is worth, I suggest that we write back to welcome in principle the drafting of new regulations because we understand why it is necessary to have someone who could help us to implement the provisions. However, we should reserve our comment on the merits of the regulations until we see them. We could write back two lines to say, “I am sorry, but we cannot say anything until you show us the regulations”, but it might be more courteous to say that, although what the Executive is doing is a good thing in principle, we will wait until we see the regulations before we comment. Is that okay?

Members indicated agreement.

Work Programme

10:51

The Deputy Convener: Do members have any comments on the draft work programme? It will be updated and changed as legislation becomes clearer.

Mr Maxwell: Is there any expectation of work arising from stage 2 of the legal reform bill? It is not in the programme, although stage 2 consideration will begin on 26 September.

The Deputy Convener: Do you mean last week's or this week's stage 1 bill?

Mr Maxwell: We debated stage 1 of the Legal Profession and Legal Aid (Scotland) Bill last week. Progress of that bill runs roughly in parallel with the Bankruptcy and Diligence etc (Scotland) Bill so I assumed that it would appear in our work programme.

The Deputy Convener: As you did, I paid close attention to that debate last week. I wonder whether there will be many Executive or other amendments that will affect the delegated powers in the bill. The bill requires serious amendment, but I am not sure whether any amendments will affect the creation of Scottish statutory instruments.

Mr Maxwell: It was just a question.

The Deputy Convener: No, we have not heard whether any committee work will arise from the bill.

Regulatory Framework Inquiry

10:52

The Deputy Convener: Next week we will consider the evidence that we received in response to the consultation on the draft report on our inquiry. We will also discuss a paper from the clerk about possible witnesses we might wish to invite to give oral evidence. Although I know that some of us are not keen to discuss anything in private, and I understand why, that discussion should be in private because we might discuss whether various individuals are worth listening to. Are you content with that, Mr Tosh?

Murray Tosh: Given your explanation of the proposal, I am persuaded that the use of your power might be justified in this circumstance.

The Deputy Convener: Thank you. The next meeting will be held on Tuesday 19 September. Dr Jackson might or might not be back by then, so I cannot tell members whether they will be away by 11 am.

Meeting closed at 10:53.

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