

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 16 January 2007

Session 2

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# **SUBORDINATE LEGISLATION COMMITTEE**

## **2<sup>nd</sup> Meeting 2007, Session 2**

### **CONVENER**

\*Dr Sylvia Jackson (Stirling) (Lab)

### **DEPUTY CONVENER**

\*Mr Kenneth Macintosh (Eastwood) (Lab)

### **COMMITTEE MEMBERS**

Janis Hughes (Glasgow Rutherglen) (Lab)

Mr Adam Ingram (South of Scotland) (SNP)

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

\*Euan Robson (Roxburgh and Berwickshire) (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**

Ruth Cooper

### **SENIOR ASSISTANT CLERK**

David McLaren

### **ASSISTANT CLERK**

Jake Thomas

### **LOCATION**

Committee Room 4

# Scottish Parliament

## Subordinate Legislation Committee

*Tuesday 16 January 2007*

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

### Delegated Powers Scrutiny

#### Crofting Reform etc Bill: as amended at Stage 2

**The Convener (Dr Sylvia Jackson):** I welcome members to the second meeting in 2007 of the Subordinate Legislation Committee. I have received apologies from Murray Tosh and Janis Hughes. I am sorry that, last week, I did not pass on Stewart Maxwell's apologies, which I should have done.

**Mr Stewart Maxwell (West of Scotland) (SNP):** Thank you, convener.

**The Convener:** Item 1 is delegated powers scrutiny of the Crofting Reform etc Bill, as amended at stage 2. A number of the provisions that contained delegated powers or on which the committee commented were removed at stage 2. Those were contained in sections 1, 2 and 8.

We had no difficulty with the delegated power contained in new section 46A of the Crofters (Scotland) Act 1993, "Regulations concerning loans", which is inserted by section 36 of the bill, nor with the use of the negative procedure. We noted, however, that as drafted at stage 1, section 46A(2)(f) referred to

"recovery of any part of a loan",

which might have prejudiced the recovery of the whole of a loan. The Executive redrafted that to avoid the difficulty that we identified. I am sure that we are content with the redrafted wording.

**Members indicated agreement.**

**The Convener:** New subsection (5B)(a) of section 38, "Further amendments in relation to the Land Court", amends schedule 1 to the Scottish Land Court Act 1993. The stage 2 amendment seems to have made a useful change that tidies up a grey area of law. Orders under paragraph 12 of schedule 1 to the act, like other court rules, will not be laid before the Parliament, but will be subject to technical scrutiny by the committee in the normal way. Are members content with the new subsection?

**Members indicated agreement.**

**The Convener:** Section 45, "Transitional provision etc", confers the customary power to make, by subordinate legislation, amendments that are supplemental to or consequential on the bill. A response has been given to a point that the committee made at stage 1, and no concerns about the provision have been highlighted. Are we content with the amendment that was made?

**Members indicated agreement.**

#### Criminal Proceedings etc (Reform) (Scotland) Bill: as amended at Stage 2

**The Convener:** We raised one point on the Criminal Proceedings etc (Reform) (Scotland) Bill with the Executive last week, on section 43 and the power to make detailed provision on the seizure of vehicles. We were content with the amendment that was made at stage 2, but we asked the Executive whether thought could be given to restricting the power to "reasonable" fees and charges. A helpful response—I think—has been received. It confirms that, having considered the point, the Executive will lodge an amendment at stage 3 that will add the qualification that we suggested. I take it that we are content with that.

**Members indicated agreement.**

## Legislative Consent Memorandum

### Statistics and Registration Service Bill

10:33

**The Convener:** We considered the legislative consent memorandum on the Statistics and Registration Service Bill last week, and we raised a question with the Executive regarding two clauses, where the same point was raised. The first of those is clause 45, in particular subsection (6)(b), which allows for provision

“authorising further disclosure by the Board of such information in circumstances where the disclosure would otherwise be prohibited by a rule of law, this Act or an Act passed before this Act.”

We were concerned about the width of the powers in clause 49, “Power to authorise disclosure by the Board: Scotland”, and we sought clarification of their intended use. The Executive has provided us with a general explanation of the policy intention behind clauses 45 and 49, which members have before them. I draw members’ attention to paragraph 34 on page 7 of today’s legal brief:

“We observe that the Executive has not directly answered the point that concerned the Committee namely that the powers in subsections (6)(b) of the 2 clauses to which reference is made could by virtue of the inclusion of a reference to the Bill be interpreted as allowing regulations under the power to override the safeguards written into the Bill and in particular the safeguards in clause 51.”

In paragraph 35, the legal brief goes further:

“The reference in the relevant subsections to any other legislation is also of particular importance in Scotland given the restrictions in the Scotland Act.”

Are you sufficiently reassured by what we have heard from the Executive?

**Mr Kenneth Macintosh (Eastwood) (Lab):** The concern here, like similar concerns in the past, revolves around the use of the term, “consequential and supplementary provision”. As you have reminded us, that phrase could be used to override the safeguards contained in the bill to protect people from the misuse of information. The Executive, rather than addressing that point, has simply given us further reassurance about the intent—although it is reassuring, I have to say. It is worth our noting that point, although there is nobody to whose attention we can draw the matter, perhaps other than the Parliament as a whole, as it is to do with a legislative consent memorandum.

The issue is on-going. This example is not the first of its kind, and I do not think that it will be the last. It is worth our noting the point for future

reference but, on the basis that it all depends on the interpretation of “consequential and supplementary provision”, I am reassured by the Executive’s response.

**Euan Robson (Roxburgh and Berwickshire) (LD):** Paragraph 33 of the legal brief lists a number of hurdles over which ministers would have to jump before any regulations came into force. I think that there are enough checks contained in the provisions to override any residual concerns.

**The Convener:** You were not at the meeting last week, Stewart, but is there anything that you wish to add?

**Mr Maxwell:** I agree with Euan Robson’s comments about the safeguards. That is a fair point.

**The Convener:** I suggest that we send the lead committee—the Finance Committee—all the relevant information that we got back from the Executive, including that which concerns the various safeguards that are in place, which Euan Robson mentioned. We might, however, add something about the wee bit of concern that we have about the provisions, as expressed in the paragraphs of the legal brief that I read out. Is that agreed?

**Members indicated agreement.**

## Executive Responses

### Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2007 (draft)

10:38

**The Convener:** The draft order before us is the fifth amendment order, and we asked the Executive what plans it has to consolidate this series of instruments. In its response, the Executive says that the original 1975 order was in fact consolidated in 2003. That means that the draft order is, in effect, the first substantial amending order. That clarifies the situation.

The Executive also wrote that it expects further amendments to be required following the passing of the Protection of Vulnerable Groups (Scotland) Bill, and that it will consider consolidation in the light of that. Are we content with that? Do we wish to draw the Executive's response to the attention of the lead committee and Parliament on the ground that we asked for information and got it?

*Members indicated agreement.*

### Prohibition of Fishing with Multiple Trawls (No 2) (Scotland) Amendment Order 2006 (SSI 2006/602)

**The Convener:** We had a number of questions about the order. We asked the Executive whether it is the policy intention to apply the conditions that are set out in new article 3(2), subparagraphs (a) to (d), of the principal order—the Prohibition of Fishing with Multiple Trawls (No. 2) (Scotland) Order 2000 (SSI 2000/405), as amended—to single trawls. As we can see from its response, the Executive has confirmed that that is not the policy intention. It therefore proposes to omit the words “or fewer” where they appear at new article 3(2) of the 2000 order, and it intends to make an order in the course of this week to achieve that aim. I am sure that we are quite happy about that. Is that okay?

*Members indicated agreement.*

**The Convener:** The Executive also notes the concern that we expressed about the impact of the order on parts of the industry. That was Euan Robson's point.

**Euan Robson:** If the Executive had only said from the start that the order would apply to between two and five vessels, we would not have had to ask the question.

**The Convener:** Are you happy with the background information that we have been given on the order?

**Euan Robson:** Yes, thank you.

**The Convener:** I suggest that we pass the additional information on to the lead committee and the Parliament. Is that agreed?

*Members indicated agreement.*

### Teachers' Superannuation (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/605)

**The Convener:** We asked the Executive why regulation 4 is to have effect from 2 December 2006 as well as from 14 June 2006. The Executive confirms that, from the terms of regulation 1(a), regulation 4 is intended to have effect from 14 June 2006 and that the terms of regulation 1(b) should not have included reference to regulation 4. The Executive acknowledges the defect in drafting but it does not consider it necessary to amend regulation 1(b) at this time. The stakeholders responsible for following the regulations will be made aware of the anomaly by the Scottish Public Pensions Agency clarifying the position in the circular that is due to be issued shortly to accompany and explain the new regulations.

Are members happy for that information to be passed on to the lead committee and the Parliament?

*Members indicated agreement.*

### Welfare of Animals (Transport) (Scotland) Regulations 2006 (SSI 2006/606)

**The Convener:** We raised 10 substantive points on the regulations last week. The first of those was the fact that the Executive has chosen to use section 2(2) of the European Communities Act 1972, rather than domestic powers. Are members happy with the explanation that the Executive has given us for why it did that?

**Mr Macintosh:** Are you asking about all the points, or just this one?

**The Convener:** We will go through them all. Do you want to say anything about them?

**Mr Macintosh:** It is unfortunate that we had to raise a large number of points about the regulations. Many of them stemmed from the original approach that was taken. The Executive explains that it used European powers rather than domestic legislation because the Scottish legislation in the area has been amended; however, it goes on to say that it could have used that amended legislation. It is not a very satisfactory situation; however, the Executive has given a response on each point, which we should draw to the attention of the lead committee and the Parliament.

**The Convener:** As Ruth Cooper was saying, we must be sure to include all the points in our discussion. I will highlight two points that the committee thought were important. The first is the defective drafting in respect of the lack of a definition of “inspector”, which has been acknowledged by the Executive. The second is the serious defective drafting in respect of regulation 9(1), which is ambiguous and does not state clearly who is to be guilty of an offence. The Executive has not yet undertaken to amend that provision; therefore, it is pretty important that we state our concern about that. It is important that we give a full account to the lead committee and to Parliament of all the responses that we have received to the points that we raised.

Euan Robson may wish to say something about the Executive’s response to the point that he raised.

**Euan Robson:** Yes. The Executive has responded to the effect that the wording in regulation 22(1) is not a matter for concern because it is similar to the provision in the Welfare of Animals (Transport) Order 1997 (SI 1997/1480), which does not pose any difficulty in practice. Effectively, the Executive is saying that, because it has used defective or incomplete wording before, it should be able just to repeat it. I do not think that that is good enough. If the Executive incorporated a phrase about the inspector making a reasonable assessment of the prevailing circumstances—the very phraseology that it uses in its response to the committee—at the appropriate juncture, that would assist. I think that we should report that to the lead committee.

Of course, in all sorts of circumstances it could be perfectly clear which individual was responsible for the animals; however, misidentification could lead to serious consequences. A series of actions could follow therefrom, including the permanent prohibition of the movement of certain animals. Frankly, I do not think that that is appropriate. I cannot remember offhand whether there is an appeals mechanism.

10:45

**The Convener:** No. We said that there should perhaps be an appeals mechanism. We are now straying into policy areas; however, there is nothing to prevent our highlighting the fact that the meaning could have been clearer in that instance and asking that the lead committee consider the matter further. The alternative, if there were no appeals mechanism, would be judicial review.

**Euan Robson:** Well, quite.

**The Convener:** We can pass that information on.

**Euan Robson:** Yes. It should go to the lead committee for it to look at. In most circumstances, it is obvious who is in charge of the animals; however, the consequences of mistaken identity could be considerable.

**The Convener:** Are we agreed that we should point out that, although the Executive says that it has used the terminology before—which is why it regards it as being correct—we believe that use of the terminology could raise some issues? I suggest that we write a report to the lead committee, as opposed to simply passing on the response that we have received from the Executive, and include the comments that Euan Robson has made.

*Members indicated agreement.*

**The Convener:** There is another point that I want to highlight, which has been touched on—the fact that there is no provision to appeal against a decision of an appointed person under regulation 21. The regulations may not, therefore, be compatible with article 6 of the European convention on human rights and may consequently raise a devolution issue. We can elaborate on that point a little in our report. Is that agreed?

*Members indicated agreement.*

### **Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms and Errors) (Scotland) Regulations 2006 (SSI 2006/598)**

**The Convener:** We asked the Executive to justify the vires for regulation 3 standing the repeal of the enabling powers. The Executive appears to accept that, because of the timing of the repeal of the enabling powers for the regulations, there is a doubt as to whether regulation 3 is intra vires. However, that has not generated any concern because—as is pointed out—the repeal of the enabling powers will mean that the forms will fall in any event; so, there is no practical implication. The regulations do not attract any parliamentary procedure.

Are members happy to pass on the response that we have received to the lead committee and to Parliament?

*Members indicated agreement.*

### **National Health Service (Functions of the Common Services Agency) (Scotland) Amendment (No 2) Order 2006 (SSI 2006/603)**

**The Convener:** We asked the Executive why it has omitted to cite in the preamble section 105(6) of the National Health Service (Scotland) Act



1978, which is the relevant enabling power. The Executive accepts that it would have been better practice to do that, but it takes the view that, due to the generalised reference in the preamble to

“all other powers enabling them in that behalf”,

the omitted power can still be relied on. Are members happy for us to draw that to the attention of the lead committee and Parliament as failure to follow proper legislative practice?

*Members indicated agreement.*

## **Draft Instrument Subject to Approval**

### **Public Appointments and Public Bodies etc (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2007 (draft)**

10:48

**The Convener:** No points arise on the draft order.

## **Instruments Subject to Annulment**

### **Scotland Act 1998 (Agency Arrangements) (Specification) (No 2) Order 2006 (SI 2006/3248)**

### **Scotland Act 1998 (Agency Arrangements) (Specification) (No 3) Order 2006 (SI 2006/3338)**

10:49

**The Convener:** No points arise on the orders.

### **Police (Injury Benefit) (Scotland) Regulations 2006 (SSI 2006/610)**

**The Convener:** A number of points arise on the regulations. Do members wish to raise any of those points, or do you want me to outline the most important of them?

**Mr Macintosh:** You could outline them. Although there are substantive points, they are more about loose drafting than anything else.

**The Convener:** Yes, they are. For instance, we can ask the Executive what purpose is served by the inclusion of the words “or wife” after “husband” in regulation 16(1) given that, in paragraph 1 of the glossary of expressions in schedule 1 on page 29, “‘husband’ includes wife”.

We can also ask the Executive to clarify whether, given the inclusion of the words “or widower” in paragraph (5) of regulation 16, paragraph (7) applies only to widows, or whether the wider interpretation of the word in the glossary should apply.

There other similar points. The Executive needs to explain the reference in regulation 24(2) to

“regulation 55(5) of the Pension Schemes Act 1993”.

We can also ask it to explain the words “under this paragraph” in regulation 25(2), given that paragraph (2) does not confer any discretion. And so it goes on. In all, there are 11 points on which we should question the Executive. Is that agreed?

*Members indicated agreement.*

**The Convener:** There are also some minor styling points.

### **Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) Amendment (Scotland) Regulations 2006 (SSI 2006/613)**

**The Convener:** No points arise on the regulations. Do members have any comments?

**Members:** No.

**Environmental Impact Assessment  
(Scotland) Amendment Regulations 2006  
(SSI 2006/614)**

**The Convener:** A number of points arise on the regulations. I have four points, but somebody else may want to lead on them. The regulations refer to the implementation of the public participation directive—the PPD—of the European Parliament and the European Council.

**Mr Macintosh:** The regulations deal with when environmental impact assessments on domestic legislation affect other countries and when environmental impact assessments in other countries affect us. It would appear that we are not being consistent. Previously, we have made it clear how the public, both in this and other countries, can be involved in any consultation. In this case, we do not seem to be doing that, so there are a number of questions to ask.

**The Convener:** There is no extent provision.

**Mr Macintosh:** That is a slightly separate point.

**The Convener:** Yes, that point is separate from your consultation one. Also, the transposition note does not cover the implementation of articles 3.8 and 3.9 of the PPD. The other points basically relate to how article 3.5(b) is implemented in relation to roads and forestry, how article 3.8 of the PPD is implemented in relation to roads, and whether thresholds might apply to any other subject areas covered. I think that that is what Ken Macintosh was implying when he mentioned how the directive applied.

**Mr Macintosh:** Yes, it was.

**The Convener:** Yes, sorry about that. That covers most of the points, although there are also minor points. Will we ask the Executive those questions?

**Members indicated agreement.**

**Products of Animal Origin (Third Country  
Imports) (Scotland) Regulations 2007  
(SSI 2007/1)**

**The Convener:** Are members happy for us to ask the Executive, with reference to regulation 2(5), why it has omitted to cite paragraph 1A of schedule 2 to the European Communities Act 1972 as an enabling power? That paragraph was cited in the draft Conservation (Natural Habitats, &c) Amendment (Scotland) Regulations 2007, which we dealt with at our last meeting. We can also ask why the amendments to the ECA made by the Legislative and Regulatory Reform Act 2006 have not been included in footnote (a) on page 3. We can also question the Executive about the vires for regulations 5(2)(7), 5(2)(9) and 16(3), which, particularly in the case of regulation 5(2),

appear to deal with matters reserved under the Scotland Act 1998.

There is also a minor point. We will await the response with interest. Is that agreed?

**Members indicated agreement.**

**The Convener:** I now move the meeting into private session.

10:53

*Meeting continued in private until 11:29.*

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