

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 13 February 2007

Session 2

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CONTENTS

Tuesday 13 February 2007

	Col.
LEGISLATIVE CONSENT MEMORANDUM	2293
Serious Organised Crime and Police Bill	2293
EXECUTIVE RESPONSES	2294
Licensing (Scotland) Act 2005: Draft Guidance for Licensing Boards and Local Authorities (SE/2007/9)	2294
Strathclyde Passenger Transport Authority (Constitution, Membership and Transitional and Consequential Provisions) Amendment Order 2007 (SSI 2007/23)	2295
Local Electoral Administration and Registration Services (Scotland) Act 2006 (Commencement No 2 and Transitional Provisions) Order 2007 (SSI 2007/26)	2296
Sulphur Content of Liquid Fuels (Scotland) Regulations 2007 (SSI 2007/27)	2297
DRAFT INSTRUMENTS SUBJECT TO APPROVAL	2298
Business Improvement Districts (Ballot Arrangements) (Scotland) Regulations 2007 (draft)	2298
Fundable Bodies (Scotland) Order 2007 (draft)	2298
Gambling Act 2005 (Mandatory and Default Conditions) (Scotland) Regulations 2007 (draft)	2299
Housing Support Grant (Scotland) Order 2007 (draft)	2299
Police, Public Order and Criminal Justice (Scotland) Act 2006 (Modification of Agency's Powers and Incidental Provision) Order 2007 (draft)	2299
Prohibited Procedures on Protected Animals (Exemptions) (Scotland) Regulations 2007 (draft)	2299
Representation of the People (Post-Local Government Elections Supply and Inspection of Documents) (Scotland) Regulations 2007 (draft)	2300
Representation of the People (Postal Voting for Local Government Elections) (Scotland) Regulations 2007 (draft)	2300
Sexual Offences Act 2003 (Notification Requirements) (Scotland) Regulations 2007 (draft)	2301
Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment Regulations 2007 (draft)	2301
Town and Country Planning (Marine Fish Farming) (Scotland) Order 2007 (draft)	2301
INSTRUMENTS SUBJECT TO ANNULMENT	2302
Contaminants in Food (Scotland) Regulations 2007 (SSI 2007/29)	2302
Licensing Register (Scotland) Regulations 2007 (SSI 2007/33)	2302
Licence Transfer (Prescribed Persons) (Scotland) Regulations 2007 (SSI 2007/34)	2302
Licensing (Closure Orders) (Scotland) Regulations 2007 (SSI 2007/35)	2302
Non Domestic Rating (Rural Areas and Rateable Value Limits) (Scotland) Amendment Order 2007 (SSI 2007/36)	2302
Notification of Marketing of Food for Particular Nutritional Uses (Scotland) Regulations 2007 (SSI 2007/37)	2302
Sea Fishing (Prohibition on the Removal of Shark Fins) (Scotland) Order 2007 (SSI 2007/39)	2302
Sea Fishing (Restriction on Days at Sea) (Scotland) Order 2007 (SSI 2007/40)	2303
Registration of Civil Partnerships (Prescription of Forms, Publicisation and Errors) (Scotland) Amendment Regulations 2007 (SSI 2007/53)	2304
Registration of Births, Deaths and Marriages (Re-registration) (Scotland) Regulations 2007 (SSI 2007/54)	2304
Smoke Control Areas (Exempt Fireplaces) (Scotland) Order 2007 (SSI 2007/55)	2304
Smoke Control Areas (Authorised Fuels) (Scotland) Amendment Regulations 2007 (SSI 2007/56)	2304
INSTRUMENT NOT SUBJECT TO PARLIAMENTARY PROCEDURE	2305
Food Protection (Emergency Prohibitions) (Radioactivity in Sheep) Partial Revocation (Scotland) Order 2007 (SSI 2007/38)	2305
INSTRUMENTS NOT LAID BEFORE THE PARLIAMENT	2306
Tourist Boards (Scotland) Act 2006 (Commencement) Order 2007 (SSI 2007/47)	2306
Planning etc (Scotland) Act 2006 (Commencement No 1) Order 2007 (SSI 2007/49)	2306
Water Environment and Water Services (Scotland) Act 2003 (Commencement No 5) Order 2007 (SSI 2007/50)	2306
Registration Services (Miscellaneous Provisions) (Scotland) Regulations 2007 (SSI 2007/52)	2306

SUBORDINATE LEGISLATION COMMITTEE

6th 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 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 13 February 2007

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

The Convener (Dr Sylvia Jackson): I welcome members to the 6th meeting in 2007 of the Subordinate Legislation Committee. We have received a number of apologies, from Murray Tosh, Janis Hughes and Euan Robson. Members will have noticed that we have almost 30 new instruments before us. I accept that there are no substantive points on a lot of them; however, one or two had to be taken away and relaid. We know that we are coming into a busy period, but I hope that our workload will even out.

Legislative Consent Memorandum

Serious Organised Crime and Police Bill

The Convener: Agenda item 1 is the legislative consent memorandum on the Serious Organised Crime and Police Bill. The provisions in the bill that trigger the need for an LCM relate to creating the offence of breach of a serious crime prevention order in Scotland. The bill gives various delegated powers to the Secretary of State for Scotland and it gives the Scottish ministers the power to bring into force those clauses of the bill that apply solely to Scotland. Nothing of concern in the LCM has been drawn to our attention. Do members have any points to make?

Members: No.

The Convener: We are content to report that no points arise on the LCM. We can report that informally to the lead committee.

Executive Responses

Licensing (Scotland) Act 2005: Draft Guidance for Licensing Boards and Local Authorities (SE/2007/9)

10:33

The Convener: We have received a few responses to points that we raised last week. The first response is to SE/2007/9, which is draft guidance on the Licensing (Scotland) Act 2005.

Members will recall that we received correspondence on the draft guidance from the clerk to the Glasgow licensing board, in which a number of points were raised. The Executive has agreed with all the points that were raised by the committee and intends to make the appropriate amendments to paragraphs 137, 160, 171, 173, 207 and 209 of the draft guidance to rectify the legal errors that we identified. A new draft was laid before Parliament on Friday, and the committee will be able to check the changes that have been made at its meeting next week.

Is there anything else that members want to say about the Executive's response?

Mr Stewart Maxwell (West of Scotland) (SNP): This is the third draft of the guidance. After we first considered the guidance, we wrote to the Executive, saying that, perhaps because the document was long and complicated, we had spotted errors that it had not spotted. We sought assurances that the Executive was confident that future drafts would contain no further errors, particularly substantive errors. The Executive officials responded to us, saying that they were confident that there were no further errors in the second draft; yet, last week, we sent them the errors that had been identified by the clerk to the Glasgow licensing board. The Executive has accepted that those are all serious errors, and it has withdrawn the second draft of the guidance and laid a third draft.

It is good that that has been done, so that we will get a better version of the guidance eventually. Nevertheless, it is concerning that, after we had written to the Executive specifically to ask about the possibility of further errors because of those that we had spotted, and the Executive had replied that it was confident that there would be none, a whole raft of errors was discovered. I find that disturbing and wonder what checks, if any, were carried out by the Executive officials before they wrote back to us saying that the draft was correct.

The Convener: You are correct in saying that the Executive officials assured us that there were no substantial errors in the document. However, I do not see any problem, as we will look at the

guidance again next week. We can write to the Executive officials, asking that they look again at the draft guidance to ensure that there are no additional errors.

Mr Maxwell: That is fine and I am happy to do that; however, we should also ask how they could say that there were no further substantive errors. I do not know how many errors there were, but six paragraphs of the draft guidance were affected. The errors that were uncovered last week by the clerk to the Glasgow licensing board were quite serious, and some of them seemed to change the effect of the act as we understood it when we passed it. I would like a detailed response from the Executive officials on how that situation developed and how they could assure us that everything was fine, yet subsequently accept the fact that there were multiple errors in the draft guidance.

The Convener: Okay. In the light of what you have said, we will not report to the lead committee or Parliament until next week, when we will have received a response from the Executive.

Mr Maxwell: I would prefer that.

The Convener: Is that okay, Ken?

Mr Kenneth Macintosh (Eastwood) (Lab): Yes.

Strathclyde Passenger Transport Authority (Constitution, Membership and Transitional and Consequential Provisions) Amendment Order 2007 (SSI 2007/23)

The Convener: We asked the Executive why the order reduced the membership and, more important, how it envisaged that the reduction in membership of the SPTA from 34 to 20 would be achieved. The Executive has given quite a full response, which members will have read. The matter hinges on the May election, after which it will be over to the councils to allocate the respective numbers. Do members have further points to raise on the order?

Members: No.

The Convener: We will report that further information was requested and was supplied by the Executive. Is that okay?

Members *indicated agreement.*

The Convener: Who are we reporting to? The lead committee?

Ruth Cooper (Clerk): Yes, and Parliament.

Local Electoral Administration and Registration Services (Scotland) Act 2006 (Commencement No 2 and Transitional Provisions) Order 2007 (SSI 2007/26)

The Convener: We asked the Executive to explain why it was necessary to cite section 62(1)(b) of the 2006 act as an enabling power in addition to other sections and, given that citation, why the order had not been made in the form of an instrument subject to annulment. On reflection, the Executive has agreed that it was unnecessary to cite section 62(1)(b), as the order could have been made without reference to that power.

The matter is addressed in paragraphs 20 to 22 of the committee's legal brief. The question is whether we are content to draw the attention of Parliament to the order on the ground of failure to follow proper legislative practice by reason of the use of a combination of enabling powers that are subject to different procedures, although they are not sufficient to affect the legal validity of the order.

We discussed the matter last week. Do members have any further points to raise?

Mr Macintosh: No.

Mr Maxwell: I am still concerned. We have previously raised the mixing of procedures in one instrument. Although that may not give rise to any legal problem in relation to this order, there is still a dichotomy. If we did nothing, we would be breaking the rules in relation to some parts of the order; however, if we subjected the whole order to parliamentary procedure, we would be breaking the rules because some parts of the order are not subject to parliamentary procedure. Once there is a single instrument, it cannot be amended or split, so it seems odd that the Executive continues to do things in this way.

As part of a more general discussion, perhaps in our legacy paper, we should raise this issue. It seems to have come up more often recently than it has in the past.

The Convener: Yes, it has. Do you want to elaborate further on information that we should pass to the Parliament?

Mr Maxwell: We should mention what has been happening. Although this particular order might be okay, we should draw attention to our more general concern about the way in which the Executive has been operating. That concern should also be included in our legacy paper.

The Convener: We could summarise paragraphs 20 to 22 of our legal brief, in order to explain our concerns further. Would you be happy with that?

Mr Maxwell: Yes, and we should also include the point made in paragraph 25—that although the legal validity of this particular order will not be affected, our concern is a serious one.

Mr Macintosh: We might as well write to the Executive and point out that its guidance suggests that it should not do what it has done, and that it did so twice in the past couple of weeks. We should probe the issue further by saying, “This is your guidance—are you going to continue doing what you’ve been doing?”

The Convener: As I say, we can use paragraphs 20 to 25 of our legal brief as the basis of our letter.

Members indicated agreement.

Sulphur Content of Liquid Fuels (Scotland) Regulations 2007 (SSI 2007/27)

The Convener: Members will remember that we asked the Executive why regulations for England and Wales defined “new plant” and “existing plant” whereas the regulations for Scotland did not. We now find from the Executive’s response that the definitions do indeed appear in the Scottish regulations, but in a different place.

We also asked the Executive to explain the difference between the transitional provisions north and south of the border. The Executive has said that there is no difference.

Are members happy with the Executive’s responses?

Members indicated agreement.

The Convener: In our report, we will simply say that we requested further information that the Executive then supplied.

Draft Instruments Subject to Approval

Business Improvement Districts (Ballot Arrangements) (Scotland) Regulations 2007 (draft)

10:42

The Convener: No substantive points arise on the regulations, but there are a few minor points that we can raise informally.

Members indicated agreement.

Fundable Bodies (Scotland) Order 2007 (draft)

The Convener: The draft order fails to specify a commencement date. Also, we commented on the lack of information in an explanatory note relating to an earlier order—the Fundable Bodies (Scotland) Order 2005 (SSI 2005/660)—which amended the same schedule to the Further and Higher Education (Scotland) Act 2005. It would appear that the Executive has made no move to remedy the old defect in the new note, which also fails to give any indication of the content of schedule 2 and the definition of “fundable body”.

Mr Macintosh: This sort of thing concerns me. In our inquiry report, one of our recommendations for the new Scottish statutory instrument procedure is that there be some form of tracking mechanism, so that when we make recommendations to the Executive we are able to find out, at the end of the year, whether our recommendations have been followed up or not.

I find it unsettling that we can dispatch a letter to the Executive, that the Executive can reply, “We’ve noted your points and we’re going to act on them,” and that we can then find that the Executive clearly has not noted our points or acted on them. It is not a huge issue, and I simply make the point in passing, but I sometimes get the feeling that we are talking to nobody and that our letters are being filed in the waste-paper bin. That is what it feels like.

In the context of this draft order the point is minor, but there is a bigger picture. The committee now has further evidence that we need a robust system to ensure that the Executive can demonstrate to us that it has followed up on our recommendations. We have to know that we are not wasting our time.

The Convener: Absolutely.

Mr Maxwell: I presume that this is one of those cases in which the Executive said that it would sort things out at the “next available opportunity”.

The Convener: We can check that—it probably is.

Mr Maxwell: That is the phrase that it usually uses. If it did use that phrase, and if this is now the “next available opportunity”, it is, as Ken suggests, disappointing that the Executive has ignored what was a commitment on its part. However, we will wait and see the result of your check, convener.

If we do our job, and if the Executive notes our recommendations and says that it will get things sorted, I agree with Ken that it is disappointing if the Executive then ignores or forgets those recommendations.

10:45

The Convener: Ruth, can we put all those points together in a letter to the Executive?

Ruth Cooper: Yes.

The Convener: There is another minor point that we can raise in the same letter, but let us move on.

Gambling Act 2005 (Mandatory and Default Conditions) (Scotland) Regulations 2007 (draft)

Housing Support Grant (Scotland) Order 2007 (draft)

Police, Public Order and Criminal Justice (Scotland) Act 2006 (Modification of Agency's Powers and Incidental Provision) Order 2007 (draft)

The Convener: No points have been identified on the instruments.

Prohibited Procedures on Protected Animals (Exemptions) (Scotland) Regulations 2007 (draft)

The Convener: Two points arise on the regulations, one of which is quite important. If members have the regulations before them, this will be easier to explain. The concern relates to the vires for regulation 4(1). If members look at the schedules to the regulations, they will see that a procedure, a purpose and a condition is specified for everything apart from “equine animals”. In schedule 4 on page 10, members will see that, for sheep, a procedure, purpose and condition are all specified. However, in schedule 6 on page 12, members will see that a condition is not specified for equine animals in the same way.

Our legal brief raises questions over the vires for regulation 4(1), and the corresponding provision in schedule 6, which allow Scottish ministers to

impose conditions on the grant of an authorisation to hot brand equine animals, given the requirement in the enabling power to specify such conditions in the regulations.

A second point arises from the first. Is the Executive satisfied—and, if so, why—that the review procedures in regulation 5 comply with article 6 of the European convention on human rights?

It would appear that the technical issues to do with dogs are okay.

Mr Macintosh: The hot branding of horses calls to mind John Wayne films.

Mr Maxwell: Yes—cowboys and Indians.

Mr Macintosh: Which minister would it be? Would it be Nicol Stephen lassoing the animals?

The Convener: I was thinking of “The Magnificent Seven”.

Mr Macintosh: No, there was no branding in that film.

The Convener: A minor point also arises; we can raise it informally in the same letter to the Executive. Is that agreed?

Members indicated agreement.

Representation of the People (Post-Local Government Elections Supply and Inspection of Documents) (Scotland) Regulations 2007 (draft)

The Convener: These regulations will be withdrawn and relaid.

Mr Maxwell: Do we know why?

Mr Macintosh: Was it because of our advice?

The Convener: Yes. Errors were spotted. Vires problems were spotted before the regulations came to the committee.

Mr Maxwell: It is worth mentioning that.

Mr Macintosh: Yes. We should congratulate our legal advisers on picking up on the errors, but we should also congratulate the Executive on responding to our points, rather than simply putting the unchanged regulations through the parliamentary process.

The Convener: Yes, we could do that, although I will not go further.

Representation of the People (Postal Voting for Local Government Elections) (Scotland) Regulations 2007 (draft)

The Convener: Members will find information on the regulations in the supplementary legal brief. No substantive points arise. A minor point does

arise, but we can deal with it informally. Is that agreed?

Members *indicated agreement.*

Sexual Offences Act 2003 (Notification Requirements) (Scotland) Regulations 2007 (draft)

The Convener: Again, information on the regulations is in the supplementary legal brief. The regulations were withdrawn by the Executive on Friday to allow for the correction of serious drafting deficiencies. The regulations have been relaid, and no points now arise. The deficiencies have been addressed.

Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment Regulations 2007 (draft)

The Convener: No substantive points arise on the regulations, but there are a number of minor points that we will raise informally.

Mr Maxwell: I think that we have jumped an instrument, convener.

The Convener: Have we? No, there are two town and country planning instruments.

Mr Maxwell: I am sorry, I was still looking at the supplementary legal brief.

Town and Country Planning (Marine Fish Farming) (Scotland) Order 2007 (draft)

The Convener: The order has been withdrawn and relaid. We will consider the relaid order next week.

I see that members are keeping up. That is good.

Instruments Subject to Annulment

Contaminants in Food (Scotland) Regulations 2007 (SSI 2007/29)

10:50

The Convener: No substantive points arise on the regulations but there is a minor point that we will raise informally.

Licensing Register (Scotland) Regulations 2007 (SSI 2007/33)

The Convener: No points arise on the regulations.

Licence Transfer (Prescribed Persons) (Scotland) Regulations 2007 (SSI 2007/34)

The Convener: No substantive points arise on the regulations, but there is a minor drafting point that we will raise informally.

Licensing (Closure Orders) (Scotland) Regulations 2007 (SSI 2007/35)

Non Domestic Rating (Rural Areas and Rateable Value Limits) (Scotland) Amendment Order 2007 (SSI 2007/36)

The Convener: No points arise on the instruments.

Notification of Marketing of Food for Particular Nutritional Uses (Scotland) Regulations 2007 (SSI 2007/37)

Sea Fishing (Prohibition on the Removal of Shark Fins) (Scotland) Order 2007 (SSI 2007/39)

The Convener: No substantive points arise on the instruments, but there are some minor drafting points that we will raise informally.

Mr Macintosh: Did you skip an instrument, convener?

The Convener: Did I?

Mr Maxwell: We both think so.

Mr Macintosh: You skipped either the Non Domestic Rating (Rural Areas and Rateable Value Limits) (Scotland) Amendment Order 2007 or the Licensing (Closure Orders) (Scotland) Regulations 2007.

The Convener: No, I read out the Non Domestic Rating (Rural Areas and Rateable Value Limits)

(Scotland) Amendment Order 2007. No points arise on it.

Mr Maxwell: Did you do the Licensing (Closure Orders) (Scotland) Regulations 2007? Perhaps you did the wrong one. I thought that you skipped one as well. I was one behind when you got to the Notification of Marketing of Food for Particular Nutritional Uses (Scotland) Regulations 2007.

Mr Macintosh: So was I.

The Convener: Which one did you say I skipped?

Mr Macintosh: Do not worry, convener, we are obviously not keeping up.

The Convener: I will go slower.

Mr Macintosh: I did not hear you say anything about the Licensing (Closure Orders) (Scotland) Regulations 2007 or the Notification of Marketing of Food for Particular Nutritional Uses (Scotland) Regulations 2007.

The Convener: Ruth Cooper ticked them off, so I must have said them. I will go more slowly.

Sea Fishing (Restriction on Days at Sea) (Scotland) Order 2007 (SSI 2007/40)

The Convener: We have just finished the order on shark fins and we now move on to the days-at-sea order. The order breaches the 21-day rule, but that appears to be acceptable in the circumstances. There is a letter about that, but it was not sent round. However, there is a note about the matter in paragraph 116 of the legal brief. Basically, the reason for the breach is that the order could not be worked on until the relevant European legislation was published.

Mr Macintosh: The Executive explained why the 21-day rule was breached and the explanation seems satisfactory.

The Convener: There are also two minor points that we will raise informally.

Registration of Civil Partnerships (Prescription of Forms, Publicisation and Errors) (Scotland) Amendment Regulations 2007 (SSI 2007/53)

Registration of Births, Deaths and Marriages (Re-registration) (Scotland) Regulations 2007 (SSI 2007/54)

Smoke Control Areas (Exempt Fireplaces) (Scotland) Order 2007 (SSI 2007/55)

Smoke Control Areas (Authorised Fuels) (Scotland) Amendment Regulations 2007 (SSI 2007/56)

The Convener: No points arise on the instruments.

Instrument Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Radioactivity in Sheep) Partial Revocation (Scotland) Order 2007 (SSI 2007/38)

10:53

The Convener: No points arise on the order.

Mr Maxwell: It is frightening that, all these years after the Chernobyl disaster, we still have such orders in place.

The Convener: I remember electioneering in the rain.

Mr Maxwell: So do I. It was pouring wet that weekend and it was before we were told about the contamination.

Instruments Not Laid Before the Parliament

Tourist Boards (Scotland) Act 2006 (Commencement) Order 2007 (SSI 2007/47)

Planning etc (Scotland) Act 2006 (Commencement No 1) Order 2007 (SSI 2007/49)

Water Environment and Water Services (Scotland) Act 2003 (Commencement No 5) Order 2007 (SSI 2007/50)

10:54

The Convener: No points arise on the orders.

Registration Services (Miscellaneous Provisions) (Scotland) Regulations 2007 (SSI 2007/52)

The Convener: No substantive points arise on the regulations. However, there are two minor points that we will raise informally.

We will now move into private for the last part of our inquiry into the regulatory framework.

10:54

Meeting continued in private until 11:25.

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