

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 20 February 2007

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

7th 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

THE FOLLOWING GAVE EVIDENCE:

David Ford (Scottish Executive Environment and Rural Affairs Department)

Allan Gibb (Scottish Executive Environment and Rural Affairs Department)

Alastair Smith (Scottish Executive Legal and Parliamentary Services)

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 20 February 2007

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

Delegated Powers Scrutiny

Aquaculture and Fisheries (Scotland) Bill: as amended at Stage 2

The Convener (Dr Sylvia Jackson): I welcome members to the seventh meeting in 2007 of the Subordinate Legislation Committee. I have received apologies from Murray Tosh and Euan Robson.

Agenda item 1 is delegated powers scrutiny. We have three Executive officials with us today: David Ford, the bill team leader; Allan Gibb, the head of sea fisheries compliance policy; and Alastair Smith, from the office of the solicitor to the Scottish Executive. I welcome you all.

First, are members content with the deletion at stage 2 of section 16, "Further powers by regulations under section 31(1) of the 2003 Act"?

Members indicated agreement.

The Convener: Section 19 inserts new section 5F into the Diseases of Fish Act 1937. Legal advisers have no concerns about the narrowing of the scope of the power concerned, and the Executive has responded to a technical point raised in relation to the section. Do members agree that the section appears to be okay?

Members indicated agreement.

The Convener: Sections 25A to 25G, on fixed-penalty notices, contain new powers that were added at stage 2 and which are subject to the negative procedure. Are members content that the Executive has made its case for the general framework approach in those sections?

Members indicated agreement.

The Convener: Section 25A, "Issue of fixed penalty notices", contains the power to specify by order offences for which fixed-penalty notices may be issued. The section enables a British sea-fishery officer to issue a fixed-penalty notice when that officer has reasonable grounds for suspecting that a person has committed a "relevant offence". The power to make an order will be subject to the negative procedure.

Do members have any questions for the Executive officials?

Mr Stewart Maxwell (West of Scotland) (SNP):

I want some clarification on why this approach has been taken in section 25A, while in other parts of the bill, such as section 4, terms have been listed and defined, which means that any future changes will require amendment. You have not included a list of offences in section 25A—will you explain why not?

David Ford (Scottish Executive Environment and Rural Affairs Department): The key issue is that sea-fisheries offences change a lot. The annual December fisheries council often comes up with new regulations that have to be implemented through legislation. If we were to list all the relevant offences in the bill, it would be almost impossible to keep up with annual changes to the body of legislation that comes from Europe, particularly at the December council.

Mr Maxwell: You said that that would be "almost impossible", but the committee sees statutory instruments all the time that change things annually. Why would it be almost impossible to do so in this case?

David Ford: Have I misunderstood? That is the point. The list will be in secondary legislation because that is the best vehicle for making annual changes.

Mr Maxwell: We can make changes to primary legislation through statutory instruments. The original determination of a list is in primary legislation, and changes to that are then made.

David Ford: The Executive's view is that the secondary legislation approach is the most appropriate, not only for flexibility in deciding what constitutes a relevant offence and keeping up with changes to legislation but because defining "relevant offence" will be relatively technical.

The Convener: Will you explain the nature of the offences that you think will be covered?

David Ford: At stage 1, we provided an initial list of the suggested offences, on which we consulted. They are relatively minor offences, and it would be a bit exhausting to go through them orally.

The Convener: Could you perhaps tell us what type of minor offences would be included?

Allan Gibb (Scottish Executive Environment and Rural Affairs Department): Certainly. The minor offences that we envisage are, for example, the landing of undersized fish and shellfish, minor breaches of by-catch regulations and lesser licence condition offences, as opposed to more serious offences that involve large quantities of species and large amounts of money.

The Convener: How can we be reassured that the term "relevant offence" would not cover anything more major?

David Ford: Before I answer that question, I would like to set out a preamble to clarify the policy. The key tenets are that any alleged offender should have not only time to seek legal advice and the information that they need to seek the appropriate legal advice but, of course, full recourse to the courts. In other words, this is an extra option available to fishermen over and above the current situation. We would not add more major offences, but there would be nothing sinister if we did. The option of going to the courts will always exist.

The Convener: Okay. Do members have any other questions?

Mr Maxwell: I have a point of clarification. Would the order introduce or take away offences as a category of offence, or would it amend offences? Undersized fish were mentioned—what would happen if the particular size of the fish was adjusted but the offence of landing undersized fish remained the same?

David Ford: The order would not amend offences—it would either add offences to or remove them from the list. It would do nothing to change the offences, because the offences are set out elsewhere in legislation. The order would purely list them.

The Convener: Will you also say a little about why the order should be subject to the negative rather than the affirmative procedure?

David Ford: I refer back to the earlier point that deciding what is considered minor is a fairly technical exercise following straightforward criteria. We consulted on the list of offences that we shared with the committee, and the feedback that we received was entirely uncontroversial. We believe that that adds to the argument that the negative procedure is appropriate for the order.

The Convener: Do members want to raise any other points?

Mr Kenneth Macintosh (Eastwood) (Lab): It strikes me as an appropriate balance, given that we know that offences will change every year.

Mr Maxwell: I am less convinced than Ken Macintosh. We always have to be careful when it comes to offences. I would not want to create an unnecessary administrative burden but, with the ability to create new offences, it is preferable to err on the side of caution and to be upfront rather than to make changes through a negative instrument. I am not entirely comfortable with the section, and I am not sure that the correct balance has been struck. I would not push the point if the committee was otherwise minded, but I have some reservations.

The Convener: It was important that we got on record the range and type of offences, the

reassurance that they are minor, the need for flexibility and the reasoning for the use of the negative procedure.

Mr Maxwell: That is helpful, but as a matter of principle we have always been careful about offences.

David Ford: May I clarify one point? Mr Maxwell said that there was a risk of creating offences. The system will not create any offences.

Mr Maxwell: I asked whether you would be adding offences or just making technical changes, for example to what constitutes an undersized fish, and you said that you would be adding offences.

David Ford: We would be adding offences to the list of what was defined as a “relevant offence”, but those offences would be provided for elsewhere in statute through the normal process.

Mr Maxwell: Sorry—I am confused.

The Convener: Perhaps the Executive’s legal adviser could elaborate.

Alastair Smith (Scottish Executive Legal and Parliamentary Services): I will try to put David Ford’s point in a different way. The specification of relevant offences will define which existing sea-fisheries offences will be open for disposal under the administrative penalties scheme—that is, the offences from which alleged offenders will be able to escape prosecution by accepting the offer of a fixed penalty. The power that we are discussing is a power to determine which offences fall within the scope of the scheme—the offences in relation to which alleged offenders will have the additional option. It is not a power to create or modify existing offences.

Mr Maxwell: That is helpful.

The Convener: Thank you.

Section 25B sets out the particulars that must be included in a fixed-penalty notice. The delegated powers memorandum explains that different forms might be required for different cases and that it would make the bill congested if they were all detailed in the bill.

Do members have any questions?

Mr Maxwell: I thought that you were going to ask some questions on that, convener.

The Convener: The central question is whether the power in section 25B(3) is intended to cover the matters that a notice must state, and if so, what level of specification of particulars will be required.

David Ford: Section 25B(3) just contains a power on how to bring in the notice—it is about the how rather than about the content of notices. As you know, the required content is set out in section 25B(1), which states:

"A notice must ... give such particulars of the circumstances alleged to constitute the offence to which it relates as are necessary for giving reasonable information about the alleged offence".

That is not affected by section 25B(3), which is just about the form of an order. Nothing in an order could lessen what is stated in the primary legislation.

The Convener: Section 25B(1) states:

"A notice must ... give such particulars".

What would an order made under section 25B(3) state about those particulars?

David Ford: I am not quite sure what you are asking. The key tenet of the policy is that the alleged offender will be given enough information for them to be able to seek legal advice. We should remember that the default position is for the person to go to court, in which case we would need a sufficient evidential base to prosecute the case. Similarly, we would not pursue an administrative penalty if we were not clear about the details of the alleged offence. An administrative penalty is not a vaguer option. The same evidential base will be required as for a court case. The fixed-penalty notice will include all the circumstances of the case, just as a court case would consider all the circumstances.

The Convener: Sorry—I do not know whether it is my hearing, but I am not picking up the sound of your voice very well. That is not your fault—it is just the equipment. However, I gather that you are reassuring us that the particulars that would be specified in an order are very much what we would expect. Is that what you said?

David Ford: That is right. We are not seeking to introduce any short cuts. The same evidential base will be required as for a court case.

10:45

The Convener: Sorry. I was a bit slow in picking up that point.

Section 25B(5) contains a power by order to shorten the "period for paying" a fixed-penalty notice, which is 28 days. The general provision on the period for paying is subject to a delegated power that enables ministers by order to specify a period shorter than 28 days in relation to different cases or different categories of case.

The period of seven days is mentioned in the supplementary delegated powers memorandum. Does the Executive intend to exercise the power to prescribe a period shorter than seven days?

David Ford: We suggested seven days because that is the most likely shorter period that we would think appropriate.

I will explain why we included the power in the bill. As the delegated powers memorandum states, the main reason for using the power is

"where the alleged offenders are domiciled outside the UK."

It is current practice and Scottish Fisheries Protection Agency policy that, if a foreign vessel is thought to be involved in an offence, the boat is detained. At present there is a fast-tracking system so that cases get to the courts quickly. If we stated a period of 28 days for administrative penalties, the boat could be tied up for 28 days, which seems unreasonable.

We are trying to strike the right balance. We want to give the alleged offender time to seek legal advice and to arrange payment if that is what they choose to do, but we do not want to make the time period too long so that the boat is held in port for a long time. We believe that seven days is a compromise that strikes the right balance, although experience in the field might show that five days or 10 days would be better.

The most important point is that we are not looking to use the power to try to bounce people in for 24 hours. Again, the fundamental tenet of the provisions is that people get enough time to seek legal advice. As you said, the power is exercisable by order. A minister might want to introduce an unreasonably short period, such as 24 hours, but the order would have to be considered by the Parliament, which could challenge it on the basis that the period was too short.

A period of seven days is our best guess, but there are enough checks and balances to make sure that the power is not used unreasonably.

The Convener: I suppose that that is why the bill does not specify a minimum period. You want that flexibility.

David Ford: Yes.

The Convener: Section 25C is on the amount and payment of fixed penalties. Section 25C(1) confers on Scottish ministers a power by order to prescribe a scale of fixed penalties. Why did the Executive not opt to restrict the power by stating a maximum penalty?

David Ford: Again, I return to one of the fundamentals of the policy. We are not imposing a new penalty but providing an option for skippers. They will always have the option to go to court. The idea is to set penalties that are a little lower than what the courts might impose. That will free up the court system and give people an incentive to discharge their responsibility.

The £2,000 figure that is mentioned in the supplementary delegated powers memorandum came from an analysis of the penalties that the courts have imposed historically, which suggested

that £2,000 would be about right. In five or 10 years' time, courts might take sea-fisheries offences far more seriously and the figure might rise to £5,000 or £10,000. If the administrative penalty was significantly out of kilter with the courts, that might provide a perverse incentive. We are trying to create a system that is, in effect, self-regulating. The administrative penalties will track the penalties that are imposed in the courts. That is why we do not want to set a maximum. We do not know what penalties the courts will impose in future.

The Convener: Are there any further questions on that?

Mr Maxwell: Yes, I have a question on the same issue. I understood what was said, but I would have thought that the normal procedure would be to stipulate the figure and then amend it to reflect the changes in the value of money, which is the phrase that is often used, or to reflect other changes. The maximum would normally be stipulated and subsequently changed, rather than not being stipulated at the start.

David Ford: That is an option, but it is not one that the Executive has chosen to pursue.

Mr Maxwell: Why?

David Ford: Because we think that the most important thing is to track what the courts are doing and to keep the penalties in kilter with the court system.

Alastair Smith: Our approach here is somewhat different from the normal run of figures that we might fix, in that we are considering an option that is available to alleged offenders, rather than a level of punishment. It is in that sense that David Ford argued that the levels are, to an extent, self-regulating. It is in the interests of the Scottish ministers to set the fixed-penalty offer at a level that is appropriate and acceptable. If the level were set too high, nobody would accept the offers and the system would fall into disuse. It is an option that is available to alleged offenders; it is not anything compulsory. That more flexible approach is favoured by the Executive, rather than ministers being required to make amendments by subordinate legislation in each case.

Mr Maxwell: Can you think of any examples of an option to choose a fixed-penalty notice when no maximum has been specified?

Alastair Smith: I cannot give you an accurate answer off the top of my head, I am afraid—we would have to write to you.

Mr Maxwell: Can you give me examples of a maximum that has been fixed?

Alastair Smith: There are a number of fixed-penalty regimes in existence, such as fixed penalties for traffic offences.

Mr Maxwell: I would have thought that such regimes were the norm. That is why I asked the question. It does not strike me as normal not to fix a maximum—in fact, I would have said exactly the opposite. I am curious about why you have chosen this particular approach for the bill. I find it slightly curious.

The Convener: If a clear maximum is not specified, is it not normal to use the affirmative procedure, rather than the negative procedure?

David Ford: That comes back to the fundamental point that we are not setting a mandatory fine. The penalty is an option. It is always open for someone to say that they do not want to pay it. They can say within the first minute of receiving it that they would rather go to court. Because of the fact that the payment is optional, we believe that it would be excessive to use the affirmative procedure. The matter technically lands within the court system, and we think that the negative procedure is sufficient and appropriate.

The Convener: It could be argued from the point of view of good subordinate legislation that, following the normal way of drafting, if there is not a clear maximum, the affirmative procedure is used. Would Alastair Smith like to comment on that? Is that not the procedure that you would normally use if there was not a clear maximum?

Alastair Smith: I am perhaps being slightly obtuse, for which forgive me, but I am not sure what it is that would be specified by means of an affirmative instrument in this case. Could you assist me on what particular aspect you think it would be better to specify?

The Convener: It is the amount, obviously. Section 25C(2) states:

"The 'appropriate fixed penalty' means such fixed penalty on the scale prescribed under subsection (1) as the British sea-fishery officer thinks fit having regard to the circumstances of the case and any relevant provision".

Alastair Smith: My apologies. That was clear enough—I was being obtuse. Without notice, I cannot really say what the normal rule would be, or whether there is in fact a consistent pattern. As has been said already, payment of a penalty will not be compulsory for anybody, and the provision here does not run parallel to provisions in which the maximum limit for a fine to be levied on conviction is set, for instance. If somebody is not happy with the level of a fixed penalty, they will have no obligation to pay it, and they may—as at present—take the matter to a prosecution in the sheriff court.

Mr Maxwell: That is exactly the point. In other examples of fixed penalties, people may refuse to pay, choosing to have their day in court. If they disagree with the issuing officer's decision to issue a fixed penalty, they can go to court. Why are the arrangements different in this case?

David Ford: They are not different. People will be able to go to court.

Mr Maxwell: But you have not set a maximum. I asked you to give me an example of where there are similar arrangements elsewhere. I accept that it might take some research but, off the top of my head, I cannot think of any, and nor can you.

David Ford: Perhaps I am being very dim, and I apologise—I am no lawyer—but section 25C(1) says:

“The Scottish Ministers may by order prescribe a scale of fixed penalties”.

That scale will have figures on it. The “British sea-fishery officer” mentioned in subsection (2) may issue a fixed penalty such as he “thinks fit”, but not outwith that scale. He cannot suddenly decide to issue a penalty of £50,000, for instance—the level must be as specified in the order. I am not aware of any general rule that says that Scottish statutory instruments to do with money must be subject to the affirmative procedure. I think that the Executive is unlikely to be enthusiastic about such an approach. I do not think that it is appropriate to say that we must use the affirmative procedure in this instance because that is the norm, as I am not sure that that has been established.

The Convener: I have another question, which might elaborate on or clear up the matter a little bit. Section 25A(2)(a) uses the phrase,

“under the Sea Fisheries enactments”.

I gather that penalties will be listed under those enactments. Are you saying that you will draw from those penalties with respect to the bill?

David Ford: No. As we have said, ministers would set a scale of penalties that would relate to what the courts are doing. However, the scale would not say, “This offence has a maximum penalty of £5,000”—or £50,000, or whatever. It would draw on a recent analysis of cases in which it would have been noted, for instance, that courts had been awarding penalties in the region of £1,000 to £2,000 for a certain offence. That would result in a scale of penalties of between £1,000 and £2,000.

The Convener: You said that the scale would “relate to what the courts are doing” in respect of offences at a particular time. Could you help us a little bit with that? Is that a normal procedure?

David Ford: I am sorry—is what a normal procedure?

The Convener: I am sorry. Forgive me. We are fairly new to this compared with you. Obviously, you have all the knowledge and expertise in this area. You said that, in fixing the penalty, you would consider the penalties imposed by the courts for similar offences. I asked whether that is

a normal procedure when fixing penalties. Can you tell us a bit more about that? That is the important point when it comes to how the penalties are to be set.

David Ford: I cannot speak for other regimes. I have to confess that I am surprisingly blinkered in my approach, and I really know only about sea-fisheries offences. We think that this approach would work. I go back to the point that Alastair Smith discussed earlier. If the administrative penalties were set too high, or higher than experience in the courts indicated was appropriate, there would be no incentive to use the system, and the provision would not achieve its aim of freeing up the court system and making life easier for alleged offenders. The point is that we would revise the system and keep the levels of administrative penalties updated on an on-going basis, so that they would stay within sensible boundaries, according to the policy.

The key point is that we are not setting a fine—these are not penalties for an offence. As we have said before, a fixed-penalty offer is effectively an option for anybody who is charged with an offence to discharge their responsibility at a cost, and the scale will define what that cost might be. We hope that it will be a reasonable cost; if it is not, there will be no incentive whatever to choose it and people will go to the courts. People will always have the option of going to the courts, but this is another option.

11:00

The Convener: All that I am trying to get at is how you are going to set the amount by looking at what is happening in the courts system at the time. It is that mechanism that I am looking for.

Allan Gibb: I will try to clarify the matter, as I did the analysis on the penalty levels. Section 25C(1) states:

“The Scottish Ministers may by order prescribe a scale of fixed penalties”.

That is the scale to which David Ford has referred. The scale ranges from referring to a procurator fiscal for a fiscal fine at a low level to a fine of between £500 and £2,000. No matter what the individual's point of view, we cannot offer an administrative penalty above that—that is the prescribed range.

The fisheries offences have been categorised according to what they contravene—for example, technical conservation gear measures, control issues, or measures to do with access, licensing and so on. We have conducted a historical analysis over a number of years on court activity for all the different types of fines in order to assess, when an individual has been found guilty in a court of law, what level of fine the sheriff has

levied. We have used that information to correlate each part of the scale to each category of offence. That is how we came up with the scale.

We would like to retain some flexibility within the scheme. A fixed administrative penalty system is not new, but it is a new initiative in relation to fisheries, which is a flexible and dynamic area. Something may arise quickly—for example, it may be decided at a December fisheries council that a species is to become a recovery stock because it is under increasing pressure or under threat of almost extinction. Courts may change their views on the seriousness of an offence on the basis of what the European Commission and member states have decided or what the science has said over a period of time, and we need to be able to reflect in the scale of penalties the change in the courts' views at that time. We would look to the levels of fine that were being levied by the courts before amending the scale.

Alastair Smith: It is important to remember that, although there will be an element of discretion for the British sea-fisheries officer, their decision will be very much constrained by the scale that is set out in the order. The assessment of the levels of fine that are imposed by the courts for specific fisheries offences will be carried out periodically when amendments to the scale that is set out in the order are being considered, and the scale will be subject to parliamentary scrutiny. The exercise that was gone through prior to the production of these proposals for the bill showed that there was a wide consensus on the issue and that the proposals were not particularly controversial. It is on those bases that the decision was taken that the negative procedure provided a sufficient level of scrutiny.

The Convener: Okay. We need to decide whether the order that introduces the scale should be made an affirmative instrument or left as a negative instrument.

Mr Maxwell: I do not think that that is the only thing that we need to decide. I have one further question. Mr Gibb talked about the need for flexibility if a December fisheries council changed the status of a species because it had become more at risk. I accept that that is what happens, and it seems perfectly reasonable to want to react speedily. However, if the fine has to be determined on the basis of what the courts are doing, how do the two things fit together? If a December fisheries council changes the rules on a species, how can there be flexibility if the Executive has to wait for the courts to determine the new level of penalty that is appropriate?

Allan Gibb: I understand the point—we might have to wait six to nine months before one of the new cases came to court. We would track the cases closely and the sheriffs and procurators

fiscal would be advised that there had been a change in the status of the stock. However, it should not be assumed that there would be lots of offences. Ideally, there would not be and everyone would be fishing responsibly and sensibly. If there were not lots of cases going to court, that would mean that people were abiding by the rules.

Alastair Smith: The principal aim in setting the fixed-penalty offers is to set amounts that are acceptable and that establish the appropriate balance between imposing a reasonable penalty for the offence and providing the alleged offender with a sufficiently attractive alternative to proceeding with prosecution. The principal basis on which the scale will be set will be the fines that the courts hand down, although that will not be the only factor to be taken into account.

When it is clear that circumstances have changed, there might be cases in which the scale of fixed penalties will wait for clear judgments that an offence is to be treated more seriously. Nevertheless, the guiding principle is always that awards will be set that are acceptable and that will make the system work. It is not in the interests of Scottish ministers to set the levels of fixed-penalty offers unrealistically high, as that would defeat the entire purpose of the scheme. That is worth bearing in mind as a general point.

Mr Maxwell: I accept your last point, but you seem to have introduced a new element. Up to now, you have said that the figures will be based on the fines that the courts are handing down—the penalty offers will be slightly lower so that they are attractive. You now seem to be saying that, although that could be the case, there is another way of doing it and that ministers may change the scales on the basis of something else, without waiting for the outcome of court cases. Can you clarify exactly how that will work?

Allan Gibb: We are not introducing anything new in that context. It is already our policy that recovery stocks or stocks under any monitoring and implementation plan will be treated slightly differently within the scale and will move up one level on the scale purely because they have been identified by the Commission as stocks under recovery.

Alastair Smith: I see what Mr Maxwell is saying about the picture becoming slightly less straightforward. Allan Gibb referred to the December fisheries council. It is important to remember that, in taking decisions on the status of stocks, the December fisheries council not only has an effect on the seriousness of offences but routinely introduces entirely new offences. The prescribed scale system that is proposed would set out a list of the offences that attracted each level of penalty, which would have to be modified as the relevant offences were modified. Therefore,

there could be a need to amend the instrument that set out the levels of the fixed penalties if new offences were created. In such cases, it would not be possible to be guided directly by what the courts had imposed, because the offences would be newly created. The level of fine that the courts have imposed will not be the only factor that ministers take into account. Naturally, ministers must extrapolate, interpret and read between the lines to make a good estimate of an appropriate level of fine. It will be appropriate to adjust that in the light of experience of whether that level of fine is acceptable and effective.

The Convener: I will ask Allan Gibb another question. You said that having a scale of fixed penalties was a new approach in your department.

Allan Gibb: The approach is new to fisheries legislation.

The Convener: In other areas in which such an approach works, what is the norm for orders? Are they subject to the negative or the affirmative procedure? Perhaps Alastair Smith has more information on that.

Alastair Smith: I do not have that information ready to hand. I do not know the procedure that applies to fixing levels and I would have to write to the committee about that.

The Convener: If fisheries legislation is taking a new approach, it is pretty important to find out what happens in other fields.

Do members have more questions to ask before we make a decision? I think that we have all the information now. We do not have much time to play around with, because amendments must be lodged by Friday. How quickly can Alastair Smith answer the last question?

Alastair Smith: It should be possible to provide an answer by close of play tomorrow, if that is acceptable.

The Convener: Okay. What are members' views?

Mr Maxwell: I do not oppose in principle the suggested way in which the system might operate, but that is different from how maximum fines have been set before and from the norm. It was right that we explored that.

There are two options. If we went down the route that is being suggested, the maximum could change and nothing would prevent it from changing markedly, so the affirmative procedure would be more relevant, as that would give us a chance to consider any proposal. The other option is to set a maximum in the bill and then change the level by instrument if there are changes in circumstances. The reasons for changing it would be set down. If that option were chosen, the negative procedure might be more reasonable.

Mr Macintosh: The question is half for us and half for the lead committee. The use of the regime for fisheries is new and the regime comes with some flexibility that may raise questions for us. The key is that a maximum needs to be set in legislation not for a range of fines but for a range of fixed-penalty notices. The maximum fixed penalty will be set by order, so the extra protection of setting a maximum in the bill does not seem to be required. The fixed-penalty notices will be alternatives to criminal proceedings. They will be another way of dealing with criminal offences that are specified in legislation.

Normally, a maximum would be set to prevent some new heinous Executive that does not exist at the moment from arbitrarily setting a maximum that was out of keeping with the original idea, but that cannot be the case with the subordinate legislation, so I do not see the problem with the provision. Yes, quite a lot of flexibility will be provided. In fact, there are issues with the flexibility that is being devolved to the sea-fisheries officer, which is more a matter for the lead committee than it is for us. What criteria will the officer use in setting the penalty? It is veering towards summary justice. If, as has been clearly stated several times, we are trying to use a system of fixed penalties to free up court time, the fixed penalties will undoubtedly be set lower than a fine that the court would impose. If they are not, and the person who receives one does not have to take the option of the fixed penalty, I do not have a problem with it. It is a policy issue as much as anything else. In terms of the subordinate legislation, we do not need a maximum penalty in the bill.

11:15

Whether such an order is negative or affirmative is more to do with the fact that the maximum will be changed regularly. If we can predict that every year the fisheries councils will come up with a couple of variations on the offences, the negative procedure is fine. The affirmative procedure is a cumbersome procedure that would be more appropriate if we were to introduce a new series of offences, rather than variations on a series of existing offences and ways of paying for them. I do not have a problem with it, but the main issue is a policy one, which is up to the lead committee.

The Convener: As this is a new way of proceeding in this area, and we have no background information about how it operates in other areas, is there perhaps a case for saying that the first order at least should be affirmative?

Mr Macintosh: I do not feel particularly strongly about it. You have called for the officials to find another example in which this sort of regime is used. If we have that, that is fine. It sounds as if

there may not be one, in which case we would be introducing one. I do not feel particularly strongly either way. I am not sure what protection would be afforded by introducing the affirmative procedure for the first order, but if the committee felt strongly that that should be the case, it would not be the end of the world.

Mr Adam Ingram (South of Scotland) (SNP): I tend to agree with Ken Macintosh. I would like some information on the kind of regime that is being introduced here and whether it applies elsewhere. Ken is right to point out that it is a policy question as much as it is a question for this committee. You say that time is short on this one.

The Convener: Our responsibility is to ensure that we have got the procedure right, and whether the use of the negative procedure is correct.

Mr Ingram: If we can be reassured that there are precedents for this type of system and procedure, I would be happy to go with the negative procedure.

The Convener: Would you agree with that, Janis?

Janis Hughes (Glasgow Rutherglen) (Lab): Yes.

The Convener: Shall we leave it until we receive information on whether there are precedents in other areas?

Mr Maxwell: We do not have another meeting.

Mr Macintosh: If we felt strongly about it, the convener could move an amendment at stage 3.

Mr Maxwell: We would have to decide that now.

The Convener: Leave that with me to decide, based on what we get back.

Mr Macintosh: When is stage 3?

Mr Maxwell: Next week.

The Convener: The amendments must be done by Friday.

Mr Macintosh: We have done manuscript amendments before.

Ruth Cooper (Clerk): The other option is for the response that we receive tomorrow to come before the committee next week, although the only option left open at that point would be the manuscript amendment.

Mr Maxwell: That is the only choice.

The Convener: Shall we see what the feedback is and consider the issue again next week?

Members indicated agreement.

The Convener: Section 25C(3) is the prescription of address and methods of payment. I

have no points on this. Do members have any points?

Members: No.

The Convener: Section 25E is on the intimation of non-payment. I have no points of concern. Do members have anything?

Members: No.

The Convener: Section 27 inserts new section 2C into the Diseases of Fish Act 1937. That section has been amended to require ministers to

"consult such persons as they consider appropriate"

before they make an order that identifies certain marine waters as a "specified area", to prevent infection. Do members have comments on section 27?

Members: No.

The Convener: Section 29 confers on ministers the power to make payments in respect of fish destroyed. I have no comments on the power; do members have comments?

Members: No.

The Convener: Section 35(1) confers on ministers the power to make incidental and other provisions. On 6 February, we discussed a similar issue during our scrutiny of the Transport and Works (Scotland) Bill, as amended at stage 2. The Executive's position is that where it does not intend to confer on ministers a power to amend the act itself, it does not want to insert wording to that effect, because that might create ambiguity. Do members have questions for officials?

Mr Maxwell: I have no further questions. My opinion has not changed since our discussion and I think that all members have made their position clear. I do not agree with the suggestion in the annex to our papers that the approach that we considered would cause confusion elsewhere.

The Convener: There would be nothing wrong with our drawing the issue to the attention of the lead committee.

Mr Maxwell: That would be fine.

The Convener: Are members content to do that?

Members indicated agreement.

The Convener: We move on to the schedule. Paragraph 1(d)(i) makes a consequential amendment to section 9 of the 1937 act, which addresses a problem that we identified at stage 1. Are members happy with that paragraph?

Members indicated agreement.

The Convener: Ruth Cooper wants to comment on a matter that relates to our earlier discussion.

Ruth Cooper: For clarification, my colleagues have pointed out that the committee can lodge an amendment and then withdraw it, rather than be pushed into lodging a manuscript amendment—I should have thought of that. What members decide to do depends on how strongly they feel about the matter. You could lodge an amendment, which you could withdraw next week on the back of the response that you receive.

Mr Maxwell: To be honest, it will be difficult for us to decide our approach until we have received a response from the officials. That is the problem.

The Convener: I thank David Ford, Allan Gibb and Alastair Smith for the clarification that they have provided, particularly on section 25C. We are much more aware of how orders would be made under that section and of court processes in relation to the scale of fixed penalties—although it took us a long time to get there. It would be helpful if Alastair Smith could provide the information that we asked for as soon as possible.

Executive Responses

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

11:23

The Convener: On the draft guidance for licensing boards and local authorities, the committee raised an issue to do with clubs, which is well documented. We have received e-mails from Janet Hood and Stewart Ferguson and a response from the Executive. On the issue that Stewart Maxwell raised, about whether the Executive is sure that it has covered all the points that we raised, the Executive says that it is content that there are no substantial errors in the draft guidance and points out that the draft guidance was considered independently by three members of the licensing team.

Mr Maxwell: The fact that a number of people, including three members of the licensing team, checked the guidance independently but did not spot the errors gives me more cause for concern. The difference of opinion as to what is an error and what is a serious error is interesting. The Executive says that there were no serious errors, but some of the points that the clerk to the City of Glasgow licensing board raised were serious errors. He was right to point them out and I do not agree with the Executive that they were not serious errors. The one that springs to mind is the point that the draft guidance's interpretation of the relationship between a disturbance and licensed premises is different from the one that I remember being in the 2005 act. That was a crucial change and I think that it was a serious error, but I suppose that it is a matter of opinion.

The Convener: To be fair, we are where we are at the moment, I suppose.

We also raised an issue to do with clubs, which, we are told, has been addressed by the Licensing (Clubs) (Scotland) Regulations 2007, (SSI 2007/76). Those regulations are on the agenda later and it does not look as if there are any issues with them. It looks as though they have covered the issue.

Do we want to draw the guidance to the attention of the lead committee? That will have to be done clerk to clerk, because the Local Government and Transport Committee meets this afternoon. We will pass on the questions that we raised, the Executive response and the further correspondence and will point out that one issue has been addressed by the Licensing (Clubs) (Scotland) Regulations 2007.

Members indicated agreement.

Fundable Bodies (Scotland) Order 2007 (draft)

The Convener: We asked the Executive to explain the lack of a commencement date for the order and why it had not revised the explanatory note. Members have a copy of the response. Are we content to draw the order to the attention of the lead committee and the Parliament on the basis of defective drafting, which the Executive acknowledged and remedied—it relaid the order—and on the basis that the explanatory note could have been clearer? The Executive has taken steps to rectify the second point as well, so it has done what we asked. Are we agreed?

Members indicated agreement.

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

The Convener: We asked the Executive to explain the vires for regulation 4(1) and whether it was satisfied that the review procedures in regulation 5 were compliant with article 6 of the European convention on human rights. The Executive has provided the necessary information to explain the vires for regulation 4(1). However, there is still doubt as to whether regulation 5 is ECHR compliant.

Mr Macintosh: The doubt about ECHR compliance is common to many items of subordinate legislation and will not be clarified until we have a further ruling on it in the courts.

The Convener: Are you happy that we report to the lead committee and Parliament that it is possible for there to be a difference of view on it?

Mr Macintosh: It is worth flagging it up.

The Convener: Is that agreed?

Members indicated agreement.

Draft Instruments Subject to Approval

Advice and Assistance (Financial Conditions) (Scotland) Regulations 2007 (draft)

Advice and Assistance (Financial Limit) (Scotland) Amendment Regulations 2007 (draft)

11:28

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

Civil Legal Aid (Financial Conditions) (Scotland) Regulations 2007 (draft)

The Convener: No points arise on the regulations.

Debt Arrangement Scheme (Scotland) Amendment Regulations 2007 (draft)

The Convener: No substantive points arise on the regulations, but there are minor points that we can raise informally with the Executive. Is that agreed?

Members indicated agreement.

Fundable Bodies (Scotland) Order 2007 (draft)

The Convener: This a relaid order. No points arise on it.

Local Governance (Scotland) Act 2004 (Allowances and Expenses) Regulations 2007 (draft)

The Convener: Do members agree to ask the Executive to explain why it has used a combination of enabling powers from different acts that are subject to different parliamentary procedures in these draft regulations?

11:30

Mr Maxwell: That is the very point I want to raise. I have been a committee member for almost four years now, and I cannot remember this sort of thing coming up more than once or twice in my first three and a half years, but over the past couple of weeks it has started to appear. I am curious to find out why the draft regulations should contain this mixture of procedures. We have written to the Executive; I will be interested to see what it has to say.

The Convener: We should receive its response next week, but there is nothing to stop us raising the point again.

Mr Macintosh: Have we written—

Mr Maxwell: Have we written? Are you not on the Education Committee?

Mr Macintosh: I have been talking to my five-year-old too much.

The Convener: I should also say that, instead of writing to the Executive again, we can simply note that this combination of powers in a single instrument has arisen once more.

Mr Macintosh: I was attempting to ask whether we have written to the Executive on Stewart Maxwell's general point.

The Convener: Yes. We should receive its response before next week's meeting.

National Waste Management Plan for Scotland Regulations 2007 (draft)

The Convener: No points arise on these draft regulations.

Number of Inner House Judges (Variation) Order 2007 (draft)

The Convener: After discussions between the legal advisers and the Executive, this draft order was withdrawn and relaid. We thank our advisers for their work.

Renewables Obligation (Scotland) Order 2007 (draft)

The Convener: We will ask the Executive to explain the reference to "subparagraph (c)" in article 24(4)(b), as such a subparagraph does not exist. Are members agreed?

Members indicated agreement.

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

The Convener: The original draft regulations were withdrawn and relaid after our legal advisers identified certain errors. They are certainly working hard, because no further points arise on these draft regulations.

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

The Convener: Several points arise on this draft order.

Mr Macintosh: This draft order, too, combines affirmative and negative procedures, and there are a number of other points that are worth raising.

The Convener: The combination of procedures is the main point. However, we should also ask whether in the definition of "fish farm development" in article 11(2)(a) the "and" should be an "or"; which provisions in the draft order rely on section 58 of the Planning etc (Scotland) Act 2006; and why, given that the power in section 26(6C) of the Town and Country Planning (Scotland) Act 1997 is subject to the consultation requirement in section 26(6H), the preamble does not, in accordance with normal drafting procedure, cite the provision under which consultation has been carried out. Are members agreed?

Members indicated agreement.

Instruments Subject to Annulment

Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2007 (SSI 2007/58)

11:33

The Convener: No points arise on this amendment order.

Civil Legal Aid (Scotland) Amendment Regulations 2007 (SSI 2007/59)

Advice and Assistance (Scotland) Amendment Regulations 2007 (SSI 2007/60)

Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2007 (SSI 2007/63)

The Convener: No substantive points arise on these instruments. We will pass a number of minor points on to the Executive. Are members agreed?

Members *indicated agreement.*

Regulation of Care (Scotland) Act 2001 (Commencement No 7 and Transitional Provisions) Amendment Order 2007 (SSI 2007/67)

The Convener: No points arise on this amendment order.

Police (Injury Benefit) (Scotland) Regulations 2007 (SSI 2007/68)

The Convener: No points arise on these regulations. However, our attention is drawn to the fact that they replace the previously revoked Police (Injury Benefit) (Scotland) Regulations 2006 (SSI 2006/610).

Mr Macintosh: I had a number of concerns about the previous regulations, which were simply riddled with flaws.

The Convener: Indeed.

Avian Influenza (Preventive Measures) (Scotland) Order 2007 (SSI 2007/69)

The Convener: The order breaches the 21-day rule, but in this case the breach appears to be justified.

Are members content to ask the Executive to explain which powers enable articles 5 to 7 of the order, as they do not appear to be enabled by sections 1 and 8A of the Animal Health Act 1981?

Members *indicated agreement.*

The Convener: We should also raise a number of minor points that have been identified.

Local Government Pensions Etc (Councillors and VisitScotland) (Scotland) Amendment Regulations 2007 (SSI 2007/71)

Sexual Offences Act 2003 (Prescribed Police Stations) (Scotland) Amendment Regulations 2007 (SSI 2007/72)

The Convener: No points have been identified on either set of regulations.

Housing Revenue Account General Fund Contribution Limits (Scotland) Order 2007 (SSI 2007/73)

The Convener: Do members wish to comment on the delay between the making and the laying of this order?

Mr Maxwell: Is what has happened unusual?

The Convener: Yes.

Mr Maxwell: We should ask the Executive about it then.

The Convener: Okay.

Housing (Scotland) Act 2001 (Alteration of Housing Finance Arrangements) Order 2007 (SSI 2007/74)

The Convener: The same problem arises with this order—a delay between the making and the laying. In this case, the delay was seven days.

Another point that we might raise with the Executive concerns the purpose of the definition of “year” in article 2. That term does not appear to be used anywhere else in the order.

Shall we raise those points?

Members *indicated agreement.*

Licensing (Clubs) (Scotland) Regulations 2007 (SSI 2007/76)

The Convener: We have spoken about these regulations before—they are the ones on which everything else hinges.

Mr Maxwell: I am sure that it will all hold together eventually.

The Convener: Yes—I am glad you said that.

No points have been identified on the regulations.

**Personal Licence (Scotland) Regulations
2007 (SSI 2007/77)**

**Food Supplements (Scotland) Amendment
Regulations 2007 (SSI 2007/78)**

The Convener: No substantive points arise on either set of regulations but some minor points do.

**Scotland Act 1998 (Agency Arrangements)
(Specification) Order 2007 (SI 2007/286)**

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

**Instruments Not Laid Before the
Parliament**

**Legal Profession and Legal Aid (Scotland)
Act 2007 (Commencement No 1) Order
2007 (SSI 2007/57)**

**Avian Influenza (H5N1 in Wild Birds)
(Scotland) Order 2007 (SSI 2007/61)**

**Avian Influenza (H5N1 in Poultry)
(Scotland) Order 2007 (SSI 2007/62)**

11:36

The Convener: No substantive points have been identified on any of the orders, just a few minor ones.

Before I close the meeting, the clerk would like to explain something.

Ruth Cooper: I am sorry to harp on about amendments to the Aquaculture and Fisheries (Scotland) Bill, but I have to be very clear in the advice that I give you. If you lodge a manuscript amendment next week when an amendment could have been lodged this week, it will affect selection. Members should be aware of that, as it might influence the decision that you make today. I am not trying to persuade committee members either way, but I have to make you aware of what could happen.

Mr Macintosh: I am confident that, if this committee decides to lodge a manuscript amendment, the Presiding Officer will select it. I understand what you are saying, Ruth, but if a committee lodges an amendment to a bill there is no real chance of its not being selected.

The Convener: I tend to agree.

Mr Macintosh: It was very sensible advice though.

Mr Maxwell: Yes, Ruth is quite right to give us that reminder, but I would still prefer to wait and see what information comes from Executive officials.

The Convener: Is that agreed?

Members *indicated agreement.*

The Convener: Our next meeting will be next Tuesday. I thought we might be having a week's rest, but we are not.

Ruth Cooper: I am sorry.

Meeting closed at 11:38.

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