



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

Wednesday 24 March 2010

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**RURAL AFFAIRS AND ENVIRONMENT COMMITTEE**  
**8<sup>th</sup> Meeting 2010, Session 3**

**CONVENER**

\*Maureen Watt (North East Scotland) (SNP)

**DEPUTY CONVENER**

\*John Scott (Ayr) (Con)

**COMMITTEE MEMBERS**

\*Karen Gillon (Clydesdale) (Lab)  
\*Liam McArthur (Orkney) (LD)  
\*Alasdair Morgan (South of Scotland) (SNP)  
\*Elaine Murray (Dumfries) (Lab)  
\*Peter Peacock (Highlands and Islands) (Lab)  
\*Bill Wilson (West of Scotland) (SNP)

**COMMITTEE SUBSTITUTES**

Rhona Brankin (Midlothian) (Lab)  
Jim Hume (South of Scotland) (LD)  
Nanette Milne (North East Scotland) (Con)  
Sandra White (Glasgow) (SNP)

\*attended

**THE FOLLOWING GAVE EVIDENCE:**

David Barnes (Scottish Government Rural Directorate)  
Richard Lochhead (Cabinet Secretary for Rural Affairs and the Environment)  
Alan Williams (Scottish Government Legal Directorate)

**CLERK TO THE COMMITTEE**

Peter McGrath

**LOCATION**

Committee Room 5



# Scottish Parliament

## Rural Affairs and Environment Committee

*Wednesday 24 March 2010*

[The Convener *opened the meeting at 09:31*]

### Subordinate Legislation

#### Beet Seed (Scotland) Regulations 2010 (SSI 2010/67)

**The Convener (Maureen Watt):** Good morning and welcome to the committee's eighth meeting this year. I ask everyone to turn off their mobile phones and BlackBerrys, as they impact on the broadcasting system.

Our main business is to consider our stage 1 report on the Crofting Reform (Scotland) Bill. As is standard practice, the committee will undertake that work in private. Before we get on to that, however, we have to consider some pieces of subordinate legislation.

Our first item is an evidence-taking session with the Cabinet Secretary for Rural Affairs and the Environment, Richard Lochhead, and officials to clarify certain technical questions about the Beet Seed (Scotland) Regulations 2010 (SSI 2010/67). I welcome from the Scottish Government the cabinet secretary; David Barnes, from the agriculture and rural development division; and Alan Williams, divisional solicitor.

The Subordinate Legislation Committee has commented on the regulations and the relevant extract of its report has been circulated to members in paper RAE/S3/10/8/4. Members will also have seen a letter from the Subordinate Legislation Committee's convener to the cabinet secretary, commenting on the issues raised by the regulations. A motion lodged by John Scott, that the committee recommends that nothing further be done on the regulations, will be debated after the evidence-taking session. Once the debate on the motion has begun, the cabinet secretary's officials will not be able to participate.

As we have only limited time in this committee room, I ask everyone to be as brief as possible. I offer the cabinet secretary the opportunity to comment briefly on the regulations.

**Richard Lochhead (Cabinet Secretary for Rural Affairs and the Environment):** Thank you, convener. As you said, in the first part of these proceedings, members will have the opportunity to ask me and my officials technical questions about the regulations.

First, I have a couple of quick, general comments. European Commission directive 2008/62, which covers the marketing of seeds of traditional or conservation varieties but not seeds of modern varieties, which are generally known as commercial crops, was required to be transposed into Scottish law by June 2009. That transposition ensured that the marketing of the only relevant conservation variety in Scotland, Bere barley grown in Orkney, would be covered. The regulations before the committee cover the marketing of seeds of conservation varieties of fodder and so on. In short, the EC directive is all about protecting the genetic purity of seeds that are produced and marketed to farmers who want to grow those crops.

The only crop in Scotland that is relevant to the directive is Bere barley, which is grown in Orkney and with which one of the committee members will be familiar. The regulations that are before us concern seeds for fodder beet and sugar beet, which are not produced in Scotland.

We acknowledge that some errors were made in drafting the regulations. As the convener has mentioned, the Subordinate Legislation Committee sent us its views and we are due to reply to it in the next few days. We regret the drafting errors that were made, but our solicitors assure me that they do not change the regulations' meaning, which would be fully understood by the courts. We will make amendments to the regulations at the first opportunity. Forthcoming seeds regulations will come to the Parliament in the next month or two, and we will use them as a vehicle for correcting the unfortunate errors that were made in the regulations that are before the committee.

I look forward to any questions that the committee may have.

**John Scott (Ayr) (Con):** Good morning, cabinet secretary. I have no objections at all to the legislative intention behind the Beet Seed (Scotland) Regulations 2010. However, I have objections to their poor drafting. I will quote directly paragraphs 5 to 8 of the Subordinate Legislation Committee's 18<sup>th</sup> report of 2010. The quotation is, in essence, a series of questions that suggests that the regulations are not fit for purpose. The report says:

"5. There are a very high number of errors in this instrument ranging from careless minor points to significant cross-referencing and formatting errors which could impact on the operation of the instrument itself.

6. In the Committee's view there has been no effective quality control applied to the instrument. It seems obvious that no-one in the Scottish Government read through the final instrument before it was submitted to the Cabinet Secretary for signing. Had they done so, the Committee is confident that the majority of the drafting errors identified would have been noted and corrected.

7. The Committee is also disappointed to note that the Scottish Government appears to consider that these regulations are unimportant as they 'have no practical consequences' for Scotland, since beet seed is not currently marketed here. The Committee would be very concerned if, on that basis, a lower standard of workmanship has been considered acceptable. The same reason is deployed for the decision not to correct immediately the errors which the Committee has identified.

8. Of further concern to the Committee is the impression that the Scottish Government appears not to place any weight on the requirement to transpose EU obligations properly, irrespective of the practical position on the ground. All EU members are entitled to expect that the law in other member states properly implements EU obligations—a fundamental requirement of the proper operation of the common market."

Perhaps you and your officials would care to address those points.

**Richard Lochhead:** I think that this part of the proceedings is for technical questions. I am happy to leave my comments to the debate, but I am not sure what the order of response is.

**The Convener:** Does any other member of the committee want to come in?

**Elaine Murray (Dumfries) (Lab):** I have views that I will express in the debate. I support John Scott's intention, but what would be the consequences if the regulations were annulled and resubmitted at a future date? Would there be any serious consequences?

**Alan Williams (Scottish Government Legal Directorate):** There should be no consequences, in the sense that the regulations have not yet come into force. No seed that they cover is marketed in Scotland, so there is no actual effect on anyone at this point.

**Elaine Murray:** Could there be consequences under the obligation to transpose the EC directive, such as infraction proceedings against the United Kingdom?

**Alan Williams:** If the regulations were annulled, there would be no implementation. Clearly, the Government would then need to remake the regulations as a full instrument, taking into account the points that were raised by the SLC.

**Liam McArthur (Orkney) (LD):** On the issue of proper implementation, I presume that the Commission would look sympathetically on a delay that was the result of trying to remedy and rectify the acknowledged drafting errors in the regulations. Therefore, we should not be at any risk of infraction proceedings.

**Alan Williams:** I do not think that there is any such risk. I understand that the Commission agreed to an extension until 20 March for the transposition. As far as we are concerned, the regulations transpose the directive fully. The regulations certainly contain drafting errors, which

we obviously very much regret and are somewhat embarrassed by, but those errors are not such that they affect the operation of the regulations.

**Karen Gillon (Clydesdale) (Lab):** When did the Government become aware of the drafting errors?

**Alan Williams:** On 5 March.

**Karen Gillon:** Presumably, if the Government had withdrawn the regulations at that point, corrected the errors and then introduced a new set of regulations, it would have been able to comply with the June deadline.

**Alan Williams:** Because the regulations had already been made, it would have been necessary to make a further set of regulations revoking them. The new set of regulations with the corrected text would presumably have come into force on the same date as the date for the coming into force of the regulations that we are discussing.

**John Scott:** Will a new statutory instrument be introduced before the June deadline?

**Richard Lochhead:** Yes, our intention is to introduce amendment regulations to correct the errors. Clearly, a choice is available. The committee could agree to today's motion to annul and then seek Parliament's support for such a move, which I think would be unprecedented for a negative instrument. Alternatively, we can accept the fact that we have made these errors and introduce amendment regulations as soon as possible. That would be a much quicker way of correcting the situation, as opposed to annulling the current regulations and introducing further regulations that would have to go through the various processes.

**John Scott:** Forgive me for asking, but if that is now the intention, why was it not the intention previously? How did the Subordinate Legislation Committee get the impression that the Government was not prepared to correct immediately the errors that that committee identified when it first considered the regulations?

**Richard Lochhead:** I certainly regret that the Subordinate Legislation Committee got that impression. I am giving a commitment to accept our responsibility for not spotting the errors and to do what we can to correct them as soon as possible. The quickest way to correct the errors would be to introduce amendment regulations, as opposed to annulling the regulations and starting from scratch. We regret giving that impression to the Subordinate Legislation Committee. We have not yet replied to that committee's report, but we plan to do so in the next few days and by the date given to us.

**David Barnes (Scottish Government Rural Directorate):** I would like to comment on the suggestion, to which Mr Scott referred earlier, that

the Government did not give due weight and importance to the transposition of the directive because the regulations “have no practical consequences” for Scotland. That wording was intended to be simply a neutral statement of fact for Parliament’s information and was in no way meant to imply that the Government did not place due importance on the principle of transposing EU directives properly. On the contrary, we attach absolute importance to that. If the impression was inadvertently given that the Government did not give due weight and importance to the transposition, we regret that. That was not in any way our intention, which is fully to respect the requirement to transpose EU legislation properly.

As the cabinet secretary said, it so happens that there is another EU seeds directive, which makes some rather technical changes to the naming of crop species. That means that a vehicle is coming along almost immediately that we can use to correct these regrettable errors.

09:45

**Elaine Murray:** I have two brief questions, one of which is a request for information. I thought that I heard the minister say that the EU directive had to be transposed by June 2009, as opposed to June 2010. Am I correct?

My other question is about the difference in timescale between rewriting the regulations that are before us to correct the errors and introducing amendment regulations. What is the difference in timescale between those two approaches?

**David Barnes:** I will leave my colleague Alan Williams to comment on the timescales associated with the different procedures.

On the deadlines, as the cabinet secretary said, the original deadline from Europe was June 2009. The Scottish Government implemented the transposition on time in relation to the only variety of conservation seed that is in active cultivation in Scotland—namely, Bere barley—and all crops other than beet.

Beet has been treated separately for two reasons. First, in domestic legislation, beet is covered by separate statutory instruments. Secondly, although most of the seed legislation was fully up to date, the beet seed legislation was in need of further work to update it, in addition to the introduction of legislation to cover the conservation varieties. That is why we secured an extension to the deadline for beet specifically. The original deadline was respected for everything except beet.

**The Convener:** Next we will hear from John Scott and Karen Gillon.

**Elaine Murray:** Alan Williams was going to explain the difference in timescales.

**The Convener:** Sorry.

**Alan Williams:** An amending instrument would be subject to negative resolution procedure. I estimate that it would be about two pages long and that it could be drafted and made in a matter of days. The issue then would be whether it should come into force after 21 days, taking into account the Easter recess, or on 20 April, which is the date on which the principal instrument will come into force.

**Karen Gillon:** When is the extension until?

**Alan Williams:** I think it is until 20 March.

**Richard Lochhead:** Yes, 20 March.

**Karen Gillon:** The extension is until 20 March and the instrument will not come into force until 20 April.

**Alan Williams:** Yes.

**Karen Gillon:** So we are still not going to comply.

**Alan Williams:** That is correct, but I understand that that was done to give people sufficient time to familiarise themselves—

**Karen Gillon:** The instrument was due to come into force on 30 June 2009 and you obtained an extension until 20 March 2010. We are now considering the instrument on 24 March 2010. Why did you leave it so late?

**Richard Lochhead:** I have accepted that errors have been made and that there are lessons for us to learn. Clearly, the instrument was laid before 20 March, albeit that it will not come into force until after 20 March. Provided that we are given an opportunity to amend the instrument through a route other than annulment and the introduction of new regulations, I am comfortable that we will be okay as far as infraction proceedings and so on are concerned. The question is: what is the quickest route to put in place the amendments to correct the errors? As you have just heard from Alan Williams, we could be in a position to bring forward a separate vehicle to make those amendments in a matter of days.

**Karen Gillon:** Just explain to me what the process would be if Parliament were to annul the regulations. How long would it take to introduce new ones?

**Richard Lochhead:** I will ask Alan Williams to address the length of time that it would take to introduce replacement regulations. Effectively, if the committee agreed to the motion to annul the regulations today, the full Parliament would then vote on the matter. If Parliament voted to annul the

regulations, we would have to go away, start the process from stage 1 and put together the replacement regulations before coming back to the Parliament.

I appeal to the committee to accept that we have acknowledged that errors have been made and that we will make amendments as soon as possible to correct those errors, which we argue do not change the meaning of the regulations. We can introduce such amendments in a matter of days.

**The Convener:** I think that questions are exhausted, so we move to the formal debate on the motion to annul the statutory instrument. I invite John Scott to open the debate, and will ask other members whether they have contributions to make. After that, we will hear from the cabinet secretary, and John Scott will then be invited to sum up.

**John Scott:** I welcome the cabinet secretary's expressions of regret about the mess that we have reached. I also welcome the news that infraction proceedings will not ensue if the motion to annul is passed today. However, in light of the Subordinate Legislation Committee's remarks, some points remain that are germane to the debate.

It is a matter for the Scottish Government to introduce poorly drafted legislation if it so chooses, but there should be no obligation on the Scottish Parliament to accept and pass such legislation. Indeed, in introducing such poorly drafted and defective legislation, the Scottish Government was until a moment ago inviting Parliament, through this committee, to be complicit in accepting such an approach and I, for one, am not prepared to do so. As an exemplar of best practice throughout Scotland, this committee—and all other parliamentary committees, as well as Parliament itself—has a right to expect well-drafted, clear and fit-for-purpose legislation at the first time of asking. The instrument is simply not up to an acceptable standard. Even more annoying, notwithstanding Mr Barnes's remarks, the Government has conveyed the impression that it appears to have no intention—or, at any rate, that it had no intention—of correcting the SSI immediately.

Further, in the past when this committee has raised with Government the issue of poor drafting, assurances have been sought and given that such matters of poor drafting would be addressed in the future. It is patently obvious that our previous concerns have not been addressed. If Government is unwilling, or indeed unable, to introduce legislation that is fit for purpose, I see no reason why the Scottish Parliament, through this committee, should bring into law such legislation.

The Subordinate Legislation Committee exists for the purpose of reviewing statutory instruments

such as this and we, as the Rural Affairs and Environment Committee, ignore at our peril the contents of that committee's report. At the very least and as a matter of courtesy to that committee, I feel that the SSI should be annulled, redrafted and brought back to this committee in an acceptable form, given that infraction procedures will not ensue. At that point, I will be happy to give it my full support.

I move,

That the Rural Affairs and Environment Committee recommends that nothing further be done under the Beet Seed (Scotland) Regulations 2010 (SSI 2010/67).

**Elaine Murray:** Over the lifetime of this Parliament, not just during the current Administration but previously, I am afraid that there have been numerous instances of poor drafting of SIs and financial memorandums. When I was a member of the Finance Committee, we objected to that frequently. There must come a time when the Parliament says that that is just not good enough. If legislation is proposed to the Parliament, it should be checked and written properly before it is considered by us. For example, I draw people's attention to paragraph 22 of the Subordinate Legislation Committee report, which says:

"Contravention of this prohibition is automatically a criminal offence by virtue of section 16(7) of the Seeds Act 1964, but the Scottish Government advises that it did not intend to create a criminal offence."

This is legislation that creates a criminal offence by mistake and that really is not good enough.

I cannot understand why making a new SI that amends the regulations should be quicker and more expedient than reintroducing the SI with amendments—I presume that the Government knows what amendments it must make. I support John Scott's call for the regulations to be annulled and reintroduced in a corrected form.

**Karen Gillon:** As members have said, this is not the first time that we have faced such an issue, under this Government or previous Governments. I have often drawn to the Government's attention issues with subordinate legislation. Only weeks ago, John Scott drew to the Government's attention another poorly drafted SSI.

It is also not the first time that a committee of the Parliament has been up against a wall with an SSI and told, "Either support it or we lose it." Things have been left too late. Regulations should be scrutinised by the Parliament and there should be a timeframe in which changes can be made, if they are required. Instead, we have a situation in which the Government has not got the regulations right—even after an extension period from the European Commission has expired—but tells the committee that it must support the instrument.



Tomorrow the Parliament will consider the Public Services Reform (Scotland) Bill. If the bill is passed, more legislation will be introduced through subordinate legislation. However, the Government has not been able to get right an SI that it has had two years to put in place, which is on a subject that seems relatively straightforward. If we are to amend primary legislation through subordinate legislation, as the Government proposes, we must have confidence that the Government can get the drafting right. I do not have such confidence. The situation has gone too far and parliamentarians have allowed it to continue for too long. I will support John Scott's motion to annul the instrument, given that the Government has made clear that there will be no consequences.

**Liam McArthur:** I support the thrust of John Scott's arguments, which Karen Gillon and Elaine Murray echoed. There are any number of examples of SIs and financial memoranda about which we have expressed serious concerns.

However, in this case, the language that the Subordinate Legislation Committee used is probably unprecedented—I have not seen anything to match it during the past three years. There comes a point at which the consequences must be serious enough to make the Government take notice and take steps in its future practice. The consequences of taking a stand on the SI that we are considering are perhaps less dramatic than the consequences might be of taking a stand in other instances, so this is an ideal opportunity to take a stand. I will support the motion.

**Alasdair Morgan (South of Scotland) (SNP):** I can do the arithmetic and see which way the vote will go.

I do not think that this is a "relatively straightforward" instrument. Even before we get to the explanatory note, it runs to 45 pages, which are closely typed, so it is longer and more complex than most of the bills that go through the Parliament. It is perhaps not surprising that it was difficult to spot the errors.

During the second session of the Parliament, I served on the Subordinate Legislation Committee for a not inconsiderable time, so I know that the situation that we face is not at all common. That is not to say that it is desirable. I am afraid that such things happen; we are where we are. What do we do to get out of the situation? Do we vote against the instrument, so that another instrument has to be laid, or do we include amending provisions in the instrument that we have heard is due to be laid? The latter option would require less work on the part of everyone who works for the Government and, therefore, for all of us. That is the logical course of action. It is not the logical course only if we want to teach the Government a lesson of some sort, but that is not why we are

here. For that reason, I will not support Mr Scott's motion.

10:00

**Richard Lochhead:** I take seriously the comments of John Scott and other committee members. We go to great efforts to transpose the many directives that emanate from Europe into Scots law. With this directive, we gave priority to the issue that was relevant to Scotland—last summer's SI on Bere barley from Orkney. As Alasdair Morgan indicated, today we are discussing an issue that, ironically, is not currently relevant to Scotland, as we do not produce seeds for beet.

I have acknowledged that errors were made in drafting the SI. The options that we face are for Parliament to take the unprecedented move of annulling such an SI, or for us to bring forward amendments as soon as possible. If we bring forward amendments, which we can do in the next few days, we will save both Parliament and the Government a lot of resources and time and will achieve the same outcome. That is our preferred option, but we are in the hands of the committee and of Parliament and will pay close regard to the decision that members make today.

My final point relates to the overall lessons that are to be learned. The Subordinate Legislation Committee is pursuing some of the issues, and the Government will engage with it on the wider issues that the Rural Affairs and Environment Committee has addressed this morning. As I indicated, I will send the Subordinate Legislation Committee a detailed letter in due course.

**John Scott:** I thank the cabinet secretary for his expressions of regret regarding the SSI and am grateful to committee colleagues for supporting annulment of the instrument. Notwithstanding the cabinet secretary's regrets, I remain of the view that the SSI should be annulled and intend to press my motion.

**The Convener:** The question is, that motion S3M-6035 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Gillon, Karen (Clydesdale) (Lab)  
McArthur, Liam (Orkney) (LD)  
Murray, Elaine (Dumfries) (Lab)  
Peacock, Peter (Highlands and Islands) (Lab)  
Scott, John (Ayr) (Con)

**Against**

Morgan, Alasdair (South of Scotland) (SNP)  
Watt, Maureen (North East Scotland) (SNP)  
Wilson, Bill (West of Scotland) (SNP)

**The Convener:** The result of the division is: For 5, Against 3, Abstentions 0.

*Motion agreed to,*

That the Rural Affairs and Environment Committee recommends that nothing further be done under the Beet Seed (Scotland) Regulations 2010 (SSI 2010/67).

**The Convener:** I thank the cabinet secretary and his officials for their attendance.

**Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2010 (SSI 2010/87)**

**Zoonoses and Animal By-Products (Fees) (Scotland) Amendment Regulations 2010 (SSI 2010/88)**

**The Convener:** Agenda item 3 is consideration of two negative instruments. The Subordinate Legislation Committee made no comments on the instruments. No member has raised a concern in advance, and no motion to annul has been lodged.

**Liam McArthur:** I did not know whether the cabinet secretary would stay for consideration of the instruments. My only question relates to the Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2010. There is growing evidence that the scheme does not take forward anaerobic digesters to the extent that was envisaged. Given that there is no one here to answer my question, I am not sure how to take it forward.

**The Convener:** It was never envisaged that the cabinet secretary would attend to answer questions on the instruments. We can send him a letter.

**Liam McArthur:** That would be helpful. I will speak to Peter McGrath about the specific questions that I have.

**The Convener:** We could delay consideration of the instrument, but a letter may be sufficient.

**Liam McArthur:** Absolutely.

**The Convener:** Does the committee agree to make no recommendations on the SSIs?

**Members indicated agreement.**

**The Convener:** That concludes the public part of today's meeting. I thank everyone for their attendance.

Our senior assistant clerk, Roz Wheeler, is moving to another committee. On behalf of the committee, I thank her for all the clerking work that she has done for the committee, which has been arduous at times.

10:05

*Meeting continued in private until 12:54.*

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