



SUBORDINATE LEGISLATION COMMITTEE

AGENDA

2nd Meeting, 2007 (Session 2)

Tuesday 16 January 2007

The Committee will meet at 10.30am in Committee Room 4.

1. **Delegated powers scrutiny:** The Committee will consider the delegated powers provisions in relation to the following bill—

Crofting Reform etc Bill as amended at Stage 2.

2. **Delegated powers scrutiny:** The Committee will consider a response from the Executive to points raised on the following bill—

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

3. **Legislative consent memorandum:** The Committee will consider a response from the Executive to points raised on the Statistics and Registration Service Bill.

4. **Executive responses:** The Committee will consider Executive responses in relation to the following instruments—

the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2007, **(SSI 2006/draft)**

the Prohibition of Fishing with Multiple Trawls (No. 2) (Scotland) Amendment Order 2006, **(SSI 2006/602)**

the Teachers' Superannuation (Scotland) Amendment (No. 2) Regulations 2006, **(SSI 2006/605)**

the Welfare of Animals (Transport) (Scotland) Regulations 2006, **(SSI 2006/606)**

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

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

5. **Draft instruments subject to approval:** The Committee will consider the following—

the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2007, **(SSI 2007/draft)**.

6. **Instruments subject to annulment:** The Committee will consider the following—

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

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

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

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

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

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

7. **Inquiry into the regulatory framework in Scotland (in private):** The Committee will consider its draft report.

Ruth Cooper
Clerk to the Committee
Tel: 0131 348 5212

The following papers are relevant to this meeting:

Agenda Items 1 – 6

Legal brief (Private) SL/S2/07/02/1

Agenda Item 1

Supplementary delegated powers memorandum (circulated to Members only)

Agenda Item 2

Executive response SL/S2/07/02/2

Agenda Item 3

Executive response SL/S2/07/02/3

Agenda Item 4

Executive responses SL/S2/07/02/4

Agenda Items 5 - 6

Copies of instruments (circulated to Members only)

Agenda Item 7

Draft report (Private) SL/S2/07/02/5

SUBORDINATE LEGISLATION COMMITTEE

2nd Meeting, 2007 (Session 2)

Tuesday 16 January 2007

Executive Response

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

1. Thank you for your letter of 9 January on the above. In that letter you explained that the Subordinate Legislation Committee sought an explanation of the following matter:

Section 43 – Power to make detailed provision relating to the seizure of vehicles (New Section 226D(10) of the Criminal Procedure (Scotland) Act 1995)

The Committee is content with this amendment and acknowledges that, without this express provision in the Bill, it would be doubtful whether the powers under the new section 226D(10) would be sufficient to allow regulations to be made for the required purpose. However, the Committee asks the Executive whether thought could be given to restricting the power to “reasonable” fees and charges. **The Executive is asked to comment.**

2. Ministers have considered the point made by the Committee and, as a result, intend to introduce an amendment at stage 3 adding a qualification to new section 226D(11)(g) of the 1995 Act (as inserted by section 43 of the Bill). The amendment will provide that any regulations made under section 226D(10) may make provision in respect of the payment of “**reasonable** fees, charges and other costs”. The addition of the word “reasonable” is intended to address the issue raised by the Committee.

3. Could I pass on my thanks to you and the Committee for this helpful observation. Please do not hesitate to get back in touch if you have any further queries.

Criminal Proceedings etc. (Reform) Bill Team

SUBORDINATE LEGISLATION COMMITTEE

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Executive Responses

The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2007, (SSI 2006/draft)

1. On 9 January 2007, the Subordinate Legislation Committee, having considered the above instrument, sought an explanation of the following:

“Given that this is the 5th commencement order made under the principal Order, the Committee asks the Executive what, if any, plans it has to consolidate this series of instruments.”

The Scottish Executive responds as follows:

2. The original 1975 Order was consolidated in 2003, and although this can be described as the “fifth” amendment Order, it is in fact the first substantial amending Order. The first four only made very limited amendments.

3. We expect further amendments will be required following the Protection of Vulnerable Groups (Scotland) Bill, and we will consider consolidation when that set of changes is made.

Scottish Executive Justice Department

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

1. On 9th January 2007 the Committee asked the Executive for an explanation of the following matter:

“The Committee asks the Executive to confirm whether it is the policy intention to apply the conditions set out in paragraph (2)(a) to (d) of new article 3 of the principal Order to single trawls and, if so, to explain why the prohibition in paragraph (1) of that article is “subject to paragraph (2)”.”

The Scottish Executive responds as follows:

2. The Scottish Executive is grateful to the Committee for bringing this matter to its attention. It is not the policy intention to apply the conditions set out in paragraph (2)(a) to (d) of new article 3 of the principal Order to single trawls. Accordingly, the Scottish Executive proposes to omit the words “or fewer” where they appear at paragraph (2) of new article 3 and shall bring forward an order in the course of next week to achieve that aim.

3. I note from the transcript of the Committee's proceedings on 9th January 2007 that concern was expressed about the impact of the prohibition on parts of the industry. The Scottish Executive understands that there are currently between 2 and 5 Scottish vessels outfitted to multiple trawl, although others may have been considering making the conversion. Some sectors and individuals have claimed greater catch selectivity for fishing with multiple trawls, but there is very little evidence to support their claims. The Scottish Executive would be prepared to consider granting a derogation from the prohibition contained in the order under section 9(3) of the Sea Fish (Conservation) Act 1967 for the purpose of conducting scientific investigation into the efficacy of fishing with multiple trawls as part of an industry-funded research programme.

Scottish Executive Environment and Rural Affairs Department

The Teachers' Superannuation (Scotland) Amendment (No. 2) Regulations 2006, (SSI 2006/605)

1. On 9 January 2007, the Subordinate Legislation Committee, having considered the above instrument, sought an explanation of the following:

"The Committee asks the Executive why, with reference to regulation 1(a) and (b), it is considered necessary to provide that regulation 4 is to have effect from 2 December 2006 as well as from 14 June 2006."

The Scottish Executive responds as follows:

2. The SPPA thanks the Committee for their letter of 9 January 2007 regarding the above instrument and for bringing the matter to its attention.

3. As is obvious from the terms of regulation 1(a), regulation 4 is intended to have effect from 14 June 2006 and the terms of regulation 1(b) should not have included reference to regulation 4.

4. Having given the matter thought, the SPPA considers that, while unfortunate, regulation 1(b) has no material effect on the intended coming into force date in regulation 1(a). In legal terms, regulation 1(a) is sufficiently clear that regulation 1(b) has no substantive effect on the earlier, clearly stated, coming into force date. The Explanatory Note, though not part of the instrument, also assists the reader as to the intended coming into force date. Consequently, while we acknowledge the defect in drafting, which is regretted, we do not consider it necessary to amend regulation 1(b) at this time. The stakeholders responsible for following the regulations will be made aware of the anomaly by the SPPA clarifying the position in the Circular that is due to be issued shortly to accompany and explain the new regulations.

**The Welfare of Animals (Transport) (Scotland) Regulations 2006,
(SSI 2006/606)**

1. On 9th January 2007 the Subordinate Legislation Committee, having considered the above instrument sought further information on the following matters:-

- (i) “To explain why unlike DEFRA it has chosen to use powers under section 2(2) of the European Communities Act 1972 rather than domestic powers under the Animal Health Act 1981 as the enabling powers for this instrument. The Committee notes that as a consequence of this penalties for breach of the legislation may be slightly different north and south of the border.
- (ii) To explain the absence of a definition of “inspector” relevant to provisions of the Regulations such as regulation 22.
- (iii) To explain whether the failure to attract or reproduce certain provisions of the 1981 Act which are implied for the purposes of the equivalent English Order is deliberate.
- (iv) To explain why, with reference to the Contents page, there is no regulation with the heading given for regulation 29 - and why regulation 29 of the Regulations is shown as regulation 30.
- (v) To explain, with reference to regulation 9(1), whether it is the person or the control post that is to be approved, and who is to be guilty of an offence under that paragraph.
- (vi) To explain why, given the decision of the ECHR in *Tsfago v UK*, there is no provision for an appeal from a decision of an appointed person under regulation 21.
- (vii) To explain why it was not possible to meet the EC deadline for coming into force of the Regulations.
- (viii) To explain why regulation 23 is headed “Powers of inspectors: supplementary”, given that inspectors have the same powers as constables under the 1981 Act as applied by that regulation.
- (ix) To explain the definition of “person appearing to the inspector to be in charge of the animals” in regulation 22(1) and whether this includes providing proof of identification. The Committee is concerned that current drafting could allow a person to be taken mistakenly for being in charge of the relevant animals.
- (x) Given the points raised at (i), to explain the lack of a right of appeal against an inspector’s decision to serve a notice in regulation 22.”

The Scottish Executive responds as follows:

First Question

2. In making these Regulations the Executive has relied on the powers in section 2(2) of the European Communities Act 1972 rather than the powers in the Animal Health Act 1981 as sections 37, 38 and 39 of the 1981 Act (which would have provided vires for the principal provisions of the Regulations) were repealed by section 52 and paragraph 8(2) of schedule 2 to the Animal Health and Welfare (Scotland) Act 2006. While section 26 of the Animal Health and Welfare (Scotland) Act 2006 may have provided sufficient vires for the Regulations it was considered that the powers in the European Communities Act 1972 were more appropriate for these Regulations given that they provide for the implementation and enforcement of revised Community obligations rather than making new substantive provisions relating to animal welfare.

3. While the penalty provisions are slightly different from those applying in England and Wales the Executive considers that for most breaches of the Regulations a maximum period of imprisonment of 3 months is the appropriate penalty. Breaches of the Regulations which relate to causing unnecessary suffering or failing to secure the welfare of animals could, if the case merited it, be prosecuted under the 2006 Act and thereby attract the higher maximum period of imprisonment of 6 months.

Second Question

4. The Executive is grateful to the Committee for drawing this matter to its attention. A definition of “inspector” should have been provided in the Regulations and this matter shall be remedied at the first available opportunity.

Third Question

5. The Executive considers that Regulations 23 and 28 provide for the application of all relevant provisions of the 1981 Act.

Fourth Question

6. There is no regulation with the heading given in the contents page for regulation 29 (amendments to the Transport of Animals (Cleansing and Disinfection) (Scotland) Order 2005) as following further reflection upon an earlier draft of the Regulations, the Executive considered that amendments to the 2005 Order were unnecessary. The contents page should have been corrected to reflect the removal of that regulation and the consequent re-numbering. This will be corrected before the instrument goes for printing.

Fifth Question

7. The Executive confirms that it is the control post that requires to be approved. Any person who uses unapproved premises as a control post will be guilty of an offence.

Sixth Question

8. Should a person be dissatisfied by a decision under regulation 21 or 22 that person may bring proceedings for judicial review. While the Executive notes the decision of *Tsfayo v UK* the full implications of that decision are still being considered. However, it is not accepted that judicial review can never provide sufficiency of review for Article 6 ECHR purposes nor that it fails to do so in this instance.

Seventh Question

9. The delay in the making of these Regulations was due to difficulties in ascertaining the precise scope and interpretation of certain provisions of the Community Regulation necessitating ongoing discussions with the European Commission. In addition, detailed discussions have been required with both Defra and the National Assembly for Wales to agree a consistent approach to the implementation, in particular the derogations to be utilised within GB, to ensure that transporters would not be faced with different rules upon crossing a border within GB. An extensive consultation exercise was also undertaken in May to August 2006 with some 400 consultees.

Eighth Question

10. Regulation 22 provides specific powers to inspectors particularly relevant to the enforcement of these Regulations. In addition regulation 23 provides for the powers conferred by the 1981 Act to also be available to inspectors enforcing these Regulations. These powers are in addition to the powers specifically created by regulation 22.

Ninth Question

11. The Executive considers that the wording of this provision, which is similar to that in the Welfare of Animals (Transport) Order 1997, does not pose any difficulty in practice. It is provided to enable the inspector to serve a notice on the person the inspector considers, having made a reasonable assessment of all the prevailing circumstances, to be "in charge" of the animals.

Tenth Question

12. See answer to sixth question above.

13. We note the minor printing points raised in the annex and shall deal with these in early course in the usual manner.

The Scottish Executive Environment and Rural Affairs Department

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

1. On 9 January 2007 the Committee asked the Scottish Executive for an explanation of the following matters:

"The Committee asks the Executive to justify the vires for regulation 3 standing the repeal of the enabling powers."

The Registrar General and the Scottish Executive respond as follows:

2. The Regulations were drafted on the basis that sections 19(2) and 40(1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 ("the 1965 Act") provided vires for the repeal, by regulation 3, of the existing forms of abbreviated certificates of birth. The general power in section 54(1)(b) of the 1965 Act for things required to be prescribed under that Act is also relevant.

3. The repeal of the forms is consequential on repeal by section 44(5) of the Local Electoral Administration and Registration Services (Scotland) Act 2006 (asp 14) (“the 2006 Act”) of the provision in the 1965 Act for such certificates, including sections 19(2) and 40(1). The 2006 Act makes provision instead for consistent reference to “extracts”. The principal enabling powers for regulation 3 were therefore repealed at midnight at the start of 2007, at the same instant that the Regulations entered into force. A circularity arises as to whether the repeal of the enabling powers or the repeal made under those powers occurred first; we thank the Committee for bringing this doubt to our attention.

4. Whilst the enabling powers were in force when the regulations were made, and the intention of the regulations is clear, the doubt which may be created as to the vires of regulation 3 should have been avoided by commencing regulation 3 “immediately before” midnight at the start of 2007.

5. With the repeal of the enabling powers, the forms prescribed thereunder will fall in any event (it was considered more helpful to the reader to expressly repeal the forms). We consider that section 17 of the Interpretation Act does not save the forms because the provision re-enacted is not the provision repealed, and the legislative context requires otherwise. Accordingly, no difficulties will arise in practice.

General Register Office for Scotland

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

1. The Committee has requested in its letter of 9 January information from the Executive on the following matter:

“The Committee asks the Executive why it has omitted to cite in the preamble subsection (6) of section 105 which is a relevant enabling power.”

The Scottish Executive responds as follows:

2. The Executive is grateful to the Committee for raising this point and accepts that it would have been better practice to cite subsection (6) of section 105.

3. The Executive also takes the view that due to the generalised reference in the preamble to “all other powers enabling them in that behalf,” the omitted power can still be relied upon. Section 105(6) is an ancillary provision. It extends the primary enabling powers in sections 10(3) and (5) by providing that these include power to vary or revoke the order. It is not a stand alone provision.

4. The Executive does, however, take account of the Committee’s point for future reference.

Scottish Executive Health Department

SUBORDINATE LEGISLATION COMMITTEE

2nd Meeting, 2007 (Session 2)

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Executive Response

Statistics and Registration Service Bill

1. On 9 January 2007 the Committee asked the Scottish Executive for information in relation to the following matters:

“Clause 45 – Power to authorise disclosure to the Board: Scotland

Subsection (6)(b), where it provides that the consequential and supplementary provision referred to in subsection (5) can include provision “authorising further disclosure by the Board of such information in circumstances where the disclosure would otherwise be prohibited by a rule of law, this Act or an Act passed before this Act” would appear to potentially override all the controls in the Act on the use of information by the Statistics Board.

The Committee is concerned at the width of this power and seeks clarification on its intended use. The Committee also asks whether consideration has been given to providing any necessary authority to the Board in such a style as would not rely on taking such a wide power.

Clause 49 – Power to authorise disclosure by the Board: Scotland

Similarly to the points raised in relation to clause 45, the Committee is concerned at the width of the power at subsection (7)(b) of clause 49 and seeks justification for and explanation of its use.”

The Scottish Executive responds as follows:

General intention of data sharing clauses

2. The general policy intention in clauses 45 and clause 49 of the Bill is to introduce a mechanism for information to be shared to and from the Board and Scottish public authorities, for use for statistical purposes only.

3. As set out in the Legislative Consent Motion (particularly paragraph 31 of Annex A), sharing information between Scottish public bodies and the Board is essential for improving the comprehensiveness and accuracy of statistics.

4. Increased data sharing has the potential to bring real benefits in terms of:

- improving statistical analysis and therefore evidence-base for better policy making and resource allocations;

- reducing burden on business (especially small business) of completing surveys on information already held by government;
- addressing problems of declining survey response rates;
- reducing cost to government of conducting surveys.

5. Clauses 45 and 49 perform the same purpose as clauses 44 and 48 (for England and Wales), which allow data sharing to and from the Board and public authorities and clauses 46 and 50 (for Northern Ireland). The Scottish Executive wishes to ensure that devolved Scottish public authorities, such as the General Register Office for Scotland, are not excluded from data sharing available elsewhere in the UK.

6. Data sharing is enabled through regulations, to provide flexibility to share data further in the specific circumstances set out in the regulations. It is not possible to anticipate every case in which the Board might require access to administrative data in departments; some data sets have not yet been created, for example, and statistical – and policy – needs are likely to change such that existing data sets might become useful for statistical analysis. Providing for delegated powers therefore ensures the flexibility for data sharing for statistical purposes to adapt to changing user needs, and developing data sets and statistical practice.

Clause 45 – Power to authorise disclosure to the Board: Scotland

7. Regulations under clause 45 authorise disclosure to the Statistics Board, for statistical purposes, of information held by a Scottish public authority the disclosure of which is prohibited by, or not permitted under, existing Scots law. Subsection (6)(b) allows those regulations to include provision authorising further disclosure by the Board of information disclosed under the regulations, where disclosure by the Board is otherwise prohibited by a rule of law, this Act or an Act passed before this Act.

8. The aim of the wider access to information available from Scottish public authorities under clause 45 is only to improve the range or quality of the statistics produced by the Board.

9. Just as there may be statistical and policy benefits from the Board using data which has come in under clause 45 for statistical purposes, there may be similar statistical and policy benefits from another public authority, sometimes in the devolved administrations, using for statistical purposes the information taken in under clause 45 once the Board has received it (although these possible benefits must be weighed against the confidentiality concerns when making the regulations). In the decentralised UK statistical system, the expertise to achieve benefits from statistical analysis may be found in different public bodies, and as such limited data sharing may sometimes be required. In certain circumstances, it might be necessary to amend the modification to the confidentiality clause made in clause 45(4), in order that the Board can disclose information in connection with its functions or to an approved researcher, to achieve benefits from statistical research. The presumption in the Bill, however, is that onward disclosure for data coming into the Board under clause 45 should not generally be allowed, and as such this can only be made through consequential provision.

Clause 49 – Power to authorise disclosure by the Board: Scotland

10. Similarly, clause 49 enables regulations authorising disclosure by the Statistics Board to Scottish public authorities of information the disclosure of which is otherwise prohibited by existing Scots law. Subsection (6)(b)¹ allows the regulations to include provision authorising further disclosure by a Scottish public authority of the information disclosed by the Board, where disclosure by the Board is otherwise prohibited.

11. In limited circumstances, there may be benefits from a public authority which has received data from the Board under clause 49 in disclosing this data on further to another public authority. The presumption in the Bill, however, is that onward disclosure of data which has come in under clause 49 should not generally be allowed, and as such this can only occur where consequential provision is made.

Safeguards

12. Careful consideration was given to the drafting and the scope of the two clauses. It was necessary to strike an appropriate balance between ensuring the clauses delivered the policy aim of ensuring that, where necessary, provision could be made for further disclosure by the Board (and other public authorities) and ensuring sufficient protections were in place to act as checks on the operation of the powers. Ruling out onward disclosure for data which came in under clause 45 on the face of the Bill would eliminate the possibility of benefits from the Board sharing data which comes in from clause 45 with, in the example above, approved researchers. Consequential provision in the regulations could further restrict disclosure, for example, if the public authority disclosing to the Board only wanted the information to go to certain individuals. Similarly, in limited circumstances, there may be benefits in a public authority being allowed to pass on the information to another public authority.

13. There are further safeguards on the use of the power in 45(6)(b) and 49(6)(b):

- The inclusion of clause 51 also ensures that the regulations may not amend the Data Protection Act 1998 or the Human Rights Act 1998.
- The regulations will not be made unless a draft of the instrument containing the regulations has been laid before and approved by a resolution of the Scottish parliament.
- The regulations made under the powers in clause 45 and clause 49 may only authorise disclosure for statistical purposes.
- The information may only be used by the Board or the public authority for the purposes for which the disclosure is authorised.
- Scottish Ministers may only make the regulations with the consent of the Treasury and where both Scottish Ministers and the Treasury consider that the sharing of information is in the public interest.

12 January 2007

¹ [We have assumed in responding below, that given 49(6)(b) mirrors 45(6)(b) in content, the Committee mean to refer to 49(6)(b) in the letter, not clause 49(7)(b).]