



**SUBORDINATE LEGISLATION COMMITTEE**

**AGENDA**

**8<sup>th</sup> Meeting, 2007 (Session 2)**

**Tuesday 27 February 2007**

The Committee will meet at 10.30am in Committee Room 6.

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

Protection of Vulnerable Groups (Scotland) Bill as amended at Stage 2

and take oral evidence from—

Andrew Mott, Bill Team Leader

Laurence Sullivan, Office of the Solicitor to the Scottish Executive.

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

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

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

the Local Governance (Scotland) Act 2004 (Allowances and Expenses) Regulations 2007, **(SSI 2007/draft)**

the Renewables Obligation (Scotland) Order 2007, **(SSI 2007/draft)**

the Town and Country Planning (Marine Fish Farming) (Scotland) Order 2007, **(SSI 2007/draft)**

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

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

the Housing (Scotland) Act 2001 (Alteration of Housing Finance Arrangements) Order 2007, **(SSI 2007/74)**.

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

the Local Governance (Scotland) Act 2004 (Allowances and Expenses) Regulations 2007, **(SSI 2007/draft)**.

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

the Public Service Vehicles (Registration of Local Services) (Scotland) Amendment Regulations 2007, **(SSI 2007/79)**

the Home Energy Efficiency Scheme (Scotland) Amendment Regulations 2007, **(SSI 2007/85)**

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment) 2007 **(SSI 2007/87)**

the Scottish Police Services Authority (Staff Transfer) Order 2007, **(SSI 2007/88)**

the Police, Public Order and Criminal Justice (Scotland) Act 2006 (Consequential Modifications) Order 2007, **(SSI 2007/89)**

the Scottish Crime and Drug Enforcement Agency (Appointment of Police Members) Regulations 2007, **(SSI 2007/90)**

the Official Controls (Animals, Feed and Food) (Scotland) Regulations 2007, **(SSI 2007/91)**

the Management of Offenders etc. (Scotland) Act 2005 (Specification of Persons) Order 2007, **(SSI 2007/92)**

the Sale of Alcohol to Children and Young Persons (Scotland) Regulations 2007, **(SSI 2007/93)**

the Potatoes Originating in Egypt (Scotland) Amendment Regulations 2007, **(SSI 2007/94)**

the Licensing (Training) (Scotland) Regulations 2007, **(SSI 2007/95)**

the Occasional Licence (Scotland) Regulations 2007, **(SSI 2007/96)**

the Licensing (Designated Airports) (Scotland) Order 2007, **(SSI 2007/97)**

the Licensing Qualification (Scotland) Regulations 2007, **(SSI 2007/98)**

the Common Agricultural Policy Schemes (Cross-Compliance) (Scotland) Amendment Regulations 2007, **(SSI 2007/99)**

the Adults with Incapacity (Conditions and Circumstances Applicable to Three Year Medical Treatment Certificates) (Scotland) Regulations 2007, **(SSI 2007/100)**

the National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2007, **(SSI 2007/102)**

the National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2007, **(SSI 2007/103)**

the Adults with Incapacity (Medical Treatment Certificates) (Scotland) Regulations 2007, **(SSI 2007/104)**

the Adults with Incapacity (Requirements for Signing Medical Treatment Certificates) (Scotland) Regulations 2007, **(SSI 2007/105)**

the Quick-frozen Foodstuffs Amendment (Scotland) Regulations 2007, **(SSI 2007/106)**.

**6. Instruments not laid before the Parliament:** The Committee will consider the following—

the Valuation Timetable (Scotland) Amendment Order 2007, **(SSI 2007/81)**

the Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No. 1) Order 2007, **(SSI 2007/82)**

the Police, Public Order and Criminal Justice (Scotland) Act 2006 (Commencement No. 3, Transitional and Savings Provisions) Order 2007, **(SSI 2007/84)**

Act of Sederunt (Rules of the Court of Session Amendment No. 2) (Fees of Solicitors) 2007, **(SSI 2007/86)**

the Vulnerable Witnesses (Scotland) Act 2004 (Commencement No. 4, Savings and Transitional Provisions) Order 2007, **(SSI 2007/101)**.

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/S2/07/08/1

Agenda Item 1

Delegated powers memorandum (circulated to Members only)

Agenda Item 2

Executive response

[SL/S2/07/08/2](#)

Agenda Item 3

Executive responses

[SL/S2/07/08/3](#)

Agenda Items 4 - 6

Copies of instruments (circulated to Members only)

**SUBORDINATE LEGISLATION COMMITTEE**

**8<sup>th</sup> Meeting, 2007 (Session 2)**

**Tuesday 27 February 2007**

**Executive Response**

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

1. At our evidence session before the Subordinate Legislation Committee on 20 February, officials were asked whether the approach taken to prescribing a scale of fixed penalties, (no limit, governed by negative resolution) as set out in section 25C of the Aquaculture and Fisheries (Scotland) Bill, took a different approach to that for fixed penalties set out in other legislation. This was not information that was to hand so officials offered to investigate recent legislation and to write to the Committee to inform them of their findings by today, 21 February. While we would not claim our survey of existing legislation to be exhaustive, we have uncovered 5 examples of fixed penalties in current legislation which together indicate that our approach was indeed novel.
2. Section 9(2) of the Dog Fouling (Scotland) Act 2003 provides that the level of the fixed penalty shall be twenty percent of level 1 on the standard scale or such other other percentage as the Scottish Ministers may by order prescribe.
3. "Fiscal Fines" under section 302 of the Criminal Procedure (Scotland) Act 1995 follow a similar pattern. Section 302(7) allows the Secretary of State (now the Scottish Ministers) by order, to prescribe a scale of fixed penalties, the amount of the maximum penalty on the scale being a sum not exceeding level 1 on the standard scale.
4. In terms of section 53 of the Road Traffic Offenders Act 1988, the maximum fixed penalty for an offence (specified on the face of the Act) may be varied by order, but only to a maximum of one-half of the maximum penalty for that offence on summary conviction.
5. Each of the three order-making powers referred to above are subject to negative procedure, but this is within the constraint that there is a maximum penalty set out on the face of the Act.
6. Section 25 of the Planning etc. (Scotland) Act 2006 provides for fixed penalties in respect of breaches of planning enforcement notices. There is no limit to the amount which the Scottish Ministers may prescribe as a fixed penalty, but the effect of section 54(16)(f) of that Act is that the orders prescribing the scale of penalties are subject to affirmative procedure.
7. Under paragraph 4(1) of schedule 1 to the Smoking, Health and Social Care (S) Act 2005 (asp 13) the fixed penalty for any offence under section 1, 2 or 3 is such amount as may be prescribed. The Act does not specify a maximum level of fixed penalty for smoking /smoking related offences but – like the approach taken by the

Planning etc. (Scotland) Act – the regulations prescribing the amount are subject to affirmative procedure (see sections 41 (definition of "prescribed") and 40(3)).

8. It therefore appears that the approach proposed in section 25C of the Aquaculture and Fisheries (Scotland) Bill of neither specifying a maximum penalty in the primary legislation nor providing for the order fixing the scale of penalties to be subject to affirmative procedure is out of line with existing precedents.

9. While we remain of the view that a fixed penalty scheme would be self-limiting because setting unrealistically high levels would mean the scheme would not work; we recognise the Committee's concerns about the need to set a limit on the face of the Bill. Taking account of the precedent of other fixed penalty schemes in legislation, the Executive therefore intends to bring forward an amendment at Stage 3 so as to prescribe a limit to the scale of fixed penalties introduced by section 25C of the Bill.

10. This amendment will be laid as soon as possible before the deadline of Friday 23 February.

11. To aid the Committee in its consideration of the issue of administrative penalties for sea fisheries offences, I attach the letter I sent to the Convener of the Environment and Rural Development Committee on 3 November 2006. Annex B to this letter sets out a detailed explanation of the policy and Annex C lists the likely offences that would be listed as 'relevant offences'.

**SUBORDINATE LEGISLATION COMMITTEE**

**8<sup>th</sup> Meeting, 2007 (Session 2)**

**Tuesday 27 February 2007**

**Executive Responses**

**The Local Governance (Scotland) Act 2004 (Allowances and Expenses) Regulations 2007, (SSI 2007/draft); and  
The Local Electoral Administration and Registration Services (Scotland) Act 2006 (Commencement No. 2 and Transitional Provisions) Order 2007, (SSI 2007/26)**

1. Thank you for your letter of 14 February on the Local Electoral Administration and Registration Services (Scotland) Act 2006 (Commencement No. 2 and Transitional Provisions) Order 2007, SSI 2007/26. In this letter I am also replying to your letter of 20 February on the draft Local Governance (Scotland) Act 2004 (Allowances and Expenses) Regulations 2007.

**Combining powers – general**

2. The Executive is aware of the difficulties which can be caused when a single instrument makes provision in exercise of powers subject to different procedures. The Executive's general position, as indicated in the Guidance referred to in your letter, is that such exercise of powers in one instrument is likely to give rise to procedural difficulties, and should be avoided unless clearly contemplated by the enabling Act.

3. Having said that, the Executive considers that there will be some cases in which it is appropriate to make such an instrument, in particular in the interests of the ultimate users of the legislation.

4. A recent example is the Tweed Regulation Order 2007 (SSI 2007/19). As the Executive explained to the Committee, the purpose of that Order was to bring together in one document all the subordinate legislation relating to the rivers in the Tweed district, so that all the relevant orders could be identified in a single instrument, with significant benefit to the users of the legislation. There have been similar cases in previous SSIs. For example, The Land Tribunal for Scotland Rules 2003 (SSI 2003/452). This used powers in section 3 of the Lands Tribunal Act 1949 (no procedure) with powers in sections 101 and 104 of the Title Conditions (S) Act 2003 (negative procedure). Both sets of powers are to do with procedural rules for the Tribunal and it would have been difficult, not at all user-friendly, and would have involved a fair amount of duplication, to try and separate them out. Another example is the Compulsory Purchase of Land (S) Regs 2003 (SSI 2003/446).

5. The Executive notes the Committee's technical point about the effect of a successful motion to annul any such instrument. However, the Executive considers that that point should not, in practice, give rise to any legal or other practical difficulty. In the event of any successful motion to annul, the relevant instrument would require to be

revoked (see article 11(4) of The Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments Order) 1999 (SI 1999/1096)). Thus, the composite instrument would be revoked. However, a further instrument could then be made, with effect from the time of revocation of the first instrument, replicating the provisions of the first instrument that were made under the power that is subject to no procedure. It would be for decision at that time whether or not those provisions should be contained in a single instrument subject to no procedure or, again, be made in a composite order. Either way, the effect of article 11(5) of SI 1999/1096 would be to preserve the validity of anything done under the revoked instrument. So no legal or other practical difficulties should, in the Executive's view, arise in such a case.

### **Combining powers – affirmative and negative**

6. As far as combining affirmative and negative powers is concerned, the Executive acknowledges that this is not in line with our normal practice. In the case of the draft Allowances and Expenses Order, the Executive again considered that the approach taken would assist the user and Parliament in having the "package" of allowances available in one instrument. However, as there are potential difficulties with this approach, the instrument will now be split into two separate instruments. The potential benefits for Parliament and end-users in being able to combine procedures (particularly where a more rigorous scrutiny procedure is chosen) is something which may be worth exploring further, perhaps in the context of the Statutory Instruments Bill in a future Parliament.

### **Conclusion**

7. The Executive does not agree that every instrument made in exercise of two powers each of which are subject to different procedure always involves a failure to follow proper legislative practice. We think there can be advantages if one of the powers is not subject to procedures. However, we accept that currently it is not desirable to combine in one instrument exercise of separate powers that are subject to affirmative and negative procedures.



### **The Renewables Obligation (Scotland) Order 2007, (SSI 2007/draft)**

1. On 20 February 2007 the Committee asked the Executive for an explanation of the following matter:

“The Committee asks the Executive to explain the reference in article 24(4)(b) to subparagraph (c) where no such subparagraph exists.”

#### **The Scottish Executive responds as follows:**

2. The Scottish Executive thanks the Committee for bringing this drafting error to our attention. The reference to sub-paragraph (c) is erroneous and should have been deleted during the drafting process. As there is no sub-paragraph (c), the Executive does not consider that the words have any legal effect, though acknowledge that they should not be there and apologise for the error.

### **The Town and Country Planning (Marine Fish Farming) (Scotland) Order 2007, (SSI 2007/draft)**

1. On 20<sup>th</sup> February the Committee asked for an explanation of the following matters—

2. The Committee asks the Executive the following—

(a) given that the power in section 26(6C) of the 1997 Act is subject to the consultation requirement in section 26(6H) of that Act, to explain why the preamble does not cite the provision under which consultation has been carried out, in accordance with normal drafting practice;

(b) to explain which provisions in the instrument rely on section 58 of the 2006 Act;

(c) if any of those provisions do not add, replace or omit the text of an Act, to explain why the instrument combines affirmative and negative procedure; and

(d) to explain whether in the definition of “fish farm development” in article 11(2)(a) “and” should be “or”.

#### **The Scottish Executive responds as follows:**

##### **Question (a)**

3. The Executive recognise that it would accord with normal drafting practice to cite the provisions under which consultation has been carried out and acknowledge that it would as a matter of style have been preferable for the draft Order to have done so.

##### **Question (b)**

4. The amendment made to the Town and Country Planning (Scotland) Act 1997 by article 8(4) of the draft Order relies on the powers contained in section 58 of the Planning etc. (Scotland) Act 2006. Article 8(4) makes a consequential change to the 1997 Act following upon the introduction of section 31A by section 4(2) of the 2006 Act. Section 31A relates to planning permission for the operation of existing marine fish

farms. The change to section 36 of the 1997 Act relates to the inclusion on planning registers of information relating to the grant or refusal of such planning permission. The powers contained in section 26(6C) do not relate to the operation of existing marine fish farms but to the application of planning legislation to the placement or assembly of equipment in marine waters or the change of use of such equipment. The draft Order therefore relies on powers in both section 26(6C) of the 1997 Act and in section 58 of the 2006 Act.

### **Question (c)**

5. Article 8(4) of the draft Order adds to the text of an Act.

### **Question (d)**

6. The Executive consider that the definition of “fish farm development” in article 11(2)(a) of the draft Order correctly refers to “and”. The definition of “fish farm development” is intended to relate to the placement or assembly of equipment in marine waters and also to a material change of use of that equipment.

### **The Avian Influenza (Preventive Measures) (Scotland) Order 2007, (SSI 2007/69)**

1. On 20 February 2007, the Subordinate Legislation Committee, having considered the above instrument, asked 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.

### **The Scottish Executive responds as follows:**

2. The Executive welcomes the opportunity to provide clarification in relation to this matter.

3. Section 1 of the Animal Health Act 1981 provides–

#### **“1. General powers of Ministers to make orders.**

The Ministers may make such orders as they think fit:

(a) generally for the better execution of this Act, or for the purpose of in any manner preventing the spread of disease; and

(b) in particular for the several purposes set out in this Act, and for prescribing and regulating the payment and recovery of expenses in respect of animals.”

4. Article 5 of the Order imposes requirements on certain persons so as to enable the Scottish Ministers to identify premises where 50 or more poultry are kept. Article 6 allows such requirements to be extended to other premises where poultry or other captive birds are kept. Article 7 relates to ensuring the monitoring of compliance with the Order.

5. In relation to articles 5 and 6, the identification of premises where poultry and other captive birds (which are susceptible to avian influenza) are kept is an integral part of disease control. This is because it allows the Scottish Ministers to make early contact with birdkeepers in the vicinity of a suspected or confirmed outbreak (whether in poultry, captive or wild birds) and ensure that those keepers are aware of the situation and taking the necessary steps to prevent the spread of the disease. The identification of premises facilitates the planning and undertaking of veterinary surveillance so that any signs of disease are picked up without delay, and appropriate measures taken. Speed of reaction to a suspected or confirmed outbreak has in the past proven to be a critical factor in minimising the risk of disease spread. As such, it is considered that articles 5 and 6 have the purpose of preventing the spread of disease and are enabled by section 1.

6. Similarly, in relation to article 7, ensuring compliance with the Order has the same purpose as articles 4, 5 and 6, which is that of preventing the spread of disease.

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

1. On 20 February 2007 the Committee asked the Executive the following—

“to explain the reason for the delay between the making and laying of this Order.”

**The Scottish Executive responds as follows:**

2. The delay between the making and laying of this Order was caused by the absence from work of the official responsible for laying the Order.

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

1. On 20 February 2007 the Committee asked the Executive the following:—

- (a) To explain the purpose of the definition of the word “year” in article 2 which does not seem to be a term used in the Order; and
- (b) To explain the reason for the delay between the making and laying of this Order.

**The Scottish Executive responds as follows:**

- (a) The word “year” appeared in earlier drafts of the Order and unfortunately the definition was not deleted when the word was removed. We do not consider that the meaning of the instrument is affected.
- (b) The delay between the making and laying of this Order was caused by the absence from work of the official responsible for laying the Order.