The Scottish Parliament

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

15th Meeting, 2005 (Session 2)

Tuesday 10th May, 2005

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

1. Item in private: The Committee will consider whether to take agenda item 6 in private.

2. Delegated powers scrutiny: The Committee will consider a response from the Executive on the delegated powers provisions in the following Bill — Management of Offenders etc. (Scotland) Bill at Stage 1.

3. Executive responses: The Committee will consider responses from the Executive to points raised on the following —

   the Water Environment (Controlled Activities) (Scotland) Regulations 2005, (SSI 2005/draft)
   the Horse Passports (Scotland) Regulations 2005, (SSI 2005/223)
   the Land Management Contracts (Menu Scheme) (Scotland) Regulations 2005, (SSI 2005/225).

4. Executive response: The Committee will consider a response to general questions raised on the implementation of EU directives in relation to the Plant Health (Import Inspection Fees) (Scotland) Regulations 2005, (SSI 2005/216).

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

   the Materials and Articles in Contact with Food (Scotland) Regulations 2005, (SSI 2005/243)
   the Fireworks (Scotland) Amendment Regulations 2005, (SSI 2005/245)
the Feed (Corn Gluten Feed and Brewers Grains) (Emergency Control) (Scotland) Regulations 2005, (SSI 2005/246).

6. **Annual report**: The Committee will consider its draft annual report.

Ruth Cooper
Clerk to the Committee
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The following papers are relevant to this meeting:

**Agenda Items 1-3 and 5**

Legal Brief (Private) – to follow SL/S2/05/15/1

**Agenda Item 2**

Executive response SL/S2/05/15/2

**Agenda Item 3**

Executive response SL/S2/05/15/3

**Agenda Item 4**

Executive response SL/S2/05/15/4

**Agenda Item 5**

Copies of instruments (circulated to Members only)

**Agenda Item 6**

Draft annual report (Private) SL/S2/05/15/5
MANAGEMENT OF OFFENDERS ETC. (SCOTLAND) BILL AT STAGE 1

On 3 May 2005 the Committee asked the Executive for an explanation of the following matters –

“The Committee noted that Orders made under section 2(1) are potentially wide in scope and may make provision for a number of key facets of a Community Justice Authority (CJA). The Committee recognised the Executive’s intention to consult with key stakeholders before making provision under this section but seeks clarification in relation to consultation on future Orders, given that a specific requirement is not included on the face of the Bill.

The Committee would also welcome clarification of the Executive’s intentions in relation to future consultation on Orders made under section 5(12) which allows Ministers to amend the list of bodies specified in section 5(2).

The Committee considered that, given the discretion conferred on local authorities and CJAs in section 7(3), Ministers may use section 7(2) to transfer functions by Order against a background of a failure of the CJA and local authorities to agree to that transfer voluntarily. The Committee therefore also seeks clarification on the Executive’s future plans to consult in relation to section 7(2).

On a related point, the Committee would also be grateful for the Executive’s comment on its plans to consult before using the power in relation to the amendment of local authority duties under section 14(1)(b).”.

The Scottish Executive responds as follows:

Section 2(1)

The Executive agrees that the Orders made under section 2(1) are potentially wide in scope. It is for that reason that such Orders will be made under affirmative procedure by virtue of the provisions of section 2(18)(a). In accordance with its usual practice the Executive would intend consulting with interested parties before laying a draft of the Order although it recognises that there may be circumstances where such consultation is either unnecessary or inappropriate. The Executive does not consider it appropriate therefore to impose a statutory requirement to consult. The Executive cannot commit future Administrations to continuing with the current policy regarding consultation.
Section 5(12)

In recognition of the significance of the power to amend section 5(2) by subordinate legislation the Executive considers it appropriate that any such Order should be made by affirmative procedure and provision for that has been included in section 5(13). The comments made regarding consultation in connection with section 2(1) also apply in connection with this section. The Executive would intend consulting with interested parties before laying a draft of the Order although it recognises that there may be circumstances where such consultation is either unnecessary or inappropriate. The Executive does not consider it appropriate therefore to impose a statutory requirement to consult. The Executive cannot commit future Administrations to continuing with the current policy regarding consultation.

Section 7(2)

The Executive considers that a distinction can be drawn between the provisions of section 7(2) and section 7(3). In terms of section 7(2) Ministers will have the power by Order to provide that functions currently exercisable by local authorities by virtue of section 27(1) of the Social Work (Scotland) Act 1968 will be exercisable instead by one or more than one Community Justice Authorities. In terms of section 7(3) a Community Justice Authority and each local authority within the area of that Community Justice Authority may jointly determine that functions will be exercisable on behalf of the local authorities by the Community Justice Authority. The Executive would not accept that the provisions of section 7(2) and section 7(3) achieve exactly the same result. Accordingly the Executive considers that the circumstances in which one provision applies may not be the same as the circumstances in which the other applies.

An Order made under section 7(2) will be made by affirmative procedure by virtue of section 7(5). The comments made regarding consultation in connection with section 2(1) also apply in connection with this section. The Executive would intend consulting with interested parties before laying a draft of the Order although it recognises that there may be circumstances where such consultation is either unnecessary or inappropriate. The Executive does not consider it appropriate therefore to impose a statutory requirement to consult. The Executive cannot commit future Administrations to continuing with the current policy regarding consultation.

Section 14(1)(b)

An Order made under section 27(1B) of the Social Work (Scotland) Act 1968, inserted by section 14(1)(b) of the Bill, will be made by affirmative procedure. This is provided for by virtue of proposed section 90(4) of the 1968 Act inserted by section 14(3) of the Bill. Since the power conferred by proposed section 27(1B) involves amendment of primary legislation (namely the provisions of section 27(1) of the 1968 Act) the Executive considers it appropriate that such an Order should be made by affirmative procedure. The
comments made regarding consultation in connection with section 2(1) also apply in connection with this section. The Executive would intend consulting with interested parties before laying a draft of the Order although it recognises that there may be circumstances where such consultation is either unnecessary or inappropriate. The Executive does not consider it appropriate therefore to impose a statutory requirement to consult. The Executive cannot commit future Administrations to continuing with the current policy regarding consultation.
The Water Environment (Controlled Activities) (Scotland) Regulations 2005 (SSI 2005/draft)

In its letter of 3rd May to Catherine Hodgson the Subordinate Legislation Committee sought an explanation of the following matters.

The Committee seeks confirmation that the enabling powers cited in the preamble which are not yet commenced will be commenced before the earliest commencement date provided for in Regulation 1 of the Regulations.

The Department responds as follows:

We confirm that all enabling powers cited in the preamble will be brought into force before the Regulations are made.

The Committee also asks for an explanation of the purpose of regulation 20(1) in so far it applies regulation 12 to variations initiated by SEPA.

The Department responds as follows:

Regulation 12 is applied in regulation 20 to ensure that SEPA can recover a charge in respect of the variation. This is in line with SEPA’s general duty to recover the costs associated with its regulatory functions, and complies with the “polluter pays” principle of Community environmental law. Regulation 12 is also applied to ensure that SEPA can obtain the information it requires to enable it to make such variation as is appropriate in the circumstances of the case.
On 3rd May 2005 the Subordinate Legislation Committee considered the above instrument and sought explanations of the following matters:-

1. The Committee asked the Executive for clarification as to why the enabling power at section 2(2) of the European Communities Act 1972 was used in preference to the powers in the Animal Health Act 1981, under which the Horse Passports Order 1997 was made.

The Scottish Executive responds as follows:-

2. The Executive is grateful to the Committee for raising this point and allowing it to clarify this matter. It was considered appropriate in this case to use the powers under section 2(2) of the European Communities Act 1972, rather than powers under the Animal Health Act 1981, as the measures in question do not relate to animal health. Also, by using powers under section 2(2) of the 1972 Act the Executive is able to ensure that breaches of the Regulations are capable of being tried both summarily and on indictment and punishable by both fines and imprisonment. The powers under the Animal Health Act 1981 would only have allowed prosecution summarily and punishment with a maximum penalty of a fine of level 5 on the standard scale or imprisonment of 1 month for a second or subsequent offence.

3. The Committee asked the Executive for an explanation of the difference in terms in the definition of “horse” between Directive 90/426/EEC and the Regulations.

4. The Executive is, again, grateful to the Committee for noting this difference and allowing the Executive to clarify. During the consultation of the Regulations it came to the Executive’s attention that there are no wild horses in Scotland. Accordingly, the Executive do not consider it necessary to include “wild horses” in the definition “horse” for the purposes of the Regulations.

5. The Committee asked for clarification as to why Commission Decision 2000/68/EC is only now being implemented when Article 4 of the Decision requires Member States to ensure compliance “as from 1 July 2000 at the latest”.

6. The Executive acknowledges and regrets the delay in implementation in this particular case. This is partly as a result of the extensive consultation which took place. Further, proposals for work on implementation of the Decision were also delayed by the ensuing foot and mouth crisis and the efforts required to deal with that.
The Land Management Contracts (Menu Scheme) (Scotland) Regulations 2005, (SSI 2005/225)

1. On 3rd May the Committee asked the Executive for an explanation of the following matters-

“The Committee notes that regulation 3(1) is “subject to paragraph (4)”. As there is no paragraph (4) in regulation 3, the Executive is asked for an explanation.

The Committee asks for clarification as to whether regulation 21(3) means that proceedings may not be commenced later than 6 months after an offence is committed.

The Explanatory Note to the instrument notes that no Regulatory Impact Assessment has been prepared in respect of these Regulations. Given their obvious impact on farming business, the Committee asks why a RIA was not prepared.”

The Scottish Executive responds as follows:

First question

2. This is an error. Regulation 3(1) should have read “subject to paragraph (2)”. This error will be remedied at the next convenient legislative opportunity. It is submitted that, notwithstanding this error, there is no real difficulty in discerning the meaning of regulation 3. Under paragraph (1) an application for aid must be made and, under paragraph (2), if the Scottish Ministers suspend the scheme “no application under paragraph (1) may be submitted to them.” It remains clear that applications for aid need not be submitted at times when the operation of the scheme itself has been suspended.

Second question

3. Yes, regulation 21(3) means that proceedings may not be commenced later than 6 months after an offence is committed.

Third question

4. A Regulatory Impact Assessment was not prepared in respect of these Regulations because the Land Management Contracts Menu Scheme is an optional scheme which uses funds modulated from the Single Farm Payment Scheme (S.S.I 2003/143, in particular regulation 10). Therefore there is no negative impact on businesses arising from these Regulations.
THE PLANT HEALTH (IMPORT INSPECTION FEES) (SCOTLAND) REGULATIONS 2005 (SSI 2005/216)

1. At its meeting on 26 April the Committee considered the Executive’s response of 21 April and asked for further information on 3 points.

Issue 1

2. The Committee noted that it accepts the practical reasons for the Executive’s use of a 10% uplift in the standard fee but remained concerned over the legal basis for this approach and whether the Regulations are *intra vires*.

3. The Scottish Executive responds as follows:

   The 10% uplift is intended to avoid the situation where, because of exchange rate fluctuations, fees converted into Sterling might fall below the standard fee. It is the Executive’s view that the standard fee, as specified in Annex VIIIa of the Directive, operates as a *de facto* minimum and to fall below that level would risk incompatibility with the Directive. There are a number of arguments in favour of this view. Firstly, Article 13d(5) states that “the standard fee as specified in Annex VIIIa is without prejudice to extra charges to cover additional costs incurred”. The paragraph then proceeds to identify certain circumstances in which the standard fee can be increased, but without moving to full cost recovery. No circumstances are identified which can lead to the standard fee being decreased. This implies that the standard fee is best viewed as a minimum.

   Also Annex VIIIa uses the phrase “maximum price” 11 times and this implies that the other prices stated in the Annex are best viewed as minimum prices which the level of fees should not fall below. Article 13d(2) provides that Member States may either set the level of fee on the basis of a detailed cost calculation or apply the standard fee. In practice the standard fee specified is significantly less than the cost of conducting plant health import inspections. This suggests that the standard fee is best viewed as a minimum, pending Member States moving towards the full cost recovery of inspection fees, as the Executive is committed to doing after 1 year. The fees in the current Regulations are in between the standard fees and what would be the full cost recovery fees.
Given that the standard fee is best viewed as a *de facto* minimum, the 10% uplift is necessary to ensure that the fees charged in Scotland for import inspections do not fall below this minimum, thus risking incompatibility with the Directive. The Executive, when implementing, took the view that, considering the wording and overall purpose of the Directive, specifying fees below the standard fee was more likely to be incompatible with the Directive than specifying fees above the standard fee.

**Issue 2**

4. The Committee asked whether the Scottish Executive or the Department for Environment Food and Rural Affairs sought any advice from the European Commission when preparing their respective Regulations.

5. The Scottish Executive responds as follows:

Member States are free to choose what they consider to be the most suitable means of achieving the result aimed at by a Directive and, therefore, neither the Scottish Executive nor DEFRA obtained advice from the European Commission in advance of preparing their respective Regulations. Of course, as with most Directives, Directive 2002/89/EC contains a notification provision providing that Member States must inform the Commission of the measures they have adopted to implement the Directive and the UK is complying with this requirement.

**Issue 3**

6. The Committee also asked the Executive to confirm whether it is aware of other subordinate legislation implementing Directives, which fails to make any definite provision for conversion of fees into currencies of Member States, which do not have the Euro as their national currency, and, if so, whether the advice of the European Commission was sought in relation to those instruments.

7. The Scottish Executive responds as follows:

Two previous SSIs have been identified which raise a similar issue. These SSIs are:
- the Products of Animal Origin (Third Country Imports) (Scotland) Regulations 2002 (No. 445)
- the Fish Labelling (Scotland) Regulations 2003 (No. 145).

SSI 2002/445 implements Council Directive 97/78/EC and Schedule 5 (Parts II, III and IV) to that instrument contains certain charges for veterinary checks, which are specified in Euros. Regulation 50 (Conversion of Charges to Sterling) provides as follows:

> “Charges expressed in Euros in Schedule 5 shall be converted to pounds Sterling at the rate of conversion published in the “C” Series of the Official Journal of the European Communities in September of the calendar year preceding that in which the relevant veterinary check was carried out.”
SSI 2003/145, regulation 6 (Small Quantities of Products) specifies a similar provision in order to implement Council Regulation (EC) 104/2000. Therefore, both these SSIs contain figures in Euros that are then converted to Sterling in accordance with an exchange rate specified at a certain point in each calendar year. In the Regulations currently at issue, the Executive considered this course of action. However, given exchange rate fluctuations, a yearly conversion would result in the fees sometimes being lower than the standard fee specified in Annex VIIIa of Directive 2002/89/EC. As stated in paragraph 3 above this would risk incompatibility with the Directive because the de facto minimum standard fee would not be complied with. Consequently the 10% uplift was considered to be a more appropriate and accurate way of implementation than linking the fee to an exchange rate specified at a certain point of the year. It is not thought that the advice of the European Commission was sought in relation to either SSI 2002/445 or 2003/145.