



The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

17th Meeting, 2012 (Session 4)

Tuesday 19 June 2012

The Committee will meet at 2.30 pm in Committee Room 6.

1. **Instruments subject to negative procedure:** The Committee will consider the following—

[Wildlife and Countryside Act 1981 \(Exceptions to section 14\) \(Scotland\) Order 2012 \(SSI 2012/173\);](#)

[Wildlife and Countryside Act 1981 \(Keeping and Release and Notification Requirements\) \(Scotland\) Order 2012 \(SSI 2012/174\);](#)

[Trade in Animals and Related Products \(Scotland\) Regulations 2012 \(SSI 2012/177\);](#)

[African Horse Sickness \(Scotland\) Order 2012 \(SSI 2012/178\);](#)

[Homeowner Housing Panel \(Applications and Decisions\) \(Scotland\) Regulations 2012 \(SSI 2012/180\);](#)

[Energy Performance of Buildings \(Scotland\) Amendment Regulations 2012 \(SSI 2012/190\).](#)

2. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

[Wildlife and Natural Environment \(Scotland\) Act 2011 \(Commencement No. 4, Savings and Transitional Provisions\) Order 2012 \(SSI 2012/175 \(C.16\)\);](#)

[Act of Adjournal \(Criminal Procedure Rules Amendment No. 2\) \(Miscellaneous\) 2012 \(SSI 2012/187\);](#)

[Energy Act 2011 \(Commencement No. 1\) \(Scotland\) Order 2012 \(SSI 2012/191 \(C.17\)\);](#)

[Water Services etc. \(Scotland\) Act 2005 \(Commencement No. 6\) Order 2012 \(SSI 2012/192 \(C.18\)\).](#)

3. **Police and Fire Reform (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

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The papers for this meeting are as follows—

Agenda Items 1 and 2

Legal Brief (private)

SL/S4/12/17/1 (P)

Agenda Items 1 and 2

Instrument Responses

SL/S4/12/17/2

Agenda Item 3

[Police and Fire Reform \(Scotland\) Bill \(as amended at Stage 2\)](#)

[Police and Fire Reform \(Scotland\) Bill \(supplementary DPM\)](#)

Briefing Paper (private)

SL/S4/12/17/3 (P)

SUBORDINATE LEGISLATION COMMITTEE

17th Meeting, 2012 (Session 4)

Tuesday 19 June 2012

Instrument Responses

INSTRUMENTS SUBJECT TO THE NEGATIVE PROCEDURE

Wildlife and Countryside Act 1981 (Exceptions to section 14) (Scotland) Order 2012 (SSI 2012/173)**On 8 June 2012, the Scottish Government was asked:**

1. Section 14(2B)(a) of the Wildlife and Countryside Act 1981 (“the 1981 Act”) enables the Scottish Ministers, by order, to specify other types of animals to which subsection (1)(a)(i) or (1)(b) does not apply. Article 2(1) of the Order specifies the types of animal listed in Part 1 of the Schedule to the Order “for the purposes of section 14(2B)(a) of the 1981 Act”. It appears from the heading to Part 1 of the Schedule and from the Executive Note that the intention was to disapply subsection (1)(a)(i) as regards the types of animal listed in Part 1 of the Schedule. However, the instrument does not appear to contain any operative provision to this effect. The Scottish Government is accordingly asked to explain:
 - a. whether it considers that the provision made by article 2(1) effectively identifies the disappplied subsection;
 - b. if it does, the basis for taking that view in the absence of any operative provision to that effect.

2. The note to the Schedule provides that the common names in column 1 of the table in the Schedule are not to be taken into account in any dispute or proceedings, and are provided for guidance only. It accordingly appears that the Latin name in column 2 is the operative provision specifying the types of plant for the purposes of section 14(2B)(b) of the 1981 Act. We note the following apparent errors in the Schedule. The Scottish Government is asked to explain whether it considers that these are in fact errors. If so, it is asked to explain the effect of each error and how it intends to correct it.
 - c. Corn spurrey: the Latin name is given as *Spregula arvensis* when it appears that it ought to be *Spergula arvensis*;
 - d. Nootka cypress: the Latin name is given as *Chamaecyparis nootkatensis* but it appears that this tree may have been redesignated *Cupressus nootkatensis*;
 - e. Petty spurge: the Latin name is given as *Euphorbia peplus*. It appears that this is a reference either to *Euphorbia peplus* (petty spurge) or *Euphorbia peplis* (purple spurge);
 - f. *Tilia cordata*: the common name appears to be given incorrectly as Small-leaved ime instead of Small-leaved lime.

The Scottish Government responded as follows:

1. The Scottish Government considers that the instrument requires to be read as a whole and that there is a respectable argument that article 2(1) alongside the heading in Part 1 to the Schedule effectively identifies the disapplied section. Section 14(1)(a)(i) make it an offence for any person to release, or allow to escape from captivity, any animal to a place out-with its native range. Section 14(2B)(a) enables the Scottish Ministers to specify by order other types of animals to which subsection (1)(a)(i) or (1)(b) does not apply. The Scottish Government considers that the operative provision is the reference to section 14(2B)(a) in article 2(1) of the Order. This read alongside the reference in the heading to Part 1 of the Schedule to the Order makes it clear that the types of animal listed in Part 1 of the Schedule are the types of animal to which the offence in section 14(1)(a)(i) does not apply.

2. The Scottish Government agrees that there are typographical errors in the listing of *Spergula arvensis*, *Euphorbia peplus* and Small-leaved lime.

The Scottish Government notes that there are differences in expert opinion on the taxonomic classification of Nootka cypress. Both *Chamaecyparis nootkatensis* and *Cupressus nootkatensis* are in use.

The Scottish Government accepts that the typographical errors referred to in paragraph 2 require correction and accordingly will remedy these errors and lay an amending instrument prior to the summer recess. The Scottish Government will take the opportunity to clarify the position in relation to Nootka cypress.

Wildlife and Countryside Act 1981 (Keeping and Release and Notification Requirements) (Scotland) Order 2012 (SSI 2012/174)

On 8 June 2012, the Scottish Government was asked:

1. Article 2 and Part 1 of Schedule 1 to the Order together bear to specify that it is an offence in terms of section 14(1)(a)(ii) of the Wildlife and Countryside Act 1981 (“the 1981 Act”) to release, or to allow to escape from captivity any animal of the species of the genus *Cervus* (deer) on, inter alia, the island of “Aaran”. It appears that this provision was intended to create that offence in relation to the island of Arran. Given that these provisions taken together create a criminal offence, does the Scottish Government consider that it has effectively specified the island of Arran for the purposes of that offence? If not, does the Scottish Government intend to remedy this error?
2. The note to the Schedule provides that the common names in column 1 of the tables in Parts 1, 2 and 3 of the Schedule are not to be taken into account in any dispute or proceedings, and are provided for guidance only. It accordingly appears that the Latin name in column 2 is the operative provision in the table in Part 2 specifying the types of invasive animal for the purposes of section 14ZC(1)(a) of the 1981 Act. We note the following apparent errors in the Schedule. The Scottish Government is asked to explain whether it considers that these are in fact errors. If so, it is asked to explain the effect of each error and how it intends to correct it.
 - a. Blaeon: the Latin name is given as *Leuciscus souffia*, but it appears that this fish may have been reclassified as *Telestes souffia*;
 - b. European bitterling: the Latin name is given as *Rhodeus sericeus*, but it appears that that name refers to the Amur bitterling and that the European bitterling is referred to as *Rhodeus amarus*;
 - c. Pikeperch: the Latin name is given as *Stizostedion lucioperca*, but it appears that this fish may have been reclassified as *Sander lucioperca*;
 - d. Toxostome (or French nase): the Latin name is given as *Chondrostoma toxostoma*, but it appears that this fish may have been reclassified as *Parachondrostoma toxostoma*.

The Scottish Government responded as follows:

1. The Scottish Government considers that it has not effectively specified the Island of Arran for the purposes of the offence and accordingly intends to remedy this error at the earliest opportunity and lay an amending instrument prior to summer recess.
2. The Scottish Government accepts that the species Blaeon has now been reclassified as *Telestes souffia*; Pikeperch has now been reclassified as *Sander lucioperca* and Toxostome (or French nase) has now been reclassified as *Parachondrostoma toxostoma*. The Scottish Government takes the view that *Rhodeus sericeus* is still considered a valid name for European bitterling, but accepts that including *Rhodeus amarus* also would eliminate any room for doubt. The Scottish Government intends to lay an amending instrument prior to the summer recess which will reflect the reclassified names.

**Trade in Animals and Related Products (Scotland) Regulations 2012
(SSI 2012/177)****On 8 June 2012, the Scottish Government was asked:**

1. Regulation 33 makes a failure to comply with the following provisions without reasonable excuse a criminal offence.
 - a. Should the reference to regulation 25(5) in fact be a reference to regulation 25(4)? If so, what is the effect of this error and does the Scottish Government propose to amend this.
 - b. Regulation 6(6) provides that no person may sign a certificate knowing it to be false. Can the Scottish Government explain in what circumstances it considers it would be reasonable to sign a statement which the person knows to be false?
 - c. Regulation 23(3) requires the importer to directly transport a consignment or destroy it "as animal by-products". Can the Scottish Government explain what "destroy the consignment as animal by-products" requires and whether this is sufficiently clear to impose criminal liability if it is not complied with?
 - d. Paragraph 5(2) of Schedule 2 and regulation 33 describe the subject matter of the offence as the keeping of records but article 8 of the relevant Commission regulation also makes provision about the keeping of animals. Is each provision within article 8 intended to be covered by the offence provision and if so is this clear?
 - e. Paragraph 6 of Schedule 2 requires that the consignment of certain products to another member State or the bringing in of such products to Scotland from another member State must comply with article 48 of regulation EC 1069/2009. That article imposes various conditions for import and export, some of which must be carried out by the competent authority. Other requirements are not clearly stated as to who is responsible for fulfilling them, such as the sealing of containers. Can the Scottish Government explain which of the requirements must be fulfilled and by whom in order to avoid criminal liability under regulation 33 and whether this is clear?
2. Can the Scottish Ministers explain why it considers the power delegated to Ministers to suspend etc. the entry of products the Scotland under regulation 25(2) by written declaration which is intended to have legal consequences (failure to comply with it is a criminal offence) is permitted by paragraph 1 of Schedule 2 to the European Communities Act 1972.
3. Paragraph 1 of Schedule 4 inserts a new part 3A into the Bluetongue (Scotland) Order 2008 using the power in section 2(2) of the European Communities Act 1972 to do so. New article 18A(1) prohibits the export of certain products unless certain EU requirements are complied with. Is it intended that this prohibition is to be enforced by way of a criminal offence? If that is the case, how is this to be done since neither the 2012 regulations, nor the 2008 Order make it an offence. Article 18A having been made using the powers in section 2(2) of the 1972 Act would not appear to be covered by the scope of section 73 of the Animal Health Act 1981. It is

that section which provides for the enforcement through the criminal law of the provisions currently in the 2008 Order which were made using the powers in the 1981 Act. If it is not intended to enforce this provision by way of a criminal offence has the EU requirement referred to been implemented effectively?

4. Is it intended that the reference to Regulation 1266/2007 in new article 18A(1) of the 2008 order is ambulatory in its effect? In order to achieve that it would appear that the defined term used in the 2008 order "Commission Regulation" should have been used, since this is what attracts the ambulatory reference but the provision does not do so.

The Scottish Government responded as follows:

1a. The reference to regulation 25(5) should indeed be a reference to regulation 25(4). The Scottish Government will bring forward an amendment to regulation 33 to correct the reference by 1st July 2012.

1b. It is accepted that the "reasonable excuse" defence in regulation 33(d) is stated too widely in that it applies to the offence of failing to comply with regulation 6(6). The Scottish Government will bring forward an amendment to regulation 33 to correct the reference by 1st July 2012.

1c. Regulation 23(3)(b) is intended to give the importer the option of destroying the consignment in accordance with the relevant legislative requirements concerning animal by-products, which are principally to be found in Regulation (EC) No 1069/2009. It is considered that the current framing of the provision would be sufficiently clearly understood in practice that it is unlikely that any significant difficulties would arise. But again, in order to avoid any risk of confusion, the Scottish Government will bring forward an amendment to regulation 23(3)(b) at the same time as the amendments mentioned above.

1d. It is intended that a contravention of any part of Article 8 of Commission Regulation (EC) No 1739/2005 is an offence. It is accepted that the parenthetical description of that provision in paragraph 5(2) of Schedule 2, and the description of it in the table in regulation 33, refer only to the keeping of records. While it is acknowledged that the description could have been framed in wider terms, it is considered that it, like all such descriptions, acts only as a signpost for the reader and does not override the fact that the provisions refer to Article 8 without qualification. Paragraph 5(2) of Schedule 2 may be usefully contrasted with paragraph 5(3), in which a reference to a single paragraph of Article 10 of the Commission Regulation is made.

1e. Paragraph 6 of Schedule 2 provides that animal by-products may only be consigned to another member State or brought into Scotland from another member State in accordance with that Article. It would be the failure to consign or bring in (as the case may be) animal by-products to which Article 48 of Regulation 1069/2009 applies in accordance with that Article which would be an offence under regulation 33. The responsibility therefore falls on the person who is consigning or bringing in such animal by-products.

2. Paragraph 1(1)(c) of Schedule 2 to the 1972 Act provides that the powers conferred by section 2(2) of the 1972 Act do not include power to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal. For the purposes of that paragraph, sub-paragraph (2) goes on to provide that a power to give directions as to matters of administration is not to be regarded as a power to legislate within the meaning of paragraph 1(1)(c).

In the present case, the Scottish Government considers that regulation 25 does not involve the conferral on the Scottish Ministers or the Food Standards Agency of a power to legislate but is instead the conferral of a power to take administrative action. A useful distinction may be drawn between the general and the particular and that a legislative act is the creation and promulgation of general rules of conduct without reference to particular cases. Regulation 25 confers power on the Scottish Ministers and the Food Standards Agency to take specific action in relation to a particular threatening disease, zoonosis, phenomenon or event arising in a particular third country (or part of a third country). In the view of the Scottish Government, regulation 25 is accordingly more properly characterised as the conferral of a power to take administrative action to deal with a particular event. It is not thought that the fact that failure to comply with a declaration is a criminal offence in and of itself means that the declaration is a legislative act, given that many functions which are clearly not legislative in character are enforced in this way.

3. It is indeed intended that a failure to comply with new article 18A(1) of the 2008 Order, or a notice served under new article 18A(2), is to be enforced by way of a criminal offence. In formulating this provision the Scottish Government has overlooked the fact that section 73 of the 1981 Act makes a criminal offence only something which is a failure to comply with a provision made in an order under that Act and, accordingly, that in order to make these provisions criminal offences under the 2008 Order it would be necessary to declare them to be offences against the 1981 Act by way of an exercise of the power conferred by section 72 of the 1981 Act. The Scottish Government is grateful to the Committee's legal adviser for pointing this out and will bring forward an amendment to address this point at the same time as the amendments mentioned above.

4 The Scottish Government accepts that by not using the defined expression "Commission Regulation" the reference to Regulation 1266/2007 in new article 18A(1) of the 2008 Order is not ambulatory in its effect. As indicated in the preamble to the instrument, it is only the EU instruments set out in Schedule 1 which are intended to be ambulatory.

African Horse Sickness (Scotland) Order 2012 (SSI 2012/178)

On 8 June 2012, the Scottish Government was asked:

Several provisions of the Order, for example, articles 17(5), 18(9) and 19(3)(b), appear to delegate to the Scottish Ministers the ability, when issuing declarations under those articles, to specify that other measures are to apply. Also, articles 9(11) and 10(10) appear to delegate similar powers to the Chief Veterinary Officer relative to measures which may be taken following suspicion of disease.

1. Can the Scottish Government explain the vires for these powers, which would enable further unspecified measures to be imposed, and in relation to unspecified persons, given that the enabling powers cited do not specifically permit such delegation? Further, and having regard to section 73 of the 1981 Act, what is the intended legal effect of the provisions concerned and how are they to be enforced?
2. To explain whether, in the absence of further definition, it is considered to be sufficiently clear what is meant by the term “non-captive horse”, in relation to which the Order makes provision at article 16 and elsewhere. Can it also be explained how provisions relating to the requirement to pay compensation (article 32) are to be applied given that ownership of such a horse may, presumably, be unknown?

The Scottish Government responded as follows:

1. In making these provisions, the Scottish Ministers proceed in reliance on section 1 of the 1981 Act. This empowers them to make such orders as they think fit for (among other things) the purpose of in any manner preventing the spread of animal disease. This is clearly a broad power. It is thought that these provisions are within that power. Given the nature of animal disease, it is thought that section 1 extends to the setting out of a suitable framework giving appropriate authorities an appropriate package of functions for tackling those diseases in specific cases which occur. It is further thought that section 1 extends to those authorities being given appropriate discretion in relation to the measures which are necessary in a given case of disease, given the wide range of possibilities which may be faced and the impossibility of catering for all of them, exactly, in an Order prepared in advance. The functions concerned are exercisable only within the general framework of disease control laid down by the Order in the context of a particular case in which premises have, or are to have, a particular disease control status. And they are exercisable only where the authority concerned considers that to do so would be necessary to prevent the spread of African horse sickness virus in that particular case. It is thought that this is within the power conferred by section 1 and does not amount to unauthorised delegation of that power.

It is considered that a person who failed to comply with a measure imposed under these provisions would commit an offence under section 73 of the 1981 Act. The powers in articles 9(11) and 10(10) are exercisable by way of the notice declaring the premises concerned to be “infected premises”. Article 26(2) provides that “A person must comply with the terms of any notice served under this Order”. Article 25(3) provides that “Any person on whom a restriction or other measure is imposed by virtue of article 17(5), 18(9) or 19(3) must comply with it.” It is accordingly

considered that a person who does not comply with a measure imposed using any of these powers would be failing to do a thing which by the Order the person is required to do. Section 73(b) of the 1981 Act makes it an offence against the Act where a person, without lawful authority or excuse, fails to do anything which by an order of the Scottish Ministers the person is required to do.

2. Article 16 of the Order makes provision where a veterinary inspector suspects that a “non-captive horse” may be infected with African horse sickness virus. The measures which may be taken are different to the general arrangements which Part 3 makes in relation to horses which may have African horse sickness virus because of the different circumstances which are faced when a horse is not captive. For example, article 16(6)(b) confers power to “capture and detain” a non-captive horse. The Scottish Government considers that it is sufficiently clear in the context that a “non-captive horse” is one which is not living in a controlled environment but is, instead, essentially roaming free. It is thought that veterinary inspectors are well placed to make the appropriate assessment of that matter.

Article 32 places the Scottish Ministers under a legal obligation to pay compensation to the owner of a horse killed under the Order. As is pointed out, this includes non-captive horses killed under article 16. It is correct that the ownership of such a horse may, at the time of its killing, be unknown. It is considered that in these circumstances, compensation is, realistically, only payable if a person comes forward and proves the person’s ownership of the horse. It is not thought that article 32 can reasonably be read as requiring the Scottish Ministers to pay compensation where no such claim is made.

Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 (SSI 2012/180)**On 8 June 2012, the Scottish Government was asked:**

Regulation 24 specifies when a homeowner housing committee will be deemed to be properly constituted, in the absence of a member of the committee. It states that is the position, if at or after the beginning of a hearing, a member of the committee other than the chairman is absent, if the parties consent to the hearing being conducted by the chairman and the remaining member. No provision is made in the Regulations for the absence or incapacity of the appointed chairman, nor, it appears, in the 2011 Act. On the other hand, regulation 26(2)(b)(iii) provides that the document recording any decision of a committee must, in the event of absence or incapacity of the chairman, be signed by another member of the committee.

1. Is it intended that a committee would be properly constituted in the event of absence or incapacity of the appointed chairman during a hearing? If so, how do the regulations provide for this?

2. In particular is any further provision needed to clarify:

(a) (in that event) whether the hearing will be properly constituted and conducted by the two remaining members, only with the consent of the parties?

(b) which of the two remaining members in the absence or incapacity of the chair has a casting vote for the purposes of regulation 26(2)(a), which provides that where the committee are constituted by two members, the chair has a casting vote?

(c) whether a majority vote is not required in the absence or incapacity of the appointed chair, as regulation 26(2)(a) also provides for a majority requirement, unless the chair is there to make the casting vote?

The Scottish Government responded as follows:

1. It is not intended that a committee would be properly constituted in the absence of the appointed chairman during a hearing and the regulations do not therefore provide for this.

Regulation 26(2)(b)(iii) is intended, for example, to enable another member to sign a decision of a committee in the event of absence or incapacity of the chairman occurring after a hearing where the chairman was present. This reflects regulation 26(1) of the Private Rented Housing Panel (Applications and Determinations) (Scotland) Regulations 2007 (SSI 2007/173).

In light of our reply to the first question, the follow-up questions do not require to be answered.