



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# SUBORDINATE LEGISLATION COMMITTEE

Tuesday 4 December 2012

Session 4

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**Tuesday 4 December 2012**

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**SUBORDINATE LEGISLATION COMMITTEE**

**28<sup>th</sup> Meeting 2012, Session 4**

**CONVENER**

\*Nigel Don (Angus North and Mearns) (SNP)

**DEPUTY CONVENER**

\*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

**COMMITTEE MEMBERS**

Jim Eadie (Edinburgh Southern) (SNP)

\*Mike MacKenzie (Highlands and Islands) (SNP)

\*Hanzala Malik (Glasgow) (Lab)

\*John Pentland (Motherwell and Wishaw) (Lab)

\*John Scott (Ayr) (Con)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Bruce Crawford (Stirling) (SNP) (Committee Substitute)

Val Ferguson (Transport Scotland)

Stuart Foubister (Scottish Government)

Colin Gilchrist (Legal Adviser)

Chris Wilcock (Transport Scotland)

**CLERK TO THE COMMITTEE**

Euan Donald

**LOCATION**

Committee Room 4



## Scottish Parliament

### Subordinate Legislation Committee

*Tuesday 4 December 2012*

[The Convener *opened the meeting at 10:30*]

### Decision on Taking Business in Private

**The Convener (Nigel Don):** I welcome members to the 28th meeting in 2012 of the Subordinate Legislation Committee. As always, I ask everyone to turn off mobile phones. I register Jim Eadie's apologies and I welcome Bruce Crawford.

**Bruce Crawford (Stirling) (SNP):** I am delighted to be here, convener.

**The Convener:** Agenda item 1 is a decision to take in private item 5, which is consideration of the evidence that we are just about to hear on the Marine Navigation (No 2) Bill. Do members agree?

**Members** *indicated agreement.*

## Marine Navigation (No 2) Bill

10:30

**The Convener:** Agenda item 2 is consideration of the legislative consent memorandum on the Marine Navigation (No 2) Bill, which is United Kingdom legislation, and an opportunity for members to ask Scottish Government officials about it. I welcome to the meeting Stuart Foubister, who is a divisional solicitor in the economy and transport division of the directorate for legal services in the Scottish Government and, from Transport Scotland, Val Ferguson, who is a policy executive in the ports and harbours branch and Chris Wilcock, who is branch head in the ports and harbours branch. Good morning, one and all.

Perhaps I can start. What is the bill all about and, if it is relevant, why is it a private member's bill? Who would like to tell us about the background to why we are looking at the bill?

**Val Ferguson (Transport Scotland):** As you said, the bill is a private member's bill. It was originally part of a much larger bill in 2008 that covered marine navigation and a number of other provisions, but which proved to be fairly contentious and was eventually dropped because it did not gain the required support. That bill contained some fairly important provisions that have been, to some extent, cherry picked. I believe that provisions relating to lighthouse authorities have been taken forward by other means, and that the provisions that we are discussing have been picked up as a hand-out bill by a member. That said, the provisions have Government support and are widely welcomed by the ports industry.

**The Convener:** That was very helpful. Can you say in one or two sentences what the bill is trying to achieve?

**Val Ferguson:** To some extent, it is part of the move towards deregulation and removing burdens from the ports industry. It will also make it slightly more straightforward for port authorities to gain or relinquish powers, which at the moment they might need private acts to achieve. It is an attempt to streamline procedure.

**The Convener:** Thank you. Mike MacKenzie will start off the questioning from members.

**Mike MacKenzie (Highlands and Islands) (SNP):** Good morning. Clause 1 provides the Scottish ministers with the power to remove harbour authorities' pilotage functions. Why does the Scottish Government consider those powers to be necessary?

**Val Ferguson:** At the moment, orders providing pilotage powers to authorities can be amended or

revoked. However, pilotage authorities have been around for a number of years and were not all created under the existing Pilotage Act 1987, and there is no provision to remove duties and powers relating to pilotage that are no longer required. The inclusion of the powers is simply a tidying-up measure. To be honest, I think that it is unlikely that they will be used frequently, but they will exist, should the need arise.

**Mike MacKenzie:** How does the Scottish Government intend to exercise the powers?

**Val Ferguson:** The Scottish Government will be reluctant to use the powers proactively; as I have said, it is very unlikely that it will do so. In the future, however, pilotage might no longer be required at a harbour, so it would be for the pilotage authority to come to us and say, "Business has changed. We no longer require to provide a pilotage service—or to keep one under review—so we'd like the powers to be completely removed." Obviously an authority will make its case and carry out a supporting risk assessment.

**Chris Wilcock (Transport Scotland):** It is worth adding that in reviewing any case we would consider navigational safety as a primary factor alongside any commercial case that a harbour authority might put to us. As we have said, we think it unlikely that there will be any such approaches, but it makes sense to take the powers, just in case circumstances change.

**Mike MacKenzie:** That sounds sensible.

Powers to remove harbour authorities' pilotage functions are required to be laid before Parliament, but are not subject to further procedure. Why does the laid-only procedure offer an appropriate level of parliamentary scrutiny?

**Val Ferguson:** The approach is consistent with other orders under the 1987 act; we saw no reason to deviate from it. Orders under that act are subject to the procedure for creating a pilotage authority, and there is no obvious case for making a change in that respect.

**Chris Wilcock:** The same holds for orders under the Harbours Act 1964, which is the more common legislation in respect of harbours and under which powers are granted and conveyed. Orders under that legislation follow that procedure, and we saw no need for anything more onerous in respect of the bill.

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** I think that, on the back of the initial response about where the bill has come from, there is perhaps one question that we should ask before we go too much further. This hand-out bill from the United Kingdom Government has emerged from a bill that was introduced in 2008, so it is not directly in the gift, or part of the

responsibility, of Scottish ministers. We are simply looking at the legislative consent process. The committee is interested only in subordinate legislation and not in the broader policy issues, but I wonder to what extent the Scottish Government has been involved in drafting the bill. In other words, are we asking you to account for legislation over which you have had no influence?

**Stuart Foubister (Scottish Government):** No. It is fair to say that we had the requisite amount of influence. We saw the bill before it was introduced and were given the opportunity to input to its drafting.

**Stewart Stevenson:** That is helpful.

**Hanzala Malik (Glasgow) (Lab):** You said that safety will be taken into account in examining any proposal to relinquish or remove pilotage powers in a given area. Who will be responsible for monitoring and safeguarding that safety element?

**Val Ferguson:** There is provision for us to consult before any order that would remove the powers is made. As with other harbours legislation, we would consult navigation authorities, including the Maritime and Coastguard Agency and other maritime experts.

**Hanzala Malik:** I did not see that in any of the documentation. Are you speaking from your own knowledge or is that built in to the legislation?

**Val Ferguson:** I cannot recall exactly whether it is built in—

**Stuart Foubister:** There is a statutory obligation to consult the harbour authority and anyone else whom the person making the order—in this case, the Scottish ministers—thinks appropriate.

**John Scott (Ayr) (Con):** Proposed new section 40A of the Harbours Act 1964, which will be inserted by clause 5, will give Scottish ministers the power to designate harbour authorities that may give general harbour directions to ships

"within ... or ... entering or leaving"

a harbour. Proposed new section 40D provides that in England and Wales the exercise of the power will be subject to negative procedure. Is the effect of the provisions that in Scotland orders that would exercise the power will not be laid before Parliament and will not be subject to any parliamentary control?

**Val Ferguson:** Again, the approach is consistent with other orders that are made under the 1964 act, which are also not subject to parliamentary procedure. We saw no reason to deviate from that consistent approach.

**John Scott:** I am sure that you are correct, but can you explain the reasoning behind the choice of procedure, which we believe differs

substantially from that which is to be applied in England and Wales? Why are we having a different procedure in Scotland?

**Val Ferguson:** The current procedure in Scotland is that orders under the Harbours Act 1964 are not routinely laid before Parliament.

**John Scott:** Has there always been that inconsistency in approach?

**Val Ferguson:** There is inconsistency between the approach in Scotland and that which is taken in the rest of the UK but, as I have said, we are maintaining consistency in the Scottish approach.

**John Scott:** I presume that that has worked well enough in the past. Would there be any benefit in having the same approach in Scotland as in England and Wales?

**Val Ferguson:** I do not think so. The present arrangements have worked successfully in Scotland.

**The Convener:** The power in proposed new section 40A will allow the amendment or repeal of “any statutory provision of local application”.

The words “of local application” are of some concern to the committee. What do you feel they mean in the context of the bill?

**Stuart Foubister:** The words mean what they say. They relate to a statutory provision that applies to a particular area, rather than one that is applicable throughout the whole of Scotland. The prime candidate would be a harbour order, which would have effective operation only within the harbour area.

**The Convener:** Right. You think that something is “of local application” if it is not of universal application. In other words, it does not matter how local its application is. That is helpful.

Forgive me—I will have to read out the next question. What does the expression “of local application” mean in this context, as it applies to secondary legislation? Has not the concept of local instruments been replaced in Scotland by that of excepted instruments that are made under the enactments that are specified in section 30(4) of the Interpretation and Legislative Reform (Scotland) Act 2010, to which neither negative nor affirmative procedure applies?

**Stuart Foubister:** The classification of statutory instruments in Scotland has changed. The concept of a local statutory instrument no longer exists, but I do not think that that causes any problems with the application of a test of whether a statutory provision is “of local application”. The change is simply a change in the classification of existing instruments.

**The Convener:** Okay—we will let the lawyers worry about that. Thank you.

**Stewart Stevenson:** My attention is on the insertion into the Harbours Act 1964 of proposed new sections 17A to 17F and, in particular, the orders that would create harbours, harbour closure orders and their revision. To some extent, the answer that was given to John Scott’s question covers the issue. Leaving aside orders that relate to harbours that are of national importance, I take it that such orders have always been not subject to parliamentary procedure. Is that the case?

I am getting nods, so we can pass over that.

Will you explain the choice of parliamentary process for orders on harbours of national importance? Why is the process different for them?

**Stuart Foubister:** That question is nothing to do with the bill—you are asking about the existing arrangements for harbours of national importance.

**Stewart Stevenson:** The affirmative procedure normally applies to orders to create harbours that are considered to be of national importance. Is what I am being told in relation to the insertion into the 1964 act of proposed new sections 17A to 17F that the process will remain the same as it has always been?

**Stuart Foubister:** Yes. A closure order would never be subject to parliamentary procedure, even if it related to the closure of a harbour of national importance.

**Stewart Stevenson:** Is that sensible in the context of a tidying-up bill? If it is necessary to establish a harbour of national importance through an order that is considered by Parliament, why has it been decided that such a harbour could be closed without consideration by Parliament? That is the essence of my question.

**Chris Wilcock:** Harbours of national importance are usually harbours that are designated as national planning framework 2 projects, such as the Stena project. Given the scale and importance of such harbours, and the infrastructure that is associated with them, it was felt that their creation needed full parliamentary scrutiny and process.

Any case for closure would be the opposite of that in that, by definition, it would have to be accompanied by an argument that the harbour was no longer of use or importance. In other words, it would be at the opposite end of the scale. I suggest that it is unlikely that we will see many cases along those lines. It is particularly unlikely that any project that has been designated as being of national importance will come forward for closure at any point in the near or foreseeable future.

10:45

**Stewart Stevenson:** I will suggest an example that might fall outside that, and I will pose a question.

There are some new harbours in remote locations that were associated with previous oilrig work and were used for a few years before dropping out of use. Those are examples of harbours that were of national importance that ceased to be of national importance relatively quickly. They may be few in number. Is it being suggested to the committee that, in the process by which a harbour of national importance would be closed—I am not aware whether any have been closed, although they may no longer be nationally important—the harbour would first drop out of the designation of being nationally important, so that when it is closed it is no longer a harbour of national importance?

It seems slightly perverse that if those harbours are, at the point of closure, still harbours of national importance, they can be closed without parliamentary process.

**Stuart Foubister:** I do not think that there is any concept of remaining on a list of national importance. Harbours get on the list by being in the national planning framework, but that is—

**Stewart Stevenson:** That is precisely my point: national planning frameworks are revised. We are heading towards NPF3, if I recall correctly, which may or may not have the same things in it as NPF2.

**Stuart Foubister:** The next planning framework is intended to designate proposed developments. Once something is completed and built, it is no longer an NPF matter.

**Stewart Stevenson:** All right. I will be really geeky. Say a harbour is in NPF2, and is designated but not built, and NPF3 is published without its being included. If that harbour is subsequently built, does it remain of national importance, even though it is not in the current plan?

**Stuart Foubister:** No. The test of whether a harbour would be of national importance, so as to attract affirmative procedure for the order that would create the harbour, would depend on whether, at that point, it was in the national planning framework.

**Stewart Stevenson:** Okay. That is fine. To be clear, once something is built and is of national importance, there is no parliamentary process for de-listing it, and it remains of national importance in perpetuity. That is the essence of what I am hearing. Tell me that I am wrong.

**Stuart Foubister:** The concept of national importance relates to development. It is about saying that something is of national importance and should therefore be built and created. Once it is built and created, there is no continuing concept of national importance. In law, it is just a harbour.

**Stewart Stevenson:** I am sorry. I am not seized of this yet. It appears that there is a parliamentary process associated with harbour revision orders on harbours that were designated as being of national importance. Therefore, there is an enduring condition of national importance, otherwise they would not be caught by the provision.

**Stuart Foubister:** If the next NPF comes out and that harbour has already been built, it will not appear in the new framework.

**Stewart Stevenson:** Are you saying, then, that a harbour that was built under the auspices of NPF2 as a harbour of national importance requires parliamentary procedure for revisions of harbour orders only until the publication of NPF3, in which that harbour no longer features?

**Stuart Foubister:** Yes.

**Stewart Stevenson:** So, de facto, the consideration by Parliament of NPF3, which excludes something that was in NPF2, will relieve that harbour of the parliamentary process for revision orders thereafter.

**Stuart Foubister:** Yes.

**Stewart Stevenson:** I do not want to put words in your mouth.

**Stuart Foubister:** Yes; what you said is right.

**Stewart Stevenson:** Right. The appropriate policy committee may wish to pursue that a little further, because it seems to me to be a little irrational. The Subordinate Legislation Committee does not engage directly on policy.

**Chris Wilcock:** The NPF2 designation covers the particular works and the projects that are included in NPF2.

If the harbour authority proposed to do something that was not caught by the designation but still required a harbour order, there could be an argument that it would not need the full parliamentary process. It would be whether it matched the description in NPF2 that would put it down the parliamentary process route rather than any works at that harbour that were undertaken once it had been—

**Stewart Stevenson:** Do you mean any works requiring a harbour order?

**Chris Wilcock:** I mean works requiring a harbour order—a marine licence or anything along those lines.

**Stewart Stevenson:** A marine licence would not require a harbour order.

**Chris Wilcock:** No. Sorry.

**The Convener:** Are we still on the bill at this point?

**John Scott:** Has Stewart Stevenson finished?

**Stewart Stevenson:** Well, he has gone as far as he feels able to go. Whether he has finished might be another matter.

**John Scott:** I may have missed the point in all of this, but I seek an explanation of why the choice of procedure—a ministerial order—is appropriate for the exercise of the power to close harbours. Why is a ministerial order appropriate for the closure of harbours that are not of national importance? Why have you chosen a ministerial order as the power? Can you justify or explain that? You may already have done so, and I may have missed it.

**Chris Wilcock:** That would be in line with the normal harbour order procedure in Scotland for projects that do not go down the NPF2 route of full parliamentary scrutiny. It would be in line with the normal procedures for the making of harbour revisions—

**John Scott:** It has aye been thus.

**Chris Wilcock:** That is the normal procedure. Given that the procedures are in place to empower or create harbours and that this is a less significant process, whereby we would be looking at harbours that were no longer required and for which there was not a case, we did not feel that a more onerous or complex procedure was required.

**John Scott:** That is fine. Thank you.

**Hanzala Malik:** There is an element of unwritten rules being applied, which is why clarity is missing. People in the know may understand and appreciate the norm that is being applied, but the legislation does not state it clearly. Therefore, there is confusion for the layperson. A little more clarity might be helpful.

**Bruce Crawford:** It is about applying common sense, as far as I can see. I understand entirely why an order is required when Parliament must pass something to create something, but it would be a pretty perverse Government that decided to follow that route to close a harbour when it currently can do that by ministerial order without bringing the matter before Parliament. In the circumstances, it would create completely unnecessary bureaucracy to bring the matter back to Parliament. For any Government that was

closing a harbour for whatever reason and in whatever circumstances, that would be a perverse decision and against any natural outcome. Let us be relaxed and not build in so much bureaucracy that we start to cause problems for people.

**The Convener:** Thank you, Bruce.

**Bruce Crawford:** Can I ask a geeky question?

**The Convener:** Let us deal with question 8 first. I return to the expression “of local application” and the power to amend. It appears that this particular case is slightly different because the word “enactment” is used. In the aforementioned context, that may refer only to UK parliamentary legislation and not to an act of the Scottish Parliament, which would not be an enactment in that context. Has that been considered, and does that cause any problems?

**Stuart Foubister:** “Enactment” includes an act of the Scottish Parliament. Section 57(1) of the Harbours Act 1964 has a specific definition of “enactment” that includes acts of the Scottish Parliament.

**The Convener:** Thank you for that clarification.

**Bruce Crawford:** My question is on clause 13 and commencement issues. The legislative consent memorandum will give the Scottish ministers the power to commence sections 1 and 6 in relation to Scotland. Commencement powers are not normal—they are probably a bit unusual in making incidental provisions. Why does the Government consider that a power to make ancillary provisions in connection with commencement is required in this case? More specifically, why does the Scottish Government think incidental provision might be required? It would be useful for us to understand that. As I understand matters, that is not the normal way.

**Stuart Foubister:** It is not. I think that the drafting is not necessarily in line with standard practice in the Scottish Parliament. We would normally attach to commencement order powers the power to make a transitional or transitory provision, including savings. This is a Westminster bill, of course, and what is here includes the power to make incidental provision. I do not imagine that we would make use of that, but we did not consider it essential to go to the extent of disapplying it for Scotland, which we would have had to do if it was not to remain in the bill.

**Bruce Crawford:** Would that have meant that we would have lost all the other so-called gains because we would have had to reject the LCM?

**Stuart Foubister:** No. When the bill was being drafted, we could have specifically requested that the power to make incidental provision that is in the commencement provisions should not extend

to Scotland, but it did not seem necessary to do that.

**Bruce Crawford:** It is inconsequential.

**Stuart Foubister:** Yes.

**Stewart Stevenson:** I have a tiny question. I take it that it is perfectly legal for harbours to exist and operate without any harbour orders of any kind that would be caught by the bill.

**Stuart Foubister:** That depends what you mean by “operate”. To do the sorts of things that harbour authorities need to do—to regulate traffic and charge—

**Stewart Stevenson:** I was making the simpler point that a harbour does not necessarily need to have a harbour authority.

**Chris Wilcock:** I think that there are examples of harbours that have no formal harbour authority.

**Stewart Stevenson:** That is all I wanted.

**John Scott:** Would that be subject to parliamentary control?

**Stuart Foubister:** Do you mean running a harbour without a harbour authority?

**John Scott:** No. I beg your pardon. I was referring to Bruce Crawford’s question about the commencement powers.

**Stuart Foubister:** The commencement order that will be made under that power would be laid before the Scottish Parliament.

**The Convener:** If members have no further questions, I thank the witnesses and suspend the meeting briefly to allow them to go.

10:57

*Meeting suspended.*

10:58

*On resuming—*

## **Instruments subject to Negative Procedure**

### **Court Fees (Miscellaneous Amendments) Scotland Order 2012 (SSI 2012/322)**

**The Convener:** There has been a failure to lay the order at least 28 days before it comes into force as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. As the purpose of the order is to correct errors in various Scottish statutory instruments before they come into force, the committee may wish to find the explanation that the Scottish Government provided for the failure to be acceptable.

Does the committee agree to draw the order to the attention of the Parliament on reporting ground (j)?

**Members indicated agreement.**

**The Convener:** As the purpose of the order is to correct those various errors, does the committee find the explanation that the Scottish Government provided for the failure to lay it 28 days before it comes into force to be acceptable?

**Members indicated agreement.**

### **Police Grant (Variation) (Scotland) Order 2012 (SSI 2012/316)**

### **M74 Motorway (Fullarton Road to the M8 West of Kingston Bridge) (Speed Limit) Regulations 2012 (SSI 2012/320)**

*The committee agreed that no points arose on the instruments.*

## Aquaculture and Fisheries (Scotland) Bill: Stage 1

10:58

**The Convener:** The purpose of this item is for the committee to consider the delegated powers in the Aquaculture and Fisheries (Scotland) Bill. The committee is invited to agree the questions that it wishes to raise with the Scottish Government on the powers. It is suggested that those questions be raised in written correspondence. On the basis of the responses received, the committee would expect to consider a draft report at its meeting on 18 December 2012.

Section 1(2) enables the Scottish Salmon Producers Organisation—the SSPO—to issue a code of good practice for Scottish fin-fish aquaculture. The effect of the power, which is in the proposed new section 4A(2) to (5) of the Aquaculture and Fisheries (Scotland) Act 2007, is that farm management agreements and statements must reflect, so far as is possible, any recommendations in the code, including recommendations on the various matters set out in subsection (4), such as fish health management. The code also defines the farm management areas in which the requirements apply.

11:00

Does the committee agree to ask the Scottish Government to explain why it is considered appropriate to confer the power on the SSPO by the issue of a code of practice, rather than to provide that the powers to regulate such matters are exercisable by regulations in a Scottish statutory instrument? Such a code is not subject to scrutiny by the Parliament and does not attract the drafting and publication requirements that apply to a statutory instrument. Does the committee also agree to ask why it is considered appropriate to confer power on the SSPO to define the farm management areas for the purposes of the regime rather than to prescribe them by Scottish statutory instrument, which would allow scrutiny by the Parliament?

*Members indicated agreement.*

**The Convener:** The code of good practice recommends good practice measures for fish farming, and one intention of section 1(2) of the bill appears to be that farm management agreements and statements will require to reflect such good practice. Does the committee agree to ask the Scottish Government to explain why it is considered appropriate to enable the code to include any recommendations that the SSPO determines, which the agreements and statements must reflect so far as possible, as there is no

provision that the code or any later document shall specify good or best practice measures that are to be reflected in the agreements and statements?

*Members indicated agreement.*

**The Convener:** Section 3(1) creates a power for the Scottish ministers to make regulations that prescribe technical requirements for equipment that is to be used for and in connection with fish farming. Further provision can be made to ensure that such requirements are complied with. Section 3(4)(b) provides that the regulations may

“confer functions on any person in relation to the prescribing of requirements.”

Does the committee agree to ask the Scottish Government to explain how and by whom that power is expected to be exercised?

*Members indicated agreement.*

**The Convener:** Failure to meet the minimum requirements, which are to be prescribed by regulations, shall attract the criminal penalties and other official enforcement measures that will be set out further in the regulations. Does the committee agree to ask the Scottish Government to explain why, in regulations that are subject to parliamentary procedure, it is considered appropriate that persons apart from the Scottish ministers could be given functions in relation to prescribing those requirements?

*Members indicated agreement.*

**The Convener:** Section 3(6) provides that the regulations could provide for continuing offences and for any such offences to be punishable by a daily or other periodic fine of an amount that is to be specified in the regulations. Unlike the provision in section 3(5) for the maximum penalty for a single criminal offence, section 3(6) states no maximum daily or other periodic fine. Does the committee agree to ask the Scottish Government to explain why that is considered appropriate and whether a maximum penalty could be specified in section 3(6)?

*Members indicated agreement.*

**The Convener:** Section 9(1) enables provisions to be made to prohibit or control the movement of any commercially damaging species that are present or suspected of being present in any body of water. Section 9(2) provides for the matters that may be contained or provided for in an order under section 9. That section makes no provision for any maximum time for provisions to apply for or about the prohibition or control of the movement of species and so on, and nor does the list of matters that may be included in an order, as set out in subsection (2), include provision as to the authorised period of the controls.

Does the committee agree to ask the Scottish Government to explain why it is considered appropriate not to include in the bill any provisions as to the time for which the prohibition or control of the movement of species and so on will apply?

**Members** *indicated agreement.*

**The Convener:** Section 14 provides a power for the Scottish ministers to make control schemes for the control of commercially damaging species on fish and shellfish farms. The relevant orders would not be statutory instruments and would not be subject to parliamentary controls.

Section 14(5)(c) says that a control scheme may “include incidental, supplemental, consequential, transitional, transitory or saving provision.”

In the absence of an explanation in the delegated powers memorandum, we have no information on how those incidental powers are intended to be used or why they are appropriate without attracting parliamentary procedure.

Does the committee agree to ask the Scottish Government to explain why the power in section 14(5)(c) to make

“incidental, supplemental, consequential, transitional, transitory or saving provision”

in a control scheme is required, in what circumstances such powers may be exercised, and why parliamentary control and the formal requirements of a Scottish statutory instrument are not considered appropriate for such provisions?

**Members** *indicated agreement.*

**The Convener:** Section 20 of the bill amends section 44 of, and inserts new sections 46A to 46G into, the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, to introduce good governance obligations on district salmon fishery boards. It is suggested that we ask the Scottish Government to explain why the power in section 20—in new section 46F of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003—is necessary in so far as it enables any modification, including repeal, of section 44(1) of the 2003 act, which provides the “basic” requirement for a district salmon fishery board to prepare annual reports and audited statements of accounts relating to the activities of the board and an annual meeting to consider the report and accounts. It is also suggested that we ask how it is envisaged that the power will be exercised.

**Bruce Crawford:** I think that we need a bit more discussion on that. One thing that has certainly struck me since I have become involved in the work of the committee is that, whichever Government is in power, we seem to be always looking for ways to make it more difficult for people to get things done.

In this circumstance, it would be more difficult for a Government to move fast and get things done if there was an affirmative process rather than a negative process. I am all for allowing Governments to be freed up from bureaucracy so that they can do things more quickly rather than be stuck with difficult situations. I know that we are asking a question here, but we should not necessarily assume that having the affirmative procedure would be better than what is currently provided.

**The Convener:** I absolutely agree with you, and the Rural Affairs, Climate Change and Environment Committee might also agree with you, but I suggest that that is a policy decision, which will be informed by the question.

**Bruce Crawford:** If we start drawing people’s attention to the issue, they will inevitably start asking questions and we will end up with the affirmative procedure.

**John Scott:** I want to back up Bruce Crawford’s very sensible comment. Why has the affirmative procedure been chosen here?

**Bruce Crawford:** Why should it be affirmative?

**John Scott:** Yes, why should the affirmative procedure be used for something relatively modest?

**The Convener:** Forgive me, but I do not understand that comment.

**Bruce Crawford:** Paragraph 96(b) in our legal brief suggests that we ask the Scottish Government,

“given that the power is to modify provisions in the Act, whether the affirmative procedure is a more suitable level of scrutiny for the exercise of this specific power”.

That means that we are asking that an affirmative instrument be laid before Parliament on every occasion rather than just allow the Government to get on and get things done. On this small matter, I am quite happy to allow the Government to get on and get things done.

**The Convener:** Even if the order modifies the basic requirements in the original act?

**Bruce Crawford:** I am talking only about new section 21A(3)(c) in relation to part 5.

**The Convener:** Forgive me, but I think that I am talking about section 20 here.

**Bruce Crawford:** Are we on paragraph 96 of the legal brief, or have I jumped the gun?

**The Convener:** I think that you may have jumped the gun. Let us just make sure that we know where we are. I am talking about section 20.

**Bruce Crawford:** Am I on section 22 of the bill? You are forewarned for when we get to section 22.

**The Convener:** You will appreciate that I cannot tell you which section you are on.

**Bruce Crawford:** I apologise, but John Scott knows where I am. I will come back to the point later.

**John Scott:** In wondering why we need the affirmative procedure, I was talking about the suggestion in paragraphs 85 and 86 of our legal brief.

**Bruce Crawford:** Did you say paragraphs 95 and 96?

**John Scott:** No, paragraphs 85 and 86. I wonder why we need an affirmative instrument.

**Bruce Crawford:** I think that the same issue applies here.

**The Convener:** Let me stick with where I am. At this point, we are talking about section 20 of the bill.

**Bruce Crawford:** And the same point applies.

**The Convener:** I think that we have taken the point, but I return to my earlier point that section 20 appears to have the power to modify the basic requirements in the act.

**John Scott:** Perhaps our clerks can give us the reason why they are happy that the affirmative procedure is required here.

**The Convener:** Does the legal adviser want to add to what has been said?

**Colin Gilchrist (Legal Adviser):** Essentially, because the additional governance requirements are specified in the bill, in principle any amendment to them is a textual amendment of the bill. The power in section 20 of the bill to amend section 44(1) of the 2003 act relates to something that was an initial requirement in the 2003 act. As a matter of principle, the affirmative procedure may be appropriate for such textual amendments. The recommendation was made on that basis.

**The Convener:** Are we comfortable with asking the question? Lots of points have been noted on where that might lead, and I am sure that they will be drawn to the attention of the Rural Affairs, Climate Change and Environment Committee.

**Members** *indicated agreement.*

**The Convener:** Section 22 of the bill will insert a new section 21A into the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003. The regulation-making power in the proposed new section 21A(1) of the 2003 act will enable the Scottish ministers to put in place a statutory scheme for carcass tagging of wild salmon. New section 21A(3) states that the regulations may make

“such modifications of Part 5 of this Act as the Scottish Ministers think fit”.

Part 5 confers powers on ministers by regulations to impose charges in connection with the carrying out of fisheries functions. Does the committee agree to ask the Scottish Government to explain: why the power in the proposed new section 21A(3)(c) of the 2003 act to make

“such modifications of Part 5 of this Act as the Scottish Ministers think fit”

is appropriate; why it could not be framed as a power to make modifications that are consequential on making regulations under the proposed new section 21A(1); how it is envisaged that the power could be used; and, given that the power is to modify provisions in the act, whether the affirmative procedure is a more suitable level of scrutiny for the exercise of that specific power, bearing in mind the fact that we are talking about the modification of an act?

**Bruce Crawford:** I am sorry about my earlier confusion. This is the part that I wanted to address.

**The Convener:** I will just restate the principle. Negative procedure is appropriate unless the text of an act is being changed, in which case affirmative procedure is appropriate. That has been our default position.

**John Scott:** I am not sure whether Bruce Crawford sat on the committee that discussed the 2003 act when it was a bill, but I did and I suggested that fish should be tagged to the ridicule of the then Government. I am delighted to see tagging being introduced even at this late stage.

**The Convener:** I can confirm that it is being talked about.

**John Scott:** Were you on the Transport and the Environment Committee at the time, Bruce?

**Bruce Crawford:** I cannot remember, John. You have a much better memory than me.

I agree that we should ask the question but I make the general point that we should be trying to make things easier for people who are in the difficult circumstances in which the world finds itself just now, and that includes the Government. We should not be binding it up with all sorts of rules and regulations and requiring it to keep coming back to Parliament, because it gums up the parliamentary process.

**The Convener:** With respect, I do not think that that is any part of our intention. The question is being asked in principle—

**Bruce Crawford:** I can see the question but if we ask it and draw the issue to the attention of the policy committee, and we end up with an

affirmative procedure, that is where it might end up. However, I accept the question.

**The Convener:** Section 28(3) will insert a new section 33B into the 2003 act that will enable the Scottish ministers to make provision by regulations to recall to ministers, or restrict, district salmon fishery board functions when consenting to the introduction of salmon or salmon spawn into inland waters, under the proposed new section 33A of the 2003 act. Does the committee agree to ask the Scottish Government to clarify, in relation to the powers in section 28(3) of the bill, how section 33A(3A) was added to that act? Section 33A was added by the Aquaculture and Fisheries (Scotland) Act 2007, but that addition did not include a subsection (3A).

There was a question in there; are we comfortable with asking it?

**Members indicated agreement.**

**The Convener:** Thank you.

Section 50(1) confers a power that will enable the Scottish ministers to make regulations for or about the imposition of charges in connection with the carrying out of fisheries functions, which will also be specified in the regulations. Section 50(2) defines the functions in relation to which the Scottish ministers may impose a charge. Those are functions of the Scottish ministers under any legislation that relates to fish or shellfish farming, salmon or freshwater fisheries, or sea fishing. The section also covers functions of persons who are appointed or authorised by ministers to enforce the legislation, such as sea fishery officers. It extends to functions under domestic and European Union legislation.

11:15

Does the committee agree to ask the Scottish Government to explain why it is necessary for the scope of the powers to extend widely to all the types of functions set out in section 50(2) under domestic and EU legislation, given that the delegated powers memorandum suggests that the regulations will impose charges

“in connection with certain specific fishery functions”,

and why it would not be appropriate for the bill to prescribe those specific functions for which there would be charging, possibly with a power to modify or add to them?

**Members indicated agreement.**

**The Convener:** Does the committee agree also to ask how it is envisaged that those powers will be exercised, and in relation to which functions they will be exercised, beyond the list of matters that can be covered in regulations in section 50(3)? Given that those are significant new

powers to impose charging across a wide range of fisheries and fishing functions, the committee might ask why the affirmative procedure would not offer a more appropriate level of parliamentary scrutiny of the exercise of the powers rather than the proposed negative procedure, in particular for the selection of the specific functions to which the charging regime would apply.

Does the committee agree to ask those questions?

**Members indicated agreement.**

**The Convener:** The power in section 51(2)(c), which seeks to insert new section 25(2B)(a) into the Aquaculture and Fisheries (Scotland) Act 2007, will permit any amendment of the definition of “relevant offence” for the purposes of the fixed penalty notice provisions in that section 25. Does the committee agree to ask the Scottish Government whether, given that the delegated powers memorandum does not explain why the power to amend the definition of “relevant offence” in any way is required, the scope of the power could be drawn more narrowly?

Does the committee agree to raise all questions in writing?

**Members indicated agreement.**

**The Convener:** Thank you for your patience.

That completes agenda item 4, and item 5 is in private.

11:16

*Meeting continued in private until 11:37.*

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