Subordinate Legislation Committee

Remit and membership

Remit:
The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Chic Brodie
Nigel Don (Convener)
James Dornan (Deputy Convener)
Kezia Dugdale
Mike MacKenzie
John Scott
Drew Smith

Committee Clerking Team:

Clerk to the Committee
Irene Fleming

Assistant Clerk
Euan Donald

Support Manager
Lori Gray
Subordinate Legislation Committee

22nd Report, 2011 (Session 4)

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 20 December 2011, the Committee agreed to draw the attention of the Parliament to the following instrument and draft instrument—

   Removal, Storage and Disposal of Vehicles (Prescribed Sums and Charges etc.) (Scotland) Revocation Regulations 2011 (SSI 2011/428); and

   Public Services Reform (Recovery of Expenses in respect of Inspection of Independent Further Education Colleges and English Language Schools) (Scotland) Order 2012 and Draft Explanatory Document (SG 2011/237)

2. The Committee’s recommendations in relation to these instruments are set out below. The instruments that the Committee determined it did not need to draw the Parliament’s attention to are set out at the end of this report.
NEGATIVE PROCEDURE

Removal, Storage and Disposal of Vehicles (Prescribed Sums and Charges etc.) (Scotland) Revocation Regulations 2011 (SSI 2011/428) (Rural Affairs, Climate Change and Environment Committee)

3. These Regulations revoke the Removal, Storage and Disposal of Vehicles (Prescribed Sums and Charges etc.) (Scotland) Regulations 2011 ("the principal Regulations"), which would otherwise have come into force on 22 December 2011.

4. These Regulations are subject to the negative procedure, and they come into force on 21 December 2011. The Committee considered the principal Regulations at its 12th meeting on 22 November 2011 and did not draw the instrument to the attention of the Parliament. The principal Regulations set out new charging arrangements for the removal, storage and disposal of abandoned vehicles by local authorities. They replace the current system of flat rates with charges based on the type or size of the vehicle and the circumstances under which it is uplifted by the local authority ("matrix charging").

5. Before making the principal Regulations the Scottish Ministers were statutorily required to consult with such representative organisations as they thought fit (under section 134(2) of the Road Traffic Regulation Act 1984). A UK wide consultation exercise was conducted by the Home Office in 2007 to establish the most appropriate charges for the removal, storage and disposal of vehicles. This revealed widespread support for matrix charging and as a result such charging arrangements were implemented in England and Wales. As detailed in the executive note to the principal Regulations, the Scottish Government was of the view that since the UK consultation had not attracted any significant opposition, an additional consultation exercise was not required.

6. However key stakeholders subsequently raised concerns about the decision not to conduct a separate Scottish consultation. Consequently, these Regulations have been made in order to revoke the principal Regulations. The Scottish Government indicates that this will allow time for discussions to be held with key stakeholders prior to the introduction of any further measures.

7. Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that a Scottish statutory instrument which is subject to negative procedure must be laid before the Parliament as soon as practicable after it is made, and in any event at least 28 days before the instrument comes into force. A failure to comply with section 28(2) does not render the instrument invalid, but the Scottish Government must explain to the Presiding Officer why the laying requirements have not been complied with.

8. This instrument comes into force 15 days after it was laid and consequently does not comply with section 28(2).

9. In the letter to the Presiding Officer, the Scottish Government explains that the laying requirements have not been complied with in order to ensure that the principal Regulations are revoked before the date they are due to come into force (22 December 2011) and that revocation of the principal Regulations is necessary.
in order to provide an opportunity for discussion with key stakeholders. The correspondence is attached at Appendix 1.

10. The Committee draws the instrument to the attention of the Parliament on ground (j) as the instrument has not been laid at least 28 days before coming into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

11. In doing so, however, the Committee accepts the Scottish Government’s explanation for failing to comply with section 28(2).
12. The purpose of this draft Order is to amend section 72 of the Education (Scotland) Act 1980. This is to allow the Scottish Ministers to recover from certain educational establishments the costs of Education Scotland in carrying out an inspection of them under section 66(1) of that Act, following a request by an establishment for an inspection.

13. This is a draft of an instrument which the Scottish Government proposes to make under section 17 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”). Section 17 permits orders to be made which remove or reduce “burdens” resulting directly or indirectly from legislation.

14. The instrument is subject to “super-affirmative” procedure.

15. At this stage the draft order is only laid for consultation purposes. It requires to be laid before the Parliament for 60 days along with an explanatory document which fulfils the requirements of section 27 of the 2010 Act. The order will be laid in draft for approval by the Parliament after the 60 day period has elapsed, and after Ministers have had regard to any representations received.

16. The Scottish Government should therefore consider the Committee’s report on the draft Order and explanatory document, before laying the finalised drafts for the approval of Parliament.

17. Under section 17 of the 2010 Act, the Scottish Ministers may make any provision by order which they consider would remove or reduce legislative burdens resulting directly or indirectly to any person. An order can modify primary legislation.

18. Section 17(2) defines a “burden” as any of - (a) a financial cost, (b) an administrative inconvenience, or… (d) an obstacle to efficiency, productivity or profitability.

19. The draft Explanatory Document for this Order sets out both the policy and legislative background to the proposals. It gives explanation as to why it is considered the Order will remove an administrative inconvenience and an obstacle to efficiency, productivity and profitability.

20. The Scottish Government was asked for clarification how the order removes or reduces any administrative inconvenience or obstacle to efficiency, productivity or profitability resulting for the independent further education colleges and English language schools which are the subject of the provision, as required by section 17, as this did not appear to be wholly clear from the explanation in the draft Explanatory Document. This correspondence is reproduced at Appendix 2.
21. The Scottish Government explains that, under the current legislative framework, the Scottish Ministers (or Education Scotland as their agency) do not carry out inspections of these schools, because the provisions do not enable them to recover the costs of the inspections from the establishments. Article 2 of this order has the effect that these establishments become liable for the financial costs of the inspections.

22. Section 72 of the Education (Scotland) Act 1980 provides that expenses incurred by the Scottish Ministers in the exercise of their functions under that Act are to be defrayed out of money provided by Parliament. However the response confirms that the Parliament has not provided funds under the Act for these particular inspections, as this is “discretionary only spending”. The establishments wish to be inspected, and it enhances their productivity and profitability if they are “approved”. They are willing to pay for this service, but are currently prevented from doing so by the effect of the legislation.

23. Taking into account the explanation in the draft Explanatory Document, and the clarification provided by the Scottish Government, the Committee accepts that the Order removes an administrative inconvenience and an obstacle to efficiency or productivity of the further education establishments affected.

24. The Committee reports to the Parliament, however, that in relation to article 2, the draft Explanatory Document could explain in a clearer way why this article removes an administrative inconvenience to, and an obstacle to the efficiency, productivity or profitability of, the further education establishments affected by the Order (rather than the effects of the Order upon Education Scotland).

25. Section 18(2)(a) of the 2010 Act requires as one condition of making the Order that “the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means.”

26. Paragraph 27 of the draft Explanatory Document explains that it is considered this condition is satisfied, because “the only way this could be done would be by Education Scotland being funded to provide the inspection services free.”

27. It is not stated in the draft Document why this alternative is not considered by the Scottish Ministers to be satisfactory, to meet the legislative test. The draft Document just states that there is an alternative. The Committee considers that the Scottish Ministers must have grounds to confirm the alternative is not satisfactory and so, in the Committee’s view, there ought to be clearer explanation in the draft Document.

28. The Committee invited such an explanation. The question and the Scottish Government’s response are set out at Appendix 2.

29. In its response, the Scottish Government intimates that the condition in section 18(2)(a) of the 2010 Act is not that the policy objective cannot be obtained by non-legislative means, but that it cannot be obtained “satisfactorily”. In the opinion of Scottish Ministers, the only way the policy objective could be obtained,
would be if inspections took place with Scottish Ministers paying for them. The response indicates that this is not satisfactory because monies are not available, and are unlikely to be available, unless they are taken from some other programme and at the expense of the other programme.

30. The Committee accepts the explanation provided. The reasons for the non-legislative alternative not to be considered satisfactory appear to relate to the clarification provided by the Scottish Government on the previous question above. The response confirms that funding authorised by the Parliament is not currently available to the Scottish Ministers to carry out these inspections.

31. The Committee therefore reports to the Parliament that in relation to article 2 of the draft Order, paragraph 27 of the draft Explanatory Document could explain in a clearer way the grounds upon which the Scottish Ministers consider that the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means (rather than only stating those means).
32. At its meeting on 20 December 2011, the Committee also considered the following instruments and determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

**Education and Culture Committee**

Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2012 [draft];

**Health and Sport Committee**

Public Services Reform (Social Services Inspections) (Scotland) Amendment Regulations 2012 [draft]

Social Care and Social Work Improvement Scotland (Excepted Services) Regulations 2012 [draft]

**Justice Committee**

Confirmation to Small Estates (Scotland) Order 2011 (SSI 2011/435)

Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SSI 2011/436)

Act of Adjournal (Amendment of the Criminal Procedure (Scotland) Act 1995) (Refixing diets) 2011 (SSI 2011/430)

**Local Government and Regeneration Committee**

Local Electoral Administration (Scotland) Act 2011 (Consequential Amendments) Order 2012 [draft]

**Rural Affairs, Climate Change and Environment Committee**

Prohibited Procedures on Protected Animals (Exemptions) (Scotland) Amendment Regulations 2012 [draft]
INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

APPENDIX 1

The Removal, Storage and Disposal of Vehicles (Prescribed Sums and Charges etc.) (Scotland) Revocation Regulations (SSI 2011/428)

On 9 December 2011 the Scottish Government was asked:

1. The Removal, Storage and Disposal of Vehicles (Prescribed Sums and Charges etc.) (Scotland) Regulations 2011 (SSI 2011/394) were laid before the Scottish Parliament on 11 November 2011. The Subordinate Legislation Committee considered those Regulations on 22 November 2011. When was the decision taken to revoke those Regulations?

2. Section 134(2) of the Road Traffic Regulation Act 1984, as read with section 53 of the Scotland Act, requires the Scottish Ministers to consult with such representative organisations as they see fit before making regulations under that Act. In relation to the Removal, Storage and Disposal of Vehicles (Prescribed Sums and Charges etc.) (Scotland) Revocation Regulations 2011, the Executive Note indicates that “…the Scottish Government has reached the decision that only limited informal consultation through discussion with key stakeholders was required.” Craies on Legislation, at paragraph 6.1.3, states that “While a duty to consult falls far short of a duty to comply with the wishes of the consultee, it is also more than a pure formality, requiring the person consulted to give his mind in a genuine way to matters raised by those consulted.”

   a. Subsequent to making that decision, did that limited informal consultation take place?
   b. On what date was the invitation to consult extended, and by what date were responses required?
   c. To whom was that invitation extended?
   d. What form did the consultation exercise take?

The Scottish Government responded as follows:

1. The Scottish Ministers decided to revoke the Removal, Storage and Disposal of Vehicles (Prescribed Sums and Charges etc.) (Scotland) Regulations 2011 on 29 November 2011.

2. The Scottish Ministers complied with the consultation requirement in section 134(2) of the Road Traffic Regulation Act 1984 before making the revocation Regulations on 5th December 2011. In answer to the particular questions-

   a. The consultation took place before the decision was made to revoke the Regulations.
   b. A formal invitation to consult was not required, and none was extended.
   c. See the answer to paragraph (b).
d. Scottish Government officials spoke with the Road Haulage Association on 28 November 2011, and met with the Scottish Vehicle Recovery Association on 29 November 2011, those being the representative organisations that Ministers saw fit to consult. Officials also spoke with those organisations, and with the Association of Chief Police Officers in Scotland, on 24 and 25 November 2011.
DRAFT INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

APPENDIX 2

Public Services Reform (Recovery of Expenses in respect of Inspection of Independent Further Education Colleges and English Language Schools) (Scotland) Order 2012 and Draft Explanatory Document (SG 2011/237)

On 9 December 2011 the Scottish Government was asked:

1. Could you clarify how, as required by section 17(1) and (2) of the 2010 Act, article 2 removes or reduces any administrative inconvenience or obstacle to efficiency, productivity or profitability resulting for the independent further education colleges and English language schools which are the subject of the provision, given that—

   (i) where the Scottish Ministers and these establishments agree to an inspection under section 66(1) of the 1980 Act, by section 72 the expenses of Scottish Ministers in carrying out the function under the Act shall be defrayed out of money provided by Parliament, and

   (ii) article 2 has the effect that these establishments become liable for the financial costs of the inspections?

2. Paragraph 27 of the draft Explanatory Document explains that it is considered the precondition to make the Order in section 18(2)(a) of the 2010 Act is satisfied, because “the policy objective could not be achieved satisfactorily by non-legislative means. The only way this could be done would be by Education Scotland being funded to provide the inspection services free.”

   (i) Could you explain why this alternative is not considered satisfactory?

   (ii) Supplemental to that, could you clarify how no funding is available for these inspections despite section 72, and how the alternative of Education Scotland being funded for the costs would be secured?

The Scottish Government responded as follows:

In reply to question (1) Scottish Ministers consider that the provision removes an obstacle to efficiency and productivity because at present no inspections of the requisite establishments are carried out and this will enable such inspections to be carried out. This will raise efficiency and productivity for the reasons set out in the Explanatory Document. In particular economic activity to the benefit of the Scottish economy will take place which otherwise would not have taken place. At present Scottish Ministers never agree to carry out the inspections and are not permitted to do them even if establishments are willing to pay for the service. No entitlement to a free service is being removed because there is no right to be inspected unless Scottish Ministers agree and contrary to the premise of the question they never agree.
In reply to question (2), Scottish Ministers are not sure of what the SLC has in mind and can elaborate if necessary. On the basis that the SLC is concerned that the precondition in section 18(2)(a) of the 2010 Act is not met, the condition is not that the policy objective cannot be obtained by non-legislative means, but that it cannot be obtained “satisfactorily”. In the opinion of Scottish Ministers, the only way the policy objective could be obtained, would be if inspections took place with Scottish Ministers paying for them. This is not satisfactory because monies are not available and are unlikely to be available unless they are taken from some other programme and at the expense of the other programme. This anyway is unlikely to lead to a net increase in efficiency and productivity because it would increase economic activity in one area by decreasing it in another. In sum Parliament has not provided the funds for this type of discretionary spending by Education Scotland, and where an Act allows discretionary only spending, there is no presumption that Parliament has to fund it.
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