Subordinate Legislation Committee

51st Report, 2012 (Session 4)

Legislative Consent Memorandum on the Growth and Infrastructure Bill

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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:

Nigel Don (Convener)
Jim Eadie
Mike MacKenzie
Hanzala Malik
John Pentland
John Scott
Stewart Stevenson (Deputy Convener)

Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
The Committee reports to the Parliament as follows—

1. At its meeting on 13 November 2012, the Committee considered the provisions in the Growth and Infrastructure Bill¹ (“the Bill”) that confer powers to make subordinate legislation on the Scottish Ministers.

2. A Legislative Consent Memorandum² (“LCM”) has been lodged in relation to the Bill. The draft of the motion which will be lodged by the Minister for Energy, Enterprise and Tourism is:

“That the Parliament agrees that the provisions of the Growth and Infrastructure Bill, introduced in the House of Commons on 18 October 2012, relating to the conferral of new powers on the Scottish Ministers to vary consents granted under Section 36 of the Electricity Act 1989 for the construction, extension or operation of electricity generating stations and to the amendment of the Town and Country Planning (Scotland) Act 1997 in relation to the grant and variation of deemed planning permissions either in relation to such generating stations and ancillary development or in relation to overhead electric lines and ancillary development, should, insofar as these matters fall within the legislative competence of the Scottish Parliament or confer new functions on the Scottish Ministers, be considered by the UK Parliament.”

3. Under rule 9B.3.6 of Standing Orders, where the Bill that is the subject of an LCM contains provisions that confer on the Scottish Ministers powers to make subordinate legislation, the Subordinate Legislation Committee shall consider and may report to the lead committee on those provisions.

4. As with bills passed by the Scottish Parliament, the Committee considered whether it is appropriate in principle for the powers to be delegated to the Scottish Ministers, whether the terms of the powers are appropriately drawn and whether the level of scrutiny applied to the exercise of the powers is appropriate.

¹ The latest version of the Bill is available at: Growth and Infrastructure Bill (HC Bill 75)

² LCM on the Bill Available at: http://www.scottish.parliament.uk/LegislativeConsentMemoranda/GrowthInfrastructureBill_lcm.pdf
Powers to make subordinate legislation

5. The Committee identified the following provisions in the Bill which include delegated powers conferred on the Scottish Ministers to make subordinate legislation.

Clause 17 (inserting new section 36C of the Electricity Act 1989) – Variation of consents under the Electricity Act 1989

6. Clause 17 inserts a new section 36C into the Electricity Act 1989. Section 36C(2) states that regulations can make provision about the variation of a section 36 consent, including provision about—

(a) the making and withdrawal of applications,

(b) fees,

(c) publicity and consultation requirements,

(d) rights to make representations,

(e) public inquiries,

(f) consideration of applications.

7. New section 36C(6) provides that regulations may be made by the Scottish Ministers, in relation to the variation of section 36 consents for generating stations, or proposed stations, in Scotland.

8. The Committee reports that it is content with the powers conferred on the Scottish Ministers to make regulations, set out in clause 17 of the Bill, and that the powers are subject to the negative procedure.

Clause 18(5) and (6) – Consents under the Electricity Act 1989: deemed planning permission

9. For England and Wales, when a consent is granted under section 36 of the Electricity Act 1989 by the Secretary of State, the Town and Country Planning Act 1990 (Section 90(2)) enables the Secretary of State to direct that planning permission is deemed to be granted, for any operation or change of use in respect of which the consent is granted.

10. Similar provision is made in section 57(2) of the Town and Country Planning (Scotland) Act 1997 for Scotland.

11. Clause 18(5) and (6) of the Bill amend section 57 of the Town and Country Planning (Scotland) Act 1997, to give the Scottish Ministers powers of direction similar to those conferred on the Secretary of State for England in section 90 of the 1990 Act, as amended by other provisions in clause 18.

12. The Committee reports that it is content with the powers to give directions conferred on the Scottish Ministers in clause 18(5) and (6).
Clause 27(4) – Commencement

13. Clause 27(4) confers power on the Scottish Ministers to commence sections 18(5) to (7) of the Act by order. When commencing these provisions different days can be chosen for different purposes.

14. The Committee reports that it is content with the commencement power in clause 27(4), and that the power is not subject to Parliamentary procedure.

Clause 27(5) and (7) – ancillary provisions

15. Clause 27(5) confers power on the Scottish Ministers to make transitional, transitory or saving provisions by order (as they consider appropriate) in connection with the coming into force of clause 18(5) to (7). By clause 24(5), such an order is not subject to procedure. Clause 27(7) states that this power to make an order includes the power to make different provision for different purposes.

16. It appeared to the Committee that transitional, etc. provisions which might be proposed in connection with the regime of deemed planning consents for larger generating stations or overhead electric lines could potentially have legal effects in relation to significant electricity developments. Such provisions also have a potential to be complex in their legal effects.

17. The Committee therefore draws to the attention of the lead committee that clause 27(5) of the Bill confers power on the Scottish Ministers by order to make such transitional, transitory or saving provisions as they consider appropriate in connection with the coming into force of clause 18(5) to (7).

18. Clause 18(5) to (7) concern the powers of the Scottish Ministers to direct that planning permission may be deemed to be granted in connection with significant electricity generation or overhead line schemes. The Committee considers that ancillary powers of this nature, to make transitional, transitory or saving provisions in relation to significant or potentially complex matters, would more usually be subject to scrutiny by the Parliament by means of the negative procedure.
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