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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   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.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

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Introduction

1. At its meeting on 12 May 2015, the Committee agreed to draw the attention of the Parliament to the following instrument—

   Public Services Reform (Scotland) Act 2010 (Part 2 Extension) Order 2015 [draft].

2. The Committee’s recommendation in relation to the above instrument is set out below.

3. The Committee determined that it did not need to draw the Parliament’s attention to the instruments which are set out at the end of this report.
Points raised: instrument subject to affirmative procedure

Public Services Reform (Scotland) Act 2010 (Part 2 Extension) Order 2015 [draft] (Finance Committee)

4. This draft instrument, if approved, will extend the effect of Part 2 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”) and its associated schedules for a period of 5 years from the date on which the instrument is made. If the order is not made before 1 August 2015 Part 2 of the 2010 Act will cease to have effect from that date.

5. Part 2 of the 2010 Act allows the Scottish Ministers to make orders to add, remove or change the functions of public bodies to improve efficiency, effectiveness and economy, and to remove burdens resulting from legislation. When the Bill for the 2010 Act was being scrutinised by the Parliament the principle of whether or not such powers should be delegated to subordinate legislation attracted considerable debate. As a result provisions were inserted into the Bill to address the concerns which had been expressed including the provision which requires the powers to be renewed by order every five years. The rationale behind this requirement appeared to be to provide the Parliament with the opportunity to review the use of the powers to date and whether the case had been made out for their renewal for a further 5 year period. This is the first occasion on which the question of renewal arises.

6. The instrument was laid on 28 April 2015 under section 133(2) of the Public Services Reform (Scotland) Act 2010 and is subject to affirmative procedure.

7. The policy note accompanying the draft instrument notes that no consultation has been undertaken on it, but offers no reasoned justification for not having done so. In the absence of a statutory requirement (as in this case) the decision on whether to consult is for the Scottish Government. The Scottish Government Consultation Good Practice Guidance indicates that this decision will be “informed by the history of the policy area, the issue under consultation, the existence of any Parliamentary/EU obligations to consult and the stage of the policy/legislative process”.

8. In the absence of a considered justification for the absence of a consultation on the draft instrument the Committee’s legal advisers asked the Scottish Government to explain in light of the history of the policy area and the intention behind the sunset clause why no consultation had been undertaken. The correspondence is reproduced at Annexe A.

9. The Committee considers that it has not received a satisfactory explanation as to why the Scottish Government concluded that a formal consultation on the principle of continuing the effect of the substantial delegated powers in Part 2 of the 2010 Act was not merited. The Committee is concerned to note that the Government takes the view
that it is unlikely that stakeholders would have any particular views on the matter. The Committee considers that the views of stakeholders (or the absence of views) should be established through the consultation process rather than assumptions made in the absence of an opportunity for comment.

10. The Committee notes that individual occasions on which the powers are exercised have been the subject of consultation but that such instruments raise an entirely different issue to that posed by the current draft order.

11. The Committee recommends that the Finance Committee as lead committee takes the opportunity to explore this matter further with the Cabinet Secretary and his officials in due course to assist and inform the Parliament’s consideration when it is asked to approve the extension of Part 2 for a further 5 year period.

12. The Committee draws the instrument to the attention of the Parliament under the general reporting ground as, in the Committee’s view, it has failed to meet expectations in terms of consultation.
No points raised

13. At its meeting on 12 May 2015, the Committee also considered the following instruments. The Committee determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

**Rural Affairs, Climate Change and Environment**

Outer Hebrides (Landing of Crabs and Lobsters) Order 2015 (SSI 2015/183);

Waste (Meaning of Hazardous Waste and European Waste Catalogue) (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/188);

Bovine Viral Diarrhoea (Scotland) Amendment Order 2015 (SSI 2015/186).
Annexe A

Public Services Reform (Scotland) Act 2010 (Part 2 Extension) Order 2015 [draft]

On 6 May 2015, the Scottish Government was asked:

Section 134(4) of the Public Services Reform (Scotland) Act 2010 provides that sections 14 to 30 of, and schedules 5 to 7 of the Act cease to have effect on 1 August 2015 unless they are continued for a further period of 5 years by order. The purpose of the draft Order is to continue the effect of those provisions for that further period. This is the first occasion on which the Government has sought to exercise the power.

Those sections contain order making powers to add, remove or change the functions of public bodies for certain purposes and to remove burdens on public bodies. During the passage of the Bill for the 2010 Act concerns were expressed at the scope and content of the powers and the level of parliamentary scrutiny to which they were subject. A difference of views was expressed on whether it was appropriate to delegate such powers to the Scottish Ministers as a matter of principle. Section 134(4) was one of a number of amendments which were made to the Bill to address these concerns. In indicating his support for the amendment at stage 2 the Cabinet Secretary commented that in the context of the Bill a sunset clause was a sensible additional safeguard which would provide further reassurance and that it would also create discipline in the use of the powers as the Bill is applied. The supplementary delegated powers memorandum prepared by the Scottish Government notes that “it is appropriate that Parliament has an opportunity for detailed scrutiny of any proposal to extend the effect of these provisions beyond 5 years, prior to deciding whether to approve the making of any such order.”

We note that there is no specific requirement for consultation on the bringing forward of an order under section 134(4) but that the Scottish Government’s website states “Consultation is an essential and important aspect of Scottish Government working methods.” This reflects a general expectation that there will be public consultation on proposals for legislation unless there are sound reasons why this is not appropriate or required.

The SG Good Practice Guidance indicates that “The decision to consult will be informed by the history of the policy area, the issue under consideration, the existence of any Parliamentary/EU obligations to consult and the stage of the policy/legislative process.”

The policy note supplied with the draft Order states that the Scottish Government is of the view that there is no requirement for a formal public consultation and that none has been conducted because the draft Order only seeks to extend the duration of Part 2 of the 2010 Act.

Given “the history of the policy area” and, that it appears that Parliament’s intention in agreeing to the sunset clause was to provide the Parliament with the opportunity to scrutinise carefully whether delegated powers which had attracted criticism and concern during the passage of the Bill should be renewed, the Scottish Government is asked:
To explain in full why it considers that a consultation exercise affording stakeholders the opportunity to reflect and comment on the operation of Part 2 of the 2010 Act was not considered appropriate.

What information if any it has received in the course of the exercise of the powers in Part 2 regarding the process, its operations and the benefits of or concerns about the use of the powers in Part 2 rather than primary legislation?

What other material it has considered before proposing that the effect of Part 2 of the 2010 Act should be continued?

The Scottish Government responded as follows:

Question To explain in full why it considers that a consultation exercise affording stakeholders the opportunity to reflect and comment on the operation of Part 2 of the 2010 Act was not considered appropriate.

Answer The Order seeks only to extend the duration of Part 2 of the 2010 Act, and we do not believe that a formal public consultation was needed or would have been of benefit. It is for Parliament to decide whether the Part should remain in force and we do not believe that stakeholders were likely to have any particular views on the issue of continuation. Each individual order taken forward under Part 2 has, however, been subject to public consultation.

Question What information if any it has received in the course of the exercise of the powers in Part 2 regarding the process, its operations and the benefits of or concerns about the use of the powers in Part 2 rather than primary legislation.

Answer As indicated above, each individual order taken forward under Part 2 is subject to public consultation, as well as Parliamentary scrutiny. In the course of such consultation and scrutiny, Parliament has considered the appropriateness of the use of the powers in Part 2.

The Scottish Government has not otherwise received any representations concerning the Part 2 process, its operations or benefits or concerns about the use of Part 2 powers rather than primary legislation.

Question What other material it has considered before proposing that the effect of Part 2 of the 2010 Act should be continued?

Answer Eight orders have been taken forward on the basis of sections 14 and 17 of the 2010 Act since the powers have been in place:
Orders Using Section 14

SSI 2011 No 215  The Public Services Reform (General Teaching Council for Scotland) Order 2011
SSI 2013 No 197  The Public Services Reform (Commissioner for Ethical Standards in Public Life in Scotland etc.) Order 2013
SSI 2015 No 39  The Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2015

Orders Using Section 17

SSI 2011 No 232  The Public Services Reform (agricultural Holdings) (Scotland) Order 2011
SSI 2012 No 102  The Public Services Reform (Recovery of Expenses in respect of Inspection of Independent Further Education Colleges and English Language Schools) (Scotland) Order 2012
SSI 2013 No 24  The Public Services Reform (Planning) (Local Review Procedure) (Scotland) Order 2013
SSI 2013 No 25  The Public Services Reform (Planning) (Pre-application consultation) (Scotland) Order 2013
SSI 2013 No 220 The Public Services Reform (Functions of the Common Services Agency for the Scottish Health Service) (Scotland) Order 2013

The use of these powers since 2010 and potential future use of these powers in relation to improving efficiency, effectiveness and economy, and removing or reducing burdens, informed the decision to propose to continue the effect of Part 2 of the Act.