Subordinate Legislation Committee Report

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SP 397

SL/S2/05/R31

31st Report, 2005 (Session 2)

Inquiry into the regulatory framework in Scotland

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Prof. Claudio Radaelli, University of Exeter
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Renfrewshire Council
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Remit and membership

Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

(a) any-

(i) subordinate legislation laid before the Parliament;

(ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter,

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; and

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

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Dr Sylvia Jackson (Convener)
Mr Adam Ingram
Gordon Jackson (Deputy Convener)
Mr Stewart Maxwell
Christine May
Mike Pringle
Murray Tosh

Committee Clerking Team:

Clerk to the Committee
Ruth Cooper

Senior Assistant Clerk
David McLaren

Support Manager
Catherine Fergusson

31st Report, 2005 (Session 2)

Inquiry into the regulatory framework in Scotland

The Committee reports to the Parliament as follows—

Introduction

1. The Subordinate Legislation Committee agreed in January 2004 that it should investigate the instruction of a bill to replace the transitional order[1] made under the Scotland Act 1998 that governs the making and scrutiny of subordinate legislation in Scotland. Before moving to investigate the instruction of a bill to define the procedures applicable to statutory instruments, the Committee agreed that it should investigate the wider regulatory framework in Scotland, in order to establish the impact and nature of Scottish regulation. It was also concerned that it should examine the development of the "better regulation" agenda where both legislative and non-legislative means of regulating are considered and improved, and it examined the Scottish Executive's approach to regulation since devolution.

2. The Committee included in its consultation paper, which it issued to stakeholders and other legislatures in June 2004, three main areas for discussion—

- Improving the quality of new regulation
- Methods for improving the quality of existing legislation
- The effective development and scrutiny of regulation.

3. This report sets out the main findings of the Committee from its examination of these areas.

Evidence taking

4. Prior to issuing its consultation paper, the Committee heard evidence from the Scottish Executive's Improving Regulation in Scotland (IRIS) Unit on 23 March 2004.

5. The Committee received 46 responses to its consultation paper from a wide range of organisations and individuals, including Executive agencies, local authorities, other legislatures, academics and business organisations.

6. The Committee took oral evidence from January to April 2005 and heard from—

- The Faculty of Advocates
- Scottish Law Commission ('the Law Commission')
- Law Society of Scotland ('the Law Society')
- Dr Aileen McHarg (University of Glasgow)
- Confederation of British Industry Scotland ('CBI')
- Federation of Small Businesses in Scotland ('FSB')
- Scottish Chambers of Commerce ('SCC')
- Scottish Enterprise
- Food Standards Agency Scotland ('FSA')
- Scottish Environment Protection Agency ('SEPA')
- Office of the Scottish Charity Regulator ('OSCR')
- The Minister for Parliamentary Business, Margaret Curran MSP

7. The Committee also received written submissions from Audit Scotland, the Chemical Industries Association and the Scottish Council for Voluntary Organisations (SCVO).

8. The Committee was invited to attend the Ninth Australasian and Pacific Conference on Delegated Legislation

and the Sixth Australasian Conference on the Scrutiny of Bills in Canberra in March 2005. The Clerk to the Committee attended the conference in order to gather information on initiatives and procedures utilised in Commonwealth countries that would inform the Committee's inquiry. The Committee's report on the conference is published at Annex F and forms part of the inquiry evidence.

9. The Committee has paid particular attention to the findings of the Mandelkern Group on Better Regulation, which was established in 2000 by member states of the EU to set out a strategy to simplify the regulatory framework at both national and Community level. In its final report, which was adopted in November 2001, the group set out seven common principles – necessity, proportionality, subsidiarity, transparency, accountability, accessibility and simplicity.

10. The Committee has also taken particular note of the Hampton Review Report which was published in March 2005. The Review was established "to consider with business, regulators and in conjunction with the Better Regulation Task Force, the scope for promoting more efficient approaches to regulatory inspection and enforcement while continuing to deliver excellent regulatory outcomes." The Review's recommendations were accepted in full by the UK Government and therefore offer background to current UK initiatives in regulation.

Better regulation Agenda

11. Upon devolution in 1999, the Scottish Executive assumed responsibility for the regulatory framework in Scotland. The main devolved areas which raise regulatory issues include agriculture and fisheries, building control, education, environment, food standards, health, housing, land-use planning, licensing, natural heritage, water and the general areas of Scots civil and criminal law. An Improving Regulation in Scotland Unit (IRIS) was created by the Executive in November 1999 and is located in the Enterprise, Transport and Lifelong Learning Department of the Scottish Executive. This unit works as a consultative body within the Executive and "leads on the agenda of raising awareness of potential impact on business of any existing or proposed policy or initiative."[2]

12. In the context of a devolved administration in Scotland, the Committee wished to hear from stakeholders how it might be ensured that regulation is responsive, accessible and flexible enough to fully support Scottish affairs. The Committee also wished to see that alternatives to regulation were being considered where possible.

13. The Committee recognised the challenge faced by the Executive in balancing the need for regulation with the requirement that individuals and business enterprises should not be overburdened. Witnesses representing business interests tended to argue, at least in relation to legislation which regulates how businesses operate, that less regulation is generally desirable. There was, however, an acceptance that legislation regulating business could be appropriate and, at times, desirable, with David Lonsdale of the SCC noting that "regulation that frees up markets, creates more choice and breaks down cartels and monopolies is a great thing"[3]. However, the Committee recognised the problems that businesses had in dealing with the "cumulative effect of hundreds or thousands of bits of legislation, however individually sound they might be"[4] highlighted by Alan Mitchell of CBI Scotland. Susan Love of the FSB pointed to the importance of consultation in the process and the role for this Committee in ensuring that regulations have been "through a robust process."[5]

14. The Committee noted evidence from Dr McHarg, where she stated—

> "A presumption against regulation per se cannot be made. That is my objection to much of the better regulation agenda. Despite the terminology of better regulation, much of what motivates that is a deregulation agenda: the notion that Government intervention is suspect from the outset and is justified only in narrow circumstances." [6]

15. Whilst supporting the principle that any regulation should be clear and effective, the Committee found the views expressed by Dr McHarg to be persuasive and similarly does not consider that achieving better regulation equates simply with deregulation.

Improving new regulation

Regulatory Impact Assessment

16. The Regulatory Impact Assessment (RIA) is recognised by the Organisation for Economic Co-operation and Development (OECD) as the main tool for informing and improving policy decisions about regulation. The UK introduced a system of RIA in August 1998, based on previous experience with cost compliance assessments and the OECD's work on impact analysis. This system entails assessment of all proposals for regulation that have an impact on businesses, charities or voluntary bodies.

17. At a Scottish level, a ll policy proposals which may have an impact upon business, charities or the voluntary sector should be accompanied by a Regulatory Impact Assessment (RIA). The Scottish Executive's Improving Regulation in Scotland Unit (IRIS) stated in its annual report that—

> The RIA is a policy tool to assist policy makers to think through and analyse the consequences of proposals in a disciplined and comprehensive way ensuring that we identify, and take fully into account before regulations are made, the effects on business, the voluntary sector and charities. The RIA improves the quality of advice given to Ministers and encourages informed public debate. The RIA helps to improve the way policy is formulated, planned and delivered – as good policy relies on providing informed and detailed advice to Ministers.[7]

18. The Scottish Executive currently follows Cabinet Office guidance on the production of RIAs, and provides additional guidance on the Scottish aspects of these assessments. The Cabinet Office guidance distinguishes 3 different stages. It requires that an initial RIA should be made at the very early stages of the policy development and should accompany any submission to the departmental Minister seeking agreement to that proposal. A partial RIA should then be prepared based upon the initial RIA but with more detailed and precisely quantified analysis of the problem which the proposal is intended to address. A full or final RIA builds upon the partial RIA in the light of the consultation and further information and analysis.

19. During evidence taking Dr McHarg stated that she supports the scrutiny of the possible impact of any policy, but questioned whether a formal approach to regulatory assessment is effective. Dr McHarg suggested that such an approach can produce a false picture of rationality which may not assist the political decision-making process. Dr McHarg was also concerned that there should be clear distinction between judging proposed legislation against a neutral set of criteria and adopting any criteria which are in favour or markets and against government intervention.[8]

20. The FSB stated that the RIA process should involve people who have first hand knowledge of how businesses operate. Scottish Enterprise stated that the assessment involved in carrying out an RIA should be built into the process of developing legislation rather than being treated as a separate add on.[9] The importance of the timing of an RIA was highlighted by the FSA and SEPA, including the suggestion that the process should generally start at an early stage during the development of the policy proposal.[10]

21. The SCC stated in written evidence that they are "concerned that RIAs are often completed late, inaccurately and merely to provide the appearance of monitoring the increased burden and often do not appear to genuinely influence policy decisions. This is disconcerting as RIAs are designed to help policy makers think through the consequences of proposals, improve the quality of advice to Ministers and encourage informed debate."[11]

22. The Executive stated that—

> "Having committed to a programme of action to improve regulation, and of actively engaging with our stakeholders, our main tool will continue to be to ensure good quality Regulatory Impact Assessments accompany and inform regulatory proposals. This will involve dialogue and engagement at an early stage in new proposals, gathering evidence to illustrate the need for any particular action through an RIA, considering carefully any alternatives to regulations and ensuring business understands the reasons for any action we eventually take."[12]

23. The Committee was particularly interested in evidence from the FSA where it was felt there was inconsistency in Government departments as to when the RIA process should begin. Martin Reid of the FSA stated that—

> "Some departments are good at initiating early consultation exercises, which are linked not necessarily to the production of a statutory instrument but to the development of a proposal. It is entirely feasible to start developing the RIA at that stage and departments should be encouraged to take that approach, so that they gather as much information as possible at the earliest stage."[13]

24. **The Committee recommends that—**

- **the Parliament and its Committees should have a role in scrutinising any RIA, given that the Executive sees the RIA as its main tool in improving regulation.**
- **any Parliamentary scrutiny should consider whether an RIA has been produced in adequate time to inform policy choices.**

25. The Committee felt that, given their importance to those affected by regulations and the opportunity they offer to properly formulate regulation, there should be a presumption in favour of producing an RIA. The Committee noted that the Executive is confident that an RIA is produced for every regulation that has an impact on business, but the Committee also has concerns in relation to the impact of a regulation on the wider community. During evidence taking the Minister set out herconcerns that lengthy reports setting out why an RIA has not been undertaken may not be particularly useful.

26. **The Committee appreciates the Minister's concerns but believes strongly that there should be a short statement from the responsible Minister in relation to any instrument which does not have an accompanying RIA. The Committee recommends that this explanation should be a statutory requirement.**

27. **The Committee also recommends that impact assessments should be extended to cover the impact of a regulation on the wider community.**

Consultation

28. The Committee noted the Law Society of Scotland's suggestion that it might be appropriate to have a provision in a parent act requiring consultation, and specifying how wide that consultation should be, where powers to make subordinate legislation contained in the Act are used.

29. The Committee has already pursued this issue throughout its scrutiny of bills this session and in particular has asserted that there should be a statutory requirement to consult where a power is wide, and particularly where it amends a provision on the face of a bill. It is in this respect that the Committee will continue to make recommendations that aim to improve the quality of regulation in Scotland in forthcoming years.

30. The Committee recognised and welcomed the Minister's commitment to consultation. The Committee was particularly interested in the Minister's aim to reach out "to people who do not traditionally get engaged in a public conversation about policies that affect them"[14] as it considered that this is particularly important for improving the transparency of highly technical areas which nevertheless have a wide impact.

31. The Voluntary Sector Compact, which is an agreement between the Executive and the voluntary sector on the principles for working in partnership does not currently cover subordinate legislation, although it covers other legislative proposals, and the Committee considers that this needs further consideration. SCVO stated in its written submission that it is "often the case that material of considerable importance/interest to the sector is only seen after it has been brought into effect."[15]

32. The FSB also stated that "As much of the regulation affecting Scottish businesses appears in subordinate legislation, there ought to be more consultation on proposals for subordinate legislation so that it does not "slip by"

unnoticed."[16]

33. The Committee agrees with the Law Society's view that there should be a general requirement to consult on any legislative proposals involving more substantive and far-reaching reforms.

34. The Committee considers that whilst a statutory requirement to consult on all subordinate legislation may not be workable, there should be a general presumption by the Executive that it should be undertaken.

35. **The Committee therefore recommends that there should be a statutory requirement for the Executive to explain, when consultation has not been carried out in relation to any statutory instrument, the reasons why it has not been undertaken.**

36. Dave Gorman outlined different methods SEPA had used in trying to obtain views, such as using focus groups where an exchange of letters was not considered sufficient[17]. The need for different approaches was also highlighted by Sandy McDougall of the FSA who considered that consultation should form part of everyday business. The FSA also drew a distinction between formal consultation on a topic and more informal means of consultation with interested parties[18].

37. Dave Gorman pointed out in evidence that consultation requirements in relation to the development of environmental legislation are driven by the Aarhus Convention, which is the European Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The Convention adopts a rights-based approach and requires parties to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. In its written submission to the Committee SEPA stated that "It may be worth considering whether the spirit of the Aarhus Convention requirements should usefully be extended to other areas."[19]

38. The Committee noted a couple of specific points in relation to consultation that it wished to draw to the Executive's attention. Firstly, the FSB felt that there should be more co-ordination between the departments of the Scottish Executive to ensure that the relevant stakeholders are able to respond effectively. The FSB considered that there was a lack of co-ordination between Executive departments and "little discussion between departments as to whether or not they will be targeting the same stakeholder group at the same time."[20]

39. Secondly, the Committee noted and supported SEPA's suggestion that consultations should be logged onto the websites of the regulators in addition to the Executive's website and that a summary of the general principles ought to be provided.[21]

40. **The Committee recommends that—**

- **all of these issues should be addressed within the Executive's review of consultation processes currently being undertaken.**
- **the Executive should inform the Committee of the findings from this review on issues associated with the policy development of subordinate legislation, including mechanisms for co-ordination across the Executive.**

Understanding and accessibility of regulation

Plain language

41. The Committee in its regular scrutiny of statutory instruments and bills examines whether the language used is as clear and accurate as possible, not only from the point of view of interpretation by the courts but also in order that any regulation may be as accessible as possible to the people it affects. The Committee regularly encounters drafting which could be clearer and reports in these terms to the lead Committee and the Parliament.

42. The Committee therefore examined how regulation might be more easily understood and accessed, particularly by those directly affected by the regulation itself. Whilst a variety of witnesses stated that legislation should always be produced in such a way as to be easily understood by lawyers and non-lawyers, the following barriers were identified—

- the possible complexity of the subject matter covered by the legislation
- possible use of technical language
- the need to have regard to how legislation is interpreted
- any requirement to read one piece of legislation in the light of other legislation.

43. Whilst noting these challenges, the Committee considered that it was still possible to assess and improve upon drafting practice and agreed with Scottish Enterprise that a plain English test should form part of the development of legislation. This point was also forwarded by the Faculty of Advocates who stated in oral evidence that the drafting process, prior to Parliamentary consideration, should include specific assessment of whether the language is clear.

44. The Committee was particularly interested in developments in Australia where the Legislation Instruments Act 2003 at Commonwealth level provides for steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users of legislative instruments. At Victorian State level, the Subordinate Legislation Act 1994, provides for guidelines on drafting practice to be adhered to. Current guidelines state that—

> 8.06 All statutory rules must be expressed:

- in language that is clear and unambiguous;
- in a way which ensures that its meaning is certain and there are no inconsistencies between provisions;
- in language that gives effect to its stated purpose;
- consistently with the language of the empowering Act; and
- in accordance with plain English drafting standards.[22]

45. The Faculty of Advocates referred to the drafting process in Sweden, which includes referral of draft texts to language experts who have the task of ensuring that the wording is clear. It was noted that in Scotland parliamentary counsel is involved in producing a text that implements the policy in the clearest possible manner, but that there is currently no role for someone who examines the text from a purely linguistic point of view[23].

46. The Committee therefore seeks a commitment from the Executive in relation to continuous improvement and assessment of drafting practice.

47. **The Committee believes that there should always be a presumption in favour of expressing law in plain language in regulations and intends that its proposed Committee bill will include provision for this, either on the face of the bill itself or delegated to guidance, which may be laid before Parliament.**

48. The Executive stated that “the importance of regulation being easily understood is fully appreciated by the Executive and the Partnership Agreement contains a commitment to ask the Scottish Law Commission to investigate the methods by which legislation is published in plain English.”[24]

49. **The Committee welcomes this commitment and requests a progress report from the Executive in relation to this matter.**

Guidance

50. The Committee wished to establish what forms of guidance could assist readers of subordinate legislation to understand the underpinning policy objectives and the legislation itself, particularly in technical areas.

51. A number of consultees and witnesses considered that, where it proved impossible for simple language to be

used in a regulation, there should be a requirement that guidance, written in plain terms, should accompany the regulation. The Faculty of Advocates alerted the Committee to the care that must be taken with guidance, in that if it over-simplifies or has a subtly different meaning to the regulations themselves it could lead to argument about meaning[25]. The Faculty recommended that guidance should accompany an instrument at the time of Parliamentary consideration.

52. The Committee noted that an explanatory statement is lodged at the Senate in Australia at the same time as each statutory instrument, as required under the Legislative Instruments Act 2003. The Committee also noted that statements include explanation of consultation undertaken on any instrument. Following the request of the House of Lords Merits of Statutory Instruments Committee, the UK Government provides explanatory memoranda for both negative and affirmative SIs and, since June 2004, these have been published on the HMSO website.

53. The Scottish Executive currently produces an Executive Note to accompany statutory instruments, which is made available to Parliamentary Committees considering instruments and to the public on request.

54. **The Committee recommends that an Executive Note should be laid with each instrument and published on the HMSO website for both negative and affirmative instruments. The Committee also recommends that the format of and material contained in each Note should follow agreed guidelines that are made publicly available.**

Online availability of legislation

55. The Committee sought evidence as to whether there should be facilities available, such as on the HMSO website, to enable the public to access, free of charge, the consolidated legal texts or texts as amended.

56. There was strong support from all of those consulted for free access to current, as amended, legislation, including subordinate legislation. The Executive explained that the UK Department for Constitutional Affairs is shortly to make its statute law database (SLD) widely available to the public. This resource publishes statutes as they are enacted and has an editorial function to incorporate new amendments into existing primary legislation. However, the Executive is not aware of any plans to do the same sort of exercise in relation to subordinate legislation.

57. The Committee noted developments in Australia, whereby section 20 of the Legislative Instruments Act 2003 (commenced on 1 January 2005) provided for the Federal Register of Legislative Instruments, which is a database of all legislative instruments, all explanatory statements in relation to legislative instruments made on or after the commencing day, and all compilations in relation to legislative instruments, that have been registered. The Australian Capital Territory (ACT) Assembly under its Legislation Act 2001 established the ACT Legislation Register, which is an authoritative resource of ACT law.

58. The Committee believes that developments in the electronic publication of legal texts internationally go some way to redressing the balance between what is available to the legal profession and the information accessible by the general public. The Committee agrees with the Faculty of Advocates that people should have ready access to the laws that govern them and should, therefore, be able to see legislation in its most recently amended state and noted their unequivocal support for the provision of free public access to consolidated legal texts and texts as amended.[26] The Committee considers this to be crucial to the adherence to the Consultative Steering Group principles of accountability and accessibility.

59. The Committee notes the importance of having access to historical versions of amended legislation, as highlighted by Dr McHarg, in order that the reader can access changes to legislation in order to aid interpretation of current provisions. The Committee agreed with the supporting evidence from the Faculty of Advocates[27], where it was stated that the public's interest lay with the law that governs or governed them on a particular date.

60. The Committee will continue to monitor the work of the Department of Constitutional Affairs in making its statute law database, which governs primary and secondary legislation, available to the public.

61. **The Committee strongly recommends that the public should have electronic access, free of charge, to —**

- **up to date texts of primary and secondary legislation, showing those texts as they are currently amended and**
- **the historical versions of any texts, showing how they have been amended**

improving the quality of existing regulation

Consolidation

Primary legislation

62. The Committee is disappointed that there has only been one exercise undertaken to consolidate primary legislation since devolution, namely the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003. The Committee understands that there are areas of Scottish law urgently in need of consolidation and notes that the Executive has not approved any programme for this to be taken forward since devolution**. In the circumstances, the Committee seeks clarification from the Executive in relation to its plans to consolidate primary legislation.**

63. The Committee accepts that a single programme of consolidation of primary legislation would be a large undertaking and favoured the Scottish Law Commission's support for smaller scale programmes identifying and prioritising particular topics for consolidation.

Subordinate legislation

64. The Executive agreed with the Committee's assertion that statutory instruments should normally be consolidated if they are amended five times or more, but considered that this depended on the extent of the amendment involved. The House of Lords Merits of Statutory Instruments Committee stated that it "supported the attempt to increase consolidation because clearer law is likely to encourage better compliance".[28]

65. In relation to subordinate legislation, the Committee supports the principle of rolling consolidation, as mentioned by the Executive in evidence. This principle allows for an instrument to be republished with the amendment inserted, rather than a new amending instrument being published on its own. **The Committee believes that this rolling consolidation would greatly assist accessibility to regulations and recommends that this is taken forward by the Executive**.

66. **In the interim, however, the Committee recommends that the Scottish Executive should report to the Committee on a regular basis on its plans to consolidate regulations, and in particular should present a programme of its planned work for this Committee and relevant subject Committees to consider.**

Reform and Simplification

67. The Scottish Law Commission has a statutory duty to keep under review all the law of Scotland with a view to its systematic development and reform. The Executive indicated that it supports the Commission in this duty and considers that any work should be taken forward on a pragmatic basis, rather than via a programme of wholesale reform. The Committee supports the Commission's Seventh Programme for Law Reform 2005-2009. The Law Society in evidence considered that it would require more discussion to account for work already undertaken by the Scottish Parliament. **The Committee recommends that the Executive should update the Committee on what further priorities it has identified with the Scottish Law Commission in this area.**

Periodic review

68. The Committee noted that one of the OECD guidelines for improving regulatory quality is for regulations to be updated through automatic review methods, such as sunsetting clauses or review clauses. A “sun-setting” clause is a provision inserted into a new piece of legislation which provides for it to cease to have effect after a fixed period of time and a “review” clause is where provision is made for the regulation to be reviewed within a certain period. Either clause would require consideration to be given as to whether the regulation was still necessary.

69. The Committee heard opposing views in relation to whether there should be a statutory requirement to review legislation, rather than it being left to policy guidance, but there was general agreement from consultees and witnesses that, in appropriate circumstances, review should be conducted as a matter of good practice. The Committee noted the view of the Law Society and others that the specified review period should be five years. The Committee also heard that review should be flexible and that in certain circumstances it should be undertaken earlier than this, for example in the area of environmental legislation where SEPA would support a statutory review after three years. Current Executive policy is to review, “within 10 years, all post-devolution regulations which have a significant impact on business to ensure that the impact continues to be justified.”[29]

70. Sunsetting provisions are used in a number of jurisdictions in Australia and form part of review process. The Committee heard conflicting views on the issue of blanket use of sunset clauses but there was wide support for the use of sunsetting provisions in the circumstances identified in the Mandelkern Report, namely where the regulation—

- was introduced at short notice
- was based on a precautionary motive
- was based upon technology or market conditions which are liable to change or
- was a pilot project or
- conferred rights upon the State

71. The Committee is sympathetic to concerns it heard in relation to how “sunsetting” might create unnecessary administrative burden but noted the importance of the Executive taking account of existing regulation and its impact in order to improve quality.

72 **The Committee believes that there is a duty to those regulated to assess whether a regulation is functioning well or could be improved and considers that the Executive’s current policy of review at 10 years of those new regulations impacting on business is insufficient in this regard. The Committee therefore recommends that the Executive undertakes to review areas of new regulation every five years.**

73. **The Committee also recommends that sunsetting provisions should be included in regulations made in the circumstances set out in the Mandelkern Report. The Committee considers this to be sound regulatory practice.**

Enforcement

74. The Committee heard the concerns of the business community in relation to what it considered to be unequal enforcement across different local authorities in Scotland and different EU countries. In particular, CBI Scotland stated—

> “One of the biggest sources of complaints from our members is not regulation per se but the consistency with which it is enforced and the uncertainty surrounding how the regulatory body might interpret regulation in practice.”[30]

75. The Committee was therefore particularly interested in establishing how the Enforcement Concordat, which is an agreement between central and local government on the principles of enforcement, is working in practice. The CBI and FSB were doubtful as to the difference the Concordat had made. However, witnesses from the FSA and SEPA indicated that it is an important part of their enforcement regimes. The Executive considers that it is useful and is committed to encouraging its effective working.

76. The Committee considers that the working group established by the Executive to work to promote the Concordat and monitor its effectiveness has a key role in establishing the main concerns of businesses and regulators in Scotland and providing feedback to the Executive on existing regulation.

77. **The Committee recommends that the Executive reports the findings of this working group, ideally within the Improving Regulation in Scotland Unit's annual report.**

78. The Committee noted the work undertaken by the UK Hampton Review and the recommendations contained in its March 2005 report, "Reducing administrative burdens: effective inspection and enforcement" where it recommended —

> **Hampton - Recommendation 23:** Every Regulatory Impact Assessment (RIA) should include, in addition to information on regulatory costs, an assessment of the practicality of enforcement, setting out:
>
> • which regulator will enforce the regulation;
>
> • the extent to which existing forms, systems, inspection regimes and penalty regimes can be used to secure the desired regulatory outcome;
>
> • the outline of the risk assessment to be used in programming inspections; and
>
> • the sources and nature of advice to be provided both at the introduction of the regulation, and while it is in force.

79. **Whilst the Committee acknowledges that enforcement information is included in Scottish RIAs currently, it recommends that this should be extended to include, similarly to the Hampton findings, an assessment of existing administrative systems and the advice to be provided to those being regulated.**

Common Commencement Dates

80. The Committee considered the idea of establishing common commencement dates for specific areas of law. The aim of this would be to ensure that changes to policy are made in a co-ordinated fashion to provide greater clarity and awareness. However, the Committee heard in evidence from those being regulated and the regulators themselves the possibility that they could be overwhelmed with regulations at specific times of the year. The Committee also noted that it would not be possible for instruments made in response to EU regulations or directives to adhere to a common commencement date.

81. **The Committee is therefore not persuaded by the argument for widespread introduction of common commencement dates.**

Role of the improving regulation in scotland unit (IRIS)

82. Throughout its consideration of improving the quality of new and existing regulation the Committee took account of the current role of IRIS. The Committee acknowledges the work undertaken by the unit in raising awareness of the impact of regulation on businesses and promoting positive engagement with the business community.

83. However, the Committee heard from witnesses representing business interests that IRIS should have more political authority if it is to effectively challenge decisions taken in other parts of the Scottish Executive. In addition to this the Committee has heard from other jurisdictions the importance of measuring the impact of regulation on community and individuals and the unit's current placing in the Department of Enterprise, Transport and Lifelong Learning provides a business focus at present.

84. The Committee acknowledges the considerable work undertaken by IRIS to provide advice on RIAs and ensure that they are produced in all relevant circumstances. The Committee, however, has examined this role carefully and considers that further work could be done by the Unit in relation to the development of RIAs.

85. As mentioned earlier in this report, the Committee considers that review must be undertaken regularly in order that the effectiveness of regulations and the accuracy of the RIA undertaken can be assessed. The Committee understands that IRIS is committed to a Regulatory MOT process at the end of 10 years, and appreciates that this may be appropriate for the majority of regulation. The Committee, however, does not consider this to be sufficient in all circumstances.

86. The Committee welcomed the publication of an annual report by IRIS in December 2004 and looks forward to further similar publications and to the opportunity for dialogue that this will present.

87. **The Committee recommends—**

- **That the Improving Regulation Unit is relocated to the First Minister's Office and should be given enhanced powers to assess standards of regulation within other departments.**
- **That IRIS should assess the performance of individual departments on areas such as the early production of an RIA, innovation in consultation and alternatives to regulation.**
- **That IRIS should have a role in identifying new regulations requiring review within five years, as recommended earlier in this report and should be responsible for the supervision of this review.**

Next

Footnotes:

[1] *Scotland Act 1998 (Transitional and Transitory Provisions) (Statutory Instruments) Order 1999* , SI 1999/1096.

[2] Page 5, IRIS Annual Report, December 2004

[3] Subordinate Legislation Committee, Official Report, 8 February 2005, col 794

[4] Subordinate Legislation Committee, Official Report, 8 February 2005, col 793

[5] Subordinate Legislation Committee, Official Report, 8 February 2005, col 805

[6] Subordinate Legislation Committee, Official Report, 1 February 2005, col 760

[7] Page 5, IRIS Annual Report, December 2004

[8] Subordinate Legislation Committee, Official Report, 1 February 2005, col 779

[9] Page 1, Scottish Enterprise Written Submission, Annex B

[10] Subordinate Legislation Committee, Official Report, 15 March 2005, col 871/872

[11] Para 3.3, Scottish Chambers of Commerce Written Submission, Annex B

[12] Page 23, IRIS Annual Report, December 2004

[13] Subordinate Legislation Committee, Official Report, 15 March 2005, Col 870

[14] Subordinate Legislation Committee, Official Report, 19 April 2005, col 962

[15] Page 1, SCVO written submission, Annex C

[16] Para 2.16, Federation of Small Businesses written submission, Annex B

[17] Subordinate Legislation Committee, Official Report 15 March 2005, col 881

[18] Subordinate Legislation Committee, Official Report 15 March 2005, col 882

[19] Page 4, Scottish Environment Protection Agency written submission, Annex B

[20] Para 2.15, Federation of Small Businesses written submission, Annex B

[21] Page 4, Scottish Environment Protection Agency written submission, Annex B

[22] General Gazette G1 Dated 6 January 2005 http://www.gazette.vic.gov.au/GazArchFrame.htm

[23] Subordinate Legislation Committee, Official Report, 25 January 2005, col 733

[24] Page 2, Scottish Executive written submission, Annex B

[25] Subordinate Legislation Committee, Official Report, 25 January 2005, col 740

[26] Subordinate Legislation Committee, Official Report, 25 January 2005, col 753/754

[27] Subordinate Legislation Committee, Official Report, 25 January 2005, column 753

[28] Para 15, House of Lords Merits of Statutory Instruments Committee written submission, Annex B

[29] Page 4, Scottish Executive written submission, Annex B

[30] Subordinate Legislation Committee, Official Report, 8 February 2005, col 796

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