EXECUTIVE NOTE

THE INTERPRETATION AND LEGISLATIVE REFORM (SCOTLAND) ACT 2010 (CONSEQUENTIAL, SAVINGS AND TRANSITIONAL PROVISIONS) ORDER 2011

SSI 2011/396

The Interpretation and Legislative Reform (Scotland) Act 2010 (Consequential, Savings and Transitional Provisions) Order 2011 ("the Order") is made in exercise of the powers conferred by sections 56 and 57(1) and (3) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("the 2010 Act"). By virtue of section 57(4) of the 2010 Act the Order is subject to the affirmative procedure.

Policy Objectives

Overview

On 6th April 2011 a new statutory framework for the Scottish Parliament's scrutiny of subordinate legislation was established by the commencement of Part 2 of the Interpretation and Legislative Reform (Scotland) Act 2010 ("the 2010 Act").

One of the 2010 Act's purposes was to reduce the number of parliamentary procedures for the scrutiny of subordinate legislation. In future subordinate legislation will, generally, be subject either to the negative procedure (defined by section 28 of the 2010 Act), the affirmative procedure (defined by section 29) or no procedure apart from laying the legislation before the Parliament under section 30.

The Order modifies the following enactments to ensure that subordinate legislation made under them is dealt with appropriately under the new framework.

Amendment of the Sheriff Courts (Scotland) Act 1907

It was intended that paragraph 2 of schedule 3 to the 2010 Act modify section 40 of the Sheriff Courts (Scotland) Act 1907 ("the 1907 Act") so that acts of sederunt made under it are subject to the negative procedure. However, because of the antiquated way in which that section was expressed it may not have been entirely clear that paragraph 2 of schedule 3 applied to section 40 of the 1907 Act. Article 3 of the Order clarifies that acts of sederunt made under section 40 of the 1907 Act are subject to the negative procedure.

Amendment of the Public Records (Scotland) Act 1937

Section 12(2) of the Public Records (Scotland) Act 1937 ("the 1937 Act") provided for regulations made under that section to be subject to the so-called "draft negative procedure". That meant a draft Scottish statutory instrument containing the regulations had to be laid before the Parliament for a specified period and could only be made at the end of that period if the Parliament had not voted against the draft. Paragraph 3 of schedule 3 to the 2010 Act was intended to modify earlier enactments by replacing the draft negative procedure with the negative procedure. However, paragraph 3 of schedule 3 to the 2010 Act was drafted to reflect the standard draft

negative procedure formulation and therefore only applies to enactments that require the draft Scottish statutory instrument to be laid before the Parliament for 40 days. It does not, therefore, apply to section 12(2) of 1937 Act which requires the draft Scottish statutory instrument to be laid before the Parliament for 30 days. Article 4 of the Order achieves what paragraph 3 of schedule 3 to the 2010 Act did not by making regulations under section 12 of the 1937 Act subject to the negative procedure.

Amendment of the Harbours Act 1964, the Roads (Scotland) Act 1984 and the Transport and Works (Scotland) Act 2007

The Harbours Act 1964, the Roads (Scotland) Act 1984 and the Transport and Works (Scotland) Act 2007 (collectively referred to as "the Transport Acts") each provided for subordinate legislation made under them to be subject to the so-called "made affirmative" procedure. That meant the legislation could be made but could not come into force unless approved by a resolution of the Parliament. Paragraph 6 of schedule 3 to the 2010 Act modified earlier Acts (including the Transport Acts) so that the affirmative procedure will now apply instead of the made affirmative procedure. Under the affirmative procedure the legislation cannot be made unless a draft Scottish statutory instrument containing it has been laid before and approved by a resolution of the Parliament. As a consequence of this procedural change references in certain provisions of the Transport Acts, as originally enacted, to legislation being scrutinised by the Parliament after being made should instead be references to legislation being scrutinised by the Parliament in draft in those cases where the affirmative procedure applies. Modifications to that effect are made in relation to the Harbours Act by articles 5 to 7 of the Order, in relation to the Roads Act by articles 12 to 15 and in relation to the Transport and Works Act by articles 18 to 22.

Amendment of the Sheriff Courts (Scotland) Act 1971

Section 12E of the Sheriff Courts (Scotland) Act 1971 contained references to the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 ("the 1999 Order"). That Order has been superseded by the 2010 Act, which provided for the 1999 Order to cease to have effect. In consequence, article 10 of the Order removes the references to the 1999 Order from section 12E.

Amendment of the European Communities Act 1972

Paragraph 2C of Schedule 2 to the European Communities Act 1972 cross-refers to article 11 of the 1999 Order. That article made provision in relation to the Parliament's scrutiny of subordinate legislation subject to annulment by resolution of the Scottish Parliament. Article 11 of the 1999 Order was the predecessor to section 28 of the 2010 Act, which defines the negative procedure. Article 11 of the Order updates the statute book by replacing the reference to article 11 of the 1999 Order with a reference to section 28 of the 2010 Act.

Consultation

On 21st September 2010 the Government launched a consultation exercise on the implementation of the remainder of the 2010 Act. Paragraphs 48 to 61 of the

consultation paper dealt with the question of what provision would be required in consequence of the commencement of Part 2 of the 2010 Act.

Respondents to the consultation offered no substantive comment on drafts of orders seeking to make consequential amendments to transport related statutes. One respondent, the Lord President's Office, alerted the Government to the need to make consequential amendments to a range of statutes containing order making powers exercisable by the Lord President or Lord Justice General, or to remove a sheriff principal or sheriff. Respondents offered no further examples of statutes that should be reviewed as part of the exercise to implement the 2010 Act.

The unique nature of the exercise to implement the 2010 Act, coupled with the relative complexity of the statutory frameworks concerned, led the Government to conclude that it would have been unwise to rush drafting the necessary consequential provisions. Furthermore, it was considered appropriate to consult further with both the Lord President's Office and Transport Scotland, and to offer those parties sufficient time to closely consider the draft provisions before finalising them. The Government therefore advised the Subordinate Legislation Committee that it would lay the outstanding consequential provisions before the Parliament as soon as possible after it resumed in September 2011.

Impact Assessments

The Order arises in consequence of changes introduced by the 2010 Act to procedures for parliamentary scrutiny of subordinate legislation. The provision contained in the Order modifies distinct statutory frameworks set out in certain Acts so that those frameworks recognise, reflect and align with core scrutiny procedures now enshrined in the 2010 Act. The Order is therefore concerned with technical matters of legislative process affecting the Government and the Parliament and does not impact upon business, environmental or equality interests.

Financial Effects

The Order has no financial effects on the Scottish Government, local government or on business.

Scottish Government
22 September 2011