

REPORT

To: GENERAL PURPOSES COMMITTEE		Subject: ENQUIRY INTO THE REGULATORY FRAMEWORK IN SCOTLAND	
From: DIRECTOR OF ADMINISTRATION			
Date: 3 August 2004	Ref: WBK/PG		

1. INTRODUCTION AND PURPOSE OF THIS REPORT

1.1. The Subordinate Legislation Committee has decided to conduct an enquiry into the regulatory framework in Scotland as a preliminary to its examination of the arrangements for the making and scrutiny of subordinate legislation as a whole. Subordinate legislation takes the form of for example statutory instruments, regulations by duly empowered Government Ministers designed to supplement primary legislation. One of the objectives of the enquiry is to ultimately improve devolved regulation and to ensure that effective structures are in place for improving the quality of regulation. It is in essence acknowledged that regulation is mainly contained in legislation and that poor quality regulation is not effective in achieving its objectives whereas good quality regulation makes protection more effective. Upon devolution in 1999 the Scottish Parliament and the Scottish Executive assumed responsibility for devolved matters in Scotland. A consultation paper has been issued which raises general issues of good regulatory practice and reform as well as issues specific to the Scottish setting. Various parties (including Scottish Local Authorities) have been invited to submit written responses to the Scottish Parliament Subordinate Legislation Committee by Friday 20 August 2004. This report is in essence a response on behalf of North Lanarkshire Council and has been prepared after the views of other departments in the Council have been sought on the terms of the consultation paper.

2. REPORT

2.1. The Subordinate Legislation Committee of the Scottish Parliament has sought local authority views on a consultation paper it has issued which consultation paper raises general issues of good regulatory practice and regulatory reform as well as issues specific to the Scottish setting. These matters have been considered and discussed with the Convener of the Committee and a response prepared which response is annexed to this Report. Unfortunately the timetable for consultation did not allow for the response to be tabled before the Committee prior to despatch.

3. CORPORATE CONSIDERATIONS

3.1. The issues contained in this report do not substantially impact on the Council's overall policies and positions.

4. **RECOMMENDATION**

- 4.1. The Committee is asked to homologate the response to the Subordinate Legislation Committee on the consultation paper they issued regarding the regulatory framework in Scotland.

Halvor B. Kjørsvik
p. Director of Administration

Members seeking further information on the contents of this report are asked to contact Paul Guidi, Principal Solicitor, at extension 2294.

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Subordinate Legislation Committee
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Dear Sir

Inquiry into the Regulatory Framework in Scotland

I refer to the consultation paper issued by you relative to the above in which views were sought regarding the various issues raised in the consultation document.

I now have pleasure in enclosing the formal response of North Lanarkshire Council to the consultation document. For the sake of simplicity the questions in respect of which comments were invited are repeated and the Council's response is detailed immediately below each question.

Regulatory Impact Assessment (RIA)

1. **Whether there are any cases since devolution where it is thought (a) that a partial or final RIA should have been produced but it has not been or (b) where it has been produced but has been used effectively to improve the quality of policy decisions about the regulation?**

North Lanarkshire Council has no comment to make.

2. **Whether an RIA should be prepared (a) only in those cases where it may be thought that the regulation may have an impact upon business, charities and the voluntary sector – as at present – and, if so, how should business be defined or (b) in all cases where regulation is proposed (except in any cases where it is not thought appropriate)?**

The regulatory impact assessment is recognised as the main tool for informing and improving policy decisions about regulation. In North Lanarkshire Council's view it is therefore to be encouraged as a tool to improve regulation and should not, therefore, be restricted to regulation affecting business, charities and the voluntary sector. There may, in North Lanarkshire Council's view, be some exceptions where a regulatory impact assessment would not be appropriate and guidance could be developed for these exceptional cases.

3. **Whether, in any case where an RIA is not prepared, a statement should be made giving reasons for not doing so and whether this statement should be given to IRIS (Improving Regulation in Scotland Unit), the Minister and the Parliament, along with the regulation?**

North Lanarkshire Council are of the view as indicated by the answer to Question 2 that the use of regulatory impact assessments should be encouraged and it should be a requirement that where a regulatory impact assessment is not prepared, a statement be made giving reasons for not doing so. This would, in the Council's opinion, in conjunction with guidance on when regulatory impact assessments are not required encourage their use where appropriate. Requiring a statement to be given to Improving Regulation in Scotland Unit, the Minister and the Parliament along with the regulation would in the Council's view serve to support the appropriate and extensive use of regulatory impact assessments.

4. **Whether the final RIA should indicate what changes have been made to the regulation as a result of going through the RIA process?**

North Lanarkshire Council feel that a requirement that the final regulatory impact assessment should indicate the changes that have been made to the regulation as a result of going through the RIA process would be beneficial. It could, in the Council's view, help to show the extent of the assessment, factors that arose and changes made which would hopefully result in more effective regulation. Furthermore, the Council feel it could also help in showing the value of the RIA process.

5. **Whether the requirement to prepare an RIA should be made statutory or whether it should remain, as at present, only a matter of policy guidance?**

North Lanarkshire Council feel that it may not be necessary to make an RIA (regulatory impact assessment) a statutory requirement. There should, however, in the Council's view be clear guidance established to assist in determining when such a process would be necessary or preferable. The Council also feel that the burden of conducting a regulatory impact assessment in all cases would add to what the Council consider to be a significant strain on already scarce resources and this may result in the delay of much needed regulatory reform. The Council feel a balance should be struck in cases like this. North Lanarkshire Council also view that the imposition of a blanket requirement for regulatory impact assessments would be likely to fall short of the guiding principles of proportionality and necessity.

6. **Whether the requirement to prepare an RIA should, as at present, be upon the policy makers and whether they ought to be required in any cases to consult IRIS and the relevant subject Committee in the Parliament?**

North Lanarkshire Council feel that those making the policy should be required to undertake the regulatory impact assessment but clear guidance on how this is to be undertaken should be made available. This would help, in the Council's view, to ensure a consistent and hopefully impartial approach to regulatory impact assessments. A requirement that policy makers consult IRIS (Improving Regulation in Scotland Unit) and the relevant subject Committee in the Parliament may also help bring rigor and objectivity to the RIA process.

7. **Whether the existing questions in the RIA are the correct questions and, in particular, whether the micro-business test is working effectively as a test?**

North Lanarkshire Council has no comment.

8. **Whether there should be a common commencement date, that is a single date or dates for commencing for new regulation in different areas of devolved matters, such as different areas of environmental law?**

In general, a common commencement date, that is a single date when changes are made to a particular area of law may help co-ordinate the process of regulation but it is recognised that it may not be practicable to operate such a process.

Further, North Lanarkshire Council are of the view that having a common commencement date when changes are made to a particular area of law should not be an overriding objective since, on occasion (there may be much regulation to consider), this could impede the necessity for specific regulation in a particular area which may have a degree of urgency or necessity.

9. **Whether there should be a general requirement to consult the public upon any proposal for regulation and any persons affected by it (except in any case where this is not thought appropriate and a statement is given explaining this) or whether this would result in consultation fatigue?**

A general requirement to consult the public upon any proposal for regulation and any person affected by it could lead to a more balanced, effective and accepted regulation. Care would need to be taken, however, to ensure that consultations did not become so frequent that those being consulted began to suffer "consultation fatigue". Where a consultation is not carried out clear and explicit guidance must be available on the reasons for the regulation. The terms of consultation must ensure effective consultation e.g. that timescales are adequate, publicity is sufficient, various methods of engagement are used and feedback is seriously considered since there is no point consulting if those consulted do not see it as being meaningful.

In order to try to avoid consultation fatigue better co-ordination between policy makers could be used to undertake several consultations as one exercise – speaking to certain groups on a range of proposed regulations at the same time rather than several separate exercises.

Further, on the issue of consultation fatigue, North Lanarkshire Council would suggest that some mechanism could be developed predicated upon proportionality which would govern the nature and the extent of the consultation linked to the size of the sector affected. An example of this would be that whenever a proposed regulation would impact on specific sectors of the population and a percentage of the population then the consultation could take a number of predetermined forms like direct consultation with interested parties/organisations combined with an open public consultation where the potential impact is widespread. In some cases, North Lanarkshire Council feel the consultation could be restricted to public advertisement of the proposed regulatory legislation with a brief statement outlining the aims and content of the proposed regulation and inviting comment generally.

10. **Whether there should be a general requirement that the public and interested parties should get access to the comments made by those consulted (except in any case where it would not be appropriate to do so – such as because of commercial confidentiality) and how account was taken of them?**

North Lanarkshire Council feel there should be such a requirement except in terms of confidentiality and the public should be able to access such comments. This would, in the Council's view, help achieve "open and transparent government" by allowing the public to see if the finalised regulation took account of comments made (or, the regulator at least would be able

to offer an explanation of why this did not happen). The Council also feel that it would allow the public to view what individual organisations or companies said about the proposed regulation and the Council feel it would help those organisations to be accountable.

11. **Whether any such general requirements should be statutory or, as at present, only a matter of policy guidance?**

North Lanarkshire Council feel that at present any such general requirements should simply be a matter of policy guidance.

12. **Whether consultation should be a one-off event or whether it should take place at appropriate stages during the making of the regulation and, if so, what those stages might be?**

In order to simplify the process and avoid consultation fatigue the number of consultations should be limited. Ideally, for one regulation it would be best for consultation to take place once. However, if sufficient changes are made during the drafting/initial consultation process (and such changes significantly change the regulation) then a further consultation process may be considered.

In the view of North Lanarkshire Council, too many consultations would place resource issues on organisations such as councils.

13. **Whether the consultation process should continue to follow the Cabinet Office Code of Practice on Consultation and, in particular, that the minimum consultation period should be 12 weeks?**

The minimum consultation period should be 12 weeks to enable all interested parties to have an opportunity to give a matter due consideration and respond.

14. **How the consultation process in relation to Bills, amendments to Bills and subordinate legislation can be handled in an effective manner?**

North Lanarkshire Council feel comments made earlier explain their views.

15. **Whether there should be a general requirement that the text and structure of the regulation should be written in plain language and be simple to use and to understand?**

North Lanarkshire Council feel that there should be such a requirement since this would enable the regulation to be easily understood and requirements should be made that the text and structure of the regulation should be written in plain language.

16. **Whether such a requirement should be part of the RIA and, if so, how can it be made effectively?**

In the view of North Lanarkshire Council, if the regulation is written in plain language and simple to use, this helps ensure that such regulation is written in a suitable manner.

17. **Whether, if, exceptionally, it may not be possible to use simple language in the regulation, there should be a requirement that guidance, written in plain terms, should accompany the regulation?**

A plain text guidance should be required where regulation cannot be written using simple language. However, in the view of the Council, this must be viewed as an exception and not as a way round writing most regulation in plain text.

18. **Whether the Scottish Ministers should have a power to establish a statutory code of good enforcement practice in relation to devolved matters as UK Ministers have under section 9 of the Regulatory Reform Act 2001 in relation to reserved matters?**

North Lanarkshire Council feel that Scottish Ministers should have such a power.

19. **Whether the Enforcement Concordat is working effectively?**

North Lanarkshire Council continues to implement and adhere to the principles of the Concordat and are of the view that it is working well.

20. **What measures should be in place by the Scottish Executive to assess how compliance with any regulation is to be measured and to determine whether compliance is equitably enforced within all parts of Scotland and, if a similar regulation is in place in other parts of UK or elsewhere in the EU, within all parts of the UK or EU?**

North Lanarkshire Council feel that it may be appropriate to incorporate ad hoc compliance checks within the remit of organisations appointed to audit bodies responsible for implementation of the regulations.

21. **Whether there should be procedures available to enable users to complain about the unequal or unfair enforcement of regulation and, if so, what those procedures should be?**

North Lanarkshire Council feel such a procedure should exist and feel it could be dealt with through a process such as an ombudsman.

22. **Whether there should be a general requirement that all new regulation (or regulation of a specified kind, such as those which impact significantly upon business – and, if so, how should that be defined) should be subject to review after a certain specified period of time and, if so, whether that period of time should be 3, 5 or 10 years?**

North Lanarkshire Council feel a review of regulation would help to ensure its continued relevance. However, the Council feel the proposals on periodic review of regulation should not necessarily be built into the legislation but predetermined cases should be identified where there will be a presumption that review clauses are appropriate unless justified otherwise. In the Council's view to impose a blanket review on all regulation will result in unnecessary work being imposed and in consequence this would be an additional administrative burden. The period of review in the predetermined cases should vary in accordance with the activity being regulated and arrangements should be flexible enough to allow an earlier review should sufficient issues arise that would make this prudent. In this regard, North Lanarkshire Council are mindful of the fact that due to certain changes in the economy or the pattern of behaviour some matters may require to be urgently reviewed.

23. **Whether such a requirement should be statutory or contained in policy guidance?**

North Lanarkshire Council feel the requirement for review should be in policy guidance.

24. **Whether there should be a blanket use of “sunset” or review clauses or whether there should be a presumption that, except where an exception can be justified, such clauses should be used in the cases identified in the Mandelkern Report, namely where the regulation:-**

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

The blanket use of “sunset” clauses is to be avoided since this could result in a great deal of additional work and may also cause instances of regulation ceasing to have effect but no replacement regulation being available. The potential disruption this could cause should be avoided and the use of “sunset” clauses should be restricted to those areas identified in the Mandelkern Report.

25. **Whether the Scottish Ministers should be invited to request the Scottish Law Commission to prepare a comprehensive programme for the consolidation of all primary legislation relating to devolved matters and, after consultation with the Parliament, to approve any such programme?**

North Lanarkshire Council feel that a sufficiently persuasive case for consolidation of all legislation has been made out. Having said that, North Lanarkshire Council recognise the scale of such an undertaking and in essence feel that the overriding need for clarity and coherence of such legislation makes this an exercise which is useful for both the administrators of the legislation and those affected by it. In the view of North Lanarkshire Council, experience shows that there is a need for clarity of draftmanship since poorly drafted regulation causes further confusion. In the view of the Council, such a review programme should extend to every area and not simply the areas of business, charities and the voluntary sector.

26. **Whether the Scottish Executive should be invited to prepare, in consultation with the Parliament, a comprehensive programme for the consolidation of all secondary legislation relating to devolved matters?**

North Lanarkshire Council feel the Scottish Executive should be so invited. North Lanarkshire Council acknowledge that it would be a very large task but one that would bring increased coherence and clarity to the legislative environment in Scotland.

27. **Whether, if the Scottish Executive cannot devote the necessary resources for the work involved in the preparation of such consolidations, such work should be outsourced?**

North Lanarkshire Council feel that outsourcing could be used in the circumstances described above, so long as the necessary checks were in place since the Executive would ultimately be responsible for the outcome of such work.

28. **Whether, when an Act of the Scottish Parliament makes a number of amendments to another Act or part of it, it should contain a “Keeling Schedule” which shows that other Act (or part of it) as so amended?**

Such an approach would, in the Council's view, help to provide clarity and assist in the effective implementation of regulation/legislation.

29. **Whether users encounter difficulties in accessing regulation (whether contained in primary or subordinate legislation) which has been amended?**

North Lanarkshire Council feel it can be a difficult task to trace all the changes in provisions associated with items of legislation. Advances in word processing and internet technology provides an opportunity for up to date, amended versions, to be made available.

30. **Whether there should be procedures available to enable users to complain about the difficulties in accessing regulation and, if so, what those procedures should be?**

North Lanarkshire Council feel there should be such a procedure since if such a procedure was available for complaints then this can be used to help improve and streamline relevant processes relating to the accessing of regulation.

31. **Whether, when a set of subordinate legislation has been amended more than, say 5 times, it must be consolidated and whether there are any circumstances in which it ought to be consolidated before then?**

North Lanarkshire Council feel such an approach would help increase coherence and clarity relating to the understanding and implementation of regulations.

32. **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 the texts as amended?**

North Lanarkshire Council feel such facilities should be available.

33. **Whether the Scottish Executive should prepare, in consultation with the Parliament, a programme for the reform and simplification of all the existing legislation, whether primary or secondary, relating to devolved matters, along the lines recommended by the Mandelkern Report?**

North Lanarkshire Council feel the Scottish Executive should prepare such a programme since this would help clarify and bring added coherence to the legislative framework in Scotland thereby enabling clear and more effective regulation.

34. **Whether consideration should be given to having a Bill which would confer upon the Scottish Ministers powers to make orders to give effect to the reforms suggested in that programme. Such a Bill might be similar to, or more extensive than, the provisions in the Regulatory Reform Act 2001?**

North Lanarkshire Council feel that if it is the view that this process is necessary then the Ministers need to have the powers to implement this.

35. **Whether, until such a Bill is enacted and to the extent that it could not be implemented by orders under the De-regulation and Contracting Out Act 1994, a start could be made on implementing that programme by means of Bills and SSIs?**

North Lanarkshire Council are in favour of an interim approach being adopted.

36. **Whether IRIS should be re-located as part of the office of the First Minister or at least as part of the Constitutional and Parliamentary Secretariat?**

North Lanarkshire Council feel that IRIS (Improving Regulation in Scotland Unit) should be re-located as part of the office of the First Minister since this would give it a higher profile and may help it to achieve its goals as it could be seen to have a higher level of political support.

37. **Whether a Minister and an official unit within each department of the Scottish Executive should be charged with being responsible for good regulatory practice within that department?**

Having a Minister and an official unit within each department of the Scottish Executive charged with responsibility for good regulatory practice within that department could have beneficial effects. However, North Lanarkshire Council feel consideration should be given to a more streamlined mechanism that supports this goal in each department but does not necessarily require a unit within each department.

38. **Whether IRIS should be charged with ensuring that departments within the Scottish Executive deliver better regulation through full compliance with the RIA process and with monitoring and assessing the level of compliance with that process by means of 6 monthly reviews?**

North Lanarkshire Council feel that if IRIS is moved to the office of the First Minister and is given sufficient powers and resources then it could be charged with the overall responsibility and should determine what appropriate review deadlines should be.

39. **Whether IRIS should be given a wider strategic role to ensure that all new regulation meets the required standards for good regulation and to draw up programmes and timetables for the consolidation of existing regulation and for its reform and simplification?**

North Lanarkshire Council feel that IRIS will have the expertise that can be applied to this wider strategic role but sufficient resources would need to be given to support this role.

40. **Whether the powers of IRIS should be strengthened by requiring all new regulation to be approved by it as meeting the required standards for good regulation as a formal part of the decision making process?**

Again North Lanarkshire Council feel that IRIS will have expertise that can be applied but resourcing this role would be an issue. If all new regulation had to be approved via IRIS then a certain base-level in terms of standards could be expected and is to be welcomed.

41. **Whether IRIS should be required to produce an annual report, to be laid before the Scottish parliament, of its activities, of the level of compliance with the RIA process within the Scottish Executive and of the progress made towards regulatory review and reform?**

North Lanarkshire Council are in favour of the idea of IRIS being required to produce such an annual report since, in the long term, North Lanarkshire Council feel this would help improve the regulatory process.

42. **Whether there should be independent advisory bodies established in Scotland, similar to BRTF, to advise IRIS on matters relating to regulatory reform?**

North Lanarkshire Council feel that if IRIS is given an enhanced role and remit then an independent advisory body can help in their work with the provision of impartial advice.

43. **Whether the remit of the Subordinate Legislation Committee should be amended to give it a specific role to consider matters of regulatory reform, including in particular,**

- **assessing whether any new regulation (whether contained in Bills or in subordinate legislation) meets the required standards of good regulation, with power to report the regulation to the lead Committee if it fails to do so;**
- **ascertaining whether an RIA accompanied any new regulation (or a statement explaining why it was not) and whether the RIA appears to have been properly prepared;**
- **considering any programmes and timetables drawn up by the Scottish Law Commission or the Scottish Executive for the consolidation of existing regulation or for its reform and simplification and assessing whether and to what extent such programmes and timetables are adhered to;**
- **considering the annual report of IRIS and the level of compliance by the Scottish Executive with the RIA process**

North Lanarkshire Council feel this amended remit would be of assistance in terms of adding rigor and an added level of scrutiny to the regulatory process and this would be beneficial.

North Lanarkshire Council hope the foregoing comments are of assistance.

Yours faithfully

Head of Legal Services