ERD/S2/05/23A

The Scottish Parliament

Environment and Rural Development Committee

23rd Meeting, 2005

Wednesday 21 September 2005

The Committee will meet at 10.00 am in Committee Room 3

1. **Inquiry into the regulatory framework in Scotland:** The Committee will consider correspondence from the Subordinate Legislation Committee on its inquiry into the regulatory framework in Scotland.

Mark Brough
Clerk to the Committee
Direct Tel: 0131-348-5240

The following papers are attached:

Agenda Item 1 Note from the clerk	ERD/S2/05/23/1

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31 August 2005

Dear Committee Convener

Subordinate Legislation Committee Inquiry into the Regulatory Framework in Scotland – Phase 2

As you may be aware, the Subordinate Legislation Committee is conducting an inquiry into the Regulatory Framework in Scotland, and is seeking views. A copy of the Committee's Phase 2 consultation paper is attached.

The consultation paper has been issued to a wide range of individuals and organisations that may have an interest in subordinate legislation and the way in which this is scrutinised by the Parliament.

The Scottish Parliament's subject Committees may clearly have an interest given their direct involvement in scrutinising subordinate legislation as lead Committees. We therefore invite your Committee to submit its views on the Parliamentary scrutiny of subordinate legislation and its own role in this process. The deadline for your response is Friday 14 October 2005.

Background

Phase 1 of the inquiry examined the existing regulatory framework in Scotland, and what would be required to improve the quality of new and existing devolved regulation. A copy of the report is attached for your information. All of the evidence the Committee received during Phase 1 is available on the Committee's webpage.

At **Phase 2**, the Committee will look at how the Parliament scrutinises subordinate legislation and will examine the supervision which the Parliament should exercise over such legislation. The Committee will then make recommendations to the Parliament with a view to introducing a bill in 2006.

The Consultation paper sets out a number of specific issues on which your comments would be very much appreciated. However, please feel free to comment

on any or all of these, or on any other issue relating to the scrutiny of subordinate legislation in Scotland.
A background paper on the current system of scrutinising subordinate legislation and the Parliamentary process is also attached for background information.

Comments

The Committee would prefer to receive comments electronically. These should be sent to:

subordinate.legislation@scottish.parliament.uk

Should you require any further information on the Committee's inquiry, then please contact the Subordinate Legislation Committee Clerks.

Yours sincerely

Sylvia Jackson MSP
Convener

`Subordinate Legislation Committee
Inquiry into the Regulatory Framework in Scotland

Background paper

Introduction

1. The Scotland Act 1998 confers upon the Scottish Parliament power to legislate within certain limits in Acts of the Scottish Parliament. Those Acts frequently contain provisions which delegate power to make legislation to the Scottish Ministers and others. In doing this, the Scottish Parliament is following the Westminster practice of delegating, where appropriate, its legislative power to the Executive. This practice is also followed by several Commonwealth countries but not by other European countries which adhere strictly to the doctrine of the separation of powers and which would regard such a practice as unconstitutional.

2. It is, however, considered important that delegated legislation should be subject to parliamentary scrutiny so that the public can be confident that it is not being subjected to laws unsupervised by the Parliament.

3. The Subordinate Legislation Committee ("SLC") is therefore conducting an inquiry into such matters. The inquiry falls into two parts -

- Phase 1 has been concerned with the regulatory framework in Scotland and with what is required to improve the quality of new and existing devolved regulation and to bring it up to the standards of best international practice. The Committee has reported on this phase and some of the issues will be carried over into Phase 2; and

- Phase 2 will examine the supervision which the Parliament should exercise over delegated legislation, most of which is made by Scottish Ministers, and to make recommendations in relation to the making, publication and parliamentary control over such legislation

4. The Committee aims to report upon Phase 2 around January 2006. If approved by the Parliament, then it is intended that the Committee's report will form the basis of a Committee Bill to replace the current provisions which are set out in a transitional order made under the Scotland Act, namely the Statutory Instruments Order ("SI Order")[1].

[1] The Scotland Act 1998 (Transitory and Transitional Provisions)(Statutory Instruments) Order 1999 (S.I. 1999/1096)

Points for Discussion

Nature of supervision by the Parliament

5. At present, the nature of the supervision exercised by the Parliament over SSIs has a dual aspect. The Parliament supervises both

- the legality of the instrument and the way in which it has been drafted in order to ensure that the delegated power is being exercised properly and within the limits authorised by the Parliament. This technical scrutiny is carried out by the SLC which reports to the lead committee and to the whole Parliament, and

- the substance of what the instrument provides. This scrutiny is carried out by the lead committee. The nature of this scrutiny, however, depends upon the form of parliamentary control.

6. The parent Act may subject a SSI to a certain form of parliamentary control. The different forms of parliamentary control are described below but basically they distinguish between those which require the instrument or the draft to be approved by resolution of the Parliament ("affirmative procedures") and those which enable the instrument or the draft to be disapproved or annulled by a resolution of the Parliament ("negative procedures"). This affects the procedures for scrutinising the SSI.

7. Affirmative procedure affords the Parliament a greater opportunity to scrutinise the SSI or the draft because the instrument or draft must be approved. The Standing Orders[2] make provision for the lead committee to decide, after a debate lasting not more than 90 minutes, whether to recommend that the instrument or draft be approved and to report its decision to the Parliament not later than 40 days after the instrument or draft is laid. A motion for approval is then considered by the whole Parliament.

8. With negative procedure, there need be no debate upon the instrument or the draft but the SI Order[3] provides that the Parliament may resolve, within 40 days after it is laid, that it is annulled, that is that "nothing further is to be done" under it or that is not made. 9. The Standing Orders[4] provides that any MSP may, within that period, propose a motion to the lead committee that the lead committee recommends that the instrument or draft be "annulled". Such a motion is in practice always debated but there is no requirement that it should be. The lead committee is then required, within the period of 40 days, to report its recommendation to the Parliament. If the Committee recommends that the instrument should be "annulled", the debate in plenary is restricted – only 3 members may speak for 3 minutes each. The SI Order spells out what is the effect of such a resolution being passed by the Parliament[5].

[2] Rule 10.8
[3] SI Order Article 10(2)
[4] Rules 10.4 and 10.5
[5] SI Order Article 11

10. Whether a SSI or a draft is subject to affirmative or negative procedure depends upon what is stated in the parent Act. It does not necessarily depend upon the inherent importance of the subject matter of the instrument or the draft, although account should have been taken of that when the Bill which became the parent Act was being considered. This has led the Procedures Committee of the House of Commons to consider whether the distinction between affirmative and negative procedures should be abolished in favour of some "mechanism for determining which [instruments] required positive approval based on their inherent significance rather than their statutory basis"[6]. However, that Committee did not recommend any such change at present.

Amendment

11. At present, there is no general provision which would allow the Parliament to make or to propose an amendment to an instrument or a draft instrument[7].

12. It may be argued that giving the Parliament a power to amend delegated legislation would be inconsistent with the purpose for which it had originally granted the power to make such legislation. However, there seems to be no reason in principle why the Parliament, as the body delegating the legislative power, should not be able to amend an instrument made by its delegate. It would simply be taking back to itself the legislative power which it has delegated to another.

13. There may, however, be problems if the Parliament was given the power to amend an instrument directly. This would make the Parliament to some extent responsible for making the instrument and this may be argued to run counter to the assumption made in the Scotland Act 1998 that subordinate legislation would be made by the Scottish Ministers or by bodies responsible to the Parliament and not by the Parliament itself. There would also be practical problems about the Parliament amending an instrument which had already been made or which may already be in force.

14. These difficulties would not arise, however, if, in the case where an instrument is laid in draft before the Parliament for approval under the affirmative procedure, the Parliament was given the power to approve the draft subject to conditions, whether specified amendments to the draft or amendments designed to achieve a particular outcome. It would then be for Scottish Ministers to decide whether to relay the draft with amendments which give effect to those conditions. This is similar to what was recommended by the Procedures Committee of the House of Commons[8]

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[6] House of Commons Procedures Committee 4th Report of 1995-96 on Delegated Legislation (HC 152), paragraph 8. Their proposals were endorsed by the House Commons Select Committee on Procedures First Report 1999-2000 (HC 48 2000)

[7] The only exception is that Census Act 1921, section 1(2) makes provision for the Parliament to make and approve modifications to a draft Order in Council in certain circumstances.

[8] House of Commons Procedures Committee 4th Report of 1995-96 on Delegated Legislation (HC 152), paragraphs 51-53. Their proposals were endorsed by the House Commons Select Committee on Procedures First Report 1999-2000 (HC 48 2000)

15. There would be more difficulties about doing something similar in the case of instruments which are made but subject to annulment under the negative procedure. If, however, the instrument was annulled, the debate would presumably make it clear why the Parliament was unhappy with the instrument and it would be for Scottish ministers to take that into account if they bring forward a new instrument.

16. There would, in any event, be less need for the Parliament to amend or to propose amendments to instruments if the Parliament was given the opportunity to comment upon a draft of the instrument before it is made – see **Consultation** below.

Consultation

17. There is no general provision for the Parliament to be consulted on a draft of an instrument before it is made or laid before the Parliament for approval. In particular cases, there may be provision made in the parent Act for consultation but, even in those cases, it is not usually provided that the Parliament should be consulted.

18. This means that there is generally no opportunity for any detailed parliamentary examination of, or effective parliamentary input into, proposed delegated legislation which can be taken into account by the Executive before the instrument is made. The comments which the Parliament might wish to make could either be on the policy behind the instrument or technical points of the kind considered by the SLC.

19. This has led to the use, in particular cases, of what is called “super-affirmative” procedure. This is described below but it generally involves (a) a draft instrument, or proposal for a draft, being laid before the Parliament (b) an opportunity for the Parliament to comment upon the draft (c) if Ministers decide to proceed with the proposal, they lay before the Parliament a draft for approval under the affirmative procedure, together with a statement of whether and how the comments have been reflected in the draft.

20. The super-affirmative procedure is used only in cases where it is considered that the instrument is of particular significance. However, in other cases and particularly in cases where the instrument is subject to the negative procedure, there may be an argument that there should be a general requirement to consult the Parliament and public less formally on a draft instrument and, if they do not, for Ministers to explain why not when they lay the instrument.

Scottish statutory instruments (SSIs)

21. The existing procedures regarding the making, publication and parliamentary control of delegated legislation are mainly regulated by the SI Order which is based upon the Statutory Instruments Act 1946. They are similar to the procedures which apply at Westminster.

22. Those existing procedures only apply to certain types of delegated legislation which are SSIs. These are mainly instruments which are expressed in the parent Act (that is, the Act authorising the delegated legislation to be made) to be exercisable by a statutory instrument and which are exercisable by the Scottish Ministers or by certain other Scottish bodies. In practice, rules, regulations and orders are usually expressed in an Act to be exercisable by a statutory instrument. This may be because they are regarded as instruments of a legislative character but there is no express requirement that all instruments of a legislative character have to be exercisable by statutory instrument.

23. If there was to be such a requirement, it may be necessary also to consider whether there should be a definition of what is meant by "legislative character"[9] and, if so whether that should be along the lines of that used in section 5 of the Australian Legislative Instruments Act 2003[10];

24. There are, however, other kinds of instruments made under delegated powers which are not subject to any procedures at all, such as directions, schemes, codes of conduct, guidelines etc. Some of these may be regarded as being instruments of a legislative character. These instruments are sometimes not even published and it may be very difficult for the Parliament or the public to ascertain whether they exist or where copies can be obtained. The Parliament is frequently unaware of their existence and is denied the opportunity of subjecting them to any form of supervision.

Forms of parliamentary control

25. As mentioned above, the parent Act may subject a SSI to a certain form of parliamentary control. There is no statutory list of the forms of parliamentary control but in practice they tend to follow established models. It is possible to distinguish 8 different forms or classes of parliamentary control which are summarised in the following table –

[9] Regulation 2(1) of the Statutory Instruments Regulations 1947 (SI 1948/1) defines statutory rules for the purposes of section 1(2) of the Statutory Instruments Act 1946 as documents of a legislative and not an executive character. It did not further define what was meant by legislative character.

[10] This provides that an instrument is of a legislative character if "it determines the law or alters the content of the law, rather than applying the law in a particular case: and it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right"

Various classes of SSI and types of parliamentary control

Class	*Procedure*
	Affirmative procedures
1	Instrument is laid before the Parliament in draft and cannot be made until the draft is approved by resolution of the Parliament
2	Instrument is laid before the Parliament after making but cannot come into force unless and until it is approved by resolution of the Parliament
3	Instrument is laid before the Parliament after making and may come into force but cannot remain in force after a specified period (usually 28 days from the date on which it was made) unless approved by resolution of the Parliament within that period
	Negative procedures
4	Instrument is laid in draft before the Parliament and cannot be made if the draft is disapproved by the Parliament within 40 days after the draft is laid
5	Instrument is laid before the Parliament after making, subject to being annulled in pursuance of a resolution of the Parliament passed within 40 days after laying
	Other procedures
6	Instrument is laid before the Parliament after making but there is no provision for further parliamentary procedures
7	Instrument is not required to be laid before the Parliament
	Super affirmative procedure
8	This is a variant of Class 1. It generally involves (i) a draft instrument being laid before the Parliament (ii) an opportunity for comments to be submitted to the Executive on the draft (iii) if Ministers decide to proceed with the proposals, they then lay before the Parliament a draft in the normal way for affirmative procedure (as in Class 1), together with a statement of whether and how the comments have been reflected in the draft.

Class 1 procedure: instrument laid in draft for affirmative resolution

26. There is no statutory provision in the SI Order which lays down any time within which the draft has to be approved. However, the Standing Orders[11] adopt similar

[11] Rule 10.6

timescales as for Class 5 instruments (instruments subject to annulment) by requiring the SLC to report upon the draft within 20 days, and the lead committee to report to the Parliament on whether the instrument should be approved within 40 days, after the draft is laid.

27. It is thought that these timescales can cause real practical difficulties. This might be solved by amending the Standing Orders to increase the periods within which—

- the SLC should report upon the draft from 20 to 30 days,

- the lead committee should report to the Parliament on whether the instrument should be approved from 40 to 60 days after the draft has been laid before the Parliament.

Class 2 procedure: instrument laid after making but cannot come into force until approved

28. This procedure is rarely used in modern Acts. It seems to achieve nothing which could not be achieved by the Class 1 procedure. The Standing Orders make it subject to the same timescales as for Class 1 instruments.

Class 3 procedure: instrument laid after making and may come into force but ceases to be in force unless approved within a specified period, usually 28 days, after being made ("28 day orders")

29. This procedure is generally used to deal with some emergency, such as an emergency prohibition order dealing with food under section 1(1) and (8) of the Food and Environment Protection Act 1985[12]. The usual procedure for such an order is that the instrument is made and is expressed to come into force at a specific time after being made. It is then laid as soon as practical thereafter which usually means 2 to 4 days after making. It ceases to be in force at the end of a specified period, usually 28 days, after being made unless it is approved before then by the Parliament.

30. The Standing Orders require the lead committee to report upon such an instrument before the end of the specified period (usually 28 days) after being made[13]. However, the Standing Orders also require the SLC to report upon the instrument to the Parliament and to the lead committee not later than 20 days after the instrument is laid[14]. This causes practical difficulties in relation to the SLC to considering and reporting upon the instrument within that timescale.

31. Some Acts avoid these problems by making provision for emergency orders to be subject to class 5 procedure (instrument laid after making but subject to annulment),

[12] c. 48. For example, the Food Protection (Emergency Prohibitions)(Amnesic Shellfish Poisoning)(West Coast)(No 4)(Scotland) Order 2003 (SSI 2003/374)
[13] SO Rule 10.6.4
[14] SO Rule 10.3.2

such as emergency control orders relating to food under section 13 of the Food Safety Act 1990[15].

32. It is, therefore, a matter for consideration whether there is any need for these instruments to require an affirmative resolution within the specified period and whether negative procedure under Class 5 would be sufficient. This would, however, diminish Parliamentary control. If they were to become Class 5 instruments, it would also require to be recognised that such instruments would have to breach the 21 day rule and may require to come into force immediately after making and before even being laid.

Class 4 procedure: instrument laid in draft subject to annulment

33. This procedure is no longer used in modern Acts[16] and Acts which provide for such a procedure could be amended to provide for a Class 5 procedure (instrument laid after making but subject to annulment).

Class 5 procedure: instruments laid after making but subject to annulment

34. There are three main problems in connection with this procedure concerning the 21 day rule, the period of annulment, and the consequences of annulment.

(a) 21 day rule

35. The SI Order requires an instrument subject to Class 5 procedure to be laid before the Parliament not less than 21 days before it is due to come into force[17]. If this is not possible, the Executive has to give explanation to the Presiding Officer.

36. The purpose of this rule is to give the Parliament some opportunity of commenting upon the instrument, and the Executive some opportunity of revoking or amending it, before it comes into effect. This is to avoid the problems which might be caused if the instrument requires to be revoked after it had come into effect.

37. However, at present, there is nothing to prevent an instrument from coming into effect at the end of the 21 day period and before the expiry of the period of 40 days during which the instrument may be annulled. As is mentioned below, there may well be problems if the instrument is annulled after it has come into force. This may make the Parliament reluctant to annul such an instrument. This would render the Class 5 procedure an even less effective system of Parliamentary control than it might otherwise have been.

38. This problem would be resolved if the 21 day rule was extended to cover the whole period when the instrument may be subject to being annulled. This would mean that an instrument would not come into force until the whole of that period had expired, unless the Executive had given some explanation as to why this was not possible.

[15] c. 16. For example, The Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2005 (SSI 2005/67)
[16] This follows the recommendation in the Second Report from the Joint Committee on Delegated Legislation 1972-73 (H.L. 204, H.C. 468).
[17] Articles 10(2) and 11(2)

(a) Period of annulment

39. The SI Order provides that the Parliament may annul an instrument subject to Class 5 procedure within 40 days after it is laid[18]. The Standing Orders then divides this period into half and requires the SLC to report upon the instrument within 20 days and the lead committee within the 40 day period[19].

40. Experience has shown that the time allowed by the Standing Orders for the SLC to consider and report upon the draft or the SSI is too short. This is particularly so because the SLC does not report adversely upon an instrument without giving the Executive an opportunity of commenting upon the criticism. There is usually only time to have two meetings of the Committee held in consecutive weeks. The typical timetable runs something as follows

- Tuesday, week 1. The Committee considers instruments laid up to noon of the previous Thursday, together with briefing given by the Committee staff. Any comments made by the Committee are sent to the Executive on Tuesday afternoon with responses requested by the following Thursday;

- Tuesday, week 2. The Committee considers the Executive responses, together with briefing given by the Committee, and determines whether to report the instrument. The report has to be made by the 20th day after laying.

41. This is a punishing timetable and the problem could be solved by increasing the period of annulment from 40 days to 60 days after the instrument is laid, with the SLC having 30 days after the instrument is laid to make their report.

42. However, simply increasing the period when the instrument may be annulled, without ensuring that the instrument does not come into force during the time when it may be annulled, may merely render it even less likely that the Parliament would ever use this sanction. Accordingly, any extension of the period of annulment could be accompanied by an extension of the 21 day rule..

43. The Procedures Committee of the House of Commons recommended that the period of annulment in these cases should be increased to 60 days after laying. This was to allow the sufficient time to enable a debate to be had upon the instrument.[20]

Consequences of annulment

44. In the case of Class 5 procedure, the parent Act provides that the SSI is "subject to annulment in pursuance of a resolution of the Scottish Parliament".

[18] Article 10(2)
[19] Rule 10.4
[20] House of Commons Procedures Committee 4th Report of 1995-96 on Delegated Legislation (HC 152), paragraph 18. Their proposals were endorsed by the House Commons Select Committee on Procedures First Report 1999-2000 (HC 48 2000)

45. However, the resolution for annulment in the Parliament does not mention "annulment". It is simply a resolution "that nothing further is to be done under the instrument after the date of the resolution".

46. What happens if the Parliament passes such a resolution? The consequences are spelt out in the SI Order[21], namely-

(a) the resolution stops anything further being done under the instrument. Accordingly, even if the instrument has come into force, no further action can be taken under it; and

(b) the instrument requires to be revoked. It requires to be revoked by an order made by the Scottish Ministers, unless it is an Order in Council or an order made by the Privy Council, in which case it requires to be revoked by an Order in Council; but

(c) this is without prejudice to the validity of anything previously done under the instrument; and

(d) it is also without prejudice to the making of a new SSI. In other words, there would be nothing to prevent the Scottish Ministers from making the same instrument in exactly the same terms again, although whether this would be politically possible is another matter.

47. There is a difficulty about interpreting what is the effect of (c) in particular cases. Take, for example, the case of an instrument which has what might be described as a "once and for all effect", such as to provide that some corporate body is dissolved on the date of coming into force of the instrument. If the instrument is annulled after it has come into force, what is the effect of the resolution? No further action can be taken under the instrument but arguably no further action needs to be taken. The instrument is spent as soon as it comes into force. Its revocation also appears to achieve nothing because this does not revive the pre-existing law and does not mean that the body has ceased to be dissolved.

48. There may also be difficulties in deciding whether an instrument has this "once and for all effect". An instrument which revokes another may be said to have this effect but what about an instrument which textually amends another - x "shall be amended". Is the amendment effected as soon as the amending instrument comes into force so that the amending instrument is then spent? Or does the amending instrument need to continue to be in force to have the amendment continue in force? Although there has been no judicial case about this, the view which seems to be taken in practice is that the amending instrument requires to continue to be in force in order to breathe life into the amendment.

[21] SI Order Article 11.

49. It is difficult to see how these problems can be resolved. It would be preferable to avoid them arising by ensuring that the instrument is annulled before it comes into force, by extending the 21 day rule.

50. Paragraph (d) above has not caused any problems. However, in Australia, it appears that there was a problem when the Parliament continually disallowed (their expression for annul) an instrument which the Executive remade. Accordingly, they provide that it is not possible to remake a regulation the same in substance as that disallowed within 6 months of the disallowance unless the disallowance resolution has been rescinded. It is not suggested that anything similar is required.

Class 6 procedure: instrument laid after making but no provision for further parliamentary procedures

51. This procedure is sometimes criticised because it does not make it clear what the Parliament is to do with the instrument after it has been laid.

52. Such an instrument is, however, subject to the scrutiny of the SLC and there seems to be no reason why the SLC should not report it to the Parliament for it to take whatever action it thinks fit.

Class 7 procedure: instrument not required to be laid

53. The disadvantage of this procedure is that the Parliament may never know of the existence of any instrument which is not required to be laid before it and is therefore unable to supervise the way in which the legislative power has been exercised.

54. In recognition of this difficulty, the remit of the SLC was extended to enable it to consider and report upon any SSI which is not laid before the Parliament but which is classified as general. It is understood that, in practice, arrangements exist to ensure that all general SSIs are brought to the attention of the SLC. However, this depends upon the continuation of those informal arrangements.

55. Informal arrangements could be formalised so that all SSIs, which are not subject to any other form of parliamentary procedure, would require to be laid before the Parliament after being made, provided that they are classified as having a general and not a local character. This would mean in effect using Class 6 procedure instead of class 7.

Class 8 procedure; super-affirmative procedure

56. This procedure has been described in paragraph 19 above.

The numbering, classification and publication of SSIs

57. The SI Order makes provision for SSIs to be numbered, classified and published. In particular, the Order requires—

- the maker of the instrument to send every SSI, immediately after it is made, to the Queen's Printer for Scotland (QPS)[22] for numbering. An SSI is numbered consecutively in the series of the calendar year in which it is made.[23]:

- the maker of the instrument to certify whether a SSI is local or general. This depends upon whether the provision made by the SSI is in the nature of a local and personal or private Act (such as orders stopping up certain roads) or in the nature of a public general Act. Local instruments are not usually printed or put on sale[24]; and

- every general SSI, as soon as possible after the QPS has numbered it, to be printed and sold by or under the authority of the QPS[25]

Consequences of not laying

59. It is not clear whether an instrument is invalidated if there is a failure

- to lay the instrument or draft if this is all that is required;
- to lay the instrument or draft which is subject to negative procedure.

60. It could be provided

- that, when an instrument which is made requires to be laid, it is should be laid as soon as practically possible after making. In this connection, it should be noted that it is possible to lay an instrument any time that the Office of the Clerk of the Parliament is open. The Office is open Monday to Friday throughout the year between 9.30 and 4.30[26]; and

- that failure to lay the instrument or the draft as required invalidates the instrument

61. It is thought that it would only be in very exceptional cases that an instrument would have come into force before it was required to be laid. .However, even the 21 day rule recognises that, in very exceptional cases, an instrument may have to come into force as soon as it is made. If it does and there is subsequently a failure to lay, this would mean that anything done under the instrument is also invalid. This may

[22] The QPS is also the Controller of HMSO. In practice it is HMSO who carries out these functions on behalf of the QPS.
[23] SI Order Article 5
[24] SI Order Article 6
[25] SI Order article 7
[26] SI Order article 14 and Rule 10.1.1 of the Standing Orders

necessitate an ASP being passed to validate what has taken place. In such a case, it may be thought appropriate to provide that the instrument simply ceases to have effect as from the date when it should have been laid but that it should be deemed to be valid before that date.

62. In Australia, there is such a provision but the position is slightly different. There is a requirement that all legislative instruments have to be tabled in the Commonwealth Parliament within 6 (previously 15) sitting days after making which may mean that they are in force before being tabled and, in the case of a Parliamentary recess, they could have been in force for some time. At common law, failure to table by the due date invalidated the instrument which invalidated anything done under it when it was thought to be in force. However, section 38(3) of the Legislative Instruments Act 2003 now provides that the effect of failing to table by the due date is that the instrument ceases to have effect as from that date, with the implication that it was valid before that date.

Subordinate Legislation Committee
Inquiry into the Regulatory Framework in Scotland

Consultation Paper

1. Nature of supervision by the Parliament

Procedure

1.1 At present, the Subordinate Legislation Committee supervises both the legality of the instrument (Scottish Statutory Instruments - SSIs) and the way in which it has been drafted, in order to ensure that the delegated power is being exercised properly and within the limits authorised by the Parliament. The subject or lead Committee examines the policy matter of the instrument.

1.2 The subject Committee for any instrument is the Committee which is designated as covering the policy matter of the instrument and this Committee is responsible for reaching a recommendation on an instrument. The SLC reports to this Committee its findings in relation to the technical aspects or problems with an instrument.

1.3 The parent Act may subject a SSI to a certain form of parliamentary control. This control falls into two main types: **affirmative** and **negative**.

- **Affirmative** procedure means that an instrument/draft instrument must be approved by the full Parliament, following consideration by both the SLC and the subject Committee.

- **Negative** procedure usually means that the instrument can be made and come into force but can be annulled by a resolution of the Parliament. Negative instruments are considered by the SLC and the subject Committee. Any member may lodge a motion to annul an instrument and the motion is debated by the subject Committee.

1.4. Whether an SSI is subject to affirmative or negative procedure depends upon what is stated in the parent Act and does not necessarily depend upon the importance of the subject matter, although account should have been taken of its importance when the bill which became the parent Act was being considered.

Comments are invited on—

- **The current negative and affirmative procedures and whether they should continue to exist for the Parliamentary consideration of subordinate legislation.**

- **The role of the subordinate legislation Committee and the subject Committees in examining subordinate legislation.**

- **Whether the procedure chosen should rely on the parent Act or whether the Parliament should consider a procedure which allows the significance of the instrument to dictate the procedure adopted.**

Amendment

1.5 At present the Parliament cannot make or propose an amendment to an instrument or a draft instrument. The Parliament's subject Committees and, in the case of affirmative instruments, the full Chamber of the Parliament, has to decide whether to approve an instrument or find no fault with it in its entirety or recommend that it is not approved or nothing further is done under it.

1.6 There does not seem to be a reason in principle for the Parliament, as the body delegating the legislative power, not to be able to amend an instrument. It could be argued, however, that giving the Parliament this kind of power would be inconsistent with the purpose for which it had originally granted the power to the Executive or another body to make such legislation.

1.7 There may be problems if the Parliament was given the power to amend an instrument directly. This would make the Parliament, to some extent, responsible for making the instrument and this may be argued to run counter to the assumption, made in the Scotland Act 1998, that subordinate legislation would be made by the Scottish Ministers or by bodies responsible to the Parliament and not by the Parliament itself.

1.8 However, the Committee wishes to consider the options to recommend that an instrument is amended by the Executive, rather than, as at present, the Parliament voting simply on whether an instrument should be approved or not.

Comments are invited on—

- **Whether the Scottish Parliament should be given powers to amend instruments or drafts, or to recommend such amendments; and**

- **Whether the Scottish Parliament should be given the power to recommend certain changes being made to an instrument, before the instrument will achieve Parliamentary approval.**

2. Consultation

2.1 There is currently no general provision for the Parliament to be consulted on a draft of an instrument before it is made or laid before Parliament for approval. In particular cases, there may be provision made in the parent Act for consultation and the SLC has examined this matter in a number of its bill considerations. However, even in cases where there is a

consultation requirement for the subordinate legislation, it is not usually provided that the Parliament should be consulted.

2.2 The SLC has made recommendations in relation to a number of bills that a type of "super-affirmative" procedure should be adopted in cases where the Parliament may wish to be consulted on an area of particular significance. This procedure involves a draft instrument, or a proposal for a draft, being laid before Parliament and the Parliament being given the opportunity to comment on the proposal before the instrument begins its Parliamentary process. There is also a requirement that Ministers, when formally bringing forward the draft should make a statement on how the Parliament's comments have been reflected in the instrument. This was recently adopted at section 8 of the FE and HE Bill during its stage 3 consideration.

Comments are invited on—

- **Imposing a general requirement to consult the Parliament on draft instruments.**

- **The use of "super-affirmative" procedure and examples of where it could be used effectively.**

3. Definition of SSIs

3.1 Existing procedures only apply to certain types of delegated legislation which are Scottish Statutory Instruments (SSIs). These are mainly powers which are authorised by the parent Act to be exercisable by a statutory instrument and are exercised by the Scottish Ministers and other Scottish bodies. In practice, this tends to cover rules, regulations and orders as they are regarded as being of "legislative character".

3.2 However, there are other kinds of instruments made under delegated powers which are not subject to any procedures at all, such as directions, schemes, codes of conduct, guidelines etc. Some of these can be regarded as being instruments of a legislative character and the Parliament is frequently not given the opportunity to subject them to any form of supervision.

Comments are invited on—

- **Whether all instruments of a legislative character, for example, guidelines and codes of conduct, should require to be SSIs.**

4. Existing Parliamentary procedures

4.1 The table below sets out the main types of procedure that SSIs are subject to in the Scottish Parliament. There are three types of **affirmative** instrument and two types of **negative** instrument procedures. **Super-affirmative** procedure is an enhanced affirmative procedure which allows

comments on a draft affirmative instrument to be made by the Parliament and responded to by the Executive.

4.2 The other procedures (class 6 and 7) concern instruments which are not subject to Parliamentary procedure but which the SLC considers.

Various classes of SSI and types of parliamentary control

Class	*Procedure*
	Affirmative procedures
1	Instrument is laid before the Parliament in draft and cannot be made until the draft is approved by resolution of the Parliament
2	Instrument is laid before the Parliament after making but cannot come into force unless and until it is approved by resolution of the Parliament
3	Instrument is laid before the Parliament after making and may come into force but cannot remain in force after a specified period (usually 28 days from the date on which it was made) unless approved by resolution of the Parliament within that period
	Negative procedures
4	Instrument is laid in draft before the Parliament and cannot be made if the draft is disapproved by the Parliament within 40 days after the draft is laid
5	Instrument is laid before the Parliament after making, subject to being annulled in pursuance of a resolution of the Parliament passed within 40 days after laying
	Other procedures
6	Instrument is laid before the Parliament after making but there is no provision for further parliamentary procedures
7	Instrument is not required to be laid before the Parliament
	Super affirmative procedure
8	This is a variant of Class 1. It generally involves (i) a draft instrument being laid before the Parliament (ii) an opportunity for comments to be submitted to the Executive on the draft (iii) if Ministers decide to proceed with the proposals, they then lay before the Parliament a draft in the normal way for affirmative procedure (as in Class1) , together with a statement of whether and how the comments have been reflected in the draft.

Timing of negative and affirmative consideration

4.3 The transitional SI Order reference provides that the Parliament may annul a negative instrument within 40 days after it is laid. Currently, there is no statutory provision which lays down the time within which a draft affirmative

instrument has to be approved but the Parliament's Standing Orders limit the timescale to 40 days in line with that given to negative procedure.

4.4 Within the total of 40 days allowed to consider these types of instruments, the SLC is given 20 days to consider them and make their report to the Parliament and the subject Committee. The remaining 20 days are given to the subject Committees and, in the case of draft affirmatives, the full Chamber of the Parliament, to consider the instruments.

4.5 This strict timetable allows little time for the SLC to consider and report on the instruments, particularly at peak times. Subject Committees can also find themselves in difficulty when scheduling the consideration of instruments into their work programmes, particularly where an issue is contentious and the Committee wishes to take evidence.

4.6 With instruments subject to negative procedure there is the additional issue of the 21 day rule. This rule is set out in the SI Order and states that a negative instrument cannot come into force less than 21 days after an instrument is laid. Should the Executive not be able to meet this requirement it must explain its reasoning to the Presiding Officer in writing. This rule allows time for the SLC to consider the instrument before it comes into force. Subject Committees, however, are frequently in the position of considering an instrument that is already in force. There may be severe logistical problems if an instrument is annulled after it has come into force.

Comments are invited on—

- **The existing procedures for scrutinising SSIs.**
- **Increasing the time allowed for the Parliament to consider SSIs.**
- **Extending the 21 days given for a negative instrument to come into force to something that would allow the Parliament to consider all negative instruments before they came into force.**

Instruments not subject to procedure

4.7 As detailed above table (class 6 and 7 procedures), there are instances where instruments are not subject to parliamentary procedure. The Class 6 procedure allows an instrument to be laid, which in practice allows the instrument to be brought to the attention of the Parliament. The Class 7 procedure simply allows the SLC to consider and report on the instrument and the wider Parliament may not know of the existence of these types of instruments.

Comments are invited on—

- **The use of these procedures.**

- **Whether the use of class 7 should be discontinued, with class 6 being used so that general instruments should be laid before Parliament in all cases.**

5. Numbering, classification and publication of SSIs

5.1 The current SI Order makes provision for SSIs to be numbered, classified and published. The maker of the instrument sends it immediately after it is made to the Queen's Printer for Scotland (QPS). The maker also certifies whether it is local or general in nature and local instruments are not usually printed or put on sale.

Comments are invited on—

- **The current publication system of SSIs.**

- **Whether there should be a requirement for the QPS to publish drafts of SSIs which are laid before Parliament and subject to affirmative procedure.**

6. Consequences of not laying

6.1 The Committee has noted that it is not currently clear whether an instrument is invalidated if there is a failure to lay the instrument/draft instrument.

Comments are therefore invited on—

- **Whether an instrument should be required to be laid as soon as practicably possible.**

- **Whether failure to lay an instrument, when this is required to be laid, should make the instrument invalid.**

Agenda item 1

Environment and Rural Development Committee

21 September 2005
ERD/S2/05/23/1

Environment and Rural Development Committee

The Subordinate Legislation Committee's Inquiry into the regulatory framework in Scotland

Note from the clerk

1. The attached correspondence from the Subordinate Legislation Committee (SLC) seeks subject committees' contributions on issues which arise when scrutinising statutory instruments. It invites committees to consider a number of issues and consultation questions. Consultation responses will help the SLC formulate its plans for a Committee Bill to replace the current arrangements for scrutinising subordinate legislation.

2. Members are invited to consider the correspondence and highlight any issues they wish to raise in a response to the SLC. As part of this inquiry it is also expected that the Convener may be invited to give oral evidence to the SLC in November (along with conveners of other committees that have a heavy subordinate legislation workload).

3. To assist members in considering the Committee's response, the following is a summary of some of the points which have been raised by members over recent months in connection with scrutiny of subordinate legislation:

   - The Committee has noted that there can be a very concentrated volume of subordinate legislation coming forward at certain times, which makes effective scrutiny more difficult.

   - The limited time available for subject committees to scrutinise an instrument means that the options for giving more detailed consideration (perhaps by taking written or oral evidence) to a particularly complex or controversial instrument are very limited. The Committee usually has the option of only one (or, at most, two) meetings on which it can consider an instrument once the SLC has reported on it. This does not usually allow enough time to decide to take evidence and then arrange that.

   - The Committee has stated in the past that it may be helpful at times to see instruments when they are in draft, but without the burden of that 'double handling' of every instrument. Requiring the Executive to give a certain amount of formal advance warning of the likely content and timing of instruments before they are formally laid before the Parliament may allow the Committee to select instruments it feels require more detailed examination.

   - The Parliament normally has 40 days in which to scrutinise an instrument, but negative instruments can normally come into force 21 days after being laid. This means that the instrument is very often in force by the time the subject committee considers it. This is confusing for the public, but can also hamper scrutiny. In some cases (eg. where an instrument sets out a grant scheme or introduces an offence), very significant problems and confusion could be created if the Parliament exercised its right to annul an instrument after substantial action (such as

application for, or payment of, grants or arrest on suspicion of an offence) had already been taken on the authority of the instrument.

- A related point is confusion over what the practical effect would be of annulling an instrument which implemented an EU obligation (as is very common in this Committee's remit). On occasion, the Committee has had very serious reservations about such an instrument, but has been unclear as to the legal implications of recommending that it be annulled.

- A very significant number of the instruments the Committee considers are implementing EU obligations. The European Communities Act 1972 allows transposition of EU obligations to be done by an instrument subject to negative procedure. This results in some very substantial policy measures (eg. such as the rules governing the Less Favoured Area Support Scheme – which amounts to £60m per annum) being subject to the lower level of scrutiny that a negative procedure entails.

- The Committee has often noted that, where the SLC has pointed out (sometimes relatively minor) flaws in an instrument, current processes do not give the SLC any route to insist on the flaw being rectified in the original instrument. A subject committee would often not wish to recommend annulment unless the instrument was regarded as so flawed as to be unworkable. The process means that the Executive has to commit to correcting this with a further instrument 'at the next legislative opportunity'. This can mean that the Committee has to scrutinise two instruments to give effect to the same policy intention, which could be seen as unnecessarily confusing for the public and causing unnecessary double-handling for committees.

- The Committee has made a number of comments about the quality and consistency of information accompanying statutory instruments (particularly the Executive Note). For example, the Note sometimes does not provide a sufficient level of explanation of the practical implications of a measure. Similarly, the Note usually refers to any consultation which has taken place but rarely gives any information on what the response was to the consultation (in terms of numbers and content of responses).

- On occasion the Committee has found it confusing that a set of statutory instruments addressing similar policy areas are subject to different, or no, parliamentary procedures. For example, some measures relating to regulation of scallop fishing were considered by the Committee as a negative instrument while other measures which were part of the same package were to come forward in an instrument that was not subject to any parliamentary procedure. This is due to the provisions of the relevant parent act, but can confuse scrutiny and the public understanding of the process.

- On occasion the Committee has found it difficult to interpret reports from the SLC. While the Standing Orders give the SLC a specific technical role in the scrutiny process separate from that of subject committees, the Committee has suggested in the past that it would be helpful if the SLC could provide a clearer indication of how serious its concerns on the drafting of a particular instrument were.

4. The Committee is invited to consider its response to the SLC.