Subordinate Legislation Committee

12th Report, 2008 (Session 3)

Inquiry into the Regulatory Framework in Scotland

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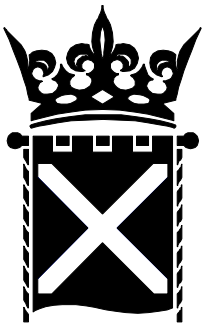

The Scottish Parliament

Subordinate Legislation Committee

12th Report, 2008 (Session 3)

Inquiry into the Regulatory Framework in Scotland

Published by the Scottish Parliament on 18 March 2008

The Scottish Parliament

Subordinate Legislation Committee

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:

Richard Baker
Jackson Carlaw
Helen Eadie
Ian McKee
John Park
Gil Paterson (Deputy Convener)
Jamie Stone (Convener)

Committee Clerking Team:

Clerk to the Committee
Gillian Baxendine

Senior Assistant Clerk
David McLaren

Assistant Clerk
Jake Thomas

The Scottish Parliament

Subordinate Legislation Committee

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Subordinate Legislation Committee

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Inquiry into the Regulatory Framework in Scotland

The Committee reports to the Parliament as follows—

INTRODUCTION

1. In the last session of the Scottish Parliament, the Subordinate Legislation Committee (SLC) published a substantial report into the regulatory framework in Scotland.[1]

2. A new SLC has been appointed this session with an entirely new membership and our task has been to consider the report by our predecessor and decide what to do about the recommendations made.

3. Our concern here has been with phase 2 of their inquiry which made wide ranging recommendations about how subordinate legislation should be scrutinised by the Scottish Parliament. Specifically, the Committee recommended replacing the current system of scrutiny with an entirely new procedure that it called the Scottish Statutory Instrument Procedure (SSIP).

4. The Parliament did not have time to consider the Committee's recommendations before the dissolution of Parliament in April 2007. It therefore falls to this Committee to consider the report and make recommendations to Parliament.

5. Although we have not accepted the previous report in its entirety, we could not have reached the conclusions we do without the evidence and analysis of our predecessors. We wish to put on record our great appreciation of the significant work they carried out.

EVIDENCE

6. The new SLC had no wish to rerun the previous committee's inquiry so we sought only to take enough evidence to allow us to understand how the report came to the conclusions that it did. We therefore arranged a short series of informal briefings and formal evidence sessions.

[1] Subordinate Legislation Committee, 14th Report, 2007 (Session 2)

7. The Committee held an informal briefing session on 20 November 2007 with some of those who had given evidence to the previous inquiry –

Professor Chris Himsworth, Professor of Administrative Law, University of Edinburgh;
Professor Colin Reid, Professor of Environmental Law, University of Dundee;
Bill Adamson, Head of Strategic Policy & Consumer Engagement, Food Standards Agency Scotland;
Dan Russell, Head of Legal & Protective Services - South Ayrshire Council - representing COSLA;
Professor Russel Griggs, CBI Scotland Adviser on regulation; and
Alan McCreadie, Law Society of Scotland.

8. We held a further informal briefing session with Scottish Government officials on 4 December 2007.

9. On 11 December 2007, the Committee took oral evidence from –

Sylvia Jackson, former Convener of the SLC;
Murray Tosh, former member of the SLC; and
Iain Jamieson, former adviser to the SLC on its inquiry.

10. The Committee then took oral evidence from Bruce Crawford MSP, the Minister for Parliamentary Business, and his officials on 15 January 2008.

11. The Committee wishes to thank those who gave formal and informal evidence.

THE CURRENT SYSTEM VS SSIP

12. The current procedures for handling subordinate legislation in the Scottish Parliament are set down in The Scotland Act 1998 (Transitional and Transitory Provisions) (Statutory Instruments) Order 1999 ("the Transitional Order"). These are based on the procedures at Westminster although the process is different (there are no lead committees at Westminster for example). As the name of the order indicates, it was intended as a starting point for the Scottish Parliament, with the expectation that over time the Parliament would legislate for its own procedures.

13. The Session 2 Committee identified a wide range of shortcomings with the current system -

(1) The confusing number of different types of parliamentary control over SSIs with different procedures attached to them.

(2) The limitations of the parent Act determining the choice of parliamentary procedure so that over time the level of scrutiny does not always match the importance of the instrument.

(3) Lack of advance notice to committees of instruments to be laid by the Government, which hinders the planning and management of workloads.

(4) The large, sometime unmanageable, peak of instruments laid just before Parliamentary recesses.

(5) The all or nothing approach to instruments, where an instrument is either approved or annulled in whole, and cannot be amended.

(6) The double-handling of instruments by committees (when an instrument with an error has to be withdrawn then re-laid and considered again).

(7) Timetabling pressures on the SLC and other committees under the current scrutiny timetables.

(8) The fact that lead committees are regularly scrutinising instruments already in force, and may therefore be reluctant to annul even an instrument that they have serious concerns about.

(9) The lack of a proper emergency procedure; and the regular breach of the rule that instruments should not come into force before being laid or, where appropriate, within 21 days of being laid.

(10) The lack of any procedure for consolidating instruments.

14. The previous committee concluded that these shortcomings could most effectively be addressed by creating an entirely new system (SSIP) which the Parliament could be sure was fit for its purposes.

15. We acknowledge the attractions of an entire overhaul of the system and we have sympathy with the view expressed by our predecessor in its report that "if the Scottish Parliament had been given the opportunity to devise a system and procedures for the scrutiny of subordinate legislation at the outset, it would not have chosen the system currently in operation…"[2]

16. At the same time, we suggest that the Parliament needs to be quite sure that a wholesale change in procedures will deliver benefits sufficient to outweigh any perceived drawbacks. During our evidence taking we have had drawn to our attention a number of positive aspects of the current system -

- it has supported the scrutiny of many hundreds of instruments since 1999;
- it is familiar to many users and is used in other legislatures including the UK Parliament & the National Assembly for Wales;
- there are a range of procedures reflecting the range of different purposes of subordinate legislation;
- the procedures act as a reasonable proxy for the importance of instruments, helping to direct scrutiny where it is most required; and
- Parliament actively engages in the process of making subordinate legislation and determines, through the parent Act, where it is appropriate for the Government to require to seek its approval of

[2] Subordinate Legislation Committee, 14th Report, 2007 (Session 2) (para 25)

instruments (those subject to the affirmative procedure); and where this is not considered necessary, Parliament still retains a review function.

17. SSIP offers a number of benefits which are set out clearly in our predecessor's report. However, we have also identified a number of difficulties with the SSIP proposals which we address in specific sections below. These lead us to conclude that SSIP would address some problems at the expense of creating others, so that at best the decision is one about where the balance of advantage lies between the current system and the proposed new system.

18. We have also identified a fairly long list of possible improvements to the current system which are discussed below. It is this above all that leads us to conclude that the most workable outcome for both the Parliament and the Scottish Government would be to improve procedures within the existing framework. The aim of the SSIP proposals was to streamline procedures, simplify the process, and have better, more targeted scrutiny. We think that progress in all these areas can be made within current procedures. We do not think that our predecessor's report has led to a widespread enthusiasm in the Parliament for wholesale redesign of subordinate legislation procedures. When this is set alongside the cautious response from two very different governments we do not feel that we have sufficient basis for recommending our predecessor's ambitious recommendations.

19. To date, we have found the present Scottish Government open-minded about changes to the current system and willing to engage in dialogue with the Committee. Our recommendations assume that this will continue but we point out that, should discussions between the Government and the Parliament prove less productive than we anticipate, the option of more far reaching change, including something like the SSIP proposal, would remain open to the Parliament.

Recommendation 1: The Committee recommends –

- **that the Parliament should retain the current system and procedures for scrutinising subordinate legislation subject to the improvements recommended in this report; and**

- **that legislation be introduced in the course of this session to replace The Scotland Act 1998 (Transitional and Transitory Provisions) (Statutory Instruments) Order 1999.**

PROPOSALS FOR CHANGE

How powers are delegated in primary legislation

Parent Act

20. At present primary legislation determines what provisions are delegated to subordinate legislation, and in making that primary legislation, Parliament determines what parliamentary procedures (if any) it is appropriate to apply to these. Our predecessor took the view that allowing the parent Act to determine procedure was insufficiently flexible. For example, Parliament in passing an act may determine that an instrument which introduces a scheme is important enough to require the affirmative procedure. However, an instrument may require to be laid

each year thereafter in order to update that scheme. It may be that over time the affirmative procedure becomes less appropriate and the less onerous negative procedure might be more appropriate. Under the current system, it is not possible to change the procedure without amending the parent Act.

21. To address this, the SSIP procedure would apply one general procedure to the majority of instruments. The responsibility for determining the appropriate level of scrutiny for instruments – in particular, whether to debate them in committee – would fall to the lead committee. It would also be open to the Scottish Government, when laying an instrument, to recommend that an instrument should be debated by the whole Parliament (a procedure which exists under the current system).

22. We can see the attraction of giving committees the opportunity to identify for themselves which instruments require greater scrutiny. However we also recognise that this would place an additional burden on committees. Under such a system, committees would be required to identify instruments from a forward programme provided by the Government, and then consider and decide on the level of scrutiny to apply to each one (e.g. whether they would want to debate it or not). Committees would be heavily dependent on good forward planning information from the Government. There is a risk that the level of scrutiny would depend on the extent of other work before the committee rather than on the significance of the instrument. We note the comments from Professor Colin Reid that "the choice of scrutiny procedure should continue to be determined by the parent Act; anything else is a recipe for delay, confusion and dissatisfaction as opinions on the significance of a measure will inevitably differ".[3]

23. We conclude that it remains appropriate for the parent Act to determine the level of scrutiny. We think that there is still scope for flexibility within this framework and we considered a number of options.

Recommendation 2: The Committee recommends that all instruments should continue to be governed by procedures set down in the parent Act.

Greater flexibility in parent Act

24. First, we considered the possibility of making more use of the "open" procedure, whereby discretion is given to the Government in the parent Act as to the procedure, from specified alternatives, that should be applied to delegated provisions.

25. The "open" procedure is a potentially attractive option in that it allows the level of scrutiny to be determined at the time of laying by the nature of the specific instrument. However, it also involves a shift in responsibility from the Parliament (in agreeing the procedure under the parent Act) to the Government (who would determine the procedure for a particular instrument). We accept that the open

[3] Subordinate Legislation Committee, 14th Report, 2007 (Session 2) (para 48)

procedure will continue to be appropriate in certain very distinct circumstances.[4] But as a general rule we consider that since Parliament is responsible for carrying out scrutiny of delegated legislation, it should also generally be responsible for determining the appropriate procedure. We do not therefore recommend any increase in the use of open procedure.

26. Where open procedure is used, we recognise that the Government has developed practice which informs which of the alternative procedures provided for are appropriate in particular circumstances. To this extent, the Government does not have a completely free choice as to procedure. To date however, the Parliament has had little influence over that practice and consequently its ability to hold the Government to account has been limited.

27. As a refinement of "open procedure", we think it would be possible to build criteria into enabling Acts setting out the circumstances which would require the discretion to be exercised in a particular way. An example of tailoring powers to particular circumstances would be where the parent Act provides that the first exercise of a delegated power is subject to affirmative procedure, but that any subsequent exercise of the power should be subject to negative procedure. Another example would be where provision has been made for negative procedure to be used unless specific conditions are met (e.g. affirmative procedure where amendment is being made to primary legislation). (We recognise that these do not specifically relate to "open procedure" as that by definition leaves a degree of choice of procedure with the person exercising the power but we use them as examples to demonstrate that tailoring of powers is possible.)

28. We consider that there is greater scope to ensure that powers are tailored to suit the precise situation for which they are required, rather than relying on broad or sweeping powers, which could be used in very different circumstances. Open procedure could also assist with combining powers with conflicting procedures in domestic legislation. (We think the principle of "trading up" scrutiny, discussed later in this report, should apply in this circumstance also).

29. Better tailoring of open procedure could be seen as a move towards a better tailoring of powers and procedures in general, a move we would welcome.

Recommendation 3: We recommend that the Scottish Government in drafting legislation, and the Parliament in its scrutiny role, should continue to make use of more flexible approaches which allow powers to be tailored to the situation for which they are required.

Post-legislative scrutiny

30. Sometimes circumstances will change in the years after legislation has been passed and the scrutiny requirement may change too. We therefore looked at whether there is a role for the SLC in post-legislative scrutiny.

[4] In particular, section 2(2) of the European Communities Act 1972 allows for open procedure (either draft affirmative or annulment). This enables the level of scrutiny to be appropriate to the instrument's content. In part, it assists where that power is to be exercised in conjunction with domestic powers. Additionally, as section 2(2) is such a broad general power, there needs to be some flexibility built in to the enabling Act to differentiate the level of scrutiny appropriate to its use in individual cases.

31. Post-legislative scrutiny allows Parliaments to consider legislation "embodying amendments to a recent Act, the need for which has been brought about either through a judgment in the courts, difficulties in interpretation, impracticality in everyday use, or the nature of the delegated legislation made under its authority".[5]

32. During scrutiny of instruments either the SLC itself, or a lead committee, may conclude that the procedure to which a delegated power is subject is no longer appropriate. An area which was politically important may have become more routine over time; or the reverse may be true. Post-legislative scrutiny would allow us to revisit the parent Act and review whether the delegated powers should still be subject to the same procedure as was agreed when the act was passed.

33. The Minister for Parliamentary Business in his evidence was broadly supportive of this suggestion, commenting that "the Committee can play an important role in post-legislative scrutiny – perhaps that could be best achieved in partnership with the relevant lead committee. I do not think that there would be anything wrong with the Subordinate Legislation Committee marking that up to the lead committee, but we should not undermine the role of other parliamentary committees in post-legislative scrutiny. There may be dangers in that if we are not careful. Alternatively the SLC might be given a power to report to the Parliament or lead committee when, in its view, a scrutiny power or framework is no longer required or fit for purpose. The committee may find that route advantageous".[6]

34. We conclude that the SLC could have a useful role in the post-legislative scrutiny process, in conjunction with lead committees. This would require a change to the Committee's remit.

35. We considered further how any recommendations from the SLC might be put into effect. SLC recommendations would be limited to recommending that powers should be subject to a different procedure: for example, negative to affirmative or negative to no procedure. Recommending changes to the *content* of the delegated power would not be part of its remit. If recommendations by the SLC then simply rested until a suitable legislative opportunity arose, instruments might continue to be over- or under-scrutinised for many years.

36. An alternative approach would be to give Ministers a specific power to alter by order the Parliamentary procedure specified in a parent Act, on the recommendation of the Subordinate Legislation Committee with the endorsement of the Parliament. Parliament's endorsement should be required since Parliament agrees primary legislation in the first place. This could be achieved by making the exercise of such a power subject to the affirmative procedure – as the Committee generally recommends in any case where changes to Acts are being made by subordinate legislation.

37. This proposal could be given further consideration in the context of a bill to implement the changes in this report.

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[5] House of Commons Committee on Procedure report on "The Process of Legislation" (1970-71) HC 538, p.viii

[6] Official Report, 15 January 2008, Columns 179-180

Recommendation 4: The Committee recommends that –

- **post-legislative scrutiny of delegated powers should be added to the remit of the Subordinate Legislation Committee, and**

- **a power should be conferred on Ministers enabling them to amend by order the procedure specified in a parent Act, on the recommendation of the SLC.**

Number of procedures

Range of existing procedures

38. There are currently 8 different forms or classes of parliamentary control which are summarised in the following table. The table also quantifies the volume of instruments under each procedure which were handled by the Parliament during the calendar year 2006 (these figures were helpfully provided to the Committee by the Minister for Parliamentary Business) –

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. This is the most common form of affirmative procedure. *59 SSIs (13%)(this figure includes Class 8)*
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. This procedure is rarely used in modern Acts. *1 SSI (0%)*
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. This procedure has in the past been mainly used for emergency food orders. *0 SSIs (0%)*
	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. This procedure is rarely used in modern Acts. *0 SSIs (0%)*
5	Instrument is laid before the Parliament after making but normally cannot come into effect within 21 days after being laid. It is subject to being annulled in pursuance of a resolution of the Parliament passed within 40 days after laying. This is the most common form of negative procedure. *242 SSIs (55%)*
	Other procedures
6	Instrument is laid before the Parliament after making but there is no provision for further parliamentary procedures (although it is subject to the scrutiny of

Class	*Procedure*
	the Subordinate Legislation Committee). *22 SSIs (5%)*
7	Instrument is not required to be laid before the Parliament (although it is subject to the scrutiny of the Subordinate Legislation Committee) *116 SSIs (26%)*
	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. *(see Class 1)*

SSIP proposals for streamlining

39. Initially, it would appear that the SSIP proposals offer a substantial streamlining of procedures by reducing the eight existing procedures to two main procedures - a general procedure to which most instruments would be subject, and an exceptional procedure. However on closer examination, we note that the exceptional procedure divides into "emergency" (e.g. an instrument restricting the movement of livestock during an outbreak of foot-and-mouth disease) and "urgent" (for example, to meet a common commencement date across the UK). There is also a "modified" SSIP general procedure for commencement orders and consolidation instruments. Rules of Court and local instruments would no longer be treated as SSIs but would still be required in some form; while instruments in class 6 and class 7 ("not subject to Parliamentary procedure" and "not laid") would fall to be considered by lead committees rather than just the SLC as at present.

40. It seems to us therefore, that the SSIP model does not quite deliver the radical streamlining promised. We suggest that the appropriate measure is not a headcount of procedures but whether each procedure has a clear and distinct value in the scrutiny process. The Minister for Parliamentary Business agreed with us that "modernising the existing procedures is the way to go. It will not be far away from the SSIP, but I do not think that the current system is so broken that we need to throw it away".[7] We conclude that there is scope within the current system for a good deal of streamlining which would add to the clarity of the scrutiny process.

No procedure/not laid

41. It appears to us that there is little real difference between class 6 instruments ("not subject to Parliamentary procedure") and class 7 instruments ("not laid"). We have considered, first, the rationale for opting for these classes in the enabling Act and second, Parliamentary handling of them. On the first point, class 7 instruments generally are those which exercise a narrow power or exercise powers which are squarely within the remit of the person exercising it (e.g. commencement orders).

[7] Official Report, 15 January 2008, Column 175

On the second point, instruments that are "laid" are published in the Parliament's Business Bulletin and so are brought to members' attention. Instruments that are "not laid" are not published in the Bulletin.

42. Both types of instrument are subject to technical scrutiny by the SLC, are not considered by lead committees and come into force without any possibility of annulment or approval by the Parliament. We do not therefore consider that there would be much material effect if all such instruments were treated as class 6 instruments (this seems logical and preferable to a move towards treating them as "not laid" since it ensures that they would be brought to the Parliament's attention through publication in the Business Bulletin). Scrutiny by the SLC but not by lead committees should continue.

Recommendation 5: The Committee recommends that class 6 (no procedure) and class 7 (not laid) procedures should be amalgamated into a single "no procedure" category.

Rarely used procedures

43. We considered whether the remaining six procedures are all required. The Minister for Parliamentary Business suggested that it may be possible to amend the legislative framework to remove those classes of procedure which are rarely used. The 2006 figures suggest that classes 2 and 4 may be redundant. That pattern is borne out by the Committee's own experience this Session and that of its predecessors as to the infrequency of these classes. Our approach is to examine whether a procedure has value rather than do a headcount of procedures (see paragraph 40 above). Using that approach, we are not persuaded that classes 2 and 4 do have such value. Class 3 is also rarely used but we discuss this further below in relation to emergency procedure.

Recommendation 6: The Committee recommends that, unless compelling reasons can be identified for retaining these procedures, class 2 (made affirmative) and class 4 (draft negative) procedures should be discontinued.

Transitional arrangements

44. We note that the two preceding recommendations would require a mechanism to ensure that, where an instrument would have been considered under a procedure which has been discontinued, it is clear which of the new procedures should apply to it. Section 29 of the Legislative and Regulatory Reform Act 2006 provides a useful model. That provision amends the European Communities Act 1972 to enable adaptation of procedures attaching to domestic enabling powers, where they are exercised in conjunction with section 2(2) of that Act. The provision ensures that domestic procedures are "traded up", so there is no consequential loss of Parliamentary scrutiny. A similar approach (whereby the discontinued procedures are transited into one of the remaining procedures) would avoid having to make textual amendments to enabling Acts, which would be a substantial and difficult exercise. Future enabling Acts would simply refer to the remaining procedures.

45. Although provision which transited the discontinued powers into one of the remaining powers could come into force, it is recognised that it would not actually be triggered until the particular powers affected are exercised.

Recommendation 7: The Committee recommends that in transiting the discontinued procedures into one of the remaining (or new) procedures, there should be no downgrading in the level of parliamentary scrutiny; and that section 29 of the Legislative and Regulatory Reform Act 2006 provides a useful model.

Regularly used procedures

46. The procedures which are used most regularly are: class 1, draft affirmative instruments; class 5, made negative instruments; and class 8, the super affirmative procedure. We next consider whether they continue to be useful.

47. One recurring argument against the SSIP general procedure was that, without the affirmative procedure, the Parliament would lose its ability to positively affirm certain instruments. For example, Professor Colin Reid told the previous committee that "retaining the affirmative procedure might be seen as a longstop or a guarantee that members and the Executive will be forced to think consciously about measures rather than allowing them to be overtaken by other events".[8] Professor Chris Himsworth added that "the Parliament gave a lot of attention to the style in which it wished to have instruments approved. That seems to have been a constitutionally interesting and important feature of practice so far, with the Parliament being seen as approving the content of certain instruments."[9]

48. General procedure under SSIP resembles affirmative procedure in some respects (e.g. a general procedure instrument could not be made if disapproved and currently, a draft affirmative instrument cannot be made unless it is approved). On one view, it can therefore be said there would be no loss of scrutiny under SSIP in that both processes effectively enable the Parliament to prevent an instrument from being made.

49. However we have had regard to the value of affirmation itself. We consider that it is constitutionally important for Parliament to positively affirm certain instruments. It then becomes clear that Parliament needs a further procedure – class 5 – for those instruments where a lower level of scrutiny is appropriate and which do not require positive parliamentary approval.

50. It could be argued that class 8 – super affirmative - is not an essential elaboration. However it is a procedure which the Scottish Parliament has used on several occasions and we consider that it offers a useful option for enhanced scrutiny of the most politically controversial delegated powers.

Recommendation 8: The Committee supports the retention of classes 1 (draft affirmative), 5 (negative), and 8 (super affirmative) procedures.

Emergency procedures

51. One attraction of SSIP is that it would provide a formal procedure for emergency or urgent instruments. We note that the Minister and his officials were willing to discuss further how emergencies are dealt with under the current system. Ken Thomson commented that, "We might be able to devise the rules in such a

[8] Official Report, 24 October 2006, Column 2018
[9] Official Report, 24 October 2006, Column 2013

way that we do not have to break a rule. It would be better to have a rule for emergencies, rather than have to break a rule in an emergency."[10] We agree that, in the context of a bill to update procedures, this issue would merit further consideration.

52. At present, instruments which require to come into force quickly are dealt with in two ways depending on whether they are affirmative or negative. Some instruments fall into class 3 – an affirmative procedure where the instrument is laid before Parliament after making and comes into force immediately but cannot remain in force after a specified period (usually 28 days from the date it was made) unless approved by resolution of the Parliament within that period. This procedure has been used in the past for emergency food orders. It may be described as for use in "expected emergencies" i.e. the parent Act anticipates that emergency action may be needed and accordingly makes procedural provision for it. The only other means of making an affirmative instrument quickly is to accelerate its progress through Parliament by taking the motion to approve in the Chamber at the earliest possible date after laying. Other than class 3, affirmative instruments cannot be brought into force immediately on laying.

53. Where under present procedures a negative instrument is required to be brought into force quickly, at any point less than 21 days after it is laid, the Transitional Order requires the Government to write to the Presiding Officer to explain the reason for this. The Subordinate Legislation Committee considers the reasons given and may report if it considers that they are not adequate.

54. In relation to affirmative instruments, we consider that class 3 may continue to be the appropriate emergency procedure. "High level" emergencies may arise e.g. those impacting on public health, or which interfere significantly with rights, or which have a national impact. In such circumstances, it is recognised that there will be a need to make law quickly. Correspondingly, it appears to us right in principle that Parliament should be able to say whether the measures should remain in force. Retaining class 3 is also consistent with our view that there should be no down-grading of Parliamentary scrutiny, when altering current arrangements. Although the table at paragraph 35 would suggest class 3 is rarely used, given that it is for use in emergencies (which will not occur in accordance with a timetable), we do not take its lack of use in a particular year as meaning it has no value. We note, for example, that the Judiciary and Courts (Scotland) Bill currently before the Parliament includes provision for this type of procedure.[11]

55. However, it is also recognised that genuine emergencies may arise outwith that situation, where the parent Act provides for negative procedure, or where the emergency arises in relation to matters covered by European Community obligations. We consider there is value in modifying negative procedure to accommodate such situations.

56. In relation to negative instruments we suggest that an emergency procedure requires certain components: (1) a definition of emergency; (2) an ability to make law immediately; (3) an appropriate level of scrutiny given that emergency

[10] Official Report, 15 January 2008, Column 181
[11] in relation to orders under section 66(2)

measures could be draconian; and (4) a sanction for inappropriate recourse to emergency procedure.

57. On point (1), it seems to us that an emergency is a sudden and significant adverse event. Although it can be planned for or predicted, the actual legislative measures should only come into effect once the emergency is underway. Additionally, if immediate provision is not made, significant loss, harm or prejudice would be likely.

58. On point (2), if an emergency requires an immediate legislative response, only "made" instruments achieve that result. To achieve a tailored emergency procedure, it would be necessary to dispense with the requirement that instruments should not come into force before laying and that they should be laid for a certain period before coming into force.

59. On point (3), emergency measures could interfere with rights or be onerous in other respects. Therefore we think it has to be appropriate that there be formal scrutiny of such instruments. Class 6 (as "no procedure") would not provide adequate scrutiny. We note that class 3 instruments expire after a specified period unless they are approved and so are time limited. Given our suggestion that class 3 be retained, we do not think it is necessary to time-limit or "sunset" instruments under this suggested procedure.

60. On point (4), we suggest that inappropriate recourse to emergency procedure should become an additional reporting ground of the SLC. In order to assess this, recourse to emergency negative procedure would also need to be justified, possibly in the Executive Note and to the Presiding Officer.

61. We noted that our predecessors also proposed a specific procedure for use in "urgent" rather than emergency situations. These might be characterised as instruments which it is highly desirable to bring into force quickly, for example to meet European obligations or a common UK commencement date. They might not need to be brought into force immediately on laying but before the 21 days provided for in the Transitional Order – which we are recommending should increase to 28 days.

62. We recognise there will be occasions where instruments need to be made urgently but we consider that these are of a different nature to emergency instruments. Emergency instruments will from time to time be unavoidable given the nature of emergencies. Urgent instruments, in contrast, should and often can be avoided by proper planning. The rationale to provide for "urgent" instruments flowed from the overall context of SSIP, which was based on a 40 day laying period. As we are only suggesting a move to a 28 day laying period, that rationale is weakened. We therefore consider it appropriate not to introduce a specific procedure for urgent instruments which might, despite best intentions, be overused by Government. We prefer to recommend that in such circumstances it is made clear that the Government is breaking the usual rules and require it to justify its actions in doing so.

Recommendation 9: The Committee recommends that –

- **Class 3 procedure be retained as an option for dealing with certain sorts of emergency procedure; and**

- **a specific procedure should be introduced for emergency negative instruments, including the elements outlined in this report; and this should only extend to emergency instruments as defined and not to urgent instruments which should continue to dealt with in the same way as breaches of the 21 day rule are at present.**

Debates on instruments

63. One criticism which has been made of the current system is that, because procedure is determined by the parent Act, there is insufficient flexibility to apply the right level of scrutiny to individual instruments. Even if the parent Act provides a reasonable "fit" most of the time, there will inevitably be some affirmatives which merit little debate and some negatives which require more extensive scrutiny. SSIP addresses this by leaving more flexibility with committees; as noted above (para 22), there are disadvantages to that. We have considered whether this can in fact be addressed within the current framework.

Affirmative procedure

64. At present, for each affirmative instrument, a Government Minister lodges a motion inviting the lead committee to recommend approval of the instrument to Parliament. The lead committee must consider such a motion and the Minister attends the committee in order to move and debate it. Whilst there will often be a debate in the lead committee on such a motion, in a minority of cases an instrument will be very straightforward and dealt with in moments. In such circumstances, it might be considered a waste of the committee's and the Minister's time to be required to hold a debate.

65. Under the Standing Orders, a Minister "<u>may</u> by motion propose to the lead committee that the committee recommend that the draft instrument be approved" (Rule 10.6.2). The Minister is "entitled to attend the committee meeting and participate in the proceedings for the purpose of debating any such motion" (Rule 10.6.3).

66. Rule 10.6.2 would appear to give Ministers some flexibility about whether to lodge a motion. To date, a motion has been lodged in every case. Whether or not there is a debate on a motion, the lead committee is still required to report to Parliament with a recommendation within the prescribed time limit. It is therefore feasible that, within the current rules, committees and the government could negotiate about whether attendance of a Minister was required on every occasion.

67. In practice, this might not offer much in the way of saved effort. It seems very likely that in most cases Ministers will prefer to lodge a motion to ensure that, if issues arise in committee, they are present to defend their policy. From the committee side, in order to consider whether debate was needed, the committee would have to consider the instrument at least once and possibly seek additional

information from the Government. A report and recommendation to Parliament would still be required.

68. We see no harm in making lead committees aware of the flexibility which already exists to dispense with debate but we note that, in most cases, it is likely to be as straightforward to proceed with a short debate as to reach agreement that it is safe to dispense with a debate.

Negative procedure

69. We have also considered those occasions where committees want to undertake more intensive scrutiny of a negative instrument. Obviously this can be achieved by lodging a motion to annul, and this will often be the appropriate procedure. However there may be occasions when committees wish to look at an instrument in more detail without indicating any intention to annul it. In such cases, it would be open to the committee to invite the Minister to give evidence on the instrument, as an alternative to initiating debate by means of an annulment motion.

70. However, for an MSP who is not a member of the committee, lodging an annulment motion will still be the appropriate way to seek a debate on an instrument.

Recommendation 10: The Committee recommends that lead committees should be made aware of the flexibility which already exists to dispense with debate on affirmative instruments and to take evidence on negative instruments.

Timescales

Adequacy of time for scrutiny

71. The previous Committee was concerned that instruments subject to the negative procedure generally come into force 21 days after laying. We agree with Murray Tosh, a former member of the Committee and Deputy Presiding Officer, who said that "the simple fact is that if a statutory instrument comes into force after 21 days and it spends 20 days in the Subordinate Legislation Committee, there is not time for the policy committee to give it adequate scrutiny. In the first two sessions, committees complained that their workloads did not allow them to squeeze in work on subordinate legislation, but when they had time to consider it, the timescales were inadequate."[12]

72. SSIP would have addressed this by providing for all instruments to be laid in draft for 40 days (no account would be taken of days when Parliament is dissolved, or in recess for more than 4 days). On this issue the Minister for Parliamentary Business told us: "there are only 33 days between the return of the Parliament after the summer recess and the October recess. That would mean that for instruments to come into force at the end of October they would have to be laid in draft in early July. It would not be possible to adjust policy preparation and drafting processes to such a timescale, and it would probably raise considerable difficulties for instruments that require consultation with Whitehall departments. A

[12] Official Report, 11 December 2007, Column 117

40 day maximum laying period would add considerably to the timetable for the making of individual SSIs. The Government could not rely on that period being reduced for more routine instruments, because we would not know which ones those were…"[13]

73. We agree that to require even the most routine instruments to be laid for 40 days is probably unworkable. However, we welcome the previous Executive's suggestion – which the current Minister supports – that the coming into force date for negative instruments should be extended from 21 days to 28 days after laying. This would allow committees more time for scrutiny of negative instruments before they come into force.

74. We consulted a sample of committee conveners on this proposal. It was very much welcomed.

Recommendation 11: The Committee recommends that the period after which instruments subject to the negative procedure can come into force should be extended from 21 days to 28 days.

Operation of the 40 day deadline

75. We note from our predecessor's report that there is some lack of clarity about the operation of the 40 day deadlines for instruments. On affirmative instruments, committees are required to report with a recommendation within 40 days but there is no deadline for Parliament to approve or reject an instrument. On negative instruments, committees must report within 40 days, and any annulment motion must be considered and disposed of within the same period. This may be difficult to achieve if an annulment motion is lodged late in the consideration period.

Recommendation 12: The Committee recommends that –

- **there should be a deadline for Parliament to take a motion to approve a draft instrument and this should be 10 days after the expiry of the 40 day period provided for committees to report; and**

- **motions to annul made instruments should be taken by the Parliament within 10 days after the expiry of the 40 day laying period, provided that the recommendation to annul has been made by the lead committee within the 40 day period.**

Parallel consideration

76. Once an instrument is laid before Parliament, the Subordinate Legislation Committee and the lead committee can begin their scrutiny of it.

77. Under Standing Orders, lead committees are obliged to "take into account any recommendations made by any other committee" before reporting to Parliament (Rules 10.4.3, 10.5.3 and 10.6.4). There is nothing to prevent lead committees from commencing their consideration of instruments as soon as they

[13] Official Report, 15 January 2008, Column 176-177

have been laid. However lead committees have tended only to begin their scrutiny once they have received a report from the Subordinate Legislation Committee.

78. In effect therefore, lead committees only have the second 20 days out of the 40 day period to report on instruments. So that lead committees can take SLC comments into account, the SLC has only the first 20 days (or, exceptionally, 22 days) to report. These are demanding timescales, given that there often needs to be dialogue between the SLC or lead committees and the Government on issues which require to be considered prior to a report being made.

79. Our predecessor therefore recommended that a system of parallel consideration should be introduced whereby the SLC and lead committees would each have the full 40 days in which to consider an instrument and to report to Parliament. The report also recommended that a lead committee should allow the SLC at least one consideration of an instrument before it submits its own report to Parliament, so that any serious concerns about technical or legal validity could be brought to its attention. The previous Executive and the current Government have both supported the introduction of parallel consideration within the current system.

80. On closer examination, it appears to us that parallel consideration could not in practice deliver much benefit if the existing relationship between lead committees and the SLC is retained. To expand on this:

- at present, the SLC reports its technical and legal concerns to lead committees. It is up to lead committees what account they take of these concerns and even in the most serious cases – for example, significant doubts about *vires* – it would be for the lead committee, not the SLC, to recommend annulment of an instrument. (It is of course open to any member, including a member of the SLC, to lodge a motion to annul an instrument which would instigate a debate in the lead committee and a possible annulment recommendation being made by that committee to Parliament (Rule 10.4.1));

- The SLC can only report to the lead committee in a meaningful way if its concerns are raised early enough to be considered by the lead committee; in effect, something like the current 20 day deadline would still be required;

- Meanwhile, although the lead committee would have the full 40 days to complete its scrutiny, for non-controversial instruments it might be just as easy to schedule consideration for after the SLC report was available than to require an instrument to be considered at two meetings, one before and one after the SLC had reported.

81. Alternatively, it would be possible to decouple completely the SLC's scrutiny and that of lead committees. Arguably, this would reflect the reality that the SLC's comments are directed more to the Scottish Government than to lead committees. No recommendation to annul an instrument has been made by a lead committee on the strength of an SLC report, and where instruments have been withdrawn or revoked in response to SLC comments, this has generally been before lead committee scrutiny had begun. While SLC reports would continue to be available to lead committees and the whole Parliament, there would be no requirement then

to report within 20 days – although the SLC might choose to do so in particular cases. It might be felt that this additional time would improve the quality of SLC scrutiny; while lead committees would benefit from greater flexibility to schedule SSI consideration to suit their other workload.

82. On the other hand, de-coupling may devalue SLC scrutiny, or result in the Government of the day taking that scrutiny role less seriously. Additionally, taking longer than 20 days on some instruments may be counterproductive if, as can happen, the politically controversial instruments are also those with technical issues.

83. We emphasise that breaking the link with lead committees would be a significant change to the role of the SLC, with more emphasis on influencing the Government immediately or with respect to future instruments; and less emphasis on a scrutiny partnership with lead committees. If it is felt that the current balance between lead committees and SLC should be retained, then it follows that the existing time constraints can only be eased to a limited extent.

84. We recognised that this issue has an impact beyond the SLC and we accordingly sought views from a small selection of committee conveners. We received a very full response from Roseanna Cunningham MSP drawing on her experience of convening three different committees, all undertaking significant amounts of subordinate legislation scrutiny. Her view was that given the limited time available for scrutiny of instruments, "it has never made sense for the two committees to conduct scrutiny in sequence, thus limiting each of them to only around half of that period."[14] She helpfully outlined for us the approach already being taken by the Rural Affairs and Environment Committee, who since the start of this session have been beginning their consideration of instruments as early as possible in the 40 day period.

85. Roseanna Cunningham's response addressed the question of the relationship between the SLC and lead committees, commenting that:

> "Such changes would give formal recognition to the distinct scrutiny roles of lead committees and the SLC – namely that the SLC's remit limits its scrutiny to relatively specialised matters of drafting and *vires*, while subject committee remits limit their scrutiny to the policy implications of the instrument. These have so little overlap in most cases that there is no meaningful "scrutiny partnership" between the two committees (as the current Rules imply)."

86. Her conclusion is therefore that, with parallel consideration, "each committee would make recommendations to the Parliament based on its particular perspective, and it would be for the Chamber as a whole to reach a final view".

87. The other two Conveners we consulted, Bill Aitken MSP and Karen Whitefield MSP, took a different view. Both said that they found it valuable to know that technical and legal aspects of an instrument had been scrutinised before they concluded their policy consideration. Bill Aitken summed up his view

[14] Letter from Roseanna Cunningham MSP, 28 February 2008 – see Annexe C

with the comment that "it would be unfortunate if a lead committee had concluded its scrutiny and raised no concerns only to find out that an instrument was defective."[15]

88. In the light of these responses, we conclude that it continues to be appropriate for lead committees to at least have the opportunity to consider the SLC's report before they conclude their consideration. If the SLC has concerns, the lead committee is likely to be better placed than the Chamber as a whole to balance policy and technical considerations and make a recommendation to the Parliament. While we recognise that it would be unusual to recommend annulment on purely technical grounds, such technical concerns might add weight to a committee's concerns about the instrument's policy or might prompt further policy questions.

89. We are sympathetic to the argument that lead committees need to make the best use of the limited time available for scrutiny and in this context we draw the attention of lead committees to the approach being adopted by the Rural Affairs and Environment Committee which appears to deliver most of the advantages of parallel consideration without its disadvantages.

Recommendation 13: The Committee recommends that there should be no change to the current procedures whereby lead committees are required to take into account the report of the Subordinate Legislation Committee before they conclude their own consideration of any instrument.

Annulment

Power to annul

90. The Committee agrees with its predecessor that it should not have the power to recommend to Parliament the annulment of an instrument subject to negative procedure, and that this power should rest solely with the lead committee.

Recommendation 14: The Committee recommends that the power to recommend annulment of an instrument should rest solely with the lead committee.

Conditional annulment

91. The Committee notes that no instruments subject to negative procedure were annulled by Parliament until March 2008[16]. It also notes that there have only been a couple of successful annulments at Westminster since the 1960s.

92. One reason why an annulment motion has not previously been considered by the Parliament may be that, where there is a risk of annulment, the Government is likely to revoke and relay an instrument.

[15] Letter From Bill Aitken MSP, 27 February 2008 – see Annexe C

[16] The Home Detention Curfew Licence (Prescribed Standard Conditions) (Scotland) Order 2008 (2008/36) was annulled by Parliament on 12 March 2008

93. However, the Committee agrees with its predecessor that there may be a reluctance by committees to recommend annulment because they are concerned about the potential impact of annulment where an instrument is already in force.

94. Where a Committee recommends the annulment of an instrument, and the Parliament agrees, the Government must revoke the instrument. Article 11(5) of the Transitional Order provides that the revocation is "without prejudice to the validity of anything previously done under the instrument."

95. The exact legal effect of this provision is not absolutely clear – it is recognised that its application will be dependent on the particular context of the instrument - and as far as the Committee is aware this has not been considered by the Courts. The provision is aimed at limiting the adverse retrospective legal effect which a decision to annul would have on persons or bodies who have been affected by the operation of the instrument after its coming into force, but before its annulment. This would include people who, for example, have acquired legal rights or incurred liabilities under the terms of the instrument while it is in force. The broader legal implications of such an annulment would, of course, depend on the provisions of the individual instrument annulled, how long it had been in force prior to annulment and how many people had in practice been affected by it.

96. We considered whether the effectiveness of the annulment procedure could be increased if the effect of an annulment could be suspended for a set period or made subject to conditions. This concept of *conditional* (or suspended) annulment would for example allow an instrument to continue in force for a set period while the Government considered a replacement instrument; or it could simply delay the effect of the annulment; or it could enable the Government to inform the Parliament what the consequences of annulment would be in a particular instance. This is not an issue on which we took detailed evidence but we consider that it merits further exploration.

Recommendation 15: The Committee recommends that the option of conditional annulment be discussed further with the Scottish Government to identify whether it could be a workable addition to the options available to the Parliament; if so, it could be provided for in the proposed bill.

Amendments

97. One of the problems our predecessor identified is that the current system does not allow changes to be made to instruments after they have been laid. If a change to an affirmative instrument is needed, the Government has to withdraw the instrument and replace it with a new one, starting the scrutiny process anew. If a change is needed to a negative instrument, the Government must revoke and replace it (because the instrument is already “made”). Committee conveners complained to our predecessors that in such circumstances, this resulted in committees “double handling” instruments even though the change might be a sensible one which was welcomed by both SLC and the lead committee. The revocation, withdrawal and relaying of instruments is also clearly a burden on the Government. A simpler course of action would be for certain changes to be able to be made to instruments without the need for them to be withdrawn or revoked and relaid.

98. We therefore support our predecessor's proposal – which both the previous and current Government welcomed - for an easier system of making minor technical changes to instruments. We agree that substantive policy amendments should not be permissible once an instrument has been made since this would fundamentally alter the balance between Parliament and Government. Our predecessor's recommendations were based on SSIP where most instruments would be laid in draft; we consider below how such amendments might be made within the current system.

99. Applying such a system to affirmative instruments should be relatively straightforward. Such instruments are laid in draft and are not yet law. Technical changes (which corrected any patent errors, or clarified ambiguities) proposed by the SLC and agreed by the Government could be implemented through the Government laying a revised draft. The benefit for the Government, compared to the current system, would be if this could be done without extending the 40 day timescale. We think it likely that legislation would be required to support such a procedure. Further detailed discussion would be needed to define what sort of amendment would be permissible within this procedure, and what amendments would require the instrument to be withdrawn and the clock started again on a new instrument.

100. Making changes to negative instruments is more complex since these instruments have already been made, and therefore are law (even though they may not come into force until later). We note the proposal for a process of certificated changes agreed between the Convener of the SLC and the Scottish Government. It seems likely that this could only be applied to a more limited set of changes than would apply for affirmative instruments. We recommend that further detailed discussions should take place between SLC officials and Scottish Government officials, to develop proposals for a workable process which could be reflected in the proposed bill.

Recommendation 16: The Committee recommends that –

- **there should be a procedure for the Scottish Government to withdraw and relay draft instruments to make agreed technical changes without affecting the 40 day time limit;**

- **further consideration should be given to a procedure which would allow minor technical changes to be made to instruments which have already been made and are subject to negative procedure; and**

- **SLC and Scottish Government officials should be asked to develop detailed proposals for the scope and operation of the proposed amendment procedures.**

Planning of subordinate legislation

101. We agree with our predecessor that one of the major weaknesses of the current system has been the absence of adequate forward planning of subordinate legislation by the Government. At present there is no routine provision to

Parliament of any forward programme of subordinate legislation. Such a programme would allow committees to plan their workloads more accurately as well as allowing end users to plan for implementation.

102. We therefore welcome the report from the Minister for Parliamentary Business that a tracking system "is now in place and is beginning to provide some useful information for us in Government as we plan SSIs."[17] We also welcome the Minister's offer to share this information with the Parliament, which will "offer data on the number, type and size of SSIs". We view this as the starting point for a more co-ordinated approach to the making and laying of instruments across the Scottish Government. In very many cases – for example, annual upratings, instruments flowing from recent acts, instruments implementing European directives - we are confident that forward planning is taking place within the Scottish Government but to date this has not been communicated to the Parliament in any coordinated way.

103. Our predecessor recommended that the Executive should provide the Parliament with a 3 month forward programme of subordinate legislation and that this should be a requirement specified in Standing Orders. We accept the arguments advanced by both the previous and present Governments that this is not an appropriate matter for Standing Orders. We accept that, especially at this early stage, information from the tracker is likely to be only partially accurate although we trust that both the accuracy and the level of detail will increase over time.

104. For these reasons, we are content with the Scottish Government's proposal that reports should be monthly rather than quarterly and should cover only six weeks rather than three months. We consider this a useful starting point. We expect that over time the information the Government can provide will increase as the quality and robustness of the tracker system develops. We note that the Government's willingness to share its forward plans will also depend on it having confidence that committees will make appropriate and responsible use of whatever information is provided, accepting that there will always be slippages in timetables or unanticipated instruments at short notice.

Recommendation 17: The Committee recommends that –

- **the Scottish Government should provide Parliamentary committees with a 6 week forward programme of subordinate legislation on a monthly basis and, given that the tracker system is now in place, this should begin quickly; and**

- **the content of the Scottish Government's forward programme should be kept under review, and should be adjusted in the light of experience.**

[17] Official Report, 15 January 2008, Column 172

Consolidation

105. For many users of subordinate legislation, the most important issue for us to address is consolidation. Our predecessor commented that: "In many, if not most, areas, it is extremely difficult to ascertain the current up to date position with regard to subordinate legislation".[18] Their report recommended the establishment of a Consolidation Working Group and we are pleased to report that such a group has now been established. Its membership includes Government, Parliament and Scottish Law Commission officials. The Group meets monthly and the Committee notes that good progress is being made in relation to its remit –

- to consider what Parliamentary and Governmental procedures and processes exist at present for the consolidation of subordinate legislation;
- to make recommendations as to any amendments to those procedures and procedures which would facilitate consolidation;
- to make recommendations on criteria which might be used to prioritise instruments requiring consolidation; and
- to consider and make recommendations as to which areas of existing subordinate legislation would benefit from early consolidation.

106. We agree with our predecessor that the Parliament's procedures need to encourage the Scottish Government to consolidate instruments and that Parliamentary time should be directed effectively so that instruments are not subjected to repeated scrutiny that is unnecessary. At present, the risk that unchanging policy areas will be re-opened for scrutiny acts as a disincentive to consolidation. There is also a risk that "rolling" consolidations (see below for definition) will mean longer instruments, which may have financial implications both for the Government and for users of the legislation who purchase copies. It is important therefore that the Parliament's procedures do not create a further barrier to consolidation.

107. We therefore support the previous committee's recommendations as to the scrutiny of consolidation and in particular their distinction between "pure" consolidations (which make no policy amendments) and "rolling" consolidations (which both consolidate and make substantive policy amendments). We agree that the overall aim should be to allow technical scrutiny of all instruments (by the SLC) but allow policy scrutiny (by the lead committees) only where policy has changed or where new policy impacts on existing measures.

108. We recognise that our predecessor's recommendations may need some minor adjustments if they are to fit within the current system rather than the proposed SSIP. We also accept that the assessment of whether or not an instrument is a consolidation will be an additional scrutiny task for SLC and one which it would be challenging to complete within the usual 20 days.

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[18] Subordinate Legislation Committee, 14th Report, 2007 (Session 2) (para 213)

109. It seems likely to us however that, because of the amount of drafting work involved, consolidations will be known about well in advance by the Government. We suggest therefore that there should be a working practice where SLC officials are given advance notice and an advance copy of consolidation instruments in order to aid the scrutiny process.

110. We note that the Consolidation Working Group is considering in detail how consolidations might be handled. While this will eventually be a matter for the Parliament to regulate through its Standing Orders, we recognise that the procedure must command the confidence of the Government as well as fulfilling Parliament's scrutiny requirements.

Recommendation 18: The Committee recommends that procedures should be established specifically for the scrutiny of consolidating instruments and that these should be based on its predecessor's recommendations.

Local instruments and Rules of Court

111. The previous Committee in its report recommended that SSIs which are classified as being of a local nature, and those which are Rules of Court, should no longer be made as SSIs. The recommendation was made in the context of SSIP and we can understand that it would not have made sense for the SSIP general procedure to apply to these kinds of instrument. Without SSIP, the same arguments do not apply. Nevertheless we have looked again at the case for continuing to make local instruments and Rules of Court as SSIs.

Local instruments

112. Local instruments are currently made as SSIs where the enabling legislation provides for this. They are not available in print from the Queen's Printer for Scotland (QPS) or the Office of Public Sector Information (OPSI), but since 2007 have appeared on the QPS website. They are not subject to any SLC scrutiny.

113. The definition of a local instrument is not wholly clear. They can cover matters akin to those covered by local byelaws – which are not SSIs. They have a similar SSI form to general instruments which make provision for specific areas (for example, closing fishing areas). They may only affect a small group of people in a particular area but this can also be true of general instruments (e.g. employees being transferred from one body to another). Instruments are only classified as local once they have been made when the authority making the instrument confirms to the QPS if it is local. The Transitional Order sets out that an instrument which is in the nature of a local and personal or private Act, shall be classified as local, and an instrument in the nature of a public general Act shall be classified as general. This definition is not particularly useful.

114. On the other hand, Parliament in passing the parent Act must have considered the delegation of powers significant enough to warrant exercise by SSI and it should be stressed that local instruments can create significant rights and duties and create offences. Designating them as SSIs gives a clarity and formality to their status, and means that a body of rules governs their making, publication, interpretation and drafting. If local instruments were not SSIs, it would be

necessary to find an alternative way of ensuring that their status as law was clear and that they were accessible to those affected by them.

115. We conclude that there would be disadvantages if local instruments were no longer made as SSIs, and no real advantages. However, we agree with our predecessor that the definition of local instruments might be made clearer. Their suggested definition, which appears a sensible starting point and could be refined when drafting the proposed bill, was:

> "an instrument should be classified as being of a local nature if its provisions are of a nature which would have been included in a private bill or which apply to a particular locality and are not of general importance."[19]

116. We also agree that local instruments should be made more accessible through publication either on the QPS website or the Scottish Government's website, or both. Accordingly, we welcome the fact that local instruments, from 2007 onwards, are available on the QPS website.

117. Finally, it is for consideration whether local instruments, if they are important enough to be made as SSIs, also merit technical scrutiny by the SLC. The SLC scrutinises other "no procedure" instruments such as commencement orders and, resources permitting, might give similar consideration to local instruments. There are however a significant number of these instruments and on balance we consider that it is unlikely to be a practical proposition for the SLC to undertake scrutiny of them.

Recommendation 19: The Committee recommends that—

- **local instruments should continue to be made as SSIs;**
- **publication of web versions of local instruments on the Queen's Printer for Scotland website should continue; and**
- **a clearer definition of local instruments should be adopted.**

Rules of Court

118. The power to make Rules of Court is delegated to the Courts by Act of Parliament. Rules of Court are at present made by the Court of Session by Act of Sederunt or by the High Court of Justiciary by Act of Adjournal and are made as SSIs. We understand that this has been the case since 1966.

119. The relationship between Parliament and the judiciary is complex. The Court's independence from both Parliament and the Government is an essential safeguard and for this reason we considered whether it is at all appropriate for Court Rules to be laid before Parliament as SSIs.

120. We note that Court Rules are not subject to any formal Parliamentary procedure; in particular, there is no scope for Parliament to approve or annul them.

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[19] Subordinate Legislation Committee, 14th Report, 2007 (Session 2) (para 287)

They are not generally subject to scrutiny by lead committees, but are subject to technical scrutiny by the Subordinate Legislation Committee.

121. However, this can be viewed as an informal process in that where the Rules are not subject to parliamentary procedures, the Courts may make and lay Rules without risk that, in future, Parliament may revoke them. We do not consider it wrong in principle for Parliament to contribute to what may be described as quality control of such instruments, particularly as making Court Rules by SSI is a legislative function rather than a judicial one. The authority of Parliament has been conferred to make the Rules by SSI and Rules are of general public importance and interest. We understand that the Lord President has described the SLC's scrutiny as extremely valuable.

122. The advantages of continuing to make Rules of Court as SSIs are similar to those outlined for local instruments. It gives them a formality and clarity of status and from it follows the application of a body of law covering publication, interpretation, drafting, etc. It is consistent with Court Rules being a formal source of law and we note that these instruments can contain significant provisions conferring rights or imposing obligations on persons and importantly enabling access to, and enforcement of, such rights and obligations. They may, for example, amend existing primary legislation. It also ensures that they are published and accessible. The Minister for Parliamentary Business summarised as follows: "the reason why the court rules are laid before Parliament is to do with their status and visibility."[20] While this could be achieved in other ways, we see no particular reason to invent a new system when the current arrangements appear to work satisfactorily.

Recommendation 20: The Committee recommends that Rules of Court should continue to be made as SSIs.

Consequences of not laying

123. The Transitional Order provides that, where an SSI requires to be laid before the Parliament after being made, it is required to be laid before it is due to come into force.[21] In practice, it is expected that an instrument should be laid as soon as practically possible after it is made and it is possible to lay an instrument at any time that the Office of the Clerk is open.[22] It is recognised that the vast majority of instruments that are made by Scottish Ministers are laid soon afterwards.

124. There are no specific penalties set down in either the Transitional Order or the Standing Orders in relation to instruments which are laid some time after they have been made. No instruments have been invalidated to date because they have not been laid soon after making.

125. The Committee accepts that the Government generally lays instruments as soon as possible after making. Our predecessor recommended that instruments which are not laid within a specific time period following laying should be annulled.

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[20] Official Report, 15 January 2008, Column 182
[21] Transitional Order article 10(1)
[22] Standing Orders Rule 2.1.3

We consider that this recommendation is unduly punitive. This is not something which occurs on a regular basis and where it does occur, it is open to the Committee to draw it to the Parliament's attention. This seems to us a sufficient sanction for what is not a significant problem.

Recommendation 21: The Committee recommends that the Scottish Government should continue to lay instruments as soon as possible after making but failure to lay should not invalidate an instrument.

NEXT STEPS

126. The Committee views this report as the beginning of a dialogue between the Parliament and the Scottish Government to find a set of procedures which meet Parliament's scrutiny requirements while allowing the Government to exercise appropriately the powers delegated to it.

127. The precise next steps will depend on the Government's response to this report. We are optimistic that the response will demonstrate that there is much common ground.

128. Implementing these changes would require legislation (replacing the Transitional Order) as well as changes to the Parliament's Standing Orders. A bill could either be a committee bill, piloted by the SLC, or a government bill which the SLC would scrutinise. The technical nature of the subject area attracts us initially to a government bill, since government has at its disposal the kind of drafting resources which a major and technical bill requires. A government bill has the subsidiary advantage that the SLC could act as lead committee and ensure through questioning and where necessary amendment that the bill delivered our intentions. (If the changes were by means of a committee bill, the SLC could not also act as lead committee).

129. We invite the Scottish Government to confirm, in its response to this report, whether it is willing to replace the Transitional Order by means of a government bill. If it is, we also invite it to indicate the timescale within which it would be able to introduce such a bill.

130. The Parliament and the Scottish Government have a shared interest in procedures which work well. Even if the legislation is government led, the Parliament must make changes to its standing orders and informal procedures to give effect to any changes. We therefore suggest that this is best viewed as a collaborative project and we propose that officials from both sides should begin early discussions about both the detailed content of a bill and the process of delivering the changes.

Recommendation 22: SLC and Scottish Government officials should begin early discussions about the detailed content of a bill to replace the Transitional Order and the process of delivering changes to the subordinate legislation scrutiny process.

SUMMARY OF RECOMMENDATIONS

Recommendation 1

- The Parliament should retain the current system and procedures for scrutinising subordinate legislation subject to the improvements recommended in this report; and

- legislation should be introduced in the course of this session to replace The Scotland Act 1998 (Transitional and Transitory Provisions) (Statutory Instruments) Order 1999.

Recommendation 2

- All instruments should continue to be governed by procedures set down in the parent act.

Recommendation 3

- The Scottish Government in drafting legislation, and the Parliament in its scrutiny role, should continue to make use of more flexible approaches which allow powers to be tailored to the situation for which they are required.

Recommendation 4

- Post-legislative scrutiny of delegated powers should be added to the remit of the Subordinate Legislation Committee, and

- a power should be conferred on Ministers enabling them to amend by order the procedure specified in a parent Act, on the recommendation of the SLC.

Recommendation 5

- Class 6 (no procedure) and class 7 (not laid) procedures should be amalgamated into a single “no procedure” category.

Recommendation 6

- Unless compelling reasons can be identified for retaining these procedures, class 2 (made affirmative) and class 4 (draft negative) procedures should be discontinued.

Recommendation 7

- In transiting the discontinued procedures into one of the remaining (or new) procedures, there should be no downgrading in the level of

parliamentary scrutiny; and that section 29 of the Legislative and Regulatory Reform Act 2006 should be considered as providing a useful model.

Recommendation 8

- Classes 1 (affirmative), 5 (negative), and 8 (super affirmative) procedures should be retained.

Recommendation 9

- Class 3 procedure should be retained as an option for dealing with certain sorts of emergency procedure; and

- a specific procedure should be introduced for emergency negative instruments, including the elements outlined in this report; and this should only extend to emergency instruments and not to urgent instruments which should continue to be dealt with in the same way as breaches of the 21 day rule are at present.

Recommendation 10

- Lead committees should be made aware of the flexibility which already exists to dispense with debate on affirmative instruments and to take evidence on negative instruments.

Recommendation 11

- The period after which instruments subject to the negative procedure can come into force should be extended from 21 days to 28 days.

Recommendation 12

- There should be a deadline for Parliament to take a motion to approve a draft instrument and this should be 10 days after the expiry of the 40 day period provided for committees to report; and

- motions to annul made instruments should be taken by the Parliament within 10 days after the expiry of the 40 day laying period, provided that the recommendation to annul has been made by the lead committee within the 40 day period.

Recommendation 13

- There should be no change to the current procedures whereby lead committees are required to take into account the report of the Subordinate Legislation Committee before they conclude their own consideration of any instrument.

Recommendation 14

- The power to recommend annulment of an instrument should rest solely with the lead committee.

Recommendation 15

- The option of conditional annulment should be discussed further with the Scottish Government to identify whether it could be a workable addition to the options available to the Parliament; if so, it could be provided for in the proposed bill.

Recommendation 16

- There should be a procedure for the Scottish Government to withdraw and relay draft instruments to make agreed technical changes without affecting the 40 day time limit;

- further consideration should be given to a procedure which would allow minor technical changes to be made to instruments which have already been made and are subject to negative procedure; and

- SLC and Scottish Government officials should be asked to develop detailed proposals for the scope and operation of the proposed amendment procedures.

Recommendation 17

- The Scottish Government should provide Parliamentary committees with a 6 week forward programme of subordinate legislation on a monthly basis and, given that the Scottish Government's tracker system is now in place, this should begin quickly; and

- the content of the Scottish Government's forward programme should be kept under review and should be adjusted in the light of experience.

Recommendation 18

- Procedures should be established specifically for the scrutiny of consolidating instruments and these should be based on the previous SLC's recommendations.

Recommendation 19

- Local instruments should continue to be made as SSIs;

- publication of web versions of local instruments on the Queen's Printer for Scotland website should continue; and

- a clearer definition of local instruments should be adopted.

Recommendation 20

- Rules of Court should continue to be made as SSIs.

Recommendation 21

- The Scottish Government should continue to lay instruments as soon as possible after making but failure to lay should not invalidate an instrument.

Recommendation 22

- SLC and Scottish Government officials should begin early discussions about the detailed content of a bill to replace the Transitional Order and the process of delivering changes to the subordinate legislation scrutiny process.

ANNEXE A: EXTRACTS FROM THE MINUTES OF THE SUBORDINATE LEGISLATION COMMITTEE

7th Meeting, 2007 (Session 3), Tuesday 2 October 2007

Work programme (in private): The Committee agreed a work programme.

10th Meeting, 2007 (Session 3), Tuesday 6 November 2007

Work Programme: The Committee agreed its work programme.

15th Meeting, 2007 (Session 3), Tuesday 11 December 2007

Inquiry into the regulatory framework in Scotland: The Committee heard evidence on its inquiry from –

Sylvia Jackson, former Convener of the Subordinate Legislation Committee;
Murray Tosh, former member of the Subordinate Legislation Committee; and
Iain Jamieson, former adviser to the Subordinate Legislation Committee.

2nd Meeting, 2008 (Session 3), 15 January 2008

Inquiry into the regulatory framework in Scotland: The Committee took evidence on its inquiry from –

Bruce Crawford MSP, Minister for Parliamentary Business; and
Ken Thomson, Director, Civil & International Justice and CPS.

6th Meeting, 2008 (Session 3), Tuesday 19 February 2008

Decision on taking business in private: The Committee agreed to take item 7, and all future consideration of its draft report on its inquiry into the regulatory framework in Scotland, in private.

7. **Inquiry into the regulatory framework in Scotland:** The Committee considered its draft report.

7th Meeting, 2008 (Session 3), Tuesday 26 February 2008

Inquiry into the regulatory framework in Scotland (in private): The Committee considered its draft report.

8th Meeting, 2008 (Session 3), Tuesday 4 March 2008

Inquiry into the regulatory framework in Scotland (in private): The Committee considered its draft report.

9th Meeting, 2008 (Session 3), Tuesday 11 March 2008

Inquiry into the regulatory framework in Scotland (in private): The Committee agreed its draft report.

ANNEXE B: ORAL EVIDENCE

RRD please insert –

Official Report Tuesday 11 December 2007 cols 116-143

Official Report Tuesday 15 January 2008 cols 171-188

ANNEXE C: WRITTEN EVIDENCE

LETTER FROM BILL AITKEN MSP, CONVENER OF THE JUSTICE COMMITTEE

1. I understand that your Committee is currently considering its report on its inquiry into the regulatory framework in Scotland. I have been asked, informally, for a view on two issues: 1) timescales for considering and reporting on instruments; and 2) parallel consideration of instruments by the SLC and lead committees/SLC having the power to recommend annulment to Parliament

2. In relation to the first issue, I would support a recommendation that the coming into force date of negative instruments be extended from 21 to 28 days following laying to allow more time for committees to consider instruments before they come into force.

3. In relation to the second issue, I have some reservations about parallel consideration of instruments. In considering the terms of an instrument, I believe it is important that a lead committee is aware of any technical and legal concerns identified by your committee. Although such concerns are rarely serious enough for a lead committee to consider annulment of a negative instrument, it would be unfortunate if a lead committee had concluded its scrutiny and raised no concerns only to find out that an instrument was defective.

27 February 2008

LETTER FROM ROSEANNA CUNNINGHAM MSP, CONVENER OF THE RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

1. I understand that you are seeking the views of a selected number of Conveners on two proposals for changes to procedures that your Committee is considering recommending.

2. I welcome this opportunity to comment. In the time available, and given the circumstances of the request, I have not consulted other members of the Rural Affairs and Environment Committee. In any case, my response is also based on my experience as a committee convener in Session 1 (Justice and Home Affairs Committee) and Session 2 (Health Committee).

3. The first proposal is to recommend an extension of the period after which negative instruments normally come into force from 21 days to 28.

4. I assume this means that the "21-day rule" set out in article 10(2) of the current transitional order (SI 1999/1095) would be replaced by a 28-day rule, and hence that an explanation to the Presiding Officer would henceforth be required for any instrument coming into force less than 28 days after laying.

5. Such a change should certainly be welcomed. Committees should have a much better chance of being able to complete their scrutiny of an instrument within this longer period, thus ensuring that any possible doubts about whether the instrument is to be annulled have been removed before it actually comes into force. This must be preferable, both from the point of view of those MSPs who may have policy objections to instruments and from the point of view of Ministers responding to those objections, neither of whom has an interest in causing unnecessary disruption to those directly affected by the legislation.

6. The second proposal is to encourage parallel consideration of instruments by the lead committee and the Subordinate Legislation Committee.

7. I very much welcome this proposal as it will enable both committees to make greatest use of the 40-day period available for scrutiny. Given this limited overall timescale, it has never made sense for the two committees to conduct scrutiny in sequence, thus limiting each of them to only around half of that period.

8. When the Rural Affairs and Environment Committee decided early in the session to meet on a fortnightly basis, it became necessary to begin its scrutiny of instruments at the earliest opportunity, without waiting for the SLC to report. This works as follows:

- Every Monday, the clerks e-mail members with a note of any new instruments laid by the end of the previous week and referred to the Committee. Members are asked to flag any potential concerns to the clerks.
- These instruments are then put on the next available Committee agenda for consideration. Committee papers are circulated every second Friday (for

Wednesday meetings), and normally include every new instrument referred to the Committee by the end of the previous Friday.

- If no concerns are raised at the Committee meeting, the instrument is "cleared" (by the Committee agreeing to make no recommendations) – although this does not preclude further consideration of the instrument at the next meeting if circumstances change (e.g. if a motion recommending annulment is subsequently lodged).
- If concerns are raised at the first meeting, the instrument can be held over to the next meeting (still well within the 40-day period), leaving time for correspondence to be entered into or witnesses invited.

9. The main limitation of this system (under the current Rules) is the expectation that we do not take any decisive step – in particular, disposing of any motion recommending approval of an affirmative instrument or annulment of a negative instrument – until we have seen the SLC report on the instrument.

10. To make parallel scrutiny work most effectively, it would make sense to change the Rules so that the SLC no longer reports to the lead committee but reports directly to the Parliament, and so that the lead committee need not wait to receive the SLC's report before reporting itself. (The lead committee should, however, remain obliged to take account of the views of any secondary subject committee before reporting.) It would also make sense to make clear that the SLC as well as the lead committee is entitled to recommend (on the motion of any MSP) annulment of a negative instrument – with such a recommendation by either committee being sufficient to trigger a short debate in the Chamber. (It might not be appropriate, by contrast, to require the SLC to consider motions recommending approval of affirmative instruments in parallel with the lead committee; but it would remain, of course, possible for the SLC to recommend against approval of such an instrument in its report to the Parliament.)

11. Such changes would give formal recognition to the distinct scrutiny roles of lead committees and the SLC – namely that the SLC's remit limits its scrutiny to relatively specialised matters of drafting and *vires*, while subject committee remits limit their scrutiny to the policy implications of the instrument. These have so little overlap in most cases that there is no meaningful "scrutiny partnership" between the two committees (as the current Rules imply).

12. Under the present Rules, if a significant concern about *vires* is raised by the SLC on an instrument that is uncontroversial from a policy perspective, it falls to the lead committee to balance these competing considerations in making its final recommendation to the Parliament. Given the lead committee's remit, it is almost inevitable that the policy considerations will be given priority – even though the *vires* issue may be of vital importance. With parallel consideration, each committee would make recommendations to the Parliament based on its particular perspective, and it would then be for the Chamber as a whole to reach a final view, taking both perspectives into account. This strikes me as a preferable approach, quite apart from the timescale benefits it would bring.

28 February 2008

LETTER FROM KAREN WHITEFIELD MSP, CONVENER OF THE EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

1. The Clerks to the Subordinate Legislation Committee (SLC) recently contacted the Clerks to the Education, Lifelong Learning and Culture Committee, to seek views from me on issues within your inquiry on the regulatory framework in Scotland, which will impact upon lead committee's dealing with subordinate legislation.

2. The issues which the Clerks brought to my attention related to the timescale for considering and reporting on instruments, parallel consideration of instruments by the SLC and lead committees and the SLC having the power to recommend annulment to Parliament.

3. Taking each of those issues in turn, I would support an extension of the coming into force date of negative instruments from 21 to 28 days. This would allow lead committees more time to consider instruments before they came into force, thus giving more time to gather information and take evidence if required. It would also enable a greater flexibility in terms of timetabling which would be greatly appreciated.

4. In terms of parallel consideration, I am not convinced that this would be an appropriate change to the current procedures. I certainly value the current system and find it reassuring that an instrument has been considered by the SLC before it is considered by a lead committee. This enables the lead committee to take account of any comments made by the SLC, which is very helpful in both contextualising and informing the lead committee's deliberations. I am concerned that parallel consideration could be complex and difficult to implement in practice, as although we would technically have 40 days to consider and report on an SSI to Parliament, I would certainly only wish to begin consideration after the SLC had considered and reported on the instrument, which would lead to something akin to the 20 day consideration that we have now. Therefore, I am not convinced there would be any advantage for a lead committee in parallel consideration.

5. However, I am not opposed to the principle of the SLC being able to recommend annulment of an instrument to Parliament. If the SLC had serious concerns about issues surrounding the legality of an instrument I would be quite happy with it having the power to recommend annulment to Parliament on that basis.

6. I appreciate being given the opportunity to comment on these issues at this stage in your own considerations and I hope you find these comments useful.

29 February 2008