The Committee will meet at 10.00 am in Committee Room 4 to consider the following agenda items:

1. **Declaration of interests:** The new member of the Committee will be invited to declare any relevant interests.

2. **Choice of Deputy Convener:** The Committee will choose a new Deputy Convener.

3. **Efficient Government:** The Committee will consider a paper from the budget adviser.

4. **Budget Process 2006 – 07:** The Committee will consider a paper from the budget adviser and will also consider guidance for the Parliamentary subject committees.

5. **Subordinate Legislation Inquiry into the Regulatory Framework in Scotland:** The Committee will consider correspondence from the Convener of the Subordinate Legislation Committee.

6. **Register of Interests of Members of the Scottish Parliament Bill:** The Committee will consider its approach to the scrutiny of the Financial Memorandum for the Register of Interests of Members of the Scottish Parliament Bill.

7. **St Andrew’s Day Bank Holiday (Scotland) Bill (in private):** The Committee will consider its draft report on the Financial Memorandum of the St Andrew’s Day Bank Holiday (Scotland) Bill.

Susan Duffy
Clerk to the Committee
The papers for this meeting are:

**Agenda Item 3**

Paper from the Budget Adviser and SPICe

[FI/S2/05/20/1]

**Agenda Item 4**

Guidance on the Budget Process from the Budget Adviser

[FI/S2/05/20/2]

Guidance on the Budget Process for Parliamentary Subject Committees

[FI/S2/05/20/3]

**Agenda Item 5**

Correspondence from the Subordinate Legislation Committee

[FI/S2/05/20/4]

**Agenda Item 6**

Paper from the Clerk on the approach to the Financial Memorandum

[FI/S2/05/20/5]

*Register of Interests of Members of the Scottish Parliament Bill* and associated documents (circulated to members in hard copy only; electronic versions available via Parliament website)

**Agenda Item 7**

PRIVATE PAPER
Finance Committee

20th Meeting 2005 – 20 September 2005

Efficient Government Commitments:
Chronology

1. This paper outlines the statements and commitments which have been made by the Executive and the UK government as part of the Efficient Government Initiative being undertaken north and south of the border.

2. This was requested by the Finance Committee at its “Away Day” on Thursday 18 August 2005. In particular, the Committee asked if there was ever an indication on the part of the Executive that Efficient Government money had been reallocated as part of the Spending Review in 2004.

3. This matter arose, because subsequent to the publication of the Efficient Government plan in November, it was reported by the Committee’s budget adviser (28 June 2005) that some £90m in the Health Budget had been re-allocated as part of the Spending Review, but included in the Efficient Government figures. This was in addition to the £201m that was built into the Local Government Spending Review settlement and also included in the Efficient Government plans.

4. The Committee was aware that the Local Government budget had efficiencies built in to its Spending Review settlement of £201m, but was not aware of this happening with Health. Also, the £90m in Health was not re-allocated to Health, but re-allocated to another (unspecified) budget line. In addition to these two major amounts being built into the SR, the adviser also reported the following to have been built into the SR04 settlement:
   
   - A cash efficiency of £10m built into the Scottish Prison Service Budget
   - Savings on Education and Young People Central Government Expenditure of £9.8m
   - Fire Central Government of £0.1m
   - Administration savings of £8.4m

   Combined the total savings built into the SR04 settlement total £319.3m.

5. As far as I can see, there is no public statement from the Executive that the £90m identified as coming out of the Health budget had been built into its Spending Review settlement. In addition, there is nothing in the public domain to indicate that the UK government had built efficiencies into any departmental SR04 settlements.
6. The remainder of this paper sets out what has been publicly stated and/or written on Efficient Government since the policy was first mooted, and other key events related to the Efficient Government Initiative.

<table>
<thead>
<tr>
<th>When</th>
<th>What</th>
</tr>
</thead>
<tbody>
<tr>
<td>24 June 2004</td>
<td>Then Finance Minister, Andy Kerr, announces to Parliament plans to save £500m per year by 2007-08 and £1bn by 2009-10.</td>
</tr>
<tr>
<td>12 July 2004</td>
<td>As part of UK Spending Review, and based on the findings of the Gershon Review of Public Sector Efficiency, the Chancellor announces plans to save 2.5% per year over the SR period, equivalent to £20bn per year by 2007-08.</td>
</tr>
<tr>
<td>29 November 2004</td>
<td>Publication of Efficient Government Plan by the Scottish Executive reveals a target of £745m recurring savings by 2007-08 (equivalent to 2.9% of the Scottish DEL and 2.4% of TME) rising to £1bn by 2010.</td>
</tr>
<tr>
<td>31 March 2005</td>
<td>Scottish Executive publishes Cash Releasing Efficiency Technical Notes. Efficiency Notes on the Time Releasing savings of £300m were due to be published by April 2005, but were not published until September 2005. In this document the Executive states its ambition to achieve £900m Cash Releasing savings by 2007-08.</td>
</tr>
<tr>
<td>May 2005</td>
<td>Audit Scotland comment on the Executive’s Efficiency Notes – the National Audit Office have performed a similar task for the UK Government, but its comments have not been published.</td>
</tr>
<tr>
<td>28 June 2005</td>
<td>As mentioned in the text above, Arthur Midwinter reports to the Committee that £319.3m of the efficiency savings have been built into the SR settlement.</td>
</tr>
<tr>
<td>6 September 2005</td>
<td>Scottish Executive publish time-releasing Efficiency Technical Notes outlining time-releasing targets of £335.7m DEL savings by 2007-08, and revising upwards the DEL cash-releasing efficiency targets to £812.9m and total savings (including Scottish Water and Registers of Scotland) to £912.3m.</td>
</tr>
</tbody>
</table>

Ross Burnside  
Senior Researcher  
SPICe
Finance Committee

20th Meeting 2005 – 20 September 2005

Briefing Note on the Reallocation of Efficient Government Savings

1. Questions have been asked regarding the reallocation of efficiency savings in Spending Review 2004. My view is there has been a lack of clarity around this issue since the initial announcement in June 2004, and that only in June 2005 did it become clear that in fact all the savings projects had been allocated to portfolio budgets.

2. My report of 28 June 2005 recorded two types of efficiency saving. These are:
   • Savings which were built into the budget baselines in SR2004, and the monies reallocated within the budget exercise (£319.3m).
   • Savings targets which are not within baselines, which portfolios are free to redirect to frontline services (£411.7m)

3. My initial impression was that only the Local Government savings of £326m had been built into the baseline, but it has since been clarified that this was not the case, and only £201m of the LG saving was built into baselines.

4. In the initial statement on 24 June 2004, the Finance Minister told Parliament that “we will set targets for efficiency gains from each government department, health board and public agencies. Gains which will free up resources that we will invest in frontline staff and services.”

5. My initial interpretation of this statement was that these were ‘targets’, and savings would be reallocated on delivery. Only during our study visits in June 2005 did I begin to rethink this position.

6. After correspondence and discussion with Executive officials, I learned that the 1% efficiency in health had been described as being “built into budgets” to show that health boards were anticipating making a 1% efficiency when planning future spend. What this means is that when setting budgets, 1% was taken off the prior year’s spend before applying any additional resources required for new developments.

7. I pursued this further and later discovered that five such cost reductions totalling £319m had been made. This is set out in the table below (this table was part of my original report to the Committee on 28 June 2005):
Table 1 – Efficiency Savings Built Into Spending Review Plans

<table>
<thead>
<tr>
<th>Department</th>
<th>Description</th>
<th>Savings (£m)</th>
</tr>
</thead>
<tbody>
<tr>
<td>EYP/C3</td>
<td>Savings from EYP Central Government Expenditure</td>
<td>£9.8m</td>
</tr>
<tr>
<td>FBSR-LG/C1</td>
<td>Assumed Local Government Efficiency Savings</td>
<td>£168.3m</td>
</tr>
<tr>
<td>FPSR-LG/C3</td>
<td>Common Police Services</td>
<td>£5.5m</td>
</tr>
<tr>
<td>FPSR-LG/C4</td>
<td>Efficiencies in Supporting People Programme</td>
<td>£27.0m</td>
</tr>
<tr>
<td>H/C7</td>
<td>NHS Efficiency Savings</td>
<td>£90.0m</td>
</tr>
<tr>
<td>J/C1</td>
<td>Fire Central Government</td>
<td>£0.1m</td>
</tr>
<tr>
<td>J/C5</td>
<td>Efficiency Savings in SPS</td>
<td>£10.0m</td>
</tr>
<tr>
<td>A/C1 to A/c5</td>
<td>Scottish Executive Administration Budget</td>
<td>£8.4m</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>£319.1m</strong></td>
</tr>
</tbody>
</table>

8. In correspondence from the Minister dated 19 June 2005 and through clarification provided by officials (reported in paper FI/S2/05/17/3 for the Committee meeting on 28 June 2005) the Executive has made clear that it sees a distinction between ‘the baseline from which savings will be made’, and ‘the baseline for those areas which will grow’. “The areas in which savings are made will not necessarily be the areas which benefit from the reallocation of those savings, since that allocation will be carried out in accordance with Ministerial priorities.”

9. However, correspondence dated 19 July 2005 from the Minister revealed that “it will not always be possible to say specifically where a particular saving has been directed to.” This is because, “many bodies, when drawing up budgets, will have a mix of new money, efficiency gains, and reprioritisation savings, and these will effectively form a single pot from which to finance new expenditure, be it in costs or expansion of services. However, it should be possible to give illustrations of the benefits, as well as some hard examples.”

10. The Spending Review and the Efficient Government Initiative were running in tandem, but the SR exercise was completed first. Therefore, departments who identified savings later in the process after their budget allocations were made are allowed to retain them and reallocate them to frontline services. The justification for this was that the Spending Review had been tighter than recent years.

11. Finally, it is clear from the correspondence that the Executive has no mechanism for monitoring the growth in outputs arising from the
Initiative, and therefore improvements in efficiency cannot be measured. The Efficient Government Delivery Group was “not tasked to track the new areas of investment arising from the realisation of savings.” (correspondence from officials dated 30 June 2005)

12. Overall, therefore, the position now is that:

- £319.3m has been built into baselines and realigned within the budget;
- We cannot identify where the £319.3m has been allocated to;
- £411.7m has been targeted but retained within portfolios;
- We may be able to get information from departments as to how this money has been used through the Supplementary Estimates.

Professor Arthur Midwinter
Finance Committee

20th Meeting 2005 – 20 September 2005

Draft Budget 2006-07

Briefing note by the Budget Adviser

1. The Executive’s spending plans for 2006-07 have increased by £277.162m over the plans in the Draft Budget 2005-06. This is composed of a growth in the Departmental Expenditure Limit (DEL) of £401.962m and a reduction in Annually Managed Expenditure (AME) of £184.8m. The big growth area in the DEL is the Communities budget, up by £337.4m, but reduced within AME by £365m. This is an accounting change for the Supporting People Programme. The other big growth item is the Finance AME, which is up by £181m, which is additional provision for NHS and teachers’ superannuation. The majority of new resource items are in the form of interdepartmental transfers.

2. The format for the portfolio chapters to a large extent reflects the Committee’s past recommendations to increase transparency. This includes the New Resources and Statements of Priorities sections, and in comparison with the 2003-04 report, summarises objectives and targets at the start of each chapter, rather than in the text.

3. The objectives and targets are largely those set last year in the Spending Review, with a few exceptions. Last year’s target 5 and 8 in the Health portfolio are updated and amalgamated in this year’s Target 5. Target 1 for the Food Standards Agency has been reduced from helping 9,000 businesses to 8,000. But the Executive has informed us that last year’s figure was a typing error. Target 1 of the Finance and Public Sector Reform portfolio for efficiency savings is increased from £500m to £745m, to reflect the increases reported in the Efficient Government Plan.

4. Last year, the Committee welcomed the reduction in the number of targets, but clearly with 114 in the Draft Budget, there is scope for rationalisation to focus on key strategic targets. There is a similar problem with statements of priorities. According to the Draft Budget, the Executive has some 94 spending priorities, nearly 7 per portfolio. In some portfolios, there is a close correspondence with the range of major programmes and activities described in the chapter. This approach is not systematic enough to cope with the tight budgets expected in the future and a more systematic approach to priority setting is urgently needed.

5. The Draft Budget now also provides consistent Grant Aided Expenditure (GAE) information across portfolios, so subject committees can be aware of the service spending assumptions made
in the local authority block grant. This issue was drawn to the Committee’s attention by the Education and Justice Committees and this change reflects arguments made over the need for transparency in block grants in Finance Committee reports in recent years.

6. There is also progress with information on the cross-cutting priorities of economic growth, promoting equality and sustainable development. Portfolio chapters adopt different approaches; some such as Education place greater emphasis on statements of policy and practice whereas others stress specific spending initiatives which contribute to these issues. The presentation of this information would benefit from standardisation in the way that other elements of portfolio chapters are presented.

7. To assist the Committee, I have summarised the specific initiatives, which are important as budget-making is in essence a process of resource allocation at the margins and in an interim year between Spending Reviews, chances are the main focus of scrutiny. Overall, departments have identified £1576m of spending which enhances economic growth; £918m on equality and £21.25m on sustainable development.

8. I have previously advised the Committee that departments treat sustainable development as a cross-cutting principle within specific decisions rather than a budget priority. That said, it is difficult to accept that only £21m of spending contributes to sustainable development. Indeed, the comment would also apply to the economic growth issue, as capital spending alone is greater than the total shown in the chapter.

9. It is helpful, in the absence of other planning documents, to have policy developments recorded and explained in the Draft Budget. However, there remains a need to integrate policy and resource decisions, particularly when crosscutting themes are identified as strategic priorities in the Budget. As with portfolio priorities, there is a need for a more systematic financial analysis of how spending advances crosscutting issues.

10. Finally, in the introduction the report repeats the Executive’s definition of efficiency gain as an improvement of the ratio of inputs and outputs and the need for a clear baseline and methodology for measuring them. It goes further in observing that, “this requires both inputs and outputs to be measured in order to demonstrate that a genuine efficiency improvement has been made”, and also reports that “completed technical notes for cash-releasing savings have been published.”

11. It is necessary to repeat therefore, the advice expressed previously to the Committee that these technical notes do not contain baselines, only that further improvements to them were expected to follow similar comments over baselines from Audit Scotland. Without real output
measures – i.e. not the conventional approach used in the National Account for Economic Analysis – from budget decisions, this initiative will remain a cost-cutting exercise, not an efficiency improvement one.

Professor Arthur Midwinter
Table 1: Specific Spending Initiatives Which Tackle Cross-cutting Issues

<table>
<thead>
<tr>
<th>Initiative</th>
<th>Economy £m</th>
<th>Equality £m</th>
<th>Sustainability £m</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Justice</td>
<td>-</td>
<td>6.0</td>
<td>-</td>
</tr>
<tr>
<td>2. Crown Office</td>
<td>0.6</td>
<td>0.35</td>
<td>0.1</td>
</tr>
<tr>
<td>3. Education &amp; Young People</td>
<td>-</td>
<td>102.3</td>
<td>0.125</td>
</tr>
<tr>
<td>4. Transport, Culture &amp; Sport</td>
<td>-</td>
<td>83.1</td>
<td>-</td>
</tr>
<tr>
<td>5. Health</td>
<td>-</td>
<td>60.2</td>
<td>8.0</td>
</tr>
<tr>
<td>6. Enterprise &amp; Lifelong Learning</td>
<td>110.0</td>
<td>39.0</td>
<td>-</td>
</tr>
<tr>
<td>7. Communities</td>
<td>373.0</td>
<td>565.3</td>
<td>12.0</td>
</tr>
<tr>
<td>8. Environment</td>
<td>1020.0</td>
<td>12.0</td>
<td>-</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>£1576.1m</strong></td>
<td><strong>£918.5m</strong></td>
<td><strong>£20.225m</strong></td>
</tr>
</tbody>
</table>
Finance Committee

20th Meeting 2005 – 20 September 2005

Budget Process 2006-07– Draft Budget Guidance to Subject Committees: Paper by the Budget Adviser

1. The Budget process this year is a shorter one, in the absence of a Stage One. This is by agreement with the Executive to align the Scottish process with the annual Spending Reviews at Westminster. The Finance Committee is currently considering the implications of the postponement of the 2006 Spending Review for next year’s process.

2. As the strategic choices are exercised in Spending Review years, this year’s process should focus on changes to the expenditure plans agreed last year. There is, therefore, no need to ask for spending recommendations for additional funding, but Committees may wish to consider whether the pattern of expenditure within its portfolio is acceptable, or whether it wishes to recommend transfers between programme budgets within its portfolio.

3. The signals from the Treasury imply a tightening of the fiscal climate by 2008. Subject Committees may therefore wish to use their evidence session with Ministers to probe their thinking about priorities – as it is clear from the Draft Budget that portfolios list far too many priorities to be meaningful and a more systematic and rigorous approach to priority-setting will be required if resources become constrained.

4. A new development in the current Draft Budget is the use of efficiency savings to reallocate resources. Parliament has now received a full set of cash-releasing efficiency savings with budgetary implications and it would be helpful to have Subject Committees’ views on these. Time-Releasing Savings Technical Notes are also available, but for the purpose of the budget exercise, Committees should focus on the cash-releasing projects. The attached note on Efficient Government explains the current position (FI/S2/05/17/3).

5. With these comments in mind, the Finance Committee would welcome responses from the Subject Committees on the undernoted key questions:

a) Is the Committee satisfied with the responses from Ministers to its recommendations for the 2005-06 Draft Budget?

b) Does the Committee wish to raise any matter regarding the changes to spending plans referred in the ‘New Resources’ section?

c) Does the Committee wish to recommend any specific changes to programme budgets within the portfolio? If so, which programmes
should be increased and why, and which programmes should be reduced to fund such changes?

d) Is the Committee content with the Statement of Priorities set out in its portfolio chapter?

e) Is the Committee content with the efficiency proposals identified for its portfolio? Are there projects to promote efficiency that the Committee would like to see considered by the Executive?

f) Further to the above, each chapter contains information regarding departmental contributions to cross-cutting priorities. Does the Committee wish to make any comments on this information?

Professor Arthur Midwinter
September 2005
1. Further to the previous discussion regarding the form of efficiency savings, the Executive has now clarified the position for the Committee. There are two types of savings, one in which the efficiency assumptions were built into budget baselines in the Spending Review settlement; and the other in which there is a savings target which is not built into a budget baseline, which departments are free to redirect into frontline services once the saving is made.

2. There are £201m of the first category of cash savings in the local government settlement, and £125m of target savings which can be redirected to frontline services.

3. In the Health portfolio, the NHS efficiency savings (H/C 7) of £90m over three years (1% of NHS Boards spending) is in the first category. The other health savings are all in the second category.

4. Thirdly, there was a cash efficiency saving built into the Scottish Prison Service budget of £10m.

5. In addition, there are a number of small projects which contribute cash savings in the Spending Review Settlement. These are:

   1. EYP/C3 savings on EYP Central Government Expenditure of £9.8m
   2. J/C1 Fire Central Government of £0.1m
   3. Administration savings of £8.4m

In each of these three cases, budgets were “flatlined” in the Spending Review, constituting a real terms cut and these savings contribute to meeting that reduction. Not all of the savings in the Administration Budget are efficiency savings, and some £5.6m additional savings were made by reducing spending in areas where less resource is required. These are not efficiency savings and have not been included within the total.

6. This makes a total of £319.3m of cash savings built into budgets. The Executive has said these savings have been realigned within portfolios and generally within programme budgets, towards front-line services. This leaves £411.7m as targets available for redirection to frontline services. As with the efficiency savings in total, local government again bares a disproportionate share of the first category of savings at 63% -
nearly twice its share of the budget. This leaves £125m which could be used to reinvest in frontline services.

Table 1 – Efficiency Savings Built Into Spending Review Plans

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>EYP/C3</td>
<td>Savings from EYP Central Government Expenditure</td>
<td>£9.8m</td>
</tr>
<tr>
<td>FBSR-LG/C1</td>
<td>Assumed Local Government Efficiency Savings</td>
<td>£168.3m</td>
</tr>
<tr>
<td>FPSR-LG/C3</td>
<td>Common Police Services</td>
<td>£5.5m</td>
</tr>
<tr>
<td>FPSR-LG/C4</td>
<td>Efficiencies in Supporting People Programme</td>
<td>£27.0m</td>
</tr>
<tr>
<td>H/C7</td>
<td>NHS Efficiency Savings</td>
<td>£90.0m</td>
</tr>
<tr>
<td>J/C1</td>
<td>Fire Central Government</td>
<td>£0.1m</td>
</tr>
<tr>
<td>J/C5</td>
<td>Efficiency Savings in SPS</td>
<td>£10.0m</td>
</tr>
<tr>
<td>A/C1 to A/c5</td>
<td>Scottish Executive Administration Budget</td>
<td>£8.4m</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>£319.1m</strong></td>
</tr>
</tbody>
</table>

Professor Arthur Midwinter
Budget Adviser
Finance Committee
20th Meeting 2005 – Tuesday 20 September 2005

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

Background

1. Correspondence has been received from the Convener of the Subordinate Legislation Committee seeking the Committee’s input to Phase 2 of its inquiry into the regulatory framework in Scotland. A copy of this letter is attached, together with the consultation framework.

2. Given that the Committee has in the past made some comments on the procedures for scrutinising the financial impact of subordinate legislation, I am proposing that the Committee respond to this consultation.

Recommendation

3. Members are invited to agree to respond to the Subordinate Legislation Committee’s consultation on the regulatory framework in Scotland and to consider their response in private at the meeting on 27 September 2005.

Des McNulty
Convener
Dear Committee Convener

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

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

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

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

Background

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

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

The Consultation paper sets out a number of specific issues on which your comments would be very much appreciated. However, please feel free to comment on any or all of these, or on any other issue relating to the scrutiny of subordinate legislation in Scotland. A background paper on the current system of scrutinising subordinate legislation and the Parliamentary process is also attached for background information.

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

   subordinate.legislation@scottish.parliament.uk

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

Yours sincerely

Sylvia Jackson MSP
Convener
Consultation Paper

1. Nature of supervision by the Parliament

Procedure

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

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

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

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

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

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

Comments are invited on—

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

- The role of the subordinate legislation Committee and the subject Committees in examining subordinate legislation.
• Whether the procedure chosen should rely on the parent Act or whether the Parliament should consider a procedure which allows the significance of the instrument to dictate the procedure adopted.

Amendment

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

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

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

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

Comments are invited on—

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

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

2. Consultation

2.1 There is currently no general provision for the Parliament to be consulted on a draft of an instrument before it is made or laid before Parliament for approval. In particular cases, there may be provision made in the parent Act for consultation and the SLC has examined this matter in a number of its bill considerations. However, even in cases where there is a consultation requirement for the subordinate legislation, it is not usually provided that the Parliament should be consulted.

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

Comments are invited on—

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

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

3. Definition of SSIs

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

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

Comments are invited on—

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

4. Existing Parliamentary procedures

4.1 The table below sets out the main types of procedure that SSIs are subject to in the Scottish Parliament. There are three types of affirmative instrument and two types of negative instrument procedures. Super-affirmative procedure is an enhanced affirmative procedure which allows comments on a draft affirmative instrument to be made by the Parliament and responded to by the Executive.

4.2 The other procedures (class 6 and 7) concern instruments which are not subject to Parliamentary procedure but which the SLC considers.
Various classes of SSI and types of parliamentary control

<table>
<thead>
<tr>
<th>Class</th>
<th>Procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Affirmative procedures</strong></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>Instrument is laid before the Parliament in draft and cannot be made until the draft is approved by resolution of the Parliament</td>
</tr>
<tr>
<td>2</td>
<td>Instrument is laid before the Parliament after making but cannot come into force unless and until it is approved by resolution of the Parliament</td>
</tr>
<tr>
<td>3</td>
<td>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</td>
</tr>
<tr>
<td><strong>Negative procedures</strong></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>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</td>
</tr>
<tr>
<td>5</td>
<td>Instrument is laid before the Parliament after making, subject to being annulled in pursuance of a resolution of the Parliament passed within 40 days after laying</td>
</tr>
<tr>
<td><strong>Other procedures</strong></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Instrument is laid before the Parliament after making but there is no provision for further parliamentary procedures</td>
</tr>
<tr>
<td>7</td>
<td>Instrument is not required to be laid before the Parliament</td>
</tr>
<tr>
<td><strong>Super affirmative procedure</strong></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>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.</td>
</tr>
</tbody>
</table>

Timing of negative and affirmative consideration

4.3 The transitional SI Order reference provides that the Parliament may annul a negative instrument within 40 days after it is laid. Currently, there is no statutory provision which lays down the time within which a draft affirmative instrument has to be approved but the Parliament’s Standing Orders limit the timescale to 40 days in line with that given to negative procedure.

4.4 Within the total of 40 days allowed to consider these types of instruments, the SLC is given 20 days to consider them and make their report to the Parliament and the subject Committee. The remaining 20 days are given to the subject Committees and, in the case of draft affirmatives, the full Chamber of the Parliament, to consider the instruments.
4.5 This strict timetable allows little time for the SLC to consider and report on the instruments, particularly at peak times. Subject Committees can also find themselves in difficulty when scheduling the consideration of instruments into their work programmes, particularly where an issue is contentious and the Committee wishes to take evidence.

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

Comments are invited on—

• The existing procedures for scrutinising SSIs.

• Increasing the time allowed for the Parliament to consider SSIs.

• Extending the 21 days given for a negative instrument to come into force to something that would allow the Parliament to consider all negative instruments before they came into force.

Instruments not subject to procedure

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

Comments are invited on—

• The use of these procedures.

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

5. Numbering, classification and publication of SSIs

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

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

6. Consequences of not laying

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

Comments are therefore invited on—

- Whether an instrument should be required to be laid as soon as practicably possible.
- Whether failure to lay an instrument, when this is required to be laid, should make the instrument invalid.
Introduction

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

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

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

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

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

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

---

Points for Discussion

Nature of supervision by the Parliament

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

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

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

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

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

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

10. Whether a SSI or a draft is subject to affirmative or negative procedure depends upon what is stated in the parent Act. It does not necessarily depend upon the inherent importance of the subject matter of the instrument or the draft, although

\(^{2}\) Rule 10.8
\(^{3}\) SI Order Article 10(2)
\(^{4}\) Rules 10.4 and 10.5
\(^{5}\) SI Order Article 11
account should have been taken of that when the Bill which became the parent Act was being considered. This has led the Procedures Committee of the House of Commons to consider whether the distinction between affirmative and negative procedures should be abolished in favour of some “mechanism for determining which [instruments] required positive approval based on their inherent significance rather than their statutory basis”\textsuperscript{6}. However, that Committee did not recommend any such change at present.

**Amendment**

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

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

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

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

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

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

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

\textsuperscript{8} House of Commons Procedures Committee 4\textsuperscript{th} Report of 1995-96 on Delegated Legislation (HC 152), paragraphs 51-53. Their proposals were endorsed by the House Commons Select Committee on Procedures First Report 1999-2000 (HC 48 2000)
16. There would, in any event, be less need for the Parliament to amend or to propose amendments to instruments if the Parliament was given the opportunity to comment upon a draft of the instrument before it is made – see Consultation below.

Consultation

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

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

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

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

Scottish statutory instruments (SSIs)

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

22. Those existing procedures only apply to certain types of delegated legislation which are SSIs. These are mainly instruments which are expressed in the parent Act (that is, the Act authorising the delegated legislation to be made) to be exercisable by a statutory instrument and which are exercisable by the Scottish Ministers or by certain other Scottish bodies. In practice, rules, regulations and orders are usually expressed in an Act to be exercisable by a statutory instrument. This may be because they are regarded as instruments of a legislative character but there is no express requirement that all instruments of a legislative character have to be exercisable by statutory instrument.
23. If there was to be such a requirement, it may be necessary also to consider whether there should be a definition of what is meant by “legislative character” and, if so whether that should be along the lines of that used in section 5 of the Australian Legislative Instruments Act 2003;  

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

**Forms of parliamentary control**  

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

---  

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

10 This provides that an instrument is of a legislative character if “it determines the law or alters the content of the law, rather than applying the law in a particular case: and it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right”
### Various classes of SSI and types of parliamentary control

<table>
<thead>
<tr>
<th>Class</th>
<th>Procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Affirmative procedures</strong></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>Instrument is laid before the Parliament in draft and cannot be made until the draft is approved by resolution of the Parliament</td>
</tr>
<tr>
<td>2</td>
<td>Instrument is laid before the Parliament after making but cannot come into force unless and until it is approved by resolution of the Parliament</td>
</tr>
<tr>
<td>3</td>
<td>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</td>
</tr>
<tr>
<td><strong>Negative procedures</strong></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>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</td>
</tr>
<tr>
<td>5</td>
<td>Instrument is laid before the Parliament after making, subject to being annulled in pursuance of a resolution of the Parliament passed within 40 days after laying</td>
</tr>
<tr>
<td><strong>Other procedures</strong></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Instrument is laid before the Parliament after making but there is no provision for further parliamentary procedures</td>
</tr>
<tr>
<td>7</td>
<td>Instrument is not required to be laid before the Parliament</td>
</tr>
<tr>
<td><strong>Super affirmative procedure</strong></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>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.</td>
</tr>
</tbody>
</table>

**Class 1 procedure: instrument laid in draft for affirmative resolution**

26. There is no statutory provision in the SI Order which lays down any time within which the draft has to be approved. However, the Standing Orders adopt similar timescales as for Class 5 instruments (instruments subject to annulment) by requiring the SLC to report upon the draft within 20 days, and the lead committee to report to the Parliament on whether the instrument should be approved within 40 days, after the draft is laid.

---

11 Rule 10.6
27. It is thought that these timescales can cause real practical difficulties. This might be solved by amending the Standing Orders to increase the periods within which—

- the SLC should report upon the draft from 20 to 30 days,
- the lead committee should report to the Parliament on whether the instrument should be approved from 40 to 60 days after the draft has been laid before the Parliament.

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

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

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

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

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

31. Some Acts avoid these problems by making provision for emergency orders to be subject to class 5 procedure (instrument laid after making but subject to annulment), such as emergency control orders relating to food under section 13 of the Food Safety Act 1990.

32. It is, therefore, a matter for consideration whether there is any need for these instruments to require an affirmative resolution within the specified period and whether negative procedure under Class 5 would be sufficient. This would, however, diminish Parliamentary control. If they were to become Class 5 instruments, it would

---

12 c. 48. For example, the Food Protection (Emergency Prohibitions)(Amnesic Shellfish Poisoning)(West Coast)(No 4)(Scotland) Order 2003 (SSI 2003/374)
13 SO Rule 10.6.4
14 SO Rule 10.3.2
15 c. 16. For example, The Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2005 (SSI 2005/67)
also require to be recognised that such instruments would have to breach the 21 day rule and may require to come into force immediately after making and before even being laid.

Class 4 procedure: instrument laid in draft subject to annulment

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

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

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

(a) 21 day rule

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

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

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

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

(a) Period of annulment

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

40. Experience has shown that the time allowed by the Standing Orders for the SLC to consider and report upon the draft or the SSI is too short. This is particularly

\(^{16}\) This follows the recommendation in the Second Report from the Joint Committee on Delegated Legislation 1972-73 (H.L. 204, H.C. 468).

\(^{17}\) Articles 10(2) and 11(2)

\(^{18}\) Article 10(2)

\(^{19}\) Rule 10.4
so because the SLC does not report adversely upon an instrument without giving the Executive an opportunity of commenting upon the criticism. There is usually only time to have two meetings of the Committee held in consecutive weeks. The typical timetable runs something as follows

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

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

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

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

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

Consequences of annulment

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

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

46. What happens if the Parliament passes such a resolution? The consequences are spelt out in the SI Order21, namely-

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

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

---


21 SI Order Article 11.
order made by the Privy Council, in which case it requires to be revoked by an Order in Council; but

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

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

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

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

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

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

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

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

52. Such an instrument is, however, subject to the scrutiny of the SLC and there seems to be no reason why the SLC should not report it to the Parliament for it to take whatever action it thinks fit.
Class 7 procedure: instrument not required to be laid

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

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

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

Class 8 procedure; super-affirmative procedure

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

The numbering, classification and publication of SSIs

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

- the maker of the instrument to send every SSI, immediately after it is made, to the Queen’s Printer for Scotland (QPS)\(^{22}\) for numbering. An SSI is numbered consecutively in the series of the calendar year in which it is made.\(^{23}\).

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

- every general SSI, as soon as possible after the QPS has numbered it, to be printed and sold by or under the authority of the QPS\(^{25}\).

Consequences of not laying

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

- to lay the instrument or draft if this is all that is required;

\(^{22}\) The QPS is also the Controller of HMSO. In practice it is HMSO who carries out these functions on behalf of the QPS.

\(^{23}\) SI Order Article 5

\(^{24}\) SI Order Article 6

\(^{25}\) SI Order article 7
• to lay the instrument or draft which is subject to negative procedure.

60. It could be provided

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

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

61. It is thought that it would only be in very exceptional cases that an instrument would have come into force before it was required to be laid. However, even the 21 day rule recognises that, in very exceptional cases, an instrument may have to come into force as soon as it is made. If it does and there is subsequently a failure to lay, this would mean that anything done under the instrument is also invalid. This may necessitate an ASP being passed to validate what has taken place. In such a case, it may be thought appropriate to provide that the instrument simply ceases to have effect as from the date when it should have been laid but that it should be deemed to be valid before that date.

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

\textsuperscript{26} SI Order article 14 and Rule 10.1.1 of the Standing Orders
Finance Committee

20th Meeting 2005 – 20 September 2005

Interests of Members of the Scottish Parliament Bill

Background
The Interests of Members of the Scottish Parliament Bill is a Committee Bill, introduced by the Standards and Public Appointments Committee on 12 September 2005.

Rule 9.15.8 of Standing Orders outlines the procedures to be followed at Stage 1 for a Committee Bill. Such Bills are not referred to a lead committee to produce a report on the Bill’s general principles as such a report is not required. However, the rule states that a Committee Bill must be formally referred to the Finance Committee at Stage 1 and the Finance Committee must report to Parliament on the Bill’s Financial Memorandum.

The Bill
Rules on the registration and declaration of members interests are set out in the Scotland Act 1998 (Transitory and Transitional Provisions) (Members’ Interests) Order 1999. This Order established the existing register of members’ interests and made provision for such a register, for declaration of interests, for prohibiting paid advocacy and for penalties for breach of any requirements. It also provided that the Order should cease to have effect when an Act of the Scottish Parliament was brought in to replace it.

This Bill will replace the Order mentioned above. It arises from investigations and reports by the current Standard and Public Appointments Committee and by the Committee’s predecessor in the first session of Parliament.

Costs
The Financial Memorandum (FM) sets out total costs to the Scottish Parliament of £3310. These costs are broken down as follows:

- Cost to update the current code and to print and distribute the new code - £1500.
- Minor administrative costs such as changes to stationery and letters to members advising of the changes - £500
- Compilation of the new register - £660
- Staff time in terms of advice to members - £650.

The FM states the costs associated with creating the new register are not additional costs but will be the costs of staff administering the transfer to the new register. These tasks will be carried out by existing staff as part of their duties but such costs have been included for completeness.
In addition there will be a small cost to individual members in relation to the time they will require to spend registering their declarable interests. However this time and cost is not quantified as the costs will be different depending on the member involved and the interests they hold.

**Committee Scrutiny**
Under normal circumstances, it is likely that the Committee would adopt Level One scrutiny for a Bill which has such minor financial implications. Level One scrutiny means that the Committee would take no oral evidence and would not produce a report. It would however, send out its standard questionnaire to organisations upon whom costs would fall and pass any completed questionnaires to the lead Committee.

Given the requirement for the Finance Committee to produce a report for this Committee Bill, it will not be possible to carry out Level One scrutiny in this way. Therefore, it is suggested that the Committee write to the SPCB and produce a short report based on the answers it receives.

It is likely that a Stage 1 debate may take place shortly after the October recess. Given that the Committee is not able to have a scheduled meeting between 27 September and 25 October, it is proposed that the Committee agree the draft report by correspondence.

Members are invited to consider the above proposals for scrutiny of this Bill.

**Des McNulty**  
Convener