The Committee will meet at 9.45 am in Committee Room 1.

1. **Item in private**: The Committee will consider whether to take item 4 in private.

2. **Scottish Commissioner for Human Rights Bill**: The Committee will consider the Bill at Stage 2 (Day 1).


4. **Criminal Proceedings etc. (Reform) (Scotland) Bill**: The Committee will consider its approach to Stage 2 of the Bill.

Callum Thomson
Clerk to the Committee
Papers for the meeting—

Agenda item 2


Members should also bring with them copies of the marshalled list and the groupings of amendments, both available from the Document Supply Centre on the morning of Tuesday 19 September 2006. Copies of these documents will also be emailed to members as soon as they are available.

Agenda item 3

Note by the Clerk on the Subordinate Legislation Committee inquiry into the Regulatory Framework in Scotland J1/S2/06/31/1

Agenda item 4

Note by the Clerk (PRIVATE PAPER) J1/S2/06/31/2

Forthcoming meetings—

Tuesday 26 September, Committee Room 3;
Wednesday 27 September, Committee Room 2;
Tuesday 3 October, Committee Room 5;
Wednesday 4 October, Committee Room 1;
Tuesday 24 October, Committee Room 1;
Tuesday 31 October, Committee Room 1; and
Wednesday 1 November, Committee Room 5.
Justice 1 Committee

SLC Inquiry on the Regulatory Framework in Scotland

Note by the Assistant Clerk

Background

1. The Convener of the Subordinate Legislation Committee wrote to all committees inviting responses to its draft report, *The Regulatory Framework in Scotland*^1^ (21st Report, 2006). The SLC has invited committee responses to a number of specific questions and to comment on the draft report and the recommendations that it makes. The deadline for committee comments is 22 September. A copy of the letter is attached at the Annexe.

2. The draft report outlines a number of perceived problems with the current procedures for scrutiny of statutory instruments, and proposes a comprehensive new system – described as the Scottish Statutory Instrument Procedure (SSIP).

Committee consideration

3. At its last meeting on 13 September, the Committee considered a paper by the Clerk on the SLC’s recommendations.

4. Members made some comments and agreed to seek clarification in relation to a number of the questions posed by the SLC.

5. The SLC’s consultation questions are detailed below, following each of which there is a note referring to Members’ comments from the last meeting, or where further clarification was sought, an explanatory note on the SLC’s proposals. The explanatory note is essentially derived from the SLC’s draft report, which was previously circulated to Members.

SLC consultation questions

6. The SLC seeks committees’ views on the following specific questions:

**Q1. Should all the existing procedures be replaced by the proposed SSIP under which all Scottish Statutory Instruments, with certain exceptions, would be laid in draft before the Parliament?**

Members were broadly supportive of this proposal, however, further clarification was sought in relation to the application of an exceptional procedure for emergency instruments (see question 8).

**Q2. Should there be parallel consideration of instruments by both the Subordinate Legislation Committee and the lead Committee?**

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^1^ The SLC Draft Report is available via the Parliament’s website, at: [http://www.scottish.parliament.uk/business/committees/subleg/reports-06/sur06-21-00.htm](http://www.scottish.parliament.uk/business/committees/subleg/reports-06/sur06-21-00.htm)
Members were broadly supportive of this proposal, on the basis that the new procedure would allow both the SLC and lead committees more time in which to consider subordinate legislation.

Q3(a). Should the instruments laid in draft under the general procedure of SSIP be subject to being disapproved by the Parliament within 40 days?

Members considered that the status quo should be retained and that subordinate legislation should continue to be subject to disapproval by the Parliament within 40 days.

However, Members requested further details on why the SLC considered alternative time periods, which his included in relation to questions 3(b) and 4 below.

Q3(b). Should the period be reduced to 30 days?

In terms of current timescales, under the Transitional Order, the Parliament may annul a negative instrument within 40 days after it is laid. The Parliament’s Standing Orders require the lead Committee to report to the Parliament setting out its recommendations within 40 days after being laid. Accordingly, the timescale of 40 days applies to both affirmative and negative procedures. In calculating the period of 40 days, no account is taken of days when Parliament is dissolved or is in recess for more than 4 days. The 40 day period refers, therefore, to calendar days.

The SLC considered whether the period of 40 days during which a draft may be disapproved under the general procedure should be reduced to 30 days. This was intended to anticipate any concerns that, if the Executive had to allow 40 days after laying an instrument before it could be made and brought into force, this might seriously hamper their workload. It was thought that the period of 30 days might be more realistic.

However, the SLC recognise that any reduction in the period of scrutiny might present lead Committees with timetabling difficulties because, if they only meet fortnightly, this would mean that they might only have 2 meetings to consider an instrument which, on occasion, might prove inadequate. It might, for example, be difficult for them to arrange for evidence to be taken in this short period.

Accordingly, the SLC considers that the period during which the draft may be disapproved or the instrument be annulled should remain at 40 days after the draft or the instrument has been laid. The period of 40 days should be calculated as at present.

Members are invited to consider the SLC’s position.
Q4. Should the Parliament be able to take a motion to disapprove a draft instrument or to annul an instrument for 10 days beyond the 40 day period?

Currently, if a lead committee wishes to move a motion to recommend annulment of a negative instrument, it must do so within the period of 40 days from the date when it was laid before the Parliament. If the committee makes such a recommendation, a motion must also be considered by the Parliament within the 40 day period. This means that the committee must make such a recommendation at least a week before the end of the 40 day period, which committees, on occasion, have found difficult under the present system.

Therefore, the SLC proposes that a motion to annul an instrument should be able to be taken by the Parliament outwith the 40 day period so long as the Committee recommends annulment within the period. The Executive supports the SLC’s suggestion.

The SLC proposes that, in order to avoid prolonging the uncertainty as to what is to happen to an instrument in this situation, a motion to annul an instrument should be considered by the Parliament within 10 days after the expiry of the 40 day period. The 10 days should be calculated in the same way as the 40 day period. This extension should also apply to any motion to disapprove a draft instrument.

The Committee considers that there may be less need for this extension under the SSIP when both the SLC and the lead Committee would have the full period of 40 days to consider a draft or an instrument. Nevertheless, it considers that the possibility of such an extension would be useful.

Members are invited to consider the SLC’s position.

Q5. Should the Executive be required to provide the Parliament every 3 months with a forward programme of instruments which it plans to make during that period?

Members supported this proposal as it would assist lead committees in the programming of their business.

Q6. Should the SLC be able to recommend to the Parliament that an instrument is annulled or that a draft instrument is disapproved but only on the ground that there are serious doubts about the legal validity of the instrument?

Members considered that this would be a useful addition to the SLC’s ability to scrutinise subordinate legislation.

Q7. Should a draft instrument laid before the Parliament be able to be amended by the Executive, with the agreement of the SLC, to take account
of technical changes without affecting the original timetable for consideration?

Members sought further clarification on the SLC’s proposal on this matter.

Currently, where an instrument is laid before the Parliament in draft, it is possible for the SLC or the lead Committee to suggest possible changes to the Executive. This is frequently done in the case of draft affirmative instruments. However, if the Executive agrees with the change, it would require to withdraw the instrument and lay the draft again subject to new time limits (in other words the clock would start again). The Committee was of the view that this may act as a disincentive to the Executive to agree such changes. There is no procedure at present which would allow an amended draft simply to take the place of the original.

The SLC notes however, that there was general support in evidence for the SLC to have the power to recommend “technical changes” to the Executive where the instrument is a draft. However, as noted above, the difficulty is that, if the Executive accepts the point, it has to withdraw and re-lay the draft subject to new time limits. The SLC is, therefore, of the view that the process should allow for the Executive to re-lay the draft without “stopping the clock” so that the amended version should simply replace the existing version and the clock would restart.

Members are invited to consider the SLC’s position.

Q8(a). Should emergency instruments be subject to the exceptional procedure?

The SLC’s proposes that the various existing forms of Parliamentary scrutiny (affirmative, negative, etc.) will be replaced by the unified SSI procedure. Within the SSIP, there will be a “general” procedure for most instruments, plus an “exceptional” procedure for emergency instruments.

Under current procedure, an emergency order (e.g. food protection orders) is usually made and brought into force before it is laid. This breaches the rules which require a SSI to be laid before it is due to come into force and, in the case of negative instruments, at least 21 days before the instrument come into force. If it is necessary to breach those rules, then Scottish Ministers require to write to the Presiding Officer explaining why this is necessary. The SLC then considers the reasons for breaching those rules. These rules are breached routinely.

The SLC proposes that emergency instruments should be able to be laid after being made, and then should be subject to annulment by the Parliament within 40 days. Only emergency instruments would be capable of being brought into force before being laid.
The SLC notes in its draft report that, from the evidence received, there was a general consensus that there should be an emergency procedure introduced to avoid the continuous breaches of the 21 day rule.

Members are invited to consider the SLC’s position.

8(b). Should emergency instruments be defined as proposed?

The SLC proposes that an emergency instrument should be defined as an instrument which—

(i) in the case of future Acts, is identified in the parent Act which authorises the making of that instrument as being an emergency instrument;

(ii) in the case of past Acts, is subject in the parent Act which authorises the making of that instrument to the Class 3 (draft affirmative) procedure; and

(iii) in the case of past Acts, is subject in the parent Act which authorises the making of that instrument to the Class 5 (negative) procedure and that Act has been amended to identify that instrument as an emergency instrument.

The Committee envisages that the SSI Bill might identify some of those cases and make the appropriate amendments, as in the case of section 13 of the Food Safety Act 1990. However, in case there are any omissions, the Committee considers that the Scottish Ministers should be given a power, by order made by SSI, to make the appropriate amendments in other cases. Such an order would be subject to the general procedure in the SSIP.

Members are invited to consider the SLC’s position.

Q9. Should the exceptional procedure be confined to emergency and other instruments of an urgent nature?

The SLC considers that, in addition to emergency instruments, urgent instruments may also be subject to the exceptional procedure. The SLC defines urgent instruments as instruments which the Executive considers are of such urgency as to require to be made before they are laid or before the expiry of the 40 day period.

An example of an urgent instrument may be where an instrument requires to be brought into force in Scotland on the same date as other similar instruments are being brought into force elsewhere in the UK. In view of the need to co-ordinate the drafting of the instrument with other administrations within the UK, the SLC acknowledges that it may not be possible for the Executive to arrange for this to take place in time to lay a draft under the general procedure.

Therefore, the SLC proposes that such urgent instruments should be subject to the exceptional procedure and considers that the Standing Orders should provide that—
(i) where the Executive adopts the exceptional procedure for instruments other than emergency instruments, it should be required to explain to the Parliament why it has done so;

(ii) the SLC should be charged with examining the reasons given by the Executive; and

(iii) the SLC should be empowered to report to the Parliament any case where it considers that it was unnecessary to adopt that procedure.

Members are invited to consider the SLC’s position.

7. The Committee agreed that questions 10-15 were of a technical nature and, therefore, were not matters on which it wished to comment.

Next steps for SLC inquiry

8. Following receipt of consultation responses, the SLC plans to take oral evidence during October and November 2006. Looking further forward, the SLC expects to introduce a Committee Bill to give effect to its proposals some time in Session 3.

Recommendation

9. Members are invited to consider those questions above in relation to which further clarification has been provided.

10. On the basis of Members’ comments, a response will be made to the Subordinate Legislation Committee.
Dear Convener,

As you will know, the Subordinate Legislation Committee has been undertaking an inquiry into the Regulatory Framework in Scotland.

The Committee has now completed its consideration of all of the evidence it received during Phase 2 of the inquiry, including that from Committees, and has come to conclusions which it has included in a draft report.

On the basis of the evidence the Committee received, and its own experience of scrutinising subordinate legislation over the last 7 years, the Committee has concluded that there should be a simplified system which is fit for purpose and where scrutiny is open and transparent and within realistic timescales.

It has always been the Parliament’s intention to replace the current transitional procedures. The Committee therefore recommends in its draft report that the current system of scrutiny should be replaced with a new system which it has called the Scottish Statutory Instrument Procedure (SSIP). This is the procedure which forms the main recommendation in the Committee’s draft Report.

Given the innovative nature of the SSIP and the wide-ranging implications for the Parliament, the Executive and those on whom subordinate legislation has an impact, the Committee has decided to publish the draft report in order to consult upon its recommendations before finally making up its mind on what to propose to Parliament.

The purpose of this letter is to invite your Committee’s comments on the draft report and the recommendations that it makes.

The Committee would prefer to receive comments electronically. These should be sent to: subordinate.legislation@scottish.parliament.uk.

The general closing date for responses is Friday 8 September 2006. However, the Committee would welcome Committee’s responses by Friday 22 September 2006.

Sylvia Jackson MSP
Convener
23 May 2006