Thank you for your letter dated 31 August, inviting the Committee to submit its views on the parliamentary scrutiny of subordinate legislation and its own role in the process. The Committee very much welcomes this opportunity to comment, and the opportunity for me, as Convener, to give oral evidence to your inquiry in November.

The Committee has a relatively heavy subordinate legislation responsibility, and has so far considered 141 instruments under the negative procedure and 20 under the affirmative procedure this Session. The Committee has highlighted a number of issues of principle during the course of its scrutiny. The Committee was also able to consider your consultation paper in some detail at its meeting on 21 September, which provided a useful opportunity to draw together members’ experiences. The Committee’s comments are below, referring where possible to the specific headings and questions in your consultation paper.

1. Nature of supervision by the Parliament

You asked for views on the current negative and affirmative procedures and whether they should continue to exist for the parliamentary consideration of subordinate legislation. The Committee acknowledges that it is correct that the parliamentary procedure applying to an instrument should be determined in the context of scrutinising the parent act.

The Committee offers no direct comment on whether the current negative and affirmative procedures should continue. However, the Committee notes that the procedure applicable to a particular instrument can, at times, bear no relation to the degree of controversy associated with it. The Committee has dealt with affirmative instruments on which there has been little policy comment or disagreement and the additional level of parliamentary scrutiny allowed for the instrument has appeared unwarranted. Equally, at times the Committee has had very little time to deal with instruments under the negative procedure which have involved quite controversial issues. Lodging a motion to annul a negative instrument is a tool to raise the debate in these cases, but is regarded as a rather drastic option. A more flexible tool may be desirable.

In particular, the Committee notes that a very significant number of the instruments the Committee considers are implementing EU obligations. The European Communities Act 1972 allows transposition of EU obligations to be done by an instrument subject to negative procedure (although the procedure prescribed by another appropriate parent act may be used where possible). This results in some very substantial policy measures (eg. such as the rules governing the Less Favoured Area Support Scheme – which amounts to £60m expenditure per annum) being subject to the lower level of scrutiny that a negative procedure entails.

You also asked about the role of the Subordinate Legislation Committee (SLC) and the subject committees in examining subordinate legislation. On occasion the Committee has found it difficult to interpret reports from the SLC. While the Committee recognises and acknowledges that Standing Orders give the SLC a specific technical role in the scrutiny process separate from that of subject committees, the Committee has
suggested in the past that it would be helpful if the SLC could provide a clearer indication of how serious its concerns on the drafting of a particular instrument were. If technical concerns about an instrument are such that there is very serious doubt about whether it can be properly implemented, there may be a place for a mechanism for the SLC to consider a motion to reject the instrument. Where the concerns are of a policy nature, the issue should clearly be for the subject committee to consider.

A related point is confusion over what the practical effect would be of annulling an instrument which implemented an EU obligation (as is very common in this Committee’s remit). On occasion, the Committee has had very serious reservations about such an instrument, but has been unclear as to the legal implications of recommending that it be annulled. The SLC might perhaps consider providing clearer advice to subject committees in those circumstances.

2. Amendment

You asked whether the Scottish Parliament should be given powers to amend instruments or drafts, or to recommend such amendments, and whether the Parliament should be given the power to recommend certain changes being made to an instrument, before the instrument gains parliamentary approval.

On balance, the Committee considers that, having delegated the power to the Scottish Ministers to make detailed subordinate legislation, attempting to take back that power to the Parliament in some form would be a huge and unmanageable responsibility. The Committee does not, therefore, believe that the Parliament should have a generalised right to amend subordinate legislation.

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

The Committee does not believe that an instrument needs to undergo parliamentary scrutiny if its purpose is simply to resolve a matter such as a typo or an erroneous cross-reference. It would seem appropriate to develop a way of taking on board such minor amendments, whether that were to happen through the instruments not being laid until the SLC has had a chance to look at them or through some other mechanism whereby the amendments could be approved the first time round, instead of requiring a further scrutiny of a second instrument. Where the SLC raises an issue and the subject committee agrees, and concerns are formally recorded so that interested parties know exactly what changes are being suggested, the Committee considers that the option to recommend formally that an instrument is amended by the Executive – without further parliamentary scrutiny - would appear to be sensible.
3. Consultation

You asked whether a general requirement to consult the Parliament on draft instruments should be imposed. The Committee has stated in the past that it may be helpful at times to see instruments when they are in draft, but without the burden of that ‘double handling’ of every instrument. The Committee believes that requiring the Executive to give a certain amount of formal advance warning to the Parliament of the likely content and timing of instruments before they are formally laid may allow the Committee to select instruments it feels require more detailed examination. Any such system should be accompanied by a formal method within the Parliament for referring these notifications to the relevant subject committee.

Aside from the general case for such a system, there is a particular case when late transposition from European Union law is involved and the Executive is running slightly behind schedule. By the time the statutory instruments come to subject committees some of them are already in force. As mentioned above, that puts subject committees in an extremely difficult position where rejecting an instrument could put the Executive in breach of EU requirements.

The issue, however, is not simply about timing. Some improvement in the quality of the information provided by the Executive with instruments would also help subject committees to plan their scrutiny effectively. The Committee has made a number of comments in the past about the quality and consistency of information accompanying statutory instruments (particularly the Executive Note). For example, the Note sometimes does not provide a sufficient level of explanation of the practical implications of a measure, and the quality of this information is very variable. Similarly, the Note usually refers to any consultation which has taken place but rarely gives any information on what the response was to the consultation (in terms of numbers and content of responses). Improvements in this information would allow for an earlier and more informed judgement of the degree of debate required when the instrument reaches the subject committee.

4. Definition of SSIs

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

The Committee does not consider that there is a need for all instruments to be SSIs. However, the Committee does believe that there is a need to develop a mechanism that allows subject committees to be aware of all instruments of a regulatory or legislative character, so it can decide to examine any it wishes. The Committee recognises that it already has the option to seek evidence on any such instrument, but considers that a formal notification method would be helpful.
5. Existing Parliamentary procedures

You asked about the timing of negative and affirmative consideration and whether the time allowed for the Parliament to consider SSIs should be increased. The Committee has noted that there can be a very concentrated volume of subordinate legislation coming forward at certain times, which makes effective scrutiny more difficult. This is particularly an issue prior to a recess period when the Executive may seek to bring forward all subordinate legislation which it wishes to come into force over the recess. For example, in June 2005 the Committee had five negative instruments to consider at the second last meeting and nine at the last one before the recess. The Committee considers that this volume (which came on top of an already very busy agenda those weeks) meant that it could not reasonably scrutinise the instruments properly and had absolutely no reasonable chance of discussing them in more depth or considering whether further evidence was needed.

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

Due to the problems caused by the volume of subordinate legislation and limited time for scrutiny, the Committee supports the idea of increasing the time allowed for scrutiny beyond the usual 40 days, on the basis that any such extension of the time limit should not cause undue delay. This would inevitably improve scrutiny, particularly if combined with other improved management measures such as increasing formal notification of forthcoming SSIs (see section 3 above).

You also asked whether the 21 days given for a negative instrument to come into force should be extended to something that would allow the Parliament to consider all negative instruments before they came into force. The operation of the 21-day rule can cause significant problems. As the first 20 days of the parliamentary process are usually taken up by the SLC’s scrutiny of an instrument, the 21-day rule means that the instrument is very often in force by the time the subject committee considers it. This is confusing for the public, but can also hamper scrutiny. In some cases (eg. where an instrument sets out a grant scheme or introduces an offence, or in the case of late transposition of EU legislation as noted above), very significant problems and confusion could be created if the Parliament exercised its right to annul an instrument after substantial action (such as application for, or payment of, grants or arrest on suspicion of an offence) had already been taken on the authority of the instrument. This leaves the Committee in an invidious position.

The 21-day rule also has the potential to hamper scrutiny and transparency particularly in the case of instruments laid in the run up to a recess. This is further exacerbated by the fact that the clock stops on the 40 days allowed for parliamentary scrutiny over recesses, while the 21-days between an instrument being laid and coming into force are a simple three-week calendar period.
Taking the example of June 2005 again, the Committee decided that it wanted to raise points with the Minister on three of the instruments considered at the last meeting in June. Members' concerns were such that the Committee delayed final decision on the instruments until the next meeting (i.e. September), by which time all the instruments had been in force for over two months. At its first meeting in September the Committee dealt with the three negative instruments held over from June and another five which had not been ready in time to go on the agenda for the last meeting in June, but which were all already in force by the time the Committee saw them in September. The instruments dealt with a number of significant policy issues and this situation therefore causes the Committee some concern.

The Committee considers that better advance warning of pending instruments might also address this issue. However, the Committee also believes that a practical solution to the specific difficulties caused by the 21-day rule is required, without causing undue delay.

I hope this information is helpful.

Yours sincerely

Sarah Boyack MSP
Convener