The Committee will meet at 10.30am in Committee Room 6.

1. Inquiry into the Regulatory Framework in Scotland: The Committee will take evidence from—

   Miss Jane McLeod, Chief Executive of the Scottish Law Commission; Jonathan Mitchell, Faculty of Advocates; and Lorna Drummond, Faculty of Advocates.

2. Draft instruments subject to approval: The Committee will consider the following—

   the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2005, (draft)


3. Instruments subject to approval: The Committee will consider the following—

   the Local Government Finance (Scotland) Order 2005, (SSI 2005/19).

4. Instruments subject to annulment: The Committee will consider the following—

   the Road Traffic (Permitted Parking Area and Special Parking Area) (South Lanarkshire Council) Designation Order 2005, (SSI 2005/11)

   the Road Traffic (Parking Adjudicators) (South Lanarkshire Council) Regulations 2005, (SSI 2005/13)

   the Non-Domestic Rate (Scotland) Order 2005, (SSI 2005/14)
the Community Reparation Orders (Requirements for Consultation and Prescribed Activities) (Scotland) Regulations 2005, (SSI 2005/18).

5. **Instruments not subject to Parliamentary procedure:** The Committee will consider the following—


6. **Instruments not laid before the Parliament:** The Committee will consider the following—

   the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004 (Commencement No.1) Order 2005, (SSI 2005/10)

   the Land Reform (Scotland) Act 2003 (Commencement No.3) Order 2005, (SSI 2005/17)


   Ruth Cooper
   Clerk to the Committee
   Tel: 0131 348 5212
The following papers are relevant to this meeting:

**Agenda Item 1**

- Note from the Clerk (Private) SL/S2/05/3/1
- Scottish Law Commission Consultation Response SL/S2/05/3/2
- Faculty of Advocates Consultation Response SL/S2/05/3/3

**Agenda Items 2 - 6**

- Legal Brief (Private) – to follow SL/S2/05/3/4

**Agenda Item**

Copies of instruments (circulated to Members only)
SUBMISSION FROM THE SCOTTISH LAW COMMISSION

INQUIRY INTO THE REGULATORY FRAMEWORK IN SCOTLAND

I refer to Ms Fergusson's letter of 17 June inviting views on the Subordinate Legislation Committee's consultation paper about the regulatory framework in Scotland. We wish to offer comments on Part 3 of the paper which deals with improving the quality of existing regulations.

As the paper points out, the Commission's statutory remit includes the preparation of programmes of consolidation and statute law revision and the preparation of draft Bills pursuant to these programmes. This aspect of our work is central to discharge of our overall duty to keep the law under review with a view to its systematic development and reform, including "... the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law".

Since the establishment of the Commission in 1965, we have prepared four programmes of consolidation and statute law revision and have been involved in the preparation of 25 consolidation Bills and 17 Statute Law (Repeals) Bills. Much of this work has been in relation to UK legislation and has been undertaken jointly with the Law Commission for England and Wales but nine of the consolidation Bills have dealt with Scotland-only legislation covering significant areas such as adoption, education, crofting and planning.

While this work may not be very high profile, either in political terms or in terms of public awareness, we believe it to be essential in improving the accessibility of the law, both for those who have to interpret and apply the legislation and for those who are affected by it. In this context, we would see consolidation as being more important than statute law revision which is concerned with the repeal of obsolete statutory provisions. Bringing all the relevant legislative texts on a particular topic together in a coherent fashion provides the opportunity for simplification and modernisation and establishes a sound basis for future reform.

We therefore welcome the Committee's interest in this area. While we appreciate the difficulties that the Executive has faced in devoting resources to consolidation, we are strongly in favour of developing a new programme, in consultation with it, so that we can undertake more consolidation of primary legislation in devolved areas.

However, we would not favour a single programme for the consolidation of all such legislation. Leaving aside the question of availability of drafting and other Executive resources, such an exercise would be a very large undertaking, the scale of which would be beyond our own resources to complete on any meaningful timescale. We would rather proceed with a series of smaller scale programmes identifying particular topics for consolidation so that some element of prioritisation can be incorporated into development of the next and subsequent programmes. This seems to us to be a better way of ensuring commitment of resources to particular consolidation exercises when they are most needed.

Part 3 of the consultation paper also touches on the level of Executive resources required for consolidation and asks whether most of this work could be out-sourced. While we do not feel able to give a view on this specific proposal, we would offer the following general comment.

In light of our own experience, we think that the paper underestimates the work that is involved in any consolidation. It is much more than a "scissors and paste" exercise. Advice from Executive officials with policy responsibility for the area in question is essential to understand fully the policy background and to resolve problems with the existing legislation before the draftsman can produce a consolidation that is workable and coherent. We are, however, fully aware of the considerable demands placed on the Executive in handling its own legislative programme, quite apart from any
additional demands that might arise from consolidation work. We would be very willing to explore with the Executive and other interested parties different ways in which consolidation could be tackled with a view to minimising its impact on Executive resources.

Yours sincerely

JANE McLEOD
SUBMISSION FROM THE FACULTY OF ADVOCATES

INQUIRY INTO THE REGULATORY FRAMEWORK IN SCOTLAND

The Faculty welcomes the opportunity to respond to this consultation paper, which raises a number of important issues. This paper does not address all of these; we have addressed only those issues raised in numbers 15 and 17, and in Part 3, of the discussion points. We limit ourselves to these because we consider that, having as we do a particular interest and expertise in the intelligibility and accessibility of law, we have important comments to make on these matters; the other points in Part 2 and in Part 4 seem to us to raise matters which are not so much for lawyers as for parliamentarians. We should say at this point that we regard question 32, the last on which we comment, as the most important, particularly as we are not confident that the issues here have as yet been fully grasped.

Easily understood

15. Whether there should be a general requirement that the text and structure of the regulation should be written in plain language and be simple to use and to understand.

17. Whether, if, exceptionally, it may not be possible to use simple language in the regulation, there should be a requirement that guidance, written in plain terms, should accompany the regulation.

There is no doubt that regulations should be comprehensible. Incomprehensibility of law is inconsistent with democratic government; neither access to the law nor efficiency in public administration can be guaranteed unless laws are written in a way that meets people’s needs and foremost among those needs is the need to understand. There is equally no doubt that many Scottish regulations are not readily comprehensible (although it is our impression that their intelligibility has on the whole improved a great deal in recent years).

On the use of plain language, we would like to draw to the Committee’s attention the initiatives of the Ministry of Justice in Sweden and the German Language Society’s editing service in the German Parliament\(^1\). In each case, all proposed legislation is revised by specialists in the use of comprehensible language. Neutral and independent readers, with no preconceptions or policy concerns, read proposed legislation from the point of view of members of the public and propose changes. This seems to have been very successful. In Sweden, for example, it has led to a style of drafting statutes as a series of questions with answers, rather than straightforward statements. At present, in Scotland, it is not until a proposed regulation is published to Parliament that readers, in the shape of MSPs, have a role. It should not be left to MSPs to carry out a specialist linguistic exercise.

\(^{1}\) These (and some other European initiatives) are both more fully described in Issue 47 of Clarity, a journal on movements to simplify legal language, copies of which are available free at http://www.adler.demon.co.uk/clarity/journals.default.htm and which we recommend to the Committee’s attention.
But there are many reasons why the language of regulations is often complex. One is that regulations may have to express ideas, and provide for situations, which are not simple. A ‘general requirement that… regulations should be… simple to understand’ can only be achieved if Parliament is willing to sacrifice the ability to deal properly with complex or technical matters. While there are occasions when the language of regulations is needlessly hard to understand, it does not follow that all regulations which are hard to understand are needlessly so. To be comprehensible is always a goal; to be ‘simple to understand’ may be unachievable in a complex regulation.

There are a number of techniques and solutions which would assist in achieving the fundamental aim of understanding. The use of plain language in regulations is only one of those, and -important though it is- it should not exclude others. We would suggest that it is not only ‘exceptionally’ that ‘it may not be possible to use simple language…’. It is very commonly the case that this is not possible. The Committee must consider the use of other techniques. Other techniques have not been addressed in the consultation paper or its background papers.

In particular, we must draw attention to the use, which is regrettably very common in Scotland, of ‘patchwork drafting’ or legislation by reference; regulations which list amendments to earlier provisions, adding or deleting words and phrases without ever stating the end text. This is a technique which, however simple the language used, makes a regulation impossible to understand without the use of scissors and paste, time and effort. It has been criticised on many occasions over the last century and more. In 1924 a Parliamentary draftsman wrote2 ‘Ministers and departments like legislation by reference for two reasons. First, the public cannot understand the Act, so the department has a pretty free hand. Secondly, the bill is very difficult to amend in committee, as our legislators cannot follow out its inferential details.’ Perhaps these beliefs are why its use continues to be so common. Whatever the reasons for patchwork drafting, we would suggest that Keeling schedules, which show the full text of the amended provision, should be far more frequently used when draft regulations are considered in Parliament. With bold or italic text to show where amendments are being made, these would make many regulations intelligible on their face which at present cannot be understood without a law library, scissors, and sellotape. Consider, for example, the Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2004 (SSI 2004/331); this is unintelligible without an amended edition of the original rules. It should have been issued with a Keeling schedule of the rules to be amended, showing the changes being made. In making this recommendation, we are repeating what has been said by others on numerous occasions in the past. The Guidelines for the Drafting of Community Legislation, promulgated on 22 December 1998 under the Treaty of Amsterdam, provide: ‘Amendments shall take the form of a text to be inserted in the Act to be amended. Preference shall be given to replacing whole provisions… rather than inserting or deleting individual sentences, phrases, or words.’ These guidelines should be followed.

The use of worked examples, diagrams, maps, and flow charts should also be expanded. None are at present commonly used in Scotland. All would frequently be

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2 Sir Mackenzie Chalmers in the ‘Edinburgh Review’.
useful. Consider, for example, the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Irish Sea) (Scotland) Order 2004 (SSI 2004/340); this is unintelligible without a map. The European Communities (Lawyer's Practice) (Scotland) Amendment Regulations 2004, (SSI 2004/302) are unintelligible as they stand, not only because of the absence of a Keeling schedule but because the amended regulations require a flow chart to show which lawyers from which jurisdictions are qualified to practise what kind of law in Scotland. In neither case is the language itself unnecessarily complicated. The problem in the first case is that text is being used to describe a map; in the second case it is that text is being used as a series of unrelated words rather than as a coherent structure. There are many other examples; many are far worse.

The question of guidance to accompany regulations does however require a note of caution. Guidance (or explanation) which over-simplifies, or has a subtly different meaning to, the regulations themselves is dangerous and may sometimes lead to more argument about the meaning of a regulation than there would have been if the regulation stood alone. If explanatory notes are to have any status in a court, they should be before Parliament, and capable of being voted on, when it makes the regulation in question; they should not be added afterwards. In that way the possibility of a gloss or “spin” being put on the regulations would be avoided. In writing guidance, we would again suggest that the use of worked examples, diagrams, maps, and flow charts be considered; at present they are practically unused.

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3 See http://www.scottish.parliament.uk/business/committees/subleg/or-04/su04-1502.htm at col. 428. The Committee presumably had before it a consolidated edition but this has not been published.

4 They are not at present capable of being voted on.
Part 3: Improving Regulatory Quality of Existing Regulations

Accessibility

25. Whether the Scottish Ministers should be invited to request the Scottish Law Commission to prepare a comprehensive programme for the consolidation of all primary legislation relating to devolved matters and, after consultation with the Parliament, to approve any such programme.

26. Whether the Scottish Executive should be invited to prepare, in consultation with the Parliament, a comprehensive programme for the consolidation of all secondary legislation relating to devolved matters.

27. Whether, if the Scottish Executive cannot devote the necessary resources for the work involved in the preparation of such consolidations, such work should be outsourced.

And

31. Whether, when a set of subordinate legislation has been amended more than, say, 5 times, it must be consolidated and whether there are any circumstances in which it ought to be consolidated before then.

In an ideal world with unlimited resources there would certainly be a comprehensive programme for the consolidation of all legislation, primary and secondary. In reality, however, the resources available are limited. Consolidation is not always an entirely straightforward exercise. If the Scottish Law Commission were to carry out such a vast programme as here suggested, and even a consolidation of primary legislation alone would indeed be vast, it would be disabled from its primary task of law reform measures.

We suggest that areas where consolidation is most urgent should be identified and given priority. What these areas are is a matter for discussion, considering both the extent to which legislation is on its face in need of consolidation and the importance of that legislation to the public. We entirely agree that there are areas of devolved law which are in desperate need of consolidation on both counts. One obvious example (but there are many others) is residential tenancy legislation. The Housing (Scotland) Acts were last consolidated in 1987; this consolidation failed to include the provisions of the Rent Acts; these were extensively amended the following year by an Act which was itself extensively amended before it even came into force; and the two parallel sets of legislation have been amended on many occasions since. It has long ceased to be possible for advisers to answer (even straightforward) questions arising under Scottish housing law without expensive private sector editions of the legislation.

Consolidation has been a low priority for many years; there is nothing glamorous about Bills which reproduce existing law. If there were to be a programme of consolidation we agree, as suggested in question 27, that drafting work could well be outsourced (as are non-executive bills already). Consolidation, unlike new

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5 The Housing (Scotland) Act 1988, which was thus never printed by HMSO in the form in which it came into force.
legislation, does not to any great extent involve policy issues; the arguments for keeping drafting in-house do not, on the whole, apply here. Outsourcing would preserve the limited resources of parliamentary counsel for tasks which implement executive policy. It would allow substantial improvement in the accessibility of legislation in priority areas.

28. Whether, when an Act of the Scottish Parliament makes a number of amendments to another Act or part of it, it should contain a "Keeling Schedule" which shows that other Act (or part of it) as so amended.

We have dealt with this question above, but we would also refer to question 32; Keeling schedules in print would, once legislation has been enacted, be far less important if there were a publicly-accessible online statute law database showing amendments.

29. Whether users encounter difficulties in accessing regulation (whether contained in primary or subordinate legislation) which has been amended.

Yes, of course they do. Sometimes private sector editions can, at a price, be used; sometimes these are unavailable. Not only is it frequently almost impossible for the ordinary citizen to discover how legislation has been amended, but lawyers too can find this time-consuming and liable to error. The costs of this time, and of errors, are in reality passed on to the public. We are aware of only two departments of government in Scotland which have made any attempt to publish amended legislation; the National Archives of Scotland\(^6\) and the Scottish Courts Service\(^7\). These are fine, but isolated, initiatives.

30. Whether there should be procedures available to enable users to complain about the difficulties in accessing regulation and, if so, what those procedures should be.

Rather than procedures to enable users to complain about difficulties which are obvious, as they are, the priority should be to deal with these difficulties by making it easy to access amended regulations; see question 32. Online editions should include a feedback form.

32. Whether there should be facilities available, such as on the HMSO website, to enable the public to access, free of charge, the consolidated legal texts or the texts as amended.

The answer to question 32 is unequivocally ‘Yes’.

We understand that the Committee may not have been fully informed of the Statute Law Database programme (the SLD), which is managed by the Department of Constitutional Affairs\(^8\). In our opinion it is essential to see this as the centrepiece of

\(^{6}\) Legislation relating to public records, at http://www.nas.gov.uk/reckep/RLS.asp.
\(^{7}\) The Rules of the Court of Session, at http://www.scotcourts.gov.uk/rules/rules.htm. These however do not show when or how amendments were made.
\(^{8}\) See http://www.dca.gov.uk/lawdatfr.htm.
any programme to make legislation in Scotland fully accessible to the public. After
many years of delay, the SLD is now expected to go online to the public in the spring
or summer of 2005\textsuperscript{9}. It will show fully amended (and thus up to date) primary
legislation, both UK and Scottish. The advantages of online electronic publishing
over traditional paper publishing are obvious. It is frequently necessary to see
legislation as it existed at an earlier date. The SLD will allow this; however, we are
not clear whether attempts will be made to extract payment from the public for
viewing the amending history; the guarded reference on the DCA website to ‘various
business and technical options for delivery of the service’ is a reference to the
possibility of charging. It is very strongly our view that any such attempts should be
resisted. It is wrong in principle that members of the public should be charged by the
state for the ‘privilege’ of discovering what its statutes are, when the marginal cost of
that discovery is, unlike paper publication, zero. If necessary, the Scottish Parliament
should insist that there be free access to its own legislation. The SLD is an initiative
which has the capability of rendering any parallel or rival online publishing of
legislation pointless or uneconomic; if it is not free, there will be no free access.

As at present proposed, the SLD will not however show the amended version (or
amending history) of secondary legislation, either UK or Scottish\textsuperscript{10}. It will show these,
as they are at present available on the HMSO website, as they were passed. There
is an almost equal need for this facility to be made available and we would suggest
that the Scottish Parliament should begin a rolling programme of online publication of
amended secondary legislation. This, we believe, would involve less work and
expense than might appear; it is necessary to have such publication for government
in-house use in any event, and modern electronic publication has of course no
marginal cost. The savings to the public, in the ability to access up to date legislation
with confidence in its accuracy, would be substantial. All Scottish secondary
legislation is at present written and published online in HTML; the cost of writing it for
the future in SGML, which would allow the amending history to be seen, would be
minimal or non-existent. While, ideally, all secondary legislation should be made
available as amended and showing its history, this ideal solution should not delay the
setting-up now of a programme of such publication as new secondary legislation is
enacted.

With the availability of online amended legislation, free to the public at point of use,
the importance of making amended legislation available on paper is in our opinion
very slight. Bitter experience has shown that paper editions of legislation tend to
have a far longer life than their contents deserve; they are hard to update; they are
expensive to print; they are not accessible except to those with access to a good law
library. We believe that the Scottish Parliament should concentrate its efforts on the
creation and maintenance of an up to date electronic edition of its legislation, rather
than dissipate efforts on the maintenance of paper editions. That is the way forward
which has been adopted by practically every other jurisdiction in the world, from
Tasmania\textsuperscript{11} to Kazakhstan\textsuperscript{12}, which has attempted to modernise its public delivery of

\textsuperscript{9} The contract for this was awarded in December 2002 and we understand the work of rewriting
the database in SGML is well in hand.

\textsuperscript{10} It will show the amendments made to primary legislation by secondary legislation.

\textsuperscript{11} http://www.thelaw.tas.gov.au/index.w3p . This site is a model of good practice.

\textsuperscript{12} http://pavlodar.com/zakon/ .
legislation. Scotland has traditionally suffered from the divergent standards of primary and secondary legislation; it is in the nature of much secondary legislation that it was, in an age of paper, relatively inaccessible. That need no longer be the case.