SUBORDINATE LEGISLATION COMMITTEE

AGENDA

25th Meeting, 2005 (Session 2)

Tuesday 20th September, 2005

The Committee will meet at 10.30am in Committee Room 2.

1. **Executive responses:** The Committee will consider responses from the Executive to points raised on the following—

   the Tuberculosis (Scotland) Order 2005, *(SSI 2005/434)*

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

   the Dissolution of Funding Councils (Scotland) Order 2005, *(SSI 2005/437)*

   the Registration of Fish Sellers and Buyers and Designation of Auction Sites (Scotland) Amendment Regulations 2005, *(SSI 2005/438)*

   the Housing (Scotland) Act 2001 (Transfer of Scottish Homes Property and Liabilities) Order 2005, *(SSI 2005/439)*

   the Mental Health (Period for Appeal) (Scotland) (No.2) Regulations 2005, *(SSI 2005/441)*

   the Mental Welfare Commission for Scotland (Procedure and Delegation of Functions) (No.2) Regulations 2005, *(SSI 2005/442)*

   the Mental Health (Certificates for Medical Treatment) (Scotland) Regulations 2005, *(SSI 2005/443)*

   the Mental Health (Form of Documents) (Scotland) Regulations 2005, *(SSI 2005/444)*

   the Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Subordinate Legislation) Order 2005, *(SSI 2005/445)*
the Mental Health (Class of Nurse) (Scotland) Regulations 2005, (SSI 2005/446)

the Civil Legal Aid (Scotland) Amendment (No.2) Regulations 2005, (SSI 2005/448)

the Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2005, (SSI 2005/449)

the Criminal Legal Aid (Scotland) Amendment Regulations 2005, (SSI 2005/450)

the Legal Aid in Contempt of Court Proceedings (Scotland) Amendment Regulations 2005, (SSI 2005/451)

the Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provision) Order 2005, (SSI 2005/452)


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

   the Mental Health (Class of Nurse) (Scotland) Revocation Order 2005, (SSI 2005/447)


4. **Sewel Convention:** The Committee will consider correspondence from the Convener of the Procedures Committee in relation to the Sewel Convention.

5. **Inquiry into the regulatory framework in Scotland:** The Committee will consider the response from the Scottish Executive to its phase 1 report on the inquiry into the regulatory framework in Scotland.

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

**Agenda Items 1 - 3**

- Legal Brief (Private) – to follow  
  - SL/S2/05/25/1

**Agenda Item 1**

- Executive response  
  - SL/S2/05/25/2

**Agenda Items 2 and 3**

- Copies of instruments (circulated to Members only)

**Agenda Item 4**

- Letter from Procedures Committee Convener  
  - SL/S2/05/25/3

**Agenda Item 5**

- Executive response  
  - SL/S2/05/25/4
- Phase 1 report (circulated to Members for information)
THE TUBERCULOSIS (SCOTLAND) REGULATIONS 2004 (SSI 2005/434)

On 13 September 2005 the Subordinate Legislation Committee, having considered the above instrument, sought an explanation of the following matters:-

1. The Committee asked the Executive to clarify whether the reference to paragraph (1)(b) in article 11(3) is intentional, given that the equivalent provision in the 1984 Order makes provision to paragraph (1) in its entirety.

2. The Committee also asked the Executive to explain the references in article 8(6)(b) to “paragraph (a)” and in article 8(6)(c) to “paragraphs (a) or (b)” as these provisions appear to be sub-paragraphs.

The Scottish Executive responds as follows:-

1. The Executive would like to thank the Committee for drawing these matters to their attention. It is accepted that the reference in Article 11(3) should be to paragraph (1) in its entirety, and that the provisions referred to in articles 8(6)(b) and (c) should be to sub-paragraphs rather than to paragraphs.

2. In relation to article 11, the Executive considers that, in the context that a notice is served under article 11(1) rather than any individual sub-paragraph thereof, it is possible to interpret article 11(3) so as to give effect to the intention that, in default by the recipient of a notice under article 11(1), the Scottish Ministers may carry out or cause to be carried out the requirements of that notice. In this regard it is noted that a notice actually served under article 11(1) would normally require all precautions specified under article 11(1) to be taken.

3. In relation to article 8, the Executive considers that the erroneous reference to paragraphs rather than sub-paragraphs would not cause the users of this legislation real confusion.

4. The Executive will, however, use the next available legislative opportunity - which is expected to arise within the foreseeable future - to make appropriate amendments.

Scottish Executive Environment and Rural Affairs Department
PROCEDURES COMMITTEE REPORT ON THE SEWEL CONVENTION

As you may already be aware, the Procedures Committee is currently finalising its report on the Sewel Convention. The Committee has already agreed to recommend a more formal procedure, governed by standing orders, in which committee scrutiny would be based on a memorandum about the relevant UK Parliament Bill. In that connection, it has now been suggested that we amend standing orders to make it a formal requirement for such a memorandum to be referred to the Subordinate Legislation Committee (SLC) for consideration if the relevant Bill includes provision conferring new powers on Scottish Ministers to make subordinate legislation.

We noted that although the SLC already has the right to consider such memoranda if it chooses to by virtue of its remit, the introduction of a formal requirement would be consistent with the existing Rules in relation to Bills (Rule 9.6.2). However, in recognition of the fact that such memoranda may in some instances relate to minor and/or technical issues, we thought it may be unnecessary to place a requirement on the SLC to “report on” the relevant provisions in every case. The Committee is therefore minded to include a new standing order along the following lines:

“In any case where the Bill that is the subject of the memorandum contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Subordinate Legislation Committee shall consider and may report to the lead committee on those provisions.”
Before reaching a final decision, the Committee would be interested to hear your Committee's views on the desirability, or otherwise, of this suggested Rule. The next Procedures Committee meeting will take place on 27 September and it would be helpful to receive your response in time for discussion at that meeting.

I should add that I will no longer be the Convener of the Committee by then, and you might therefore reply to the Deputy Convener, Karen Gillon, pending the Committee's choice of a new Convener.

Iain Smith MSP
Convener

Cc Karen Gillon
I was pleased to see the Subordinate Legislation Committee’s report into stage 1 of the inquiry into the regulatory framework in Scotland that was published before the summer recess. It is a very thorough piece of work.

My colleagues and I appreciated the opportunities given to the Executive to be involved in stage 1 of the inquiry, in providing comments on the consultation paper last year and oral evidence to the Committee in April this year. On behalf of the Executive, I now enclose our response to your report.

I am sending copies to the Presiding Officer and your Committee’s clerk.

MARGARET CURRAN
Introduction

The Executive fully appreciates the importance for Scotland of ensuring that the framework of regulation is appropriate and informed by the principles of necessity, proportionality, subsidiarity, transparency, accountability, accessibility and simplicity. In December 2004 the first Improving Regulation Annual Report was published by the Executive, underscoring a determination to build on the progress that has already been made in that regard. In this endeavour, the Executive welcomes the perspectives and contributions of other stakeholders and has found the process and outcome of stage 1 of the Committee’s Inquiry particularly constructive. The detailed recommendations in the Committee’s report have been considered carefully, with both the costs and the benefits being weighed, and the Executive’s views on each of them are set out below.

Regulatory Impact Assessment (RIA)

Recommendation at paragraph 24. The Committee recommends that-
- the Parliament and its Committees should have a role in scrutinising any RIA, given that the Executive sees the RIA as its main tool in improving regulation.
- any Parliamentary scrutiny should consider whether an RIA has been produced in adequate time to inform policy choices.

Recommendation at paragraph 26. The Committee appreciates the Minister’s concerns but believes strongly that there should be a short statement from the responsible Minister in relation to any instrument which does not have an accompanying RIA. The Committee recommends that this explanation should be a statutory requirement.

The Improving Regulation Unit (formerly IRIS) always advises that an RIA should be carried out if the regulation is expected to impact on business, charities or the voluntary sector. However, in cases where the policy officials determine to proceed without an RIA, it is recommended that a statement is inserted into the advice to Ministers to alert them to that effect. Departments must be prepared, if challenged, to defend the decision not to produce an RIA.

The Executive is concerned that the focus on RIAs should be appropriate and proportionate, with effort and resources directed where they are likely to be of most benefit. The Executive notes the strength of the Committee’s view on this matter and will, therefore, examine how this can be introduced in an efficient and cost-effective manner. The requirement may most appropriately be met by including a statement within the Executive Note as a matter of standard practice, rather than through the production of a separate document.

Recommendation at paragraph 27. The Committee also recommends that impact assessments should be extended to cover the impact of a regulation on the wider community.
The Executive acknowledges that RIAs should cover impact on the wider community and has already taken steps for that purpose. RIAs currently measure the impact on different sectors and groups. Proposals may have different effects on people, depending on where they live (in deprived, urban or rural communities) as well as on their ethnicity, gender, age, health and income. Thus different options may have beneficial impacts on some groups and negative impacts on others. It is important, therefore to determine who is affected to ensure that the economic, social and environmental costs and benefits are as comprehensive as possible in order to help those affected to assess the impact of a change on them. We will review the Guidance Note on RIAs to see how best to take these points on board.

**Consultation**

*Recommendation at paragraph 35.* The Committee recommends that there should be a statutory requirement for the Executive to explain, when consultation has not been carried out in relation to any statutory instrument, and the reasons why it has not been undertaken.

The Executive is firmly committed to an approach to government that is based on engagement and participation. At the same time, it is recognised that this can be demanding on all parties. Therefore, consultation needs to be focused appropriately. As previously noted, many instruments are minor and technical in nature. It is also the case that other instruments give effect to policy that has been developed on the basis of thorough consultation and in relation to which further consultation would add little value. Therefore, the Executive agrees with the Committee’s conclusion that a statutory requirement to consult on all subordinate legislation would not be workable.

The Executive considers that a general presumption that consultation should be undertaken on legislation that is new and substantive is already part of our civic participation ethos. Appropriate engagement and consultation is promoted, with Ministers and officials being expected to be responsible for individual decisions on whether / how to consult. The Executive’s *Consultation Good Practice Guidance* encourages clear and justifiable decisions to be taken on consultations, on a case by case basis, and that these decisions be open and accountable. Supplementary guidance for consultation relating to both primary and secondary legislation appears in the Scottish Executive Bill Handbook – *A Guide to Bill Procedure in the Scottish Parliament*.

As regards the specific proposal that there should be a statutory requirement to explain decisions in each and every case where consultation is not undertaken, the Executive’s view corresponds with its view on the similar proposal relating to RIAs. The Executive recognises the Committee’s concerns and will examine how this can be introduced in an efficient and cost-effective manner. Again, the requirement may most appropriately be met by including a statement within the Executive Note as a matter of standard practice, rather than through the production of a separate document.

*Recommendation at paragraph 40.* The Committee recommends that-

- all of these issues should be addressed within the Executive’s review of consultation processes currently being undertaken.
The Executive should inform the Committee of the findings from this review on issues associated with the policy development of subordinate legislation, including mechanisms for co-ordination across the Executive.

The Executive is currently looking at ways of refining its consultation processes – e.g., encouraging the use of innovative methods of inviting comment on its proposals – which will enhance the policy making process and help ensure that the development of our proposals takes account of a wide range of views. The points made by the Committee will be considered as part of this process, and the Executive will inform the Committee of the outcome of this work. However, our initial thoughts on the specific issues raised in paragraphs 36 to 39 are noted in the Annex to this response.

Understanding and accessibility of legislation

Recommendation at paragraph 47. The Committee believes that there should always be a presumption in favour of expressing law in plain language in regulations and intends that its proposed Committee bill will include provision for this, either on the face of the bill itself or delegated to guidance, which may be laid before Parliament.

The Office of the Scottish Parliamentary Counsel (OSPC) drafts Executive Bills and amendments. OSPC share the Committee’s desire that legislation should, so far as possible, be drafted in plain language.

Numerous factors contribute towards the form and style of primary legislation. One such factor is the need for it to be drafted consistently with rules of statutory interpretation. Those rules have different sources. There are common law rules, such as the rule that a statute creating an offence will be strictly construed in favour of the accused. There is the interpretation order (S.I. 1999/1379). And there is the existing law, changes and additions to which should be drafted so as to mesh in coherently. The need to draft new law in a way which weaves it into both the existing interpretation rules and the background law is often the reason why a Bill does not appear to tell the whole story. (In any such cases, the accompanying Explanatory Notes can supply the balance.)

Perhaps the most significant influence on legislative style is the need for legal certainty. Ministers and the Parliament wish legislation to be drafted to a degree of precision and particularity which enables them to predict, with confidence, how it will apply. It is not normal practice to draft Bills so as only to give abstract indications as to how the resultant Acts should be operated and interpreted.

The practice of legislating with precision and particularity means that Bills can sometimes appear detailed and complex. Judges and lawyers, accustomed to the precision of legislation, attribute substantive meaning to every word and phrase. So drafters try to avoid including any unnecessary, repetitive or explanatory text which could be interpreted in a way which would distort or confound the legislative intention.
But the unique considerations which dictate the form and style of legislation do not conflict with or prevent the use of plain language. Some laws can be set out by way of a few simple propositions. Others can be inherently complex and will not lend themselves to being expressed in such a straightforward manner. While Scotland is a small country, it houses a modern, complex society in which a large number of citizens, with differing ambitions, interests and requirements have to live and interact together. Their relationships are complex, and the regulations which govern those relationships will inevitably reflect that complexity. The aim of plain language drafting is to express complex legislation in the simplest way possible without compromising the legal certainty demanded by legislators.

Legislation must be effective: it must be observed and, if it is not, it must be capable of being readily enforced. For those purposes, effective communication to citizens, public officials, lawyers and courts is essential. Plain language is the natural medium for that effective communication.

Drafting does not consist of translating simple concepts into arcane “legal” prose. Obscure, unfamiliar, old-fashioned and technical words and complicated syntax are seldom found in modern primary legislation. Contrary perceptions may be based on a belief that legislation is drafted today in much the same style as it was 50 or 100 years ago. However, this is not the case. OSPC has during the six years of its existence followed a well-understood practice of using plain language and simple syntax, and continues to follow and, wherever possible, improve on that practice.

Subordinate legislation is drafted by the Executive’s solicitors (although OSPC have very recently assumed responsibility for the drafting of some instruments). The desirability of using plain language is covered in the Executive’s in-house training and in quality control work. Where the Executive is transposing Community legislation, an extremely important factor is the form of that legislation. It will always be difficult and frequently legally risky to attempt to re-express the language of Community texts in an effort to achieve clarity of purpose let alone plainness of speech. However, the Executive does indeed aim for greater use of plainer language in subordinate legislation, where possible, but doubts that a statutory requirement will assist in this regard.

*Recommendation at paragraph 49.* The Committee welcomes this commitment and requests a progress report from the Executive in relation to this matter.

The Executive’s memorandum to the Committee noted that, as regards taking forward this commitment from the Partnership Agreement, the Scottish Law Commission had been asked to investigate methods by which legislation can be published in plain English. The Executive expects to publish a report in the near future.

*Recommendation at paragraph 54.* The Committee recommends that an Executive note should be laid with each instrument and published on the HMSO website for both negative and affirmative instruments. The Committee also recommends that the format of and material contained in each note should follow agreed guidelines that are made publicly available.
The Committee will be aware, in accordance with the letter from Margaret Curran to Sylvia Jackson dated 20 June, that Executive Notes for both negative and affirmative instruments are being published on the HMSO website from 1 July. The Executive provides Executive Notes for all instruments which are required to be laid before Parliament, except where this is clearly superfluous (e.g. for very simple instruments where the Explanatory Note covers everything that would be in the Executive Note) or there are other special circumstances (e.g. extreme urgency). The Executive is very willing to work with the Committee on an agreed style format for Executive Notes.

Recommendation at paragraph 61. The Committee strongly recommends that the public should have electronic access, free of charge, to –

- up to date texts of primary and secondary legislation, showing those texts as they are currently amended and
- the historical versions of any texts, showing how they have been amended.

The Executive agrees with this recommendation in principle. However, it could require a significant amount of resources and, unless the Executive was to set up its own database, is not wholly within its control. The Statutory Publications Office, within the Department of Constitutional Affairs (DCA), is working to produce a Statute Law Database for access to the public. Our understanding is that it is planned that the general public will be given access, free of charge, to the original text of primary and secondary legislation that has appeared on the statute book since 1 January 1991 (the database base date). They will also be able to access, free of charge, the latest available revised version of primary legislation. (The DCA has no current plans in relation to revised secondary legislation.) The DCA expects to be able to start running a pilot of the public version of the enquiry service next year.
Consolidation

**Paragraph 62.** In the circumstances the Committee seeks clarification from the Executive in relation to its plans to consolidate primary legislation.

**Paragraph 65.** The Committee believes that this rolling consolidation would greatly assist accessibility to regulations and recommends that this is taken forward by the Executive.

**Recommendation at paragraph 66.** In the interim, however, the Committee recommends that the Scottish Executive should report to the Committee on a regular basis on its plans to consolidate regulations, and in particular should present a programme of its planned work for this Committee and relevant subject Committees to consider.

The Executive agrees that there is merit in consolidation and that consolidated legislation would improve the statute book. However, consolidation involves much more than a simple renumbering of existing provisions, inevitably throwing up questions of policy and practice which require policy input. Even a ‘pure consolidation’ is intensive of both legal and administrative resources at a time when resources are stretched to accommodate busy legislative schedules. An appropriate balance therefore requires to be struck. A further practical consideration is that a great deal of the legislation most in need of consolidation is GB or UK in extent; separating out the “Scottish” component on its own may not be an option and support, if not further legislation by the UK Government or other devolved administrations, may be necessary to ensure cross border effect.

Notwithstanding these constraints, the Executive shares the Committee’s desire to make progress in relation to consolidation. In determining the way ahead, it will be important to be clear about the form of consolidation. There may be a number of examples of subordinate legislation which could benefit from pure consolidation i.e. the various texts can simply be put together without the need for any changes to the legislation. In the case of such pure consolidations, it is anticipated that Committees would put in place rules that would enable consolidations to go through with a very limited degree of scrutiny, without opening up all aspects of the legislation to consideration. That is a matter which the Executive has discussed with the Committee in the past, and on which it would welcome the Committee’s specific proposals. For consolidation that involved more than this, it is anticipated that Parliament would wish to exercise a greater degree of scrutiny and this again would have resource implications.

In relation to “rolling consolidations” of subordinate legislation, the Executive recognises this would have the advantage that, following an initial “pure” consolidation, subsequent amendments would be made by replacing the whole existing instrument with a new instrument which incorporated the (perhaps minor) adjustments being made. The user’s attention could be drawn to the alterations in the Explanatory Note. The Executive anticipates that, over a period, such a process would produce considerable savings in time and resources in the preparation of subordinate legislation. But, again, the Executive would anticipate a requirement for appropriate alterations to Standing Orders to reflect the fact that a large part of any such instrument would previously have been examined, as to substance, by
the Parliament, and would not require to be examined afresh on each (perhaps minor) alteration.

So far as a programme of consolidation is concerned, the Executive does not have the administrative or legal resources to commence a free-standing programme of consolidation: the intention remains to undertake consolidations in particular areas of law where the need is greatest, and as opportunities present themselves. A recent example is the Teachers’ Superannuation (Scotland) Regulations 2005 (SSI 2005/393). The 2005 Regulations will consolidate the principal regulations and the various amending regulations. The consolidation of these regulations was instructed in 1999 and, even though it has been largely a pure consolidation exercise with a few minor amendments, the time and effort required - against other priorities for the office - meant that it was not possible to complete it until this year.

Reform and simplification

Recommendation at paragraph 67. The Committee recommends that the Executive should up-date the Committee on what further priorities it has identified with the Scottish Law Commission in this area.

As the report observes, the Scottish Law Commission’s seventh programme of law reform has been laid before the Parliament by the Scottish Ministers. The Commission additionally continues to deal with requests for advice received from government; four topics are currently referred to the Commission by Scottish Ministers:-

- Sharp v Thomson (examining the protection of buyers on the seller's insolvency)
- Interest on debt and damages
- Rape and other sexual offences
- Limitation in personal injury actions

Any further priorities to be identified will be notified.

Periodic Review

Recommendation at paragraph 72. The Committee believes that there is a duty to those regulated to assess whether a regulation is functioning well or could be improved and considers that the Executive’s current policy of review at 10 years of those new regulations impacting on business is insufficient in this regard. The Committee therefore recommends that the Executive undertakes to review areas of new regulation every five years.

The Executive introduced a request to undertake review RIAs after a maximum of 10 years. The review RIA process currently requires policy developers to revisit within 10 years their decisions on the course to adopt. The review RIA process provides them with the opportunity to review the situation and to check that the approach that they adopted is appropriate and still current. However, the Executive recognises that this might not be an appropriate time frame in every case and the Small Business Consultative Group Regulation Sub-Group is currently looking at this area. Options include recommending some regulations which might need reviewing after 3 or 5 years. However, it is also important to guard against
reviews routinely being carried out within a shorter time for every regulation introduced, without regard to need and in the absence of representations and evidence of difficulty, in order to avoid nugatory activity and unnecessary bureaucracy, which could impact on organisations’ ability to respond constructively.

*Recommendation at paragraph 73.* The Committee also recommends that sunsetting provisions should be included in regulations made in the circumstances set out in the Mandelkern Report. The Committee considers this to be sound regulatory practice.

Although sunsetting is a way of ensuring that legislation is reviewed, kept up to date and not left on the statute book after it has served its purpose, sunsetting is not always appropriate, for instance for regulation implementing some EU directives, or where there is the possibility of generating considerable uncertainty for business. Using sunset clauses for laws that are justified in the long-term is likely to be bureaucratic, resource intensive and unproductive.

The Committee itself was alive to and sympathetic to concerns as to how “sunsetting” might create unnecessary administrative burdens. That is a key objection to “sunsetting” but again in special and exceptional circumstances the Executive accepts that there may well be a case for such a clause.

### Enforcement

*Recommendation at paragraph 77.* The Committee recommends that the Executive reports the findings of this working group, ideally within the Improving Regulation in Scotland Unit’s annual report.

Scottish local authorities are to the fore in much of the enforcement work that impacts in the business community in Scotland and have the lead in committing to the Enforcement Concordat. The Improving Regulation Unit issues reminders bi-annually to all Executive agencies and NDPBs to encourage them to fulfil their obligations to the principles of the Concordat towards improving the regulatory and enforcement environment for business in Scotland. The regulatory sub-group of the Small Business Consultative Group is also looking at enforcement by Scottish regulators as part of its general look at aspects of the regulatory environment.

The Executive accepts this recommendation and will include the findings of the Concordat working group in the Improving Regulation Unit’s future annual reports.

*Recommendation at paragraph 79.* Whilst the Committee acknowledges that enforcement information is included in Scottish RIAs currently, it recommends that this should be extended to include, similarly to the Hampton findings, an assessment of existing administrative systems and the advice to be provided to those being regulated.

Scottish RIA guidance is regularly reviewed to enable improvements to be made. As noted by the Committee, Scottish RIAs already provide enforcement information. However, the Executive fully support the Hampton findings on this issue, will adopt amended guidance on RIAs as a result and will encourage Scottish agencies to adopt the new Hampton guidance as part of Best Practice.
Role of the Improving Regulation in Scotland Unit (IRIS)

Recommendation at paragraph 87. The Committee recommends-

- That the Improving Regulation Unit is relocated to the First Minister’s Office and should be given enhanced powers to assess standards of regulation within other departments.
- That IRIS should assess the performance of individual departments on areas such as the early production of an RIA, innovation in consultation and alternatives to regulation.
- That IRIS should have a role in identifying new regulations requiring review within five years, as recommended earlier in this report and should be responsible for the supervision of this review.

As previously advise, the Unit was formed in November 1999 as a focal point for concerns about regulatory matters. It advises and is consulted by all Executive Departments and their agencies, if any proposed legislation will have regulatory impacts on the Scottish business community.

The role of the Unit is important, but the remit for action – and therefore the resources to be devoted to it – needs to be seen in context. It is generally recognised that the vast majority of regulatory burden falls in areas with an EU or UK base and that the scope for Executive only action is relatively limited. Moreover, survey evidence suggests that there is no additional “Scotland only” regulatory burden that causes significant problems. Nor is there evidence that the organisational or geographic position of the Unit hampers the remit assigned to it. We see no immediate benefit to be obtained from creating a large bureaucracy associated with Scottish-only legislation or from relocating the Unit from one Department to another. And in relation specifically to the recommendation for centralisation within the First Minister’s Office, it is important to recognise that this would alter substantively the nature and balance of that office.

To some extent the Unit already assesses the performance of individual departments. It now also publishes an Annual Report for deregulation work across the Executive as a whole. But to greatly expand its role in this area would necessitate significant increase in staff resources and associated expenditure at a time when the Executive is determined to streamline bureaucracy.

As noted in the response to the recommendation at paragraph 72, the Executive is receptive to the idea of holding reviews of new regulations at shorter intervals, where the particular circumstances warrant earlier reviews.

Scottish Executive
September 2005
CONSULTATION

This Annex sets out some initial thoughts on the specific issues raised in paragraphs 36 to 39 of the Committee’s report.

Using different consultation methods - The Scottish Executive Consultation Good Practice Guidance currently encourages the use of a wide range of consultation methods which should be selected to meet the needs of the target audience of a particular exercise. It also contains relevant information about the consultation database and related advice about co-ordinating consultation activity. The current review will continue to develop this guidance, stressing in particular the need to use appropriate methods to engage members of the public.

The distinction between formal and informal consultation - The Consultation Good Practice Guidance does not draw a distinction between formal and informal consultation, but sets out good practice which teams can apply as appropriate to their circumstances. The Executive encourages ongoing engagement with stakeholders and specific consultation exercises should take place within that context. Much ongoing engagement will constitute “informal” consultation.

Incorporating the spirit of the Aarhus Convention into all areas of Scottish Executive practice - In line with the spirit of the Aarhus Convention, the Executive already promotes and encourages participation at appropriate stages in the development of policy. In particular, the Executive promotes a 12 week standard consultation period, has published a summary version of its consultation guidance, and there are plans to give greater emphasis to the need to engage directly with the public in the revised version of its full consultation guidance.

Greater co-ordination of consultation activity - The Executive is aware of the need to introduce greater co-ordination into its consultation activity. Teams are already encouraged to coordinate where possible with other related consultation exercises, but inevitably a lot of our stakeholders are interested in a wide range of consultations. A recently introduced database of consultations may offer some potential to achieve greater co-ordination, and this will be explored as the database is developed. In addition, the Executive has recently established a Civic Participation Steering Group and a Civic Participation Network. Both of these initiatives provide opportunities for addressing the issue of co-ordination of consultation activity.

Logging of consultations on regulators’ websites - The Consultation Good Practice Guidance encourages teams to think creatively about the distribution and advertising of their consultation exercises. The best way to reach the intended audience will vary from exercise to exercise, but seeking the assistance of other organisations in this is recognised as helpful, through the distribution of copies of consultation papers at appropriate locations, or through the hosting of web links. The Executive is happy to give further emphasis to the option of seeking the assistance of appropriate organisations in hosting links to consultation papers on the Scottish Executive website, where a short summary of the exercise can be found, along with a link to the full paper(s).
I was pleased to see the Subordinate Legislation Committee’s report into stage 1 of the inquiry into the regulatory framework in Scotland that was published before the summer recess. It is a very thorough piece of work.

My colleagues and I appreciated the opportunities given to the Executive to be involved in stage 1 of the inquiry, in providing comments on the consultation paper last year and oral evidence to the Committee in April this year. On behalf of the Executive, I now enclose our response to your report.

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MARGARET CURRAN
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**Consultation**

**Recommendation at paragraph 35.** The Committee recommends that there should be a statutory requirement for the Executive to explain, when consultation has not been carried out in relation to any statutory instrument, and the reasons why it has not been undertaken.

The Executive is firmly committed to an approach to government that is based on engagement and participation. At the same time, it is recognised that this can be demanding on all parties. Therefore, consultation needs to be focused appropriately. As previously noted, many instruments are minor and technical in nature. It is also the case that other instruments give effect to policy that has been developed on the basis of thorough consultation and in relation to which further consultation would add little value. Therefore, the Executive agrees with the Committee’s conclusion that a statutory requirement to consult on all subordinate legislation would not be workable.

The Executive considers that a general presumption that consultation should be undertaken on legislation that is new and substantive is already part of our civic participation ethos. Appropriate engagement and consultation is promoted, with Ministers and officials being expected to be responsible for individual decisions on whether / how to consult. The Executive’s Consultation Good Practice Guidance encourages clear and justifiable decisions to be taken on consultations, on a case by case basis, and that these decisions be open and accountable. Supplementary guidance for consultation relating to both primary and secondary legislation appears in the Scottish Executive Bill Handbook – *A Guide to Bill Procedure in the Scottish Parliament*.

As regards the specific proposal that there should be a statutory requirement to explain decisions in each and every case where consultation is not undertaken, the Executive’s view corresponds with its view on the similar proposal relating to RIAs. The Executive recognises the Committee’s concerns and will examine how this can be introduced in an efficient and cost-effective manner. Again, the requirement may most appropriately be met by including a statement within the Executive Note as a matter of standard practice, rather than through the production of a separate document.

**Recommendation at paragraph 40.** The Committee recommends that:

- all of these issues should be addressed within the Executive’s review of consultation processes currently being undertaken.
- the Executive should inform the Committee of the findings from this review on issues associated with the policy development of subordinate legislation, including mechanisms for co-ordination across the Executive.

The Executive is currently looking at ways of refining its consultation processes – e.g., encouraging the use of innovative methods of inviting comment on its proposals – which will enhance the policy making process and help ensure that the development of our proposals takes account of a wide range of views. The points made by the Committee will be considered as part of this process, and the Executive will inform the Committee of the outcome of this work. However, our initial thoughts on the specific issues raised in paragraphs 36 to 39 are noted in the Annex to this response.
Understanding and accessibility of legislation

Recommendation at paragraph 47. The Committee believes that there should always be a presumption in favour of expressing law in plain language in regulations and intends that its proposed Committee bill will include provision for this, either on the face of the bill itself or delegated to guidance, which may be laid before Parliament.

The Office of the Scottish Parliamentary Counsel (OSPC) drafts Executive Bills and amendments. OSPC share the Committee’s desire that legislation should, so far as possible, be drafted in plain language.

Numerous factors contribute towards the form and style of primary legislation. One such factor is the need for it to be drafted consistently with rules of statutory interpretation. Those rules have different sources. There are common law rules, such as the rule that a statute creating an offence will be strictly construed in favour of the accused. There is the interpretation order (S.I. 1999/1379). And there is the existing law, changes and additions to which should be drafted so as to mesh in coherently. The need to draft new law in a way which weaves it into both the existing interpretation rules and the background law is often the reason why a Bill does not appear to tell the whole story. (In any such cases, the accompanying Explanatory Notes can supply the balance.)

Perhaps the most significant influence on legislative style is the need for legal certainty. Ministers and the Parliament wish legislation to be drafted to a degree of precision and particularity which enables them to predict, with confidence, how it will apply. It is not normal practice to draft Bills so as only to give abstract indications as to how the resultant Acts should be operated and interpreted.

The practice of legislating with precision and particularity means that Bills can sometimes appear detailed and complex. Judges and lawyers, accustomed to the precision of legislation, attribute substantive meaning to every word and phrase. So drafters try to avoid including any unnecessary, repetitive or explanatory text which could be interpreted in a way which would distort or confound the legislative intention.

But the unique considerations which dictate the form and style of legislation do not conflict with or prevent the use of plain language. Some laws can be set out by way of a few simple propositions. Others can be inherently complex and will not lend themselves to being expressed in such a straightforward manner. While Scotland is a small country, it houses a modern, complex society in which a large number of citizens, with differing ambitions, interests and requirements have to live and interact together. Their relationships are complex, and the regulations which govern those relationships will inevitably reflect that complexity. The aim of plain language drafting is to express complex legislation in the simplest way possible without compromising the legal certainty demanded by legislators.

Legislation must be effective: it must be observed and, if it is not, it must be capable of being readily enforced. For those purposes, effective communication to citizens, public officials, lawyers and courts is essential. Plain language is the natural medium for that effective communication.

Drafting does not consist of translating simple concepts into arcane “legal” prose. Obscure, unfamiliar, old-fashioned and technical words and complicated syntax are seldom found in modern primary legislation. Contrary perceptions may be based on a belief that legislation is drafted today in much the same style as it was 50 or 100 years ago. However, this is not the case. OSPC has during the six years of its existence followed a well-understood practice of using plain language and simple syntax, and continues to follow and, wherever possible, improve on that practice.
Subordinate legislation is drafted by the Executive’s solicitors (although OSPC have very recently assumed responsibility for the drafting of some instruments). The desirability of using plain language is covered in the Executive’s in-house training and in quality control work. Where the Executive is transposing Community legislation, an extremely important factor is the form of that legislation. It will always be difficult and frequently legally risky to attempt to re-express the language of Community texts in an effort to achieve clarity of purpose let alone plainness of speech. However, the Executive does indeed aim for greater use of plainer language in subordinate legislation, where possible, but doubts that a statutory requirement will assist in this regard.

Recommendation at paragraph 49. The Committee welcomes this commitment and requests a progress report from the Executive in relation to this matter.

The Executive’s memorandum to the Committee noted that, as regards taking forward this commitment from the Partnership Agreement, the Scottish Law Commission had been asked to investigate methods by which legislation can be published in plain English. The Executive expects to publish a report in the near future.

Recommendation at paragraph 54. The Committee recommends that an Executive note should be laid with each instrument and published on the HMSO website for both negative and affirmative instruments. The Committee also recommends that the format of and material contained in each note should follow agreed guidelines that are made publicly available.

The Committee will be aware, in accordance with the letter from Margaret Curran to Sylvia Jackson dated 20 June, that Executive Notes for both negative and affirmative instruments are being published on the HMSO website from 1 July. The Executive provides Executive Notes for all instruments which are required to be laid before Parliament, except where this is clearly superfluous (e.g. for very simple instruments where the Explanatory Note covers everything that would be in the Executive Note) or there are other special circumstances (e.g. extreme urgency). The Executive is very willing to work with the Committee on an agreed style format for Executive Notes.

Recommendation at paragraph 61. The Committee strongly recommends that the public should have electronic access, free of charge, to –

- up to date texts of primary and secondary legislation, showing those texts as they are currently amended and
- the historical versions of any texts, showing how they have been amended.

The Executive agrees with this recommendation in principle. However, it could require a significant amount of resources and, unless the Executive was to set up its own database, is not wholly within its control. The Statutory Publications Office, within the Department of Constitutional Affairs (DCA), is working to produce a Statute Law Database for access to the public. Our understanding is that it is planned that the general public will be given access, free of charge, to the original text of primary and secondary legislation that has appeared on the statute book since 1 January 1991 (the database base date). They will also be able to access, free of charge, the latest available revised version of primary legislation. (The DCA has no current plans in relation to revised secondary legislation.) The DCA expects to be able to start running a pilot of the public version of the enquiry service next year.
Consolidation

Paragraph 62. In the circumstances the Committee seeks clarification from the Executive in relation to its plans to consolidate primary legislation.

Paragraph 65. The Committee believes that this rolling consolidation would greatly assist accessibility to regulations and recommends that this is taken forward by the Executive.

Recommendation at paragraph 66. In the interim, however, the Committee recommends that the Scottish Executive should report to the Committee on a regular basis on its plans to consolidate regulations, and in particular should present a programme of its planned work for this Committee and relevant subject Committees to consider.

The Executive agrees that there is merit in consolidation and that consolidated legislation would improve the statute book. However, consolidation involves much more than a simple renumbering of existing provisions, inevitably throwing up questions of policy and practice which require policy input. Even a ‘pure consolidation’ is intensive of both legal and administrative resources at a time when resources are stretched to accommodate busy legislative schedules. An appropriate balance therefore requires to be struck. A further practical consideration is that a great deal of the legislation most in need of consolidation is GB or UK in extent; separating out the “Scottish” component on its own may not be an option and support, if not further legislation by the UK Government or other devolved administrations, may be necessary to ensure cross border effect.

Notwithstanding these constraints, the Executive shares the Committee’s desire to make progress in relation to consolidation. In determining the way ahead, it will be important to be clear about the form of consolidation. There may be a number of examples of subordinate legislation which could benefit from pure consolidation i.e. the various texts can simply be put together without the need for any changes to the legislation. In the case of such pure consolidations, it is anticipated that Committees would put in place rules that would enable consolidations to go through with a very limited degree of scrutiny, without opening up all aspects of the legislation to consideration. That is a matter which the Executive has discussed with the Committee in the past, and on which it would welcome the Committee’s specific proposals. For consolidation that involved more than this, it is anticipated that Parliament would wish to exercise a greater degree of scrutiny and this again would have resource implications.

In relation to “rolling consolidations” of subordinate legislation, the Executive recognises this would have the advantage that, following an initial “pure” consolidation, subsequent amendments would be made by replacing the whole existing instrument with a new instrument which incorporated the (perhaps minor) adjustments being made. The user’s attention could be drawn to the alterations in the Explanatory Note. The Executive anticipates that, over a period, such a process would produce considerable savings in time and resources in the preparation of subordinate legislation. But, again, the Executive would anticipate a requirement for appropriate alterations to Standing Orders to reflect the fact that a large part of any such instrument would previously have been examined, as to substance, by the Parliament, and would not require to be examined afresh on each (perhaps minor) alteration.

So far as a programme of consolidation is concerned, the Executive does not have the administrative or legal resources to commence a free-standing programme of consolidation: the intention remains to undertake consolidations in particular areas of law where the need is greatest, and as opportunities present themselves. A recent example is the Teachers’ Superannuation (Scotland) Regulations 2005 (SSI 2005/393). The 2005 Regulations will consolidate the principal regulations and the various
amending regulations. The consolidation of these regulations was instructed in 1999 and, even though it has been largely a pure consolidation exercise with a few minor amendments, the time and effort required - against other priorities for the office - meant that it was not possible to complete it until this year.

Reform and simplification

Recommendation at paragraph 67. The Committee recommends that the Executive should update the Committee on what further priorities it has identified with the Scottish Law Commission in this area.

As the report observes, the Scottish Law Commission’s seventh programme of law reform has been laid before the Parliament by the Scottish Ministers. The Commission additionally continues to deal with requests for advice received from government; four topics are currently referred to the Commission by Scottish Ministers:

- Sharp v Thomson (examining the protection of buyers on the seller's insolvency)
- Interest on debt and damages
- Rape and other sexual offences
- Limitation in personal injury actions

Any further priorities to be identified will be notified.

Periodic Review

Recommendation at paragraph 72. The Committee believes that there is a duty to those regulated to assess whether a regulation is functioning well or could be improved and considers that the Executive’s current policy of review at 10 years of those new regulations impacting on business is insufficient in this regard. The Committee therefore recommends that the Executive undertakes to review areas of new regulation every five years.

The Executive introduced a request to undertake review RIAs after a maximum of 10 years. The review RIA process currently requires policy developers to revisit within 10 years their decisions on the course to adopt. The review RIA process provides them with the opportunity to review the situation and to check that the approach that they adopted is appropriate and still current. However, the Executive recognises that this might not be an appropriate time frame in every case and the Small Business Consultative Group Regulation Sub-Group is currently looking at this area. Options include recommending some regulations which might need reviewing after 3 or 5 years. However, it is also important to guard against reviews routinely being carried out within a shorter time for every regulation introduced, without regard to need and in the absence of representations and evidence of difficulty, in order to avoid nugatory activity and unnecessary bureaucracy, which could impact on organisations’ ability to respond constructively.

Recommendation at paragraph 73. The Committee also recommends that sunsetting provisions should be included in regulations made in the circumstances set out in the Mandelkern Report. The Committee considers this to be sound regulatory practice.

Although sunsetting is a way of ensuring that legislation is reviewed, kept up to date and not left on the statute book after it has served its purpose, sunsetting is not always appropriate, for instance for regulation implementing some EU directives, or where there is the possibility of generating considerable uncertainty for business. Using sunset clauses for laws that are justified in the long-term is likely to be bureaucratic, resource intensive and unproductive.
The Committee itself was alive to and sympathetic to concerns as to how “sunsetting” might create unnecessary administrative burdens. That is a key objection to “sunsetting” but again in special and exceptional circumstances the Executive accepts that there may well be a case for such a clause.

**Enforcement**

*Recommendation at paragraph 77.* The Committee recommends that the Executive reports the findings of this working group, ideally within the Improving Regulation in Scotland Unit’s annual report.

Scottish local authorities are to the fore in much of the enforcement work that impacts in the business community in Scotland and have the lead in committing to the Enforcement Concordat. The Improving Regulation Unit issues reminders bi-annually to all Executive agencies and NDPBs to encourage them to fulfil their obligations to the principles of the Concordat towards improving the regulatory and enforcement environment for business in Scotland. The regulatory sub-group of the Small Business Consultative Group is also looking at enforcement by Scottish regulators as part of its general look at aspects of the regulatory environment.

The Executive accepts this recommendation and will include the findings of the Concordat working group in the Improving Regulation Unit’s future annual reports

*Recommendation at paragraph 79.* Whilst the Committee acknowledges that enforcement information is included in Scottish RIAs currently, it recommends that this should be extended to include, similarly to the Hampton findings, an assessment of existing administrative systems and the advice to be provided to those being regulated.

Scottish RIA guidance is regularly reviewed to enable improvements to be made. As noted by the Committee, Scottish RIAs already provide enforcement information. However, the Executive fully support the Hampton findings on this issue, will adopt amended guidance on RIAs as a result and will encourage Scottish agencies to adopt the new Hampton guidance as part of Best Practice.

**Role of the Improving Regulation in Scotland Unit (IRIS)**

*Recommendation at paragraph 87.* The Committee recommends—
- That the Improving Regulation Unit is relocated to the First Minister’s Office and should be given enhanced powers to assess standards of regulation within other departments.
- That IRIS should assess the performance of individual departments on areas such as the early production of an RIA, innovation in consultation and alternatives to regulation.
- That IRIS should have a role in identifying new regulations requiring review within five years, as recommended earlier in this report and should be responsible for the supervision of this review.

As previously advise, the Unit was formed in November 1999 as a focal point for concerns about regulatory matters. It advises and is consulted by all Executive Departments and their agencies, if any proposed legislation will have regulatory impacts on the Scottish business community.

The role of the Unit is important, but the remit for action – and therefore the resources to be devoted to it – needs to be seen in context. It is generally recognised that the vast majority of regulatory burden falls in areas with an EU or UK base and that the scope for Executive only action is relatively limited. Moreover, survey evidence suggests that there is no additional “Scotland only” regulatory
burden that causes significant problems. Nor is there evidence that the organisational or geographic position of the Unit hampers the remit assigned to it. We see no immediate benefit to be obtained from creating a large bureaucracy associated with Scottish-only legislation nor from relocating the Unit from one Department to another. And in relation specifically to the recommendation for centralisation within the First Minister’s Office, it is important to recognise that this would alter substantively the nature and balance of that office.

To some extent the Unit already assesses the performance of individual departments. It now also publishes an Annual Report for deregulation work across the Executive as a whole. But to greatly expand its role in this area would necessitate significant increase in staff resources and associated expenditure at a time when the Executive is determined to streamline bureaucracy.

As noted in the response to the recommendation at paragraph 72, the Executive is receptive to the idea of holding reviews of new regulations at shorter intervals, where the particular circumstances warrant earlier reviews.

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CONSULTATION

This Annex sets out some initial thoughts on the specific issues raised in paragraphs 36 to 39 of the Committee’s report.

Using different consultation methods - The Scottish Executive Consultation Good Practice Guidance currently encourages the use of a wide range of consultation methods which should be selected to meet the needs of the target audience of a particular exercise. It also contains relevant information about the consultation database and related advice about co-ordinating consultation activity. The current review will continue to develop this guidance, stressing in particular the need to use appropriate methods to engage members of the public.

The distinction between formal and informal consultation - The Consultation Good Practice Guidance does not draw a distinction between formal and informal consultation, but sets out good practice which teams can apply as appropriate to their circumstances. The Executive encourages ongoing engagement with stakeholders and specific consultation exercises should take place within that context. Much ongoing engagement will constitute “informal” consultation.

Incorporating the spirit of the Aarhus Convention into all areas of Scottish Executive practice - In line with the spirit of the Aarhus Convention, the Executive already promotes and encourages participation at appropriate stages in the development of policy. In particular, the Executive promotes a 12 week standard consultation period, has published a summary version of its consultation guidance, and there are plans to give greater emphasis to the need to engage directly with the public in the revised version of its full consultation guidance.

Greater co-ordination of consultation activity - The Executive is aware of the need to introduce greater co-ordination into its consultation activity. Teams are already encouraged to coordinate where possible with other related consultation exercises, but inevitably a lot of our stakeholders are interested in a wide range of consultations. A recently introduced database of consultations may offer some potential to achieve greater co-ordination, and this will be explored as the database is developed. In addition, the Executive has recently established a Civic Participation Steering Group and a Civic Participation Network. Both of these initiatives provide opportunities for addressing the issue of co-ordination of consultation activity.

Logging of consultations on regulators’ websites - The Consultation Good Practice Guidance encourages teams to think creatively about the distribution and advertising of their consultation exercises. The best way to reach the intended audience will vary from exercise to exercise, but seeking the assistance of other organisations in this is recognised as helpful, through the distribution of copies of consultation papers at appropriate locations, or through the hosting of web links. The Executive is happy to give further emphasis to the option of seeking the assistance of appropriate organisations in hosting links to consultation papers on the Scottish Executive website, where a short summary of the exercise can be found, along with a link to the full paper(s).

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