The Committee will meet at 2.15 pm in Committee Room 6.

1. **Offences (Aggravation by Prejudice) (Scotland) Bill**: The Committee will consider Patrick Harvie MSP’s response to points raised on the delegated powers provisions in this Bill at Stage 1.

2. **Scottish Government responses**: The Committee will consider the Scottish Government’s response in relation to the following—

   - the Licensing of Animal Dealers (Young Cats and Dogs) (Scotland) Regulations 2008 (**SSI 2008/draft**); and
   - the Diseases of Animals (Approved Disinfectants) (Scotland) Order 2008 (**SSI 2008/219**).

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

   - the National Health Service Pension Scheme (Scotland) Regulations 2008 (**SSI 2008/224**);
   - the National Health Service Superannuation Scheme (Additional Voluntary Contributions, Injury Benefits and Compensation for Premature Retirement) (Scotland) Amendment Regulations 2008 (**SSI 2008/225**);
   - the National Health Service Superannuation Scheme (Scotland) Amendment Regulations 2008 (**SSI 2008/226**);
   - the Teachers’ Superannuation (Scotland) Amendment Regulations 2008 (**SSI 2008/227**);
the Local Government Pension Scheme (Administration) (Scotland) Regulations 2008 (SSI 2008/228);

the Local Government Pension Scheme (Transitional Provisions) (Scotland) Regulations 2008 (SSI 2008/229);

the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008 (SSI 2008/230);

the Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2008 (SSI 2008/233);

the Court of Session etc. Fees Amendment Order 2008 (SSI 2008/236);

the Sheriff Court Fees Amendment Order 2008 (SSI 2008/239);

the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008 (SSI 2008/240);

the Academic Awards and Distinctions (UHI Millennium Institute) (Scotland) Order of Council 2008 (SSI 2008/212);

the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2008 (SSI 2008/217);

the Official Feed and Food Controls (Scotland) Amendment Regulations 2008 (SSI 2008/218);

the Academic Awards and Distinctions (Additional Powers of the University of Aberdeen) Order of Council (SSI 2008/220);

the Offenders Assisting Investigations and Prosecutions (Substituted Sentences) (Scotland) Order 2008 (SSI 2008/232);

the High Court of Justiciary Fees Amendment Order 2008 (SSI 2008/237);

the Adults with Incapacity (Public Guardian’s Fees) (Scotland) Amendment Regulations 2008 (SSI 2008/238);

the Roads (Scotland) Act 1984 (Fixed Penalty) Regulations 2008 (SSI 2008/243); and

the Road Works (Fixed Penalty) (Scotland) Regulations 2008 (SSI 2008/244).

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

   the Bluetongue (Scotland) Amendment Order 2008 (SSI 2008/234); and
5. **Inquiry into the Regulatory Framework in Scotland**: The Committee will consider the Scottish Government’s response to its Inquiry into the Regulatory Framework in Scotland report.

Shelagh McKinlay
Clerk to the Committee
Tel: 0131 348 5175
The following papers are relevant to this meeting:

**Agenda items 1-4**

Legal brief (Private)  
Summary of Recommendations

**Agenda item 1**

Response from Patrick Harvie MSP

**Agenda item 2**

Scottish Government responses

**Agenda item 5**

Scottish Government response
The Committee will be invited to consider the following recommendations under consideration at today’s meeting. Decisions are a matter for the Committee.

**Agenda Item 1**  
Offences (Aggravation by Prejudice) (Scotland) Bill

**Section 3: Commencement and short title**

The Committee is invited to consider whether it is satisfied with the response from the member in charge of the Bill.

**Agenda Item 2**  
Scottish Government responses

the Licensing of Animal Dealers (Young Cats and Dogs) (Scotland) Regulations 2008 (SSI 2008/draft)

The Committee may wish to consider drawing this instrument to the attention of the lead committee and Parliament on the following grounds –

- in relation to question (a), that the meaning and effect of the offence provisions as a whole could be clearer; and to report the “reasonable excuse” defence to the offence of making false statements to the lead committee for further consideration; and

- in relation to question (b), that its drafting appears to be defective in so far as it purports to provide a licensing regime involving inspection in relation to persons whose premises are outside Scotland.

In relation to question (c), the Committee may wish to consider whether it is satisfied with the Government’s explanation and, if so, to draw this instrument to the attention of the lead committee and Parliament on this basis; and to report the effect of regulation 15(3) to the lead committee for further consideration.

In relation to question (d), the Committee may wish to draw this instrument to the lead committee and Parliament on the grounds that the meaning of regulation 19
could be clearer as to the investigatory powers available to Ministers, such that the lack of express provision could have an effect on the operation of the instrument.

the Diseases of Animals (Approved Disinfectants) (Scotland) Order 2008 (SSI 2008/219)

The Committee may wish to consider whether it is satisfied with the explanation provided by the Scottish Government in relation to article 13(2) and, if so, to draw this instrument to the attention of the lead committee and Parliament on this basis.

Agenda Item 3  Instruments subject to annulment

the National Health Service Pension Scheme (Scotland) Regulations 2008 (SSI 2008/224)

The Committee may wish to consider asking the Scottish Government –

(a) with regard to the definition of “collaborative services” in regulation 2.A.1, whether the reference to “section 16(1)(3)” of the National Health Services (Scotland) Act 1978 (“1978 Act”) is an error in so far as no such subsection exists. If the view is taken that this is an error, what is the correct reference, and what is the effect of the error considered to be;

(b) to clarify what the meaning of the reference to the “2006 Act” in regulations 2.B.1(6)(b)(v), 2.H.1(2)(e) and 3.H.1(3)(e) is in the circumstances where “2006 Act” is not defined in the Regulations;

(c) with regard to regulation 2.D.7(8)(b), whether the reference to “regulation 2.D.6(1)(c)” is an error, so far as that subparagraph does not exist in the Regulations. If the view is taken that this is an error, what is the correct reference, and what is the effect of the error considered to be;

(d) with regard to regulation 2.H.6(2), whether the reference to “regulation 2.H.(4)” is an error, so far as that paragraph does not exist in the Regulations. If the view is taken that this is an error, what is the correct reference, and what is the effect of the error considered to be;

(e) (i) with regard to the definition of “active member” in regulation 3.A.1(1), whether the reference to “regulation 3.D.5(9)” is an error, in respect that that sub-paragraph does not appear in the Regulations;
(ii) if the view is taken this is an error, to clarify what provision is intended to be referred to, and whether the provision is better included within the text of the definition, or included in a footnote;

(f) (i) with regard to regulation 3.A.8(8), whether the reference to “paragraph (3)(a)” is correct, in respect that it appears that paragraph 3(a) defines how
pensionable earnings will be calculated, and paragraph 3(b) appears to define circumstances where a member is treated as having continued to receive pensionable earnings, after their earnings are reduced or cease; (ii) if the view is taken this is an error, to clarify what provision is intended and what the effect of the error is considered to be; and

(g) to clarify what the meaning and effect of regulation 3.D.6(1)(b)(i) is, and whether it is considered that the meaning and effect of this provision could be made clearer.

the National Health Service Superannuation Scheme (Additional Voluntary Contributions, Injury Benefits and Compensation for Premature Retirement) (Scotland) Amendment Regulations 2008 (SSI 2008/225)

The Committee may wish to consider asking the Scottish Government –

(a) in relation to regulation 2(11)(d), which inserts a new paragraph (10)(a) into paragraph 10 of regulation 15 of the National Health Superannuation Scheme (Scotland) (Additional Voluntary Contributions) Regulations 1998, to explain whether the reference to regulation E2A(7) of the National Health Superannuation Scheme (Scotland) Regulations 1995 is an error in so far as no such regulation appears to exist. If the view is taken that this is an error, what is the correct reference, and what is the effect of the error considered to be; and

(b) to explain why regulation 3(5)(b) refers to the substitution of the words “widow, widower or surviving civil” with the word “surviving” in both cases where occurring in regulation 7(1) of the National Health Service (Scotland) (Injury Benefits) Regulations 1998 given that the words “widow, widower or surviving civil” appear only once and explain the effect of the drafting.

the National Health Service Superannuation Scheme (Scotland) Amendment Regulations 2008 (SSI 2008/226)

The Committee may wish to consider asking the Scottish Government to clarify –

(a) in relation to reg 46(2) which inserts new Q1(1A)(b) into the 1995 Regulations, (1) how this condition can be fulfilled, given that (a) it is not clear how members will have known about that condition in advance of 31st March 2008 (b) the condition did not have legal effect until the day after the condition was to have been fulfilled; (2) how this condition will be applied by scheme administrators and (3) what if any prejudice may be caused to members; and

(b) given new D1(2) and Schedule 1, para 10(2A) of the 1995 Regulations (inserted by Reg 9 and 63 respectively) empower Scottish Ministers to make determinations altering the figures to which those provisions apply, (1) why it was considered competent and appropriate to do so by means of
determination rather than amending the 1995 Regulations from time to time and (2) how such determinations are to be made transparent and accessible to readers of the 1995 Regulations.

the Teachers’ Superannuation (Scotland) Amendment Regulations 2008 (SSI 2008/227)

The Committee may wish to consider seeking clarification from the Scottish Government of the following –

(a) given that Regulation 16(3) and (4) govern the application of the textual amendment to the 2005 Regulations made by Reg 16(1) but do not do so as a textual amendment, to clarify the reasons for that approach and whether it would have been clearer to readers to have made those provisions as textual amendments; and

(b) how members and other readers of this instrument will be made aware of the availability of the right to make an election under regulation 30.

the Local Government Pension Scheme (Administration) (Scotland) Regulations 2008 (SSI 2008/228)

The Committee may wish to consider asking the Scottish Government to explain whether the reference to the European Assembly Elections Act 1978 in regulation 8(3)(b) is an error, given that the 1978 Act has been repealed by the European Parliamentary Elections Act 2002 and, if so, explain the effect of the reference to the 1978 Act.

the Local Government Pension Scheme (Transitional Provisions) (Scotland) Regulations 2008 (SSI 2008/229)

The Committee may wish to consider asking the Scottish Government to –

(a) explain why paragraph 1 of Schedule 2 begins “subject to paragraph 7” in the circumstances where there is no paragraph 7 of schedule 2 and to explain the effect of this reference;

(b) explain whether the reference in paragraph 1 of Schedule 2 to regulation 18(2) rather than regulation 18(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008 is an error and, if so, explain the effect of this error;

(c) explain whether the reference in paragraph 4(1) of Schedule 2 to regulation 14 rather than regulation 13 of the Local Government Pension Scheme (Administration) (Scotland) Regulations 2008 is an error and, if so, explain the effect of this error;
(d) explain whether paragraph 6(3) of Schedule 2 adds anything in the circumstances where it appears to be repetition of paragraph 3(1)(b) combined with paragraph 3(2) of Schedule 2; and

(e) in the circumstances where regulation 15(2)(b) refers to the “1987 Regulations” but this is not a defined term in the Regulations, explain the meaning and effect of this reference.

the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008 (SSI 2008/230)

The Committee may wish to consider asking the Scottish Government to explain whether the reference to the definition of “pension member” in regulation 2 should be to “pensioner member” in the circumstances where this is the term defined in section 124(1) of the Pensions Act 1995 and, if so, to explain the effect of this error.

the Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2008 (SSI 2008/233)

The Committee may wish to consider asking the Scottish Government, in relation to paragraph (2) of Column 2 of the Schedule, for Option 74 –

(a) whether a definition of “unfavourable condition” in Schedule 1 to the principal Regulations is either required or would be useful to readers; and

(b) if it is considered that this definition should have been added, what is the effect of the omission considered to be.

the Court of Session etc. Fees Amendment Order 2008 (SSI 2008/236)

The Committee may wish to consider asking the Scottish Government, in relation to the fees stated in Part I, paragraph G9 of Schedules 1, 2 and 3, to explain why these entries are appropriate, given that section 9 of the Conveyancing Amendment (Scotland) Act 1938 was repealed by schedule 15 to the Title Conditions (Scotland) Act 2003.

the Sheriff Court Fees Amendment Order 2008 (SSI 2008/239)

The Committee may wish to consider asking the Scottish Government, in relation to the Note contained in paragraph 33, Column 1, of Schedule 3 –

(a) if the paragraph to which it refers should be paragraph 38, rather than paragraph 37; and

(b) if so, what the effect of this error is considered to be.
The Committee may wish to consider asking the Scottish Government –

(a) in relation to the entries in the new Schedule 1B (at paragraphs 1, 2, 5-7, and 11) which state various payments for types of assistance by way of representation in summary criminal proceedings, whether the lack of specification of an amount in the columns 1 or 2 means that no payment is permitted for the work carried out, or that the type of work narrated is not applicable, or whether there is some other explanation for not stating an amount or “nil”; and

(b) given that the Explanatory Note is very brief and does not contain a summary explanation of particular regulations, what other steps would the Government propose taking to publicise an explanation of the meaning and effect of the various provisions for readers, for example, producing unofficial consolidations of the Regulations being amended, or issuing guidance on the provisions.

The Committee may wish to consider if it is content with these instruments.
the Bluetongue (Scotland) Amendment Order 2008 (SSI 2008/234)

The Committee may wish to consider asking the Scottish Government: -

(a) whether in extending the definition of “animals” in the principal Order to include camelids it is relying on powers under section 87(2) of the Animal Health Act 1981 and if so, what it considers the failure to refer to this power in the preamble means;

(b) whether the prohibition in article 22A of the principal order inserted by this Order is intended to cover all vaccine or only vaccine against bluetongue, and if the latter meaning is intended why it considers this is sufficiently clear from the Order as drafted; and

(c) who is empowered to give the authorisation referred to in Article 22A and why it considers this is sufficiently clear from the Order.

the Glasgow Commonwealth Games Act 2008 (Commencement No. 1) Order 2008 (SSI 2008/245)

The Committee may wish to consider if it is content with this instrument.
Annex

**Minor points**
The following instruments contain minor points, which the Committee may wish to raise informally with the Scottish Government—

The National Health Service Pension Scheme (Scotland) Regulations 2008 (SSI 2008/224)

The National Health Service Superannuation Scheme (Additional Voluntary Contributions, Injury Benefits and Compensation for Premature Retirement) (Scotland) Amendment Regulations 2008 (SSI 2008/225)

The National Health Service Superannuation Scheme (Scotland) Amendment Regulations 2008 (SSI 2008/226)

the Local Government Pension Scheme (Administration) (Scotland) Regulations 2008 (SSI 2008/228)

the Local Government Pension Scheme (Transitional Provisions) (Scotland) Regulations 2008 (SSI 2008/229)

the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008 (SSI 2008/230)

The Offenders Assisting Investigations and Prosecutions (Substituted Sentences) (Scotland) Order 2008 (SSI 2008/232)

The Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2008 (SSI 2008/233)

The Court of Session etc. Fees Amendment Order 2008 (SSI 2008/236)

The High Court of Justiciary Fees Amendment Order (SSI 2008/237)

the Adults with Incapacity (Public Guardian’s Fees) (Scotland) Amendment Regulations 2008 (SSI 2008/238)

The Sheriff Court Fees Amendment Order 2008 (SSI 2008/239)

The Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008 (SSI 2008/240)
Thank you for your letter dated 4 June 2008. Scottish Government officials have given me assistance in relation to the questions raised by the committee.

They advise that the Scottish Government has no intention of commencing the provisions on different days. Therefore, no reliance is placed on the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999, Schedule 1, paragraph 3(c).

They advise that, in line with standard practice, the Scottish Government does not intend to commence the provisions any earlier than 2 months after Royal Assent.

I trust that this answers the questions raised by the committee.

Yours sincerely,

Patrick Harvie MSP
The Licensing of Animal Dealers (Young Cats and Dogs) (Scotland) Regulations 2008 (SSI/2008/draft)

1. On 10 June 2008 the Scottish Government was asked for an explanation of the following matters—

“(a) given that regulations 4(3), 12(6), 17(1) and 17(2) specify offences but no maximum penalty on conviction is specified in relation to those offences,

i. whether it is intended that the penalties imposed by regulation 17(3) applies to those offences as it applies to all other offences under these regulations (other than as provided for by regulation 17(4)); and

ii. if so, whether it is intended that the prosecution must prove that such offences are committed “without reasonable excuse” as provided in regulation 17(3);

(b) whether the requirement for inspection and powers of inspection imposed under regulations 7(3) and 12 respectively are intended to apply in respect of premises used in connection with the sale of young cats or dogs which are situated outside Scotland;

(c) whether the power of the sheriff to give directions with respect to the conditions to which a licence is subject on appeal under regulation 15(3) is intended to override the mandatory licence conditions set out in regulation 10; and

(d) how the Scottish Ministers intend to enforce these Regulations in the event of their making a direction under regulation 19(2) that they do so in the absence of a power to appoint enforcement officers with appropriate powers of entry and inspection similar to those conferred on the local authority by regulations 12 and 16 respectively.”

2. The Scottish Government responds as follows—

(a) it is intended that—

i. the penalty imposed by regulation 17(3) applies to the offences in regulations 4(3), 12(6), 17(1) and 17(2); and

ii. the prosecution must prove such offences are committed “without reasonable excuse” as provided in regulation 17(3);
(b) these Regulations extend to Scotland only, so the requirements for inspection and powers of inspection imposed under regulations 7(3) and 12 do not apply to or in respect of premises situated outside Scotland;

(c) the power of the sheriff to give directions with respect to conditions under regulation 15(3) is intended to override all conditions including the mandatory licence conditions in regulation 10; and

(d) if the Scottish Ministers make a direction under regulation 19(2) then they are exercising the enforcement duties imposed on the local authority, and those duties include the function of appointing an inspector under regulation 12, who will if appointed by the Scottish Ministers have the powers of an inspector under regulation 16.

The Diseases of Animals (Approved Disinfectants) (Scotland) Order 2008 (SSI/2008/219)

3. On 10 June 2008 the Scottish Government was asked for an explanation of the following matter—

“The Committee considered the above instrument at its meeting on 10 June and asks the Scottish Government, in relation to article 13(2), how the Scottish Ministers intend to enforce the Order in the event of their making a direction they shall enforce instead of the local authority, in the absence of powers to appoint enforcement officers or inspectors with appropriate powers of entry and inspection etc.

This is given that section 52 and Part V of the Animal Health Act 1981 contain powers of local authorities to appoint inspectors and other officers for enforcement.”

4. The Scottish Government responds as follows—

Article 13(2)

Under section 89 of the Animal Health Act 1981, “inspector” is defined as a person appointed to be an inspector for the purposes of that Act by the Minister (i.e. the Scottish Ministers) or by a local authority, and this Order is made for the purposes of that Act. The Scottish Ministers are therefore able, if necessary, to appoint an inspector for the purposes of this Order. Section 63 sets out the general powers of such an inspector, including powers of entry.
Introduction

1. On 18 March 2008 the Committee published its report into the regulatory framework in Scotland. The Scottish Government’s response to this report has now been received and is attached.

Government Response

2. The Government has welcomed the Committee’s report, which it found helpful and constructive. It supports the Committee’s view that the current system should be simplified and is pleased that the Committee’s recommendations are built on tried and tested arrangements, and that it does not seek to replace current procedures wholesale. The Government supports the vast majority of recommendations made in the report and has indicated that it would be willing to bring forward a Government Bill to give effect to the proposed improvements.

3. The two recommendations that the Government does not support are—

Recommendation 12 on the deadline for Parliament to consider motions to approve a draft instrument or annul a negative instrument. The Committee recommended that the deadline for such motions should be 10 days after the expiry of the 40 day period. The Government considers that this would have significant practical disadvantages in terms of its forward planning, and mentions that there would be too few sitting days between parliamentary recesses at key times in the parliamentary year for this to be practicable.

Recommendation 15 which suggested that the option of the conditional annulment of instruments could be discussed further with the Government to identify whether it would be a workable addition to the options available to the Parliament. The Government considers that conditional annulment would cause significant confusion for those affected by the legislation and that it might give rise to legal uncertainty. It supports the retention of the existing arrangements for annulling instruments.

4. Recommendations that the Government wishes to give further consideration to are—

Recommendation 4 on the post-legislative scrutiny of delegated powers, where it wishes to give further consideration to how Parliamentary procedures might work in practice.

Recommendation 9 on emergency procedures, where it wishes to consider further the definition of an “emergency” instrument.
Next Steps

5. If the Committee is content, officials will discuss the outstanding issues identified above with Government officials and report back to the Committee on these after the summer recess. Officials will also discuss and report back on a timetable for the Bill.

Recommendation

6. The Committee is invited to note and comment on the Scottish Government’s response.

The Clerk to the Committee
June 2008
GENERAL

1. The Government welcomes the Subordinate Legislation Committee Report, *Inquiry into the Regulatory Framework in Scotland*, (12th Report, 2008 – SP Paper 74) and wishes to commend the SLC on both the balanced manner in which it has investigated the issues and the carefully considered conclusions it has reached. The Government regards the SLC’s report as extremely constructive and helpful in both tone and content.

2. The report is a thorough piece of work which lays the foundations for a range of potentially significant improvements to the processes by which subordinate legislation is scrutinised in the Scottish Parliament. The Government entirely shares the SLC Convener’s publicly expressed view that any changes to current scrutiny systems should deliver “a simpler, more transparent system which improves scrutiny”. That aspiration is something which informs both the SLC’s report and the Government’s formal response. Its realisation will continue to require close co-operation between Parliament and Government.

3. The Government recognises that decisions on the form and detail of the scrutiny process properly lie with the Parliament. Scrutiny of subordinate legislation is a significant part of the work undertaken by parliamentary committees and it is therefore essential that the arrangements intended to underpin that work make best use of committee time, and enable members to hold the Government properly to account.

4. The Government has its own direct interest in the efficiency of the Parliament’s processes for handling the programme of subordinate legislation. A careful balance requires to be struck between Ministers’ ability to exercise the delegated powers given to them by Parliament and the delivery of effective parliamentary scrutiny.

5. It is also essential that the wider interests of external bodies and the general public are properly considered when making any reforms to subordinate legislation procedures. Questions of transparency and accessibility are of vital importance in this context, and there is a special obligation on both Parliament and Government to ensure that the mechanisms by which subordinate legislation is made, scrutinised and implemented reflect the founding principles of the new Parliament, as expressed by the Consultative Steering Group.

THE GOVERNMENT POSITION

6. It is therefore heartening to find that the recommendations in the report reflect the need to strike a balance between competing demands and interests, whilst at the same time maintaining the essential constitutional distinction between the role and function of Government and Parliament.

7. The report proposes necessary and important simplifications to existing processes, which it argues are more complex than is necessary. But it does so by building on and developing tried and tested arrangements, rather than seeking to replace them wholesale. The Government welcomes this emphasis on improvements to procedures
which have evolved over many years and are well-understood, but which will nonetheless benefit from rationalisation and updating. In addition, in accepting almost all of the SLC’s recommendations, the Government explicitly endorses the principle that the proposed changes to procedure should not inappropriately reduce or weaken the level of scrutiny given to subordinate legislation.

8. Certain of the recommendations will, as is acknowledged in the report, necessitate further detailed discussion between the Government and the Parliament. The Government welcomes the opportunity to work further with the Parliament on these issues. The Government’s position on the overall principles of the SLC report is therefore set out in this response. It is likely that that position will be refined as more detailed discussion progress, as indeed the view of the Parliament may evolve as technical issues are explored further.

9. In summary, the Government is happy to accept the overwhelming majority of the SLC’s recommendations and would, in principle, be willing to bring forward a Government Bill to give effect to the proposed improvements. Any bill would, however, need to be paralleled by changes to Standing Orders and these will of course remain a matter for the Parliament. It will therefore be important to ensure that the detail of both legislative changes and amendments to Standing Orders are developed in close co-operation in order to deliver a coherent overall package of reforms.

10. The Government looks forward to continuing its positive and constructive engagement with the SLC as work on improving the scrutiny framework for subordinate legislation is taken forward.

DETAILED COMMENTS
General framework

Recommendation 1

- The Parliament should retain the current system and procedures for scrutinising subordinate legislation subject to the improvements recommended in this report; and

- legislation should be introduced in the course of this session to replace The Scotland Act 1998 (Transitional and Transitory Provisions) (Statutory Instruments) Order 1999.

11. The Government welcomes these recommendations. They provide a solid foundation on which to base any reforms of the subordinate legislative framework. Both this Government and the previous administration have signalled significant reservations about the integrity of the proposed Scottish Statutory Instrument Procedure (SSIP), argued for by the Session 2 SLC. Seeking to improve the existing framework, in the manner now proposed by the current SLC, will deliver significant benefits without the risks and disbenefits associated with the SSIP proposal.

12. The Government is willing, in principle, to promote a Bill to replace the Transitional Order. Parallel changes to Standing Orders will be required and it is therefore important that Parliament and Government co-ordinate work on the detailed, technical
specification of the overall package of reforms, without however compromising the ability of parliamentary committees to scrutinise any resulting Government legislative proposals with the normal degree of rigour and independence.

Delegation of powers

Recommendation 2

- All instruments should continue to be governed by procedures set down in the parent act.

13. This recommendation maintains the status quo and is supported by the Government.

Greater flexibility in parent Act

Recommendation 3

- The Scottish Government in drafting legislation, and the Parliament in its scrutiny role, should continue to make use of more flexible approaches which allow powers to be tailored to the situation for which they are required.

14. This recommendation represents the status quo and is supported by Government. The Government is willing to work closely with the Parliament to consider whether, and in what circumstances, it may be appropriate to provide for ‘open’ procedure for delegated powers under any future Bill. In our view, the availability of ‘open’ procedure can be useful in offering a degree of flexibility within the scrutiny framework, although decisions should continue to be made on a case by case basis, taking account of the particular purpose and context of the legislation in question.

Post-legislative scrutiny

Recommendation 4

- Post-legislative scrutiny of delegated powers should be added to the remit of the Subordinate Legislation Committee.

- A power should be conferred on Ministers enabling them to amend by order the procedure specified in a parent Act, on the recommendation of the SLC.

15. The Government acknowledges the concern that, over time, the procedures associated with delegated powers may become ‘mismatched’. The Government also acknowledges that it is for the Parliament to determine the extent and scope of delegated ministerial powers when passing primary legislation. Specifying the scrutiny procedure under which subordinate legislation is considered is part of this process and is very much a matter for the Parliament rather than the Government to determine.

16. Nonetheless, the Government believes that there is merit, in principle, in the SLC proposal to create a new ministerial power, which would be exercised at the suggestion of the Parliament. The Government agrees that more detailed examination of the
proposal should now take place, and that a key feature of its implementation is likely to include the SLC working in conjunction with lead committees to undertake post-legislative scrutiny of relevant statutes. Where such scrutiny identifies a need for adjustment the necessary changes could then be implemented by the Government, provided there is clear support for the change in the Parliament. We therefore agree that any power to make an order to amend the scrutiny procedure should be subject to affirmative resolution and should normally be pursued at the instance of the SLC. Whilst acknowledging that this provides a robust constitutional basis for the proposal, the Government would wish to explore the proposal further in order to establish a more detailed technical specification for how such a procedure might function in practice.

Number of procedures

Recommendation 5

- Class 6 (no procedure) and class 7 (not laid) procedures should be amalgamated into a single “no procedure” category.

Recommendation 6

- Unless compelling reasons can be identified for retaining these procedures, class 2 (made affirmative) and class 4 (draft negative) procedures should be discontinued.

Recommendation 7

- In transiting the discontinued procedures into one of the remaining (or new) procedures, there should be no downgrading in the level of parliamentary scrutiny; and that section 29 of the Legislative and Regulatory Reform Act 2006 should be considered as providing a useful model.

Recommendation 8

- Classes 1 (affirmative), 5 (negative), and 8 (super affirmative) procedures should be retained.

17. The Government agrees with the SLC that the number of classes (or types) of SSI should be streamlined and that the most realistic proposals – which would see a reduction from 8 classes of SSI to 5 – are those outlined by the SLC. Accordingly, the Government welcomes the recommendations and will be happy to develop a more detailed specification for achieving the desired rationalisation of the current 8 classes of instrument.

18. The Government shares the SLC’s view that any transition to a new class system should not result in any downgrading of procedure in respect of any instrument. Reference in the report to section 29 of the UK Legislative and Regulatory Reform Act 2006 as offering a possible model for ensuring a ‘trading-up’ of procedure is noted.
19. At present there is no statutory list of the forms of parliamentary control and one matter that might usefully be explored further is the option of explicitly defining the various classes of instrument in primary legislation.

Emergency procedures

Recommendation 9

- Class 3 procedure should be retained as an option for dealing with certain sorts of emergency procedure; and

- a specific procedure should be introduced for emergency negative instruments, including the elements outlined in this report; and this should only extend to emergency instruments and not to urgent instruments which should continue to be dealt with in the same way as breaches of the 21 day rule are at present.

20. The Government welcomes the recommendation to retain Class 3 procedure as being appropriate for implementing emergency procedure.

21. The second part of the recommendation proposes the introduction of a procedure for handling ‘emergency negative instruments’. This would appear to arise from discussion at the Government’s evidence session with the SLC in January. There is clear common ground on the need for procedures to deal with emergencies. As part of the consideration of what improvements could be made to existing procedures, the Government has suggested that there may be scope for improving existing arrangements. These improvements would seek to reduce instances where the Government was forced to bring negative instruments into force earlier than 21 days after they were laid in the Parliament – a scenario which at present would involve the Government in breaking the 21 day rule. That in turn requires the Government to write formally to the Presiding Officer.

22. The recommendation proposes a new procedure to cater for genuine emergencies arising in areas where the parent act provides for negative procedure but where it is apparent that it will be necessary to breach the 21 day rule. The Government considers the proposal to be constructive and helpful, but would wish to discuss further the definition of an “emergency”. In this connection there will be inevitable concerns that a process of this kind might make it easier for government legislation to be “fast-tracked” in a way which could reduce the opportunity for thorough parliamentary scrutiny. That is not an outcome which the Government is seeking. Any mechanism of this kind would therefore require to be carefully circumscribed and used in moderation. The SLC’s insistence on retaining the current arrangements for instruments which are merely “urgent” indicates that it too has identified the need for a very careful definition of a new “emergency” procedure. Further exploration of the potential options should now be undertaken.
Debates on instruments

Recommendation 10

- Lead committees should be made aware of the flexibility which already exists to dispense with debate on affirmative instruments and to take evidence on negative instruments.

23. The Government supports this recommendation which usefully recognises that committees can, within the existing subordinate legislation scrutiny framework, tailor the degree of scrutiny to the particular circumstances and significance of each SSI. This demonstrates the flexibility of the existing scrutiny procedures.

Timescales

Recommendation 11

- The period after which instruments subject to the negative procedure can come into force should be extended from 21 days to 28 days.

24. The Government supports this recommendation. The extension of the scrutiny period by a further 7 days is a constructive and proportionate means of striking a balance between the need to ensure that committees are not subject to undue scheduling pressures and the need to avoid unnecessarily delaying the progress of Government legislation. The effect of the proposal will be to help ensure that SSIs continue to be dealt with efficiently and effectively by the Parliament.

Recommendation 12

- There should be a deadline for Parliament to take a motion to approve a draft instrument and this should be 10 days after the expiry of the 40 day period provided for committees to report; and

- motions to annul made instruments should be taken by the Parliament within 10 days after the expiry of the 40 day laying period, provided that the recommendation to annul has been made by the lead committee within the 40 day period.

25. Recommendation 12 arises from long standing confusion over the deadlines within which the Parliament must conclude its scrutiny of instruments.

26. Article 11(3) of the current Transitional Order provides that (for negative instruments), ‘if, within the period of 40 days beginning with the date on which a copy of the instrument is laid before it, the Scottish Parliament so resolves, nothing further is to be done under the instrument after the date of resolution’.

27. It is therefore clear, as a matter of law, that the Parliament must determine its position in relation to a negative instrument within a 40 day period from the date on which the instrument is laid. However, Parliament’s Standing Orders require parliamentary committees to lodge a motion to annul a negative instrument, within a 40
28. The Transitional Order does not provide for any time limit within which Parliament must either approve or disapprove affirmative instruments. Rule 10.6 of the Standing Orders requires parliamentary committees to report on affirmative instruments within a 40 day period (or, in the case of some emergency orders, by the end of the relevant period).

29. The Government agrees with the SLC that any existing ambiguity over the time in which Parliament has to complete its scrutiny of instruments should be removed. The Government does not, however, agree that the appropriate solution is to extend the period within which the Parliament can vote on an SSI. The SLC proposal to extend the period within which Parliament can determine its position by a further 10 days (i.e. to 50 days in total) would, in the view of the Government, have significant practical disadvantages. This is because governments can only plan ahead with any certainty on the basis of the maximum period within which the Parliament can annul or decide not to affirm an instrument.

30. Thus, where a minister wishes a policy to take effect on a specific date, secure in the knowledge that the necessary subordinate legislation has been affirmed (or will not be annulled) by the Parliament, the safe assumption is to set the implementation date 40 days after the relevant instruments are laid. Extending that period to 50 days would significantly complicate matters, since there would then be too few sitting-days between parliamentary recesses at key times in the parliamentary year. Taking this parliamentary year as a model, if the Government required to have an instrument in place for 1 November, it would have been necessary to lay the SSI on 20 June. This would impose an unhelpful burden on the Government, without delivering any commensurate improvement in scrutiny.

31. It is of course rare in practice for Parliament to take as long as 40 days to consider an instrument, and in many cases SSIs are dealt with in less than half that time. But that is not something which any government can, or should, take for granted. It is therefore the Government view that the limit within which Parliament is required to determine its position should remain at 40 days, with efficiencies introduced in other areas, in particular through better access by committee clerks to information about likely forthcoming SSI business and by extending the period between the laying and coming into force of negative instruments from 21 days to 28 days (see Recommendation 11). Where time pressures remain a factor, the Government would also encourage parliamentary committees to undertake parallel rather than serial consideration of instruments (see Recommendation 13).

Parallel consideration

Recommendation 13

- There should be no change to the current procedures whereby lead committees are required to take into account the report of the Subordinate Legislation Committee before they conclude their own consideration of any instrument.
32. The Government notes that the SLC is not against the principle of scrutinising SSIs in parallel with lead committees, but is concerned to ensure that the conclusions reached are brought together in a manner which allows the Parliament to reach a definitive view on the instrument as a whole. Whilst this is ultimately a matter for the Parliament, the Government agrees that there are good arguments for structuring parliamentary consideration in such a way that the lead committee receives a report from the SLC before finalising its own report. This should not however mean that the lead committee only begins scrutinising an SSI once the SLC has concluded its consideration. To do could potentially result in scrutiny by one or other committee being more limited or time-pressured than should be the case.

33. The Government therefore supports paragraph 89 of the report, which draws the attention of lead committees to the approach being adopted by the Rural Affairs and Environment Committee. That committee begins its consideration of instruments as early as possible in the 40 day period, and does not await receipt of the outcome of the SLC’s scrutiny before starting to consider an SSI in which it has the lead, policy interest.

Annulment

Recommendation 14

- The power to recommend annulment of an instrument should rest solely with the lead committee.

34. The Government supports this recommendation, which reflects the status quo. It remains open to any member of the Parliament (whether or not a member of the lead committee) to propose to the committee that it should recommend annulment.

Conditional Annulment

Recommendation 15

- The option of conditional annulment should be discussed further with the Scottish Government to identify whether it could be a workable addition to the options available to the Parliament; if so, it could be provided for in the proposed bill.

35. This recommendation reflects the view that committees may be reluctant to recommend annulment of an SSI, especially after it has come into force, because they are uncertain of the practical consequences.

36. The Government notes that the report contains no firm evidence as to the extent to which committees perceive this to be a problem. In the event that a lead committee were inclined to recommend annulment of an SSI and it considered that additional background was required, it would be open to the committee to ask the relevant Minister to appear before it to give evidence. This evidence could readily include matters relating to the consequences of either not bringing the legislation into force or of revoking it after it had come into force. It is therefore difficult to see the advantages of mechanism allowing the conditional annulment of an instrument. Indeed, a procedure of this kind would be likely to cause significant confusion for those affected by the legislation and might give rise to legal uncertainty. This would be particularly unwelcome where criminal
liability might arise or where commercial interests or individuals are required under legislation to carry out particular actions or incur costs.

37. Rather than attempt to construct a new procedure under which SSIs might be conditionally annulled, the Government believes that existing arrangements should be retained. These already give parliamentary committees considerable power. Thus, where a committee has serious concerns about an SSI this would normally be addressed by drawing these concerns to the attention of the Government, where necessary indicating that the committee may be prepared to recommend annulment. Where it is convinced by the arguments advanced, the government has the option to agree to revoke the instrument in question and to lay an amended instrument which addresses the concerns raised.

38. The Government therefore does not support the proposal for a procedure to conditionally annul SSIs. But it does remain willing to consider any further arguments the SLC may wish to present in support of its proposal.

Amendments

Recommendation 16

- There should be a procedure for the Scottish Government to withdraw and relay draft instruments to make agreed technical changes without affecting the 40 day time limit;

- further consideration should be given to a procedure which would allow minor technical changes to be made to instruments which have already been made and are subject to negative procedure; and

- SLC and Scottish Government officials should be asked to develop detailed proposals for the scope and operation of the proposed amendment procedures.

39. The Government welcomes these recommendations, which reflect the Government’s existing support for the introduction of a “certification procedure” to allow technical changes to SSIs after they have been laid in the Parliament. In essence, in relation to negative instruments, the process would allow for relatively minor legal and drafting points to be addressed by means of a certificate, the terms of which would be jointly agreed by a lead Minister and the Convener of the SLC. This would occur before the instrument came into force. Similarly, necessary technical changes to draft affirmative SSIs would be facilitated by allowing Ministers to make drafting or other corrections without restarting the 40 day period.

40. The Government agrees with the conclusion in the report that policy amendments should not be permissible under these new procedures. Where policy changes do require to be made after an instrument has been laid in the Parliament, current arrangements already allow for it to be withdrawn/revoked and re-laid. To do so without “restarting the clock” would carry the risk that the Parliament would then have inadequate time to consider the new policy implications. This would clearly be undesirable.
Planning of subordinate legislation

Recommendation 17

- The Scottish Government should provide Parliamentary committees with a 6 week forward programme of subordinate legislation on a monthly basis and, given that the Scottish Government’s tracker system is now in place, this should begin quickly; and
- the content of the Scottish Government’s forward programme should be kept under review and should be adjusted in the light of experience.

41. The Government supports this recommendation and has begun providing monthly statistical information covering those SSIs which it expects to lay in the following 6 week period. This arrangement will be kept under review in order to monitor its effectiveness.

Consolidation

Recommendation 18

- Procedures should be established specifically for the scrutiny of consolidating instruments and these should be based on the previous SLC’s recommendations.

42. The Government supports the establishment of procedures which would make it more straightforward to consolidate SSIs. For example, where no new policy matters are introduced (i.e. where the consolidation is a “pure” or “simple” consolidation, or more properly a “consolidation without substantive amendments”) the Government believes that a simplified scrutiny process would have considerable attractions. This is also true for “rolling” or “amending” consolidations (i.e. consolidations with substantive amendments).

43. The Government therefore acknowledges the benefits of introducing streamlined procedures which would encourage the consolidation of subordinate legislation. The benefits are likely to be particularly significant for the end-users of legislation, for whom the accessibility and transparency of legislation is an important factor.

44. A Consolidation Working Group has already been established to take work in this area forward at a technical level. The Group brings together officials from the Scottish Government, the Scottish Parliament and the Scottish Law Commission. The Government remains committed to working closely with the Parliament to put in place appropriate new parliamentary procedures which would allow for both “simple” and “amending” consolidations to be undertaken using streamlined processes. Formal implementation of such new procedures is likely to require changes to Standing Orders and therefore remains primarily a matter for the Parliament.

Local instruments and Rules of Court

Recommendation 19

- Local instruments should continue to be made as SSIs;
• publication of web versions of local instruments on the Queen’s Printer for Scotland website should continue; and

• a clearer definition of local instruments should be adopted.

45. The Government supports this recommendation and will work with relevant interests to consider how the term ‘local instrument’ could be more clearly defined.

Recommendation 20

• Rules of Court should continue to be made as SSIs.

46. The Government supports this recommendation, which reflects the status quo.

Consequences of not laying

Recommendation 21

• The Scottish Government should continue to lay instruments as soon as possible after making but failure to lay should not invalidate the instrument.

47. The Government supports this recommendation, which reflects the status quo and maintains legal certainty in relation to the effect of an instrument.

Next steps

Recommendation 22

• SLC and Scottish Government officials should begin early discussions about the detailed content of a Bill to replace the Transitional Order and the process of delivering changes to the subordinate legislation scrutiny process.

48. The Government supports this recommendation and is willing in principle to bring forward a bill giving effect to the SLC’s recommendations, subject to the small number of reservations expressed above. The Government is happy for its officials to meet their parliamentary counterparts, in order to explore technical issues in greater detail. Legislative proposals brought forward by the Government will, in certain cases, require to be paralleled by changes to Standing Orders. These remain a matter for the Parliament, but it will be important that both legislative and internal procedural changes are co-ordinated in such a way as to deliver a coherent overall result. The Government remains committed to working closely with the Parliament to deliver a package of reforms which meet the needs of both Parliament and Government, and which therefore serve the needs of Scotland as a whole.

SCOTTISH GOVERNMENT
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