

REPORT

To: GENERAL PURPOSES COMMITTEE		Subject: INQUIRY INTO THE REGULATORY FRAMEWORK IN SCOTLAND	
From: DIRECTOR OF ADMINISTRATION			
Date: 13 September 2006	Ref: WBK/PG		

**1. PURPOSE OF REPORT**

- 1.1. To advise the Committee of a proposed new simplified procedure to replace the current procedures for scrutinising subordinate legislation. This proposed new procedure has been called by the Subordinate Legislation Committee the Scottish Statutory Instrument Procedure (SSIP).

**2. BACKGROUND**

- 2.1. The Subordinate Legislation Committee previously conducted an inquiry in two phases into the Regulatory Framework in Scotland. The first phase examined the existing regulatory framework in Scotland and what would be required to improve the quality of new and existing devolved regulation. The Council contributed to this Phase 1 work and this Committee at its meeting on 25 August 2004 approved a Council response to the consultation document issued by the Subordinate Legislation Committee.
- 2.2. For Phase 2, the Subordinate Legislation Committee's inquiry looked at the actual process of regulation (also known as Subordinate Legislation). The Committee examined the supervision which the Parliament should exercise over subordinate legislation most of which was made by Scottish Ministers. On 24 August 2005 this Committee at a meeting approved a Council response to the Consultation Document issued regarding Phase 2.
- 2.3. During the inquiry the Subordinate Legislation Committee heard from a wide range of organisations and individuals from Scotland and from further afield on the current system of scrutiny and procedures. On the basis of the evidence received and from its own experience over the last seven years the Subordinate Legislation Committee was attracted to taking the opportunity to devise a new simplified procedure to replace the range of current procedures which are seen as complex and archaic. The Subordinate Legislation Committee called this procedure the Scottish Statutory Instrument Procedure (SSIP).
- 2.4. In view of the innovative nature of the Scottish Statutory Instrument Procedure and the impact this will have in terms of the planning, making, scrutiny, time tabling and the processing of subordinate legislation, the Subordinate Legislation Committee agreed to consult upon the recommendations it made in its draft report before finally making up its mind on to what to propose to Parliament. In the interests of transparency the Subordinate Legislation Committee has gone a step further and has published its draft report in full. Comments were invited from various organisations regarding the draft report that has been prepared.

### **3. ISSUES FOR CONSIDERATION**

3.1. The consultation has been over the summer period and a response to the consultation on the draft report has been prepared and issued, in consultation with the Convener of the Committee. Unfortunately, the time limit for consultation did not allow the full response to be placed before the Committee before it was sent but the Committee will be in a position to consider homologation. The response is annexed to this report.

### **4. CORPORATE CONSIDERATIONS**

4.1. The issues contained in this report do not significantly impact on the Council's wider policies and positions.

### **5. RECOMMENDATION**

5.1. The Committee is asked to homologate the Council response to the Clerk to the Subordinate Legislation Committee.

*Walter B. Kelgou*  
b. **Director of Administration**

Members seeking further information on the contents of this report are asked to contact Paul Guidi, Principal Solicitor (Licensing) on extension 2294.

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#### **Administration**

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Dear Sirs

### **Inquiry into the Regulatory Framework in Scotland - Draft Report**

I refer to the Consultation Paper issued by you relative to the above in which views were sought regarding the various issues raised in the Consultation Document.

I now have pleasure in enclosing the formal response of North Lanarkshire Council to the Consultation Document. For the sake of simplicity, questions in respect of which comments were invited are repeated and the Council's response is detailed immediately below each question.

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

North Lanarkshire Council ("the Council"), in a previous consultation response, indicated that it felt the existing procedures for scrutinising Scottish Statutory Instruments were sufficiently clear and adequate. If changes are to be made, however, as appears to be the case, the Council can see the advantage in simplifying the procedure. The Council therefore believes that rather than make further changes to the existing procedure, it would be beneficial to replace these procedures with the proposed SSIP, with certain exceptions.

**(2) Should there be parallel consideration of instruments by both the Subordinate Legislation Committee and the lead Committee?**

North Lanarkshire Council's view is that the benefit of such parallel consideration would be that the Subordinate Legislation Committee would have an extra twenty days to consider the instrument. The Council understands that the procedure as it stands does not prevent the lead Committee from considering the instrument for the full forty days, though it may have become practice that consideration is not given until after the report is received from the Subordinate Legislation Committee. If this extra time is required by the Subordinate Legislation Committee then the proposed parallel consideration would certainly be of use. North Lanarkshire Council feels, however, that there may be a difficulty if, as suggested, draft instruments can be amended following proposal by the Subordinate Legislation Committee. Thus, for example, the instrument itself may change on the 39<sup>th</sup> day and there would then not be adequate time for the lead Committee to consider the instrument as amended. Whilst the amendment should be of a technical nature, there may be circumstances where this will impact on the policy side of the instrument. The Council also question the value in requiring the Subordinate Legislation



Committee to send its reports to the lead Committee when the lead Committee may not have time to consider these and in any case will not be required to.

(3)

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

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

As stated above, North Lanarkshire Council sees the benefit in there being a single procedure. Laying the instruments in draft, subject to being disapproved by the Parliament within 40 days, would in the Council's opinion be the most appropriate procedure to follow. This would mean that uncontentious instruments could go through the procedure fairly simply without requiring significant action whilst at the same time giving an opportunity to the Parliament to prevent instruments being made. Given what is noted in the report about timescales, the Council would doubt that reducing the period to 30 days would be appropriate.

**(4) Should the Parliament be able to take a motion to disapprove a draft instrument or annul an instrument for 10 days beyond the 40 day period?**

North Lanarkshire Council believes that the Parliament should be able to make a motion to disapprove a draft instrument or to annul an instrument for 10 days beyond the 40 day period, providing the disapproval or annulment was recommended within the 40 day period. The 40 day period is clearly intended to be the period of time that Parliament has for consideration of the draft instrument. If Parliament were required to make the motion within the 40 day period the Committee recommendation would have to be submitted well within this period, reducing consideration time.

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

In North Lanarkshire Council's opinion a three month forward programme would be significantly beneficial as it would allow the various Committees to plan their work more effectively. North Lanarkshire Council would, however, comment that in order for this to be effective the forward programme must be sufficiently detailed to allow the Committee to predict the amount of time consideration of each instrument will require. The Council would also comment that if a fixed three month period is used, this will still not provide a great deal of notice in relation to instruments that are to be laid in the first month of the period, unless the three month forward programme requires to be laid in advance. For example, if the three month programme for the months April, May, June is laid on 1 April, this will not give adequate notice of instruments which are to be laid that April.

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

North Lanarkshire Council agrees that the SLC should be able to recommend annulment or disapproval only on the ground that there are serious doubts about the legal validity of the instrument, as the SLC's role is only to look at the construction and validity of the instrument, not the substance.

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

North Lanarkshire Council believe that the instrument should be capable of amendment with the agreement of the SLC without affecting the original timetable for consideration. However, as stated previously, North Lanarkshire Council see a difficulty in that if such an amendment is

made towards the end of the 40 day period, the lead Committee may not have time to consider the instrument as amended. Although the amendment should simply be a technical change, there may be circumstances where it will have an impact on the lead Committee's policy consideration. The Council consider that this difficulty could be cured by putting a time limit on amendments, for example, requiring any amendments to be completed by the 30<sup>th</sup> day of the consideration period.

North Lanarkshire Council believes consideration should be given to extending the power to amendments with the approval of the lead Committee. Whilst this may affect the substance of the instrument, the amended instrument will still be subject to scrutiny by the lead Committee. In the Council's opinion requiring the clock to start again for any non technical amendments simply leads to delay in the process. This would also reduce the number of situations where the Parliament was left in a "take it or leave it" situation.

**(8)**

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

North Lanarkshire Council agrees that emergency instruments should be subject to the exceptional procedure.

**(b) Should emergency instruments be defined as proposed?**

North Lanarkshire Council agrees with the definitions given for emergency instruments, but would question whether another type should be added. The Council wonders whether there may be a situation where producing a statutory instrument becomes an emergency, but such an emergency situation was not envisaged either when the act was drafted or subsequently by Scottish Ministers. In these circumstances the instrument would, according to the proposal, require to go through the standard procedure.

**(9) Should the exceptional procedure be confined to emergency and other instruments of an urgent nature?**

North Lanarkshire Council feels that the exceptional procedure must be restricted to emergency and other instruments of an urgent nature. For the proposed changes to work exceptional procedure should only be used where there is good reason.

**(10) Should consolidation instruments be subject to the modified general procedure under which the lead Committee will not be entitled to consider "pure" consolidations and only substantive amendments in a "rolling" consolidation?**

North Lanarkshire Council takes the view that consolidation instruments should only be considered by the lead Committee in a "rolling" consolidation. The Council believes that there should be clear guidelines as to what constitutes a "rolling" consolidation and a "pure" consolidation as it may not always be obvious.

**(11) Should commencement orders be subject to the modified general procedure under which the lead Committee will not be entitled to consider them?**

North Lanarkshire Council agree that commencement orders should not be considered by the lead Committee. Again, however, the Council believes that in certain circumstances it may be difficult to determine whether or not an order is a commencement order. It would therefore be beneficial if this decision is made by the SLC in the same manner as with consolidation instruments.

(12)

- (a) **Should Scottish Statutory Instruments (SSIs) continue to be defined as at present?**
- (b) **Should local instruments cease to be made by statutory instrument?**
- (c) **Should local instruments be defined as proposed?**

North Lanarkshire Council agrees that SSIs should continue to be defined as at present, local instruments should cease to be made by statutory instrument and local instruments should be defined as proposed. The Council would, however, suggest that in some circumstances there may be some dispute as to whether an instrument is a local instrument or not. In these circumstances North Lanarkshire Council would suggest that the decision is again made by the SLC.

(13) **Should rules of court cease to be made by statutory instrument?**

North Lanarkshire Council agrees that rules of court should cease to be made by statutory instrument.

(14)

- (a) **Should an instrument which requires to be laid after being made (the exceptional procedure) be required to be laid as soon as practicable after being made and in any event not later than 7 days after making?**
- (b) **Should an instrument which is made with or without either a draft being made under the general procedure or the instrument being laid after making under the exceptional procedure (as required above) be treated as never having had any legal effect, subject to the following exception?**
- (c) **Where an emergency instrument or other urgent instrument is brought into force within the 7 day period but are not laid within that period, should that invalidate the instrument the day after that period expires?**

North Lanarkshire Council agrees that instruments should be treated as indicated in (a), (b) and (c). The Council acknowledges that there are situations in which an instrument may require to be made before being laid, but there should be no reason for it not thereafter being laid within 7 days. The Council also agree that for the sake of clarity if the instrument has already come into force within that 7 day period it should not be invalid until such time as the 7 day period ends.

(15)

- (a) **Should the SSIP apply to all SSIs and to all other statutory instruments which are subject to procedure in the Scottish Parliament?**
- (b) **Should it apply in all cases (both past and future) where there is a power to make such instruments?**

North Lanarkshire Council agrees that the SSIP should apply to all SSIs, to all other statutory instruments which are subject to procedure in the Scottish Parliament and in all cases where there is a power to make such instruments. There is benefit in the various instruments being treated in the same manner and this can be achieved by applying the SSIP to all. For the avoidance of doubt North Lanarkshire Council do not believe guidelines/codes of conduct should be treated as SSIs.

## **Further Comment**

North Lanarkshire Council note that, where an instrument requires to be made before being laid (the exceptional procedure), it requires to be laid within 3 days. Where this does not happen a full explanation must be given for the delay and the SLC will have the power to report any instrument to the Parliament where it is not satisfied with the explanation given. North Lanarkshire Council believe that, given that the instrument will not have any legal effect if not laid within 7 days, the 3 day requirement is not necessary. North Lanarkshire Council believe the 7 day limit is adequate to ensure that instruments are laid expeditiously. North Lanarkshire Council also notes that there does not appear to be a similar 3 day time period where instruments have been made during the period of dissolution.

North Lanarkshire Council also note that where an instrument is not laid within 7 days of it having been made, the Executive will be required to provide reasons for the SLC who will then be able to report to the Parliament. The Council believe that this would create uncertainty in that it is likely that this procedure would last longer than the 7 day period. There could therefore be a situation where an instrument has been made and subsequently laid after, for example, 5 days, whilst a decision on its validity has still not been reached 7 days thereafter (following an adverse report from the SLC).

North Lanarkshire Council would also appreciate clarification on a particular aspect of the report. At paragraph 242 it is stated that "The 40 day period would be calculated as at present, namely as calendar days except that no account is taken of any time during which the Parliament is dissolved or is in recess for more than 4 days". The Council would be grateful if it could be clarified that this means that if, for example, Parliament is in recess for 10 days, none of these days will be taken account of, as opposed to 4 of them being taken account of.

North Lanarkshire Council hope the foregoing comments are of assistance.

Yours faithfully

**Director of Administration**