The Committee will meet at 2.00 pm in Committee Room 5.

1. **Items in private:** The Committee will consider whether to take item 6 in private. The Committee will also decide whether to consider the main themes arising from the evidence received relating to the Christmas Day and New Year’s Day Trading (Scotland) Bill in private at subsequent meetings.

2. **Christmas Day and New Year’s Day Trading (Scotland) Bill – witness expenses:** The Committee will decide whether to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any expenses of witnesses in the inquiry.

3. **Christmas Day and New Year’s Day Trading (Scotland) Bill:** The Committee will take evidence on the Bill from—

   Fiona Moriarty, Director, Scottish Retail Consortium, and Kevin Hawkins, Director General, British Retail Consortium; and

   Bruce Fraser, Scottish Divisional Officer, and Liz McHugh, Shop Steward, USDAW;

   and then from—

   Peter Betts, Store Manager, Debenhams; and

   Graeme Ross, Deputy Chief Officer, Scottish Co-op;

   and then from—

   Riddell Graham, Director of Strategy, Partnerships and Communications, VisitScotland;
Subordinate legislation: The Committee will consider the following negative instrument—

The Civil Legal Aid (Scotland) Amendment (No. 2) Regulations 2006 (SSI 2006/325).

Regulatory Framework Inquiry: The Committee will consider a note by the clerk in relation to the Subordinate Legislation Committee Inquiry into the Regulatory Framework in Scotland.

Christmas Day and New Year’s Day Trading (Scotland) Bill: The Committee will consider the main themes arising from the evidence session, to inform the drafting of its Stage 1 report.
Papers for the meeting—

Agenda Item 3

Members are reminded to bring with them copies of the Bill, Explanatory Notes and Policy Memorandum, available from Document Supply or from the Parliament's website:
http://www.scottish.parliament.uk/business/bills/59-xMasDay/index.htm

Written evidence (to be circulated in hard copy) J2/S2/06/20/1
Summary of written evidence (PRIVATE PAPER) J2/S2/06/20/2
Lines of questioning (PRIVATE PAPER) J2/S2/06/20/3
SPICe briefing on Bill J2/S2/06/20/4
SPICe briefing on UK legislation J2/S2/06/20/5
Letter from Finance Committee on the Christmas Day and New Year's Day Trading (Scotland) Bill J2/S2/06/20/6

Agenda Item 4

Cover note by Clerk (including SSI and Executive Note) J2/S2/06/20/7

Agenda Item 5

Note by Clerk J2/S2/06/20/8

Documents circulated for information only—

Letter from Minister for Justice on Draft Tribunals, Courts and Enforcement Bill, dated 14 August 2006

Forthcoming meetings—

- Tuesday 12 September 2006, Committee Room 1
- Tuesday 19 September 2006, Committee Room 6
The Christmas Day and New Year’s Day Trading (Scotland) Bill was introduced in the Parliament on 20 March 2006 by Karen Whitefield MSP. The Bill would prohibit most large shops from opening on both Christmas Day and New Year’s Day for the purpose of making retail sales. This briefing reviews the key arguments for and against the proposals and identifies some of the underlying evidence.
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SUMMARY OF THE BILL

This bill is not a complex one. With the exception of a number of exempted categories the Bill would prohibit large shops from opening on both Christmas Day and New Year’s Day for the purpose of making retail sales.

Exemptions include the following:

- **Cafes, pubs, takeaways** - Trade or business ‘mainly or wholly’ relating to meals, refreshments, or alcohol for consumption on the premises or prepared for order for consumption off the premises.

- **Registered pharmacies** – that are open solely for dispensing prescriptions.

- **Transport related shops** – in ports, railways stations, airports, and motorway service stations.

- **Petrol stations** – wholly or mainly for the sale of fuel for motor vehicles.

**Penalty for allowing a shop to trade** – The occupier and shop manager would be prosecuted by summary criminal procedure and subject to a fine not exceeding £50,000.

The definition of large shop – The Bill specifies a relevant floor area of 280 sq m (compared to 260 sq m for a standard doubles tennis court, 203 sq m for Committee Room 2 and 666 sq m for the Parliament’s chamber). ‘Relevant’ means the floor area used for making retail sales or display of goods.

Both the above levels replicate the Christmas Day (Trading) Act 2004 (chapter 26) now applying in England and Wales, which in turn took its definitions from the Sunday Trading Act 1994 (chapter 20).

**Aims of the Bill** - By taking these measures it is hoped the Bill will contribute to the following policy objectives:

- To allow retail workers a day off on Christmas Day and New Year’s Day.

- To maintain the special nature of those days.

Behind the Bill is a fear that if legislation is not put in place now it could become more common for large stores to open on Christmas Day and New Year’s Day. If one large store decides to open others may be forced to follow suit it is argued (a so called ‘domino effect’), resulting, it is suggested, in no additional economic benefit for the stores and the erosion of these two days being treated as national holidays.

Further details can be found as follows:


- Christmas and New Year’s Day Trading in Scotland – Consultation, and Consultation Summary and Conclusions.
SUMMARY OF ARGUMENTS FOR AND AGAINST THE BILL

The following table summarises some of the main arguments made by various individuals and organisations for and against the proposals in the Bill. Further details are provided later in the briefing.

<table>
<thead>
<tr>
<th>Arguments For</th>
<th>Arguments Against</th>
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<tbody>
<tr>
<td>· Helps keep Christmas Day and New Year’s Day ‘special’</td>
<td>· The Bill runs counter to the principles of freedom of choice, both for employees and for consumers</td>
</tr>
<tr>
<td>· Enables retail workers to spend time with their families and take a break during a very busy period</td>
<td>· Not everyone in Scotland is a member of a conventional ‘family’; not everyone considers Christmas to be ‘special’, a concept which has evolved over the years and will continue to evolve</td>
</tr>
<tr>
<td>· Supports ‘family life’</td>
<td>· Retail is an important sector of the economy; to grow the economy restrictions on operations should be removed rather than added to</td>
</tr>
<tr>
<td>· Without safeguards the ‘choice’ of whether to work or not will be illusory. Pressure will be brought to bear to ensure that stores are staffed on these days.</td>
<td>· There may be a significant specific impact on the economy. For some this is particularly the case with the proposed New Year’s Day restrictions, which are thought likely to have a negative impact on tourism associated with the Hogmanay celebrations</td>
</tr>
<tr>
<td>· A voluntary code amongst large shops, or general convention, is not likely to hold. Once one retailer breaks ranks others would be forced to follow, with the effect of simply spreading the same level of spend slightly more thinly</td>
<td>· Employees may lose out on opportunities to work, at times when they might be earning premium overtime payments</td>
</tr>
<tr>
<td>· Large stores opening would increase the need for other services to operate including ancillary retail services (wholesale, distribution etc), public transport and health services</td>
<td></td>
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LEVEL OF SUPPORT

Some 81 of the 91 responses to the Member’s consultation (Whitefield 2005) expressed support for the proposals whilst 4 were against them entirely. 3 respondents took no position on Christmas Day but opposed New Year’s Day restrictions, and the remaining 3 actively supported the Bill in relation to Christmas Day but not New Year’s Day.

The Bill had 33 MSP supporters one month from the date it was lodged (1 December 2004). This included 27 Labour MSPs, 1 Independent, 2 Scottish Socialist Party, 2 Scottish National Party and 1 Liberal Democrat.

A petition (PE 700) on the proposed measures, which was presented to the Parliament on 8 January 2004, attracted 13,797 signatures. The Public Petitions Committee discussed the
petition on 21 January 2004 and agreed by division to support the general principles of the petition (For 6, Against 0, Abstentions 2), and to write to the Executive seeking its views on the issues raised in the petition, together with an indication of whether it would be minded to support the proposed Members’ Bill on the topic.

The Executive’s response (Scottish Parliament March 2004) stated that the Executive appreciated the concerns of staff who are or may be required to work on Christmas and New Year’s Day. The response also stated that the Executive was aware that;

“(a) to regulate shop trading hours on Christmas and New Year’s Day would set a regulatory precedent in this area and add to the burdens on business: (b) the Scottish Retail Consortium reported that none of its members actually opened on Christmas Day 2003: and (c) a prohibition on trading by large shops on New Year’s Day would have a negative impact on tourism”

The Executive stated it wished to reserve its position until the outcome of the Member’s consultation was known.

ALTERNATIVES TO THE BILL

The following alternative means of achieving similar policy goals have been discussed by consultees to the Bill, and in debate on a similar measure applying to England and Wales (now the Christmas Day (Trading) Act 2004).

VOLUNTARY CODE OR LEGISLATION

If restrictions are needed some have argued that a voluntary code amongst large retailers would be appropriate. The summary of consultation responses (2005) states:

“The introduction of a voluntary code, rather than legislation, was mentioned by 7 respondents. Those who support the proposals took the view that such a code would not be sufficient to protect workers as they felt that employers would not abide by it. The Scottish Retail Consortium on the other hand indicated that they would like to see their members being given the opportunity to see if a voluntary code to protect staff with no desire to work on New Year’s Day would work. They said their members had already agreed that if their stores opened on New Year’s Day in the future, they would sign an agreement to ensure staff do not feel obliged to work on New Year’s Day”.

The Department for Trade and Industry’s previous consultation on Christmas Day Trading proposals for England and Wales (2003a) stated:

“The Government would have liked to address the issue of Christmas Day opening without recourse to new regulation. But consideration of alternative approaches produced no viable options. Although some form of voluntary consensus on the part of retailers might have delivered the desired result in theory, in practice such a consensus would have contravened Competition Law”

WIDENING THE FOCUS BEYOND RETAIL TRADE

It has been argued by some that protecting workers (and so also their families) may be more logically served by changes to wider reaching employment law (a reserved area) rather than by restricting ‘trade’ in the retail sector. This has been an argument used most conspicuously by
those opposing the proposals and seeking to point out inconsistencies, rather than as a proposition for increased employment protection.

For example the Scottish Retail Consortium (consultation responses 2005) highlights what it sees as the inconsistencies of the Bill. It asks:

“Why is the proposal only targeted at the retail sector? If there is a principle that employees should not feel under pressure to work on New Year’s Day, surely this should apply to all people in Scotland, not just employees of one sector.”

The SRC continues:

“Whilst it is recognised that the Scottish Parliament does not have the powers to regulate employment practices and only trading practices, this means that although shops would be prevented from trading by this proposal, staff could still be working, so the proposed legislation would not have the desired impact. For instance, larger stores are prevented from trading on Easter Sunday in England and Wales, but there are often staff working behind closed doors in order to get the store ready for the following day. The proposal also means that retail support staff such as delivery and logistics staff, internet site support staff and telesales staff would potentially be working on Christmas day and New Year’s Day. SRC members who are electrical retailers have reported that Christmas Day is one of the busiest days of the year for telephone support staff who deal with enquiries from members of the public who have received electrical equipment as gifts”.

DEBATE ON THE PRINCIPLES OF THE BILL

This section highlights some of the evidence, arguments and wider debate on the principles of the Bill.

FREEDOM OF CHOICE

It has been suggested that the decision as to whether to work or to shop on Christmas Day or New Year’s Day should be one for the individual, not for the state. Tesco Stores Ltd states (Consultation responses 2005) that the current framework of self regulation presents no foreseeable problems for staff.

“It must be noted that if there is a demand for shopping on Christmas Day and New Year’s day and staff are willing to work, a ban would be removing the individual right to choose, irrespective of the individual’s personal needs. As an organisation, we have a diverse workforce including many individuals who would choose to work, on the above dates, if given the choice in exchange for being allowed to take time off for other events and festivals they celebrate, that may occur at other times during the year. Furthermore should there be a demand for stores to open at these times, but the law restricts trading, then ultimately the customers and many employees are all at a loss.”

However the Scottish Trades Union Congress (Consultation responses 2005) suggests that the voluntary nature of such choice would be illusory

“It can be anticipated that the offer from employers wishing to open on these days would be that staff attendance would be purely voluntary and well remunerated. In reality there tends to be a variety of pressures on workers in such situations varying from direct pressure from the unscrupulous employer to more implicit pressure derived from workplace expectations and peer pressure. An example of this would be the significant
proportion of individual workers who agree to sign away their rights under the EU Working Time Directive despite the wish to work less than 48 hours per week”

SOCIAL IMPACT

The ‘special’ nature of Christmas Day

The Policy Memorandum to the Bill cites numerous shared cultural references to the ‘special’ nature of Christmas including films such as ‘It’s a Wonderful Life’ and books such as Dickens’ ‘A Christmas Carol’. The First Minister also recently alluded to the special nature of Christmas for Scottish families and the sacrifice of those who work on Christmas Day in his 2005 Christmas message (Scottish Executive 2005)

“As we gather with our families and friends this Christmas, we should remember others.

“Those who give up their time at Christmas to work in the service of others. Doctors, nurses, policewomen and men, paramedics, and the thousands of others who provide care services to the elderly and vulnerable. People who put public service first and foremost. Scotland needs and values their contribution.”

Numerous consultees emphasised their view that Christmas is indeed ‘special’ and should not become a normal working day. One retail worker made her point as follows:

“The nature of Christmas is to enjoy the festive season. For people in retail there would be no reply to the question ‘How was your holiday?’”

Such cultural references and perceptions are not necessarily uniformly shared however. Scottish Liberal Democrat MP Malcolm Bruce presented an alternative view of Christmas during a Commons debate in 2004:

“People choose to shop on Christmas day, and some shops are open. Although many people do not want to work on Christmas day – I am one of them; I want to be at home with my family – I know of people who loathe and detest Christmas day. They want to be out and about with people and would prefer to work. The Bill would deny them that right. The extent of freedom of choice is at the heart of whether we need the Bill”

(House of Commons 18 June 2004, column 984)

Historically the original date of ‘Yule’ in the Julian Calendar was placed on 5 January (Livingstone 1997). There were riots when the calendar was altered and many people refused to hold Christmas on the new date of 25 December. After the Reformation attempts were made to ban the celebration of Yule. No holiday was permitted. This ruling was upheld by the General Assembly of the Church of Scotland, and although defied by many people, led to Christmas Day being a working day in Scotland up until the 1960s.

The ‘special’ nature of New Year’s Day

The General Assembly of the Church of Scotland stated in their consultation response (2005):

“New Year’s Day has no religious background, but actually has in Scotland a longer tradition of being a day without commerce and without work for as many as possible”

“We believe that to allow larger stores to open, as if these days were like any other, would be to chip away even more at Scotland’s traditional and religious heritage.”
“…It is in our view a sad thing that it is even necessary to legislate to protect Christmas Day and New Year’s Day. Such a step provides evidence of a flattening of our lives, a process where every day becomes the same – with no high days or holy days, no rest, no play, no reflection; only commerce, a life in which we relate to one another primarily through the exchange of money.”

However a number of those opposed to the Bill have objected most strongly to restrictions on trading on New Year’s Day. The Scottish Retail Consortium (consultation response 2005) for example took no position with regards to Christmas Day trading but reports that its members are very concerned about the proposals in relation to New Year’s Day.

“There is no doubt that New Year’s Day is special and that is why high numbers of tourists visit the country and key cities in Scotland at this time of year. This opportunity should not be missed by the retail sector, in the interests of the economy”

The SRC (2005b) emphasised this point in a more recent press release

“Whilst the SRC has no issue with asking retailers to close on Christmas Day, it is New Year's Day that is the problem.”

"Scotland has a global reputation as one of the places to be over the New Year, particularly with the Hogmanay festival, and a ban on shops opening at this important time on the world’s stage would only irreversibly harm Scotland's reputation. SRC Director, Fiona Moriarty, says: "We are dismayed that Karen Whitefield is calling for a ban on trading on New Year's Day. This ban would have a significant effect on Scotland's tourism industry and its reputation as a world class destination."

Families and Christmas/New Year

One of the policy objectives of the Bill is to protect the special nature of the two days as times when family and friends can spend time together. The ‘families’ theme was reflected in several of the consultation responses. The Baptist Union of Scotland stated

“We believe very much in the value of the family and feel that there are already great pressures on family life. Therefore we are keen that Christmas and New Year’s Day should be given the proposed protection”

The following two comments were typical of those from retail workers in the consultation:

“I feel that Christmas is a special day and should remain this way. Many families work all year and should be allowed one day a year off to celebrate with their families”

“Whether it is for religious reasons or because it is traditionally regarded as a holiday time, I strongly believe that all workers should have this time off. Retail workers seldom have the chance of a weekend off to plan family gatherings and such like so it isn’t much to ask for a couple of special days a year to do so.”

The response to the consultation from the Mothers’ Union also stressed the relevance of the legislation to family life:

“The Mothers’ Union believes it is vital to balance formal work with other aspects of life, such as family responsibilities, voluntary activities and leisure pursuits. This is for the
benefit of individuals, their families, employers and the wider community. Traditional and religious holidays are mechanisms that society has established to make each aspect of life universally viable and in particular to provide an opportunity for families to spend time together. Most large retailers already forbid their staff from taking any holiday on the run-up to the Christmas and New Year period and, if trading does increase on Christmas and New Year’s Day, the special nature of these days would not only be lost for workers in the retail industry but also for society as a whole. The constant demands for more availability and flexibility of commerce must not be adhered to when they are detrimental to the needs of family and community life”

EQUAL OPPORTUNITIES ISSUES

Impact on women

The Mothers’ Union also stated in their consultation response that:

“Women would particularly benefit from such legislation, as it is women who make up the majority of employees in the retail industry. It has been shown that women, the traditional primary carer within the family, still do the majority of domestic work even when both partners work. Legislation would therefore mean that women would not be expected to provide their families with a traditional Christmas or New Year on top of a day at work. In addition, it would ensure that not only managers but lower paid staff, who are also more likely to be women than men, would be entitled to some holiday over the winter season”

As Figure 1 below indicates two thirds of employment in the retail sector is accounted for by female workers (Nomisweb; Annual Business Inquiry 2003). Therefore the Bill is likely to have a proportionately greater direct impact on women.

Figure 1; Employees in Scotland in Retail trade 2003

<table>
<thead>
<tr>
<th>Employment Category</th>
<th>Number</th>
<th>Percentage</th>
</tr>
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<tbody>
<tr>
<td>Male Full Time Workers</td>
<td>52,222</td>
<td>20%</td>
</tr>
<tr>
<td>Female Full Time Workers</td>
<td>51,697</td>
<td>20%</td>
</tr>
<tr>
<td>Male Part Time Workers</td>
<td>36,236</td>
<td>14%</td>
</tr>
<tr>
<td>Female Part Time Workers</td>
<td>116,089</td>
<td>46%</td>
</tr>
</tbody>
</table>
**Impact on ethnic/religious groups**

The Bill’s Policy Memorandum raises the issue as to whether the celebration of a Christian festival might discriminate against those of non-Christian faiths. The Policy Memorandum notes however that the Scottish Interfaith Council took soundings on the issue in 2003 and received some ‘positive reactions’ from several of those contacted.

The degree to which Scotland remains a Christian society has been the subject of much debate. The ‘Faith Survey’ for BBC News 24 (2005) measured religious belief across the UK, including Scotland. Figure 2 below for example illustrates attitudes towards Christianity in Scotland, indicating that 78% of Scots think it is quite or very important that British society continues to be based on ‘Christian values’.

**Figure 3 “How important is it that British society continues to be based on Christian values?” (% responding)**

![Pie chart showing attitudes towards Christianity in Scotland](image)

**ECONOMIC AND FINANCIAL ISSUES**

**Are large shops likely to open on Christmas and New Year’s Days in the future?**

One issue raised by respondents is whether the Bill aims to solve a ‘non-problem’; particularly that it is inconceivable that shops would ever wish to trade on Christmas Day. The Scottish Retail Consortium (Consultation responses 2005) takes ‘no position’ on the proposal regarding Christmas Day and states:

“They have trialled opening larger stores on Christmas Day in areas with large non-Christian communities, but these trials were deemed unsuccessful, so none of our members intend to open on Christmas Day in the future”

The CBI response to the consultation went further
“We have no objection in principle to controls on Christmas Day opening, but it is our belief that no large retailer is ever likely to seriously consider opening on Christmas Day, so there appears to be no real need to introduce legislation prohibiting it”

In relation to New Year’s Day the SRC consultation response states

“Some SRC members have now opened on New Year’s Day in Scotland, and have found a viable and growing consumer demand for this. In fact, Debenhams found a queue of 10 customers waiting outside their Perth store when they opened, and despite torrential rain, sleet and snowfall in Edinburgh their store was extremely busy.”

The Union of Shop, Distributive and Allied workers (USDAW) have however stated in their response to the consultation that:

“Scottish shop workers are very concerned about the possibility of Christmas Day and New Year’s Day trading. Not least because in recent years a number of retail companies have experimented with Christmas Day trading. Also, this year and last, for the first time one company, Debenhams opened some of its large stores on New Year’s Day.”

“Scottish shop workers believe that these recent development make the need for legislation to protect Christmas Day and New Year’s Day absolutely necessary. Many shop workers believe that, at sometime in the future, they will be forced to work on these two days if legislation is not passed to stop large stores from opening. Whilst employers may start by asking for volunteers, the truth is that they will not get enough and that is when they will start compelling people to work in order to open the stores.”

The Trades Union Congress (2003a) has previously estimated the numbers of workers across all occupations working on winter holidays. Based on the Labour Force Survey, the TUC estimates are below:

Table 1; Numbers estimated to be working in Scotland on winter bank holidays
(all occupations)

<table>
<thead>
<tr>
<th>Holiday</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Christmas Day 1999</td>
<td>104,000</td>
</tr>
<tr>
<td>Boxing Day 2000</td>
<td>167,000</td>
</tr>
<tr>
<td>New Year’s Day 2001</td>
<td>121,000</td>
</tr>
<tr>
<td>Hogmanay (2001)</td>
<td>207,000</td>
</tr>
</tbody>
</table>

(TUC 2003a)

**Impact on key economic sectors**

**The Scottish Retail Sector**

There are some 26,000 shops in Scotland. 160 of these have more than 250 employees and account for 28% of sales. Total sales for 2004 stood at just over £20 billion, with one quarter of all sales accounted for by Glasgow and Edinburgh (Scottish Retail Consortium 2005c).

Just over 250,000 people are employed in the Scottish retail sector. Approximately 100,000 of these are employed on a full time basis and 150,000 on a part time basis (NOMISweb, Annual Business Inquiry 2003).
Figures from the Scottish Retail Consortium (2005a) highlight the current importance of the Christmas and New Year period for retail sales

“Christmas is the most significant trading period of the year for retailers in Scotland, with approximately 40% – 60% of many larger retailers’ turnover being made between November and January – ‘the Golden Triangle’.”

“In Scotland the focus is on Christmas and Hogmanay which leads to the festive period extending over a longer time frame than England and Wales. This sees increased levels of consumer spending between Christmas day through to early January, particularly on food and drink”

The DTI reports that the England and Wales Christmas Day trading proposals were subjected to the Office for Fair Trading’s ‘competition filter’ which assesses the impact of regulations on competition (DTI 2003). The nine questions in the filter assess the market structure and potential impact of the regulations. According to the DTI in all cases the nine questions registered a “no” answer and therefore there was no need therefore to proceed to a more detailed “competition assessment” as is done in cases when significant competition issues are raised.

Others indicated that the impact on Scotland of the Scottish proposals would be detrimental to the economy overall. Debenhams (Consultation responses 2005), who had previously trialled the opening of two of their stores on New Year’s Day indicated that the proposals would restrict customer choice and would

“…make the business environment more difficult for major employers and those seeking to satisfy customer demand.”

Ancillary retail

The United Road Transport Union, representing ‘nearly one thousand drivers employed in Scotland” argues that (consultation response 2005) ancillary workers should also be covered by the legislation.

“Shelves would still need to be stacked and stores replenished. Any legislation that seeks to prohibit the opening of stores needs to be carefully drafted to encompass not only the stores opening part, but also safeguards need to be put in place to ensure that other workers, ancillary to actual shop workers, are also caught by the legislation”

Tourism

Research by VisitScotland highlights the importance of retail for tourism with 61% of overseas tourists citing shopping as a main activity of a holiday to Scotland and almost half of UK visitors following suit (Scottish Retail Consortium 2005c). The same research indicated that a “combined 80%” of foreign tourists buy either Scottish whisky or woollen goods during their holiday. Perhaps less obviously in tourism terms the ‘continued success’ of the Braehead retail development in Glasgow in attracting visitors from Northern Ireland is also highlighted.

The potential negative impact on city tourism has been highlighted by Edinburgh councillor Donald Anderson (Scottish Retail Consortium 2004)

‘Edinburgh is one of the best places in the world to spend Hogmanay and we have worked extremely hard to achieve this. On January 1, when most cities traditionally close
their doors and nurse their hangovers, the capital is vibrant and entertaining thousands of residents and visitors. This is a huge asset, both economically and socially, to Edinburgh and Scotland.

‘I do not want to see the clock turned back and for the city to become a sleepy deserted no mans' land. These proposals have the potential to do just that. We should be promoting Scotland as a modern forward-thinking country, yet these proposals send out the opposite message to all who live, visit and do business here.

Lesley Sawers, Chief Executive of Glasgow Chamber of Commerce, stated further (Scottish Retail Consortium 2004)

‘Recent research indicates that 60% of visitors state the main reason for visiting Glasgow was for shopping, so to prohibit stores from opening on New Year's Day is a backward step that would impact severely on the retail tourism that is so vital to the city's economic prosperity. Opening hours should be driven by consumer demand, and operational issues left for stores to resolve.”

The Member in charge of the Bill (Policy Memorandum paragraph 77) offers a number of counter-arguments to the view that tourism would be detrimentally affected by the Bill. This includes the “reality that hardly any large shops are open on 1st January at present”, that tourists’ decisions to come to Scotland, and in particular Edinburgh, at New Year are most influenced by the scale and quality of the celebrations, and that the loss of a single day’s shopping on 1 January is unlikely to dampen enthusiasm for retail spending. The Member also highlights the view that an extra day’s spending will not increase total revenue but will result in the spread or ‘cannibalisation’ of existing spend over the entire seasonal period.

Analysis for Edinburgh City Council (2005) of the economic impact of Edinburgh’s “winter festivals” in 2004/05 revealed the following assessment of the contribution to the local and Scottish economies (Table 2 below). The £35.9m of output generated by the winter festivals compared to estimates of £69.9m for the Festival Fringe, £23.3m for the Military Tattoo, £19.3m for the Edinburgh International Festival and £13.9m for all other summer festivals.

Table 2; Economic impact of Edinburgh’s winter festivals

<table>
<thead>
<tr>
<th></th>
<th>Output (£m)</th>
<th>Income (£m)</th>
<th>Employment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Edinburgh's Capital Christmas</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Edinburgh</td>
<td>11.5</td>
<td>2.7</td>
<td>196</td>
</tr>
<tr>
<td>The Lothians</td>
<td>0.9</td>
<td>0.3</td>
<td>27</td>
</tr>
<tr>
<td>Scotland</td>
<td>0.4</td>
<td>0.1</td>
<td>42</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>12.8</strong></td>
<td><strong>3.1</strong></td>
<td><strong>265</strong></td>
</tr>
<tr>
<td><strong>Edinburgh's Hogmanay</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Edinburgh</td>
<td>24.4</td>
<td>5.7</td>
<td>439</td>
</tr>
<tr>
<td>The Lothians</td>
<td>2.2</td>
<td>0.8</td>
<td>65</td>
</tr>
<tr>
<td>Scotland</td>
<td>5.0</td>
<td>1.7</td>
<td>161</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>31.6</strong></td>
<td><strong>8.2</strong></td>
<td><strong>665</strong></td>
</tr>
<tr>
<td><strong>Edinburgh's Winter Festivals</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
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<td>35.9</td>
<td>8.3</td>
<td>635</td>
</tr>
<tr>
<td>The Lothians</td>
<td>3.1</td>
<td>1.2</td>
<td>92</td>
</tr>
<tr>
<td>Scotland</td>
<td>5.4</td>
<td>1.8</td>
<td>203</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>44.4</strong></td>
<td><strong>11.3</strong></td>
<td><strong>930</strong></td>
</tr>
</tbody>
</table>

providing research and information services to the Scottish Parliament

13
**Impact on public finances**

The Financial Memorandum within the Explanatory Notes identifies zero costs for the Scottish Administration, zero costs for local authorities and “absolutely minimal” costs for the police. If large shops do open on the two days the Financial Memorandum identifies potential additional costs, for example in terms of emergency public services and transport services.

Scotmid retail group’s consultation response suggested that “any organisation choosing to open on both dates should be levied for the cost of any public services which would be necessary to support their operations”.

**DEBATE ON DETAILS OF THE BILL**

**Comparison of England/Wales legislation with Scottish proposals**

The Christmas Day (Trading) Act 2004 applicable in England and Wales provides an obvious point of comparison for the Scottish proposals. Table 3 below compares the 2004 Act with the proposals in the Scottish Bill. The Christmas Day (Trading) Act followed many of the detailed provisions of the Sunday Trading Act 1994. The list of exempted shops was debated in the Commons, and consideration was also given to the possibility of including other categories such as toy shops, shops where a local need or demand could be demonstrated, and shops with all non-Christian employees.

The Scottish Bill parallels the England/Wales legislation in many respects. There are however a number of differences in the exempted categories of shops. In England and Wales for example shops selling motor or cycle supplies, farm shops, off licences and exhibition stands are all excluded. The England/Wales legislation does not specifically exempt cafes, restaurants and takeaways as is the case in Scotland. Some of these distinctions reflect policy choices whilst others are more technical in nature.
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<td>Criminal offence for a large shop to open for the purpose of making retail sales on the specified days. Thus it falls to the police to take action if a shop breaks the prohibition. This is in the context of no existing Sunday Trading inspectorate regime as was the case in England and Wales. Fine of up to £50,000</td>
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</tr>
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<td></td>
</tr>
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<td></td>
</tr>
<tr>
<td><strong>Definition of a large shop</strong></td>
<td></td>
</tr>
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<td>A relevant floor area exceeding 280 square metres (3,000 square feet)</td>
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</tr>
<tr>
<td><strong>Days applicable</strong></td>
<td></td>
</tr>
<tr>
<td>Christmas Day</td>
<td>Christmas Day and New Year’s Day</td>
</tr>
</tbody>
</table>

Some consultation respondents raised points about specific details within the Bill, including the definition of a large shop and the maximum level of the fine.

**Definition of a large shop at over 280 square metres**
Tesco Stores states that the definition does not truly reflect a large store in today’s market.

“We believe that a large store should be anything over 25,000 square feet as any store smaller than this, will not have a full range of products available for our customers”

Tesco Stores also point out that
“Different employment rights would apply to our staff depending on the type of store in which they are employed. This approach is likely to be deemed unfair to our people”

**Setting the fine at a maximum of £50,000**

The Bill proposes a maximum fine of £50,000 for those convicted of breaching the legislation. This amount mirrors that in the Christmas Day (Trading) Act 2004 applying in England and Wales. Scotmid retail group suggested that the financial penalty should be higher than proposed:

“It is believed there should be significant financial fines for breach of Christmas/New Year’s Day opening, certainly in excess of the £50,000 under the Sunday Trading Act. This coupled with ‘public service levies’ may serve as a deterrent.”

Table 4 below (Mintel 2005) provides some context for the level of the fine, providing basic corporate financial data for the UK’s top 10 retailers in 2003. The final column involves simply dividing the annual sales per outlet figures by 365 to get a mean average sales per day.

**Table 4; The UK’s “top ten” retailers**

<table>
<thead>
<tr>
<th>Company name</th>
<th>Accounts to year end</th>
<th>Sales 2003/04 (£’000)</th>
<th>Operating profit 2003/04 (£’000)</th>
<th>Outlets</th>
<th>Sales per outlet (£’000)</th>
<th>Average Sales per outlet per day (£’000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tesco (UK)</td>
<td>Feb</td>
<td>24,760,000</td>
<td>1,526,000</td>
<td>1,878</td>
<td>12,836</td>
<td>35.167</td>
</tr>
<tr>
<td>J Sainsbury (UK)</td>
<td>Mar</td>
<td>14,220,000</td>
<td>564,000</td>
<td>583</td>
<td>26,333</td>
<td>72.145</td>
</tr>
<tr>
<td>Wm Morrison Group</td>
<td>Jan</td>
<td>13,194,060</td>
<td>Na</td>
<td>604</td>
<td>21,917</td>
<td>60.047</td>
</tr>
<tr>
<td>ASDA Stores</td>
<td>Dec</td>
<td>13,097,590</td>
<td>338,167</td>
<td>267</td>
<td>49,991</td>
<td>136.962</td>
</tr>
<tr>
<td>Marks &amp; Spencer (UK)</td>
<td>Mar</td>
<td>7,159,800</td>
<td>728,100</td>
<td>390</td>
<td>19,670</td>
<td>53.890</td>
</tr>
<tr>
<td>GUS – includes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Argos</td>
<td>Mar/Feb</td>
<td>3,384,000/1,400,107</td>
<td>297,400/55,963</td>
<td>556/281</td>
<td>6,278/5,055</td>
<td>17.200/13.849</td>
</tr>
<tr>
<td>Homebase</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Boots Group – includes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Boots the Chemists</td>
<td>Mar</td>
<td>4,475,700</td>
<td>568,400</td>
<td>1,426</td>
<td>3,196</td>
<td>8.756</td>
</tr>
<tr>
<td>Dixons Group (UK)</td>
<td>Apr</td>
<td>4,697,900</td>
<td>254,200</td>
<td>1,119</td>
<td>4,187</td>
<td>11.471</td>
</tr>
<tr>
<td>Somerfield</td>
<td>Apr</td>
<td>4,521,200</td>
<td>45,500</td>
<td>1,268</td>
<td>3,566</td>
<td>9.770</td>
</tr>
<tr>
<td>John Lewis Partnership includes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>John Lewis</td>
<td>Jan/Feb</td>
<td>2,019,800/2,547,900</td>
<td>111,000/104,200</td>
<td>26/144</td>
<td>77,685/17,943</td>
<td>212.836/49.159</td>
</tr>
<tr>
<td>Waitrose</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1 Figures taken direct from Mintel (2005), not calculated from columns 3 and 5 in Table 4.

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 SOURCES


Trades Union Congress (2003a) news release; All I want for Christmas is my two weeks leave London http://www.tuc.org.uk/work_life/tuc-6025-f0.cfm


JUSTICE 2 COMMITTEE

BRIEFING PAPER

The Christmas Day Trading Act 2004

INTRODUCTION

This briefing provides information on the passage through Westminster of the Christmas Day Trading Act 2004 (the 2004 Act), which applies only to England and Wales. It also compares the 2004 Act with the Scottish bill (the Christmas Day and New Year’s Day Trading (Scotland) Bill).

Prior to the passing of the 2004 Act there was no legislation to prohibit Christmas Day opening other than the restrictions affecting large stores under the Sunday Trading Act 1994 (STA 1994). Under the STA 1994 ‘large’ shops were required to remain closed on Christmas Day, but only when the 25 December fell on a Sunday. Trading was allowed when Christmas Day fell on any other day of the week.

Up to 2000 the practice was that large shops did not open on Christmas Day. However, in 2000 a number of retailers experimented with trading on Christmas Day (which fell on a Monday). It was reported, for example, that both Sainsbury’s and Woolworths ran Christmas Day shopping trials in the London area as did Budgens at 17 of their stores. On Christmas Day 2003, Woolworths reportedly opened one big store in Southall, London and some supermarkets, including Sainsbury’s, also opened smaller stores attached to petrol stations.

A campaign by USDAW (the Union of Shop, Distributive and Allied Workers) argued that large shops should be prohibited by law from opening on Christmas Day on whatever day of the week it falls.

A consultation by the DTI issued in April 2003 indicated that “97% [of respondents] supported keeping Christmas Day special and agreed that large shops should remain closed”.

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2 “Union seeks ban on December 25 shop opening”, Times, 21 December 2000
3 Ibid.
5 DTI ‘Summary of Responses’ to Christmas Day Trading consultation; August 2003
CONSIDERATION OF THE BILL IN WESTMINSTER
This section highlights the key stages of the passage of the bill at Westminster, highlighting some of the key aspects of the debate.

Table 1: Summary of Progress of bill

<table>
<thead>
<tr>
<th>House of Commons</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>First reading:</strong> January 7 2004 (HC Bill 20)</td>
</tr>
<tr>
<td>The Christmas Day (Trading) Bill was introduced in the House of Commons on 7 January 2004 by Kevan Jones Labour MP for Durham North. The Bill supported the USDAW (Union of Shop, Distributive and Allied Workers) campaign, and had government support. It was almost identical to two previous, failed, Bills introduced by Gwyneth Dunwoody in 2001 and Kevin Hughes in 2002.</td>
</tr>
</tbody>
</table>

| **Second reading:** March 26 2004 |
| The Bill was moved by **Kevan Jones** who set out the case for the legislation, the following providing a flavour of the points he made:  
“The House and the nation need to ask whether the public price of ruining a unique, special day is worth paying to allow larger shops to open. Christmas day would then become just like any other day of the year.”  
“Most people assumed that the 1994 [Sunday Trading] Act covered Christmas day, and that was certainly the sentiment of the House and of those Members who supported that Bill.”  
**Patrick Cormack** (Conservative) also supported the bill, for example stating:  
“It is appalling that a country with an established Church should say that on one of its two greatest festivals, pressure—however direct or indirect—will be put on certain people to go to work, thereby driving a nail into family life”  
**Lembit Opik** (Liberal Democrat) described himself as a libertarian and also supported the Bill  
In essence, libertarianism is defined as the freedom to live life and to harm oneself—as long as one can show that one is conscious of the harm that is thereby being done—but not to harm others. The harm principle is the core of this discussion, because it applies to those who are compelled by others to work on Christmas day. It is not intellectually rigorous to pretend that there is no harm involved in making people work on Christmas day  
**Barry Gardiner** (Labour) Member for Brent, North argued that Bill was supported more widely than the Christian community:  
“Brent has more than 120 different first languages spoken in its schools. We have every faith that it is possible to conceive of in our borough. Yet not one person has opposed the Bill on the ground of respect for different cultures and faiths.”  
**Other contributors** argued that the definition of a large shop would also include some family run rural enterprises providing a service to
their local community, that the bill provides for a Christian holiday but not for other faith holidays, that it ‘protects’ employees in large stores which are already unionised but not those in small stores and exempt categories, along with other apparent anomalies in the bill such as the treatment of membership ‘wholesalers’ such as Costco⁶. Other issues raised included the wisdom of including the level of the fine in the bill itself.

Standing committee:

1st sitting: May 12 2004 (am)  
A very brief debate included a short presentation made by Kevan Jones MP and Gerry Sutcliffe the Parliamentary Under-Secretary of State for Trade and Industry. Support was voiced by Liberal Democrat and Conservative Members of the committee. It was agreed that the bill be reported without amendment.

House of Commons

Third reading: June 18 2004  
At the third reading a number of amendments were put forward but subsequently withdrawn. These included the following proposed exemptions (i.e. that large shops would be allowed to open):

- where the owner of a large shop employs entirely non-Christian employees
- where there is a local public demand for it to be open on Christmas Day

Considerable debates ensued, particularly questioning the practicalities of such arrangements. The amendments were withdrawn. Further proposed exemptions (also withdrawn) included

- any shop where the trade or business consists wholly or mainly of the sale of books
- any shop where the trade or business consists wholly or mainly of the sale of children’s toys and games
- any shop which meets a ‘prescribed local need’ (prescribed the Secretary of State)

An amendment was lodged by Eric Forth MP to restrict loading and unloading activities, to parallel the Sunday Trading Act. Although the specific amendment was withdrawn it was agreed that this would be considered favourably at later stages of the Bill’s consideration. The bill was read for a third time and passed.

House of Lords

First reading: June 21 2004  
Brought from the Commons; read a first time, and ordered to be printed

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⁶ Kevan Jones MP stated in response that Costco “is covered, because if people shopped there on Christmas day and purchased retail goods, the provisions in the Bill would apply. The only thing that would be excluded would be if they were buying goods for retail sale afterwards.”
| **Second reading:**  
July 16 2004 | The debate in the Lords included the maiden speech of Lord Kalms the founder and President of Dixons. Lord Kalms stated he agreed with the purpose of the bill but indicated that there was no likelihood of trading on Christmas day by large multiples. Generally the purpose of the Bill was supported by those Lords taking part in the debate. It was read a second time, and committed to a Committee of the Whole House. |
| **Committee stage:**  
**September 8 2004** | The Committee of the whole House considered the Bill. As previously signalled in earlier debates amendments were lodged, and agreed, to prohibit loading and unloading before 9.00am on Christmas day. Bill as amended in the committee (**HL 111**) |
| **Third reading:**  
**October 11 2004** | Read a third time, and passed, and returned to the Commons with amendments |

**House of Commons**

| **Consideration of Lords amendments:**  
**October 15 2004** | Some amendments were lodged on the Lords’ amendments, including changing the time until which loading/unloading would be restricted to 10.00am. However in the interests of ensuring the bill would not fall the amendments were withdrawn and Lords amendments were agreed to. |

**Royal assent: October 28 2004**

**COMPARISONS BETWEEN THE ACT AND THE SCOTTISH BILL**

Table 2 below compares the 2004 Act with the proposals in the Scottish Bill. The Christmas Day (Trading) Act followed many of the detailed provisions of the Sunday Trading Act 1994. The list of exempted shops was debated in the Commons, and consideration was also given to the possibility of including other categories such as toy shops, shops where a local need or demand could be demonstrated, and shops with all non-Christian employees.

The Scottish Bill parallels the England/Wales legislation in many respects. There are however a number of differences in the exempted categories of shops. In England and Wales for example shops selling motor or cycle supplies, farm shops, off licences and exhibition stands are all excluded. The England/Wales legislation does not specifically exempt cafes, restaurants and takeaways as is the case in Scotland. Some of these distinctions reflect policy choices whilst others are more technical in nature.
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**Simon Wakefield**  
**SPICe Research**  
**August 2006**

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament Committees and clerking staff. They provide focused information or respond to specific questions of interest to committees and are not intended to offer comprehensive coverage of a subject area.
Dear David

Christmas Day and New Years' Day Trading (Scotland) Bill

The Finance Committee considered its approach to the Financial Memorandum of the above bill and agreed to adopt level 1 scrutiny.

This level of scrutiny is applied where there appears to be minimal additional costs as a result of the legislation. Applying this level of scrutiny means that the Committee will not take oral evidence, nor will it produce a report. It will, however, seek written comments from relevant organisations through its agreed questionnaire (attached), and then pass these comments to your committee. These organisations are listed below:

- CBI Scotland;
- The Federation of Small Businesses in Scotland;
- Scottish Retail Consortium;
- STUC; and
- Association of Chief of Police Officers in Scotland.

Yours sincerely

[Signature]

Des McNulty
Convener
Enc: Finance Committee standard questionnaire
QUESTIONNAIRE

This questionnaire is being sent to those organisations that have an interest in, or which may be affected by, the Christmas Day and New Years' Day Trading (Scotland) Bill. In addition to the questions below, please add any other comments you may have which would assist the Committee’s scrutiny.

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

3. Did you have sufficient time to contribute to the consultation exercise?

Costs
4. If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Wider Issues
7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?
1. The instrument aims to ensure that civil legal aid is available to those applying for intervention or guardianship orders under the terms of the Adults with Incapacity (Scotland) Act 2000 without regard to the applicant’s income or capital, or requiring the applicant to pay any contribution to the Legal Aid Fund.

2. In its 31st Report 2006 the Subordinate Legislation Committee drew the attention of the Justice 2 Committee to the instrument on the following grounds:

3. Section 36(3)(bb) was inserted into the Legal Aid (Scotland) Act 1986 by the Adults with Incapacity (Scotland) Act 2000 and is relevant to the enabling powers cited in the preamble. The SLC considered that, though the instrument is not invalidated, the relevance of Section 36(3)(bb) should have been footnoted, and therefore the failure to do so constituted failure to follow proper legislative practice.

4. The SLC also considered that regulation 1(2), which contains definitions of terms not used in these Regulations, though it does not affect the validity of the instrument, is superfluous and therefore constitutes defective drafting.
5. The relevant extract from the Subordinate Legislation Committee’s 31st Report 2006 is reproduced at Annex A.

6. If members have any queries or points of clarification on the instrument which they wish to raise with the Scottish Executive in advance of the meeting, please could these be passed to the Clerk of the Committee as soon as possible, to allow for sufficient time for a response to be received in advance of the Committee meeting.

Clerk to the Committee  
23 August 2006
Annex A

Extract from the Subordinate Legislation Committee's 31st Report 2006

The Civil Legal Aid (Scotland) Amendment (No. 2) Regulations 2006, (SSI 2006/325)

1. The Committee asked the Executive 2 questions on this instrument,

2. Firstly, it asked why section 36(3)(bb) of the 1986 Act had not been cited as an enabling power, or its relevance indicated in a footnote.

3. The Executive, in its response printed in Appendix 1, indicated that it was not cited because it is not in itself an enabling power. It is satisfied that, given the powers cited and the reference to Scottish ministers using all other powers enabling them in that behalf, this does not in any way affect the validity of the instrument. The Executive acknowledged the oversight in relation to the footnote, although it is satisfied that it does not in any way affect the validity of the instrument.

4. The Committee agrees with the Executive that for the reasons given there was no need to cite section 36(3)(bb) in the preamble. However as the guidance on the drafting of statutory instruments indicates, the provision is relevant to the power to make the instrument and therefore although it was correctly included in a footnote to the Regulations, its relevance to the making of the instrument should have been explained in that footnote.

5. Although the Committee agrees that in this instance neither the absence from the preamble of a reference to the subsection nor the failure to draft the footnote in appropriate terms in any way invalidates the instrument, the instrument to that extent fails to follow proper legislative practice.

6. The Committee draws the attention of the lead Committee and the Parliament to this instrument on the grounds of failure to follow proper legislation practice.

7. Secondly, the Committee asked about the purpose of regulation 1(2) which contains definitions of terms not used in these Regulations.

8. In its response, the Executive accepts that Regulation 1(2) is superfluous but that its inclusion does not affect the validity of the instrument.

9. Whilst acknowledging the Executive’s comments about validity, the Committee considers that the inclusion of meaningless provisions is confusing for the reader and should be avoided.

10. The Committee draws the attention of the lead Committee and the Parliament to this instrument on the grounds of defective drafting.

APPENDIX 1

The Civil Legal Aid (Scotland) Amendment (No. 2) Regulations 2006, (SSI 2006/325)

1. The Committee noted 2 points on these Regulations.

2. Firstly it considers that subsection (3)(bb) of section 36 of the Legal Aid (Scotland) Act 1986 should have been cited as an enabling power. The subsection is footnoted in footnote (a) on page 1 but without explanation as to its relevance.
3. The Committee accepts that it could be argued that as subsection (3)(bb) simply defines one of the purposes for which the power under subsection (2)(h) of section 36 may be exercised, it is not in itself an enabling power. However subsection (3)(h) has to be read with subsection (3)(bb) and is therefore relevant to the making of the Order. Accordingly if not actually cited in the preamble, its relevance should be indicated in the footnote. The Committee asks the Executive to explain why the subsection has not been either cited in the preamble or why the footnote did not indicate its relevance.

4. The Committee also noted that regulation 1(2) contains definitions of “the Act”, “the 2000 Act” and “Fund” none of which terms appear to be used in the Regulations. The words “the Act” and “the 2000 Act” do occur in the Regulations but only in insertions into the principal Regulations. Accordingly, the definitions in the present Regulations do not apply. In any event regulation 2(1) of the principal Regulations already includes a definition of “the Act” and a definition of “the 2000 Act” is inserted into the principal Regulations by regulation 4(a) of these Regulations. The Committee therefore asks the Executive to explain the purpose of regulation 1(2).

The Executive responds as follows:

5. Subsection (3)(bb) of section 36 of the Legal Aid (Scotland) Act 1986 was not cited as an enabling power to the instrument due to the fact that, as the Committee acknowledges, it is not in itself an enabling power. Given the powers cited, and the reference to Scottish Ministers using all other powers enabling them in that behalf, we are satisfied that this does not in any way affect the validity of the instrument.

6. With regard to the relevance of section 36(3)(bb) not being indicated in the footnote to the instrument, we acknowledge that this is an oversight. It is accepted that the footnote should have provided details as to the pertinence of the subsection to the instrument. Again we are satisfied that this does not in any way affect the validity of the instrument.

As regards regulation 1(2), it is acknowledged that the words, “the Act”, “the 2000 Act” and “Fund” occur in the Regulations but only in insertions into the principal Regulations. Regulation 1(2) is therefore superfluous but its inclusion does not affect the validity of the instrument.
Subordinate Legislation Committee Inquiry into the Regulatory Framework in Scotland

Note by Clerk

Since July 2005 the Subordinate Legislation Committee has been considering the effectiveness of the current system for the scrutiny of statutory instruments in the Scottish Parliament, as part of its inquiry into the regulatory framework in Scotland.

The Committee has published a draft report on its Inquiry into the Regulatory Framework in Scotland, which sets out a new procedure for the scrutiny of statutory instruments (SSIP). The Committee has decided to consult both stakeholders and parliamentary committees on this procedure before making final recommendations to the Parliament.

The new Scottish Statutory Instrument Procedure

The SLC recommends a number of changes to existing procedures. In particular, it recommends that current 8 varieties of instruments should be streamlined, and the negative and affirmative procedures for considering instruments, should be replaced by two procedures, a general procedure and an exceptional procedure.

General procedure

- The SLC propose all instruments should be laid in draft before the Parliament for a maximum period of 40 days. (The period of 40 days is a maximum and can be reduced if the Parliament is content with the draft before then);

- after 40 days (or the reduced period) if the draft instrument is not disapproved it can be brought into force without any further Parliamentary procedure;

- during this 40 day period the Executive may (with the approval of the Parliament) amend the draft and replace it with an amended draft. In this case the 40 day period would stop and would start again with the amended draft. This procedure will allow the Executive to respond to technical concerns raised by the SLC, which form the majority of the grounds on which instruments are currently reported to the lead committee;

- Both the SLC and the lead committee will continue to scrutinise draft instruments. However, consideration of the instrument can now take place in 'parallel' rather than consideration by the lead Committee following that of the SLC as at present. The SLC suggests that this would give the lead Committee more time to consider particular instruments;
Both the lead committee and the SLC will report to the Parliament; and both committees can recommend to the Parliament that an instrument should not be made;

The SLC may only make such a recommendation when it is in serious doubt of the legal validity of an instrument, and only a member of the SLC may propose that such a recommendation be made. Policy matters remain for the consideration of the subject committee;

Where, during this 40 day period, where the SLC or the subject committee recommend that an instrument be not made it is for the Parliament to determine whether to accept this recommendation.

A motion to disapprove a draft may be taken by the Parliament outwith the 40 day period, provided that the lead Committee or the SLC has made a recommendation for disapproval within that period; and that the motion is considered within 10 days after the expiry of that period.

Exceptional procedure

The two sorts of instrument that would be exceptions to the general procedure would be emergency instruments and urgent instruments.

An emergency instrument is defined by the SLC as an instrument which—

- in the case of future Acts, where a Parent Act authorises the making of that instrument as an emergency instrument; or
- in the case of past Acts, is subject in the parent Act to the Class 3 (draft affirmative) procedure; or
- in the case of past Acts, is subject in the parent Act to the Class 5 (negative) procedure and that Act has been amended to identify that instrument as an emergency instrument.

The SLC proposes that the where the Executive adopts the exceptional procedure for instruments other than emergency instruments, it should be required to explain to the Parliament why it has done so. The SLC may report to the parliament if it believes in any case that this was unnecessary.

The SLC defines urgent instruments as those which the Executive considers are of such urgency as to require to be made before they are laid or before the expiry of the 40 day period. The SLC gives an example of an urgent instrument as one which needs to be brought into force at the same time as instruments elsewhere across the UK, but given the need for co-ordination may not be ready in time to be laid under general procedure. Whereas emergency instruments might come into force any time after being made or before being laid, an urgent instrument would not normally come into force within 21 days after being laid.
Instruments subject to these exceptions would be laid ‘as soon as practicable’ after being made and would be subject to being annulled by Parliament within 40 days. After an instrument is laid, it should be subject to parallel consideration by both the lead Committee and the SLC; and both Committees will be able to recommend that an instrument should be annulled. The SLC can only recommend this on the grounds that there is a serious doubt about the legal validity of the instrument and only a member of the SLC will be able to propose such a motion.

**Modified general procedure**

There are two cases where the Committee considers that the general procedure should be modified so that a draft instrument should not be subject to consideration by the lead Committee. These are the cases of commencement orders and consolidation instruments.

*Commencement orders*

The SLC considers that it should not be open to those opposed to certain legislation to recommend that commencement orders should be disapproved on policy grounds. The SLC proposes that a lead committee should not consider commencement orders except where the draft contains other provisions, such as transitional or consequential provisions. Where this is the case it should only consider those provisions.

*Consolidation orders*

The SLC differentiates between ‘pure’ consolidation orders which re-enact subordinate legislation (‘subject only to any amendments which are necessary to produce a satisfactory consolidation’) and ‘rolling’ consolidation orders which are subject to substantive amendments. The SLC proposes that only substantive amendments should be subject to lead Committee consideration.

**Wider recommendations**

In addition, the SLC recommends that the Executive should put in place a co-ordinated approach across all the departments. The SLC propose that at the beginning of each three month period, the Executive should provide the Parliament with a programme of likely subordinate legislation, including the likely content and proposed parliamentary procedure for each instrument.

The SLC also believes that the quality of information provided by the Executive in relation to consultation carried out in respect of individual SSIs should be improved. In particular, the SLC considers that Executive Notes should not only include details of who has been consulted, but that these should also provide information on the content of responses to the consultation. This would allow lead Committees to assess views on the policy and the potential for taking evidence when considering an instrument.

The SLC is also considering producing and publishing annually a report itemising commitments made by the Executive to the Committee following its
reports, and detailing the action that has been or has not been taken by the Executive.

**Recommendation**

The Committee is invited to consider these proposals and provide comments to the SLC on them. The detailed questions that the SLC is asking are reproduced below.

Clerk to the Committee
August 2006

**Subordinate Legislation Committee consultation**

The SLC is consulting on its proposals, and as well as asking for general comments on the SSIP, sets out the following questions in its report:

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?

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

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

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

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?

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?

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?

8. (a) Should emergency instruments be subject to the exceptional procedure?
8. (b) Should emergency instruments be defined as proposed?

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

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?

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

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

13. Should rules of court 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?
14. (b) Should an instrument which is made without either a draft being laid under the general procedure or the instrument being laid after making under the exceptional procedure (as required above) be treated as never have had any legal effect, subject to the following exception?
14. (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?

15. (a) Should the SSIP apply to all SSIs and to all other statutory instruments which are subject to procedure in the Scottish Parliament?
15. (b) Should it apply in all cases (both past and future) where there is a power to make such instruments?
DRAFT TRIBUNALS, COURTS AND ENFORCEMENT BILL - PROPOSED LEGISLATIVE CONSENT MOTION

I wish to advise the Committee that the Department for Constitutional Affairs (DCA) has on 25 July published in draft a Tribunals, Courts and Enforcement Bill, a link to which can be found at http://www.official-documents.co.uk/document/cm68/6885/6885.asp. I am not yet able to advise on possible introduction dates for this Bill. My purpose in writing now is to allow any observations and input from the Committee to be taken on board as early as possible, both by the Executive and the DCA.

As members of the Committee may know, in March 2003 the UK Government announced proposals for reform of the centrally administered tribunals system, following a report of Sir Andrew Leggatt and others published in 2001. In June 2004 a White Paper was published setting out the UK Government’s proposals in more detail. The reform programme involves two main streams of work. The first was to set up a new Executive Agency within the DCA, the Tribunals Service, designed in due course to bring together the administration of the tribunals administered by central government. The agency, the establishment of which did not require primary legislation, was launched on 1 April 2006. The Tribunal Service deals with the administration of some of the largest and most important of the reserved tribunals such as Social Security Tribunals, Asylum and Immigration Tribunals and Taxation Tribunals. These new arrangements coincide with the creation of the Judicial Appointments Commission which took on responsibility (also from 1 April) for making recommendations in relation to the appointment of members of certain reserved tribunals.

The second stream of work, which requires primary legislation, involves the creation of a unified tribunals structure, including a first instance tier and an appellate tier, each with a single judicial office. The UK Government is committed to introducing a Bill for this purpose as soon as Parliamentary time allows. These are the proposals which are the subject of the current DCA draft Bill.
My officials have worked closely with DCA to ensure that the draft Bill properly reflects the Scottish context as far as reserved matters are concerned, and to consider the extent to which the proposals could potentially in due course be applied to devolved tribunals in Scotland. There are two aspects of the DCA Bill proposals which, if introduced, would require a Legislative Consent motion before the Scottish Parliament, as they involve the UK Parliament legislating in devolved areas. These are, firstly, the replacement of the Council on Tribunals with an Administrative Justice and Tribunals Council and, secondly, changes in relation to the Criminal Injuries Compensation Appeals Panel. The Annex to this letter sets out the position in detail, as well as providing background in relation to proposed future arrangements for appointments of Scottish General Commissioners of Taxation.

In relation more generally to devolved tribunal issues, we are conscious of the potential for the improvement of the public services involved through sharing of services and facilities across this sector. However, the circumstances in Scotland are structurally different from those in the rest of the UK and therefore may not necessarily lend themselves to the adoption of the same model here as the DCA has adopted for reserved tribunals. We have a much smaller population base and the make-up of devolved tribunals is rather different. In terms purely of numbers, cases heard by Scottish devolved tribunals are a small percentage of tribunal cases throughout the UK and there is a heavy numerical dominance of a small number of large devolved tribunals. The largest two are the Mental Health Tribunals only recently set up and the Children’s Hearing System. In relation to the latter, at present the executive proposes moving support arrangements onto a regional basis, requiring local authorities to provide support to members of the children's panel against national standards (on recruitment, training and support). Any changes will be contained in the draft Bill to implement Getting it Right for Every Child which will be presented for consultation towards the end of the year.

Therefore in welcoming the work done by DCA, we need to give full consideration to the effectiveness of these proposals in practice in the Scottish context and the means by which the right solution could be found to the very different circumstances applicable to devolved tribunals.

I hope that this letter sets out the position of the Executive is helpful to the Committee and I am happy to respond to any questions arising from its consideration of these issues.

I am copying this letter to the Convenor of Justice 1 Committee for information.

Best wishes

CATHY JAMIESON
ANNEX

PROPOSED TRIBUNALS, COURTS AND ENFORCEMENT BILL
ISSUES RELEVANT TO THE LEGISLATIVE CONSENT MOTION

General

1. The main aim of the tribunal provisions within the proposed Tribunals, Courts and Enforcement Bill is to create a new overarching statutory framework for reserved tribunals. The Bill would contain two measures which would be within the legislative competence of the Scottish Parliament and which in consequence require consideration by the Parliament of a Legislative Consent Motion or, in one area, where an analogous issue arises because of an impact on an executively devolved function. This Annex sets out these issues in detail.

Replacement of the Council on Tribunals with an Administrative Justice and Tribunals Council

2. The Bill proposes the replacement of the Council on Tribunals with a new body to be called the Administrative Justice and Tribunals Council (AJTC). The Council on Tribunals is a cross-border public authority under the Scotland Act and, as it operates on a GB wide basis and carries out functions in relation to both reserved and devolved tribunals, the abolition of the Council and replacement by the AJTC, if contained in the Bill, would trigger a Legislative Consent Motion.

3. The AJTC will not be a cross-border public authority, but structurally is intended to operate in a similar way to the Council on Tribunals. It is proposed to have a different range of supervisory functions from the Council on Tribunals, relating to supervision of the system of administrative justice and reviewing the constitution and working of Tribunals. It will be empowered to comment on proposed legislation relating to Tribunals. It is proposed to operate in Scotland in relation to devolved tribunals in principle in the same way as it would in relation to reserved tribunals.

4. If these GB-wide arrangements were not put in place, Scotland would be placed in a disadvantageous position for two reasons. Firstly, until we had the opportunity ourselves to legislate, there would be no equivalent supervisory body which could operate in relation to Scottish devolved tribunals, hence creating an unsatisfactory imbalance of tribunal scrutiny. Secondly, we would lose the experience gained from the scrutiny carried out by the AJTC across the reserved/devolved divide, bearing in mind that most of the tribunals (and the largest ones) operating in Scotland deal with reserved matters eg Social Security, Tax, Asylum and Immigration.

5. In order to regulate properly the over-arching inter relationship of the AJTC with the Scottish Ministers (in relation to devolved matters), powers would need to be conferred in relation to issues such as appointment and removal by the Scottish Ministers of Council members of the AJTC; designation by the Scottish Ministers of Scottish Committee members of the AJTC; exercising advisory functions for the AJTC to advise the Scottish Ministers on the development of (and changes in) the administrative justice system in Scotland; exercising referral functions in relation to receipt of reports in such matters; commenting on proposed Scottish or UK legislation; publication of reports on Scottish matters; attendance at devolved tribunal hearings; and the laying of Annual Reports before the Scottish Parliament.
6. The need for Order making powers for the Scottish Ministers is limited. As part of the arrangements for the establishment of the AJTC however, it will be necessary to specify, by Order, the list of tribunals which will be subject to supervision by the Council. It is proposed that this list will initially be the same as the list of devolved tribunals under the existing legislation which are subject to supervision by the Council on Tribunals. It can be added to when new devolved tribunals are created in future. This Order making function is proposed to be exercised by the Scottish Ministers, subject to Scottish Parliamentary scrutiny.

Functions in relation to the Criminal Injuries Compensation Appeals Panel

7. In dealing with what might generally be described as the reserved tribunal system, the Bill will contain no provisions which deal with devolved tribunals (except so far as relating to the Administrative Justice and Tribunals Council). However, it is proposed to transfer the substantive appeals jurisdiction of the Criminal Injuries Compensation Appeals Panel into the new Tribunal Service. This would be done by using the order making powers in the Bill in due course to transfer the appeal right to the First Tier Tribunal, within the integrated Tribunal Service.

8. The Panel is a cross-border public authority since the Criminal Injuries Compensation Authority operates on a Great Britain wide basis and the Panel was designated as such at the time of devolution. The functions of the Panel were modified to reflect the reserved/devolved divide and one of the statutory modifications at that time was to confer upon the Scottish Ministers the power of appointment of not fewer than five members of the Panel in consultation with UK Ministers. In contrast to the clearly reserved nature of the functions relating to Commissioners of Taxation (see below), the Panel exercises in effect mixed functions and therefore the appointment functions of the Scottish Ministers as part of the operational requirements of the Panel can truly be regarded as devolved.

9. The unusual position of the Panel is worthy of comments in two respects. Firstly is that DCA have recognised that the Scottish power of appointment of Panel members should be retained because of its essentially devolved nature. Scottish Ministers will therefore continue to exercise the functions of appointing at least five members of the Panel, in consultation with UK Ministers. This does not fall within the general transfer of reserved tribunals appointments functions to the Judicial Appointments Commission as from 1 April.

10. Secondly, although the appointments process will maintain its Scottish Ministerial involvement, it is proposed in due course to transfer all other appeal functions of the Panel into the new structure proposed to be established under the Bill. This will allow Panel users in Scotland as well as England & Wales to enjoy the benefits of inclusion within the new integrated Tribunal Service. For reserved tribunals, this will be achieved by the Bill conferring on the Lord Chancellor the power to transfer tribunal functions from the existing tribunals to the First Tier or Upper Tier tribunals established by the Bill. In relation to the Panel, consent of the Scottish Ministers will be required before this can be done.

11. These, and other consequential changes, re-define the constitution of the Panel and would require the consent of the Parliament. If that consent were not given (with the effect that the Panel was not able to be brought within the new Tribunal Service), the benefits of increased integration and transparency would be lost to an important body in its decision making processes affecting appellants often in vulnerable positions.
Appointment function of Scottish Ministers in relation to General Commissioners of Taxation

12. The Scottish Ministers have responsibility for appointing General Commissioners of Taxation in relation to Scotland, under executive devolution arrangements. These functions were conferred under the Taxes Management Act 1970 and were executively devolved to the Scottish Ministers in 1999.

13. The Bill contains a power for the Lord Chancellor by Order to transfer tribunal functions from the existing tribunal decision makers to one of the two new tribunals under the unified Tribunal Service, established by the Bill, namely the First Tier or Upper Tier Tribunal. It is anticipated that he will do so in due course in relation to the functions of General Commissioners for Income Tax. That will in effect abolish that office.

14. Given the likelihood of eventual transfer into the new overarching Tribunal Service (causing the office of General Commissioner for Income Tax to cease to exist) and since this power relates clearly to the reserved function of taxation, we do not believe that it is sensible for the Executive to retain this function.