The Committee will meet at 10:30am in Committee Room 3, Committee Chambers, Edinburgh.

1. **Delegated powers scrutiny:** The Committee will consider the delegated powers provisions in the following Bill—

   Local Governance (Scotland) Bill as amended at Stage 2

   and will take evidence from Sarah Morrell, Local Democracy Team Leader, Finance and Central Services Department, Scottish Executive and Rosemary Lindsay, Office of the Solicitor to the Scottish Executive.

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

   the Town and Country Planning (Electronic Communications) (Scotland) Order 2004, *(draft)* (laid on 3\textsuperscript{rd} June 2004).

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

   the Police (Scotland) Regulations 2004, *(SSI 2004/257)*

   the Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004, *(SSI 2004/258)*

   the Advice and Assistance (Scotland) Amendment (No. 2) Regulations 2004, *(SSI 2004/262)*

   the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No. 3) Regulations 2004, *(SSI 2004/263)*

   the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2004, *(SSI 2004/264)*
the Agricultural Business Development Scheme (Scotland) Amendment Regulations 2004, (SSI 2004/267)

the Regulation of Care (Social Service Workers) (Scotland) Order 2004, (SSI 2004/268)

the Food Labelling Amendment (Scotland) Regulations 2004, (SSI 2004/269)

the Individual Learning Account (Scotland) Amendment Regulations 2004, (SSI 2004/270)

the National Health Service (Tribunal) (Scotland) Amendment (No. 2) Regulations 2004, (SSI 2004/271)

the Common Agricultural Policy (Wine) (Scotland) Amendment Regulations 2004, (SSI 2004/272)

the Education Maintenance Allowances (Scotland) Regulations 2004, (SSI 2004/273)

the Glasgow Metropolitan College (Establishment) Order 2004, (SSI 2004/274)

the Waste Management Licensing Amendment (Scotland) Regulations 2004, (SSI 2004/275)

the Inshore Fishing (Prohibition of Fishing and Fishing Methods) (Scotland) Order 2002, (SSI 2004/276)


the Beef Carcase (Classification) (Scotland) Regulations 2004, (SSI 2004/280).

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

    the Shrimp Fishing Nets (Scotland) Order 2004 (SSI 2004/261).

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

    the River Findhorn Salmon Fishery District (Baits and Lures) Regulations 2004, (SSI 2004/259)


Alasdair Rankin
Clerk to the Committee
Tel: 0131 348 5212
The following papers are attached for this meeting:

**Agenda Items 1-5**

Legal Brief (for members only) – to follow  
SL/S2/04/21/1

**Agenda Item 1**

Copies of the Bill as amended at Stage 2
Executive Memorandum  
SL/S2/04/21/2

**Agenda Item 2**

Executive Responses  
SL/S2/04/21/3

**Agenda Items 3-5**

Copies of Instruments (circulated to Committee members only)

**Papers circulated for information:**

Minutes of 20\textsuperscript{th} meeting, 2004 (Session 2)  
SL/S2/04/20/M
Memorandum to the Scottish Parliament Subordinate Legislation Committee

Local Governance (Scotland) Bill as amended at stage 2

Provisions conferring power to make subordinate legislation

Purpose

This Memorandum has been prepared by the Scottish Executive to assist the Subordinate Legislation Committee in its consideration, in accordance with Rule 9.7.9 of the Parliament’s Standing Orders, of the Local Governance (Scotland) Bill. This Memorandum refers to the Bill as amended at Stage 2. It describes those provisions conferring power to make subordinate legislation which were amended at stage 2. It also gives the Committee an explanation of amendments affecting the exercise of subordinate legislation making powers which it is proposed to introduce at stage 3. The Memorandum explains and gives reasons for the amendments. It should be read in conjunction with the Executive’s Memorandum to the Subordinate Legislation Committee dated November 2003.

Background to the Bill

The core elements of the Local Governance (Scotland) Bill are the introduction of a new system for electing councillors based on the single transferable vote (“STV”) model in Part 1 of the Bill and in Part 2 the amendment of the rules relating to candidates in local government elections and the introduction of a new power to provide for payments to be made to councillors (including remuneration and severance payments). The Bill as introduced was considered by the Subordinate Legislation Committee in its meetings on 13, 20 and 27 January 2004 and reported on in its 2nd Report 2004. Reference is also made in this Memorandum to the Stage 1 report on the Bill by the Local Government and Transport Committee.

Section 9 – Power to make further provision about local government elections

Order making power under section 9(1) and new sections 3 and 5

*Power conferred on:* The Scottish Ministers

*Power exercisable by:* Order made by Statutory Instrument

*Parliamentary Procedure:* Affirmative resolution of the Scottish Parliament in the case of an order containing provisions of the type mentioned in section 9(2) or provisions which add to, replace or omit any part of the text of an Act. Otherwise negative resolution of the Scottish Parliament.
Section 9

The order making power under section 9(1) of the Bill was amended at stage 2.

Subsection (1) was amended to require the Scottish Ministers to make an order rather than permit them to do so as was provided in section 9(1) of the Bill as introduced.

Subsection (2) was also amended to specify the matters regarding which provision must be made in this order. Subparagraphs (a) and (b) of section 9(2) of the Bill as introduced were deleted since their subject matter is encompassed in provisions of the amended section 9(2). In particular the former 9(2)(a) is encompassed within the new 9(2)(a) and 9(2)(b) is encompassed within the new 9(2)(d).

The provisions in section 9(2)(c) and (d) of the Bill as introduced were renumbered as subsection (2A) which provides as to matters regarding which provision may be made in the order. The text of these provisions remains unchanged.

Sections 3 and 5

Section 3 of the Bill as introduced was amended at stage 2 to require that an order under section 9(1) of the Bill shall specify the manner in which the number of votes which will secure the return of a candidate as a councillor is to be calculated.

Section 5 of the Bill as introduced was amended at stage 2 to require that an order under section 9(1) of the Bill shall make provision as to the transfer of ballot papers from candidates who are deemed to be elected as councillors or excluded from the election.

The Committee will note that provision for these matters is also made at section 9(2) of the Bill as amended at stage 2. Section 9(2)(a) makes provision for the matter provided for in section 3 and section 9(2)(d) makes provision for the matter provided for in section 5.

The reason for this duplication is that we were advised by the Parliamentary Authorities that the deletion of sections 3 and 5 of the Bill as introduced would be considered “wrecking” amendments and therefore inadmissible. The “wrecking” effect of the deletion of these sections has however been removed by the successful stage 2 amendment of section 9 of the Bill.

Accordingly, the Executive propose to bring forward amendments at stage 3 to remove sections 3 and 5 of the Bill and thus address the duplication of provision which arose for technical reasons.

Reason for stage 2 amendment of power at section 9(1).

At stage 2 the Bill was amended to remove the detail of the system of the single transferable vote (“STV”) which is to be used in Scottish local government elections from primary legislation and provide for it to be in subordinate legislation. Section 2
of the Bill as amended still requires that the poll is conducted using STV but the detail of the particular system of STV is left to subordinate legislation.

The Bill as introduced provided for a system of STV commonly called the Gregory method which has been used in Northern Ireland since 1973. There are other STV systems involving more complex methods of transferring votes. In view of the current position where votes are counted manually, the fact that the Gregory method is already used within the UK, and that the method is relatively straightforward to understand, the Executive considered that the Gregory system was the most appropriate for introduction here.

Having heard evidence during stage 1 the Local Government and Transport Committee concluded in its stage 1 report that the method of STV set out in the Bill was the most appropriate one for local government elections in Scotland at this time given the currently available counting technology. It went on to state its preference for the “weighted inclusive Gregory” method of STV but recognised that the adoption of this method would be likely to make manual counts unrealistically time consuming. The Committee recommended that the Executive should consider the issue and put in place any necessary measures including any necessary subordinate legislation powers to enable a different method of STV to be adopted in due course. [Paragraphs 198 to 200 of the Local Government and Transport Committee’s stage 1 report on the Local Governance (Scotland) Bill.]

Further to this, the Local Government and Transport Committee at paragraph 172 of its report in relation to the use of subordinate legislation in the Bill recommended that the Executive reconsider the subordinate legislation powers in respect of the counting rules.

The Executive has taken on board the recommendations of the Committee and amended the Bill to remove the detail of the method of STV to be used. Instead provision regarding the detail of the system will be made in an order under section 9(1) of the Bill. The section 9(1) order making power had to be amended to require that an order setting out these provisions is made and to provide that it is subject to affirmative procedure. Providing for these matters by way of subordinate legislation rather than primary legislation will facilitate flexibility in the method of STV used if this should prove to be appropriate in the future. This might be as a result of developments in counting technology, or as a result of experience with different methods of STV used here or elsewhere.

Amendment of Section 10 (Reviews of electoral arrangements)

Removal of subordinate legislation making power in section 10(3)(d) of the Bill as introduced

Section 10(3)(d) of the Bill as introduced inserted a new subsection (1A) into section 28 of the Local Government (Scotland) Act 1973. This gave Scottish Ministers the power to make rules with reference to which the Local Government Boundary Commission for Scotland would set the ward boundaries for the purposes of local government elections. It also introduced a new subsection (1B) which meant that the rules would be subject to affirmative procedure. Schedule 6 of the 1973 Act
which contains the existing rules was to be repealed in terms of section 10(3)(f) of the Bill as introduced.

The Subordinate Legislation Committee in its report concluded that in all the circumstances this power was justified.

However the Local Government and Transport Committee while accepting the general findings of the report by the Subordinate Legislation Committee asked the Executive to re-consider its use of subordinate legislation in relation to the rules for setting ward boundaries.

The Executive has taken on board the recommendations of the Local Government and Transport Committee and of the STV Working Group’s initial report which concluded that any necessary changes to the current rules could be achieved by amending Schedule 6 to the 1973 Act.

The Bill as introduced has therefore been amended to reinstate and adjust Schedule 6 of the 1973 Act. In consequence the subordinate legislation making power which was introduced at section 10(3)(d) has been removed.

Proposed amendment at Stage 3 of section 22 of the Bill

Background

It is proposed to introduce amendments to section 22 of the Bill at stage 3. The purpose of these amendments is to clarify the way in which the subordinate legislation making powers under section 17(1) and section 21 of the Bill may be exercised.

Section 17(1) – Reason for clarification of way power can be exercised

Section 17(1) of the Bill provides that the Scottish Ministers may make regulations which will provide for the payment of remuneration and allowances to and reimbursement of expenses incurred by councillors.

Section 17(4) of the Bill provides that where the Scottish Ministers have made a requirement under section 19(2) of the Bill in relation to the payment of councillors’ remuneration, allowances and expenses, then before making regulations under section 17(1) they must consider any information, advice or recommendations given to them by the Scottish Local Authorities Remuneration Committee in response to that requirement.

Section 19(2) of the Bill provides that the Scottish Ministers may require the Remuneration Committee to provide them with information in relation to or review, and prepare and submit to the Scottish Ministers advice or recommendations in relation to the payment of such of councillors’ remuneration, allowances and expenses as are specified in the requirement.

The power under section 17(1) of the Bill will be used to set up a new system for remunerating councillors. As was noted in our Memorandum to the Subordinate
Legislation Committee on the Bill as introduced it is likely that the content of the regulations will be informed by the work of the Remuneration Committee. At this stage therefore the detail of the new system of remuneration is not established.

When the detail of the new system of remuneration is established it will be necessary to put in place the legislation to give it effect. This will involve an exercise of the regulation making power under section 17(1) of the Bill but in addition it is likely that provision will have to be made for the repeal of some or all of the legislation which governs the existing system for payment of councillors’ allowances and expenses. There may also be a requirement for a transitional measure to assist the change over to the new system.

In view of this we have given further consideration to how this could be achieved. Since we do not know at this stage exactly what provision will be required we can not bring forward an appropriate provision in the Bill. We have therefore considered whether any consequential repeals and transitional provisions could be included in the regulations under section 17(1) of the Bill.

The extent of the regulation making power under section 17(1) is governed by section 22 of the Bill. Section 22(2)(a) provides that the regulation making power includes power to make such incidental, supplemental, consequential, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient. At first reading this may appear to allow the regulation making power under section 17(1) to be used to make the necessary consequential and transitional provisions to give effect to the new system of remuneration and allowances for councillors.

Section 22(2) however has to be read subject to section 22(3) which provides that an order under section 9(1) (which makes provision as to the conduct of elections) may modify any enactment. It could therefore be implied that subordinate legislation making powers not referred to in section 22(3) may not be capable of being used to modify enactments. Thus the regulation making power under section 17(1) of the Bill may not be capable of being exercised so as to modify an enactment. We consider that the introduction of the new remuneration system for councillors may require such a power to modify.

Section 21 – reason for clarification of way power can be exercised

Section 21 of the Bill contains an ancillary provision which allows the Scottish Ministers by order to make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes or in consequence of the Bill once enacted.

Consideration was given to making the consequential and transitional provisions which will be required following the introduction of the new system of allowances and remuneration for councillors under this provision. Again there was the problem that the power under section 21 as presently drafted may not be capable of being exercised so as to modify an enactment. In addition using the power under section 21 would mean that the provisions introducing the new system of allowances and remuneration would be in one set of regulations (under section 17(1)) and the
consequential and transitional provisions would be in a separate order under section 21. It was considered preferable to make all the necessary changes in one instrument. Accordingly it was decided to amend the way in which the power under section 17(1) could be exercised.

It is known at this stage that modifications of enactments will be required as a result of the exercise of the power under section 17(1) although the detail of what the modification will be is not known. It is considered that there may be other incidental, consequential, transitional, transitory or saving provisions which will require to be made and that these may necessitate the modification of an enactment.

The order making power in section 21 has to be read in conjunction with section 22 and as outlined above the effect of section 22(3) as currently drafted is that by implication an order making power not mentioned in that section may not be capable of being used to modify an enactment.

It is considered desirable for the ancillary making power in section 21 to be capable of being exercised so as to modify enactments. This will allow any necessary modifications which are required in the context of incidental, supplemental, consequential, transitional, transitory or saving provisions to be made without having to have recourse to primary legislation.

Amendments to be laid at stage 3

In view of the above we propose to lay amendments to section 22 of the Bill at stage 3 to clarify the way in which the subordinate legislation making powers under section 17(1) and section 21 of the Bill may be exercised. An amendment will be laid to amend section 22(3) so that it provides that in addition to orders under section 9(1), orders under section 21 and regulations under section 17(1) may modify any enactment.

Further amendments to section 22(4) and (5) will be made so that in addition to what is already provided in relation to orders under section 9(1) of the Bill, regulations under section 17(1) of the Bill and orders under section 21 of the Bill which contain provisions which add to, replace or omit any part of the text of an Act is subject to affirmative procedure.
Insertion of direction making power into section 10(3)

Section 10(3)(aa)(ii) — amendment of section 18 of the 1973 Act to insert direction making power

1. Section 10(3) of the Bill as introduced was amended at Stage 2 to insert an amendment to section 18 of the Local Government (Scotland) Act 1973. Section 18 provides in relation to the procedure for reviews by the Local Government Boundary Commission for Scotland.

2. Section 18(2)(a) of the 1973 Act currently provides that the Boundary Commission must consult certain persons in conducting a review.

3. Section 10(3)(aa)(ii) of the Bill as amended at stage 2 inserts a new subsection (2A) into section 18 of the 1973 Act which provides that the Scottish Ministers may give directions to the Boundary Commission and/or to any council affected by a review in relation to the consultation under section 18(2)(a) of the 1973 Act.

4. A new subsection (2B) is also inserted into section 18 of the 1973 Act. This provides that directions in relation to the consultation may be given generally or in relation to particular reviews or particular aspects of reviews.

Reason for taking power to give direction

5. In the course of evidence taking during Stage 1 views were expressed that Councils having particular knowledge and understanding of local ties in their area should be involved at an early stage in the process of drawing up proposals for ward boundaries. The existing section 18(2)(a) already provides for councils to be consulted but the Executive wish to ensure that there is a full exchange of views at a very early stage in the process. At the same time, the Executive wish to ensure that the tight timetable for ensuring that the new ward boundaries are in place in time for the next local government elections in 2007 is not jeopardised by this expanded consultation.

6. The direction making power is therefore intended to address these two aspects of making sure that the consultation takes the form of a full exchange of views and that it runs to time. The power is limited to giving directions which relate to the conduct of the consultation under section 18(2)(a) rather than more generally in relation to the review.

The Scottish Executive
June 2004
SUBORDINATE LEGISLATION COMMITTEE

20th Meeting, 2004 (Session 2)

Tuesday, 8th June 2004

Executive Responses

- the Town and Country Planning (Electronic Communications) (Scotland) Order 2004, (draft)
THE TOWN AND COUNTRY PLANNING (ELECTRONIC COMMUNICATIONS) (SCOTLAND) ORDER 2004, (DRAFT)

On 8 June 2004 the Committee asked the Executive for an explanation of the following matters -

1. This draft Order replaces the draft Order that came before the Committee last week, which has been now been withdrawn following the identification of defects by the Committee. The Committee asks the Executive for further clarification on articles 7(2) and 8(2), which in the view of the Committee remain defectively drafted.

2. The wording of new sub-paragraph (10) (paragraph 8) does not concern the giving of a notice (or deemed notice) but states the date from which a notice given under new sub-paragraph (9) will be effective. It therefore appears to the Committee that new sub-paragraph (8) to the giving of a notice under sub-paragraph (10) may be wrong and the Committee asks the Executive for comment.

3. Similarly, it appears to the Committee is of the opinion that the reference in new sub-paragraph (9) to paragraph (b) of new sub-paragraph (8) is also wrong in context. It is appreciated that the policy intention may have been to permit the giving of a notice that an address is no longer to be used for electronic communications but this does not seem to be what the draft provides. Sub-paragraph (9) states that a notice may be given “for the purposes mentioned in” paragraphs (a) or (b). Paragraph (a) refers to the use of electronic communications for all purposes (which is clearly a purpose). Paragraph (b) however refers to an address which is not a purpose. The only purpose referred to in paragraph (b) is the purpose in paragraph (a). If the drafter intended to provide for the giving of a notice that the address referred to in paragraph (b) is no longer to be used for electronic communication then the draft should so provide. The Committee asks the Executive for comment.

The Scottish Executive responds as follows:

The Committee seeks comments on the provisions of sub-paragraphs (8) to (10) of paragraph 1 of Schedule 9 to the Town and Country Planning (Scotland) Act 1997 as it would be amended by Article 7 of the Order. The Committee also seeks views on the reference in sub-paragraph (8) to “sub-paragraphs (9) and (10)”; and the reference in sub-paragraph (9) to “paragraphs (a) or (b) of sub-paragraph (8)”.

The Executive has already commented on the thinking behind these provisions in its response to the third and fourth questions posed by the Committee’s letter concerning this Order dated 1 June 2004.

Sub-paragraph (10) is part of the provisions about notice which are referred to in sub-paragraph (8) insofar as the effect of a notice relates to any deemed agreement which would otherwise apply to an applicant’s use of electronic communications. The Executive does not, therefore, agree with the Committee’s views that the reference to sub-paragraph (10) (as well as sub-paragraph (9)) is wrong. If that interpretation should however be incorrect it would be the Executive’s view that that reference would not in any way prejudice the proper application of the Order in practice.
Similarly, it is the Executive’s view that the reference to paragraph (b) in sub-paragraph (9) is correct. Sub-paragraph (8) sets out the basis on which an applicant shall be deemed to agree to electronic communications. Paragraph (a) provides that such agreement covers usage of electronic communications and paragraph (b) makes specific provision in terms of an applicant’s address in connection with that usage. A notice given under new sub-paragraph (9) can be given in relation either to deemed agreement as to general usage of electronic communications or to deemed agreement in relation to an applicant’s address. The Executive’s view is therefore that reference to both paragraphs is correct. As above, it is also the Executive’s view, if that interpretation should be incorrect, that these references would not in any way prejudice the proper application of the Order in practice.

SCOTTISH EXECUTIVE DEVELOPMENT DEPARTMENT