The Committee will meet at 10:30am in Committee Room 6.

1. **Delegated powers provisions**: The Committee will consider the delegated powers provisions in the following Bill—
   
   the Gaelic Language (Scotland) Bill at Stage 1.

2. **Executive responses**: The Committee will consider the responses from the Scottish Executive to points raised on the following—
   
   the Genetically Modified Food (Scotland) Regulations 2004, *(SSI 2004/432)*
   
   the Genetically Modified Animal Feed (Scotland) Regulations 2004, *(SSI 2004/433)*
   
   the Debt Arrangement and Attachment (Scotland) Act 2002 (Transfer of Functions to the Accountant in Bankruptcy) Order 2004, *(SSI 2004/448)*
   
   the Avian Influenza (Survey Powers) (Scotland) Regulations 2004, *(SSI 2004/453)*.

3. **Draft instruments subject to approval**: The Committee will consider the following—
   
   the Mental Health (Care and Treatment) (Scotland) Act 2003 Modification Order 2004, *(draft)*.

4. **Instruments subject to annulment**: The Committee will consider the following—
   
   the Feeding Stuffs (Scotland) Amendment (No.2) Regulations 2004, *(SSI 2004/458)*.
5. **Instruments not laid before the Parliament:** The Committee will consider the following—


6. **Subordinate legislation provisions in Private Bills:** The Committee will consider a note from the Clerk and agree its approach to such provisions.

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

Agenda Items 1-5

Legal Brief (for members only) – to follow

SL/S2/04/29/1

Agenda Item 1

Subordinate legislation memorandum

Bill and accompanying documents (circulated to Members only)

SL/S2/04/29/2

Agenda Item 2

Executive responses

SL/S2/04/29/3

Agenda Items 3 - 5

Copies of instruments (circulated to Members only)

Agenda Item 6

Note from the Clerk – to follow

SL/S2/04/29/4

Papers circulated for information:

Minutes of 28th meeting, 2004 (Session 2)

SL/S2/04/28/M
MEMORANDUM TO THE SUBORDINATE LEGISLATION COMMITTEE
BY THE SCOTTISH EXECUTIVE

GAELIC LANGUAGE (SCOTLAND) BILL

Purpose

This memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of provisions in the Gaelic Language (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose and nature of each such provision and explains why the matter is to be left to subordinate legislation. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill (documents SP Bill 25-EN and SP Bill 25-PM, respectively).

Policy Context

The Bill introduces a number of measures to underpin the Executive’s policy objective of securing the status of the Gaelic language in Scotland. The Bill establishes the Gaelic development body, Bòrd na Gàidhlig, on a statutory basis to oversee the promotion and development of the language. The Bill will also confer a power on the Bòrd to require certain public authorities to prepare a Gaelic language plan to encourage and facilitate the use of the Gaelic language in public life. The Bill provides for Bòrd na Gàidhlig to issue guidance on matters relating to Gaelic education.

Subordinate Legislative Powers

The Bill provides for subordinate legislation in relation to regulations about the content of Gaelic language plans (section 3(7)) and for varying the size of membership of Bòrd na Gàidhlig (Schedule 1 paragraph 2(2)).

Section 13 of the Bill makes provision for the Act to be brought into force by a commencement order. This order may contain any necessary transitional, transitory or savings provisions as Ministers may think fit.

All powers to make subordinate legislation in the Bill are new and are conferred on the Scottish Ministers.

The intention behind taking subordinate legislation powers is to ensure flexibility in the development of language plans and to enable Ministers to respond to changing circumstances and experience gained from the work of Bòrd na Gàidhlig. The justification for the Parliamentary procedures attaching to each power is given below.
Subordinate legislative powers

GAELIC LANGUAGE PLANS

Section 3(7): Power to make further provision by regulations as to the content of Gaelic language plans.

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution of the Scottish Parliament

Section 3(7) will allow for the Scottish Ministers through regulations to specify information which should be included in language plans prepared by public authorities. For example, the power might be used to specify issues which all education authorities should include if they were requested to produce a Gaelic language plan. The flexibility of regulations will allow for the varying issues which different types of public authority deal with to be accommodated. Section 3(5)(c) states that when preparing a Gaelic language plan the public authority has to have regard to any guidance issued by Ministers or the Bòrd. The regulation making power in section 3(7) can be used to usefully underpin this guidance. The Bill simply requires that the plans be drawn up. Should further detailed information on what plans should contain be required the regulation making power will be available.

The intention behind this power is to ensure future flexibility in the development of language plans and to enable Ministers to respond to the changing circumstances and experience gained from the work of the Bòrd. The Executive considers that the regulations are not unusual or significant enough to justify affirmative procedure and has therefore opted to apply negative procedure.

SHORT TITLE AND COMMENCEMENT

Section 13(2) and (3): Power to commence provisions by order.

Power conferred on: The Scottish Ministers

Power exercisable by: Commencement Order

Parliamentary Procedure: No parliamentary procedure

Section 13(2) provides for the Scottish Ministers by order to appoint the day on which the Act comes into force. Section 13(3) provides that when Scottish Ministers make an order under section 13(2) they may in that respect make such transitional, transitory or saving provision as they think fit. The transitional power would be used to ensure that there is a smooth handover of the work already begun by the existing Bòrd. Any such order would not be subject to any Parliamentary procedure. This is standard commencement provision.
MEMBERSHIP OF BÒRD NA GÀIDHLIG

Paragraph 2(2) of Schedule 1: Power by order to vary the size of Bòrd na Gàidhlig.

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Statutory Instrument

Parliamentary Procedure: Negative Resolution of the Scottish Parliament

Paragraph 2(2) of Schedule 1 provides for the Scottish Ministers by order to vary the minimum or maximum number of ordinary members of Bòrd na Gàidhlig. The provision provides flexibility to vary the size of the Bòrd should the situation arise where the work of the Bòrd would benefit from increasing its size, for example to accommodate members with areas of particular expertise. At present it is felt that a Bòrd of between 5 and 11 members, plus a chair, would be sufficient to enable the Bòrd to discharge its business effectively. Negative procedure has been chosen in this case as the power simply allows for alteration of the number of Bòrd members.
Executive Responses

- the Genetically Modified Food (Scotland) Regulations 2004, (SSI 2004/432)
- the Genetically Modified Animal Feed (Scotland) Regulations 2004, (SSI 2004/433)
- the Debt Arrangement and Attachment (Scotland) Act 2002 (Transfer of Functions to the Accountant in Bankruptcy) Order 2004, (SSI 2004/448)
- the Avian Influenza (Survey Powers) (Scotland) Regulations 2004, (SSI 2004/453)
THE GENETICALLY MODIFIED FOOD (SCOTLAND) REGULATIONS 2004, (SSI 2004/432)

In its letter of 26th October to Catherine Hodgson the Committee asked for an explanation of the following matters:

“1. The Committee asks the Executive why section 9(7) of the Food Safety Act 1990 (as applied by regulation 6 of the Regulations) does not provide that an operator is to bear the expenses of detention of food under section 9(3) when the detention provisions on that subsection appear identical to those in section 9(2).

2. The Committee also asks the Executive to explain why section 9(7) as amended refers to “detention” of the food whereas subsections (2) and (3) of that section make no such reference but instead refer only to seizure and removal of the food.”

The Food Standards Agency responds as follows:

1. The Agency’s policy in Scotland is that the costs associated with storage or confinement of the food prior to its seizure for the purposes of being dealt with by the sheriff should be borne by the operator. In the same way the cost of any disposal or destruction of the food ordered by the sheriff should be borne by that operator. However, the Agency accepts that once seized for the purposes of being dealt with by the sheriff the cost of storage or otherwise of the food should be a matter for the enforcement authority.

2. Section 9(7) was drafted in such a way that it would refer to the purposes set out in section 9(2)(a)(ii). The word “detention” was chosen in order to describe food which was detained in the sense of being required not to be removed or removed only to a specific place. The word “seizure” was deliberately not used so as to avoid any implication that costs associated with the purposes of section 9(2)(b) would be attracted.

3. The Agency will make clear in its guidance to enforcement authorities that this is the approach to be adopted. However, given the Committee’s comments the Agency will consider revisiting this provision at the next legislative opportunity with a view to clarifying its form.

4. The Agency is grateful to the Committee for its observations.
1. In its letter of 26th October to Catherine Hodgson the Committee asked for an explanation of the following matters:

“1. The Committee asks the Executive to explain why sub-paragraph (h) of regulation 7(2) on page 4 spells out the title of the current Regulations in full whereas sub-paragraphs (b) to (f) of that regulation refer simply to “these Regulations”.

2. The Committee asks the Executive to explain the purpose and effect of regulation 10(1) and (2) in so far as applying to offences under regulation 5(1) (which are triable “either way” and therefore not subject to the statutory time limit in s136 of the Criminal Procedure (Scotland) Act 1995).

3. The Committee asks the Executive to explain regulation 8(7) which raises points similar to regulation 6 of SSI 2004/432 as set out in the Committee’s letter of today, marked SL/04/98.”

The Food Standards Agency responds as follows:

1. The Agency notes the Committee’s comments and accepts that for consistency a reference to “these Regulations” would have sufficed. However, in the context of the alteration which was being made it was thought to be helpful to the reader to recognise the appropriate form prescribed by narrating the title of the Instrument fully. It is not considered, however, that this drafting point affects the validity of the Instrument.

2. The purpose of regulation 10(1) and (2) is to maintain consistency in enforcement as between these Regulations and the Genetically Modified Food (Scotland) Regulations 2004 (SSI 2004/432). Since both Regulations emerge from a single Community source (Regulation EC No 1829/2003) it was considered both appropriate and helpful to enforcement authorities to maintain a consistent approach. The Genetically Modified Food (Scotland) Regulations 2004 by regulation 6(2) apply the provisions of section 34 of the Food Safety Act 1990.

3. The Agency refers the Committee to its response of even date in relation to the Genetically Modified Food (Scotland) Regulations 2004 (SSI 2004/432). The policy of the Agency is the same as in relation to those Regulations. The intention is that the operator bear the costs associated with the detention of the product during any testing or analysis being conducted by an inspector, and also any costs associated with an order of the court for its appropriate disposal. It is not the policy intention to impose costs on the operator for any storage or other handling during any period that the matter is before the sheriff on the question of disposal.

4. The language of regulation 8(7) and the use of the word “detention” was intended to identify only the purposes of regulation 8(2)(a)(ii) and not the terms of regulation 8(2)(b). It is for that reason that the word “seizure” was not used.
5. The Agency will in its guidance to enforcement authorities make this point clear. However, given the comments of the Committee the Agency will consider revisiting this provision at the next legislative opportunity with a view to clarifying its form.

6. The Agency thanks the Committee for its observations.
On 26th October 2004 the Committee asked the Executive for an explanation of the following matter:

“The Committee asks the Executive why article 4 is considered necessary given section 1B of the Bankruptcy (Scotland) Act 1985.”

The Scottish Executive responds as follows:

Section 1B of the Bankruptcy (Scotland) Act 1985 provides that the functions of the Accountant in Bankruptcy may be carried out on his behalf by members of his staff authorised by him to do so. It is arguable that the functions referred to in article 4 are not functions of the Accountant in Bankruptcy but are functions of the Scottish Ministers which may be performed on their behalf by the Accountant in Bankruptcy. In that case the effect of section 1B would be lost in relation to those functions. The Executive considered article 4 to be desirable in order to ensure that this did not occur.
On 26th October the Subordinate Legislation Committee considered the above instrument and sought an explanation of the following matters:-

1. The Committee asked the Executive to explain the purpose of the definition of the word “person” given the definition of the word in Schedule 1 to the Interpretation Act 1978;

2. The Committee asked the Executive for information as to how the Decision is to be implemented in respect of wild birds.

The Scottish Executive Environment and Rural Affairs Department responds as follows:-

1. The Executive wished to make it clear that in regulations 4(1)(g) and 6(3), ‘person’ did not include a body corporate. The Executive considers that the form of words adopted has the equivalent effect to a phrase such as “person, in regulations 4(1)(g) and 6(3), does not include a body corporate” but additionally makes it clear to those affected by the instrument that all the offences created by regulations 6(1) and (2) can be committed by bodies corporate.


In Decision 2004/615/EC, the Commission set out its requirements and guidelines on how the survey was to be designed and implemented. Decision 2004/615/EC amended the guidelines for the survey by adding an Annex. In paragraph 3 of the Annex the Commission narrated that one of the objectives of the programme was “to continue surveillance for avian influenza on a voluntary basis in wild birds”. Part C1 of the Annex makes it clear that sampling of wild birds is to be carried out on a voluntary basis. A survey plan, based on these instructions, was submitted to the Commission and received approval in article 1 of Decision 2004/630/EC, as meeting the requirements of Decision 2004/111/EC as amended by Decision 2004/615/EC.
Subordinate Legislation Committee
Delegated Powers Provisions in Private Bills
A Note from the Clerk

Introduction
1. As Private Bills do not often contain delegated powers it has not yet been necessary for the Committee, in this or the previous session, to consider its approach to such provisions. The Edinburgh Tram Line Bills do, however, contain proposed delegations of regulation-making powers to Ministers as well as some other delegations of power in administrative form. The Committee will therefore wish to consider its general approach to the consideration of such provisions.

The Special Provisions for Private Bills
2. While Chapter 9A of Standing Orders sets out the particular rules for Private Bills, it makes no express provision for scrutiny of delegated powers provisions by the SLC in the way Chapter 9 (Public Bills) does. The Committee’s remit in Chapter 6, however, imposes a general duty on it to consider and report on any “proposed powers to make subordinate legislation in particular Bills or other proposed legislation”. That wording seems to provide a basis for the Committee to consider such provisions in Private Bills.

3. The Parliament, in considering delegated powers provisions in a Public Bill, agrees on the extent to which it wants to retain direct control over an aspect of public policy and to what extent it is prepared to delegate that to Ministers. With a Private Bill, the Parliament is considering whether to give a private third party (the promoter) a special benefit in law, taking account of the objections of other private third parties (objectors). In that context, any decision to delegate a power to Ministers has a different significance, since it is more about the balance between the promoter of the Bill and the Executive than about the relationship between Parliament and the Executive.

4. It is because of this different context that there are different Rules for the two categories of Bill. Unlike those relating to Public Bills, the Private Bill Rules specifically ensure that all the early scrutiny (at Preliminary and Consideration Stages) is confined to one small committee, whose members must be disinterested and are required to act in a detached and apolitical way, arbitrating between third-party views in a quasi-judicial manner rather than bringing their own political views to bear. They are also required to hear all the evidence, again to ensure that they can reach a balanced and impartial assessment on the basis of the evidence.

5. That is why there is no provision in the Private Bills part of Standing Orders for the Bureau to refer Private Bills to a subject committee or secondary committees and no obligation on a Private Bill Committee (PBC) to take account of the views of any other committee. (But this would not rule out a PBC inviting evidence from wherever it saw fit.) These Private Bill provisions are in place to provide a “first line of defence” against any judicial review, for example, sought by an objector who considers that his/her view has been unfairly or unreasonably dismissed and in particular with regard to ECHR matters.
Arguments For and Against SLC Involvement

6. It might be argued that the direct involvement of the SLC in the Private Bill process would undermine these principles, since some SLC members could have the sort of constituency or other interests in relation to the Bill that PBC members have been selected not to have. It could also be said that SLC members will not necessarily have heard all the evidence that relates to the question of whether a particular delegated powers provision is appropriate.

7. Against that, the scrutiny of such provisions by the SLC is constrained by its technical and legal remit, which formally excludes the intrusion of constituency or other interests. Also, any Private Bill will, in the end, have to come before the whole Parliament and no members are excluded from consideration of a Bill at that point, whatever interests they have. Finally, if a PBC did not hear some of the evidence that could be made available on a delegated powers provision, it could be said that it took less than a complete and balanced view of the Bill overall.

Possible SLC Private Bill Scrutiny Procedure

8. Taking these arguments together, a variation of the SLC’s usual Bill scrutiny procedures seems possible which takes account both of the special considerations applying to Private Bills and the requirement, under the terms of its remit, that the SLC consider delegated powers in any “proposed powers to make subordinate legislation in particular Bills or other proposed legislation”.

9. As the two letters from the Tram Line Committees propose, a PBC could invite the SLC to consider the delegated powers provisions in the Bill with the assistance of a memorandum from the promoter which the PBC, rather than the SLC, has requested. The SLC could then consider these provisions and put any written or oral questions to the promoter as it would to the Executive or a Member with Public Bills. The Committee would then submit its report to the Parliament rather than the PBC which could then take what account of the report it wished. The appropriate Stage of the Bill to do this would seem to be, by analogy with Public Bills, at the initial or Preliminary Stage.

10. If there were subsequent insertions, or amendments, of delegated powers in the Bill, the SLC could consider those too and report in a similar way before the Bill is debated by the Parliament.

11. In light of the requests from the Tram Line Committees, this Committee will wish to consider how to proceed.

Clerk to the Committee

29th October 2004