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

1. **Delegated powers scrutiny**: The Committee will consider a response from the Scottish Executive to points raised on the following Bill—

   Further and Higher Education (Scotland) Bill at Stage 1.

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

   - the Building Standards Advisory Committee (Scotland) Regulations 2004, (SSI 2004/506)
   - the Road User Charging (Exemption from Charges) (Scotland) Regulations 2004, (SSI 2004/519).

3. **Draft instruments subject to approval**: The Committee will consider the following—

   - the Scotland Act 1998 (Modification of Schedule 5) Order 2005, (draft)
   - the Scotland Act 1998 (River Tweed) Order 2005, (draft)
   - the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2005, (draft).

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

   - the Environmental Information (Scotland) Regulations 2004, (SSI 2004/520)
the Race Relations Act 1976 (Statutory Duties) (Scotland) Amendment Order 2004, (SSI 2004/521)


the Plastic Material and Articles in Contact with Food Amendment (Scotland) Regulations 2004, (SSI 2004/524)

the Contaminants in Food (Scotland) Regulations 2004, (SSI 2004/525)


the Fire Services (Appointments and Promotion) (Scotland) Regulations 2004, (SSI 2004/527)

the Salmonella in Laying Flocks (Sampling Powers) (Scotland) Regulations 2004, (SSI 2004/536).

5. **Draft Guidance subject to annulment:** The Committee will consider the following—


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

   the Protection of Children (Scotland) Act 2003 (Commencement No.1) Order 2004, (SSI 2004/522)

   the Standards in Scotland’s Schools etc. Act 2000 (Commencement No.7) Order 2004, (SSI 2004/528)

   Act of Sederunt (Sheriff Court Bankruptcy Rules) 1996 Amendment 2004, (SSI 2004/534)

   the Diseases of Animals (Approved Disinfectants) Amendment (Scotland) Order 2004, (SSI 2004/537)


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

Agenda Items 1-6

Legal Brief (for members only) – to follow  SL/S2/04/35/1

Agenda Item 1

Executive response  SL/S2/04/35/2

Agenda Item 2

Executive responses  SL/S2/04/35/3

Agenda Items 3 - 6

Copies of instruments (circulated to Members only)
On 30 November 2004, the Committee asked the Executive for further explanation of the following matters:

**Section 5(7) Fundable further and higher education**

“The Committee accepts the Executive’s view that, in order to allow the definitions to reflect changes which may occur over time, this is an appropriate matter for subordinate legislation. However, the Committee is of the view that the provision to “modify” subsections (1) to (6) creates wide powers for future subordinate legislation, which it considers should be subject to affirmative rather than negative procedure, particularly given that it is additionally a Henry VIIIth power. The Committee also notes that this provision covers a range of matters and is not particularly content that the two provisions at 5(1)(b) and 5(5) should be drawn together this way in legislation. The Executive is requested to provide comment on this matter.”

**Section 7(1) Fundable bodies: further provision**

“Similarly to the point raised in relation to 5(7), the Committee was concerned that this provision has considerably wide powers and it considers that it should be subject to affirmative rather than negative procedure. The Executive is therefore requested to provide comment.”

**Section 7(4) Fundable bodies: further provision**

“The Committee notes that there is considerable overlap between this power and that contained in 7(2)(i) and seeks clarification from the Executive on the drafting of this section.”

**Section 7(5) Power to issue guidance**

“The Committee notes the power at section 7(5) for the Scottish Ministers to issue guidance in relation to the objectives set out at subsection 2. The Committee seeks clarification on the use of this power, with a view to reaching a judgement as to whether it may be appropriate for such guidance to be laid before the Parliament.”

**Section 8(6) Funding of the Council**
“The Committee has some concerns in relation to the width of the powers that this provision grants to Ministers. The Committee accepts that this provision may be used to make modest changes but, given the scope of how it may be used, recommends that the Executive adopts affirmative rather than negative procedure. The Executive is requested to comment on this issue.”

Section 8(7) Funding of the Council

“The Committee considers that this provision, as read with subsection (6), again gives very wide powers to Ministers, in relation to the setting of fees for further and higher education courses. The Committee noted that affirmative procedure has been set out in the bill for this provision but, given the level of detail to be set out in any delegated legislation, would recommend a more rigorous form of scrutiny. The Committee therefore requests that the Executive considers a super-affirmative procedure, whereby proposals in draft are laid before the Parliament to allow it to suggest amendments before the draft order itself laid. The Executive is requested to comment on this issue.

The Committee notes the concerns of the lead Committee in relation to both section 8(6) and 8(7) and asks that the Executive further outlines the intention of these powers in order to inform this Committee's consideration of the balance between primary and secondary legislation in this bill.”

Section 22(4)(j) Consultation and collaboration

“The Committee notes that the power in paragraph (j) allows for bodies and persons to be added to the list but not for the amendment of the list and seeks clarification from the Executive on the intention of this provision.”

Section 31 and section 34(2)

“The Committee noted the inconsistency between the procedural provisions in these two sections and asks for clarification from the Executive.”

The Scottish Executive responds as follows:

Section 5(7) Fundable further and higher education

The Executive acknowledges that section 5(7) of the Bill contains provision that Ministers may by order under negative procedure modify subsections (1) to (6). However, the sole purpose of these subsections is to define the various programmes of learning which comprise “fundable further education” and “fundable higher education”, and which are referred to in various sections of the Bill. Accordingly, the power to modify in subsection (7) could only be used to modify the descriptions of the various programmes of learning that fall within the definitions of “fundable further education” and “fundable higher education.” It would be difficult for an order to distort this purpose of the section.
The Executive has considered that the modification of the descriptions of programmes of learning falling within the definitions of “fundable further education” and “fundable higher education” is a suitable matter for negative procedure. This is considered sufficient to allow the definitions to reflect changes that may occur over time, in the types of programmes and courses specified in the definitions. By section 5(8), Ministers are also required to consult the Council before making any order.

It may also assist the Committee to explain that the definitions of “fundable further education” and “fundable higher education” update for the purposes of the Bill, the definitions of “further education” and “higher education” contained within sections 6 and 38 of the Further and Higher Education (Scotland) Act 1992 (“the 1992 Act”). These definitions will remain in force in relation to legislation which refers to these definitions in the 1992 Act. The provisions in section 5 of the Bill are drawn from these provisions to that extent. By sections 6(2) and 38(5) of the 1992 Act, Ministers may also by order, under negative procedure, modify entries relating to programmes of learning or courses within the definitions of “fundable further education” and “higher education.”

The Committee indicates concern at the way in which the provisions in section 5(1)(b) and 5(5) are drawn together. Section 5(1)(b) provides that a programme of learning which prepares a person for (i) a qualification awarded by the Scottish Qualifications Authority (SQA) or (ii) a General Certificate of Education qualification of England and Wales or Northern Ireland, falls within the definition of “fundable further education” for the purposes of the Bill. Section 5(5) provides that, for the purposes of defining courses at higher level that fall within the definition of “fundable higher education”, a course is to be regarded as providing education at a higher level if its standard is higher than the standard of courses in preparation for the examinations that are specified in section 5(5)(a) to (d). The Department does not consider that there is any inconsistency between these provisions.

It may also assist the Committee to point out that these provisions in section 5(1)(b) and 5(5) update, for the purposes of the definitions of “fundable further education” and “fundable higher education” in the Bill, the corresponding provisions that define programmes of learning for the purposes of “further education” and “higher education”, as defined by sections 6(1)(b) and 38(3) of the 1992 Act.

**Section 7(1) Fundable bodies: further provision**

Section 7(1) of the Bill makes provision that Ministers may by order modify schedule 2, by adding, removing or varying entries relating to the “fundable bodies” that are specified in that schedule. The Executive has considered that the power to so amend schedule 2 by order is appropriate to be exercised under the negative procedure. This is considered appropriate to deal with the variety of situations where bodies may be subject to mergers, closure, changes of name, or new bodies are established, or bodies are added as eligible for funding, or removed.
It is acknowledged that, if there were no further restrictions on the exercise of the power, a power of Ministers to amend the list of fundable bodies may be a wide power, in respect that it may have serious effects upon a fundable body affected. However, section 7 contains further restrictions before the power can be exercised. By section 7(1), Ministers may only make the order where the Council has either proposed, or has approved, the making of a modification. By section 7(2), in so proposing or approving, the Council must have regard to the desirability of ensuring that all entries in the schedule relate to bodies for which the Council considers suitable provisions, procedures and arrangements are in place. The various required provisions, procedures and arrangements are set out in section 7(2)(a) to (i). Accordingly, these limitations on the power will operate in any situation where Ministers propose by order that a body is either to be added or removed from the list in schedule 2.

If, however, upon consideration of this further explanation and information, the Committee remains of the view that affirmative procedure should be adopted here, then the Executive would be willing to instruct an amendment to that effect, and would discuss this further with Solicitors and Parliamentary Counsel.

**Section 7(4) Fundable bodies: further provision**

The Executive does not consider that there is necessarily any overlap in the powers contained in section 7(2)(i) and 7(4). There is a distinction between the purposes of these provisions. The power by order in section 7(4), under negative procedure, would operate to enable the updating of the details of the various provisions, procedures and arrangements that are specified in section 7(2)(a) to (h) if that were required over time. The power in section 7(2)(i) is a further power by regulations, under affirmative procedure, to specify the details of additional provisions, procedures and arrangements that fundable bodies may be required to put in place over time. In accordance with paragraph 10 of the Memorandum to the Committee, it is considered that these would be sufficiently material changes that Parliamentary scrutiny through affirmative procedure would be appropriate.

**Section 7(5) Power to issue guidance**

The Executive intend that the guidance referred to in section 7(5) would be guidance that would further clarify, for fundable bodies and the Council, the procedures, provisions and arrangements that bodies require to put in place for the purposes of section 7(2). This would also assist the Council in its responsibilities in terms of the section. Ultimately, under section 7(1), the Council would require to propose or approve the making of a modification. Thereafter, any modification of schedule 2 would require to be made by order.

**Section 8(6) Funding of the Council**

This is a matter which has already been discussed further within the Executive, and which was addressed within the Deputy First Minister's
evidence to the Lead Committee on 16th November. The Executive intends to bring forward an amendment which would provide, as the Committee suggests, that the power under section 8(6) will be subject to affirmative procedure.

Further, we would be agreeable that this proposed amendment would include provision that consultation would be required with specified persons or bodies, prior to exercising the order making function under both 8(6) and 8(7). It is proposed that consultation would be required with (a) such persons or bodies that Ministers determine are representative of the students of fundable bodies as defined by the Bill, (b) the governing bodies of all fundable bodies as defined by the Bill, (c) the new Council, and (d) such other persons or bodies as Ministers may determine from time to time. The precise wording of such a planned amendment will be discussed further with Solicitors and Parliamentary Counsel.

Section 8(7) Funding of the Council

The Committee has suggested that a “super-affirmative procedure” be adopted for the power to set fee levels within the terms and conditions of grant funding to the Council. The Executive notes that such procedure has been adopted in certain exceptional cases, for example, for designation orders under section 6 and 7 of the National Parks (Scotland) Act 2000, or remedial orders under sections 12-14 of the Convention Rights Compliance (S) Act 2001. We have considered, however, that a sufficient degree of Parliamentary scrutiny of proposals to make any order under both section 8(6) and 8(7) will be in place, if affirmative procedure is adopted for both these subsections, and if there is a proposed amendment to put in place a statutory requirement for consultation, before any order is made, (as above).

In proposing this, we have also had regard to our policy intentions in relation to these powers, on which the Committee requests further details in its second paragraph. Initially, we would refer the Committee to paragraph 37 of our Policy Memorandum to the Bill:

“ It is important to be clear that this power if used, is only intended to be used sparingly. Its purpose is to allow Ministers the flexibility to act in situations where Scottish students may be disadvantaged in specific subject areas by an increasing flow of students from elsewhere in the UK. At the moment, the only area this might apply to is medicine. Ministers believe it is essential that any further differentiation is carefully focussed and has the approval of Parliament.”

We would also draw to the Committee’s attention that this power to specify maximum fee levels within grant conditions to the Council shall replace the power that is already contained in section 42(3B) of the 1992 Act. This enables the specification of maximum fee levels within grant conditions to the Scottish Higher Education Funding Council. This existing power is to secure that maximum fee levels are set for any class of persons and for courses, as prescribed by regulations, to be equal to the maximum amount of allowances
as determined by Ministers under section 73D(2) of the Education (Scotland) Act 1980. By section 60 of the 1992 Act, this power can be exercised under negative procedure.

**Section 22(4)(j) Consultation and collaboration**

The intention of the Executive in this provision is to enable Ministers to specify (by order) additional persons with whom the Council must consult and collaborate with in accordance with section 22(1), beyond those listed in 22(4). This will enable a degree of flexibility if further suitable persons emerge in the future.

However, on further consideration of your comments, we believe that your point is correct and that it would be useful to have the ability to amend the list of persons, for example to cover any changes of legal status. We shall discuss the precise wording of a proposed amendment further with Solicitors and Parliamentary Counsel.

**Section 31 and section 34(2)**

It is not considered that there is a procedural inconsistency between section 31(ancillary provision), and 34(2) (commencement orders). Commencement orders are usually not subject to procedure. Section 31 may be used and is in force independently of a commencement order. It is considered appropriate to specify affirmative procedure, in accordance with section 32(4)(c), in respect of any ancillary orders under section 31 that amend an Act. If the Committee wish to elaborate further concerns on procedural inconsistency of these provisions, of course we shall consider that further.
SUBORDINATE LEGISLATION COMMITTEE

35th Meeting, 2004 (Session 2)

Tuesday, 14th December 2004

Executive Responses

- the Building Standards Advisory Committee (Scotland) Regulations 2004, (SSI 2004/506)

- the Road User Charging (Exemption from Charges) (Scotland) Regulations 2004, (SSI 2004/519)
On 7th December 2004 the Committee asked the Executive for an explanation of the following matter:-

“The Committee noted that a provision for the determination of the period of office of the members of the Building Standards Advisory Committee (BSAC) is not included in the regulations. Given this omission, the Committee seeks clarification on the appointment process to the BSAC, particularly in relation to the length of time any such appointment will last.”

The Scottish Executive responds as follows:

1. The Executive accepts that there is no such provision in the regulations. The Executive considers that apart from the provisions of section 31(2) of the Building (Scotland) Act 2003 which state that the members of BSAC are to be appointed by the Scottish Ministers after consultation with such persons as appear to them to be representative of the interests concerned, there is no further requirement within the Act for regulations which cover such details as the determination of the period of office of the members of BSAC.

2. These appointments are governed by the Code of Practice issued by the Office of the Commissioner for Public Appointments in Scotland (OCPA). Following public consultation inviting interest in membership of the BSAC members are normally appointed for a period of three years. Appointees may serve any number of terms subject to the maximum 10 year rule as, in terms of the OCPA Code of Practice, the BSAC is given the status of a “lower tier” body. Where a member is appointed as Chair then, in accordance with the OCPA Code of Practice, this counts as a new appointment and the 10 year rule starts again.
On 7 December 2004 the Committee asked the Executive for an explanation of the following matter –

“The Committee is concerned that regulation 3(b) confers discretion yet by virtue of the introduction to the regulation it is expressed as an obligation. The Committee asks the Executive whether this obliges an authority where it decides to provide for further exemptions to include such provisions in the scheme, or whether it authorises an authority to make further exemptions as it sees fit.”

The Scottish Executive responds as follows:

The Executive notes that the introduction to regulation 3 is expressed as an obligation. The purpose of regulation 3(b) is to enable an authority to make such further exemptions as it sees fit and to ensure that such exemptions are contained within the charging scheme made by that authority.