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

1. **Items in private:** The Committee will decide whether to consider agenda item 7 in private.

2. **Letter from the Deputy Minister for Justice:** The Committee will consider a letter from the Deputy Minister for Justice to the Convener with regard to the timing of the commencement of instruments.

3. **Executive responses:** The Committee will consider responses from the Scottish Executive to points raised on the following—
   - the Scotland Act 1998 (River Tweed) Order 2005, *(draft)*
   - the Environmental Information (Scotland) Regulations 2004, *(SSI 2004/520)*
   - 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)*.

4. **Draft instruments subject to approval:** The Committee will consider the following—
   - the Council Tax (Discount for Unoccupied Dwellings) (Scotland) Regulations 2005, *(draft)*
   - the Waste (Scotland) Regulations 2005, *(draft)*.
5. **Instruments subject to annulment:** The Committee will consider the following—

   the General Teaching Council for Scotland Election Scheme 2004 Approval Order 2004, *(SSI 2004/542).*

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

   the Education (Listed Bodies) (Scotland) Order 2004, *(SSI 2004/539)*

   the Environment Act 1995 (Commencement No.22) (Scotland) Order 2004, *(SSI 2004/541).*

7. **Inquiry into the regulatory framework in Scotland:** The Committee will consider an approach paper.

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

Agenda Items 2-6

Legal Brief (for members only) – to follow  SL/S2/04/36/1

Agenda Item 2

Letter from the Deputy Minister for Justice  SL/S2/04/36/2

Agenda Item 3

Executive responses  SL/S2/04/36/3

Agenda Items 4 - 6

Copies of instruments (circulated to Members only)

Agenda Item 7

Approach Paper (for members only)  SL/S2/04/36/4
THE TITLE CONDITIONS (SCOTLAND) ACT 2003 (NOTICE OF POTENTIAL LIABILITY FOR COSTS) AMENDMENT ORDER 2004

I am writing to seek the views of the Subordinate Legislation Committee on the timing of commencement of this Order which we intend to make soon.

You may recall correspondence between the Clerk to the Committee and my officials on the similarly named Tenements (Scotland) Act 2004 (Notice of Potential Liability for Costs) Amendment Order 2004 (SSI2004/490). In that correspondence the Committee expressed concern about the gap between the date when the Act came into force (28 November) and the date when the Order came into force (6 December). The Order under the Title Conditions (Scotland) Act makes parallel provision for non-tenemental property, and since it is likely that the Committee may have the same concerns, I thought it might be helpful if I wrote at this stage. To assist the Committee, I am attaching a copy of a draft Order – we do not expect that the final version will change much.

The Order amends the form of notice set out in schedule 1A. This schedule was introduced into the Title Conditions Act by the Tenements Act. We do not at present have powers to change schedule 1A of the Title Conditions Act – the power to do so will be available if Parliament approves The Tenements (Scotland) Act 2004 (Consequential Provisions) Order 2004, a draft of which is before Parliament now. The Justice Committee considered it on 30 November, and was content with it. It therefore seems likely that it will be approved, and I will be able to make the Order on liability for costs.

The need for these two Orders was drawn to our attention by the Scottish Law Commission in November. By then it would have been too late to commence the Order for tenements without breaching the 21 day rule. We did not consider it would have been appropriate to breach the 21 day rule because our view was that the potential for any difficulty caused by the delay would be minimal.
Your Committee, however, took a different view. They believed that there was a danger that the incoming owner would have to meet the costs of work even though that work was not shown on the notice. The significant thing in the legislation is that the notice must specify what the work is. There is no blank cheque here – the work already done or (following the proposed amendments) the work planned must be specified in the Notice. A new owner is liable for work carried out before the new owner acquires the flat only if notice of the work is registered at least 14 days before the date of acquisition. The point of the amendment to be made by the Order was to protect planned work.

It might help if I set out an example of how this would operate in practice. Say that the owners in a tenement decide to carry out a repair. They may be aware that one of their number is about to sell up and so they want to register a notice. If there is no notice the incoming purchaser would not be liable for any works already carried out. The outgoing owner would be liable and he might disappear, leaving the others to pick up the bill. If there is a registered notice both the outgoing and the incoming owner would be liable – this means that the other owners could choose who to pursue for the debt. It would also be possible for there to be negotiation between the incoming and outgoing owner. But this joint liability only applies where the notice has been registered at least 14 days before the date of acquisition. (The purpose of the time gap is to allow for the mechanics of registration.) Returning to our tenement, the Act without amendment would only allow the other owners to register a notice for work carried out. That means that the owners would not be able to register a notice until the work had been finished. If a sale was imminent, they would have to be very alert to register their notice in the period between the completion of the work and the date 14 days before the acquisition date. There may be cases where it would not be possible to register a notice in time. The amendment allows them to register a notice when the work is planned and well before the work is carried out. It thus provides greater protection for them without threatening the position of the purchaser.

Our view was that it would be highly unlikely that anyone would be disadvantaged by the discrepancy in dates between 28 November and 6 December. The earliest date on which a notice could be registered would be 29 November. Owners could register a notice for work carried out from then. But where work was still to be carried out, a notice could not be registered before 6 December. The incoming owner would not be disadvantaged in any way – no notice, no liability. The owners wanting to register a notice might suffer a slight disadvantage in that they could not put down a notice for planned work until 6 December, but it seems highly unlikely that there would be many people in this situation – and the earliest date that any incoming owner would have been liable would be 13 December.

Turning now to the proposed parallel Order on the Title Conditions Act, the gap in time would clearly be longer, but the number of occasions on which a notice might be used would be fewer. We propose to amend the Title Conditions Act in exactly the same way – to allow a notice to be registered for planned work. This could be used for non-tenemental property where there was a shared responsibility for maintenance – perhaps for a shared private access road or a common wall.

Assuming the empowering order is approved by Parliament, the Order could be made then. If we were not to breach the 21 day rule, the earliest that the Order could come into force would be after the Christmas recess. If the 21 day rule were to be breached, the Order could come into effect on the day after it is made.

In our view the likelihood of any owner – purchasing, selling, or an owner or a property with a common interest who wishes to register a notice – being disadvantaged by this delay would be minimal. We are therefore not inclined to breach the 21 day rule, but we are content to be guided by the wishes of your Committee on this.
In view of the interest of the Justice Committee on this matter, I am copying this letter to Annabel Goldie.

Yours sincerely

Hugh Henry

HUGH HENRY
Executive Responses

- the Environmental Information (Scotland) Regulations 2004, (SSI 2004/520)
- 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)

On 14 December 2004 the Subordinate Legislation Committee considered the above Order and asked the Executive for an explanation of the following matters:-

1. The Committee asks whether once the Order has been approved, the Executive will be able to commence the 2003 Act for the rest of Scotland.

2. The Committee asks the Executive to explain the purpose of article 1(2) which relates to section 53 of the Scotland Act. Section 53 operates amongst other things to transfer functions of Ministers of the Crown under pre-commencement enactments to the Scottish Ministers. The Committee therefore asks the purpose of this provision and in particular to which functions article 1(2) is intended to refer.

3. The Committee asks the Executive why article 10 of the Order makes no provision in relation to the continuation of current legal proceedings. The Committee also asks why article 11 makes no provision in relation to current employees of the Commissioners and the Council.

4. The Committee asks the Executive why in relation to article 4(1) on page 6 in the definition of “Tweed Acts” the series of Acts referred to are not themselves defined.

5. The Committee asks whether in the definition of “enactment” in article 4(1) “either” should read “any”.

The Scottish Executive responds as follows:

The Executive is grateful to the Committee for drawing these matters to the attention of the Executive. The Executive has decided to withdraw the Order so that a correct version can be laid.

First Question

1. The current intention is to commence the 2003 Act at or about the date on which this Order comes into force.

Second Question

2. In relation to article 1(2), doubts have been raised about this provision, in the context of the general practice in other areas following devolution. The Executive will accordingly omit it from the next version of the Order.

Third Question

3. Specific provision is being inserted to address the position of legal proceedings and employees, so as to clarify the position.

Fourth Question
4. With regard to the definition of “the Tweed Acts” in Article 4(1), the definitions of the Acts referred to were omitted in error, and the Order will be withdrawn so that a correct version can be laid.

Fifth Question

5. In the definition of “enactment”, while either “either” or “any”, or indeed any other word denoting either of those expressions, might have produced the same result, “either” was the intended word.
THE ENVIRONMENTAL INFORMATION (SCOTLAND) REGULATIONS 2004, (SSI 2004/520)

In its letter of 14 December 2004 to Catherine Hodgson the Committee commented as follows:

“The Committee notes that the equivalent UK Regulations were laid in draft for approval by each House of Parliament whereas these regulations have been made under negative procedure. The Committee asks the Executive why it chose negative procedure for these regulations.”

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

These Regulations are made under section 2(2) of the European Communities Act 1972. In accordance with paragraph 2(2) of Schedule 2 to that Act such an instrument may be subject to either affirmative or negative procedure before the Parliament. The Department considered, in light of that and given the form and content of these Regulations, that negative procedure was appropriate.

Consideration had been given at an early stage, in each administration, to the use of powers under the Freedom of Information (Scotland) Act 2002 and the Freedom of Information Act 2000 to make the regulations relating to the matters covered by the Directive (sections 62 of the 2002 Act and 74 of the 2000 Act refer).

It was decided, however, that it would be necessary to employ section 2(2) of the European Communities Act 1972 in order to completely transpose the Directive.

The Parliamentary procedure in the Freedom of Information Act 2000 would have required affirmative procedure for the making of the transposing regulations but equivalent provisions in the Freedom of Information (Scotland) Act 2002 require negative procedure. It may be that this difference accounts for the approach adopted by the United Kingdom government.
1. On 14 December the Committee asked the Executive for an explanation of the following matter:

A number of the provisions of the Schedules are already to be found in the Protection of Children (Scotland) Act 2003. The Committee cites for example paragraphs 3(2) to (4) and 8(4) of Schedule 1 and paragraphs 2(2) to (4) and 7(4) of Schedule 2. The Committee asks the Executive whether such duplicate powers can be considered to be “further” provisions in terms of the enabling power.

2. The Scottish Executive responds as follows-

In its general approach to the drafting of these Regulations the Executive sought to avoid duplicating provisions in the Act. However in places it was felt appropriate to duplicate provision that appears in the Act where there would be benefit to the reader of the Regulations in doing so. In any event some of the provisions in the Regulations quoted by the Committee do not mirror exactly the provisions in the Act.

The Executive agrees that the provision in paragraph 3(2) of Schedule 1 and the equivalent provision in paragraph 2(2) of Schedule 2 of the Regulations duplicate the effect of section 7(1) of the Act. However the Executive consider that paragraphs 3(2) of Schedule 1 and 2(2) of Schedule 2 should not be read in isolation. They require instead to be read in conjunction with the sub-paragraphs that follow. These paragraphs contain the following additional provision not contained in the Act –

(a) the requirement to give notice immediately;

(b) the requirement in paragraph 3(2) only to give notice of the date that the entry is made, and

(c) the requirement to give notice of the entry to such other persons as Scottish Ministers consider appropriate.

The Executive agrees that the provision in paragraph 8(4) of Schedule 1 and the equivalent provision in paragraph 7(4) of Schedule 2 duplicate the effect of sections 5(6)(b) and 6(5)(b) of the Act respectively insofar as they require notice to be given to the referring body and organisation with whom the person is working. However the paragraphs contain additional requirements in specifying when the notice has to be given and requiring notice also to be given to such other persons as Ministers consider appropriate.

The additional requirements specified above are imposed on Scottish Ministers and consequentially the Executive considers that they do not impose burdens on third parties. The Executive also considers that these are supplementary provisions that may be added in Regulations by virtue of section 21(2)(b) of the Act.
3. The Scottish Executive hopes that this explanation is helpful to the Committee.
On 14 December the Committee asked the Executive for an explanation of the following matter:-

“whether “role” is intended to come within the meaning of “rank” for the purposes of these regulations.”

The Scottish Executive responds as follows:

The Executive confirms that “role” is intended to come within the meaning of “rank” for the purposes of these Regulations.

As the Committee points out the enabling power in section 18(1)(c) of the 1947 Act confers power on Scottish Ministers to make Regulations *inter alia* as to the qualifications for appointment to and promotion into any rank within a fire brigade.

As the Committee also points out, the Regulations make provision for the qualifications for appointments to what are referred to as “roles” in a brigade, rather than "ranks". The term “rank” is not defined in the 1947 Act and it is not considered that the term “role” has any different legal meaning to the term “rank”, both meaning a grading structure or position that a person may be appointed to within a brigade. The explanatory note confirms that the effect of the Regulations is to replace the previous 12 ranks with seven ranks and that the ranks are now referred to as “roles”. This reflects the fact that the term “rank” is no longer used in fire brigades.
On 14th December 2004 the Subordinate Legislation Committee considered the above instrument and sought an explanation of the following matter:-

1. The Committee asked the Executive to explain the purpose of paragraph (2) of regulation 6 and in particular what offence would be covered by that paragraph that does not already fall under paragraph (1) of that regulation.

The Scottish Executive responds as follows:-

1. The Executive would like to thank the Committee for drawing this matter to its attention. It is accepted that paragraph (2) of regulation 6 is not necessary. Paragraph (1) of that regulation covers all offences which would be committed under the instrument.

2. The Executive does not propose to amend the instrument. The survey, in relation to which the sampling powers in the instrument are required, is due to be completed by the end of October 2005. Accordingly, it is not anticipated that the powers in the instrument will be exercised after that date. If the circumstances alter then the Executive will reconsider this matter.