The Committee will meet at 10.30am in Committee Room 6.

1. **Inquiry into the Regulatory Framework in Scotland**: The Committee will take evidence from—

   Mr Michael Clancy, Director, Parliamentary Liaison, the Law Society of Scotland and Dr Aileen McHarg, Senior Lecturer in Public Law, Convenor of the Centre for Regulatory Studies, University of Glasgow.

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

   Protection of Children and Prevention of Sexual Offences (Scotland) Bill at Stage 1.

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

   Charities and Trustee Investment (Scotland) Bill at Stage 1.

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

   Water Services etc. (Scotland) Bill at Stage 2.

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

   the Community Reparation Orders (Requirements for Consultation and Prescribed Activities) (Scotland) Regulations 2005, **(SSI 2005/18)**.
6. **Draft instruments subject to approval:** The Committee will consider the following—

   the Budget (Scotland) Act 2004 Amendment Order 2005, *(draft)*.

7. **Instruments subject to approval:** The Committee will consider the following—

   the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (Scotland) Order 2005, *(SSI 2005/34)*.

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

   the Conservation of Salmon (Esk Salmon Fishery District) Regulations 2005, *(SSI 2005/24)*

   the Parking Attendants (Wearing of Uniforms) (South Lanarkshire Council Parking Area) (No.2) Regulations 2004, *(SSI 2005/35)*

   the Conservation of Salmon (River Annan Salmon Fishery District) Regulations 2005, *(SSI 2005/37)*

   the Potatoes Originating in Egypt (Scotland) Amendment Regulations 2005, *(SSI 2005/39)*

   the Valuation for Rating (Decapitalisation Rate) (Scotland) Regulations 2005, *(SSI 2005/41)*.

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 **Draft Guidance subject to annulment:** The Committee will consider the following—


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

    the Higher Education Act 2004 (Commencement No.1) (Scotland) Order 2005, *(SSI 2005/33)*

    the Electronic Fingerprinting etc. Device Approval (Scotland) Order 2005, *(SSI 2005/36)*.

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

**Agenda Item 1**

Note from the Clerk (Private)  
Law Society of Scotland Response  
Dr McHarg Response

**Agenda Items 2 - 10**

Legal Brief (Private) – to follow

**Agenda Item 2**

Subordinate legislation memorandum  
Bill and accompanying documents (circulated to Members only)

**Agenda Item 3**

Subordinate legislation memorandum  
Bill and accompanying documents (circulated to Members only)

**Agenda Item 4**

Subordinate legislation memorandum  
Bill (circulated to Members only)

**Agenda Item 5**

Executive response

**Agenda Items 6-10**

Copies of instruments (circulated to Members only)
The Law Society of Scotland (“the Society”) has considered this consultation paper and has the following comments to make.

**Part 2: Improving Regulatory Quality of New Regulation**

**Regulatory Impact Assessment**

The Society has no comments to make on points 1 – 7. In relation to point 8 regarding a common commencement date, there may be merit in having a common commencement date for new regulation in discrete areas of devolved matters, but this should be considered on a case-by-case basis.

**Public Consultation**

**Question 9**

*Whether there should be a general requirement to consult the public upon any proposal for regulation and any persons affected by it (except in any case where this is not thought appropriate and a statement is given explaining this) or whether this would result in consultation fatigue.*

Broadly speaking there should be a general requirement to consult the public on any proposal for regulation and any persons affected by it.

**Question 10**

*Whether there should be a general requirement that the public and interested parties should get access to the comments made by those consulted (except in any case where it would not be appropriate to do so – such as because of commercial confidentiality) and how account was taken of them.*

There should be a general requirement that the public and interested parties should get access to the comments made by those consulted.

**Question 11**

*Whether any such general requirements should be statutory or, as at present, only a matter of policy guidance.*

Legislation frequently provides for obligations to consult. Similarly, freedom of information legislation establishes a right to access information submitted to public authorities. Accordingly, where legislation does not already exist, the existing policy guidance should be satisfactory.

**Question 12**

*Whether consultation should be a one-off event or whether it should take place at appropriate stages during the making of the regulation and, if so, what those stages might be.*
Consultation should be a one-off event unless, as a result of the consultation process, the proposal has changed to such an extent that further consultation on the revised version is appropriate.

**Question 13**
Whether the consultation process should continue to follow the Cabinet Office Code of Practice on Consultation and, in particular, that the minimum consultation period should be 12 weeks.

The consultation process should continue to follow the Cabinet Office Code of Practice on Consultation. The minimum consultation period should be 12 weeks and this should be strictly enforced.

**Question 14**
How the consultation process in relation to Bills, amendments to Bills and subordinate legislation can be handled in an effective manner.

It is difficult to envisage a proper mechanism for consultation on amendments to Bills. The Parliamentary process and timetable is so constricted that allowing for consultation on amendments would be difficult. Accordingly, adequate consultation prior to legislative introduction should be carried out so that the need for amendment is minimised and the consultation proceeds upon a genuine appreciation that the legislation will, broadly speaking, reflect what was consulted upon.

There should be a general obligation to consult upon subordinate legislation and to publish the results of that consultation.

**Question 15**
Whether there should be a general requirement that the text and structure of the regulation should be written in plain language and be simple to use and to understand.

There should be a general requirement.

**Question 16**
Whether such a requirement should be part of the RIA and, if so, how can it be made effectively.

Such a requirement should not be part of the RIA.

**Question 17**
Whether, if exceptionally, it may not be possible to use simple language in the regulation, there should be a requirement that guidance, written in plain terms, should accompany the regulation.

There should be a requirement for such guidance.

**Enforcement**
**Question 18**
Whether the Scottish Ministers should have a power to establish a statutory code of good enforcement practice in relation to devolved matters as UK Ministers have under section 9 of the Regulatory Reform Act 2001 in relation to reserved matters.

Scottish Ministers should have a power to establish a statutory code of good enforcement practice in relation to devolved matters in the same way as UK Ministers have under section 9 of the Regulatory Reform Act 2001.

**Question 19**
Whether the Enforcement Concordat is working effectively.

The Society has no comments to make.

**Question 20**
What measures should be in place by the Scottish Executive to assess how compliance with any regulation is to be measured and to determine whether compliance is equitably enforced within all parts of Scotland and, if a similar regulation is in place in other parts of UK or elsewhere in the EU, within all parts of the UK or EU?

The Society has no comments to make.

**Question 21**
Whether there should be procedures available to enable users to complain about the unequal or unfair enforcement of regulation and, if so, what those procedures should be.

There should be no additional right to complain regarding the enforcement of a regulation standing that those affected by unequal or unfair enforcement can currently take action for judicial review and have many other remedies through the courts or tribunals.

**Periodic Review**

**Question 22**
Whether there should be a general requirement that all new regulation (or regulation of a specified kind, such as those which impact significantly upon business – and, if so, how should that be defined) should be subject to review after a certain specified period of time and, if so, whether that period of time should be 3, 5 or 10 years.

There should be a general requirement and the specified review period should be 5 years.

**Question 23**
Whether such a requirement should be statutory or contained in policy guidance.
The requirement should be statutory.

**Question 24**
Whether there should be a blanket use of “sunset” or review clauses or whether there should be a presumption that, except where an exception can be justified, such clauses should be used in the cases identified in the Mandelkern Report, namely where the regulation
- was introduced at short notice or
- was based on a precautionary motive or
- was based upon technology or market conditions which are liable to change or
- was a pilot project or
- conferred rights upon the State.

Sunset or review clauses should be subject to the presumption that such clauses should be used in the cases identified in the Mandelkern Report.

**Part 3: Improving Regulatory Quality of Existing Regulations**

**Accessibility**

**Question 25**
Whether the Scottish Ministers should be invited to request the Scottish Law Commission to prepare a comprehensive programme for the consolidation of all primary legislation relating to devolved matters and, after consultation with the Parliament, to approve such a programme.

Scottish Ministers should certainly discuss with the Scottish Law Commission whether a comprehensive programme for the consolidation of all primary legislation relating to devolved matters is practical and/or feasible. The issue of codification is already being discussed and consolidation may deflect from proper debate about that issue.

**Question 26**
Whether the Scottish Executive should be invited to prepare, in consultation with the Parliament, a comprehensive programme for the consolidation of all secondary legislation relating to devolved matters.

The Society agrees that the Executive should be invited to consult upon prepare, in consultation with the Parliament, a compressive programme for the consolidation of all secondary legislation relating to devolved matters.

**Question 27**
Whether, if the Scottish Executive cannot devote the necessary resources for the work involved in the preparation of such consolidations, such work should be outsourced.

The Society agrees that if the Scottish Executive cannot devote the necessary resources for this work, such work should be outsourced.

**Question 28**
Whether, when an Act of the Scottish Parliament makes a number of amendments to another Act or part of it, it should contain a “Keeling Schedule” which shows that other Act (or part of it) as so amended.


Question 29
Whether users encounter difficulties in accessing regulation (whether contained in primary or subordinate legislation) which has been amended.

The Society has no comment to make.

Question 30
Whether there should be procedures available to enable users to complain about the difficulties in accessing regulation and, if so, what those procedures should be.

There should be procedures available to enable users to complain about difficulties. The procedures should involve reference to the Stationery Office.

Question 31
Whether, when a set of subordinate legislation has been amended more than, say, 5 times, it must be consolidated and whether there are any circumstances in which it ought to be consolidated before then.

The Society agrees that when a set of subordinate legislation has been amended more than 5 times it should be consolidated.

Question 32
Whether there should be facilities available, such as on the HMSO website, to enable the public to access, free of charge, the consolidated legal texts or the texts as amended.

The Society agrees that there should be facilities made available to enable the public to access, free of charge, consolidated legal texts or texts as amended.

Question 33
Whether the Scottish Executive should prepare, in consultation with the Parliament, a programme for the reform and simplification of all the existing legislation, whether primary or secondary, relating to devolved matters, along the lines recommended by the Mandelkern Report.

The proposal that the Scottish Executive should prepare in consultation with the Parliament a programme for the reform and simplification of all the existing legislation requires more discussion and scrutiny. The Parliament has already embarked upon reform and simplification of many areas of devolved Scots law and further reform should only be undertaken where it is necessary and/or desirable or where decisions of the Courts suggest that the legislation involved required revision.
Question 34
Whether consideration should be given to having a Bill which would confer upon the Scottish Ministers powers to make orders to give effect of the reforms suggested in that programme. Such a Bill might be similar to, or more extensive than, the provisions in the Regulatory Reform Act 2001.

Consideration should be given to having a Bill which would confer upon the Scottish Ministers powers to make orders to give effect to the reform suggested in that programme.

Question 35
Whether, until such a Bill is enacted and to the extent that it could not be implemented by orders under the De-regulation and Contracting Out Act 1994, a start could be made on implementing that programme by means of Bills and SSIs.

A piecemeal approach in this area would not be beneficial and any changes should await the more broad-ranging reform.

Part 4: Effective Structures for Improving Regulatory Quality

Role of IRIS

In relation to questions 36 to 42, the Society has no comments to make.

Role of the Parliament

Question 43
Whether the remit of the Subordinate Legislation Committee should be amended to give it a specific role to consider matters of regulatory reform, including, in particular,

- assessing whether any new regulation (whether contained in Bills or in subordinate legislation) meets the required standards of good regulation, with power to report the regulation to the lead committee if it fails to do so;
- ascertaining whether a RIA accompanied by new regulation (or a statement explaining why it was not) and whether the RIA appears to have been properly prepared;
- considering any programmes and timetables drawn up by the Scottish Law Commission or the Scottish Executive for the consolidation of existing regulation or for its reform and simplification and assessing whether and to what extent such programmes and timetables are adhered to;
- considering the annual report of IRIS and the level of compliance by the Scottish Executive with the RIA process.

The Society agrees with the extension of the remit of the Subordinate Legislation Committee, although there may be a need for more resources to be made available to enable this revised remit to be effectively carried out.
THE SCOTTISH PARLIAMENT
SUBORDINATE LEGISLATION COMMITTEE

INQUIRY INTO THE REGULATORY FRAMEWORK IN SCOTLAND

Submission by Dr Aileen McHarg, Senior Lecturer in Public Law, Convenor of the Centre for Regulatory Studies, University of Glasgow

Introduction

I am grateful for the opportunity to contribute to the Committee’s inquiry into this important subject. However, I should make it clear from the outset that I am opposed to the adoption of many of the “regulatory reform” proposals discussed in the Consultation Paper. On the face of it, it is difficult to object to the idea of “better regulation” – and indeed, the principles identified in the Paper have a motherhood and apple pie quality. Nevertheless, I believe that there are significant disadvantages in the introduction of a formal system for controlling the production and review of regulation, especially if this is extended to primary legislation.

In particular, I am suspicious of regulatory reform proposals whose strongest advocates are, I believe, influenced by a philosophy which views government action as inherently undesirable. These sorts of universalistic prescriptions for “better regulation” start from the assumption that regulation is an unfortunate, but occasionally technically necessary, response to market failure. It is not seen as a legitimate expression of the democratic will, which therefore legitimately varies with the political – and the policy – contexts in which it is situated. Instead, regulation is best left to the experts, who will ensure that it is kept in check. It would, in my opinion, be a retrograde step for Scottish democracy if the Scottish Parliament were to impose further restrictions of this kind on the use of its already limited legislative powers.

In addition, adoption of the kind of measures discussed in the Consultation Paper would impose considerable administrative burdens which, in the spirit of “better regulation” principles, themselves need to be justified by evidence of bad regulation. Whilst specific examples of poorly-designed or obsolete measures are no doubt easy to find, it is not clear to me that there is a widespread problem to be addressed, nor that formal regulatory review mechanisms would be able to eradicate all bad regulation.

My comments on the specific discussion points in the Consultation Paper are as follows:

Improving the Quality of New Regulation

Questions 2 – 6: Consideration of the consequences of different options for affected groups must inevitably form part of the policy-making process and formalisation of this through an obligation to produce an RIA can act as a useful focus for consultation and Parliamentary scrutiny. When used in a targeted manner, RIAs can also be an effective means of ensuring consideration of factors that might otherwise be overlooked (e.g., the impact of policies on gender equality, the environment or small businesses). Nevertheless, a number of objections can be made to the routine use of RIAs:
• There is a strong risk of lip-service compliance. RIAs are often bland documents produced at the end of a policy process once key decisions have been taken, rather than genuinely informing them. This may simply indicate that they are not being taken as seriously as they should be. However, it may be that RIAs presume an unrealistically rational decision-making process, progressing in a linear fashion from the identification of a problem, through consideration of different reform options, to the final policy choice.

• As with all forms of cost-benefit analysis, there is a risk of bias in the way in which impacts are assessed – in favour of the immediate, concentrated and quantifiable, against the long-term, diffuse and nebulous.

• The choice of which impacts are to be counted is not value-neutral and may legitimately vary according to the policy area in question and over time as political priorities change. There is, therefore, again a risk of bias to the extent that assessment criteria are set by “independent experts” and/or of excessive rigidity if these are concretised in legislation.

• If there is a statutory obligation to prepare RIAs, there must be some means of enforcing it. If it is to be enforced judicially, and especially if review of the adequacy of RIAs is to be permitted, this creates additional scope for obstructionism by groups opposed to regulation. Parliamentary enforcement might therefore be more appropriate, but this is not readily applicable to non-legislative measures.

• The enumeration of regulatory impacts, or listing of costs and benefits, does not in itself determine whether or not the regulation is justified. Costs and benefits must always be weighed and this is, again, inevitably a value choice. It seems to me unlikely, therefore, that RIAs will substantially address the root causes of bad regulation, such as the desire to be seen to do something, usually under severe media pressure, to respond to a perceived crisis, or unwillingness, for political reasons, to upset powerful interest groups.

However, if preparation of RIAs is to be made a formal requirement, it is difficult to justify restricting this to cases where regulation has an impact on business/non-governmental organisations. For one thing, there are difficulties of definition; many government actions have an impact on business, even though we would not naturally classify them as “business regulation”. For example, reducing the time limit for lawful abortion has an impact on the business of private abortion clinics. As this example demonstrates, the definitional issue is not merely a technical problem. To accord business and other non-governmental interests the quasi-constitutional protection of mandatory RIAs risks distorting the way in which we understand the issues at stake in particular regulatory decisions. For instance, under Australia’s regulatory review regime, an attempt was made to reform the Victorian public audit system on the grounds that audit services were supplied in the market and, as a monopoly, the public audit system was unduly restrictive of competition. However, to view the public audit process through a business lens in this way ignores the constitutional context in which it takes place, and hence the inappropriateness of a market approach. A second argument in favour of general obligation to prepare RIAs is that a significant feature of the growth of the “regulatory state” over the past two decades has been the application of regulatory techniques within the public sector, very often without considering the costs that such regulation imposes. Accordingly, there is probably a greater need for the pursuit of “better regulation” practices within the public sector than in relation to business regulation, where the relevant principles are already well-accepted.
**Question 8:** There could be advantages in the adoption of common (annual or bi-annual) commencement dates in particular policy areas in terms of making it easier for those affected to keep up with new requirements and to manage change more effectively. However, these objectives may not be practically achievable. Much regulation (e.g., tax, employment, social security) is not sector-specific, so in practice it would necessary to be aware not just of one set of commencement dates, but a range of dates. This would not be a problem for large organisations in which responsibility for different types of regulation is likely to be spread, but would not represent much improvement for small businesses which, according to the UK Government’s consultation, are the main intended beneficiaries of the reform. In addition, even for sector-specific regulation, there is an element of artificiality about the idea of common commencement dates. Sometimes a “big bang” approach might be appropriate, but in other cases, staggered implementation might be more manageable, especially where there is no real connection between the regulations in question. The UK government’s consultation paper also notes potential problems in emergency situations and with compliance with implementation dates for EC legislation.

**Question 9:** There has been a substantial increase in the amount of consultation undertaken by government agencies in the UK in recent years and there is now an apparent acceptance of the principle that consultation should be the norm. This is a welcome development. There can be a risk of consultation fatigue, but it is always open to consultees to opt-out of particular consultation exercises and this is surely preferable to having no chance to participate.

**Question 10:** Full transparency requires that, as far as possible, responses to consultation should be published. In any case, under Freedom of Information legislation, members of the public will have the right to access any information held by public authorities. Although both the Scottish and UK Acts contain exemptions for information subject to legally enforceable duties of confidentiality (as well as more specific exemptions, such as commercial confidentiality), the mere fact that respondents have stated that their responses are confidential may not be sufficient to satisfy this. It is also very important that there should be some sort of follow up from the consulting body explaining how respondents’ comments have been taken into account. It is a frequent complaint from those participating in consultation exercises that this does not happen, or is inadequate. It is perhaps inevitable, though, that those whose views have not been followed will be dissatisfied no matter how full an explanation is given.

**Question 11:** At present, the legal enforceability of consultation obligations is somewhat haphazard. Although some exercises are undertaken due to specific statutory requirements, most are not, and the statutory position is not obviously related to the relative importance of the decisions in question. However, consultation obligations may also be enforceable at common law. The doctrine of legitimate expectations may be relied upon either where consultation has been promised or there has been a past practice of doing so and, exceptionally, the rules of natural justice may require consultation if a decision applies in practice to only a limited and ascertainable group of people. As the practice of consultation becomes more deeply entrenched, the legitimate expectations doctrine becomes increasingly applicable, so undermining much of the practical objection that might be made to a general statutory consultation obligation in terms of the administrative burdens that this would impose. Accordingly, the imposition of such a duty would be desirable to remove the remaining anomalies in
the legal position, and would also have symbolic value in reinforcing the commitment to open decision-making.

**Question 12**: It is difficult to formulate general rules about when consultation should be undertaken. For major policy changes, affected parties will usually want an opportunity to shape the terms of inquiry at the outset, as well as to comment on specific proposals as they develop. However, for less significant changes, it will usually be more meaningful to comment on concrete proposals, and fewer consultation rounds will be required.

**Question 13**: The 12 week minimum consultation period set by the Cabinet Office is reasonably generous. Some statutory consultation periods are much shorter than this (e.g. 28 days for modifications to utility licences). A reasonably lengthy period is particularly important for organisations which require formal approval from their governing board/council for responses which raise significant policy issues. It is also important to allow time for interested parties who have not been directly consulted to find out about the proposals. However, there will always be cases where a shorter timetable is necessary, so it is essential to maintain flexibility.

**Question 14**: I can see no reason why pre-legislative public consultation for Bills and statutory instruments (SIs) should be any different in principle to that for other kinds of government policy decisions. Once the Bill/SI enters the Parliamentary process, however, different considerations apply. Whilst it may be annoying for those who have participated in the formulation of legislative proposals at an earlier stage to see them rejected or altered during Parliamentary debates – and especially so when ministers unilaterally table large swathes of amendments to Bills – it is difficult to see what additional public consultation is appropriate. The Parliament must be free to accept, reject or amend legislative proposals as it sees fit. In any case, the legislative process is a public process and interested parties are able to lobby MSPs or give evidence to committees. Amendments to Bills are frequently the result of lobbying. In fact, in the interests of transparency, it might be desirable for MSPs to be required to declare the provenance of any amendments that they table.

**Questions 15 – 16**: It goes without saying that legislation should be as simple and intelligible as possible, both in terms of structure and language. However, for a number of reasons, this is not always easy to achieve; ranged against ready intelligibility are, for instance, the need to use technical language, the desire for precision and certainty, and the need to cover all eventualities. In any case, there is more to understanding the law than the ability to read legislation, and what is simple for one person might not be for another. It is therefore difficult to see that a general requirement to draft legislation in simple terms would be workable. Moreover, it is already open to the Subordinate Legislation Committee to draw the Parliament’s attention to SIs which it considers to be obscure; similarly, poorly drafted Bills can/should be corrected during the scrutiny process.

**Question 17**: The practice of publishing explanatory notes/policy memoranda alongside Bills is extremely helpful. Explanatory notes have also accompanied SIs for much longer than has been the case (at UK level) for Bills. It is unclear what more is required here. In any case, a rule that non-simple regulations must to be accompanied by plain language guidance would be very difficult to define and apply.
Question 21: In general, a person cannot complain about the enforcement of a rule against them solely on the ground that it has not been enforced against someone else. If one has broken the law, that is the end of the matter. I think that it would set a dangerous precedent to allow “users” (which I assume refers to those subject to regulation) to complain about unequal enforcement per se. Not only is 100% detection of breaches highly unlikely, so that enforcement is inevitably somewhat unequal, but it is also a valid regulatory strategy to target enforcement resources on particular cases or particular regulatees. Risk regulation techniques explicitly advocate that regulatory attention should focused on regulatees who pose the highest risk of non-compliance and on types of behaviours that are considered to involve the greatest hazards, even though this may entail tolerating a level of non-compliance with other aspects of the regime. Where unequal enforcement is influenced by other considerations, such as unjustified discrimination against a particular class of users, then there is obviously cause for complaint. However, there are already legal avenues for challenging such practices – via judicial review (on grounds of irrelevant considerations, improper purposes or bad faith), anti-discrimination legislation, or even possibly under the Human Rights Act. Judicial review is often regarded as an expensive and inaccessible means of challenging government acts (though there are fewer obstacles for petitioners to overcome in Scotland than in England). Nevertheless, the easier it is to challenge decisions, the greater the risk of obstructionist tactics by regulatees.

Questions 22 - 24: I do not support the proposal that there should be blanket use of “sunset” clauses in all new regulation. Such clauses have rarely been used in primary legislation in the UK, being restricted to cases of exceptional departures from basic values (such as anti-terrorism legislation). The blanket use of sunset clauses would have a number of disadvantages:

- The more widespread the use of sunset clauses, the greater risk of overlooking the need to renew important legislation (as occurred in 2001 in relation to the renewal of authority for the Erskine Bridge toll);  
- The choice is rarely between regulation or no regulation; rather the question is what sort of regulation should there be. Accordingly, sunset clauses are crude instruments and could lead to the revival of inappropriate rules or uncertainty as to what the law is;  
- There may be a temptation to put off reforming bad laws in the knowledge that they will lapse eventually; similarly, mandatory sunset clauses might, paradoxically, encourage the enactment of questionable legislation on the basis that any adverse effects will not be permanent.

Even if the use of sunset clauses were restricted to the cases identified by the Mandelkern Report, this would still encompass a large amount of legislation. Moreover, the assumption that legislation which confers rights upon the State is somehow exceptional and of suspect legitimacy is to be resisted.

Mandatory review of new legislation has more to recommend it, though, for the reasons stated above, I find it difficult to justify restricting this to regulation which impacts on business. Although it seems likely that, if there are significant problems with new legislation, affected parties will make this known, the fact that there is a mandatory review date makes it more difficult for complaints to be ignored. On the other hand:
• There could again be a problem, particularly if the interval between enactment and review is relatively long, with delaying necessary reforms on the basis that a review is pending.

• But short intervals are not necessarily appropriate either – there is value in regulatory stability, irrespective of the content of regulation.

• The fact that those subject to regulation complain about it does not make it bad regulation. Regulated industries can be expected to continue to complain about regulation to which they are subject no matter how thoroughly it is reviewed.

• A statutory review requirement creates risks of vexatious legal challenge, on the basis that the review has not been conducted properly.

On balance, therefore, I would support a general requirement to review new legislation, perhaps within 5 – 10 years of enactment. However, this should remain a matter of good administrative practice, rather than a statutory duty.

Improving the Quality of Existing Regulations

Questions 29 & 32: It is possible to access amended primary and secondary legislation (either online or in paper form) via a number of commercially provided sources, but it would be extremely helpful if these were available free of charge on the HMSO website. Nevertheless, it would be important to ensure that this was in addition to and not in place of the unamended texts. It is essential to be able to follow the evolution of statutory provisions, both for academic research purposes, and for lawyers/judges trying to understand the meaning of current provisions.

Question 30: It seems unnecessarily bureaucratic to provide specific procedures for complaining about difficulties in accessing regulation. All public bodies operate complaints procedures already and there is the possibility, in most cases, of further complaint to the Scottish Public Services Ombudsman. It is also a defence, in a prosecution for breach of an SI, that the relevant SI has not been published. However, to extend this further to cover difficult-to-access regulations would breach the fundamental principle that ignorance of the law is no excuse.

Question 33: Again, it seems, on the face of it, no more than good administrative practice to keep existing laws under review in order to ensure that they remain as effective as possible. However, the formalisation of review procedures, whether labelled “deregulation” or “better regulation”, involves a fetishisation of regulatory reform which is not neutral in its impacts.

Questions 34 – 5: The growth in recent years of powers to amend primary legislation by secondary legislation (so-called Henry VIII clauses) is a regrettable constitutional development. Does the Scottish Parliament really have so much business that it needs to offload further legislative powers to ministers?

Structures for Improving Regulatory Quality

Questions 37 – 42: The creation of independent or quasi-independent structures for ensuring compliance with “better regulation” principles simply reinforces the assumptions that (a) interpretation of these principles is a matter of technical expertise and (b) what amounts to good regulation is the same in all contexts. On the contrary, the application of, for instance, the principles of good regulation drawn up by the Better
Regulation Task Force is clearly not self-evident. The idea that regulators should be accountable for their decisions is uncontroversial precisely because it begs all the important questions: accountable to whom, for what and by what channels? Similarly, to what should regulations be proportionate, and in whose judgment? When does consistency turn into rigidity and in what circumstances is policy change appropriate, etc.? The recommendations made by the Better Regulation Task Force in particular contexts are far from uncontentious. In the area with which I am most familiar, utility regulation, its recommendations are largely supportive of the regulated industries. This might not be entirely surprising given the strong representation of business interests amongst its members.

Question 43: Some of the objections to regulatory reform regimes are mitigated if oversight and compliance is entrusted to Parliamentary bodies rather than “independent experts”. However, extension of the Subordinate Legislation Committee’s remit to include “quality control” of primary legislation would have constitutional implications. The justification for special checks and limitations on the form and substance of secondary legislation is that it is subject to less thorough Parliamentary scrutiny than primary legislation and cannot be amended. The creation of further restrictions on the use of primary legislative powers is not a step that should be taken lightly.
SUBORDINATE LEGISLATION COMMITTEE

4th Meeting, 2005 (Session 2)

Tuesday 1st February, 2005

Protection of Children and Prevention of Sexual Offences (Scotland) Bill
Memorandum to the Subordinate Legislation Committee

Purpose

1. 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 Protection of Children and Prevention of Sexual Offences (Scotland) Bill (SP Bill 30) conferring powers to make subordinate legislation. It describes the purpose and nature of each provision. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill (documents SP Bill 30-EN and SP Bill 30-PM, respectively).

Policy Context

2. The primary policy objective of the Bill is to improve protection from sexual harm, with particular emphasis on the protection of children.

3. Section 1 of the Bill strengthens the law by creating a specific offence to deal with those offenders who attempt to “groom” children for the purpose of committing sexual offences. The offence would occur when an adult has met or communicated with a particular child under 16 on at least 2 occasions, and then meets, or travels to meet, that child with the intention of committing a sexual offence against that child.

4. The offence is intended to cover situations where an adult establishes contact with a child through, for example, meetings, telephone conversations or communications on the internet, and gains the child’s trust and confidence so that the adult can arrange to meet the child for the purposes of committing a sexual offence.

5. The Bill also introduces a new civil order – the Risk of Sexual Harm Order (RSHO) – which would assist the police to impose early restrictions on an adult who is deemed to be acting in such a way as to present a risk of sexual harm to children. This order would complement the new criminal offence of grooming, but will cover a much wider spectrum of behaviour, for example explicit communication with children via email or in chatrooms, or loitering around schools or playgrounds.

6. Finally, the Bill extends the availability of Sexual Offences Prevention Orders (SOPOs) in Scotland. The SOPO is used to place restrictions on an offender who is deemed to pose a risk of serious sexual harm following conviction of or caution in respect of a relevant offence, a finding of not guilty by reason of insanity or a finding that the act was committed but the person was under a disability. At present in Scotland, a SOPO can only be made on application to a Sheriff Court by a Chief
Constable in respect of an offender who has previously been dealt with by the court, but who is continuing to exhibit sexually risky behaviour that causes concern. The Bill amends the Sexual Offences Act 2003 to allow courts in Scotland to impose a SOPO at the same time as dealing with the offender in respect of the relevant offence, if the court considers that the offender presents a risk of serious sexual harm to the public.

Subordinate Legislative Powers

7. The Bill gives the Scottish Ministers power to make subordinate legislation:

- in relation to the sexual offences which an adult might intend to commit against a child as part of the “grooming” offence in part 1 (Section 1(5)); and
- for commencement orders including transitional, transitory or saving provisions (Section 11).

Relevant Sexual Offences – Section 1(5)

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative Resolution of the Scottish Parliament

The new “grooming” offence is complete when, following the earlier contacts, the adult meets, or travels to meet, the child with the intention of committing a relevant offence against the child.

The list of relevant offences is set out in Part 1 of the schedule to the Bill, and consists of offences of a sexual nature that could be committed against children. Part 2 of the schedule provides that references to any of these offences in Part 1 also include a reference to an attempt, conspiracy or incitement to commit the offence and, with the exception of certain specified offences, a reference to aiding, abetting, counselling or procuring the commission of that offence.

Section 1(5) confers power on Scottish Ministers to modify the list of offences in the schedule by statutory instrument. This allows additional offences to be added in the light of experience or if new relevant offences are created.

Section 1(6) makes provision for any order made under section 1(5) to be subject to annulment in pursuance of a resolution of the Parliament.

The intention behind taking subordinate legislation powers is to ensure flexibility to respond quickly to changing circumstances in this important and sensitive area without the necessity for further primary legislation.
**Commencement – Section 11(2)**

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: None

Section 11(2) provides for the Scottish Ministers by order to specify the day or days when the provisions of the Bill shall come into force. It allows different days to be specified for different purposes. Section 11(3) provides for such an order to make such transitional, transitory or saving provisions as they think necessary.

This commencement provision is intended to enable effective commencement of the Bill.
SUBORDINATE LEGISLATION COMMITTEE

4th Meeting, 2005 (Session 2)

Tuesday 1st February, 2005

Charities and Trustee Investment (Scotland) Bill
Memorandum to the Subordinate Legislation Committee

Purpose

1. 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 the Charities and Trustee Investment (Scotland) Bill (the Bill). It describes the purpose of each provision conferring power to make subordinate legislation and explains why the matter is to be left to subordinate legislation rather than being included in the Bill. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Policy Context

2. The Charities and Trustee Investment (Scotland) Bill introduces a new regulatory regime for charities in Scotland. It sets up a new charity regulator and public register of charities. The overall objective of this Bill is to ensure there is a robust, proportionate and transparent regulatory framework that satisfies public interest in the effective regulation of charities in Scotland and meets the needs of the Scottish charity sector.

Parts of the Bill

3. The Bill is divided into 4 Parts which deal with proposed measures in the following categories:

   Part 1  Charities
   Part 2  Fundraising for benevolent bodies
   Part 3  Investment powers of Trustees
   Part 4  General and supplemental provisions

Direction Making Powers

4. In addition to the delegated powers set out below, the Bill confers direction and rule making powers on the Scottish Ministers and direction making powers on the Office of the Scottish Charity Regulator (OSCR) which are not subject to parliamentary procedure. The Executive considers that the conferral of such powers is essential to allow sufficient flexibility in the exercise of regulatory and supervisory functions. These powers are listed for information purposes in Annex A.
Delegated Powers.

5. The Bill confers powers on the Scottish Ministers to make orders and regulations in relation to a range of matters dealt with in the Bill. Whilst a number of powers contained within the Bill are new, others emulate or update powers which already exist within the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and Civic Government (Scotland) Act 1982. The powers conferred in the Bill are for the most part, either of a technical and procedural nature or because of their nature require a flexible procedure and thus it is felt appropriate that they might be dealt with by subordinate legislation.

Part 1 Charities

Section 3(3) (f) - Scottish Charity Register

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

6. Section 3 provides for the maintenance of the Scottish Charity Register (the Register) by OSCR. Subsections (3) (a) to (e) set out what each charity entry on the register must contain. Subsection (3) (g) allows OSCR to set out additional information that it considers appropriate. Subsection (3) (f) confers a power on the Scottish Ministers to set out in Regulations additional information that they require to be included in the Register.

Reason for taking power

7. It is expected that the information required by subsections (3) (a) to (e) will be sufficient to provide the public with a complete picture of the charity. Paragraph (g) will allow OSCR to add further detail that it considers relevant on either a general or case by case basis. It is intended that the regulation-making power in paragraph (f) will be exercised by the Scottish Ministers when it becomes apparent that certain additional information is required for most or all charities. For example, it is currently considered uneconomic to require OSCR to include copies of every charity’s accounts on the Register. In time however it may be considered important to include these. The regulation making power would provide the flexibility to make this change.

Section 6(1) - Applications: further procedure

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

8. Section 6 (1) confers on the Scottish Ministers the power to make regulations in relation to the procedure for applying and determining applications for entry on the Register. Section 6 (2) provides that in particular, regulations may make
provision for information or documents that must accompany any application, the form and manner of the application, the period within which OSCR must make a decision on the application and further circumstances where OSCR must refuse to enter a body on the Register.

**Reason for taking power**

9. Such detailed operational matters are more appropriately dealt with in regulations rather than in primary legislation. A broad power is required as the Register of charities is a new register. Processes may change over time and provisions may need adjustment to deal with unpredictable eventualities.

---

**Section 15(1) - References in documents**

- **Power conferred on:** The Scottish Ministers
- **Power exercisable by:** Regulations made by statutory instrument
- **Parliamentary procedure:** Negative resolution of the Scottish Parliament

10. Section 15(1)(a) confers a power on the Scottish Ministers to require a charity on the Register to state it is a charity on such documents as the Scottish Ministers may specify in regulations. Such regulations may also, by subsection (b), require a charity to state other information on such documents. The regulations may also provide that any statement required by regulations appears in a language other than English.

**Reason for taking power**

11. The power relates to a matter of detail most appropriately dealt with in secondary legislation. The regulations will specify documents such as letters, cheques, facsimiles, e-mails etc. Where such documents are normally in a language other than English, then the declaration of status can appear in that other language e.g. Gaelic. This type of detail may require frequent revision to take account of developments and changes in the forms of communication.

---

**Section 19(4) and (8) – Removal from the Register: Protection of assets**

- **Power conferred on:** The Scottish Ministers
- **Power exercisable by:** 19(4) Regulations and 19(8) Order made by statutory instrument
- **Parliamentary procedure:** Negative resolution by Scottish Parliament

12. Section 19 (1) provides that where a body is removed from the Register, its property at the time of removal and income from such property must continue to be applied for the charitable purposes they were intended for. Subsections (2) and (3) provide for the continuation of OSCR’s supervisory power over such a body so far as it relates to this property and income. Section 19(4) allows the Court of Session to approve a scheme prepared by OSCR, in accordance with regulations made by the
Scottish Ministers, for the transfer of such property or income to a charity but only where the court is satisfied in relation to the matters set out in section 19(5). Section 19(6) allows the court to approve a scheme subject to modifications and section 19(7) provides that a charity receiving property or assets in pursuance of a scheme may apply that property as it sees fit. Section 19(8) confers a power on the Scottish Ministers to disapply subsections (1) to (7) by order in relation to property they consider to be of national importance. Subsection 19(9) provides that the order may make provision in relation to particular items, types of property or property owned by particular persons and subsection 19(10) provides that an order is only competent where the charity owns the property when the order takes effect.

Reason for taking power

13. The regulation making power under section 19(4) will allow Scottish Ministers to set out requirements for a transfer scheme proposed by OSCR under these provisions. This will consist of detailed matters appropriately covered in secondary legislation. The order making power in section 19(8) is necessary to enable Scottish Ministers to disapply the provisions. It will allow particular items or types of property that are of sufficient national importance to be provided for to ensure that they continue to be subject to their existing protection and access arrangements. We consider the power to make future arrangements for particular items of property to be an appropriate use of secondary legislation.

Section 23(2) and (3) - Entitlement to information about charities

Power conferred on: The Scottish Ministers
Power exercisable by: Orders made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

14. Section 23(1) obliges a charity to provide copies of its constitution and accounts when a member of the public makes a reasonable request for such. Section 23(2) allows the charity to charge a fee not exceeding the cost of complying with this request or, if less, any maximum fee that the Scottish Ministers may by order prescribe. Section 23(3) confers a power on the Scottish Ministers to exempt charities by order from the duty to provide copies of their constitution and accounts if certain criteria are met.

Reason for taking the power

15. The power in section 23(2) is required so that the maximum level of fee can be set and changed as required without recourse to primary legislation. The power to exempt charities by order in section 23(2) is required so that certain charities, particularly smaller charities, may be exempted should the administrative burden of providing accounts prove to be unduly onerous or inappropriate. It is likely that such an order will require to be amended from time to time.
Section 25(3) – removal of restrictions on disclosure of certain information

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

16. Section 25 (3) confers a power on the Scottish Ministers to designate bodies to which OSCR may disclose information. The Scottish Ministers may by order designate any public body or officeholder to which OSCR may disclose information free from restrictions of secrecy. They may also designate a body where the purpose is for that body to disclose information to OSCR where that body is a Scottish public authority with no mixed functions or reserved functions.

Reason for taking power

17. Information will be available under the Freedom of Information (Scotland) 2002 Act on request to be disclosed voluntarily by OSCR and other public bodies. However, information that is subject to other restrictions such as confidentiality could not otherwise be shared. Section 25 lifts obligations of secrecy imposed under Scots law on bodies which are designated for that purpose. Until OSCR is fully operational, it is not possible to accurately determine which bodies should be designated and, even once bodies are designated, they may eventually have that designation removed if circumstances no longer require that information is shared with them. The list will also need to be updated as new public bodies are formed. Power to designate bodies in secondary legislation gives the necessary flexibility to allow information sharing procedures with appropriate bodies to evolve without recourse to primary legislation.

Section 35(1) - Transfer schemes

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

18. Section 35(1) provides that OSCR can prepare a transfer scheme for approval by the Court of Session for the transfer to a charity of any assets of another charity, body controlled by a charity or body representing itself as a charity where the Court is satisfied that there has been misconduct, it is necessary to protect the property of the charity or where the purposes of the charity would be better served. Section 35 (1) provides that such a scheme prepared by OSCR must be in accordance with regulations by Scottish Ministers.

Reason for taking power

19. As with the regulations applying to a transfer scheme for the transfer of assets where a body is removed from the Register in section 19(4), the subject matter of these regulations will cover detailed matters that we believe are most appropriately dealt with by secondary legislation.
Section 40(2) – Reorganisation of charities: applications by charity

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedures: Negative resolution of the Scottish Parliament

20. Section 40 allows OSCR on the application of the charity to approve a reorganisation scheme proposed by the charity. The Scottish Ministers are empowered by section 40(2) to make provision in regulations as they think fit in relation to the form and manner in which the applications are made, the period within which OSCR must make a decision, publication of the proposed scheme and may make different provision in relation to different types of charity.

Reason for taking power

21. Section 40 is broadly intended to replace provisions relating to the reorganisation of public trusts under section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (the 1990 Act). Under these provisions a public trust can only reorganise on application to the Court of Session. There is power under section 9(5) of that Act for Scottish Ministers to prescribe by order an annual income, below which a public trust must apply to the Sheriff Court but that power has not been exercised.

22. The policy behind this provision is to prevent burdening charities with the expense of applying to the courts for reorganisation. Without court procedures, detailed procedures are required to allow OSCR to consider reorganisations appropriately. The regulations will contain technical procedural detail which we consider to most appropriately set out in secondary legislation.

Section 45 (4) - Accounts

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

23. Section 45 imposes general obligations on all charities to keep proper accounting records, produce an annual statement of accounts that has been audited or examined independently and to forward that statement of account to OSCR. Section 45(4) confers power on the Scottish Ministers to make regulations to detail how those obligations are to be carried out. Further, subsection (5) allows the Scottish Ministers to have different requirements for different types of charities including the making of exemptions.

Reason for taking power

24. The 1990 Act also contained a power for the Scottish Ministers to make regulations in relation to accounts. However, the sections on accounts in that Act (sections 4 and 5) contained significantly more detail as to what the accounts must
contain. As a consequence of this, it was found to be difficult to keep up with changes in accounting practices or changes in the size of charities.

25. The regulation-making power is broadly drawn to allow charity accounts to follow standard accounting practices as they change. If this level of detail were to appear on the face of the Bill, significant amendments to the Act might be required in due course. Small charities or designated religious charities may be given exemption from certain of the regulations.

Section 48(1) - Dormant accounts of charities: procedure and interpretation

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

26. This regulation-making power allows the Scottish Ministers to set down the procedure that OSCR must follow when dealing with an account that has been dormant for a period of 5 years or more in terms of section 47, where the account holder appears to have been a charity under the Bill or the 1990 Act. Further, the Scottish Ministers can regulate the expenses that OSCR may claim as a result of exercising its functions relating to dormant charity accounts. This partially restates the powers the Scottish Ministers currently have under section 12(10) of the 1990 Act.

Reason for taking power

27. This is a detailed procedural matter that we consider to be most appropriately covered in regulations rather than primary legislation.

Section 50(3) – Constitution and powers (Scottish Charitable Incorporated Organisations (SCIOs))

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

28. Chapter 7 makes provision for a new incorporated form of body specifically for charities. Section 50 sets out general provisions regarding the constitution and powers of SCIOs. Section 50 (3) provides that a SCIO’s constitution must provide for such matters and comply with requirements as are specified in regulations made by Scottish Ministers.

Reason for taking power

29. The basic requirements for a constitution are set out in section 50. Because SCIOs are a new legal form, without the historical detail of trusts and companies, it is likely that experience will dictate the need to develop additional requirements. The regulation-making power will allow for this. Once again this will require detailed
technical requirements to be specified and we consider regulations to be appropriate for this purpose.

Section 52(1) – Name and status (SCIOs)

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

30. This provision confers a power on the Scottish Ministers similar to that provided for under section 15(1). It allows Scottish Ministers to require a SCIO to state it is a SCIO on such documents as the Scottish Ministers may specify in regulations.

Reason for taking power

31. The regulations will contain details as to the type of documents that should declare the status of the SCIO. This may include letters, cheques, facsimiles, e-mails etc. We consider the type of detail required to be better placed in regulations rather than on the face of the Bill because it may require frequent revision to take account of developments and changes in forms of communication.

Section 63 – Regulations relating to SCIOs

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament except 63(d) which is subject to affirmative resolution procedure

32. This section confers a general power on the Scottish Ministers to make further provision for SCIOs by regulations, particularly in relation to applications to become a SCIO, the administration of a SCIO, the amalgamation of SCIOs and the winding up and dissolution of SCIOs and such matters as they see fit.

Reason for taking power

33. Again because SCIOs are a new legal form, it is likely that experience will dictate the need to develop additional requirements and practices. Setting out administrative details in regulations will allow for greater flexibility for the development of the SCIO as a legal form for charities. Regulations in respect of winding up and dissolution may not be made unless a draft is laid before and approved by the Scottish Parliament.
Part 2 Fundraising for benevolent bodies

Section 82(1) – Regulations about fundraising

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

34. The regulation making power in section 82(1) confers a power on the Scottish Ministers to make regulations about benevolent fundraising including the solicitation of money and promises of money by professional fundraisers, representations made by commercial participators in relation to benevolent contributions and generally in connection with benevolent fundraising by benevolent fundraisers. Subsection (2) sets out a list of specific issues the regulations may make provision for. There is a requirement to consult such persons as the Scottish Ministers see fit prior to making regulations. Regulations under this section may also provide for a level 5 fine for breach of specified regulations.

Reason for taking power

35. The Scottish Ministers have agreed that plans for the self-regulation of fundraising should be given an opportunity to prove themselves. If this approach fails, the Scottish Ministers require to have the power to intervene and provide for the regulation of fundraisers and fundraising. Regulations will be required to cover some aspects of fundraising irrespective of the outcome of self-regulation but it is anticipated that specific regulations in relation to section 82(h) and section 82(3) will only be made if self-regulation failed. A power to regulate these activities using subordinate legislation would allow Ministers to act promptly without having to introduce primary legislation. Fundraising for charities and other benevolent purposes is an area that has been the focus of much concern and led to a decline in public confidence in this sector. An appropriate power to regulate a wide range of fundraising issues is therefore an important part of this Bill. The regulations will again have a largely administrative procedural content.

Sections 85(5)(d) and (10) – Local Authority Consents

Power conferred on: The Scottish Ministers
Power exercisable by: Regulation made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

36. Sections 83 to 91 make provision for public benevolent collections. They replace the provisions under section 119 of the Civic Government (Scotland) Act 1982. Section 85 makes provision for the procedure and timings whereby applications are made to the Local Authority for authority to hold a collection. Subsection (5) sets out the conditions, such as when and where the collection may take place and the form of collection boxes that may be used, which may be imposed by the local authority when giving consent to collect. The regulation-making power in subsection 5(d) enables the Scottish Ministers to specify the type of badges
and certificates of authority that should be used by collectors. Subsection (10) confers a power on the Scottish Ministers to disapply, for certain types of applications, the subsection (2) duty on Local Authorities to consult the local chief constable before determining an application to collect. Applications by charities, for example, could be exempted as charities are regulated by OSCR.

Reason for taking power

37. Giving the power in subsection (5) to the Scottish Ministers instead of Local Authorities will allow the development of a standard that cuts across all Local Authorities, making it easier for the public to develop an awareness of what identification and authority benevolent collectors should have. The power in subsection (10) will allow Ministers to disapply the duty to local authorities to consult with the local chief constable where the Scottish Ministers feel that it is not necessary, possibly because they are already regulated by a statutory regulator. Regulations under this subsection (5) deal primarily with administrative and technical detail and subsection (10) with operational matters which can be suitably provided for in regulations without recourse to primary legislation.

Section 89(1) - Regulations relating to public benevolent collections

Power conferred on: The Scottish Ministers
Power exercisable by: Regulation made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

38. As noted above, the provisions relating to public benevolent collections in sections 83 to 91 are based on those concerning public charitable collections in the Civic Government (Scotland) Act 1982. Section 89(1) gives the Scottish Ministers the power to make further provision for the purpose of regulating public benevolent collections, and may make particular provision in relation to the keeping and publishing of accounts, preventing public inconvenience and specifying which provisions it is an offence to breach.

Reason for taking power

39. This regulation making power is similar to that in s119 (13) of the Civic Government (Scotland) Act 1982. It is necessary to allow the Scottish Ministers to respond to changes in collecting practice that gives rise to concern or abuse. We consider that the technical and procedural nature of these matters is appropriate for secondary legislation.

Section 90(1) – Collection of goods

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament
40. Section 90(1) allows the Scottish Ministers to make regulations about the collection of goods from the public for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes. In terms of Subsection (2) regulations may in particular make provision about certain matters. This includes a requirement to notify Local Authorities of the intention to collect. These regulations will also allow Ministers make it an offence to breach certain regulations.

Reason for taking power

41. The collection of goods is not currently included in the public charitable collection legislation and is not be included as a public benevolent collection in this Bill. While there is currently no apparent difficulty in relation to this type of fundraising in Scotland, concern has been expressed by the sector that the lack of legislation dealing with it may lead to it being abused in the future. Were this to happen, this regulation-making power would allow the Scottish Ministers to introduce the necessary controls without recourse to primary legislation.

Part 3 Investment power of trustees

Section 94(1) – Power to amend enactments

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
<tr>
<td></td>
<td>(Affirmative if adds to or omits part of an Act)</td>
</tr>
</tbody>
</table>

42. Part 3 of this Bill amends the investment powers of trustees in line with the recommendations by the Scottish Law Commission. Schedule 3 to the Bill sets out consequential amendments in light of the changes made to the investment powers. Section 94(1) confers on the Scottish Ministers an order-making power to make amendments to any local, personal or private Act of Parliament and any other Act of Parliament of the Scottish Parliament as a consequence of sections 92 and 93. There is a duty to consult any person who may be affected by the proposed amendment.

Reason for taking power

43. As noted above, Schedule 3 of the Bill is intended to list any consequential amendments. The order-making power is a necessary precaution to cover any other amendments that may have been overlooked. There is a duty to consult to ensure that there is no unfairness as a result of the exercise of that power. An order under this section deals with a specific legislative amendment. Any order that adds to, replaces or omits any part of the text of an Act is subject to affirmative resolution procedure.
Part 4 General and supplementary

Section 97(2) – Transitional arrangements

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

44. There are already established bodies of law and regulation relating to charities in Scotland. It is in the interests of charities, the regulators concerned and the public that the transition from one legal regime to the next is a smooth one. To this end it is necessary to make transitional arrangements that will allow the move from one regulatory regime to that provided for in this Bill. A power is conferred on the Scottish Ministers to make further transitional, transitory or savings provisions by order. The order-making power will be used in particular to provide appropriate arrangements for English and Welsh charities who can currently operate as charities in Scotland by virtue of their being charities in England and Wales.

Reason for taking power

45. The nature of these provisions means that they are time-limited. We therefore consider it unnecessary to put them on the face of the Bill. It also allows a degree of flexibility in dealing with unforeseen practical difficulties.

Section 100 - Ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative and affirmative resolution of the Scottish Parliament

46. Section 100 confers a power on the Scottish Ministers to modify any enactment that prevents a body becoming an charity by virtue of the fact that it is controlled or directed by a third party in terms of section 7(3)(b). The Scottish Ministers may also make by order incidental, supplemental, consequential, transitional, transitory or saving provisions as they consider necessary or expedient for the purposes of or in consequence of the Bill when enacted. Where such an order adds to, replaces or omits any part of the text of an Act, that order will be subject to affirmative resolution procedure. In all other cases it is negative procedure.

Reason for taking power

47. The first part of the power confers a particular type of supplemental power which may be needed. It will, if required, principally enable bodies such as NDPBs set up under existing legislation to continue to have charitable status by permitting modification of the enactments establishing them. The second part of the power has been conferred on the Scottish Ministers to allow flexibility if further changes are found to be necessary as a result of the Bill establishing a new body of law on charities and repealing the existing law. This provision does not confer a carte
blanche power to make further provision in relation to charities. Any provision made under this power must be considered to be a necessary or desirable consequence of the Bill’s provisions. Its extent is therefore constrained by the scope of the Bill’s provisions. Any changes to primary legislation will require to be approved by an affirmative resolution of the Scottish Parliament.

Section 104(2) - Short title and commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: None

48. Section 104(2) provides that the Bill with the exception of sections 97, 100 and 101 shall come into force on such day as the Scottish Ministers may by order appoint. Sections 97, 100 and 101 will come into force when the Bill receives Royal Assent.

Reason for taking the power

49. The order making power is required to ensure effective commencement of the Bill.

Schedule 1, paragraph 1(3)(e) – Membership of OSCR

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

50. Paragraph 1 of Schedule 1 makes provision for the membership of OSCR. Subparagraph (3) lists the individuals that are disqualified from membership. The order making power in (3) (e) will allow the Scottish Ministers to prescribe by order further persons who are disqualified from membership of OSCR.

Reason for taking power

51. It is possible that in time additional persons other than those set out in the Bill will need to be disqualified. To protect public confidence in the integrity of regulator, the Scottish Ministers require an order making power to deal with that eventuality.

Schedule 2, paragraph 1(3)(d) – Scottish Charity Appeals Panel

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

52. Paragraph 1 of Schedule 3 makes provision for the panel members of the Scottish Charity Appeals Panel (SCAP). Subparagraph (3) lists the individuals that are disqualified from membership. The order making power in subparagraph (3) (d)
will allow the Scottish Ministers to prescribe further persons from membership of SCAP.

Reason for taking power

53. The reason is the same as that specified for the order-making power in Schedule 1.

Schedule 2, paragraph 4(1)

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

54. The Scottish Ministers may make rules as to the practice and procedure of the Scottish Charity Appeal Panel.

Reason for taking power

55. These are detailed administrative provisions and will need to be reviewed regularly to ensure they remain efficient and comply with developments in judicial standards.

The Scottish Executive
November 2004
DIRECTION MAKING POWERS

The Scottish Ministers
Section 2(4) – Direction about form etc of Annual Reports (the Scottish Ministers to OSCR)

OSCR
Section 11(3) –  Direction not to change name (OSCR to charity)
Section 12 (2) and (3) - Direction to require charity to change name (OSCR to charity)
Section 16(6) (b) – Direction not to take action for 6 months (OSCR to charity)
Section 28(2) –  Direction not to undertake activities for 6 months (OSCR to charity) body or person
Section 30(1) - Direction to take steps to meet charity test (OSCR to charity)
Section 31(5) to (9) Direction to stop representation as a charity (OSCR to body) or
Direction not to part with property (OSCR to financial institution or person) Direction to cease acting for a charity or body in any activity. Direction for payment to charity or body (OSCR to person) Direction not to part with sums collected for charity or body (OSCR to financial institution or person).

Reason for conferral of Direction making powers not subject to parliamentary scrutiny

These direction making powers are to be used for individual cases in connection with registration and inquiries relating to particular charities and bodies

The Scottish Executive
November 2004
SUBORDINATE LEGISLATION COMMITTEE

4th Meeting, 2005 (Session 2)

Tuesday 1st February, 2005

Water Services etc. (Scotland) Bill as amended as stage 2
Memorandum to the Subordinate Legislation Committee

Purpose

1. This memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.7.9 of the Parliament's Standing Orders, of the Water Services etc. (Scotland) Bill. This memorandum refers to the Bill as amended at Stage 2. It describes the purpose of those provisions conferring power to make subordinate legislation which were amended or added at Stage 2, explains why the matter is to be left to subordinate legislation, and explains why the stated parliamentary procedure applying to each power has been chosen as the most appropriate option in each case. The memorandum should be read in conjunction with the Executive’s memorandum to the Subordinate Legislation Committee, which was submitted with the Bill when it was introduced.

Subordinate Legislation Powers following Stage 2

2. During Stage 2, one paragraph of Schedule 2 to the Bill which conferred a power to make an order was removed (paragraph 1(7) of schedule 2), 2 sections which conferred powers to make regulations were amended and 6 new powers to make orders were added. This memorandum examines each of these. Section 27 of the Bill sets out the procedures for orders and regulations to be made under the Bill.

Section 4(7), Exceptions to offences regarding the public water supply system

Powers conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Affirmative resolution procedure

3. New subsection (8A) has been added to section 4 of the Bill. This new subsection qualifies the regulation-making power provided for at section 4(7) of the Bill, and provides that the power under section 4(7) may be exercised only where the effect of the regulations would not be prejudicial to the exercise of Scottish Water’s core functions as respects the supply of water. Thus, the scope of regulations made under section 4(7) is restricted to specifying the circumstances and categories of person in respect of which the prohibitions as regards the public water supply system (as set out in section 4(1) to (3) of the Bill) do not apply.

Reason for taking this power

4. In its Stage 1 Report (see in particular paragraphs 8-23), the Committee was concerned about the width of the section 4(7) regulation-making power and that it
could, for example, lead to privatisation of Scottish Water by the back-door. The amendment, however, ensures that the power cannot be used in a way which would be prejudicial to the exercise of Scottish Water’s core functions regarding the supply of water. It reinforces the Executive’s intention that the power be exercised to provide for a flexible response to the unforeseen application of the prohibitions provided for in sections 4(1) to (3) of the Bill.

Section 5(7), Exceptions to offences regarding the public sewerage system

Powers conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Affirmative resolution procedure

5. New subsection (8A) has been added to section 5 of the Bill, which makes provision equivalent to that described at paragraph 3 above in relation to section 4(7) of the Bill in respect of Scottish Water’s core functions regarding the provision of sewerage services. The provision similarly qualifies the scope of the regulation-making power in section 5(7) of the Bill to ensure that it cannot be used in such a way as to prejudice the exercise of Scottish Water’s core functions as respects the provision of sewerage and disposal of sewage.

Section 12(3A), Water and sewerage services undertaking

Powers conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

6. Section 12(1) of the Bill enables the Scottish Ministers to require Scottish Water to secure the establishment of a business undertaking to obtain a licence to become a water or sewerage services provider (see subsections (2) and (3)).

7. Provision regarding applications for water and sewerage services licences is made in paragraphs 1 and 2 of Schedule 2 to the Bill. Section 12(3A) of the Bill confers an order-making power on Scottish Ministers to enable modification of the licence application procedure provided for in paragraphs 1 and 2 of Schedule 2 in respect of the initial licence application to be made by the undertaking and the granting of such a licence.

Reason for taking this power

8. The Executive considers that it is important to have some degree of flexibility as regards the initial application for a licence by the undertaking, given the Executive’s intention (as indicated in its letter to the Committee of 3 October 2004 during Stage 1) that before the provisions are commenced more generally, the undertaking will require in the first instance to apply for a licence under Part 2 of the Bill to provide water and sewerage services. During this period, it was considered that there may be a case for a simplified applications procedure to be in place. It is considered that negative parliamentary procedure provides for sufficient Parliamentary scrutiny for this power, which is to be used in narrow circumstances concerning the first application for a water and sewerage services licence by the
undertaking. In consequence, paragraph 1(7) of Schedule 2 to the Bill (as introduced), which conferred a more general order-making power on the Scottish Ministers as regards amending the licence application procedure provided for under that Schedule, and which was itself subject to negative resolution procedure, has been removed. In its Stage 1 Report, the Committee was concerned about the width of such a power (see paragraphs 47-50).

Section 12A(1), (2) and (6), Financing, borrowing and guarantees

Powers conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

9. Subsections (1), (2) and (6) of new section 12A of the Bill (financing, borrowing and guarantees) confer upon the Scottish Ministers order-making powers to specify the circumstances in which the undertaking established under section 12(1) of the Bill is to be financed, whether by grant, loan or guarantee.

10. Section 12A(1) enables Ministers to specify in an order, the circumstances under which they may, with the consent of Scottish Water, make grants to the undertaking. Section 12A(2) makes similar provision in respect of loans to the undertaking and in respect of the circumstances in which the undertaking may not borrow from any other person (except as described in subsection (4)(b), where the undertaking may borrow by way of overdraft or otherwise for the purpose of meeting a temporary excess of expenditure). Finally, section 12A(6) enables Ministers to make an order specifying circumstances in which Ministers may guarantee the discharge of any financial obligation in connection with sums borrowed in terms of section 12A(4)(b).

Reason for taking this power

11. Just as section 12 of the Bill is intended to afford to Scottish Water some degree of flexibility as regards the form of undertaking to be established, section 12A provides for equivalent flexibility as regards the funding arrangements for that undertaking, subject to the financial controls the Scottish Ministers are able to exercise as a result of the order-making powers provided for in section 12A(1), (2) and (6). That flexibility will allow Ministers to decide in an Order, which is subject to Parliamentary scrutiny, which funding mechanisms are the most appropriate in the light of their approval of the exact form that the undertaking established under section 12 will take. It is considered that negative Parliamentary procedure provides sufficient Parliamentary scrutiny for this power. As an additional safeguard, subsection (3) provides that any borrowing by the undertaking must not exceed the amount specified in the relevant Budget Act as approved by Parliament. Moreover, in terms of subsection (7), Ministers must lay a statement before the Parliament immediately after any guarantees made under subsection (6).
Section 17A(8), Continuation and discontinuation of sewerage services

Powers conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

12. New section 17A of the Bill provides for the circumstances in which trade effluent services may be continued or discontinued by Scottish Water. In general, sewerage services cannot be discontinued, due to the public health risks involved, however, trade effluent is treated differently under the Bill, due to the specialised technical agreements which govern its disposal. Under section 17A(6), a sewerage services provider may request Scottish Water to discontinue trade effluent services to a customer. Scottish Water must carry out this request provided that the conditions in subsection (11) are met. Before doing so, section 17A(7) provides that a sewerage services provider, at least 14 days before making such a request, must serve a notice on the occupier of the premises in question, and on Scottish Water and the Commission, informing them of the intention to make the request to disconnect. Section 17A(8) enables the Scottish Ministers to make an order prescribing the form and content of such notices.

Reason for taking this power.

13. Just as with the similar power in section 16(3) of the Bill, as regards the prescription of notice for discontinuance of water services, it is not considered necessary to define in detail the form and content of the notice on the face of the Bill, and that this is more appropriate for subordinate legislation. This affords sufficient flexibility to make amendments to these details if required in light of the operation of the new licensing regime. It is considered that negative Parliamentary procedure provides sufficient Parliamentary scrutiny for this power.

Section 19B(1), Sewerage nuisance: code of practice

Powers conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

14. New section 19B(1) gives the Scottish Ministers the power to make an Order containing a code of practice on the assessment, control and minimisation of sewerage nuisance. This is referred to as “a sewerage code”. Section 19B(2) defines “sewerage nuisance” as smells and discharges, insects or any other thing emanating from any part of the public sewerage system so as to be prejudicial to health or a nuisance. Section 19B(3) provides that a sewerage code may include guidance on the best practicable means of assessing, controlling and minimising sewerage nuisance, and the circumstances in which a person to whom a sewerage code applies could be regarded as complying or not complying with that code.

15. Section 19B(8) requires Scottish Ministers, in advance of making an order containing a sewerage code, to consult Scottish Water, local authorities and any other appropriate persons, on the proposed sewerage code. Once an Order
containing a sewerage code has been made, Ministers and every local authority, must, in accordance with section 19B(7), publicise the sewerage code.

Reason for taking this power

16. Given the detailed technical provisions which are likely to be contained in a sewerage code, it is considered appropriate that it is brought into effect by way of secondary legislation. The power is also sufficiently wide so as to enable different sewerage codes on different aspects of sewerage nuisance to be introduced. Any such Order is also to be subject to prior consultation and will be publicised. In the circumstances, it is considered that this provides a sufficient level of scrutiny.

SCOTTISH EXECUTIVE
[25 January 2005]
SUBORDINATE LEGISLATION COMMITTEE

4th Meeting, 2005 (Session 2)

Tuesday 1st February, 2005

Executive Responses

- The Community Reparation Orders (Requirements for Consultation and Prescribed Activities) (Scotland) Regulations 2005, (SSI 2005/18)
THE COMMUNITY REPARATION ORDERS (REQUIREMENTS FOR CONSULTATION AND PRESCRIBED ACTIVITIES) (SCOTLAND) REGULATIONS 2005, (SSI 2005/18)

On 25 January 2005 the Committee asked the Executive for an explanation of the following matters –

“The Committee notes that paragraphs (b), (c), (d), (f) and (g) of regulation 2 contain the words “as the local authority thinks appropriate”. The enabling power obliges local authorities to consult “such persons or class or classes of persons as the Scottish Ministers may by Regulations prescribe”. The Committee considers that the use of the word “prescribed” means that the Regulations themselves must specify the material in question and there is no room for the Regulations to delegate this power to a third party.

A similar point arises in relation to regulation 3(a) where the decision is delegated to “the supervising officer appointed by the local authority”.

The Committee asks the Executive for comment on whether regulations 2(b), (c), (d), (f) and (g) and 3(a) amount to sub-delegation not authorised by the enabling powers.”.

The Scottish Executive responds as follows –

The purpose of the paragraphs of regulation 2 quoted in paragraph 2 of the Clerk to the Committee’s letter is to identify classes of person that local authorities are required to consult. In the Executive’s view it is sufficient for the purposes of section 27(5A) of the Social Work (Scotland) Act 1968 to specify the classes of person that require to be consulted. It is recognised that within any local authority area there may be more than one group or organisation that considers itself to fall within the specified class. Consequently the local authorities require scope to decide which groups or organisations that may fall within any class should be consulted. On the basis that the Regulations prescribe the classes of person that local authorities are required to consult, the Executive considers that the provisions of regulation 2 quoted in the letter dated 25 January 2005 do not constitute unauthorised sub-delegation.

With regard to the question raised about the provisions of regulation 3(a) the Executive does not consider that the provisions of this regulation constitute unauthorised sub-delegation. The “prescribed activity” referred to in regulation 3(a) is “unpaid work … that will enable reparation to be made in accordance with section 245K(5)(a) …” of the Criminal Procedure (Scotland) Act 1995. The Executive considers however that it would be important when determining what unpaid work an offender should undertake that an assessment is made of the offender’s ability to undertake the work. Consequently for the avoidance of doubt the Executive considers it appropriate to include
provision in the Regulations that would make it clear that the
supervising officer should reach a view that the offender would be
capable of undertaking the proposed work.

In the event that the provisions of regulation 3(a) simply stated that
“unpaid work that will enable reparation to be made” is a prescribed
activity for the purposes of section 245K(5) of the 1995 Act it would still
be the responsibility of the supervising officer to be satisfied that the
offender would be capable of undertaking that work. Given the terms
of section 245K(4) of the 1995 Act it will, in any event, be the
supervising officer’s responsibility to decide which activity the offender
should undertake. The Executive does not believe that the provisions of
regulation 3(a) constitute unauthorised sub-delegation on this occasion.