SUBORDINATE LEGISLATION COMMITTEE

AGENDA

5th Meeting, 2005 (Session 2)

Tuesday 8th February, 2005

The Committee will meet at 10.30am in Committee Room 4.

1. **Inquiry into the Regulatory Framework in Scotland:** The Committee will receive a briefing from Professor Alan Page, the Committee’s adviser on European issues relating to its inquiry.

2. **Inquiry into the Regulatory Framework in Scotland:** The Committee will take evidence from—
   
   Alan Mitchell, Head of Policy, CBI Scotland,
   Susan Love, Policy Development Officer, Federation of Small Businesses in Scotland,
   David Lonsdale, Policy Officer, Scottish Chambers of Commerce and
   Brian Jamieson, Director of Legal and Company Secretary Scottish Enterprise.

3. **Delegated powers scrutiny:** The Committee will consider a response from the Executive on the delegated powers provisions in the following Bill—

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

4. **Delegated powers scrutiny:** The Committee will consider a response from the Executive on the delegated powers provisions in the following Bill—

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

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

   Budget (Scotland) (No.2) Bill as introduced.
6. **Delegated powers scrutiny:** The Committee will consider the delegated powers provisions in the following Bill—

   Fire (Scotland) Bill as amended at Stage 2.

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

   - the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2005, *(draft)*
   - the Advice and Assistance (Financial Conditions) (Scotland) Regulations 2005, *(draft)*
   - the Civil Legal Aid (Financial Conditions) Scotland Regulations 2005, *(draft)*
   - the Housing Support Grant (Scotland) Order 2005, *(draft)*
   - the Landfill Allowances Scheme (Scotland) Regulations 2005, *(draft)*
   - the Renewables Obligation (Scotland) Order 2005, *(draft)*.

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

   - the Antisocial Behaviour (Noise Control) (Scotland) Regulations 2005, *(SSI 2005/43)*
   - the European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005, *(SSI 2005/42)*
   - the Domestic Water and Sewerage Charges (Reduction) (Scotland) Regulations 2005, *(SSI 2005/53)*
   - the Water Service Charges (Billing and Collection) (Scotland) Order 2005, *(SSI 2005/54)*.

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

10. Inquiry into the Regulatory Framework in Scotland – witness expenses:
   The Committee will consider a paper on witness expenses.

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

**Agenda Item 1**

Paper from the Adviser SL/S2/05/4/1

**Agenda Item 2**

Note from the Clerk (Private) SL/S2/05/4/2
CBI Scotland response SL/S2/05/4/3
Federation of Small Businesses in Scotland response SL/S2/05/4/4
Scottish Chambers of Commerce response SL/S2/05/4/5
Scottish Enterprise response SL/S2/05/4/6

**Agenda Items 3 - 9**

Legal Brief (Private) – to follow SL/S2/05/4/7

**Agenda Item 3**

Executive response SL/S2/05/4/8

**Agenda Item 4**

Executive response – to follow SL/S2/05/4/9

**Agenda Item 5**

Subordinate legislation memorandum SL/S2/05/4/10
Bill (circulated to Members only)

**Agenda Item 6**

Subordinate legislation memorandum – to follow SL/S2/05/4/11
Bill (circulated to Members only)

**Agenda Items 6-9**

Copies of instruments (circulated to Members only)

**Agenda Items 10**

Witness expenses paper SL/S2/05/4/12
Subordinate Legislation Committee

Regulatory Framework Inquiry

European Aspects

Recent developments

1. In terms of the Committee’s consultation paper I think that the first point that falls to be made is that concern with improving the quality of regulation has been much slower to manifest itself at the European than at the national level. Successive governments have realised, however, that there is little point in taking action to minimise burdens at the national level if developments at the European level force an increase in these burdens. This recognition became particularly acute in the course of the completion of the single market. The emphasis has therefore been on building similar disciplines at the European level to those that have become accepted at the national level.

2. Following the Commission’s White Paper on European Governance,¹ and the report of the Mandelkern Group on Better Regulation,² there are signs that these efforts are beginning to bear fruit. In June 2002 the Commission proposed a ‘comprehensive framework’ for ‘better lawmaking’, and an accompanying ‘action plan for simplifying and improving the regulatory environment’³. As well as measures to improve new regulation through the introduction of systematic impact assessment and minimum standards of consultation,⁴ the action plan envisages the updating and simplification of the Community acquis.⁵

3. An Inter-Institutional Agreement on Better Law Making was also signed by the Commission, European Parliament and Council in December 2003.⁶ The Agreement has been hailed by the Commission as ‘the most ambitious effort yet undertaken to improve regulation by associating the three institutions in an overall strategy for better lawmaking at EU level, while respecting the responsibilities of each institution.’⁷

4. Important though these developments are, it is probably fair to say that we are not yet at a point at which better regulation is ‘firmly embedded in the culture of the EU’.⁸ The Commission’s annual ‘Better Lawmaking’ report details the

measures taken to improve the quality and accessibility of Union legislation as well as the application of the principles of subsidiarity and proportionality.\(^9\)

5. Recent developments apart, the main points seem to me to apply to European law-making generally and not to be confined to improving regulation. They can be conveniently divided into those that apply to the ‘negotiation’ of EU obligations and those that apply to their ‘implementation’ (transposition and enforcement).

**Negotiation**

6. It has become an accepted tenet of European policy making that if national interests are to be fully taken into account in the negotiation of Community obligations they have to be voiced at an early stage in the process. The same is no less true of devolved interests. In contrast to the UK government, however, the devolved administrations have no guaranteed voice in the Community decision-making process. They may thus find themselves faced, for example, with the task of transposing and enforcing directives in the negotiation of which they had little or no say.

7. In the absence of a guaranteed voice, the emphasis has been on consultation between Whitehall and the devolved administrations. In the Memorandum of Understanding which governs relations between the UK government and the devolved administrations, the UK government recognizes that the devolved administrations will have an interest in international and European policy making in relation to devolved matters, notably where implementing action by the devolved administrations may be required,\(^10\) and commits itself to involving the devolved administrations as fully as possible in discussions about the formulation of the UK’s policy position on all EU and international issues which touch on devolved matters.\(^11\)

8. Despite assurances that this process works well there is evidence this is not always the case. A Cabinet Office report on improving the way the UK handles European legislation, for example, suggests that further work should be carried out to investigate whether the traditional systems of consultation and policy development within Whitehall and between Whitehall and devolved administrations are as robust as they might be when dealing with European legislative processes, and comments that there is scope for this (i.e. the traditional systems) to be ‘improved greatly’.\(^12\) It further comments: ‘The relationship with Devolved Administrations (DAs) varied and developed over the

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\(^10\) Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly of Wales and the Northern Ireland Executive Committee Cm 5240 (2001), paragraph 17.

\(^11\) Ibid., para 19; see also the attached Concordat on Co-ordination of European Policy Issues, Parts B1 and B3.

course of the Study. This is clearly an area where improvements can be made both in Whitehall and the DAs.\textsuperscript{13} This is an issue the Subordinate Legislation Committee may wish to explore.

9. In terms of parliamentary scrutiny, the Parliament’s European and External Relations Committee’s sifts proposals for EC/EU legislation and initiatives with a view to identifying those that may be of interest to itself and to other committees. Since January 2002 the Committee has confined itself to acting as a kind of ‘early warning system’, notifying subject committees of relevant EC/EU legislative developments, and encouraging them to investigate those that are of interest to them.\textsuperscript{14}

\textbf{Implementation}

10. Under the devolution settlement the devolved administrations are responsible for implementing EU obligations which concern devolved matters.\textsuperscript{15} The functions transferred to the Scottish ministers under section 53 of the Scotland Act include the observation and implementation of obligations under Community law.\textsuperscript{16} For the purpose of transposing Community obligations the Scottish ministers have access to the powers conferred by section 2(2) of the European Communities Act 1972. These powers continue to be exercisable in relation to devolved matters by United Kingdom ministers concurrently with their Scottish counterparts.\textsuperscript{17} This gives Scottish ministers the option of relying on UK implementation; it also means that UK government can intervene to give effect to those obligations should the Scottish ministers show any indication of failing to do so.

11. The implementation of EU obligations is an important impulse to lawmaking in the devolved Scotland. Of the 62 Acts passed by the Scottish Parliament during its first session, two contained substantial components linked to European Union legislation.\textsuperscript{18} Of just over 1,950 Scottish Statutory Instruments (SSIs) made during the Parliament’s first session, approximately 10% contained measures in connection with implementation of EU legislation in Scotland.\textsuperscript{19} The equivalent UK figures are higher, with about half of all legislation with a significant impact on business, charities or the voluntary sector commonly being said to be introduced in implementation of EU obligations,\textsuperscript{20} which undoubtedly reflects the higher EU

\textsuperscript{13} Ibid., 7.
\textsuperscript{14} Legacy Paper, Part 2, paragraphs 3-8.
\textsuperscript{15} Memorandum of Understanding, supra n10 at paragraph 20.
\textsuperscript{16} Scotland Act, s57(1); see also Schedule 5, paragraph 7(2).
\textsuperscript{17} Scotland Act, s57(1).
\textsuperscript{19} S2W -788. The European and External Relations Committee’s estimate for SSIs with a European content is slightly higher: it estimates that about 15% of the estimated 350 SSIs received each year in the Parliament are driven by the EU: Legacy Report, Part 2, paragraph 22.
\textsuperscript{20} See e.g. HL Deb col 1, 10 May 2004.
content of the reserved areas. In the evidence received by the Committee, the importance of the EU dimension is emphasised by the Food Standards Agency Scotland.21

12. The Parliament’s European and External Relations Committee receives regular reports from the Scottish Executive on the transposition and implementation of EC/EU legislation in the devolved areas. It has chosen to concentrate on two aspects of the process:

- the Executive’s success in transposing and implementing obligations on time, against the background that delays in transposition could lead to financial penalties, and UK government intervention. Securing the timely implementation of EU obligations was an issue in the immediate aftermath of devolution.

- recourse by the Executive to section 57(1) of the Scotland Act, which allows EC obligations in the devolved areas to be implemented on a UK- or GB-wide rather than Scottish basis. The Committee’s predecessor had no objection in principle to the use of UK- or GB-wide legislation in devolved areas, provided there were no specific Scottish interests to be accommodated.

13. These are not the only aspects that might be examined – by the Subordinate Legislation Committee or the European and External Relations Committee. Others include:

- the related question of ‘differential implementation’, i.e. the freedom the Scottish Executive has to go its own way - to tailor ‘Scottish solutions to Scottish problems’ - in which regard it might be asked whether the Executive has always made effective use of such discretion as it enjoys in the implementation of directives.22 Where it has no real margin of discretion it may make more sense for obligations to be implemented on a UK- or GB-wide basis. But it is clear that this is not the only reason for preferring national rather than devolved implementation.23 In evidence to the Committee, the importance of ‘flexibility’ in the implementation of directives is emphasised by the Scottish Chambers of Commerce.24

- ‘gold-plating’ – a major concern at national level, which is also of interest to the devolved administration. In its Improving Regulation annual report, the Executive stresses its commitment to ensuring that regulations are

21 RF 009, paragraph 20.
22 The Welsh experience suggests no great capacity or enthusiasm for exploring the EU ‘margin of appreciation’: Rawlings, Delineating Wales.
23 See exchange of correspondence in EU/03/2/7 stressing the importance attached to uniformity of regulation in matters affecting business.
24 RF 003, paragraph 3.4.
implemented ‘without gold plating’. It is perhaps worth remembering in this connection, however, that one person’s gold-plating is another person’s additional protection for, say, the environment.

- the effectiveness of consultation between the UK government and the devolved administrations (paragraph 8 above). UK government policy on transposition stresses the importance of appropriate co-ordination and consultation within government, including the devolved administrations. It recommends preparing a project plan for the eventual transposition of the legislation, which should be agreed where appropriate with the devolved administrations.

- the evidence of the Scottish Environment Protection Agency to the Committee may be worth noting in this regard. In its evidence it states: “Given that most Scottish environmental legislation transposes EU law, it is important that agencies such as SEPA are consulted during the development of the originating European proposals to ensure that these are practicable, enforceable and deliver the desired outcome. Similarly, there is arguably a greater need for SEPA to input to the prior assessment of the impact, costs and benefits of new approaches and laws i.e. as part of the regulatory impact assessment. The earlier the consultation, the easier it is to inform the overall principles.”

- the effectiveness of consultation with outside interests. The Better Regulation Task Force suggests that securing implementation on time may be at the expense of consultation with affected interests. Directives have to be implemented on time, but this should not be at the expense of consultation; ‘better project management rather than short consultation should be the tool to achieve this’. In evidence to the Committee, the Scottish Chambers of Commerce is critical of the limited time allowed for consultation as is the General Medical Council Scotland.

- The choice between primary and secondary legislation to implement obligations. The UK pattern is to implement by secondary legislation. The small number (2) of ASPs in the first session concerned with the implementation of EU obligations suggests that the Scottish pattern is no different. One factor that may point in the direction of implementation by

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27 RF 038, para 12.
28 The Challenge of Culture Change, supra n8 at 13.
29 RF 003, paragraph 3.5; RF 039, paragraph 13.
secondary rather than primary means (or else reliance on Westminster) is the fact that little or no margin of discretion is permitted to member states.

- the choice between affirmative and negative resolution procedure where section 2(2) of the European Communities Act is used to implement obligations, and whether affirmative resolution procedure might be appropriate where a substantial margin of discretion is left to member states (terms of reference paper).

- transposition notes – in November 2001 the UK Government undertook to make available to Parliament a memorandum alongside primary or secondary legislation giving effect to directives explaining how the main elements of the directive have been, or will be, transposed into UK law. The idea is to improve the process of transposition. The Scottish Executive does not appear to have entered into a similar commitment in relation to legislation laid before the Scottish Parliament.

- the overlap between the Subordinate Legislation Committee’s remit and that of the European and External Relations Committee in the scrutiny of legislation made in the implementation of European obligations (terms of reference paper). The European and External Relations Committee is currently reviewing procedures and processes for scrutiny of the Executive’s transposition and implementation of EC/EU legislation in devolved areas.\(^{31}\)

- Parliamentary scrutiny, including the question of shared parliamentary scrutiny - legislative co-operation - between Westminster and Holyrood. As regards scrutiny at Holyrood, the Federation of Small Businesses in Scotland looks to the Scottish Parliament to take an active role in ensuring compliance with the principles of better regulation.\(^{32}\) As regards scrutiny at Westminster, it may be noted that the House of Lords Merits of Statutory Instruments Committee has power to draw the special attention of the House to an instrument on the grounds that it 'inappropriately implements EU legislation'.\(^{33}\)

**Other comments**

14. There are a number of other, related points the Committee may wish to keep in mind. I mention them only briefly here, but I can elaborate on them if desired. The first is that improving regulation is not just about subordinate legislation: it is about any legislative instrument that serves as a vehicle for regulation. The second, which is the converse of the first, is that subordinate legislation is not just

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\(^{32}\) RF 037, paragraph 1.6

\(^{33}\) RF 015, paragraph 5.
about regulation or imposing burdens on business.\textsuperscript{34} The final, and most important, is that ‘better secondary legislation’, so to speak, or the ‘better legislation’ agenda, is not confined to minimising burdens on business, although that is the starting point for much of the effort that has been made over the last twenty or so years to improve the quality of regulation. Looking ahead to the Committee’s final report, it also occurs to me the Committee could usefully say a little more about the history of ‘improving regulation’ at the national and (above) European levels. It would help give the reader a much stronger sense of the context of this part of the Committee’s inquiry.

\textbf{Professor Alan Page}

\textbf{Adviser to the Committee}

\textbf{February 2005}

\textsuperscript{34} A Regulatory Impact Unit analysis of statutory instruments in 2003 suggests the over 90\% have little or no substantial impact on business: see RIU website.
CBI SCOTLAND RESPONSE TO SUBORDINATE LEGISLATION COMMITTEE’S INQUIRY INTO THE REGULATORY FRAMEWORK IN SCOTLAND

Business is not anti-regulation per se. Some regulations are necessary to maintain a civilised society, and others to ensure the efficient operation of markets. But, business is opposed to unnecessary, ill-conceived and poorly implemented regulation.

Policymakers must follow the Better Regulation principles set out by the Better Regulation Task Force. Regulations need to be:

• Transparent – clearly defined objectives and obligations
• Accountable – regulators are accountable to Parliament and appeals procedures are accessible
• Consistent – with existing Scottish, UK and EU regulations
• Targeted – focused on the problem
• Proportionate to risk – balance risks and costs.

Regulations that meet these criteria are more likely to achieve their objectives without inhibiting the ability of business to create the wealth and grow the Scottish economy.

Role of the Scottish Executive and Parliament

While it is true that many regulations originate at an EU level, this can be overstated. A recent CBI report on environmental regulation found that, while there where more than 250 EU Directives relating to the environment, there were also 169 environmental regulations of UK origin. There are two areas where the Executive and Parliament need to perform better to improve the quality of regulation:

• First, they must see legislation as a last resort, rather than an automatic response to a policy objective or political problem.
• Second, they must improve the transposition of EU Directives into national law. The lack of timely and clear transpositions makes it very difficult for businesses to plan ahead on how they will comply with regulation and invest accordingly.
While the Committee’s focus is on regulation that takes the form of primary or secondary legislation, it must be recognised that there is a growth of non-statutory regulation in the form of ministerial powers to issue directions and guidance. This is a concern to business.

**The role of the IRIS Unit**

The Unit is not perceived by business as an effective agent for improving the regulatory framework in Scotland. This is not a reflection on the quality of the individuals involved, but rather on its overall resources and positioning within the Executive. The IRIS Unit should:

- Report directly to the First Minister and the Permanent Secretary – this should give it more ‘authority’ and the confidence to robustly challenge public policy makers
- Have greater resources
- Take steps to quantify the overall burden of business regulation, and changes in this year to year.

**Answers to specific questions in Part 5 of the Committee’s report**

1. The initial rollout of the PPC regulations was an example of a regulation being far more burdensome on business than was originally envisaged.

2. Option (a) would seem preferable if it improved the quality of RIAs.

3. Yes.

4. Yes.

5. It should be statutory.

6. In principle yes, provided that the assumptions made in the RIA are the subject of rigorous, independent scrutiny by a body not directly involved with the proposal. A better-resourced and more ‘authoritative’ IRIS Unit would appear to be the obvious choice to take on this scrutinising role.

7. Micro-business tests are very difficult in practice to get right – we do not have enough information to assess whether the test is working well in practice.

8. In principle, we see value in having a single commencement date for all legislation affecting business, provided that legislation was not rushed to meet the annual date, and that RIAs were adhered to. There would also need to be a safeguard to ensure that the total volume of legislation implemented on the day was not too much for businesses to manage – perhaps by having a maximum aggregate compliance cost. Legislation that would lead to this limit being exceeded would be delayed to the next annual commencement date.

9-14. We do not have a view on these questions.

15. Yes, provided that the regulations still provided certainty.
16. If possible.
17. Yes.
18. Yes.
19. CBI supports the Enforcement Concordat, but feedback from CBI members on its effectiveness is mixed.
20. Inconsistent enforcement is a concern of CBI Scotland members – however, we are not sure how the proposal here would be achieved.
21. Yes. We are not sure how such a complaint procedure should work in practice but it should be simple, transparent and applied consistently.
22-24. We are sympathetic to the ‘sunset clause’ idea, provided the danger of large number of ‘renewals’ did not cause a parliamentary logjam.
25. Yes.
26. Yes.
27. Yes.
28-32. We have no view on these questions.
33-35. In principle, we would support reform and simplification along the lines suggested.
34-40. See our comments above on the role of the IRIS Unit
41. Yes.
42. Yes.
42. We have no view on this question.

CBI SCOTLAND, AUGUST 2004
Introduction

1.1 The Federation of Small Businesses is Scotland’s largest direct-member business organisation, representing 18,000 members. The FSB campaigns for an economic and social environment which allows small businesses to prosper.

1.2 The FSB welcomes the present inquiry and acknowledges the committee’s commitment to keep the scope of this as broad as possible in order to gather as many useful recommendations as possible. As we pointed out in our recent response to the Finance Committee’s Cross-Cutting Expenditure Review on Economic Development, government spending on economic development and national infrastructure is an essential part of creating the conditions for small businesses to grow, but this must be complemented by a commitment to the removal of unnecessary barriers to business growth and expansion. This seems a logical conclusion of the Executive’s claim to have put economic growth at the top of its priorities.

1.3 Regulation is a constant cause of concern to the business community. The Federation’s recent membership survey “Lifting the Barriers to Growth” highlighted that 57% of members are dissatisfied or very dissatisfied with the impact on their business of both the volume and complexity of legislation. A variety of other surveys confirm the difficulties that many businesses have implementing new regulations and directives in areas as diverse as health and safety, waste disposal and employment.

1.4 It is easy to dismiss business unease with legislation as ‘moaning about red tape’ but issues such as the time taken to ensure compliance with the increasing complexities of employment legislation. Last year the FSB’s legal advice line took around 160,000 calls from concerned members, with the vast majority of these calls connected to employment law.

1.5 In order to give committee members greater insight into the day-to-day difficulties caused by the high number of regulations we suggest that a committee member is appointed as a rapporteur to visit a small business as part of the Committee’s inquiry.

1.6 The FSB is particularly concerned about the impact of regulations on small and micro businesses as compliance with regulation can affect small businesses disproportionately for the following reasons:

- Fixed costs (e.g. registering as waste carrier) produce higher relative compliance costs for small firms.
- Small firms with 1-2 employees spend nearly 5 times as many hours per person dealing with regulation than firms with 50 or more employees\(^1\). This is time diverted away from production or finding new customers to grow the business.

\(^1\) Small Business Research Trust, “Nat West SBRT Quarterly Survey of Small Businesses in Britain” Col.16, No 3 (2000)
Small businesses are less resilient than large firms to regulatory changes – they have fewer resources to absorb new costs associated with regulation. Small firms carry out their own administration and do not employ (or have the capacity to employ) specialists in employment law, PAYE or environmental management.

1.7 It should be noted that it is not only the business community that is concerned about regulation. The voluntary sector and local authorities frequently complain about the difficulties caused to their operations by what they feel to be excessive government regulation and inspection.

1.8 Much of the legislation that is applicable to Scottish business originates in Brussels or Westminster and the Scottish Parliament therefore has limited scope to influence the principle of the proposal. However, given that these regulations and directives are transposed directly into Scots law, the Scottish Parliament must take an active role to ensure that regulations comply with the principles of better regulation.

**Discussion Points**

**Part 2: 1 – 8 Regulatory Impact Assessments (RIAs)**

2.1 RIAs do not appear to be used routinely as part of the policy development process. It is clear that while the RIA is completed in good faith, it is often considered as an ‘add-on’, rather than an integral part of the policy making process. This is indicative of the low priority given to the consideration of legislation’s negative consequences on business and other groups.

2.2 Our experience would suggest that partial RIAs are often used when consulting on draft legislation (e.g. Draft Water Services Bill), leaving the full RIA until the actual legislation is introduced to Parliament. As many proposals are likely to have gone through several phases of consultation before reaching the published Bill stage, a RIA at this point in the process is less relevant. Partial RIAs are not particularly detailed and are therefore also less relevant to the policy development process.

2.3 The objectives of the regulation must be set out clearly at the top of the RIA.

2.4 The FSB has commented upon several Financial Memoranda accompanying Bills and it is often at this stage that the opportunity to comment upon the impact of the proposal is discussed which seems rather late in the overall process. Current issues which will have implications for businesses and where no RIA has yet come forward include the Licensing Bill (published though not yet introduced to Parliament) and the Fire Bill (introduced to Parliament but proposing to complete RIAs once secondary legislation is brought forward).

2.5 RIAs are also unhelpful if they are completed without sufficiently robust data and rely upon assumptions. We would like to see better focus on gathering relevant data in order that RIAs give a true reflection of costs and other implications of regulation.

2.6 The FSB believes that while the principle of the relevant department (or agency) completing the RIA is sound, there is a complete lack of awareness about the day-to-day activities of a small business and that RIAs tend to focus on upfront costs to businesses,
rather than assessing other factors relating to compliance, notably staff time. To ensure that policy makers have a better understanding of how to identify and evaluate the likely impacts on small businesses, the FSB strongly recommends that policy makers speak to individual small business owners and staff about the implications that new policies would have on their working practices.

2.7 The latest Corporate Sector Statistics published by the Scottish Executive show that 93% of all businesses in Scotland employ less than 10 people, i.e. are micro businesses. Any analysis of legislative proposals should therefore consider this group as its priority. However the introduction of the micro-business test was an acknowledgement of the failure to properly assess the impact of legislation on the majority of small businesses. However, we are yet to be convinced that RIAs properly consider the impact of legislation on micro businesses though this is probably due to the lack of understanding outlined in paragraph 2.6.

2.8 The FSB has supported the introduction of a common commencement date for employment legislation at Westminster and would support such measures in Scotland, particularly for changes to environment law.

2.9 The FSB is particularly concerned that while each RIA considers each proposal on its merits, it is the cumulative effect of regulation which most concerns businesses.

9-14 Public Consultation

2.10 A considerable level of “consultation fatigue” is already evident. The number of Scottish Executive consultations, together with calls for evidence for parliamentary committee inquiries and committee consideration of legislation is overwhelming.

2.11 The nature of many of these consultations means that individuals, such as business people, as unlikely to have the time to read through the consultation, let alone respond. There are some notable exceptions, such as the current Scottish Executive consultation exercise on smoking, which highlight how a wider audience can more easily contribute their views.

2.12 Consultation document reports – which outline the issues raised in responses – are helpful. However, the perception remains that some consultations are carried out so that policy makers can “tick a box” and claim to have consulted the business community.

2.13 Scottish Executive consultations usually adhere to the 12 weeks suggested by the Cabinet Office. It is important to point out that parliamentary committees are – due to the timetable and workload – often guilty of allowing short timescales for submissions of evidence when considering a particular piece of legislation or aspect of an inquiry.

2.14 There appears to be little thought given to the timing of consultations - a remarkable number were issued at the start of the summer holiday period, with closing dates at the end of the summer period. This is clearly unhelpful for the organisations who wish to respond – particularly in local government or voluntary sector where there are no meetings over the summer. The Licensing Bill consultation has also been carried out over the summer, the busiest time of the year for hoteliers, restaurateurs and publicans, limiting the scope for them to actively comment on the proposals.
2.15 In addition there appears to be little joined-up thinking between Scottish Executive departments. Each department issues its own consultations according to its timetable, but there appears to be little discussion between departments as to whether or not they will be targeting the same stakeholder group at the same time. This “free-for-all” relating to consultations can only lead to less effective scrutiny of proposals, and the FSB would like to see some co-ordination of consultations to ensure that relevant stakeholders are able to respond effectively.

2.16 The FSB is concerned that much of the legislation affecting Scottish businesses, which originates in Scotland, is likely to be subordinate legislation. This tends to receive little attention and can easily “slip by” unnoticed.

15-17 Easily Understood

2.17 The FSB would welcome simplification of the language used in many regulations – particularly those relating to the environment. Much of the text uses specialist terms and it is often hard to understand a) what is being proposed b) why it is being proposed and c) who will it effect and how

18-21 Enforcement

2.18 The FSB is concerned that legislation may not always make it clear how the sentiment of the legislation is to be enforced. For example, regulations relating to waste explain the need for “pre-treatment” of waste but do not detail the nature or extent of “pre-treatment”. There is also the obvious lack of consistency which can occur when enforcers are advised to “take a proportionate approach” on certain issues, which inevitably means businesses are uncertain about whether or not they are breaking the law.² Similarly, a member of the FSB was recently told by a SEPA official to disregard the requirement to list the European Waste Catalogue code for waste he was transferring as it was unclear which category was appropriate. We have no doubt that this advice is common-sense, but it is understandable that businesses are unclear at times which laws are to be enforced more strictly than others.

2.19 The Enforcement Concordat is clearly not a priority for local government or the Scottish Executive. The FSB is represented on the Enforcement Concordat Working Group. The group last met over a year ago. At this last meeting the re-launching of the Concordat appeared to be imminent following the publication of a “good practice” guide in England and Wales, yet – to our knowledge – nothing has happened since this time. In our experience many senior policy makers and politicians have never heard of the Concordat and we believe that the Enforcement Concordat is failing the business community.

22-24 Periodic Review

2.20 The FSB strongly supports the need to review all new regulation and suggests that Regulatory Impact Post-Implementation Assessments (RIPIAs) should be carried out at a stipulated time 12-18 months after a regulation comes into force. Such a review would allow those affected to highlight departures from the original RIA forecast and allow any

² Scottish Executive (2003) Correspondence to Local Authority Chief Executives in relation to the enforcement of EU Animal By-products Regulation
“mistakes” or unintended consequences of legislation, to be addressed. It would also improve the effectiveness of RIAs by providing feedback on the original assessment.

Part 3: Improving Regulatory Quality of Existing Regulations

25-32 Accessibility

3.1 The FSB supports the role of the Scottish Law Commission in undertaking a more thorough consolidation exercise and would welcome comment from the Scottish Executive on this point regarding resources for the Scottish Law Commission.

3.2 While it is unlikely that most businesses would refer to the actual text of legislation (advice on the relevant legislation should be available in a more accessible format e.g. Netregs website which sets out environmental legislation relevant to businesses) it would nonetheless be helpful if the text, as amended, were available online.

Part 4: Effective Structures for Improving Regulatory Quality

36-42 IRiS

4.1 Despite activity in 2001, when various seminars were held and a report of the progress of IRiS was published, we are unclear what has been achieved by IRiS in the last 3 years.

4.2 The FSB notes the following section in the committee’s paper:

“...the only powers available to Scottish Ministers to do so are contained ins sections 1 to 4 of the Deregulation and Contracting Out Act 1994. These powers enable the Scottish Ministers to make an order amending primary legislation relating to devolved matters which was enacted prior to that Act but only for the purpose of removing unnecessary statutory burdens. No orders have been made under that Act since devolution because, according to the evidence given by officials from IRiS, no proposals for removing unnecessary statutory burdens have been identified since then.”

4.3 It is difficult to reconcile this with the comments made in the 2001 progress report:

“The IRiS Unit will put a searchlight on business regulation. In partnership with business we will flush out regulations causing difficulty and ask what is really needed.”

4.4 Furthermore, IRiS’s remit to reduce existing legislation appears to have disappeared; the explanatory paragraph on the Scottish Executive’s website link to Better Regulation reads: “Avoiding increasing the burden of red-tape on Scottish business by Improving Regulations In Scotland (IRIS)”. Hardly a convincing declaration of intent to cut the numbers of regulations applying to Scottish businesses. It is important to consider that better regulation can often mean deregulation or self regulation.

4.5 It seems quite clear then that better regulation has completely slipped off the list of priorities of the Scottish Executive, which is bitterly disappointing for those in the business community.
4.6 The need to overhaul IRiS was identified in the FSB’s manifesto for the Scottish Parliamentary elections in 2003. This stated that IRiS should have a greater role in monitoring regulation that might affect Scottish businesses, regardless of the origin of the regulation – Brussels, Westminster or Holyrood. Above all, the FSB outlined the need for greater political backing and increased resources for IRiS.

4.7 There is merit in placing IRiS under the direct control of the First Minister in order to achieve cross-departmental commitment to better regulation and senior political backing. However, the FSB believes that, in line with proposals outlined in our manifesto, a better-resourced IRiS unit could be based within the existing Finance Department, given that it should have responsibility for evaluating policy proposals from all departments.

4.8 The FSB would also like to see IRiS adopt a more strategic role, ensuring that the culture of better regulation is embedded across the Scottish Executive, that consolidation of existing legislation is undertaken and taking an overview of the cumulative effect of regulation on Scottish businesses.

4.9 An annual report laid before the Scottish Parliament may help to focus on the need to keep regulation at the top of the agenda, but this should not really be necessary where growing the economy is the Scottish Executive’s main priority.

4.10 At present the FSB is unconvinced of the need for an independent advisory body similar to the BRTF. The advice of the BRTF and other experts is surely readily available to IRiS. A number of issues which require action are already evident.

43 Role of the Parliament

4.11 If the committee’s workload allowed further consideration of matters relating to regulatory reform this may be beneficial. However, the FSB believes that all committees (as all departments) should have a commitment to regulatory reform.

Conclusion

The FSB believes that business has legitimate concerns about regulation in Scotland. We have highlighted where we think action could be taken to improve the regulatory framework and outlined our concerns that regulatory reform has slipped off the political agenda. This is important because better regulation is not just about benefiting business, but is directly linked to creating a stronger and more competitive economy – so vital if we want Scotland to have greater opportunity for all. As growing the economy is the Scottish Executive’s top priority, we believe it is only logical that the commitment to better regulation is embedded at every level of government in Scotland.
RESPONSE TO THE SUBORDINATE LEGISLATION COMMITTEE’S INQUIRY INTO THE REGULATORY FRAMEWORK IN SCOTLAND

1. About Scottish Chambers of Commerce

1.1 The Scottish Chambers of Commerce is the umbrella organisation of the local Chambers of Commerce. Its prime functions are to promote and protect the interests of local Chambers and their member businesses throughout the length and breadth of Scotland. It helps promote cooperation between the local Chambers in the provision of services and represents the common interests of Chambers at a national and international level.

1.2 Scottish Chambers policy is determined by a Council on which all Chambers have equal representation, and is executed under their direction. Policy groups, formed from a wide cross section of member Chambers, are used to develop policy initiatives. The national body represents the interests of members to the Scottish, UK and European Parliaments, opposition parties, the Scottish Executive and other Government officials, Enterprise bodies, COSLA and other public bodies, and works with other private-sector business support bodies in Scotland on areas of mutual interest.

1.3 Membership is open to any firm or company irrespective of size. Collectively, Chambers in Scotland have an annual turnover of over £7.3 million and the current membership ranges from the country’s largest companies to the smallest retail and professional operations. The present membership ranked by market capitalisation includes 23 of the top 25 companies, and 38 of the top 50 companies in Scotland. Together Scotland’s Chambers provide well over half the private-sector jobs in Scotland and provide an unequalled geographical and sectoral representation throughout Scotland compared to other organisations representing Scottish business.
2 Opening Remarks

2.1 Scottish Chambers of Commerce (SCC) welcomes the opportunity to contribute to the Subordinate Legislation Committee’s inquiry and call for evidence on the Regulatory Framework in Scotland. SCC has been a consistent advocate of an improved, simpler and lighter regulatory burden on Scottish business, believing that the burden of regulation is one of the most significant avoidable constraints on business growth and one of the issues of most concern in our surveys of member firms. In our ‘Manifesto for Business’¹, published prior to the 2003 Scottish Parliament elections, we set out a range of policies for ‘Better Regulation’. After the election SCC cited ‘Regulation’ as one of five key policy priorities for the incoming Scottish Executive which had committed itself to prioritising economic growth.

2.2 The increasing burden of ‘red tape’ upon Scottish business is of genuine and real concern. Research produced by the Chambers of Commerce in the UK² shows an upwards trend in the number of Regulatory Impact Assessments and hence regulations produced by Government. This research also revealed that the average cost to business of each regulation had increased too over the past five years.

The opportunity cost of spending time and money on compliance means less time and fewer resources are available to businesses for marketing and R&D. Regulation should be a last resort, at minimum cost to companies with flexibility to aid implementation. Chambers of Commerce³ have estimated that within the UK as a whole the total cost of regulations introduced since 1998 exceeds £30 billion. The source of much of the burden may well be Westminster or Europe, however there remains much that the Scottish Parliament and Scottish Executive can and should do.

2.3 We hope that this particular consultation will result in action to improve the situation.

3. The Scottish Chambers response:

Improving regulatory quality of new regulation

3.1 The Scottish Chambers of Commerce commends the introduction of ‘sunset clauses’ on all domestic legislation and regulations which affect business as a means of improving the quality of new regulation. Such measures have a proven track record in several Australian states. Under this provision, existing regulations are either automatically repealed or

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¹ Available at www.scottishchambers.org.uk
³ BCC Burdens Barometer 2004
reviewed by a parliamentary committee after a set period of time. We believe the existing, ‘regulatory MOT’, provision whereby regulations are reviewed after ten years is simply far too long and must be shortened, e.g. to every five years. We accept that this would increase the administrative burden on both the Executive and Parliament when a regulation is due for repeal or review, but believe this is a useful lesson for legislators on the burdensome implications for business of legislation and regulations. SCC also supports the consideration of a ‘common commencement date’ each year for the introduction of regulations that affect businesses – advance notice of when regulations come into effect provides greater certainty and helps reduce compliance costs to business.

3.2 In specific answer to this question, the “SUNDAY WORKING IN SCOTLAND” CONSULTATION highlights the abuse of the RIA system. The consultation itself states “The voluntary arrangements in respect of shop and betting workers in Scotland has worked well” and “a Regulatory Impact Assessment (RIA) is being prepared”. Guidance on the preparation of RIAs says they should be prepared as early as possible in the proposal development and should accompany the consultation. That the Executive chose not to do this and the guidance appeared to have been ignored further undermined the commitment to meaningful consultation and also the business community’s view of the commitment to better regulation.

The Regulatory Impact Assessment failed to discuss the implications of not introducing the regulation as demanded in Cabinet Office RIA Guidance. Indeed, the benefits discussed are those of introducing family friendly recruitment policies (which we support) and not the benefits of introducing this regulation (which we did not).

Secondly and perhaps more importantly, the UK Government and the Scottish Executive have agreed that they will pursue every measure available to them to reduce the burden of ‘red tape’, this includes the use of self regulation. In this instance we had self regulation which by the consultations own words was working well and yet this is not deemed enough. This precedent undermines the commitment to self regulation and gave a clear signal to business that ‘even if you self regulate and it works, we will still consider regulating anyway’. Surely this feeds any cynicism regarding government commitment towards reducing the burden of regulation.

This is just one example of many which highlights the inadequacy of the current RIA regime and of commitment to it.

3.3 The number of final Regulatory Impact Assessments (RIAs) produced in Scotland under devolution has reached 98\(^4\) in total. SCC are concerned

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\(^4\) Source: [http://www.scotland.gov.uk/about/ELLD/EI/00015242/Final.aspx](http://www.scotland.gov.uk/about/ELLD/EI/00015242/Final.aspx) (as at April 2004)

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that Regulatory Impact Assessments are often completed late, inaccurately and merely to provide the appearance of monitoring the increased burden, and often do not appear to genuinely influence policy decisions. This is disconcerting as RIAs are designed to help policy makers think through the consequences of proposals, improve the quality of advice to Ministers and encourage informed public debate. Indeed, it is for this reason that we believe policy makers should continue to be responsible for producing RIAs. SCC believes the Parliament’s Enterprise & Culture Committee or perhaps the Subordinate Legislation Committee should have RIAs as a standing item on its agenda, and should have the right to formally agree or disagree that the assessment in the RIA is a ‘fair and accurate representation of the costs and benefits’. This is not in itself a veto, but a constructive attempt to ensure the validity and accuracy of such assessments. The Committee should be able to say whether a proposed regulation would have an adverse impact on businesses and whether the objective of the regulation could have been achieved by alternative means. Together these measures would improve Parliament’s effectiveness at holding the Executive to account over its assessment of the impact of new or recent regulations on Scottish business.

3.4 Scottish Ministers and the Executive should ensure that the greatest flexibility is allowed when transposing EU Directives into Scots law. Increasingly, EU Directives are drafted in such a way as to outline aims or frameworks rather than procedures. This allows the Executive the opportunity to be innovative in the regulatory regimes it introduces, for example ‘comply as you complete’. Furthermore, we believe the principle of RIAs is an admirable means of pre-legislative scrutiny and should be extended EU-wide, as a significant proportion of all UK regulation affecting business reflects the enactment and incorporation into domestic law of EU initiated legislation.

3.5 Attempts to contribute to and improve European Commission proposals are hampered by the short period of time they provide for their consultation processes, often only six weeks in duration. The Executive and Parliament should lobby the Commission to follow their lead and extend this to at least three months.

3.6 SCC believes that regulation ought to be the recourse of last resort. Legislators at all levels should make greater use of alternatives to regulations, such as self-regulation, codes of practice etc. To embed this culture within the policy making sphere SCC suggests that departments within the Scottish Executive should be given incentives to find alternatives to regulation and avoid it wherever possible.

3.7 We also believe that the remit of the existing Improving Regulation in Scotland (IRIS) Unit has been too limited. For example, the Executive recently published draft statutory guidance, in the form of Section 52 of the

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Local Government in Scotland Act, relating to the transfer of council employees when outsourcing contracts. This guidance includes several new burdens on private and voluntary sector organisations seeking to bid for local authority contracts. Yet no RIA was produced for this, with IRIS explaining that it fell outwith their remit which precludes them from considering anything other than strictly defined ‘regulations’.

3.8 The Enforcement Concordat has had ample opportunity to deliver improvements both for enforcers and businesses. However it has singularly failed to deliver any improvements due to the fatal inertia of regulators to use the document. Local Authorities in particular have seen no value whatsoever in using the document beyond signing up to it as a marketing device. Initiative, imagination and energy behind the concordat could have gone a long way to delivering better enforcement, more targeted enforcement and more efficient enforcement. Overall the concordat has seen little of the former and delivered none of the latter.

**Effective structures for improving regulatory quality**

3.9 The Scottish Chambers of Commerce believes the biggest impediment to stopping the increasing flow of red tape is the willingness and commitment of legislators. There is at least an acknowledgement from government in both Edinburgh and London that the burden of regulation and red-tape is an issue for business, hence the creation of Regulatory Impact Assessments, IRIS etc over the last five or six years. However, without a significant increase in political support from both Scottish Ministers and the Parliament, the Executive’s IRIS Unit will not deliver the successes that it was intended to achieve.

3.10 Moreover, while the regulatory burden is of significant and real concern, we believe that there are other burdens on business that fall outwith the remit of IRIS but nonetheless remain within the remit of the Executive, e.g. policies which affect certain elements of competition, public sector procurement, charging, business taxation, planning, building regulations, licensing and so on. IRIS is hampered by it’s own ‘red tape’.

In light of this, SCC believes there is merit in subsuming the role of IRIS within a new, revamped, Executive Unit, e.g. a **Business Burdens Unit** which would have a much wider remit and responsibility than that of IRIS, one which is there to monitor and check all the burdens on business, not just regulations, and which strengthens the business voice in the public policy making process.

3.11 The remit of the Business Burdens Unit should extend to all legislative and non-legislative proposals and measures which impact on
business and emanate not just from the Scottish Executive but should cover too the policies of public agencies such as SEPA, Care Commission etc. This wider, more holistic approach, would build on suggestions put forward for south of the border by the Better Regulation Task Force⁶, which calls for RIAs to be introduced for proposals such as national identity cards.

3.12 A new Business Burdens Unit would have more teeth and get greater political commitment if it were to be based within the Office of the First Minister, rather that being located within the Enterprise Department like IRIS. Strengthening the economy is the Executive’s no.1 priority and we believe the new Unit could underline this message by being led by a senior business person and crucially report to and have direct access to the First Minister. This would also avoid any ‘turf war’ between Ministers.

The Unit could both provide added and fresh impetus to the red tape debate in Scotland and broaden out the debate to consider the wider burdens on business thus reflecting the reality for business. Red tape is part but not all of the story.

This would help to ensure that consideration of the effect of burdens and regulation on business would be less likely to be an afterthought, as IRIS officials themselves admitted in evidence to the Committee in March 2004. It might also ensure that alternatives to regulation, e.g. self-regulation, codes of practice, are given a greater chance of being considered and implemented. Such a Unit ought to be tasked with establishing whether Executive departments and agencies can be incentivised to find alternatives to intervention wherever possible. Appointing someone from outwith the state sector to head up a Business Burdens Unit would help ensure the commitment and support of the wider business community. We would like to see the Unit becoming the genuine partnership between the Executive, Parliament and business that IRIS never became. The existing Small Business Consultative Group could become the Unit’s informal ‘board of directors’ directing and agreeing the work programme for the Unit. A parliamentary Committee would have the increased role outlined earlier. We believe this is an ambitious and new way to move the debate forward and crucially to deliver the real and tangible benefits which have proved illusive for IRIS.

Such a Unit ought to be able to insist on Business Impact Assessments on measures that will affect businesses, to improve the quality of advice to Ministers, better inform public debate and parliamentary scrutiny. The Executive and Westminster government have already accepted that the RIA process needs change and the RIA process has already expanded to include a ‘competition assessment’. However, we believe this evolution should be

⁶ BRTF Annual Report 2004
encouraged and sped up to more accurately reflect the business reality and a thorough Business Impact Assessment could achieve this.

3.13 IRIS, established five years ago, has a remit that extends to charities and the voluntary sector, but we understand in practise it solely concerns itself with business related regulations. We believe that a new Business Burdens Unit should have a wider focus than just business, as burdens, regulation and red-tape affect the voluntary and charitable sectors too. Including the voluntary and charitable sectors might well broaden the coalition and strength of message of those seeking a light of touch approach from government.

In short, IRIS was a good idea, right for it’s time, but we believe the debate has moved forward and it is time the structures reflected this.

4.0 Summary

4.1 The Scottish Chambers of Commerce is greatly encouraged by the commitment of the Scottish Parliament’s Subordinate Legislation Committee to benchmark Scotland’s regulatory framework against best practice elsewhere and seek improvements to the regulatory and legislative process. Legislators need to strike a balance between protection for consumers and impeding business if the Executive and the Parliament are to realise promises made on economic growth, wealth creation and greater employment opportunities.

4.2 We hope Ministers will find the results of this consultation useful too, and an opportunity to breathe new life into the deregulation agenda and fulfil its commitment to putting economic growth and business friendly policies at the top of its agenda.

4.3 The Scottish Chambers are willing to provide further assistance if the Subordinate Legislation Committee deem it helpful.

David Lonsdale
Policy Officer
Scottish Chambers of Commerce
July 2004
12 August 2004

Clerk to the Subordinate Legislation Committee
Room 5.16 Parliament Headquarters
The Scottish Parliament
EDINBURGH
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Dear Sir / Madam

Subordinate Legislation Committee's Inquiry into the Regulatory Framework in Scotland

Thank you for providing Scottish Enterprise (SE) with the opportunity to respond to this inquiry, by responding to the Committee’s consultation paper.

Our general observations are that SE’s experience of legislation since the advent of the Scottish Parliament has been principally of primary legislation rather than secondary legislation.

There is no doubt that the scrutiny built into the legislative process of the Scottish Parliament by the extensive use of the Committees and the existence of the Subordinate Legislation Committee has ensured that regulation is now more fully considered before coming into force.

SE has been invited to give evidence to Scottish Parliamentary Committees on legislative proposals in a way not previously available before the devolved administration.

On the Discussion Points posed in the Consultation, where we have relevant input, we respond as follows:

Regulatory Impact Assessment (RIA)

As long as the RIA itself is not overly complex, such a cost/benefit and impact analysis should be an essential part of any legislative proposal and should not be regarded as a “bureaucratic add-on”.

We are not convinced that making the requirement for a RIA statutory will render it more effective than a policy directive.
Public Consultation

The current arrangements for consultation by the Parliament and its Committee appear to work well.

Easily Understood

The need for plain language wherever possible is supported. This is something that the relevant Committee could include in its scrutiny.

Periodic Review

It would be an ideal arrangement if regulation of certain kinds, such as that affecting business, were reviewed after say, 5 years. Again we are not convinced that more statutory intervention is desirable to achieve this aim.

“Business” may be regarded as enterprises carrying out commercial activities for profit.

Accessibility

Although periodic consolidation may be desirable, it is often the case that further amending legislation is enacted soon after a consolidating Act.

For the general user, an indication on the face of published legislation of the existence of amending or subordinate legislation would be most useful.

Role of the Parliament

The suggested expanded remit of the Subordinate Legislation Committee appears a sensible development.

Yours faithfully

For and behalf of Scottish Enterprise
Brian Jamieson
Sectary
SUBORDINATE LEGISLATION COMMITTEE

5th Meeting, 2005 (Session 2)

Tuesday 8 February, 2005

Protection of Children and Prevention of Sexual Offences (Scotland) Bill at Stage 1 – Executive Response
PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) BILL

On 1 February 2005, the Committee asked the Executive to respond to the following view:

Section 1(5) Relevant sexual offences

The Committee noted that this provision concerns criminal offences and that it is a Henry VIII power, the use of which could affect the way in which the bill operates. The Committee therefore considered that this provision should be subject to affirmative rather than negative procedure and asks the Executive for its comments on this matter.

The Scottish Executive responds as follows:

Section 1(5) allows the Scottish Ministers to modify the schedule to the Bill and, in particular, to add a reference to an offence to Part 1 of the schedule, delete any such reference from the Part or alter any such reference in that Part.

The Executive notes that the Committee considers that the provision should be subject to affirmative rather than negative procedure and asks the Executive for its comments on this matter.

Part 1 of the schedule contains the list of sexual offences that fall within the definition of “relevant offence”. For the proposed new offence in section 1 of the Bill to be complete, it must be established that, in addition to earlier meetings or communication with a child, the adult met or travelled with the intention of meeting the child and committing a “relevant offence”.

The order making power is intended to ensure that the list of “relevant offences” remains up to date. For example, if new sexual offences are created or existing offences are amended or repealed, then the schedule could be amended by order to reflect these changes. The order making power could not be used to change the substance of the proposed new offence: the preparatory steps noted above would always need to be undertaken and the accused person would need to intend to commit a relevant offence. Accordingly, the Executive considers that the order making
power constitutes a relatively routine power to ensure that the list of offences in the schedule reflects a complete and current range of sexual offences against children and, as such, the negative procedure would seem to be appropriate.

Nevertheless, the Executive will take full account of the Committee’s views on this matter when considering laying amendments for Stage 2 of the Bill. The Executive’s intentions in this regard will be confirmed by Hugh Henry, Deputy Minister for Justice, in due course.

Hugh Dignon
For the Scottish Executive
SUBORDINATE LEGISLATION COMMITTEE

5th Meeting, 2005 (Session 2)

Tuesday 8 February, 2005

Charities and Trustee Investment (Scotland) Bill at Stage 1 – Executive Response
CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL AT STAGE 1

On the 1st February 2005 the Committee asked the Executive for an explanation of the following matters –

Section 6(1) Applications: further procedure

The Committee asks for clarification of the drafting of 6(2) (a) as it interrelates to 4(d) (i). Similarly the Committee would be grateful for clarification of 54(2) (d) (i).

The Scottish Executive responds as follows -

The Executive accepts that the words in brackets in section 6(2)(a) may require adjustment. The information and documents mentioned in section 4 and section 54(2) includes specific information and documentation for these two sections but also includes information and documents required in regulations under section 6 (1). We accept that there is circularity in the drafting of this section and will make an appropriate amendment at Stage 2.

Section 19(8) – Removal from the Register: Protection of Assets

The Committee was concerned that this power could be seen to allow Ministers by order to oust the jurisdiction of the court and that it would perhaps be better for this matter not to be left to subordinate legislation. The Committee therefore asks the Executive to comment as to whether it would be given consideration to drafting this section differently to address this concern.

The Scottish Executive responds as follows -

The general purpose of section 19 is to ensure that once a charity is removed from the register, its charitable assets will continue to be applied for charitable purposes. Subsections 4 and 5 allow application to the Court of Session by OSCR to approve a scheme for the transfer of the assets of a charity removed from the register where it is necessary to protect property and income or where the charitable purposes would be better achieved by transferring the property and income to another charity. It was considered on policy terms that this may not be appropriate in all cases. Certain circumstances could be envisaged where it would be inappropriate for OSCR to have such a power to apply to the court where a body holding property of national importance ceased to be a charity.

The effect of the Bill provisions as currently drafted prohibits a body subject to third party control from being a charity. This would have prevented all NDPBs from retaining their charitable status (including cultural NDPBs) unless Ministers’ powers of direction were removed. It has now been agreed, however, that certain cultural NDPBs which have national collections will retain their status as charities despite Ministers continuing to exercise powers of direction and amendments will be brought forward at Stage 2 of the Bill to that effect.

It is not yet known exactly what form the amendment will take. However, irrespective of the form of this amendment, there may be other cases where NDPBs or other bodies opt to have a non charitable status in future where some of their property,
especially buildings, is of national importance. Ministers may regard the transfer of that property to another charity as inappropriate for a variety of practical reasons including the provision of adequate maintenance. In addition, any mainstream charity could have one piece of property which is considered to be of national importance. Maintenance arrangements for that property may be best served by remaining with the body even if it stops being a charity. For the reasons outlined, we wish to retain this power as currently drafted as a provision allowing Scottish Ministers to make an order disapplying this section in certain circumstances.

Section 82(1) – Regulations about fundraising

The Committee reached the view that, in the light of comments in the memorandum on the subordinate powers in the bill, regulations under section 82(2)(h) and 82(3) may be of sufficient importance that consideration should be given to them being subject to affirmative procedure rather than negative procedure and asks the Executive for comment.

With regard to the power to create criminal offences in subsection (5), the Committee considered that sanctions for breaches of the regulations should appear as a substantive provision on the fact of the bill, rather than provided for in the regulations. The Committee therefore asks for comment from the Executive on this matter.

The Scottish Executive responds as follows –

We are considering whether this provision needs further amendment at stage two. The Executive intends to put in place regulations in a relation to all matters covered under section 85(2) (a) to (g). However, the Executive has stated that regulations in relation to the matters covered in section 82(2) (h) and section 82(3) would only be introduced where proposed self regulation on the part of the fundraising industry failed. We are considering whether these provisions should be separated out rather than being contained in one provision. We would wish regulations concerning the first provisions in (a) to (g) to be subject to negative procedure and on that basis will reconsider whether the offence should be in the bill itself. If the provisions in 2(h) and (3) are to be in separate regulations, we accept that they may be of significant importance to be subject to affirmative procedure particularly if the offence is to be imposed in regulations. We disagree, however, that the power specifically creates a criminal offence. The regulations may provide for an offence but that can only be as set out in section 82(5) namely the sanction of a fine not exceeding level 5 on the standard scale.

Section 85(5) (d) and 85(10) – Local Authority consents

The Committee wished to highlight, purely for information purposes, the fact that these matters could perhaps have been left to guidance or a circular rather than requiring subordinate legislation

The Scottish Executive responds as follows –

We agree that the first of these matters could be left to guidance or a circular but felt that there is merit in developing common standards for badges and certificates.
These may be most appropriately specified in subordinate regulation rather than in terms of guidance. The duty to consult the Chief Constable before determining applications for consent in terms of section 85(2) is, as is currently the case in the relevant regulations under the Civic Government (Scotland) Act 1982, expressed as an absolute duty. We will probably wish, in the future, to disapply this requirement for certain specific types of application or for certain types of body. The current provision in section 85 (10) will require to be adjusted slightly at Stage two to achieve that. Given the terms of section 85(2) we consider that this can only be achieved in subordinate legislation.

Section 97(2) – Transitional arrangements

The Committee noted that subsection (3) appeared to allow Ministers to disapply any provision of the Act to any body or charity without limit of time and asks for the Executive’s view on a cut-off date governing the use of this power.

The Scottish Executive responds as follows –

We note the Committee’s comments in relation to this provision. The new Charity regulator, OSCR, has to set up the register from scratch. In terms of subsection (1) OSCR will be entering on the register all existing charities but all of these will require to provide information and documents. OSCR will require to determine in each case whether each charity remains on the register. Similarly, there may be transitional provisions required to deal with for example a foreign charity that will not have made an application and will only be able to refer to itself in specific terms when carrying out any activity in Scotland. Existing charities going on to the register will require to provide OSCR with new documentation so that OSCR may assess whether they should continue to be charities. Transitional arrangements will need to cover particular cases such as the transition from designated religious bodies under the 1990 Act to designated religious charities and exempt promoters to designated national collectors. We believe that it will be impractical to insert a cut off date at this stage.

Section 104(2) – Short title and commencement

The Committee asks for the Executive’s view in relation to commencing section 103 on Royal Assent, given the reference in section 97 to terms defined in that section

The Scottish Executive responds as follows –

We note the Committee’s observations. The Executive have looked at this section again and have decided that there is no need for section 97 to be commenced on Royal Assent as section 101 allows commencement dates to contain transitional provisions. A Stage 2 amendment will be brought forward removing the reference to section 97 from section 104(2).

Date: 4th February 2005
Scottish Executive
MEMORANDUM ON DELEGATED POWERS

Background

1. Rule 9.4A of the Parliament’s Standing Orders requires that immediately after introducing an Executive Bill which contains any provision conferring power to make subordinate legislation, the member in charge shall lodge with the Clerk a memorandum setting out, in relation to each such provision of the Bill—

   (a) the person upon whom, or the body upon which, the power is conferred and the form in which the power is to be exercised;

   (b) why it is considered appropriate to delegate the power; and

   (c) the Parliamentary procedure (if any) to which the exercise of the power is to be subject, and why it was considered appropriate to make it subject to that procedure (or not to make it subject to any such procedure).

Relevance to the Budget (Scotland) (No.2) Bill

2. Section 7 of the Bill gives the Scottish Ministers the power by order made by statutory instrument to amend—

   (a) the amounts specified in section 3;

   (b) schedules 1 to 5.

No such order may be made unless a draft of it has been laid before, and approved by resolution of, the Scottish Parliament.

Reasons for use of subordinate legislation

3. The Budget Bill is the vehicle through which the Scottish Ministers seek Parliamentary approval of their spending plans for the coming financial year (in this case, 2005-06) – since all spending, both in terms of overall amounts and the purpose for which resources are to be used, must be subject to prior parliamentary authorisation.

4. It is inevitable that these spending plans will be subject to change during the financial year to which the Bill applies. Such changes might be, for example, to reflect:

   i) transfers of resources within the Executive, and with Whitehall;

   ii) changes in accounting and classification guidelines; or

   iii) the allocation of resources from central funds including the Contingency Fund and from End Year Flexibility allocations.
There is therefore a need for a mechanism to allow Scottish Ministers to seek authorisation for such changes. The use of affirmative statutory instruments for this purpose was originally introduced to implement the pre-devolution Financial Issues Advisory Group’s (FIAG’s) recommendations for the process (paragraph 3.40f of their Final Report), and is also covered in the Agreement on the Budget Process between the Parliament and the Executive.

5. Since devolution, the Budget Revision process through the use of secondary legislation has become a regular part of the annual budget process. All of the annual Budget Acts have been subject to at least one revision by secondary legislation, and Budget Acts 2003 and 2004 were both subject to three revisions – colloquially known respectively as the Summer, Autumn and Spring Budget Revisions. The Budget Act and subsequent revisions roughly mirror the UK Parliament’s process (since Scotland’s drawdown from the UK consolidated fund must also be approved by the UK Parliament) through Main and Supplementary Estimates.

Finance Co-ordination
Scottish Executive
SUPPLEMENTARY MEMORANDUM TO THE SUBORDINATE LEGISLATION COMMITTEE BY THE SCOTTISH EXECUTIVE

FIRE (SCOTLAND) BILL

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 Fire (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 newly delegated matters are to be left to subordinate legislation and why the stated parliamentary procedure applying to each power has been chosen as the most appropriate option in each case. This memorandum supplements the Executive’s previous memorandum to the Subordinate Legislation Committee, in connection with the Bill as introduced.

Delegated Powers following Stage 2

2. Consideration of the Bill at Stage 2 resulted in a number of amendments across the Bill. In particular amendments to sections 67, 72, 81 and new section 54A have the effect of altering or extending existing subordinate legislation powers contained in the existing sections of the Bill, whilst amendments to sections 53 and 54 removed powers, and amendments to 5, 55 and 56 have the effect of conferring new powers. The rationale for these changes is set out below.

Section 2(1): Schemes to constitute joint fire and rescue boards

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* order made by statutory instrument  
*Parliamentary procedure:* affirmative resolution procedure

3. The Parliamentary procedure applicable to section 2(1) has been altered. Section 2(1) of the Bill allows Scottish Ministers by order to combine fire and rescue authorities for the purposes of carrying out the functions of a fire and rescue authority.

4. In response to concerns raised during the Stage 1 evidence sessions, the Deputy Minister for Justice gave assurances that whilst the detail of the amalgamation scheme provisions was properly a matter for subordinate legislation, the power would be amended so that it would become subject to the affirmative resolution procedure of the Scottish Parliament, in order to ensure a greater level of parliamentary scrutiny. An amendment to subsection (4) of section 81 (Orders and regulations) was accordingly made at Stage 2.
Section 5(3): Power to transfer staff, property, rights or liabilities of a joint fire board

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution procedure

5. New subsection (3) has been added to section 5. As set out above, section 2 of the Bill allows for the combining of the areas of two or more fire and rescue authorities in an amalgamation scheme. This may be done by the Scottish Ministers by order, where such an order appears to them to be in the interests of greater efficiency, effectiveness and economy. Schedule 1 also relates to the powers of joint fire and rescue boards. Similar schemes already exist under section 147 of the Local Government (Scotland) Act 1973. Section 5 provides that these schemes will continue to have effect despite the repeal of the Fire Services Act 1947 and section 147 of the Local Government (Scotland) Act 1973 and that they will be deemed to be section 2(1) schemes under this Bill.

6. Section 5 was amended at Stage 2 to insert at subsection (3) a new transitional provision giving Ministers the power by order to transfer the property, rights, liabilities or staff of existing joint fire boards made under existing administration schemes to joint fire and rescue boards made under section 2(1) of the Bill. The power is an administrative one which will enable existing joint fire boards constituted by the schemes set out in section 5(1) to have a smooth transition when becoming joint fire and rescue boards under section 2(1). For this reason, it is thought appropriate to leave the matter to subordinate legislation.

7. New amalgamation schemes under section 2(1) are subject to consultation and to the affirmative resolution procedure. Consistent with this, the new power in section 5(3) is also to be exercised using the affirmative resolution procedure (per section 81(4)(za) as amended at Stage 2).

Section 53(2)(f): Power to specify intervals at which reviews must be carried out

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution procedure

8. Section 53(2)(f) was removed at Stage 2. Section 53(1) provides that the Scottish Ministers may make regulations in relation to the carrying out of fire safety risk assessments and reviews of those assessments under sections 49 (Duties of employers to employees) and 50 (Duties in relation to relevant premises). Subsections (2)(a) – (f) of section 53 had detailed matters that may in particular be addressed in those regulations.

9. Section 53(2)(f) had established that the power at section 53(1) in particular enabled Scottish Ministers to make provision specifying intervals at which reviews must be carried out. It is intended that these powers will be exercised to ensure that
assessments are undertaken regularly and it is unlikely in policy terms, at least in the short-term, that there will be a need to specify precise timescales.

10. On further reflection, the Executive has concluded that the general enabling power at 53(1) will be sufficient for both of these purposes. The power at 53(2)(f) has therefore been deleted on the basis that it is no longer deemed necessary.

Section 54(2)(l): Power to create criminal offences and specify rules as to the burden of proof in relation to such offences

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* negative resolution procedure

11. Section 54(2)(l) was removed from the Bill at Stage 2. Under section 54(1), the Scottish Ministers may make regulations about fire safety in premises covered by the Bill. The power is modelled on section 12 of the Fire Precautions Act 1971. Subsection (2)(l) provided that Scottish Ministers may make provisions in regulations creating criminal offences, and may also specify rules as to the burden of proof in relation to those offences.

12. This power was the subject of correspondence between the Scottish Executive and the Subordinate Legislation Committee. In particular, the Executive’s letters of 23 September and 30 September 2004 elaborated the policy behind the power.

13. It had been the Executive’s intention to include in fire safety regulations made under the power in section 54, provisions in relation to electrical luminous tube signs. The current provisions are contained in the Electrical Luminous Tube Signs (Scotland) Regulations 1990 S.I. 1990/683. These include an offence provision where there is failure to comply either with the requirements of the Regulations or with any notice issued under the Regulations.

14. Following discussion with colleagues in the Scottish Building Standards Agency who have responsibility for issuing Scottish Building Regulations it was agreed that their legislation was a much more appropriate vehicle for these provisions. As a result this offence-creation power, which was only included for the purpose of replicating the 1990 Regulations, is no longer required.

Section 54A: Power to make further provision for protection of fire-fighters

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* negative resolution procedure

15. The new section 54A, which was added at Stage 2, extends the power exercisable under section 54(1). Stage 2 amendments have been brought forward to section 72 and to the long title of the Bill which clarify and further define the “relevant premises” to which the Part 3 fire safety regime extends. These amendments were necessary because at introduction the regime extended to all shared or common
areas of domestic premises. This would have resulted in, for example, a shared driveway between two private homes being subject to the regime. This was not the intention. The amendments clarify that private dwellings and their common areas are excluded from the definition of “relevant premises”.

16. However, this exclusion results in a gap in relation to the ability to impose maintenance requirements on fire safety equipment or facilities which are located in the common areas of private dwellings and which are provided for the express purpose of ensuring the safety of firefighters. For example, many blocks of flats have facilities such as dry riser inlets or firefighters’ lifts which need to be properly maintained in order to protect fire-fighters when they are responding to operational incidents and fires.

17. The Bill has therefore been amended to enable the extension of this one aspect of the regulations made under Part 3 to the common areas of private dwellings. It is therefore intended that regulations under section 54 will make provision ensuring the proper maintenance of such equipment and facilities specifically required to ensure the safety of fire-fighters. This provision enables Scottish Ministers also to apply such a provision to common areas of private dwellings, where such equipment is often located. The power has been left to subordinate legislation because of its close link to the duty to be set out in subordinate legislation.

18. This safeguarding provision is the only provision under Part 3 which is currently intended to extend to common parts of ‘private dwellings’.

19. The amendment amounts to an extension of the existing subordinate legislation provisions at section 54(1). The powers are exercisable under the negative resolution procedure, which is the procedure applied to section 54 regulations.

Section 55: Special case: temporary suspension of Chapter 1 duties

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* negative resolution procedure

20. Section 55 has been amended to confer a power on Scottish Ministers to prescribe by regulations further categories of persons who may cause temporary suspension of fire duties. The purpose of section 55 is to ensure that fire safety duties imposed in Part 3 and in regulations made under Part 3 are not a barrier to the military and emergency services responding to operational incidents. Accordingly it provides that where the application of the Chapter 1 duties would prevent a listed person from carrying out their duties, the Chapter 1 duty in question would not apply for the requisite period.

21. This section was amended at Stage 2 to make it clearer that the emergency service personnel listed require to be undertaking “operational duties”, as defined, before the suspension would be triggered. The suspension provision should not apply when such personnel are not carrying out duties connected with their work.
On introduction, the personnel who could trigger such a suspension were listed as being a member of the armed forces of the Crown or a visiting force and a constable or any other member of a police force.

22. A Stage 2 amendment removed the reference to a “member of a police force” on the basis that the meaning of “member of a police force” has arguably become broader through its use in other legislation. We wished to ensure that it was clear that the provision in section 55(2)(b) applies only to police constables (and special constables) and does not apply to, for example, other employees of a police authority, such as police civilian drivers or control room operators etc. who would have no such aegis in these circumstances.

23. As terminology is subject to change it was also considered that a regulation-making power would be helpful to enable the persons covered by this section to be added to. It is also anticipated that this power will be used to extend the provision to, for example, the ambulance service. The power will be used to adjust the application of the provision, and the descriptions of those who should be affected and the administrative nature of this provision, in addition to the need for flexibility in its use, make it appropriate to be set out in subordinate legislation and subject to the negative procedure.

Section 56: Enforcing authorities

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* order made by statutory instrument  
*Parliamentary procedure:* affirmative resolution procedure

24. A new power has been added at section 56(7) of the Bill, enabling Scottish Ministers by regulations to modify section 56(6). Section 56(6) sets out those organisations that are enforcing authorities for the purposes of Part 3 of the Bill. There is a power in section 72(6) enabling the amendment of the types of premises to which Part 3 applies. It is possible that if this power is exercised, consequential changes would have to be made to section 56(6). It is also likely that, for other unforeseen reasons, the identities of enforcing authorities for relevant premises will require to be amended in the fullness of time.

25. It is considered appropriate to incorporate a clear and specific power for this purpose into the Bill, given that the power could significantly change the content of section 56(6). A consequential amendment has also been made to section 81 to ensure that the new regulation-making power is subject to the affirmative resolution procedure, in recognition that a greater degree of Parliamentary scrutiny would be appropriate for a power that, as set out above, could alter section 56(6) of the Bill. It also aligns the procedure applicable to section 56(7) with that applicable to the section 72(6) power.

Section 67: Offences

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* negative resolution procedure
26. A number of changes have been made to section 67 at Stage 2 that modify and extend delegated powers. Section 67 sets out offences and associated penalties in respect of the provisions contained in Part 3 of the Bill.

27. As originally drafted, subsection (10) reversed the burden of proof for the offence that could be committed in relation to the duty in section 49; section 67(1)(a)(i) provides that it is an offence for an employer to fail to carry out his or her duty to ensure, so far as is reasonably practicable, the safety of the employer’s employees. Other duties which should be carried out to the same “so far as is reasonably practicable” standard will be set out in regulations. There will also be duties in regulations that should be carried out to the “so far as is practicable” standard.

28. The Stage 2 amendment that has become section 67(11) enables regulations to reverse the burden of proof concerning the “so far as is reasonably practicable” standard in relation to specified offences. Consequently it will be for the accused to prove that it would not have been reasonably practicable for him or her to do more than was in fact done. Similarly, the Stage 2 amendment that has become section 67(12) enables regulations to reverse the burden of proof in relation to the “so far as is practicable” duty in specified offences. Regulations will therefore make clear that where a fire safety duty is placed on a person “so far as is practicable”, in proceedings for the connected offence the onus of showing that it was not practicable to do more than was done shall be on the accused.

29. A linked Stage 2 amendment has been made to section 67(9), and a new section 67(9A) has been inserted. Section 67(9) had provided that in every offence under section 67, other than that which could be committed by the employer under section 67(1)(a)(i), a due diligence defence was available. Therefore the only situation in which the defence was not available was where the employer bore the reverse burden of proof and had to show that it was not reasonably practicable for him or her to do more than was done. As it is the policy intention also to reverse the burden of proof where fire safety duties in regulations consist of a duty to do something “so far as is practicable” or “so far as is reasonably practicable”, the due diligence defence is also to be disapplied to these offences. It was accordingly necessary to insert an amendment enabling Scottish Ministers, by regulations, to disapply the due diligence defence to offences caused by breaches of duties set out in regulations.

30. The modification and extension of these powers are required to reflect the fact that the detailed duties, for example in relation to dangerous substances, are to be contained in fire safety regulations and the use of the negative procedure is considered appropriate for regulations under this section as their exercise will be closely linked to existing regulation-making provisions at section 54 which are subject to the negative procedure, and the exercise of the power will result, as with the exercise of the section 54 power, in provisions of a detailed and technical nature.
Section 69(b): Employee’s act or omission not to afford employer defence

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* negative resolution procedure

31. A new regulation-making power has been added at section 69(b). Section 69 makes provision for an employee’s acts or omissions not to be used by an employer as a defence in any proceedings under sections 67 or 68. A new power has been added at section 69(b) to enable Scottish Ministers, by regulations, to extend this provision to persons of a description specified in regulations. It is currently intended that regulations under section 54 will enable an employer to assign fire safety assistance duties to competent persons. Such competent persons would then assist the employer in meeting his or her fire safety duties under the Bill. Consequently, Scottish Ministers may wish to specify in regulations that the employer cannot put forward a defence to proceedings brought under sections 67 or 68 relying on the acts or omissions of such competent persons.

32. The use of the negative procedure is considered appropriate as the exercise of the power under section 69(b) would therefore be closely linked to the exercise of the power in section 54, to which the negative resolution procedure applies.

Sections 72(6) and 72(7): Meaning of “relevant premises”

*Power conferred on:* the Scottish Ministers  
*Power exercisable by:* regulations made by statutory instrument  
*Parliamentary procedure:* affirmative resolution procedure (for section 72(6)) & negative resolution procedure (for section 72(7))

33. Section 72(6), by virtue of an amendment to section 81(4)(b), has been made subject to affirmative resolution procedure. A new linked power has also been added at section 72(7) enabling the consequential modification of Part 3 when new premises are brought within its ambit by the section 72(6) power.

34. Section 72 sets out the premises which are subject to the fire safety regime in Part 3 of the Bill. Under subsection (6), the Scottish Ministers may make regulations to modify (by addition or deletion) the list of premises subject to the regime.

35. When the Bill was introduced the Subordinate Legislation Committee (SLC) queried the use of the negative resolution procedure in respect of the order making power at section 72(6) given that this power will be used to amend primary legislation. Following further consideration of the point, we wrote to the SLC agreeing that affirmative resolution procedure would be more appropriate, enabling closer Parliamentary scrutiny of any exercise of the power, and confirming that we would bring forward an amendment at Stage 2 to this effect.

36. Section 72 has been further amended by the addition of subsection (7) to provide a power by regulations by which Scottish Ministers can modify the application of Part 3 to premises which become “relevant premises”, in any way which the Scottish Ministers consider necessary or expedient. This grants the
Scottish Ministers a modification power, so that Part 3 can be applied, if required, in a modified form to different categories of relevant premises. It is thought that such a power could be necessary where a provision in Part 3 should apply in some respects, but not all. The power to modify Part 3 would therefore enable Scottish Ministers to clarify the applicable law, and avoid doubt and uncertainty, and possibly inappropriate consequences, where new types of premises are to be brought within the definition of “relevant premises”. At the time of instructing the amendment it was considered that the detailed nature of the provisions that would be prepared under section 72(7) meant that the negative resolution procedure was appropriate. However, the Executive has been considering further the type of procedure that should apply to the power in section 72(7), in recognition of the fact that its exercise could potentially significantly affect the application of Part 3 of the Bill.
Subordinate Legislation Committee

Tuesday, 8 February 2005

Inquiry into the Regulatory Framework in Scotland – Witness Expenses

Background

1. Under Rule 12.4.3 of the standing orders, the Committee may arrange for payment of expenses incurred by any witness invited to give evidence at a committee meeting. Reimbursement is entirely at the discretion of the Committee.

2. The witness expenses scheme was established by the Parliament on 6 July 2000 (motion S1M-1086) and sets out the categories of claim that may be considered.

Action

3. The Committee is invited to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any witness expenses which arise during this inquiry. However, in the event of the Convener rejecting a claim, it will be referred back to the Committee for consideration.

Ruth Cooper
Clerk to the Committee
3 February 2005