The Committee will meet at 10.30am in Committee Room 5.

1. **Delegated powers scrutiny:** The Committee will consider a response from the Executive on the delegated powers provisions in the following Bill — Smoking, Health and Social Care (Scotland) Bill at Stage 1.

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

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

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

5. **Instruments subject to annulment:** The Committee will consider the following—
   the Invergarry - Kyle of Lochalsh Trunk Road (A87) Extension (Skye Bridge Crossing) Toll Order (Revocation) Order 2005, (SSI 2005/167)
   the Advice and Assistance (Scotland) Amendment (No.2) Regulations 2005, (SSI 2005/171)
   the Building (Forms) (Scotland) Regulations 2005, (SSI 2005/172)
the TSE (Scotland) Amendment Regulations 2005, (SSI 2005/173)

the Mental Health (Fee Payable to Designated Medical Practitioners) (Scotland) Regulations 2005, (SSI 2005/175)


the National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment (No.2) Regulations 2005, (SSI 2005/179)

the Police Pensions Amendment (Scotland) Regulations 2005, (SSI 2005/200)

the Intensive Support and Monitoring (Scotland) Amendment Regulations 2005, (SSI 2005/201)


6. Instruments not subject to Parliamentary procedure: The Committee will consider the following—


the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.10) (Scotland) Order 2004 Revocation Order 2005, (SSI 2005/204)

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

- the Mental Health (Care and Treatment) (Scotland) Act 2003 (Commencement No.4) Order 2005, (SSI 2005/161)

- the Vulnerable Witnesses (Scotland) Act 2004 (Commencement) Order 2005, (SSI 2005/168)

- the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 (Commencement) Order 2005, (SSI 2005/174)


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

**Agenda Items 1-7**

Legal Brief (Private) – to follow SL/S2/05/11/1

**Agenda Item 1**

Bill response SL/S2/05/11/2

**Agenda Item 2**

Executive response SL/S2/05/11/3

**Agenda Items 3-7**

Copies of instruments (circulated to Members only)

The following papers in relation to the Committee’s inquiry are circulated for information:

Response from COSLA SL/S2/05/11/4
Response from Scottish Council for Voluntary Organisations SL/S2/05/11/5
Dear Ruth

RE: Smoking, Health and Social Care (Scotland) Bill at Stage 1

Thank you for your letter of 23 March to Catherine Hodgson on behalf of the Subordinate Legislation Committee, in which you requested clarification of a number of points arising from the Committee’s consideration of the Bill. I trust that the response in the attached Annex is helpful in resolving those issues.

Yours sincerely,

Roderick S. Duncan
Bill Team Leader
SMOKING, HEALTH AND SOCIAL CARE (SCOTLAND) BILL

Subordinate Legislation

Section 4(2) and 4(7): Meaning of “smoke” and “no-smoking premises”

1. I understand that there is still some question as to the detail of what might comprise the additional scrutiny procedure proposed as “super-affirmative”. The Minister for Parliamentary Business last year expressed continuing reservations on the issue, but undertook to review the position in light of any clarification of what the Committee envisaged a super-affirmative procedure would look like, the sort of circumstances and criteria that might justify its use and the sort of benefits that might be anticipated. Ministers would wish to examine the detail of the proposed additional scrutiny procedure to enable them to provide a fully informed response to any suggestion by the Committee that the procedure be invoked in relation to any specific regulations.

2. As regards the specific question of invoking such an additional scrutiny procedure in relation to the regulations to be made under section 4(2) and (7) of the Smoking, Health and Social Care (Scotland) Bill, Ministers appreciate that the definition of “no-smoking premises” under the regulations is an important element of the new no-smoking regime and on that basis are happy to accept that such a definition should be subject to some form of additional scrutiny. However, the draft regulations are currently out to wide public consultation for this very purpose and I am sure that the Health Committee, and indeed all MSPs, will take this opportunity to consider and comment on the detail of the way in which these sections of the Bill would operate.

Section 11: Charges for certain dental services

3. At the present time the level of dentists’ remuneration is linked to patient charges. Section 71 of the 1978 Act provides a regulation making power in respect of charges for general dental services (GDS). Section 71A makes provision on the calculation of charges for dental appliances and treatment.

4. In terms of certain constraints on existing powers it is assumed that the Committee is referring to section 71A (4) and (5). While the provisions as amended do not contain any express constraint that Ministers shall not provide for a charge which exceeds the amount which Scottish Ministers consider to be the cost to the health service of the dental service supplied or provided, Ministers shall, of course, not exercise the power in that way nor authorise any charges that appear to them to be inappropriate.

5. To date the negative resolution procedure has worked well for governance of dental charges and other NHS charges and in balancing the need for administrative flexibility with parliamentary scrutiny. Accordingly, the Executive does not consider that a sufficient case is made for making the powers, as amended, subject to affirmative resolution procedures in relation to the first or any particular exercise of them.

Section 18: Health Boards’ functions: provision and planning of pharmaceutical care services

6. Section 2CA(7) requires Ministers to publish directions under regulations provided by section 2CA(5) in a document to be known as the Drug Tariff. The Drug Tariff already exists and is provided for at regulation 9 of the NHS (Pharmaceutical Services) (Scotland) Regulations 1995. Amongst other things, the Tariff lists and details the drugs, medicines and appliances that can be ordered and dispensed as part of the provision of pharmaceutical care services. It is a lengthy (over 400 pages) and largely technical document that is published quarterly but, by necessity, subject to monthly review and amendment as and where appropriate. Against this background we continue to consider that the most appropriate way of dealing with the provision made at 2CA(6)(c), as qualified by 2CA(7), is by means of direction, which is in line with current practice with regard to the Drug Tariff. In addition this level of scrutiny is consistent with the existing level of scrutiny for the Drugs Tariff.
7. In new section 2CB(2) lists what are currently considered to be the most important criteria that should be listed in regulations and thereby subject to scrutiny by the Parliament. The intention is, where necessary, to add detail to those main criteria. It is important that in working to the stated criteria, that Health Boards work to a common database in assessing and determining the relative pharmaceutical care service needs. The intention is that the direction will be used to provide, or point to, the data on which the plan must be developed. For example, they should all work to the same set of population statistics and the same categories and descriptors of epidemiology of disease or service, and they should all report using the same units of measure, e.g. the number of prescriptions for condition [X] dispensed per [10,000] of the population. As is evident, this data is of a technical nature. Additionally, the sources and measure of the data will be subject to review and change in light of practical experience. On this basis we continue to consider that this level of detail, required to support the main plan criteria stated in regulations, renders it appropriate to directions.

Section 24: Payments to certain persons infected with hepatitis C as a result of NHS treatment

8. Following the advice of the Expert Committee led by Lord Ross, it was agreed by the four UK administrations in 2003 that a single UK wide scheme would be established to provide ex-gratia payments to qualifying persons who had been infected with Hepatitis C through contaminated blood products. Cabinet approved the allocation of £15 million as Scotland’s contribution to the fund, taking account of other pressures on the NHS budget. The Skipton Fund Limited was established by the Department of Health (England) as a limited company to administer the scheme on a UK wide basis on behalf of the four administrations.

9. In order to promote the efficient operation of the scheme, it was agreed that DH England would assume responsibility for the administration and funding of the scheme on behalf of all the administrations.

10. Section 24(1) of the Smoking, Health and Social Care (Scotland) Bill provides specific statutory cover for the making of payments under the scheme. Subsection (2) of that section also prescribes certain matters which must be included in any scheme, such as the procedure to be followed in making a claim under the scheme and how claims are to be determined. Scottish Ministers remain accountable to the Scottish Parliament for all payments made to the Skipton Fund, and this is reflected in section 24(4) of the Bill. The use of funds by the Skipton Fund will additionally be subject to scrutiny by the Scottish Executive via the usual auditing and accounting controls. Nevertheless, the scheme remains a non-statutory, ex gratia arrangement entered into jointly by the four administrations.

11. In light of all of the above, it is felt that an appropriate level of scrutiny is assured.

Section 28: Registration of child care agencies and housing support services

12. Section 28 of the Bill is concerned with persons providing certain child care agencies and housing support services (as defined under the Regulation of Care (Scotland) Act 2001) on 1 April 2003 who were deemed to have their service registered with the Care Commission until 30 September 2003. Where a provider did not make an application to the Care Commission for registration before 1 October 2003 or did not have their application granted by 1 April 2004 their deemed registration lapsed and continuation of the service was unlawful. The effect of section 28 is that where such a person applied for registration by 30 September 2004, they are to be treated as if their deemed registration had not lapsed and, subject to the earlier occurrence of certain events, they are deemed to be registered until 1 April 2006. Section 28 of the Bill also provides that, where, before 1 April 2006, the application for registration is granted or refused, registration is cancelled, or if the provider ceases providing the service, the deemed registration ceases on the date that happens.

13. It is not anticipated that it should be necessary to extend the deemed registration period beyond 1 April, 2006, however the use of the provision in section 28(4)(e) of the Bill is thought necessary to ensure that, if for any reason, the Care Commission is unable to process all relevant applications before 1 April, 2006, the Scottish Ministers can extend the date without the need for further primary legislation. It is considered that the use of negative procedure is appropriate for two reasons. Firstly, the scope of the power is extremely limited and, secondly, taking into account the Parliamentary time required for affirmative procedure, it affords the Scottish Ministers more time to extend the period were unforeseen difficulties in processing by the Care Commission to arise at the last minute.
SUBORDINATE LEGISLATION COMMITTEE

11th Meeting, 2005 (Session 2)

Tuesday 12 April, 2005

Executive Response

The Additional Support Needs Tribunals for Scotland (Appointment of President, Conveners and Members and Disqualification) Regulations 2005 (SSI 2005/155)

On 22 March the Committee asked the Executive for an explanation of the following matters.

1. It appears to the Committee that regulation 5 contradicts regulations 2 and 3 by forbidding persons holding the qualifications specified in those regulations from being Tribunal members. The Committee asks the Executive to explain the drafting of this regulation given that in terms of schedule 1 to the parent Act the convener is and the President may be a member of a Tribunal.

2. The Committee asks the Executive why section 34(2)(b) which appears to the Committee to be relevant to this regulation has not been cited as an enabling power.

The Scottish Executive responds as follows:

First question

1. In drafting the provision in regulation 5 the Executive had regard to the definitions of “panel” and “Tribunal member” in paragraph 1 of Schedule 1 to the Education (Additional Support for Learning) (Scotland) Act 2004. The Executive also had regard to the provision of paragraph 4 of schedule 1 on the constitution of Tribunals which in sub-paragraph (2)(b) refers to two other members selected by the President from the panel referred to in paragraph 3(1)(b) of Schedule 1.

2. On that basis and under the power in section 34(2)(b), helpfully referred to in the Committee’s letter in its second question, along with the power in paragraph 3(2)(c) of schedule 1, regulation 5 prescribed a description of persons disqualified from appointment to the panel of members other than the convener for the purposes of paragraph 3(1)(b). The Executive do not consider that provision to contradict the provisions of regulations 2 and 3 which prescribe the qualifications, training and experience for appointment as President or to the panel of conveners.

3. The intention is to promote a diversity of qualifications, training and experience among those appointed to the Tribunals.

Second question

The Executive thanks the Committee for drawing our attention to the power in section 34(2)(b) of the 2004 Act. On reviewing the instrument in the light of the Committee’s consideration the Executive agree that it would have been appropriate to cite the specific power. The Executive however consider that the instrument is within vires because of the general enabling provision in the preamble.
EVIDENCE TO THE SUBORDINATE LEGISLATION COMMITTEE ON ITS INQUIRY INTO THE REGULATORY FRAMEWORK IN SCOTLAND

COSLA welcomes the Committee’s invitation to submit evidence to its inquiry into the regulatory framework in Scotland. The Committee will be aware of local government’s position as a sector which is both heavily regulated and also empowered to undertake substantial regulation itself.

In providing our evidence we have focussed on those half dozen discussion points from the Committee’s consultation paper which bear most closely on the position of local government.

**Discussion Point 2. Whether a Regulatory Impact Assessment should be prepared in all cases where regulation is proposed.**

Cabinet Office guidance only requires an RIA to be made if the proposal is thought to have an impact upon businesses, charities or the voluntary sector. However, the Committee notes that, as RIAs can be an effective tool for improving policy decisions about regulation, there may be a case for requiring them to be produced in all cases, unless their omission can be justified.

COSLA believes that an RIA should normally be prepared by the Scottish Executive where regulation is proposed, as a means of improving policy decisions. We believe that an RIA should assess the likely impacts not only on those bodies proposed to be regulated, but also on those bodies proposed to be undertaking the regulation. Councils are major stakeholders in both categories.

Councils are regulated in a wide range of activities, such as education, housing, waste management and social work. COSLA therefore believes that local government should have the opportunity to confirm, or otherwise, that any proposed regulation is necessary, proportionate and likely to be effective.

Councils are also empowered to undertake regulation in a wide range of areas, including land use planning, environmental health, licensing, consumer protection and building control. COSLA therefore believes that local government should have the opportunity to confirm, or otherwise, that Councils will have the necessary powers, funds, information, staff and skills to undertake any proposed regulation. We would, in particular, wish to be able to confirm, or otherwise, that Councils would be likely to be supported in their enforcement of relevant regulation by the police and/or procurators fiscal.

**Discussion Point 9. Whether there should be a requirement to consult persons affected by a proposal for regulation.**
COSLA believes that there should be a statutory requirement on the Scottish Executive to consult persons affected by a proposal for regulation, whether as regulators or regulatees, and that such consultations should follow the Cabinet Code of Practice on Consultation. A key purpose of an RIA should be to assess how a proposed regulation will have an impact upon affected bodies. It is difficult to see how an RIA could properly do this without consultation with those bodies.

**Discussion Point 10.** Whether the public and interested parties should get access to the comments made by those consulted.

COSLA believes that, in accordance with the principles of accountability and transparency promoted by the Better Regulation Task Force, the public and interested parties should normally get access to the comments made by those consulted.

**Discussion Point 19.** Whether the Enforcement Concordat is working effectively.

COSLA has been advised by LACORS and the local government officer societies for trading standards and environmental health services that the Enforcement Concordat has been uniformly adopted and applied by all Councils. The majority of Councils have established internal cross service officer groups to assess how the Concordat can be applied by other services and this work is ongoing. All the evidence suggests that the Concordat is working effectively.

**Discussion Point 20.** How the Scottish Executive should measure compliance and determine whether it is equitably enforced within all parts of Scotland.

COSLA believes that the measurement of equitable compliance should take account of differing local circumstances in different parts of Scotland. Standardised compliance could have unintended inequitable impacts in some areas and circumstances. This is an issue which should therefore be addressed in consultation by the Scottish Executive with those bodies affected by a proposed regulation, both as regulators and as regulatees.

**Discussion Point 21.** Whether to enable users to complain about unequal or unfair enforcement.

COSLA believes that, in the spirit of all the principles promoted by the Better Regulation Task Force, there should be procedures which enable users to complain about unequal or unfair enforcement. The machinery for such complaints, insofar as they relate to regulation by Councils, should be the existing processes, including the Scottish Public Services Ombudsman where appropriate.

Bob Christie
Corporate Adviser
COSLA
16 August 2004
Submission to the Subordinate Legislation Committee of the Scottish Parliament’s Inquiry into the Regulatory Framework in Scotland

Scottish Council for Voluntary Organisations

Introduction
SCVO is the umbrella body for the voluntary sector in Scotland. Our 1200 members represent a vast constituency covering the majority of charitable activity in Scotland. A number of these members are themselves intermediary bodies representing the interests of the sector locally and with respect to specific types of work and through them we maintain a further contact with the sector at large and the issues that affect it.

The elected SCVO Policy Committee represents large and small, local, national and international organisations, covering many different fields of activity. The Committee too informs our policy positions.

There are issues to do with subordinate legislation that are of concern to the sector. We welcome this opportunity to input to the Committee’s inquiry and thank them for it.

The Voluntary Sector Compact
One of the major problems with subordinate legislation is that it is not tied in to the Compact in the same way as consultation documents and official consultations on detailed legislative proposals. This leads to the tabling of a very wide raft of material in the Parliament on a Thursday afternoon, which is usually only tabled on the day and consequently does not benefit from the level of scrutiny that we believe would be most beneficial. It is very often the case that material that is of considerable importance and/or interest to the sector is only seen after it has been brought into effect and we have lost the opportunity to adequately address any difficulties it may present. Good examples of this in recent times have included the Protection of Children Scotland Act (POCSA) Commencement Order, the approval of the (yearly) Water Charges Order, decisions on levels of Rate Support Grant and some of the secondary legislation supporting the operations of the Care Commission.
Press Notices
SCVO are concerned that the Executive has not ensured that the sector’s representative bodies receive all the relevant supporting Press Notices to go with the publication of the secondary and subordinate legislation. This is a problem because the press notice usually contains some kind of supporting context or statement from Ministers that allows the sector (and others) to make more sense of the Commencement Order (or other form of Parliamentary instrument).

Sewel Motions
One particular area of concern is the lack of information on the progress of matters originally the subject of a Sewell motion. It is not standard practice for the Holyrood authorities to publicise the subsequent passage of legislation at Westminster, nor to ensure publication of the secondary material implemented by the UK Parliament if it is concomitant on that for Holyrood. This is regrettable. There could be arrangements made for reciprocity between the Clerks to the Parliaments to ensure that the timescales and all other related Statutory Instruments etc are simultaneously published to allow the tracking of the implementation of all matters dealt with under a Sewell procedure. Examples of this issue in practice have included some of the access code legislation (as part of the Land Reform process) and some aspects of nature conservation practice and derogations from planning law for government departments when these relate to semi-reserved matters, e.g. certain types of licensing for nuclear and other hazardous facilities, for MoD activities and the licensing and regulation of communications masts.

Proofing the Impact of Subordinate Legislation on the Voluntary Sector
Whilst the Executive can be congratulated on some of the work they have done with Committees to allow careful scrutiny of the consequences of legislation, there is as yet no specific "proofing" of the consequences of legislation for the Scottish voluntary sector. This is unfortunate, as such testing of legislation for its potential impact on the sector would have afforded some protection against some of the more recent problematic consequences of legislation.

SCVO is particularly concerned that there has been serious financial and practical consequences resulting from the progressive increase in the level of regulation and compliance burdens placed upon the sector. The sector readily recognises that much of this regulation is intended to create uniformity of standards and to meet the increasing levels of both public and specific client group expectations. However, the specific problems which have always disadvantaged the sector are not being simultaneously addressed in order to balance out the increased regulation and create a completely level playing field. The circumstances surrounding the implementation of the Protection of Children Scotland Act (POCSA) provide a similarly good example with respect to this issue as they do with respect to the Compact (as noted above).
Clarity
‘Understandability’ and ease of comprehension is a very real issue in the quality of subordinate legislation, supporting and associated Guidance and supplementary material. There is a real and pressing need for subordinate legislation to be presented in more straightforward terms. This might best be achieved by presenting subordinate legislation and/or its related Guidance in the form of a series of questions; where the clients and providers of the services referred to in the legislation have a supportive hand in the framing of the questions. While this may add to the time taken to prepare secondary legislation, it will ensure much improved transparency, greater consistency in the early stages of legislative change, a wider constituency of ownership and a willingness to re-visit the material if clear problems begin to emerge.

Accessibility
The voluntary sector works with a significant number of marginalised groups who are excluded from an understanding of the legislative process, either because of lack of ready access or of a lack of understanding caused, for example, by equalities considerations. This level of exclusion is illustrated by the delays there have been in making available in community languages at the right time key parts of the Care Commission’s material. Similar problems existed in respect of Westminster delays in producing material relating to the Disability Discrimination Act. The sector appreciates that there is recognition by those concerned that the timely production of materials in accessible formats and in accessible locations is important but delays in practice often prove difficult and hinder accessibility.

The level of scrutiny of primary legislation is asymmetric when contrasted with the lack of ability to make changes to subordinate material. Making the latter subject to the 12 weeks rule in the Compact would help, but so would the publication of a proper weekly summary of all the tabled subordinate material and the Acts to which it relates, as well as the specific impact of each of the elements of legislation. It is likely that many MSPs and the Clerks themselves would benefit from this material, particularly for cross-cutting Bills. A very good example of where that would have been useful was with reference to the large amount of supporting material put in place by the Local Government in Scotland Act 2003.

Recognition of the Unique Circumstance of the Voluntary Sector
The voluntary sector is still not seen as a distinctive identity that may sustain unique impacts from the legislative process. For example, on water charges, the sector is treated as part of the non-domestic sector, but it does not have the same attributes as those of businesses. It is distinct from both the non-domestic and business sectors. It would be very useful to have more specific codification of how the sector might be influenced by such ‘mis-hits’.
Voluntary Effort
A defining feature of the voluntary sector is voluntary effort. Organisations are controlled by volunteer management committees (boards of directors, trustees etc) and a huge range of services and essential community activity is delivered by volunteers, rather than paid staff. The issues outlined above weigh even more heavily on those who give up their time freely for the benefit of others as opposed to paid staff who may be able to at least set some of their work time aside to tackle them. Volunteers and voluntary organisations accept the good intentions behind much regulation but that does not mean they always have the time or capacity to address new requirements as fully as they would wish. This can lead to the curtailment of voluntary activity, which nobody wants to see happen, least of all the Executive if judged by the positive intentions set out in the Volunteering Strategy. For this reason in particular we believe it is especially important to address the concerns that we have outlined.

Jim Lugton
Policy Officer
SCVO