SUBORDINATE LEGISLATION COMMITTEE

AGENDA

12th Meeting, 2005 (Session 2)

Tuesday 19th April, 2005

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

1. Inquiry into the regulatory framework in Scotland: The Committee will take evidence from—

   Margaret Curran MSP, Minister for Parliamentary Business.

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

   Further and Higher Education (Scotland) Bill as amended at Stage 2.

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

   Gaelic Language (Scotland) Bill as amended at Stage 2.

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

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

   the Advice and Assistance (Scotland) Amendment (No.2) Regulations 2005, (SSI 2005/171)

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

   the Intensive Support and Monitoring (Scotland) Amendment Regulations 2005, (SSI 2005/201).
5. **Draft instruments subject to approval**: The Committee will consider the following—

   the Fire (Scotland) Act 2005 (Relevant Premises) Regulations 2005, *(SSI 2005/draft)*.

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

   the Miscellaneous Food Additives Amendment (Scotland) Regulations 2005, *(SSI 2005/214)*

   the Smoke Flavourings (Scotland) Regulations 2005, *(SSI 2005/215)*

   the Plant Health (Import Inspection Fees) (Scotland) Regulations 2005, *(SSI 2005/216)*.

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

   the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.5) (Scotland) Order 2004 Revocation Order 2005, *(SSI 2005/212)*

   the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.3) (Scotland) Order 2004 Revocation Order 2005, *(SSI 2005/213)*

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

   Act of Adjournal (Criminal Procedure Rules Amendment No.2) (Miscellaneous) 2005, *(SSI 2005/160)*

   Act of Adjournal (Criminal Procedure Rules Amendment No.3) (Vulnerable Witnesses (Scotland) Act 2004) 2005, *(SSI 2005/188)*

   Act of Sederunt (Ordinary Cause Rules) Amendment (Gender Recognition Act 2004) 2005, *(SSI 2005/189)*

   Act of Sederunt (Child Care and Maintenance Rules) Amendment (Vulnerable Witnesses (Scotland) Act 2004) 2005, *(SSI 2005/190)*

   Act of Sederunt (Rules of the Court of Session Amendment No.5) (Miscellaneous) 2005, *(SSI 2005/193)*

   Act of Sederunt (Rules of the Court of Session Amendment No.6) (Asylum and Immigration (Treatment of Claimants, etc.) Act 2004) 2005, *(SSI 2005/198)*

   Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules Amendment) (Caution and Insurance) 2005, *(SSI 2005/199)*.

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

**Agenda Item 1**

Briefing Paper (Private)  SL/S2/05/12/1
Scottish Executive response  SL/S2/05/12/2
IRIS Annual Report 2003 - 2004  No number given
– circulated for Members’ information only

**Agenda Items 2-8**

Legal Brief (Private) – to follow  SL/S2/05/12/3

**Agenda Item 2**

Delegated powers memorandum  SL/S2/05/12/4

**Agenda Item 4**

Executive responses  SL/S2/05/12/5

**Agenda Items 5 - 8**

Copies of instruments (circulated to Members only)

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

Response from Audit Scotland  SL/S2/05/12/6
Dear Sylvia,

I was pleased to see that, as part of its important inquiry into the regulatory framework in Scotland, the Subordinate Legislation Committee had produced an informed and thoughtful consultation paper, inviting submissions from interested parties. This open and inclusive approach is very welcome, given the impact that regulation has on all sections of society. I hope that a good range of organisations and individuals have taken advantage of the opportunity that you have provided to furnish the Committee with their perspectives on the key issues.

For the Executive’s part, we share the Committee’s interest in the transparency, accessibility, general quality and good management of regulations and secondary legislation. We will certainly continue to co-operate fully with the inquiry as it progresses. Indeed, you will recall that we have already contributed to the Committee’s deliberations, for example, through the oral evidence that officials gave in March. We look forward to engaging further on the detail of the issues, once the Committee has had a chance to reflect on the responses that it has received to its consultation paper.

Meantime, while not wishing to prejudge the areas on which the Committee may wish to focus in light of those responses, I thought that you might find it helpful if I set out in broad terms the Executive’s thinking on the main themes raised in your consultation paper. To that end, I enclose a short note for the Committee’s attention. I hope that the Committee will find this useful. As I said, we look forward to engaging with you and your colleagues in more detail over the coming months.

Best Wishes,

MARGARET CURRAN
SUBORDINATE LEGISLATION COMMITTEE
INQUIRY INTO THE REGULATORY FRAMEWORK IN SCOTLAND

SCOTTISH EXECUTIVE NOTE

Introduction

The regulation of activity – whether achieved by primary or secondary legislation, or by guidance or other means, and regardless of the level of government from which it emanates – implies a constraint on the freedom of those who engage in that activity. It also implies financial and other costs arising from the work on development, communication, compliance and enforcement that is inevitably associated with regulation.

With those considerations in mind, the overarching philosophy of the Executive is that regulation should be imposed only when, on balance, the inherent constraints and costs are assessed to be more than offset by the anticipated benefits. Moreover, the Executive recognise that such assessments are likely to be optimised if they are informed appropriately by the views of those whom the regulation would affect.

Regulatory Impact Assessment (RIA)

Like the OECD, the Executive see an RIA as a key tool for encouraging and assisting policymakers to think through the consequences of proposals, for improving the quality of advice to Ministers and for facilitating informed public debate. Because they can help ultimately to improve the way in which policy and legislation are planned, developed and delivered, the Executive actively promote the appropriate use of RIAs. Executive policy is that departments and agencies which exercise statutory powers and make rules with a general effect on others should in appropriate instances produce an RIA.

The view is taken that, in order to derive the greatest benefit, in practice such effort should be focused on instances where the judgement is that it is most likely that there could be a substantive impact on the subjects. In this vein, the Executive’s procedural guidance on the preparation of subordinate legislation states:

"A Regulatory Impact Assessment (RIA) must be completed for every SSI which is expected to have an impact upon Scottish businesses with the aim of ensuring policy is developed with a full consideration of this impact. The RIA should be started at the earliest opportunity and, as a public document, must be available to the public and business for comment."

It also makes clear that:

"The IRIS Unit should be contacted as early as possible whenever proposed legislation has any impact on businesses, charities or voluntary bodies. All regulators should use good practice routinely as part of the policy process - to consider whether regulation is necessary; to consult all those affected and to secure implementation and compliance. Where there is expected to be no significant impact and no RIA completed the IRIS Unit must be contacted with the justification for this decision."

and that:

"The Executive Note [which accompanies subordinate legislation that is laid before the Parliament] should indicate if a RIA has been completed and, if it has, a copy of it should accompany that Note."
Similar direction is incorporated within the Executive’s procedural guidance on the preparation of primary legislation.

The importance attached to RIAs is signified by the requirement for final versions to be signed by the accountable Minister and copies placed in the Scottish Parliament Information Centre at the time that the associated legislation is presented to Parliament. Copies are also sent to the lead committee, Parliamentary legal advisors and the Executive’s Improving Regulation in Scotland (IRIS) Unit, who then publish it on the Executive’s website.

Public Consultation

As is often the case, a practical balance requires to be struck between various objectives that, while important, are not always readily compatible. Thus, the undoubted merits of comprehensive and unhurried consultation have to be weighed against the burdens and resource implications of such consultation (for consulters and consultees) and against any consequent delay in the enactment of legislation that aims to benefit the people of Scotland.

That said, considerable importance is attached to involving customers and stakeholders appropriately in the process of making policy and legislation. The Executive’s overall approach to consultation is detailed in the document *Good Practice Guidance on Consultation*, which reflects an underpinning of key principles such as consistency, openness and transparency. This document is referenced in the Executive’s procedural guidance on the preparation of both primary and subordinate legislation, which also highlight the relevance of the *Scottish Compact* (the Executive’s agreement to working in partnership with the voluntary sector) and specifically its emphasis on the need for consultation exercises to take account of the difficulty that organisations may encounter in meeting timescales that allow less than 3 months to respond.

As well as timescales, the quantity of consultation can also impact on an organisation’s ability to engage and the Executive are aware of the concerns about ‘consultation fatigue’ that are mentioned by the Committee. Those concerns are taken seriously, but the Executive’s response is not to draw back but, rather, to seek to improve the process of consultation, to promote ongoing engagement as well as specific consultation exercises, and – as with RIA effort – to focus consultation effort on instances where the judgement is that it is likely to yield the greatest benefit.

Easily understood

The importance of regulation being easily understood is fully appreciated by the Executive and, indeed, the Partnership Agreement contains a commitment to ask the Scottish Law Commission to investigate methods by which legislation can be published in plain English. This is now being progressed with the Commission, with due regard being given not only to the requirement for clarity but also to the requirement for legislation to be effective and robust, with provisions being expressed in a context that is consistent with existing legislation and which will be understood by the Courts. The Courts are the ultimate arbiters of legislative meaning, of course, but the Executive will often produce explanatory material or guidance to assist readers by explaining the effect of the legislation in more everyday language.

Enforcement

The enforcement of regulation is crucial in ensuring its effectiveness. The Enforcement Concordat, formally signed in March 1998, goes some way to achieving the best regulatory environment by encouraging openness, helpfulness, proportionality and consistency from regulators.
While there is some variation in application, all Scottish local authorities have adopted the Concordat and each authority has nominated a lead officer to be responsible for its local promotion and monitoring. In order to encourage best practice and allow a national forum for discussion of issues surrounding the Concordat, periodic meetings [are/were] held which bring together these lead officers with business organisations, regulators and others to ensure that everyone has an opportunity to participate in the debate.

**Periodic review**

The Executive accept that it is in nobody’s interest for outdated or otherwise inappropriate regulation to remain in force. At the same time, if it is to be justifiable then the value of any activity to refresh the regulatory environment should outweigh the potentially significant resource implications of so doing. Consequently, the Executive believe that such activity should be undertaken only as and when particular circumstances suggest that it is appropriate.

While the Executive are not persuaded of the case for blanket use of sunsetting or review clauses, the view is taken that such clauses may more often be justified for the type of regulation identified in the Mandelkern Report. The Executive will reflect on this in light of the Committee’s deliberations. Already, however, Executive’s policy is that there should be a “Review RIA” or “Regulatory MOT” within 10 years for all post-devolution regulations which impact significantly on business, to ensure that the impact continues to be justified.

**Accessibility**

The Committee places great emphasis on consolidation and the Executive appreciate its merits, not least in making the law more accessible. There may be some doubt, however, as to whether a single, comprehensive programme of consolidation of primary legislation is necessary, desirable or feasible within reasonable timescales. As is recognised by the Committee, the Scottish Law Commission has a pivotal role in relation to the consolidation of primary legislation and its views will need to be taken into account in determining how this work could most appropriately be taken forward. As regards secondary legislation, the Executive recognise that consolidation can be of considerable value when an instrument has been substantively amended on several occasions. While a reasonable working assumption might be, as the Committee suggests, that consolidation could be considered when an SSI has been amended 5 times, the value of consolidation is likely to depend on the extent as well as the number of amendments. The Committee and Executive have already established a joint working group at official level to address this issue, the deliberations of which will be helpful in determining the most appropriate approach for the future.

Alternative arrangements for consolidation activity are by no means necessarily ruled out by the Executive, but any decisions will need to take informed account of the complexity of the work that is involved, the skills that are required and the associated demands that are placed on a range of organisations.

**Reform and Simplification**

The benefits of modernisation and simplification are considerations taken into account by the Scottish Law Commission in undertaking its duty to keep the law under review and promote its systematic development and reform. The Executive are committed to supporting the Commission in the pursuit of those considerations, as in the Executive’s own activity. As with consolidation, for both primary and secondary legislation it appears to the Executive that, on balance, there may well be merit in continuing to take forward such work on a pragmatic basis, as and when priorities arise,
rather than through a single programme of wholesale reform which may not be necessary, desirable or feasible within reasonable timescales.

While it may on occasion be expedient to amend primary legislation through secondary legislation under general powers, as permitted elsewhere in the UK by the Regulatory Reform Act 2001 for example, the Executive are aware that the practice can be controversial. All else being equal, the preference of the Executive would normally be to make such amendments through primary legislation or dedicated secondary legislation. Though the possibility of replicating the 2001 Act's general order-making powers for Scottish Ministers has not been rejected permanently, the Executive are not aware that it has been demonstrated that there is a compelling and immediate requirement for such provisions to be prioritised above other Bills within the legislative programme.

**Role of IRIS**

The Improving Regulation in Scotland (IRIS) Unit is located within the Enterprise, Transport and Lifelong Learning Department, with a remit that includes the oversight of work by the Executive, its Agencies and Associated Departments on the Better Regulation agenda. However, while it has lead responsibility for providing advice and guidance on regulatory reform, IRIS is not the only part of the Executive that deals with these matters. Constitutional and Parliamentary Secretariat and the Office of the Solicitor to the Scottish Executive, both within Legal and Parliamentary Services Department, have a particular role in supporting this endeavour in respect of legislation. The Development Department’s Voluntary Issues Unit also has a role, through mainstreaming *Scottish Compact* principles across the Executive, in helping to improve the ability of the voluntary sector to engage effectively with the Executive’s policy and legislative agenda. Moreover, all officials are explicitly required to ensure that, where relevant, policy advice to Ministers includes an explanation or outline of the impact on business, charities and voluntary organisations of any proposals involving new or amended regulations.

Departmental structures and their effectiveness are kept under general review. In line with a commitment given by the Deputy First Minister, systems have been put in place to allow IRIS to produce annual reports covering the Executive’s progress in improving the regulatory environment and these reports will help to inform assessments of options for the future.

**Role of the Parliament**

Within the bounds of the devolution settlement’s legislative framework, it is for the Parliament to determine the roles to be played by it and its committees. For its part, the Executive will generally support any appropriate proposals to enhance the effectiveness of arrangements for Parliamentary scrutiny and accountability. As regards the particular role of the SLC, therefore, while it is not clear that its current remit has unduly restricted its ability to address relevant issues, in principle there can be no objection to giving consideration to whether there might be scope for improvement. In any such consideration a key concern, in the Executive’s view, would be that the essential nature of the SLC’s current work should be recognised and should remain as its primary focus.

Scottish Executive
November 2004
SUBORDINATE LEGISLATION COMMITTEE  
12th Meeting, 2005 (Session 2)  
Tuesday 19th April, 2005  
SUPPLEMENTARY MEMORANDUM BY THE SCOTTISH EXECUTIVE  
FURTHER AND HIGHER EDUCATION (SCOTLAND) BILL

Purpose

1. This supplementary 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 provisions in the Further and Higher Education (Scotland) Bill conferring powers to make subordinate legislation. This memorandum refers to the Bill as amended at Stage 2 and it should be read in conjunction with the Executive’s memorandum to the Subordinate Legislation Committee, which was submitted when the Bill was introduced.

Subordinate Legislation Powers following Stage 2

2. The Subordinate Legislation Committee suggested that some of the order making powers within the Bill should be subject to the affirmative procedure. The affected sections, which were originally under negative procedure, are sections 5(7), 7(1), and 8(6).

3. The powers in section 8(6) and (7) are now subject to a new consultation condition contained in subsection (12A) of that section as inserted at Stage 2.

4. Again, following a recommendation from the Subordinate Legislation Committee section 22(5A) has been added so as to allow the Scottish Ministers to modify the list of bodies with whom the Council is to consult and collaborate in the exercise of its functions.

5. Section 32 provides for procedures.

Section 5(7): Fundable further and higher education

Power conferred on: The Scottish Ministers.  
Power exercisable by: Order.  

6. This provision gives the Scottish Ministers power to alter the definitions of “fundable further education” and “fundable higher education” in the Bill. It is considered that this would be an appropriate matter for subordinate legislation as it allows the definitions to reflect changes which may occur over time in the types of programmes and courses which should be specified by these definitions. By section 5(8), Ministers require to consult the Council before making the order.
7. To reflect recommendations made by the Subordinate Legislation Committee, this order-making power is subject to affirmative procedure.

Section 7(1): Fundable Bodies: further provision

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

8. This provision gives the Scottish Ministers power to amend schedule 2, which contains the list of fundable bodies. As fundable bodies are subject to mergers, closures or changes of name, or new bodies are established, or bodies are added as eligible for funding, or removed, the content of the schedule should be updated. Accordingly, listing in the schedule will mean that the body is eligible for funding by the Council. Ministers may make such an order only if the Council has proposed or approved the making of the modification. In doing so, the Council must have regard to the matters specified in section 7(2).

9. To reflect recommendations made by the Subordinate Legislation Committee, this order-making power is subject to affirmative procedure.

Section 8(6): Funding of the Council

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

10. Section 8(6) allows the Scottish Ministers to specify requirements in relation to fees payable to fundable bodies, as part of the terms and conditions imposed on the Council for grant funding. The Council can be obliged, as a condition of its grant from Ministers, to place conditions on a fundable body which obtains grant from the Council, in relation to the level of fees paid to that fundable body. Section 8(6)(a) provides that Ministers may by order specify the classes of persons for whom the fundable body is to secure that fees paid to the body will be equal to the fee levels as provided for in section 8(7). Section 8(6)(b) provides that Ministers may by order specify (i) the programmes of learning or (ii) courses of education in respect of which the fundable body is to secure that fees paid to the body will be equal to the fee levels as provided for in section 8(7).

11. This provision for specification of fees levels as part of the terms and conditions of grant to the Council will only apply to such classes of persons, programmes of learning or courses of education as Ministers specify by order. It is not possible to specify fee levels, or which persons should pay these fees, at this point in time, as the determination of initial fee levels, and to which persons or courses this shall apply, is dependant on future external factors.

12. The provision is different from, but has analogies with, the existing provision in section 42(3B) of the Further and Higher Education (Scotland) Act 1992. This provides (in relation to the Scottish Higher Education Funding Council (SHEFC)), that terms and conditions of grant to SHEFC can require the recipient of a grant, loan
or other payment to higher education institutions to secure that fees payable by any class of persons prescribed by regulations in connection with the attendance of courses, as prescribed by the regulations, are equal to such maximum allowance amounts that Ministers may determine under section 73D(2) of the Education (Scotland) Act 1980. Section 42(3B) is repealed by the Bill.

13. To reflect recommendations made by the Subordinate Legislation Committee, this order making power is subject to affirmative procedure.

14. An additional subsection (12A) has been added to section 8 during stage 2 which puts a requirement on the Scottish Ministers to consult the Council and other key stakeholders, including student representatives, before making an order under section 8(6).

Section 8(7): Funding of the Council

Power conferred on: The Scottish Ministers.  
Power exercisable by: Order.  

15. This provision gives the Scottish Ministers the power to specify fee levels to be applied for the purposes of section 8(6). Provision by order allows for the specification of fees by reference to a particular academic year, or to authorise Ministers to determine fees for subsequent academic years. For subsequent years, Ministers may be authorised to determine fees that are, in each case, no higher than the initial specified year, or which, in any subsequent year, may be higher than the fees in the initial year, provided that the increase is no greater than required to maintain the value in real terms of the fees (having regard to any retail price index). Clearly, as time goes by, the real terms value of fee levels will fluctuate. It is therefore necessary to give Ministers a power to allow for changing circumstances in future, and for inflation.

16. Fee levels cannot presently be set in the Bill, as Ministers are considering their options on this particular issue in consultation with stakeholders. Fee levels for particular academic years will also depend on future external factors, as indicated above. The setting of fees in higher education is a particularly sensitive area and the new power to differentiate fee levels for certain subjects in exceptional circumstances could be viewed by some as controversial. As such, it is considered that the affirmative resolution procedure would be appropriate to ensure that a suitable level of Parliamentary scrutiny is given to the proposals.

17. If Ministers determine that it is appropriate for this power to be used, this power would be used to set fee levels. The power is intended to be used sparingly, and only in areas where there is evidence that not doing so would disadvantage Scottish students.

18. An additional subsection (12A) has been added to section 8 during stage 2 which puts a requirement on the Scottish Ministers to consult the Council and other key stakeholders, including student representatives, before making an order under
section 8(7). That this order-making power is subject to affirmative procedure is unchanged.

Section 22(5A); Consultation and collaboration

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

19. Section 22(4) lists the bodies and persons with whom the Council is to consult and collaborate in the exercise of its functions, so far as it considers appropriate. An order will allow Ministers to specify additional persons to be added to the list, to cover changes of circumstances, or changes in the nature or status of the specified bodies.

20. It is considered that the power to make such amendments to the list is appropriate to be exercised through negative resolution procedure.

21. Section 22(5A) was added at stage 2 to reflect the recommendation from the Subordinate Legislation Committee that Ministers should have the power to amend the list of bodies in section 22(4). In consequence, section 22(4)(j) has been removed.

ELLD: FAED & HESD
April 2005
SUBORDINATE LEGISLATION COMMITTEE

12th Meeting, 2005 (Session 2)

Tuesday 19th April, 2005

Executive Responses

• The Vulnerable Witnesses (Scotland) Act 2004 (Commencement) Order 2005, (SSI 2005/168)

• The Advice and Assistance (Scotland) Amendment (No.2) Regulations 2005, (SSI 2005/171)

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

• The Intensive Support and Monitoring (Scotland) Amendment Regulations 2005, (SSI 2005/201)
1. The Scottish Executive refers to the Subordinate Legislation Committee letter of 12 April 2005 concerning the above instrument in which an explanation was sought of the following matters:

a) The Committee noted that in article 3 on page 1 there is a definition of “the 2004 Act”. This term did not appear in the Order and the Executive was asked to explain the purpose of the definition.

   b) Also in relation to article 3, the Committee noted that the term “the 1995 Act” was defined as meaning the Criminal Procedure (Scotland) Act 1995. That term was used in some parts of the Schedule while other parts referred to the Act in full. The Committee requests an explanation from the Executive.

2. In relation to a) the Scottish Executive agrees with the Committee that as the instrument refers in full to the Vulnerable Witnesses (Scotland) Act 2004 when it appears, the definition is superfluous and it would have been better that it was omitted.

3. In relation to b) the Scottish Executive agrees with the Committee that there should have been consistency with references in full to the Criminal Procedure (Scotland) Act 1995, and if a definition is given it should be followed.

14 April 2005
On 12th April 2005 the Committee asked the Executive for an explanation of the following matter:

“The Committee notes that this is the seventh amendment to the Advice and Assistance (Scotland) Regulations 1996 and asks the Executive what, if any, plans it has for consolidation of these Regulations.”

The Scottish Executive responds as follows –

The Executive is aware that these Regulations have now been amended several times. Reforms have been necessary as a result of modernising and efficiency initiatives together with a number of changes to legislation.

It had been intended that the principal Regulations should be consolidated before now. However, the Strategic Review of the Delivery of Legal Aid, Advice and Information is about to start its consultation stage with a consultation paper to be published very soon. The review may give rise to substantial re-structuring of the legal aid system, including further regulatory changes over the next year or so.

It has therefore been considered prudent to await the outcome of this review before consideration is given to embarking on what would amount to a substantial programme of consolidation.

13th April 2005
On 12 April the Committee requested an explanation of the following matters. The Scottish Executive thanks the Committee for their comments.

2. The Committee notes the explanation for the breach of the 21-day rule but asks the Executive for further information as to when it knew that the English Regulations were to be brought into force on 1 April and thereby was in a position to establish when the corresponding Scottish regulations needed to be laid to ensure the same coming into force date.

The Scottish Executive’s policy is to mirror the action taken by Department of Health. Although we knew that the English Regulations were to be brought into force on 1 April, the final agreed changes to the Regulations were only confirmed by Department of Health on 8 March. Until that time we were unable to finalise the required amendments to the Regulations.

2. In regulation 6 there are references to “regulation 10(5A)” and “regulation 9”. The Committee assumes that these are intended to be references to these regulations as they appear in the principal Regulations given that no such regulations exist in the instant Regulations. However, the Committee asks the Executive to explain the absence of any cross reference to the principal Regulations in this regulation.

The Committee is correct in assuming that the references to “regulation 10(5A)” and "regulation 9" are references to those regulations in the principal Regulations. The Executive agrees that there ought to have been cross reference in SSI 2005/179 to the principal Regulations. However, given that there is no regulation 9 or 10(5A) in SSI 2005/179, the Executive considers that it is clear that it is the principal Regulations which are being referred to. It does not consider there is an urgent need to correct the omission in the instrument but will insert the appropriate cross reference when the principal Regulations are next being amended.”

14 April 2005
On 12 April the Committee asked the Executive for an explanation of the following matter which is answered below.

“The Committee notes that the Regulations do not cite section 70(12) of the parent Act as an enabling power. Given that this power was cited in the principal Regulations, presumably as the basis for prescribing the conditions listed in regulation 6, the Committee asks the Executive to explain under what power it purports to make regulation 4, which seeks to amend regulation 6.”

The Scottish Executive responds as follows:

The Executive thanks the Committee for drawing our attention to section 70(12), which was cited in the principal Regulations as the basis for prescribing the conditions listed in regulation 6. On reviewing the instrument in the light of the Committee’s observation we agree that insofar as these Regulations amend regulation 6 of the principal Regulations it would have been appropriate to cite the specific power. We consider that the instrument is within vires because of the general provision in the preamble, which refers to “all other powers enabling them in that behalf”.

14 April 2005
Introduction
Audit Scotland is responsible for the audit of most public sector bodies in Scotland. We follow public money from the Scottish Executive through to 200-plus local spending bodies, looking across all the organisations that are involved in major spending programmes, and we also look at the experience of the users of services.

We do this through the annual audit of each organisation and through a programme of reports to the Parliament. Our audit of public bodies goes much wider than in the private sector. We are committed to supporting improvement in public services as well as scrutinising performance. Auditors support managers and senior civil servants in addressing performance weaknesses and areas of risk, but they also report in public on what they have found in the audit of each public body.

Regulation
Our main interest in relation to the Committee’s inquiry is in public sector regulation – we use the term scrutiny to cover audit, inspection and regulation, which have distinct but complementary roles:

- **Audit** is the scrutiny of public bodies covering their corporate governance and management; the financial statements and underlying financial systems; and performance, performance management and reporting.
- **Inspection** is periodic, targeted scrutiny of specific services, to check whether they are meeting national and local performance standards, legislative and professional requirements, and the needs of service users.
- **Regulation** is the process by which public sector activity and market forces are directed for the public good. It includes the ‘authorisation’ or ‘registration’ of bodies to undertake regulated activities and monitoring their compliance with statutory requirements and professional standards. It may also include the prescription of compulsory activities and price controls.

In general, audit is undertaken on behalf of Parliament, whereas inspection and regulation are tools of the Executive.

The scrutiny of public services in Scotland (and elsewhere in the UK) is complex. It is a key part of the approach to holding public services to account and helping them to improve, but a number of new scrutiny regimes have
been introduced since 1999 and there is a perception that the burden on public bodies is increasing. The Annex to this paper sets out some background information on the main inspectorates and regulators.

Audit Scotland works with the other scrutiny bodies to maximise the impact of our work with public bodies while minimising the avoidable burden. This is done through the agreement of Memoranda of Understanding, through joint studies and inspections, and through the new audits of Best Value in local government which pull together the results of the different inspection regimes to provide a rounded picture of each council.

We are also working with the Scottish Executive and the inspectorates to identify opportunities to streamline our work further, particularly through sharing information and developing common standards.

The Executive’s Efficient Government plan includes a longer term commitment to streamlining bureaucracy, and we are fully committed to playing our part in this. We believe that there would be value in reviewing:

- how new approaches to public sector scrutiny are introduced. A number of new inspection regimes have been introduced since 1999, and their focus is changing. In the past inspections focused on professions or services (such as schools, police and fire), where as the new approaches increasingly focus on client groups such as children and older people. This is a welcome trend because these inspections should be better able to focus on the interests of those who use services, but it increases the risk of overlap and duplication because of the range of bodies falling within the scope of each inspection regime. This trend may increase the case for a mechanism like a Regulatory Impact Assessments to examine the objectives of a proposed new scrutiny regime.

- whether the existing arrangements are working effectively. As the Annex shows, there is a wide range of audit, inspection and regulation activity aimed at holding public services to account and helping them to improve and, as well as examining the impact of new arrangements, there would be value in carrying out periodic reviews of existing arrangements to examine how they work in practice, whether they are achieving their objectives, and how the balance of costs and benefits and be optimised.

Audit Scotland is committed to playing its part in ensuring that scrutiny adds value to public services by providing assurance and supporting improvement.

11 April 2005
## Inspectorates

<table>
<thead>
<tr>
<th>Role</th>
<th>Role Description</th>
<th>Coverage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>HM Inspectorate of Education</strong></td>
<td>Inspects primary and secondary schools; also evaluate pre-school education, teacher education, community learning and development, further education and the education functions of local authorities. Primary schools are inspected every 7 years and secondary schools every 6 years. Inspection of local authority education departments, in partnership with Audit Scotland. Developing a multi-agency inspection regime for children’s services, involving HMIE, HMIC, Care Commission, SWSI and NHS QIS. Pilot inspections of child protection in Highlands and E Dunbartonshire in 2005; integrated inspections of all aspects of children’s services will be in place across the country by 2008.</td>
<td>Local authorities</td>
</tr>
</tbody>
</table>

| **Social Work Services Inspectorate**     | Refocusing inspection of social work services:  
   - Older people  
   - Learning disabilities  
   - Mental health  
   - Children  
   Rolling programme of criminal justice inspections – first 3 reports have been published. “Inspections of practice in all the groupings of local authorities and unitary authorities providing criminal justice social work services across Scotland. The programme focuses on the core elements of service provision including social enquiry reports for the courts, home background reports for the Parole Board and the community supervision of those on probation orders, community service orders and parole and non-parole licences.” | Local authorities                                  |

| **Communities Scotland**                  | Inspects the housing functions of local authorities and registered social landlords                                                                                                                                                                                                                                                                   | Local authorities, RSLs                            |

| **HM Inspectorate of Constabulary**       | Inspects police forces and common police services; produces inspection reports and thematic reports                                                                                                                                                                                                                                             | Police forces and common police services          |

<p>| <strong>HM Fire Services Inspectorate</strong>         | Inspects fire brigades; produces inspection reports and thematic reports                                                                                                                                                                                                                                                                       | Fire brigades                                     |</p>
<table>
<thead>
<tr>
<th>Regulator</th>
<th>Function</th>
<th>Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>HM Inspectorate of Prisons</td>
<td>Inspects prison establishments and legalised police cells</td>
<td>Prisons</td>
</tr>
<tr>
<td>Inspectorate of Prosecutions</td>
<td>Inspects COPFS, considers complaints against them, and carries out thematic reviews at the request of Ministers. First thematic review will be on race issues.</td>
<td>COPFS</td>
</tr>
<tr>
<td>NHS Quality Improvement Scotland</td>
<td>Sets standards, monitor performance, and provide advice, guidance and support to NHSScotland on effective clinical practice and service improvements.</td>
<td>Health boards Private healthcare providers</td>
</tr>
<tr>
<td>Benefits Fraud Inspectorate</td>
<td>Inspects social security benefit administration and counter-fraud activity in local authorities and DWP benefit paying services.</td>
<td>Local authorities</td>
</tr>
</tbody>
</table>

**Regulators**

<table>
<thead>
<tr>
<th>Regulator</th>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Care Commission</td>
<td>Jacquie Roberts</td>
</tr>
<tr>
<td>General Teaching Council for Scotland</td>
<td>Matthew MacIver</td>
</tr>
<tr>
<td>Office of the Scottish Charity Regulator</td>
<td>Jane Ryder</td>
</tr>
<tr>
<td>Scottish Environment Protection Agency</td>
<td>Campbell Gemmell</td>
</tr>
<tr>
<td>Scottish Social Services Council</td>
<td>Carole Wilkinson</td>
</tr>
<tr>
<td>Water Industry Commissioner</td>
<td>Alan Sutherland</td>
</tr>
<tr>
<td></td>
<td>To be replaced by a Commission under the Water Bill</td>
</tr>
<tr>
<td>Drinking Water Quality Regulator for Scotland</td>
<td>Tim Hooton</td>
</tr>
</tbody>
</table>