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

1. **Items in private**: The Committee will consider whether to take agenda items 7 and 8 in private.

2. **Delegated powers scrutiny**: The Committee will consider the delegated powers provisions in the following bill—
   
   Smoking, Health and Social Care (Scotland) Bill as amended at Stage 2.

3. **Delegated powers scrutiny**: The Committee will consider the delegated powers provisions in the following bill—
   
   Transport (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 Nitrate (Public Participation etc.) (Scotland) Regulations 2005, *(SSI 2005/305)*

   the Charities (Designated Religious Bodies) (Scotland) Order 2005, *(SSI 2005/306)*

   the Wildlife and Countryside Act 1981 (Variation of Schedule) (Scotland) Order 2005, *(SSI 2005/308)*

   the Mental Health (Content and amendment of care plans) (Scotland) Regulations 2005, *(SSI 2005/309)*
the Mental Health (Content and amendment of Part 9 care plans) (Scotland) Regulations 2005, (SSI 2005/312)

the Student Loans (Information Requests, Maximum Threshold, Maximum Repayment Levels and Hardship Loans) (Scotland) Regulations 2005, (SSI 2005/314)

the Local Government Pension Scheme (Scotland) Amendment (No.2) Regulations 2005, (SSI 2005/315)

the Genetically Modified Organisms (Transboundary Movements) (Scotland) Regulations 2005, (SSI 2005/316)

the Gaming Act (Variation of Fees) (Scotland) Order 2005, (SSI 2005/319)

the Prevention and Monitoring of Cetacean Bycatch (Scotland) Order 2005, (SSI 2005/330)


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


the Products of Animal Origin (Third Country Imports) (Scotland) Amendment Regulations 2005, (SSI 2005/323)

the Cereal Seed (Scotland) Regulations 2005, (SSI 2005/328)

the Fodder Plant Seed (Scotland) Regulations 2005, (SSI 2005/329)

the National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Amendment Regulations 2005, (SSI 2005/336)

the National Health Service (General Medical Services Contracts) (Scotland) Amendment Regulations 2005, (SSI 2005/337)

the Local Authorities’ Traffic Orders (Procedure) (Scotland) Amendment Regulations 2005, (SSI 2005/338)

the Advice and Assistance (Scotland) Amendment (No.3) Regulations 2005, (SSI 2005/339)

the Pollution Prevention and Control (Scotland) Amendment (No.2) Regulations 2005, (SSI 2005/340)

the Education (Graduate Endowment, Student Fees and Support) (Scotland) Amendment Regulations 2005, (SSI 2005/341)
the Fire (Additional Function) (Scotland) Order 2005, (SSI 2005/342)
the Fire (Charging) (Scotland) Order 2005, (SSI 2005/343)
the Fire (Scotland) Act 2005 (Consequential Modifications and Amendments) (No.2) Order 2005, (SSI 2005/344)
the Education (Student Loans) Amendment (Scotland) Regulations 2005, (SSI 2005/345)
the Public Service Vehicles (Registration of Local Services) (Scotland) Amendment Regulations 2005, (SSI 2005/346)

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

   the Water Services etc. (Scotland) Act 2005 (Commencement No.1 and Savings) Order 2005, (SSI 2005/351)

   the Education (Listed Bodies) (Scotland) Amendment Order 2005, (SSI 2005/354).

7. **Inquiry into the regulatory framework in Scotland:** The Committee will consider its draft phase 1 report.

8. **Inquiry into the regulatory framework in Scotland:** The Committee will consider an approach paper in relation to phase 2 of its inquiry.

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

**Agenda Items 2 – 6**

Legal Brief (Private) – to follow  
SL/S2/05/21/1

**Agenda Item 2**

Delegated powers memorandum – to follow  
SL/S2/05/21/2
Bill as amended at Stage 2 (circulated to Members only)

**Agenda Item 3**

Delegated powers memorandum – to follow  
SL/S2/05/21/3
Bill as amended at Stage 2 (circulated to Members only)

**Agenda Item 4**

Executive responses  
SL/S2/05/21/4

**Agenda Items 5 and 6**

Copies of instruments (circulated to Members only)

**Agenda Item 7**

Draft phase 1 report (Private)  
SL/S2/05/21/5

**Agenda Item 8**

Approach paper (Private)  
SL/S2/05/21/6
Background paper from the Adviser (Private)  
SL/S2/05/21/7
THE NITRATE (PUBLIC PARTICIPATION ETC.) (SCOTLAND) REGULATIONS 2005 (S.S.I. 2005/305)

1. In its letter of 14th June to Catherine Hodgson the Subordinate Legislation Committee commented as follows-

“...The Executive is asked to explain the reference in regulation 2(2)(a) to the wording “published in 1997 by the Scottish Office” given that this wording appears to have been replaced by regulation 6(2)(a) of SSI 2002/27.”.

The Scottish Executive responds as follows:

1. The Executive thanks the Committee for drawing this matter to its attention and acknowledges that the wording “published in 1997 by the Scottish Office” was indeed amended by regulation 6(2)(a) of SSI 2002/276 (rather than SSI 2002/27).

2. The Executive considers that this clerical error in regulation 2(2)(a) is such that the intended amendment to the definition of “code of good agricultural practice” can have no effect.

3. The absence of amendment to the definition of “code of good agricultural practice” in the 1996 Regulations will not produce any significant policy or legal issue either for government or the industry for the time being. The measure has no effect in relation to the transposition of the Public Participation Directive.

4. In the circumstances, the Executive intends to bring forward amending Regulations at the earliest opportunity after the summer recess.
THE CHARITIES (DESIGNATED RELIGIOUS BODIES) (SCOTLAND) ORDER 2005 (SSI 2005/306)

1. The Subordinate Legislation Committee considered the above instrument on 14 June 2005 and asked for an explanation of the following matters—

“the Executive is asked to clarify why it chose not to narrate the statutory conditions to the exercise of the enabling power, as set out in section 3(1)(a) to (c) and (2) of the parent Act, in the preamble to the instrument” (the parent Act is the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990).

The Scottish Executive responds as follows:

The Executive do not agree that the matters set out in sections 3(1) and (2) are “pre-conditions” which as a matter of drafting practice require to be narrated in the preamble to the instrument. Those provisions set out the scope of the power which the Scottish Ministers may exercise: the designated religious bodies must appear to the Scottish Ministers to meet those criteria. It is implicit in the exercise of the powers that the Scottish Ministers have satisfied themselves in relation to those criteria, just as it would be implicit in the prescribing of a fee under a power to prescribe “such fee as may appear to them to be appropriate” that the prescribed fee did appear to them to be appropriate. It would not be necessary to say so in the preamble.

The Explanatory Note to the instrument confirms that the bodies appear to the Scottish Ministers to be bodies capable of being designated on this basis. If the preamble referred to “the bodies designated appearing to the Scottish Ministers to be in accordance with section 3(1) and (2)” of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, it is not clear what additional benefit that would provide the reader of this instrument.

In any case, it is clear that the validity of the instrument is not affected by the omission of the reference to being satisfied as to those matters listed in section 3(1) and (2). The Executive has also reviewed an earlier order designating religious bodies (SI 1993/2774) and notes that a similar position was adopted in that order.

In its letter of 14 June to Catherine Hodgson, the Subordinate Legislation Committee commented as follows –

“The Executive is asked to explain why no Executive Note was provided with this instrument.”

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

No Executive Note was provided on this occasion because the content and immediate effect of the Order were considered to be self-evident. The Order adds the plants species listed in the table in Article 2 of the Order to Part II of Schedule 9 to the Wildlife and Countryside Act 1981. The Explanatory Note explains that these are species which may not be planted or otherwise caused to grow in the wild. It was considered that, given the self-explanatory text of the Order itself and the further information provided in the Explanatory Note, a separate Executive Note was not necessary in connection with this particular Instrument.
The Mental Health (Content and Amendment of Care Plans) (Scotland) Regulations 2005 (SSI 2005/309)

The Mental Health (Content and Amendment of Part 9 Care Plans) (Scotland) Regulations 2005 (SSI 2005/312)

On 14 June 2005, the Committee asked for an explanation of the following matters:

With regard to SSI 2005/309, the Committee noted that there is a reference to paragraph (1) in regulation 3, but no reference to subsequent paragraph numbers, and it is not clear if later paragraphs are missing or whether the inclusion of paragraph (1) is simply a drafting error. Further that there is also a reference to paragraph (c)(ii) in regulation 3(1)(c)(iii), but it is not clear if this is correct. As regulation 3 is currently drafted, this is an incorrect reference and the Committee asks the Executive for an explanation.

The same issue arises in SSI 2005/312, and the Committee asks the Executive to explain the inclusion of paragraph (1) in regulation 3.

The Scottish Executive responds as follows:

The Executive accepts the Committee's point in relation to SSI 2005/312, and is grateful to the Committee for bringing it to its attention. The reference to paragraph (1) in regulation 3 is a hangover from earlier drafts and should have been removed. As currently drafted, the reference in regulation 3(1)(c)(iii) is erroneous, but if the offending reference to paragraph (1) in the regulation was absent, the reference would otherwise be correct.

On SSI 2005/312, the Executive accepts the Committee's point on the reference to paragraph (1) in regulation 3, and is again grateful to the Committee for bringing it to their attention. The explanation for the drafting error is the same as with the previous instrument.

It is not considered that the references will alter the legal effect of the instruments, or will mislead the reader. The Executive will however bring forward an amendment to correct these references at the earliest legislative opportunity.
On 14 June 2005 the Committee asked the following –

“1. The Executive is asked to explain why new regulations 11A to 11F are inserted into Part III of the Repayment of Student Loans (Scotland) Regulations 2000 (repayments by overseas residents), when they appear to apply to all borrowers, not only those who are resident overseas.

2. New regulation 11F provides that a “document is to be treated as served on a person when it is delivered to that person or sent to that person by post.” The Executive is asked to explain whether the time of serving is the time of posting or the time of delivery; and whether this provision is intended to have a different effect from the Interpretation Act 1978, section 7.

3. New regulation 11C(3) provides for a penalty of £100, however the explanatory note refers to a penalty of £108. The Executive is asked to explain this discrepancy.

4. The Executive is also asked to explain whether the references to “paragraph 9(4),” “sub-paragraph 13(4)(a)” and “paragraph 13(1)” in regulations 4 and 5 should in fact be references to regulations.”

The Scottish Executive responds as follows:

**Point 1**

1. New regulations 11A to 11F apply to all borrowers in terms of the Repayment of Student Loans (Scotland) Regulations 2000 (the Principal Regulations). However under regulation 3(2) of the Education (Student Loans) (Repayment) Regulations 2000 (the Collection Regulations) Scottish Ministers have made a determination that repayments of loans shall be collected by the Inland Revenue in accordance with parts III and IV of the Collection Regulations, rather than under the Principal Regulations. The determination has the effect that the Inland Revenue will collect most loan repayments through self-assessment or PAYE. However this is not possible for loans to persons who are not in the UK tax system i.e. overseas borrowers. Where borrowers are living and working abroad, then repayments are collected under the Principal Regulations. The new regulations are inserted into Part III of the Principal Regulations as, in practice, these provisions will apply only to overseas borrowers.

2. The determination is expected to stay in place for the foreseeable future. However should Scottish Ministers decide that the Inland Revenue should not collect payments under PAYE and self-assessment for borrowers within the UK tax system, then they could revoke the determination. In such circumstances it would be necessary for the information request provisions to be used in relation to all borrowers, as the Principal Regulations, rather than the Collection Regulations would be the main method of repayment. Therefore the new regulations are framed to apply to “borrowers”, rather than
just overseas borrowers, to accommodate the possibility that the determination may be revoked in the future.

**Point 2**

3. New regulation 11F indicates that a document is served when either of two events occur i.e.
   - it is delivered to a person; or
   - it is sent to a person by post.

4. Due to the context, the reference to delivery must be to delivery other than by post. The reason these two options were given is that in some instances documents will not be sent by post. The time of serving in relation to a “delivered” document is when that document is actually delivered i.e. (taking its ordinary meaning) it has been handed over. In relation to documents which are served by being sent by post, the provisions of section 7 of the Interpretation Act 1978 will apply. This means that the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary intention is proved, service is effected at the time at which a letter would be delivered in the ordinary course of post.

**Point 3**

5. The Executive acknowledges the error in the Explanatory Note. The reference to a penalty payment of £108 should be to a penalty payment of £100. The Executive apologises for this drafting error. The Explanatory Note is not part of the Regulations and this error does not invalidate the effect of the amendment Regulations. However the Executive is aware of the importance of providing correct information to students. Guidance is available for students on the subject of student loans and is issued by the Student Loans Company. Currently this guidance does not indicate the monetary value of the penalty payment. However, at the next possible opportunity, the Executive will ensure that this guidance makes reference to the level of penalty payment as being £100. It is our understanding that guidance, rather than the Explanatory Note will be the primary source of information for students on loans. The Executive will also seek to correct the version of the Explanatory Note which appears in the Annual Volume of Statutory Instruments and on the HMSO (now “Office of Public Sector Information”) website.

**Point 4**

6. The Executive accepts that the correct references in regulations 4 and 5 should be to regulation 9(4), regulation 13(4)(a) and regulation 13(1). The Executive apologises for this drafting error. Notwithstanding this error, it is the Executive’s view that the meaning of the amendment Regulations is sufficiently clear so that the effect of the amendment Regulations is not invalidated by this error. The Executive will ensure that this error is not repeated in future amendments to the Repayment of Student Loans (Scotland) Regulations 2000.
The Local Government Pension Scheme (Scotland) Amendment (No.2) Regulations 2005, (SSI 2005/315)

On 14 June 2005 the Committee asked the Executive –

“whether the references to paragraphs 132(1) and 132(3) in regulation 2(a) and (b) should be references to regulations 132(1) and 132(3).”

The Scottish Executive responds as follows:

The Executive thanks the Committee for this comment on the Regulations.

The Executive accepts that the correct reference in regulation 2(a) and (b) should be to regulations 132(1) and 132(3) and not to paragraphs 132(1) and 132(3). The Executive apologises for this drafting error. Notwithstanding this error, it is the Executive’s view that the meaning of the amendment Regulations is sufficiently clear so that the effect of the amendment Regulations is not invalidated by this error. The Executive will ensure that this error is not repeated in future amendments to the Local Government Pension Scheme (Scotland) Regulations.
In its letter of 14 June to Catherine Hodgson, the Committee commented as follows

“The Committee noted that paragraph 6 of Schedule 2 gives inspectors powers to ask questions of anyone whom they have reasonable cause to consider are able to provide information relevant to any test or inspection under the Schedule. The Committee noted that failure to comply with this is a criminal offence.

The Committee considered that it is arguable that the provisions could breach the right of a person not to incriminate oneself as guaranteed by Article 6 of ECHR. The Executive is asked to comment.”

The Scottish Executive responds as follows:

The Executive notes the Committee's comments and can confirm that there was no intention that the power conferred be used in a way incompatible with the Convention or Convention rights. Indeed the Department considers that the provision could not lawfully be employed so as to breach Article 6 of ECHR. In accordance with section 101 of the Scotland Act 1998, the provision requires to be read so as to be compatible with the Convention. In addition, the inspectors enforcing these Regulations are in accordance with the Human Rights Act 1998 themselves bound by the requirements of the Convention and cannot lawfully exercise their powers so as to breach it.
The Gaming Act (Variation of Fees) (Scotland) Order 2005, (SSI 2005/319)

1. The Scottish Executive refers to the letter dated 14 June 2005 in which the Subordinate Legislation Committee asks the following question:

   The Committee stated that it had noted that the Order uprates the fees amounts set out in section 48 of the Gaming Act 1968. The instrument does not amend all of the figures in section 48(4) of the Act to reflect the new amounts in section 48(3) and the Committee asked the Executive for clarification.

The Executive comments that, in preparing the Order, it was felt that the way in which previous Gaming Act (Variation of Fees) Orders had been prepared was confusing. In the schedule of the previous Order there are five matters to which the fees relate, with five corresponding previous sums and new sums. What is confusing is that in respect of renewal of licence and transfer of licence there are two other sets of figures. These are not distinguished from the fees in respect of these licences which confuses the reader in that he does not know from the Order which are the fees figures. In fact these second sets of figures do not relate to these licences at all. The second figures in fact refer back to the figures in sections 48(3)(a) and (b). They serve no legal purpose. The Executive accepts that this could have been done differently, but for the sake of clarity and making the Order as user friendly as possible for a reader of the schedule, it was decided not to include the second figures in each of sections 48(4)(a) and (b) as they are consequentials which are superfluous. The Executive thinks that there is no scope for any legal confusion as the figures which set the fees have been amended and it is considered that the effect of the Order is that any reference to an amended figure will be read as that amended figure.
THE PREVENTION AND MONITORING OF CETACEAN BYCATCH (SCOTLAND) ORDER 2005 (SSI 2005/330)

1. On 14th June the Committee considered SSI 2005/330 and asked for an explanation of the following matters:-

“The Committee considered that the relevant EC legislation is overdue for implementation, as the Council Regulation came into force in July last year. The Committee asks the Executive to comment on this delay and the timing chosen for making provision for the enforcement of Council Regulation (EC) 812/2004.”.

The Scottish Executive responds as follows:

1. The European Council adopted Council Regulation (EC) 812/2004 (“the Regulation”) on 26 April 2004 and the Regulation entered into force on 1st July 2004. The provisions of the Regulation which require to be enforced in domestic law are to be phased in over the course of the next two years.

2. The Regulation requires Member States to design and implement observer monitoring schemes in various fisheries specified in Annex III to the Regulation by the dates specified in Annex III. The earliest date specified is 1st January 2005. The observer monitoring scheme was designed and implemented in Scotland by the 1st January deadline set in the Regulation.

3. The Regulation also provides that the first phase of mandatory use of acoustic monitoring devices (“pingers”) should start in certain fisheries specified in Annex I of the Regulation by 1st June 2005. The Executive made and laid the SSI making provision for the enforcement of the Regulation as soon as possible. The Executive regrets the fact that it was unable to make the SSI by the 1st June deadline.