AGENDA

24th Meeting, 2005 (Session 2)

Tuesday 13th September, 2005

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

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

   the Environmental Levy on Plastic Bags (Scotland) Bill at Stage 1.

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

   the Mental Health (Specified Persons’ Correspondence) (Scotland) Regulations 2005, *(SSI 2005/408)*

   the Mental Welfare Commission for Scotland (Procedure and Delegation of Functions) Regulations 2005, *(SSI 2005/411)*

   the Mental Health (Period for Appeal) Order 2005, *(SSI 2005/416)*

   the Regulation of Scallop Dredges (Scotland) Order 2005, *(SSI 2005/371)*.

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

   the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.9) (Scotland) Order 2005, *(SSI 2005/421)*

   the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.10) (Scotland) Order 2005, *(SSI 2005/431).*
4. **Instruments subject to annulment:** The Committee will consider the following—

- the Regulation of Care (Prescribed Registers) (Scotland) Order 2005, (SSI 2005/432)
- the Food Safety (General Food Hygiene) Amendment (Scotland) Regulations 2005, (SSI 2005/435).

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

- the Further and Higher Education (Scotland) Act 2005 (Commencement) Order 2005, (SSI 2005/419)
- the Regulation of Care (Scotland) Act 2001 (Commencement No.6) Order 2005, (SSI 2005/426)
- the Civil Partnership Act 2004 (Commencement No.1) (Scotland) Order 2005, (SSI 2005/428)
- the Criminal Justice (Scotland) Act 2003 (Commencement No.6) Order 2005, (SSI 2005/433)

6. **Executive correspondence:** The Committee will consider responses from the Executive on general issues relating to the scrutiny of SSIs and bills.

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

**Agenda Items 1 - 5**

Legal Brief (Private)  
SL/S2/05/24/1

**Agenda Item 1**

Delegated powers memorandum  
SL/S2/05/24/2

Bill and accompanying documents (circulated to Members only)

**Agenda Item 2**

Executive responses  
SL/S2/05/24/3

**Agenda Items 3 - 5**

Copies of instruments (circulated to Members only)

**Agenda Item 6**

Note from the Clerk  
SL/S2/05/24/4
MEMORANDUM TO THE SUBORDINATE LEGISLATION COMMITTEE BY THE MEMBER IN CHARGE OF THE BILL, MIKE PRINGLE MSP STEWART MAXWELL MSP

ENVIRONMENTAL LEVY ON PLASTIC BAGS PROHIBITION OF SMOKING IN REGULATED AREAS (SCOTLAND) BILL: PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION

Purpose

1. This memorandum has been prepared by Mike PringleStewart Maxwell MSP, the Member in charge of the Bill. It has been provided to assist the Subordinate Legislation Committee with their consideration, in accordance with Rule 9.6 of the Parliament's Standing Orders, of provisions in the Environmental Levy on Plastic Bags (Scotland) Prohibition of Smoking in Regulated Areas (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each such provision, explains why the matter is to be left to subordinate legislation and explains the choice of procedure.

Policy Context

2. The Bill aims to reduce the number of plastic bags in circulation, to encourage people to reuse them wherever possible and to recycle them after use. Prevent people including children, from being exposed to the effects of passive smoking in certain public areas. The Bill does not prevent people from smoking in all public places, it focuses specifically on areas where food is supplied and consumed.

3. The Bill has 3 key objectives, these are:

- Protecting the environment both by the reduction in the number of plastic bags in circulation and by investing the money raised by the levy
- Assisting local authorities towards meeting the Scottish National Waste Plan targets by encouraging the reduction of plastic bags in circulation and reuse of those that are; and
- Raising awareness of environmental issues such as recycling.

4. The Bill should be considered as part of the process of safeguarding the health of the people of Scotland from the effects of tobacco smoke. It will help raise awareness of the dangers of both passive smoking and smoking, while at the same time assisting to change the attitudes of the public towards smoking in general. It is to be hoped that it will also encourage people who want to stop smoking, and help ex smokers from relapsing, by providing more smoke free environments in public places.

Content of the Bill

4. The Bill:
• Places a levy which is payable by the customer on the provision of all bags made wholly or in part of plastic other than those that fall within the exemptions provided,
• Makes it an offence for suppliers not to charge customers the levy when they take a non-exempt plastic bag;
• Requires those supplying plastic bags to customers to register in each local authority area where they supply bags;
• Requires suppliers to pay the amount of the levy collected to the relevant local authority;
• Requires suppliers to keep certain records in relation to the levy;
• Requires local authorities to spend the amounts collected by the levy, after the deduction of reasonable collection costs, on environmental projects;
• Requires the local authority to publish an annual report on its performance;
• Requires each local authority to authorise in writing at least one person to exercise the powers conferred on the local authority by the Bill;
• Makes it an offence to obstruct an authorised officer in the course of their duties; and
• Provides powers to local authorities to enable them to impose civil penalties in respect of certain failures to comply with the Bill.
• Makes it an offence to smoke in regulated areas;
• Makes it an offence for owners, occupiers and the like to knowingly permit smoking in regulated areas;
• Requires signs to be clearly displayed inside and outside regulated areas; and
• Provides that offences can be prosecuted summarily.

Delegated Powers

5. The Bill confers a total of eighty-three delegated powers on the Scottish Ministers. All of the powers are new and no existing powers are being amended or repealed. The powers are explained in detail in the following paragraphs. By virtue of section 179(1) all of the delegated powers under the Bill are exercisable by orders or regulations made by statutory instrument.

Section 1(24): Amount of the levy
Extension of the “prescribed period”

Powers conferred on: The Scottish Ministers
Powers exercised by: Order made by statutory instrument
Parliamentary procedures: Affirmative resolution of the Scottish Parliament

6. Section 1 places a levy on the provision of plastic bags, other than those exempted by Section 2(2).
7. Section 1(2) sets the amount of the levy at 10p. The order making power contained in Section 1(2) gives power to the Scottish Ministers to increase the amount of the levy.

9. lengthen the prescribed period. No power is given to the Scottish Ministers to reduce the length of the prescribed period to less than 5 days.

8. It is submitted that this is an appropriate matter for subordinate legislation as it could be determined at a future date that it is necessary to increase the amount of the levy to reflect inflationary increases and to keep the levy at an appropriate amount,. through scientific developments, that the harmful smoke particles linger for a longer period. In that event, the amount of the levy prescribed period should be capable of being increased extended without requiring a further Bill. This is a power to modify a provision set out in primary legislation, and could be used to promote further changes in environmental policy. Affirmative resolution procedure is therefore considered appropriate.

Section 2(41): Changes to bags exempt from the levy

The definition of regulated area

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

9. Section 2 sets out which plastic bags are exempt from the levy. The order making powers given to the Scottish Ministers by section 2(4) allow them to remove any category of bag from the list in section 2(2) should they wish the levy to apply to further plastic bags; it also allows them to reduce the dimensions of a ‘small’ bag as provided for by 2(3). The third strand of this power allows them to alter the amount of the multiplier used in 2(2(e) in relation to the cost of bags designed for reuse which are sold at to customers for at least 5 times the amount of the levy. This enables them to change the minimum amount that must be paid for a reuse bag to keep it in line with any increases that are made to the amount of the levy, or perhaps to make the provision of reuse bags more financially advantageous

10. It is submitted that this is an appropriate matter for subordinate legislation. It is considered that this is an appropriate matter for affirmative resolution procedure as any order made under the powers in 4(a) (b) and (c) would amend primary legislation. These changes could fundamentally widen the effect of the Bill in relation to the types of bags affected by the legislation.

Section 4(3): Registration with the local authority

Power conferred on: The Scottish Ministers
Power exercised by: Regulations made by statutory instrument
Paragraphs:

11. Section 4 places a requirement on anyone who supplies or intends to supply plastic bags to register with the local authority for any area where plastic bags are to be supplied. Section 4(2) sets out the information that the supplier must provide to the local authority. This is the name and address of the business, the name of the any other person with a controlling interest in the business and the address of any other premises or location within the local authority where bags are to be supplied

12. Section 4(3) gives powers to the Scottish Ministers to make regulations containing further provisions in respect of registration. The Bill states that this could include the time and method of registration, the information that is to be supplied and how the local authorities maintain the register.

13. It is submitted that this is an appropriate matter for subordinate legislation. It is considered that this is an appropriate matter for negative resolution procedure as the regulation making power will merely set out additional further administrative procedures in connection with registration and will not alter the minimum information that the Bill provides for.

Section 5(54): Provisions for returns and payments

Power conferred on: The Scottish Ministers

Power exercised by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

13. Section 5 sets out the requirement for suppliers to submit returns and payments in respect of the amount collected by the levy to the relevant local authority. The dates and intervals of these returns and payments are to be determined by the local authority, although they must not be any more frequent than monthly. Suppliers with more than one premises or location in a local authority area, may, with agreement from the local authority, vary these intervals. Section 5(1) provides that signs should be clearly displayed inside and outside regulated areas indicating that smoking is not permitted. Section 5(2) makes it an offence if person(s) in charge of a regulated area fail to display such signs. These signage requirements will serve to focus the mind of proprietors, and will make it clear to customers and staff that an offence may be committed if smoking takes place in the regulated area. The Bill does not specify detailed requirements with regard to signage, because it is not considered appropriate to include precise, technical details of this sort within primary legislation.

14. Section 5(4) gives power to the Scottish Ministers to make regulations prescribing the detailed requirements for the content of signs and the manner in which they are to be displayed. Section 5(5) places a requirement on the Scottish Ministers to
consult with certain bodies representative of the hospitality industry before making any regulations in respect of signs.

14. It is submitted that the details of the content of signs and the manner in which they are to be displayed are appropriate matters for subordinate legislation. It is thought to be appropriate that the Scottish Ministers should have the power to decide on the details, having consulted with interested parties/authority make a single return.

15. Section 5(5) gives powers to the Scottish Ministers to make further provision by regulations on the returns that are to be made and the times and methods of payment. The Scottish Ministers may wish to do this to ensure consistency throughout Scotland.

16. It is submitted that this is an appropriate matter for subordinate legislation. As with the power contained in section 4, it is considered that this is an appropriate matter for negative resolution procedure due to the administrative nature of the regulations that may be made.

Section 6(3): Provisions for record keeping

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

17. Section 6 sets out the record keeping requirements that are placed on suppliers in relation to the levy. Suppliers are required to keep full and accurate records of the number of non exempt plastic bags they provide to customers along with the amounts of the levy collected at each premises or location. Records must be kept for a period of 5 years from the date the return is made.

18. Section 6(3) gives powers to the Scottish Ministers to make further provision as to the records to be kept and the form and manner in which they should be kept by regulations. The Scottish Ministers may wish to do this to ensure consistency throughout Scotland.

19. It is submitted that this is an appropriate matter for subordinate legislation. Once again, it is considered that this is an appropriate matter for negative resolution procedure due to the administrative nature of the regulations that may be made.

Section 7(3): Collection of the levy and information provided to suppliers by the local authority

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

20. Section 7 requires local authorities to collect the amount of the levy collected from suppliers. Section 7(2) places a requirement on local authorities to provide certain information to any person who is or who in its opinion may become a supplier. This information relates to the registration requirements placed on suppliers by the Bill, the frequency and dates about how returns and payments are to be made, the form of the returns and any supporting information required and the method of payment.

21. Section 7(3) gives powers to the Scottish Ministers to make regulations containing further provision on the collection of the levy by the local authority and on the form and manner in which they provide the information under section 7(2). The Scottish Ministers may wish to do this to ensure consistency throughout Scotland or if it should become apparent that suppliers or potential suppliers require additional information to be provided.

22. It is submitted that this is an appropriate matter for subordinate legislation. It is considered that this is an appropriate matter for negative resolution procedures as the regulations may only set out administrative arrangements for information sharing.

Section 10(4): Powers of authorised officers

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

23. Section 10 requires local authorities to authorise in writing at least one person to exercise the powers given to it under the Bill. Section 10 also provides powers to the authorised officers to enable them to carry out their duties. These powers are set out in detail in the schedule to the Bill. These powers include authority to require information and assistance from suppliers and their employees, authorised officers being able to enter premises where they believe non-exempt plastic bags or information relating to them are being kept and the removal and retention of information relevant to the levy. Section 10(4) allows Scottish Ministers to make further provision in the exercise of these powers by regulations.

24. It is submitted that this is an appropriate matter for subordinate legislation. It is considered that this is an appropriate matter for affirmative resolution procedure. The existing provisions involve a degree of necessary interference with the property of suppliers. Further provisions in relation to the exercise of these powers may add to that interference. While there are restrictions and safeguards built into the schedule to ensure that the powers of authorised officers are exercised appropriately, for example a warrant from the Sheriff must be obtained before a premises can be entered by force, it is important to ensure that any changes to the exercise of the powers of authorised officers do not contravene any of the rights.
Section 14(7): Amount of Civil Penalties

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

25. Section 14 enables local authorities to issue civil penalties where a person fails to; register as a supplier, submit a return, pay the amount of the levy they have collected to the local authority, keep records or comply with a lawfully made requirement from an authorised officer. The amount of the penalty for each infringement is set at £100.

26. The order making power given to the Scottish Ministers in section 14(7) enables them to increase the amount of the penalty.

27. It is submitted that this is an appropriate matter for subordinate legislation as it could be determined at a future date that it is necessary to increase the amount of the penalty to reflect inflationary increases and keep the amount of the penalty at an appropriate amount. In that event, the amount of the penalty should be capable of being increased without requiring a further Bill. This is a power to modify the effect of primary legislation. Further, the potential increase increase is unrestricted by amount and affirmative resolution procedure is considered appropriate.

Mike Pringle MSP
Stewart Maxwell MSP
Member in Charge of the Bill
30 June 2005
January 2004
The Mental Health (Specified Persons Correspondence) (Scotland) Regulations 2005, (SSI 2005/408)

On 5 September 2005, the Committee asked for an explanation of the following matter:

The Committee asks the Executive to explain why the term “specified person” has been specifically defined in regulation 2, given its definition in section 281(9) of the parent Act, while the term “relevant item” in regulation 5(2) has not been specifically defined.

The Scottish Executive responds as follows:

It is thought appropriate to define the term “specified person” in these regulations to make it clear what the term means in this context and to distinguish it from its use elsewhere in the parent Act.

Although the term is defined in section 281(9) of the Act, the same term is used in several other places in Part 18 of the Act to designate completely different sets of persons. For example, the phrase “specified persons” is used again in section 284 to designate patients who are to be subject to regulation of their telephone calls. These are not the same specified persons as those covered by the definition in section 281(9) which relates only to correspondence.

In addition, section 286 authorises certain persons to be specified in regulations in connection with security provisions. Again, this is a different set of “specified persons” from those covered by the definition in section 281(9) or any regulations made under section 284.

It is not thought that it is necessary to define the term “relevant item” because it is used in the Act only in the context of correspondence and its meaning is clear.

Scottish Executive Health Department

The Mental Health (Period for Appeal) Regulations 2005, (SSI 2005/416)

On 5 September 2005, the Committee asked for an explanation of the following matters:

With regard to SSI 2005/411, the Committee seeks clarification of the use of the word “may” in paragraph 1(2) of the Schedule to the Regulations as it is unclear whether this calling of a meeting by the Convener is meant to be mandatory when certain conditions are met.

With regard to SSI 2005/416, the Committee noted that the word “(Scotland)” does not appear in the title to the instrument or in the citation provision in regulation 1 and the Committee asks the Executive for an explanation of this omission.

The Scottish Executive responds as follows:

The Executive accepts the Committee’s points in relation to both instruments, and is grateful to the Committee for bringing them to their attention. On SSI 2005/411, the reference in paragraph 1(2) of the Schedule is erroneous, as the intention is that where certain conditions apply a meeting shall be convened.

In the circumstances, the Executive will bring forward further instruments to revoke these instruments and address the matters raised, whilst otherwise reflecting the content of these instruments. In the case of SSI 2005/411, the Executive will also take the opportunity to correct the minor printing errors drawn to its attention.

Scottish Executive Health Department
The Regulation of Scallop Dredges (Scotland) Order, (SSI 2005/371)

On 5th September 2005 the Committee asked the Executive for an explanation of the following matter –

“It appears to the Committee that this Order imposes technical standards. However, there is no indication of whether it has been notified to the European Commission under the Technical Standards Directive. The Executive is asked to confirm whether this notification has been made and, if so, why no explanation has been included in the Explanatory Note or Executive Note.”

The Scottish Executive responds as follows:

1. This Order has not been notified to the European Commission under the Technical Standards Directive.

2. The Executive notes the Committee’s view that this Order imposes technical standards. In light of the Committee’s view the Executive is re-considering whether any of the provisions of this Order fall to be notified under the Technical Standards Directive.

3. The Executive understands that none of the provisions of either the Scallop Fishing Order 2004 (SI 2004/12) or the Scallop Fishing (Wales) Order 2005 (SI 2005/1717 (W.132)) were notified to the European Commission under the Technical Standards Directive. Accordingly, in re-considering whether any of the provisions of this Order fall to be notified under the Technical Standards Directive the Executive proposes to consult with DEFRA and NAWAD.

4. The Executive will advise the Committee of the outcome of its re-consideration in due course.

Scottish Executive Environment and Rural Affairs Department
SUBORDINATE LEGISLATION COMMITTEE  
24th Meeting, 2005 (Session 2)  
Tuesday 13th September, 2005  
General Correspondence from the Scottish Executive

Note from the Clerk
1. The Subordinate Legislation Committee, in addition to points directly relating to the terms of its reports on Scottish Statutory Instruments, raised a number of general issues in the weeks leading up to summer recess 2005. The Executive’s responses to these points were received at the end of June and beginning of July 2005 and are presented for the Committee’s information and discussion.

LETTER A

Subject  
Number of instruments laid in the week commencing 6 June 2005

Reference  
Subordinate Legislation Committee, Official Report, Tuesday 14 June 2005, Column 1093

2. The Committee may remember that it was concerned by the number of instruments laid prior to summer recess 2005. 
The Committee is invited to note the response received from the Scottish Executive in relation to this matter.
The Deputy Convener (Gordon Jackson): I welcome everyone to the 20th meeting in 2005 of the Subordinate Legislation Committee. I have received apologies from Mike Pringle, and Sylvia Jackson is away at a conference. I expect that the other committee members will arrive—no-one else said that they would not be here.

I have a little note for the record. I do not know what we can do about it, but there is almost an overload of instruments to consider—I think that there are 32 or 33 of them. It is not so much a problem for us, but for the legal staff and others. Perhaps such an overload is inevitable, or perhaps the Executive should think a little about spacing out the instruments, although I do not know how easy that would be.

Mr Adam Ingram (South of Scotland) (SNP): I wonder whether the approaching end of the parliamentary year is a factor. It seems that the Parliament’s agenda tends to get consumed by bills, instruments or whatever when the end of the parliamentary year approaches. Perhaps why that happens and why things cannot be spread more evenly throughout the year should be considered, although I do not know by whom.

The Deputy Convener: I do not know either. I invite the clerk to say what the mechanism would be.

Ruth Cooper (Clerk): We could write an official letter to the Executive on behalf of the committee on the planning of the programme, if members agree.

Christine May (Central Fife) (Lab): I do not disagree with that suggestion. However, there has been a significant improvement in quality from last year, albeit that there is an enormous volume of material to discuss. I think that we will find it necessary to comment on fewer instruments.

The Deputy Convener: That is a fair comment. The other committee members have now arrived.

Murray Tosh (West of Scotland) (Con): Here comes the quorum.

The Deputy Convener: The meeting has already started—the committee was quorate. We missed you terribly, but we started.

We were saying that there seems to be an overload of instruments to consider. We are receiving instruments in huge batches—there are more than 30 to consider at this meeting. That may be inevitable. Perhaps the process cannot be controlled and is demand led or, as Adam Ingram said, the overload may be to do with the end-of-term rush. However, we decided that we would write to the Executive to point out that the process must be measured, for the benefit of staff apart from anybody else. Christine May rightly wanted to make the generous point that the quality of instruments has
improved and that there are not as many that need to be corrected as there used to be. However, the matter should be discussed, as there is a huge overload of instruments to be considered.

**Murray Tosh:** There is not only an overload on this committee. Subject committees will also be overloaded. They will not be able to meet on the final Wednesday before the recess because there is an extra plenary allocation. Some subject committees will find it difficult to slot in a discussion on instruments if there is a reason to have one—for example, if a motion to annul is lodged and so on.

**The Deputy Convener:** We will make that point. Are members happy with that suggestion?

**Members indicated agreement.**
Dear Sylvia

Your Clerk wrote to the Executive on 15 June 2005 about the number of instruments that were laid in the Parliament in the week beginning 6 June. I thought it might be helpful if I replied to you on the issue.

The Parliamentary summer recess means that, as in previous years, a large number of negative SSIs had to be laid by the deadline to comply with the current Scottish rule that requires there to be a period of 21 sitting days between the date on which the SSI is laid and the date on which it comes into force. The effect of the 21 day rule is that all negative instruments that are due to come into force on 1 July had to be laid by no later than 9 June and those that had to come into force at any time during the summer recess had to be laid no later than 10 June. In consequence, instruments that could otherwise have been laid over the summer had to be brought forward and bunched.

The Executive does try to stagger the laying of SSIs in the period leading up to the deadline by which instruments need to be laid in compliance with the rule (e.g. by bringing them even further forward). However, the workload pressures and the desire to get the SSIs right often mean that instruments are still being worked on right up until the deadline.

My officials give warning, to your Clerks and the Chamber Desk, of the deadlines for laying SSIs prior to the recess. We have to plan to meet the known peaks and it is a significant amount of work at this end, for solicitors, particularly those who are also stylists, and for the SSI clerks. I appreciate the difficulties placed on the Chamber Desk and the SLC but we would hope that the Parliament is also able to accommodate for known pressures of business such as this.

The letter also refers to the volume of instruments causing difficulties for lead Committees work programmes. That point is understood, but hopefully those pressures will be assuaged by the fact that Parliament has 40 days to consider the SSIs and lead Committees will have most of September to complete their consideration.
Finally, I note the kind words about the improved quality of the drafting standard of instruments. My officials have seen these and I am sure that they appreciate such recognition of their hard work.

MARGARET CURRAN
LETTER B

Subject
Henry VIII powers

Reference
Subordinate Legislation Committee, Official Report, 24 May 2005, Column 1049

3. The Executive’s response on this matter is in relation to the question raised by Christine May MSP on 24 May 2005, that in each case where an Henry VIII power is used, where secondary legislation has the power to amend primary legislation, the regulation-making power should be subject to affirmative procedure. The response received indicates that the Executive considers that there may be occasions where affirmative procedure for Henry VIII powers would be “unnecessarily burdensome or restrictive.” The Executive has accepted that it would be required to provide an explanation for the position adopted.

4. The Committee may therefore wish to consider whether the Executive should explain, in its accompanying delegated powers memorandum, the reasons for affirmative procedure not being adopted when a Henry VIII power is used.
Christine May (Central Fife) (Lab): I wish to raise a general point about Henry VIII powers and the committees' view—which the Executive has agreed with on numerous occasions—that the exercise of a Henry VIII power should be subject to the affirmative procedure, rather than the negative. There are a number of instances where the Executive has agreed with the committee and has lodged amendments accordingly. There has also been one occasion when that did not happen. Could we raise the issue with all bill teams? It would seem to make more sense to do things the other way round: the Executive should accept the affirmative procedure as the norm and should explain why it chooses to use the negative procedure on those occasions when it does that instead.

The Convener: Yes. Are we all agreed on that?

Members indicated agreement.
Dear Ruth

SUBORDINATE LEGISLATION COMMITTEE – BILLS CONSIDERATION

Thank you for your letter of 25 May 2005 in which the Committee made observations about the use of so-called “Henry VIII” powers in Executive Bills.

The Executive agrees that it will normally be appropriate for any subordinate legislation that amends primary legislation to be subject to affirmative procedure. There may however be occasions on which this would be unnecessarily burdensome or restrictive. In such circumstances the Executive would accept that it would be appropriate that it should be required to provide an explanation for the position adopted.

Yours sincerely

COLIN TROUP
LETTER C

Subject
Executive co-ordination with UK Departments/21 Day Rule

Reference
Subordinate Legislation Committee, Tuesday 19 April 2005, Column 987

5. The Executive had explained that there had been a delay with this instrument due to co-ordination with the relevant UK department and that as a result the 21 day rule had been broken. The Committee therefore wished to clarify what communication took place between the UK department and the Scottish Executive in relation to this instrument. The Committee also wished to establish whether the 21 day rule had similarly been broken at Westminster.

6. The Executive states in its response that it works very closely with UK counterparts to seek to ensure cooperation.

7. The Executive also states that the 21 day rule operates differently at Westminster, where it is not a rule of law but a rule of practice. The Executive explains that, unlike at the Scottish Parliament, where the clock stops for recesses (of more than four days), at Westminster recess days do count for the purposes of the rule. This difference allowed the English regulations to meet the deadline and avoid breaching the 21 day rule.

8. The Committee is invited to comment on this correspondence.
The Convener: We raised two issues of concern in relation to these regulations, the first of which was the breach of the 21-day rule. Members will recall that we asked the Executive whether it was aware of the timescale involved. The Executive response argues that as the Department of Health did not confirm the final agreed changes to the English regulations until 8 March, the Executive had only from that date until 29 March to lay the regulations. Does any member have a point to raise on the response?

Murray Tosh: Did the English regulations also fail to meet the deadline?

The Convener: We can find that out.

Murray Tosh: It becomes a footnote. Nonetheless it strikes me that what the Executive did in the circumstances was not unreasonable. I presume that there was good cause for both sets of amendment regulations to reflect each other and to come into effect on the same day, and the Executive per se cannot be criticised for the delay.

However, there might be a fault in the system, which would be worth knowing about. There is an indication that Scottish regulations follow UK regulations to a considerable degree and that the Scottish Executive may be left to hang on for decisions on points of substance before it knows what it wishes to include in its regulations. That probably happens more often than we see and may reflect a lack of equality between the two Governments regarding the detail of regulations. We may regard this as a politically contentious issue, rather than as an administrative problem that is deserving of severe censure. I am inclined to say that we are satisfied with the Executive's explanation. However, at some stage the committee may wish to examine the interface between UK and Scottish statutory instruments.

Mr Maxwell: I agree with what most of what Murray Tosh has said. I was curious about some of the wording in the Executive's response, which states that regulations "were only confirmed by Department of Health on 8 March."

Was the decision taken on 8 March or was the Scottish Executive informed of it on that date? Those are two entirely different things.

It would also be interesting to know whether the English regulations breached the 21-day rule. If the decision was taken on 8 March, the English regulations would have breached the rule; however, if the rule was observed in England that tends to suggest that the decision was taken earlier and was revealed on 8 March, when information was given to the Scottish Executive.

The Convener: Do we have time to write back to the Executive, or do we have to report on the regulations today?
**Ruth Cooper (Clerk):** I am afraid that we must report on the regulations today.

**Mr Maxwell:** We can report on the regulations, but we could still ask about what happened elsewhere. Murray Tosh is right to say that there may be an administrative problem between what is happening in London and what is happening here in Edinburgh. That problem may need to be sorted out.

**The Convener:** Absolutely. Ruth Cooper wants to clarify an issue.

**Ruth Cooper:** I should clarify the point that Stewart Maxwell made about the 21-day rule. From legal advice, I understand that, although the rule is a precedent at Westminster, it is not statutory, as it is here. However, it might still be of interest to find out what the timescale was.

**Mr Maxwell:** The timescale will be the same, regardless of whether the rule is statutory.

**Ruth Cooper:** We can pursue the matter.

**Murray Tosh:** The issue that Ruth Cooper raises is important, because it offers an insight into the way in which the two Governments may handle statutory instruments. If the requirement at Westminster is less onerous, the issue may be for us to establish that that is the explanation for what has happened and to press for Westminster to amend its practices when it is dealing with parallel regulations, to ensure that the greater responsibility on the Scottish Executive can be honoured. An interesting inquiry into the issue may be held. For that reason, I would like to have the information that we have requested, although I do not think that it is germane to these regulations, which will become history.

**The Convener:** We will do two things. We will send a letter to the Scottish Executive and ask all the questions that we have highlighted. We will also draw the attention of the lead committee and the Parliament to the explanation that we have received and indicate that there has been a justifiable breach of the 21-day rule.

The Executive acknowledges that regulation 6 ought to have included a cross-reference to the principal regulations and indicates that it will make an appropriate amendment when the principal regulations are next amended. Do we agree to bring that defective drafting to the attention of the lead committee?

**Members indicated agreement.**
On 3 May the Committee requested information on the following matters.

1. The Committee would be grateful for any background information in relation to the Executive’s coordination of the drafting and laying of Scottish statutory instruments with UK departments.

2. The Committee would be particularly grateful for information as to whether in this instance the equivalent English regulations broke the 21 day rule at Westminster.

The Scottish Executive responds as follows:

First question

1. There are no formal protocols governing the process of coordination. In each case the Executive works very closely with its UK counterparts to seek to ensure close cooperation and a good flow of information so that such coordination can be achieved.

Second question

2. In this instance the equivalent English regulations, the National Health Service (Charges for Drugs and Appliances) and (Travel Expenses and Remission of Charges) Amendment Regulations 2005 (SI 2005/578) (“the English regulations”), did not break the 21 day rule at Westminster. The English regulations were made on 9 March, laid on 10 March and came into force on 1 April.

3. The Executive observes that the 21 day rule operates differently at Westminster. There, it is not a rule of law but a rule of practice, set out in Statutory Instrument Practice. In this context it is relevant to note that, at Westminster, recess days do count for the purposes of the rule. This allows UK departments greater flexibility than is available to the Executive and means that in identical circumstances UK departments may comply with the UK 21 day rule while the Executive is not able to comply with the Scottish 21 day rule. An additional effect of the UK 21 day rule is that, in the run up to a recess, it is not necessary to lay all instruments coming into force during the recess 21 days before the recess begins, whereas the result of the 21 day rule in the Scottish Parliament is to create bottlenecks at certain dates.

4. The effect of these differences in March/April 2005 was that in Scotland, 3 March was the latest date for laying regulations to come into force on 1 April, whereas in England the latest date was 11 March. Department of Health officials finalised amendments to the English regulations on 8 March and were able to lay the English regulations on 10 March, within the time required to comply with the 21 day rule at Westminster.
LETTER D

Subject
Date of making a request

Reference
Subordinate Legislation Committee, Tuesday 31 May 2005, Column 1074

9. Following consideration of the drafting of the Additional Support for Learning (Appropriate Agency Request Period and Exceptions) (Scotland) Regulations 2005 (SSI 2005/264), the Committee requested that the Executive provided general clarification on its approach to the calculation of the date on which a request is “made”.

10. The Committee is invited to comment on the Executive’s response in relation to this matter.
The meaning and practical effect of regulation 2 may be unclear. It provides that an appropriate agency must comply with a request "within a period 10 weeks starting on the date when the request was made by the authority".

A "request" is defined in section 28(1) of the Education (Additional Support for Learning) (Scotland) Act 2004 as a request that is in writing and which "contains a statement of the reasons for making the request."

It is not clear what "made" means in that context: it is not clear whether the 10-week period will commence only when the appropriate authority receives the request or, alternatively, as soon as the written request is signed or posted.

Christine May: Given the fairly well-publicised Royal Mail delivery results, it might be important for recipients to know whether the date on which a request became effective was the date on the postmark or the date when they received the letter. Clarification would be welcome.

Mr Maxwell: I would think that the relevant date would be the date on which the request was received. That would be in line with the Freedom of Information (Scotland) Act 2002, under which time limits apply from the date on which an authority receives a freedom of information request. As the point is not absolutely clear, we should seek clarification on it, but the relevant day must be the day that the request is received; I cannot imagine that it would be the day on which it was posted in the high street.

The Convener: I hope that that is the case.

Murray Tosh: Should there not be standard practice throughout the governmental machinery and ought the same rule not to apply in every circumstance?

Christine May: No. I can think of some emergency situations—perhaps the closure of a dangerous operation—in which an order becomes effective as soon as it is made, regardless of whether the subject of that order has received the paperwork.

Murray Tosh: In that case, there might be a graded policy that provides for the date of issue to be the relevant date, but there ought to be a presumption that the date of receipt is the relevant date unless there is a justifiable reason for treating some circumstances differently.

The Convener: We will write to the Executive to ask for clarification on that point. I gather that the same issue arises in regulation 3(3). In addition, we will ask what the standard practice is.
Mr Maxwell: If there is one.

The Convener: Indeed. We will also ask what exemptions there might be from that standard practice, as we accept that there may be exemptions. Is that agreed?

Members indicated agreement.
Dear Ruth

DATE OF MAKING A REQUEST

Thank you for your letter of 25 May 2005, in which the Committee sought general clarification on the approach adopted by the Executive in relation to the calculation of the date on which a request is “made”. In particular, the Committee asked whether the relevant date is generally calculated as the date of issue or date of receipt. The Committee sought information on the standard practice of the Executive in this regard.

The Executive does not have a standard practice on this point as a matter of policy. Depending on the particular circumstances, the relevant date might be the date of issue or sending of a document, the date of receipt, or some other specified date – for example the day after posting by first class post. Generally the Executive will seek to use the appropriate wording in any particular context to make the intention clear.

In relation to the use of the word “made”, again the Executive does not have a standard practice and the meaning of the wording used must be interpreted in its particular context. For example, an order will be “made” when it is signed.

Where there is a reference to a request being “made” it would be the Executive’s view that a request would not normally be “made” until it was effectively communicated to the recipient. In this regard it might be helpful to note the decision of the High Court of Justiciary in the case of Elliot, Applicant 1984 SLT 294. Dealing with the question whether an application had been “made” in terms of section 444 of the Criminal Procedure (Scotland) Act 1975, Lord Justice-Clerk Wheatley said (at page 295):

“Generally speaking when it is provided that an application shall be made with a timetable in view, the application is not made, in that it is not completed, until it is in the hands of the person to whom it is addressed. If it is maintained that this general rule does not apply in a given situation it must be shown that there are circumstances which warrant such a non-application. In a statutory case this may be shown from the context in which the provision is made or from the fact that the application of the general rule would either make the provision incapable of practical performance or prevent the benefit which the provision was intended to provide from being realised.”
That approach has been endorsed for example in *Adam v Secretary of State for Scotland* 1988 SLT 300 and by the Court of Appeal in England in *Camden London Borough Council v ADC Estates Limited* (1991) 61 P&CR 48.

The Committee will also of course be aware of the terms of paragraph 4 of Schedule 1 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999 (SI 1999 No 1379), which in short provides that, where a document is to be served by post, service is deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post unless the contrary is proved. In other words, it would be open to the recipient of a letter to prove that it was actually received at a later date.

Yours sincerely

COLIN TROUP
11. The Committee was concerned that the consultation requirement contained in article 9 of regulation EC 178/2002 of the European Parliament and of the Council is not referred to in the preambles to relevant regulations. This matter had been raised in the past and the Committee wished to establish the Executive’s position in relation to this matter.

12. The Executive has responded to the Committee to state that it will change its policy in this area and narrate any requirement to consult which is imposed by domestic or European legislation as a precondition for the making of subordinate legislation.

13. The Committee is invited to comment on the Executive’s response in relation to this matter.
The Convener: The committee was concerned that the consultation requirement contained in article 9 of regulation EC 178/2002 of the European Parliament and of the Council is not referred to in the preambles to these regulations. The Executive is still saying that it is normal drafting practice not to include a reference to article 9 in the preambles to orders and regulations made under European directives. Members will be aware that that approach is different to the approach that is taken in Westminster.

Initially, we were concerned that there was a vires issue but we have to be content that the consultation has taken place and that there is no vires issue. We are simply talking about drafting practice. We can take this up in our review and suggest that, in the interests of transparency, it would be better if the preambles included a reference to article 9 of regulation EC 178/2002. The Executive points out that the footnotes to the preambles contain a form of reference to article 9, but it is not terribly transparent; it would be possible to mention article 9 by name. Perhaps we could go for the middle ground by suggesting that the Executive could be a little clearer in the footnotes and by returning to deal with the issue in our review.

Christine May: I do not disagree, and I am prepared to support the recommendation. However, for the record, I say that we appear to have reached an impasse. We are not going to get agreement. There is a legal basis for the route that the Food Standards Agency has taken, and we have to accept that. Nevertheless, I find the reason for refusing to countenance a reference to article 9 of regulation EC 178/2002 in the preambles a little perverse—maybe that is too strong a word, but it is almost perverse. The fact that such a thing was never done in the old Scottish Office is not a good enough reason for not doing it now. Practice has been changed at Westminster in the interests of transparency and clarity. It is reasonable that reference to article 9 be given the same prominence in our instruments. I hope that we will refer to that point in our report on our review of the regulatory framework.

Gordon Jackson (Glasgow Govan) (Lab): I agree. It has not been Scottish practice, but one is tempted to say, "So what?". Westminster has said that whether including a reference to the article is strictly necessary or not, it makes instruments clearer and it is better practice. It is not clear to me why we should sit on our high horse and say, "We've never done it like that." Maybe I am missing something.

The Convener: I do not think that you are.

Mr Maxwell: I support what colleagues have said on the ground of clarity. That is the important point. The convener's opening remarks referred to being different from Westminster, but whether we are different from Westminster is neither here nor there. The problem is that the Executive has not explained why the particular
route was chosen. If it gave us a solid reason we might feel that it was all right, but we do not know. The driving force behind what we are saying is that the regulations must be made as clear as possible for the user, which I absolutely support. Whether the situation is the same or different from Westminster is irrelevant.

**Murray Tosh:** I have no objection to the convener’s suggestion, which is an attempt to get us closer to some sort of agreement. I agree with colleagues. The regulations fall short of the standard of drafting that we have asked for. The drafting is defective and we should stick to our guns. I agree that there is probably no point in writing letters backwards and forwards to get the same old answer. I have no difficulty with simply stating in all our reports on orders that do not cite article 9 of regulation EC 178/2002 that the drafting is defective. We can note our position, but we should make it clear and hold to it until the Executive either comes up with a really convincing explanation or—as I think it will have to do at the end of the day—accepts the consistency and logic of what we say.

**The Convener:** Adam, do you have any further points?

**Mr Adam Ingram (South of Scotland) (SNP):** No. Colleagues have covered the ground. Your suggestion is fair enough, convener.

**The Convener:** As Murray Tosh said, we will inform the lead committee and the Parliament that the drafting is defective, which we can elaborate in our letters to them. We will take the issue further in our review of the regulatory framework, so that we get the clarity to which Christine May and Stewart Maxwell alluded. We will send a letter to the Executive informing it of our position, but we are not going to go backwards and forwards. We will address the issue in our review and take it up later.

**Mr Maxwell:** Are you going to include your suggestion on making the footnote clearer?

**The Convener:** Yes.
Dear Ruth

ARTICLE 9 OF REGULATION (EC) No. 178/2002
THE MISCELLANEOUS FOOD ADDITIVES AMENDMENT (SCOTLAND) REGULATIONS 2005 (SSI 2005/214)
THE SMOKE FLAVOURINGS (SCOTLAND) REGULATIONS (SSI 2005/215)

In its letter of 27 April the Committee made a number of observations about references to certain consultation requirements in the preamble to and footnotes of SSIs. The Executive replied on 4 May, undertaking to write again to the Committee after it had reviewed its long-standing practice on the point.

That review has now been completed. The Executive notes firstly that there is no legal obligation to cite consultation requirements in the preamble to an instrument, and that failure to do so has no effect upon the validity of that instrument. From the legal point of view, it is the fact or otherwise of consultation which is relevant to validity. It is also the case that not every precondition of validity is narrated in the preamble. The decision whether or not to do so in this case is therefore a matter of appropriate drafting practice; ultimately the standard must be what is most useful to the user of the instrument.

The Executive considers that the relevant information could be conveyed in a number of equally suitable ways – for example in a footnote or in the explanatory note. However, the Executive notes the Committee’s view and is content to adopt the approach suggested. It therefore proposes in future to adopt the approach that the preamble to an instrument should narrate any requirement to consult which is imposed by domestic or European legislation as a precondition for the making of subordinate legislation. The Executive does not consider that there is any merit in extending this approach to any requirement to consult or inform Community institutions under a Community instrument, and does not understand the Committee to be suggesting otherwise; it therefore proposes to maintain its current practice on that point.

Yours sincerely

[Signature]

COLIN TROUP