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

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

Lorna Drummond, Faculty of Advocates;
Professor Chris Himsworth, School of Law, University of Edinburgh;
Dr Aileen McHarg, School of Law, University of Glasgow; and
Professor Colin T Reid, Professor of Environmental Law, University of Dundee

and receive supporting technical clarification from Iain Jamieson, Committee Adviser on the inquiry.

2. **Delegated powers scrutiny**: The Committee will consider a response to points raised on the following bill—

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

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

the Mental Health (Certificates for Medical Treatment) (Scotland) Regulations 2005, *(SSI 2005/443)*

the Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provision) Order 2005, *(SSI 2005/452).*

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

the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.11) (Scotland) Order 2005, *(SSI 2005/455).*
5. **Instruments subject to annulment:** The Committee will consider the following—

   the Food Labelling Amendment (No.2) (Scotland) Regulations 2005, (SSI 2005/456).

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

   Act of Adjournal (Criminal Procedure Rules Amendment No.4) (Mental Health (Care and Treatment) (Scotland) Act 2003) 2005, (SSI 2005/457).

   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/S2/05/26/1  
Submission from Dr Aileen McHarg SL/S2/05/26/2  
Submission from the Faculty of Advocates SL/S2/05/26/3  
Inquiry information pack No number given  
- for Members information only

**Agenda Items 2 - 6**

Legal brief (Private) – to follow SL/S2/05/26/4

**Agenda Item 2**

Response from the Non Executive Bills Unit SL/S2/05/26/5

**Agenda Item 3**

Executive responses SL/S2/05/26/6

**Agenda Item 4 to 6**

Copies of instruments (circulated to Members only)
SUBORDINATE LEGISLATION COMMITTEE

26th Meeting, 2005 (Session 2)

Tuesday 27th September, 2005

Inquiry into the Regulatory Framework in Scotland – Phase Two

Submission by Dr Aileen McHarg, School of Law, University of Glasgow

The specific issues raised by the consultation paper are interconnected in various ways. Accordingly, I have organised my comments under three broad headings:

- Procedures for Parliamentary scrutiny of subordinate legislation;
- Amending subordinate legislation;
- Choice of procedure.

1. Procedures for Parliamentary Scrutiny of Subordinate Legislation

The consultation paper outlines eight different procedures which may be used for scrutinising delegated legislation. It seems to me that this is too many, and the background paper notes that some are rarely used.

There are two general considerations to be taken into account when designing scrutiny procedures. One is the importance of the measure in question; the other is how quickly the instrument requires to be made. Both, clearly, are variable factors.

*Importance*

The more important the measure, the greater the degree of scrutiny required. There are essentially three potential levels of scrutiny available: no formal scrutiny, Parliamentary disapproval; Parliamentary approval. It therefore seems logical that there should be no more than three basic procedures by which delegated legislation can be made. There may be a case for a fourth procedure along the lines of the current super-affirmative procedure (Parliamentary approval plus). However, this issue is connected with the question of whether delegated legislation should be amendable and will be discussed further below.

I agree with the background paper that the current class 7 procedure (instrument not required to be laid) should be discontinued. It seems unnecessary to have more than one category of procedure which involves no formal scrutiny, and wrong in principle that the Parliament should not at least be informed of the use being made of delegated powers.

*Speed*

There are two problematic issues here. One is how much time the Parliament requires in order to scrutinise instruments properly. The other is the need for some instruments to come into force quickly, before the time for Parliamentary scrutiny has elapsed.
There does not appear to be any particular reason why the Parliament should have forty days for scrutiny of measures subject to affirmative or negative resolution, rather than sixty days or some other period. The only consideration is that the scrutiny process should not take so long that it compromises the flexibility that is one of the reasons for employing delegated rather than primary legislation.

Cases of urgency are dealt with at present by allowing some instruments to come into force before the scrutiny period has elapsed (class 3 and 5 procedures). For the reasons given in the background paper, this approach is highly unsatisfactory. It also offends the principle of legal certainty that legislation may be brought into force yet be annulled (or cease to remain in force) within a very short period. It would be more desirable to have an explicit procedure for use in emergencies. This might involve a much shorter period for Parliamentary scrutiny. Alternatively, there might be no initial scrutiny, but the mandatory inclusion of a sunset or review clause in the instrument itself.

2. Amending Subordinate Legislation

I agree with the consultation paper that there is no objection in principle to the Parliament having the power to amend subordinate legislation. In addition, a strong case can be made that the lack of an amending power significantly reduces the effectiveness of Parliamentary control over delegated legislation in practice. To reject an instrument altogether will often be a disproportionate response to the concerns that the Parliament has about a particular instrument. It is also a more serious matter in party political terms than merely amending an instrument. Hence, the Parliament's powers may be more theoretical than real.

On the other hand, the consultation paper notes that allowing the Parliament to amend subordinate legislation might conflict with the reasons for delegating the power to Ministers in the first place. Particularly relevant here are the need for greater speed than normal legislative procedures allow and the complexity of the issues dealt with by subordinate legislation. These objections can be overstated. Even with a power of amendment, scrutiny procedures for delegated legislation would be significantly less onerous than for primary legislation. A possible model might be for the lead committee (taking account of the views of the Subordinate Legislation Committee) to decide whether or not amendments should be made, with the whole Parliament only having the power to decide whether to approve the instrument in its original form, approve it as amended, or reject it altogether. In addition, the fact that the scrutiny process is in the hands of the Subordinate Legislation Committee and relevant subject committees makes the complexity argument less compelling than it might be at Westminster. Nevertheless, if the practical objections are thought to be significant, a compromise might be to allow amendment of certain particularly important instruments only. In other words, the “super-affirmative” procedure would be one which allows for amendment as well as requiring positive Parliamentary approval.

Another objection raised by the background paper is that giving the Parliament power to amend subordinate legislation might make it to some extent responsible for making the instrument, and that this would run counter to the assumption made in the Scotland Act that subordinate legislation would be made by Ministers. This does
not seem to me to be a major difficulty. In the first place, the provisions in the Scotland Act relating to subordinate legislation apply only to measures made under that Act and not to delegated powers conferred by other enactments. Secondly, the Scotland Act is a constitutional measure and, as such, should not be given a narrow, technical interpretation. If there are strong principled and practical arguments in favour of the Parliament having a power to amend subordinate legislation, then the literal wording of the Scotland Act should not be allowed to stand in the way.

Thirdly, if it is still thought to be necessary that Ministers should be wholly responsible for “making” delegated legislation, that position can be formally maintained by expressing the Parliament’s power as a power to grant conditional approval or disapproval, rather than a power of amendment per se. As such a power is envisaged in the background paper (paras 14 – 15), this might be thought to add undesirable delay into the subordinate legislation process, as the Scottish Ministers would have to decide whether to relay the instrument subject to the amendments proposed by the Parliament, which would then have to be scrutinised afresh. However, this could be avoided by providing that so long as the amendments are made within the original scrutiny period the conditional approval takes effect to allow the instrument to come into force (or the conditional disapproval ceases to have effect to prevent it coming into force). Allowing time for this to occur adds weight to the case for extending the current scrutiny period. The existence of a power of amendment or conditional approval/disapproval would also further strengthen the case against instruments coming into force before the Parliamentary scrutiny process has expired.

Finally, the background paper notes that there would be less need for an amendment power if the Parliament were routinely consulted (along with the general public) on draft instruments prior to them being laid before it for approval. Although, as my submission to Phase One of the Committee’s inquiry made clear, I am in favour of a general duty on Ministers to consult before introducing regulatory measures, I think that this is a much less satisfactory alternative. One reason is that I think it is undesirable in principle to treat the Parliament as just one consultee amongst others. The Parliament is not just another interest group; rather, its function is to represent the general interest and to adjudicate in conflicts between general and particular interests. Accordingly, the two stages of, first, finding out the views of affected parties and, second, making a final decision about where the balance should be struck between conflicting interests are conceptually different and ought to be kept separate in practice. A second reason why this is less satisfactory than an amendment power is because a right to be consulted is not the same as the right to have one’s views prevail. The Parliament ought not to be dependent upon the goodwill of the Executive for its opinions about the appropriate content of subordinate legislation to be taken into account.

3. Choice of Procedure

The questions of how to determine which scrutiny procedure should be followed for particular pieces of delegated legislation and which rules ought to be subject to a revised statutory instruments regime are perhaps the most difficult ones raised by the consultation paper.
One of the biggest weaknesses of the Statutory Instruments Act 1946 (and, by implication, the current Scottish regime) is its permissive nature. It is up to those drafting legislation which contains delegated rule-making powers (i.e., usually the very Ministers who will be the beneficiaries of those powers) to decide whether the Statutory Instruments Act applies at all and, if so, to what extent. The objections to this are self-evident. However, they are somewhat mitigated in practice by the fact that the Subordinate Legislation Committee has the power to scrutinise delegated powers when they are conferred, and may comment on the appropriateness of the procedure chosen (as does the House of Lords Delegated Powers and Regulatory Reform Committee for delegated powers conferred on Scottish Ministers by UK statutes). When scrutinising delegated legislation, the Committee can also comment on unexpected or inappropriate uses of delegated powers, and this could include uses which are inappropriate given the level of scrutiny to which the instrument is subject.

Moreover, the alternative approach whereby the choice of procedure is determined ex post facto according to the “objective” importance of the measure in question would appear to raise significant difficulties. An attempted legislative solution would be particularly problematic. There would be severe definitional problems; it would create a risk of vexatious challenges to delegated legislation on the grounds that the wrong procedure had been chosen; and there would also be a risk of the general legislation being overridden by subsequent specific pieces of legislation specifying different procedures for particular instruments. In addition, who would decide into which procedural category particular measures fell? If this were to be a decision for Ministers, then the end result would be worse than the current position. An alternative approach, which would avoid most of these problems, might be for the Subordinate Legislation Committee to decide at the start of the Parliamentary scrutiny process what level of scrutiny particular instruments require. However, the Executive is likely to object about the uncertainty this would involve, and it would probably also introduce further delay into the process of making delegated legislation.

Nevertheless, there is more to be said in favour of enacting a statutory requirement that all delegated rule-making powers be classed as Scottish Statutory Instruments. As the background paper notes, it is wrong in principle that Parliament is denied the opportunity to scrutinise any rules which have legislative effect. This would also have the benefit of ensuring that all legislative instruments are published in a consistent format, and therefore more easily accessible. And it might also help to resolve doubts about the legal effect of particular rules, which can be a major problem for statutory rules which are not in the form of statutory instruments (and even more so for non-statutory rules).

However, this would not be without practical difficulties either. On the definitional issue, the definition used in section 5 of the Australian Legislative Instruments Act 2003 seems a reasonable starting point, although for completeness it might be sensible to add a reference to “curtailing a freedom” and some reference to legislative rules being of general application (though this is perhaps implicit in “rather than applying the law in a particular case”). But the real problems are likely to arise in application of the definition. For example, since codes of practice and guidelines are not binding it is questionable whether they have a legislative character.
Similarly, directions typically apply only to particular individuals or organisations and so may be thought not to be legislative. On the other hand, these are clearly things which ought to be published in some easily accessible form, as should codes and guidance that are not issued under specific statutory powers. Although the Freedom of Information (Scotland) Act will ensure that many more of these are published than before, it may still be the case that what is really required is something along the lines of the Official Journal of the European Communities, where all formal decisions made by the Scottish Ministers (irrespective of their analytic classification as legislative, quasi-legislative, executive, quasi-judicial, etc) are published.
SUBORDINATE LEGISLATION COMMITTEE

26th Meeting, 2005 (Session 2)

Tuesday 27th September, 2005

Inquiry into the Regulatory Framework in Scotland – Phase Two

Submission from the Faculty of Advocates

Introduction

The Faculty would like first to take the opportunity to welcome the 31st Report of the Subordinate Legislation Committee on Phase 1 of this Inquiry, which it fully supports.

Following the approach taken in the evidence for the Faculty in that phase, this paper does not address in detail all issues raised in this phase; not because they are not important, but because our interest and expertise is less in the practical procedures of Parliament and more in issues of accessibility and legislative quality. We also regret that the time which we could give to discussion and consideration was limited.

1.4 Comments are invited on—
—The current negative and affirmative procedures and whether they should continue to exist for the Parliamentary consideration of subordinate legislation.
—The role of the Subordinate Legislation Committee and the subject Committees in examining subordinate legislation.
—Whether the procedure chosen should rely on the parent Act or whether the Parliament should consider a procedure which allows the significance of the instrument to dictate the procedure adopted.

We cannot claim practical experience of the workings of current procedures in the Scottish Parliament and its committees, and accordingly offer only general comments. The differences between affirmative and negative procedure seem to us to be more apparent than real; they offer relatively similar levels of scrutiny. In neither case does that scrutiny permit extensive debate by Parliament. We believe that there is a need for a ‘fast track’ for very straightforward and uncontroversial matters; that other matters require a level of scrutiny which depends primarily on their importance; and that the determination of the level of importance of a proposed instrument, as also of its complexity, and of how controversial it is, is probably better done when a draft instrument is first placed before committee than when the parent act was drafted. At this stage such matters as the appropriate timetable and length of debate could be addressed.

1.8 Comments are invited on—
—Whether the Scottish Parliament should be given powers to amend instruments or drafts, or to recommend such amendments; and
—Whether the Scottish Parliament should be given the power to recommend certain changes being made to an instrument, before the instrument will achieve Parliamentary approval.
We do not think that there is anything constitutionally novel\(^1\) or undesirable in these proposals; indeed, as a matter of abstract principle it would no doubt be desirable to maintain Parliamentary control over the process of delegated legislation by permitting amendments to be made. In practice, however, we find it hard to believe that an unrestricted power to amend, or to recommend amendments, would be workable. Such a power would require debate to be allowed on the motion to amend. We would suggest that, if any power to amend were to be introduced, this might be limited to significant issues, perhaps by permitting motions to amend only if made by, say, one third of the members of the lead committee or of the Subordinate Legislation Committee and accompanied by a reasoned statement as to why, in the opinion of those signing the motion, it raised a question of sufficient importance to justify debate. Few such issues would, we suspect, arise in practice. We are also concerned that the exigencies of the Parliamentary timetable would often mean, on the current timetable for the making of instruments, that any amendment could only be debated, let alone made, after the instrument had come into force. An example is The Mental Health Tribunal for Scotland (Practice and Procedure) Rules 2005, SSI 2005/420\(^2\). These were made on 25, and laid on 29, August to come into force (subject to annulment) on 5 October 2005; but the timetable discloses that they could not be considered by the Subordinate Legislation Committee until 13 September, or by the Health Committee until later. If a significant issue on these Rules were identified by either committee which it was thought should result in amendment, it would be very undesirable if this were to hold up enactment of the Rules as drafted; this would hold up the entire operation of the Tribunal. We would suggest that, if amendment were to be allowed, the timetable for Parliamentary consideration should be lengthened; and possibly also Parliament should have a power to reserve a possible amendment for consideration until after the unamended instrument had been enacted, particularly in urgent cases.

2.2 Comments are invited on—
—Imposing a general requirement to consult the Parliament on draft instruments.
—The use of “super-affirmative” procedure and examples of where it could be used effectively.

We think that draft instruments should normally, where available, be laid before Parliament as a matter of openness and accessibility, and if there is a consultation process at all this should involve Parliament, with drafts being placed on the Draft Scottish Statutory Instruments page on the OPSI website, which we note holds, rather surprisingly, only three drafts from 2005 at present, and also on the Scottish Parliament website, which many users would think was the natural place to look.

3.2 Comments are invited on—
—Whether all instruments of a legislative character, for example, guidelines and codes of conduct, should require to be SSIs.

\(^1\) The power of amendment does not appear to be so exceptional in the Westminster Parliament as is suggested in fn 7 of the Background Paper; eighteen examples are given in the Report of the Joint Committee on Delegated Legislation, HL 184, HC 475 of 1971-72, p.181.

\(^2\) We should declare an interest here, as these were drafted by a member of the Faculty committee responsible for this report.
Guidelines, codes of conduct, and similar instruments would not normally be regarded as instruments of a legislative character. In our view, not all such instruments should require to be made as statutory instruments. We have no objection in principle to such instruments as guidelines and codes of conduct being executive rather than legislative instruments: in many cases their style and language makes it inappropriate that they should be scrutinised as if they were statutory instruments. The Court of Session has a similar distinction between the Rules of Court, which are published as Acts of Sederunt, and Practice Notes, which give general guidance; this is not a distinction which has, so far as we know, ever caused any particular difficulty.

We agree, however, that the boundary between legislative and executive instruments is not at all clear in practice. In some cases it might well be suggested that a particular document has been dealt with on the wrong side of the line; a well-known example is the Immigration Rules, which at Westminster are laid before Parliament under section 3(2) of the Immigration Act 1971. It has frequently been argued that “the time has come when the House may wish to consider amending the 1971 Act through an amendment to the present bill to provide that the Immigration Rules, which are of immense importance to asylum seekers, should be made subject to the affirmative resolution procedure.” There are Scottish examples of doubtful categorisation. One, in the planning context, is Annex IV to SDD Circular 17/1987: this has the practical effect of amending section 66 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 without Parliamentary authority for the particular amendment, and it would be hard to say that it did not have a ‘legislative character’. Another such is the Social Work (Representations Procedure) (Scotland) Directions 1996, SWSG 5/1996, which laid down important provisions as to the practical operation of complaints procedures in local government which gave content to the Social Work (Representations Procedure) (Scotland) Order 1990 (SI 1990/2519). These have been given detailed consideration in case-law, where it has been said that they are necessary to comply with obligations under Article 6 of the European Convention on Human Rights, but they are practically unknown because they are so inaccessible; to local governments almost as much to citizens and those who advise them. They cannot even be discovered on the Scottish Executive

3 Background Paper, paragraphs 23 and 24.
4 These Rules are neither delegated legislation nor rules of law, but rules of practice laid down for guidance to those entrusted with the administration of the Act. However, it is clear that in fact the Rules have a far more binding effect than any code of practice, as a cursory reading of the Immigration Appeal Tribunal’s case-law shows.
5 For example, the 22nd Report of the House of Lords Select Committee on Delegated Powers and Deregulation, 1999, from which this is a quotation.
6 This example is taken because it is specifically noted in the leading Scottish textbook, ‘Scottish Planning Law and Procedure’, Rowan Robinson and others, 2001, at paragraph 3.19; but there are many others. The authors comment, rightly, “This direction is not published in any easily accessible way… It is … difficult to see how those concerned with development can readily inform themselves of relevant sub-delegated legislation”.
7 Section 67(2) of that Act gives Scottish Ministers the relevant power.
8 Secretary of State for Health v Beeson, 2002 EWCA Civ 1812.
9 Thus, for example, in Yule v South Lanarkshire Council, 2001 SC 203, it was not noticed by either side, or by the court, that the petitioner had had a remedy under these directions; this was noticed for the first time in Beeson the following year.
website unless the searcher is aware that they are there\textsuperscript{10}; and then only with considerable effort; and it is practically impossible to discover whether they have been amended, superseded, or revoked. These and similar directions are far more important, and far more deserving of being treated as statutory instruments, than many statutory instruments at present\textsuperscript{11}.

In our view, any documents which could be said to have a legislative character should be published and made accessible as such; and we think that, in the absence of a coherent scheme of publication by the Scottish Executive\textsuperscript{12}, Parliament should undertake this.

4.6 Comments are invited on—
—The existing procedures for scrutinising SSIs.
—Increasing the time allowed for the Parliament to consider SSIs.
—Extending the 21 days given for a negative instrument to come into force to something that would allow the Parliament to consider all negative instruments before they came into force.

We have commented above on existing procedures for scrutiny. We think the time allowed should be extended, particularly if as we suggest there might be amendment. The third question can admit of only one answer; Parliament must be allowed that right, except possibly and unusually in cases of special urgency.

4.7 Comments are invited on—
—The use of \textit{existing} procedures.
—Whether the use of class 7 should be discontinued, with class 6 being used so that general instruments should be laid before Parliament in all cases.

We believe that class 7 should be discontinued as suggested, so that Parliament is at least made aware formally of the existence of all proposed instruments.

5.1 Comments are invited on—
—The current publication system of SSIs.
—Whether there should be a requirement for the QPS to publish drafts of SSIs which are laid before Parliament and subject to affirmative procedure.

We think that all SSIs, should be published on the internet, including those which are not published in paper form because they are considered to be only of local interest. At present, the criteria for non-publication are opaque; it is said that those which are not published are ‘generally of local application\textsuperscript{13}’, but some which are very local

\textsuperscript{10} There is a list of current planning circulars on the website, but the example given of Circular 17/1987 is not on it; and several Google searches (‘circular ‘17/1987’ ‘listed buildings’ ‘was one example’) failed to find it.

\textsuperscript{11} See our comment on question 5.1 below.

\textsuperscript{12} Its website cannot be regarded as a coherent scheme of publication, as its search facilities are primitive.

\textsuperscript{13} Scottish Statutory Instruments webpage. This distinction goes back to the Statutory Instruments Regulations 1947, SI 1948/1, regulation 5, made at a time of notorious paper shortage.
indeed are published\textsuperscript{14}. Those selected for non-publication are totally inaccessible to those interested; if they are important enough to make, they are important enough to publish. It is practically impossible to discover their content, although an annual list is published which itself suggests that the vast majority of statutory instruments which are left unpublished are not in fact of sufficient importance to deserve to be treated as statutory instruments at all\textsuperscript{15}.

We have dealt with the second part of this question above.

This question, however, more fundamentally goes to our comments in Phase 1 as to the advantages of a Statute Law Database which contained secondary legislation. We think that, if secondary legislation is not so included, consideration should be given to the manner of electronic publication, and in particular whether, when SSIs are published which amend others, the original SI or SSI should not be published on the internet in its amended form so as to show its history\textsuperscript{16}. We do not think that this would be likely to have any significant cost.

6.1 Comments are invited on—
—Whether an instrument should be required to be laid as soon as practically possible.
—Whether failure to lay an instrument, when this is required to be laid, should make the instrument invalid.

In light of the perceived doubt expressed in the background paper as to the final question, we think there should be express provision made as to the consequences of failure to lay. We think that it might well be argued at present that such a failure invalidates the instrument\textsuperscript{17}; but in our opinion this should be looked at as a matter of Parliamentary policy and not of existing law. There are obvious arguments both for and against invalidity as a matter of policy; these are for Parliament.

**General comments**

1 There is a continuing problem of practical accessibility for members of the public. In its Phase 1 report, the Committee accepted the evidence of the Faculty on use of plain language and similar techniques (paragraphs 43-47). Failure to use these, we suggest, might justify the Committee in suitable cases in rejecting an instrument on grounds of lack of clarity. The Committee might further consider requiring, on first considering an instrument, that those who have produced it also produce an explanation or flowcharts. We referred earlier to the proposed Mental Health Tribunal Rules (SSI 2005/420); while their language is probably about as clear as is feasible given the complexity of their subject matter, they are still of necessity very difficult for a lay reader to follow. A series of flowcharts would be

\textsuperscript{14} The Holyrood Park Amendment Regulations 2005, SSI 2005/15, deal with a single car park in Holyrood Park. As the Committee is aware, there are numerous similar examples.

\textsuperscript{15} Most relate to temporary and localised road traffic measures.

\textsuperscript{16} The Statute Law Database will show any amendments made to primary legislation.

\textsuperscript{17} \textit{R v Secretary of State ex parte Camden LBC}, 1987 2 All ER 560, left this open. See also Erskine May, p. 672.
invaluable; indeed, if the Health Committee had a power to amend, they would be practically indispensable when it was considering the exercise of that power. Similar considerations apply to the non-use of Keeling schedules.

2 We welcome the publication of Executive Notes with statutory instruments beginning with SSI 2005/380, although we are surprised at the laconic nature of those published on the internet, and that fuller notes are not available. We would further suggest that the Committee might, in the same spirit, also consider occasionally publishing its Legal Briefing, without suggesting that this should be a matter of course; we noted a tantalising example of reference to the Legal Briefing in the Minutes of the Committee for 5 September at column 1148.

3 A matter we particularly stressed in Phase 1 was free public access to the Statute Law Database. We noted with satisfaction what was said on this matter on behalf of the Scottish Executive in their evidence at column 976, and the recommendations of the Committee at paragraph 61 of its Report, and would suggest that the Committee keep this under review.
SUBORDINATE LEGISLATION COMMITTEE

26th Meeting, 2005 (Session 2)

Tuesday 27th September, 2005

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

Response from the Non Executive Bills Unit

General

It might be helpful to an understanding of the approach taken in drafting Members’ Bills if I set out some background detail. This should also assist in responding to the Committee’s point under the heading ‘General’.

Members’ Bills are drafted by the Unit in such away that they can be implemented without being dependant on the Executive bringing forward subordinate legislation. Where appropriate, this approach to self sufficiency is countered by giving powers to the Scottish Ministers to amend administrative detail that has been prescribed in the Bill. However, to achieve the aim of the Member it is important that a Bill can come into force without any Executive action.

This approach can often produce the opposite of an ‘enabling Bill’ with much more detail set out on the face of the Bill than might be contained in an equivalent Executive measure.

Section 2(4)

The approach taken in this section to restrict Ministers’ powers reflects the deliberate policy of the Member. The Bill already contains a substantial amount of exemptions and allowing Ministers to increase these exemptions would reduce the effectiveness of the policy underpinning the Bill.

Section 6(3)

The Landfill Tax Regulations 1996 and the Irish Waste Management (Environmental Levy) (Plastic Bag) Regulations 2001 set the requirement for record keeping at 6 years. The Member thought that this was too long and agreed to set the requirement in the Bill at a minimum of five years. That is considered to be a reasonable period to keep the types of documents which are affected, namely supporting documents, such as invoices from suppliers, and till receipts. This length of time links to Section 15(2) which restricts local authorities when issuing notices for estimated amounts to a period of 5 years before the date the notice is served.

Section 8

It was decided on policy grounds not to have unduly formal control on the types of environmental project covered. That said, it was considered appropriate for Ministers to have a degree of control in relation to how local authorities use the money raised
on the basis of criteria set out in guidance. Different criteria may apply to different local authority areas and there may be separate criteria for joint projects. Such matters are best left to guidance which can be adjusted to meet new types of project rather than being formally prescribed in a statutory instrument.

As long as the projects are environmental projects the Member would have no concerns about Ministers determining the appropriateness of the types of such projects. The Bill as drafted does not require Ministers to issue the guidance and on reflection the Member feels that this should be the case and proposes to amend at Stage 2.

**Section 10(4)**

The powers in Section 10 are based on similar provisions found at Section 7 of the Water Industry (Scotland) Act 2002 (asp 3) and schedule 7 to the Finance Act 2001 (c9) in relation to the Aggregates Levy.

The power in 10(4) is given to the Scottish Ministers in case anything has been inadvertently omitted which would assist and improve the exercise of the power and assist best practice in this area. For example, the notices served on suppliers may require to contain further information such as some detail on the consequences on suppliers for failure to comply with a notice.

**Section 12**

It was deemed appropriate to have the fixed penalty on the face of the Bill. It is anticipated that the penalty will only be increased in line with inflation and the amount can be increased in terms of section 14(7).

I hope this is helpful to your Committee’s scrutiny and I look forward to their report.

Non Executive Bills Unit
The Mental Health (Certificates for Medical Treatment) (Scotland) Regulations 2005, (SSI 2005/443)

On 20 September 2005, the Committee asked for clarification of the following matter:

The Executive was asked for clarification of the references to “page 3” in column 2 of both Schedules to the instrument. It appeared to the Committee that there was no page 3 in the form corresponding to the references.

The Scottish Executive responds as follows:

The particulars set out in the certificates and the forms of certificate prescribed by the regulations are only parts of the forms in which they appear. The reference to page 3 in column 2 of both Schedules is a reference to page 3 of Form T2. The whole of form T2 is not prescribed by the regulations. Only page 3 of Form T2 contains the prescribed certificate under section 238 of the 2003 Act and this is the page appended to the regulations.

Scottish Executive Health Department
The Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provision) Order 2005, (SSI 2005/452)

On 20 September 2005, the Committee asked for an explanation of the following matters:

1. The Executive was asked to clarify whether the reference to “any period of 12 months” in articles 20(4)(a), 25(2)(a) and 29(4)(a) ought to be a reference to “the period of 12 months”.

2. The Executive was also asked whether the reference to a “care plan” in article 20(6) ought to be a reference to a “Part 9 care plan”.

3. Finally the Committee requested an explanation of whether use of the word “if” in article 34(8)(b) was intentional.

The Scottish Executive responds as follows:

First Question

1. The Executive accepts that the reference to “any period of 12 months” in articles 20(4)(a), 25(2)(a) and 29(4)(a) ought to be a reference to “the period of 12 months”, as in these cases there is a particular period of 12 months, however the Executive believes that the period in question is clear from the context.

Second Question

2. The reference to a “care plan” in article 20(6) ought not to be a reference to a “Part 9 care plan”. This article is concerned with patients who are to be treated as if subject to a compulsion order and a restriction order. Such patients are provided for in Part 10 of the Mental Health (Care and Treatment) (Scotland) Act 2003. They have a different regime from patients who are subject only to a compulsion order and who are provided for in Part 9 of the 2003 Act. Some provisions are the same for both sets of patients; for example, the duty of the mental health officer in section 138 of Part 9 is the same as in section 181(2) of Part 10. However, patients subject to the Part 10 regime do not have a Part 9 care plan.

Third Question

3. The use of the word “if” in article 34(8)(b) is unintentional. The Executive regrets that this is a typographical error; the word should be “of”. However we are satisfied this does not affect the legality of the instrument in any way.