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

1. **Item in private:** The Committee will consider whether to discuss oral evidence heard in relation to its inquiry into the regulatory framework in Scotland in private at its next meeting.

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

   George Lyon MSP, Deputy Minister for Finance, Public Service Reform and Parliamentary Business;
   Murray Sinclair, Head of Constitution and Parliamentary Secretariat; and
   Jane McLeod, Office of the Solicitor to the Scottish Executive.

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

   Housing (Scotland) Bill as amended at Stage 2.

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

   the Fundable Bodies (Scotland) Order 2005, *(SSI 2005/draft)*

   the Contaminated Land (Scotland) Regulations 2005, *(SSI 2005/draft)*

   the Glasgow School of Art (Scotland) Amendment Order of Council 2005, *(SSI 2005/525)*

   the Education (Graduate Endowment, Student Fees and Support) (Scotland) Amendment (No.2) Regulations 2005, *(SSI 2005/545)*

   the Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2005, *(SSI 2005/549)*.
5. **Draft instruments subject to approval**: The Committee will consider the following—

the Private Landlord Registration (Modification) (Scotland) Order 2005, *(SSI 2005/draft).*

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

the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.15) (Scotland) Order 2005, *(SSI 2005/575)*

the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.16) (Scotland) Order 2005, *(SSI 2005/579).*

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

the Marriages and Civil Partnerships (Fees) (Scotland) Regulations 2005, *(SSI 2005/556)*

the Private Landlord Registration (Advice and Assistance) (Scotland) Regulations 2005, *(SSI 2005/557)*

the Private Landlord Registration (Information and Fees) (Scotland) Regulations 2005, *(SSI 2005/558)*

the Private Landlord Registration (Appeals against Decision as to Rent Payable) (Scotland) Regulations 2005, *(SSI 2005/559)*

the Antisocial Behaviour Notice (Appeals against Order as to Rent Payable) (Scotland) Regulations 2005, *(SSI 2005/560)*

the Antisocial Behaviour Notice (Management Control Orders) (Scotland) Regulations 2005, *(SSI 2005/561)*

the Antisocial Behaviour Notice (Landlord Liability) (Scotland) Regulations 2005, *(SSI 2005/562)*

the Antisocial Behaviour Notice (Advice and Assistance) (Scotland) Regulations 2005, *(SSI 2005/563)*

the Disability Discrimination (Public Authorities) (Statutory Duties) (Scotland) Regulations 2005, *(SSI 2005/565)*

the Firefighters’ Pension Scheme Amendment (Scotland) Order 2005, *(SSI 2005/566)*

the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Separations) (Scotland) Regulations 2005, *(SSI 2005/567)*

the Civil Partnership Act 2004 (Relationships Arising Through Civil Partnership) (Scotland) Order 2005, *(SSI 2005/568)*
the Less Favoured Area Support Scheme (Scotland) Regulations 2005, (SSI 2005/569)

the Registration of Independent Schools (Scotland) Regulations 2005, (SSI 2005/571)


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

the Antisocial Behaviour etc. (Scotland) (Commencement and Savings) Amendment Order 2005, (SSI 2005/553)

the Education (Additional Support for Learning) (Scotland) Act 2004 (Commencement No.3) Order 2005, (SSI 2005/564)


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

**Agenda Item 2**

Briefing note (Private) SL/S2/05/32/1  
Scottish Executive Phase 2 Consultation response SL/S2/05/32/2

**Agenda Items 3 - 8**

Legal brief (Private) – to follow SL/S2/05/32/3

**Agenda Item 3**

Delegated powers memorandum SL/S2/05/32/4  
Bill as amended at Stage 2 and revised Explanatory Notes (circulated to Members only)

**Agenda Item 4**

Executive responses SL/S2/05/32/5

**Agenda Items 5 - 8**

Copies of instruments (circulated to Members only)
Introduction

1. The Executive’s overall approach to regulation was outlined during stage 1 of the inquiry. Central to that approach is the view that “regulation should be imposed only when, on balance, the inherent constraints and costs are assessed to be more than offset by the anticipated benefits”. Our approach to the regulation of regulation – i.e. to the processes and procedures that govern the making of regulation – is similarly based on the view that the costs incurred, for example, in additional consultation and scrutiny, should not outweigh the likely benefits.

2. In reviewing the efficacy of the current approach and the merits of potential changes, the Executive considers that account needs to be taken of practical experience as well as abstract theory. There is a wealth of experience now that the Parliament has passed nearly a hundred Acts and several thousand statutory instruments. From the Executive’s standpoint, the experience has been a generally positive one in that – while there is always the potential for improvement – a large amount of necessary and beneficial secondary legislation has been enacted timeously, efficiently and effectively.

Nature of supervision by the Parliament

3. As regards procedural matters, the Executive considers that it is necessary (and generally sufficient) to have the two types of Parliamentary control – affirmative and negative – for the making of statutory instruments. Over the past 6 years, the Parliament has legislated to apply each of these procedures on very many occasions. This suggests that the Parliament sees merit in both procedures, with the choice between them being made on a case-by-case basis according to circumstances. That is certainly the Executive’s conclusion. It is not clear what alternative procedures the Committee might consider and what the benefits might be, but the Executive will consider any other proposals that are put forward on this issue.

4. The consultation paper raises the question of the stage at which it is appropriate to determine the procedure that should be applied. While there may be theoretical arguments for making that determination individually for each and every instrument only after its content is clear, in practice this is likely to be problematic in terms of timing and handling. It is also worth highlighting that it is already possible for primary legislation to provide for a degree of flexibility. For example, an Act may provide that an instrument should be subject to negative procedure unless certain objective criteria are met, in which case the affirmative procedure should be
followed. It is for the Parliament to decide, in the context of a particular Bill, how much detail it wishes to insist upon in the sections of the Bill, and how much discretion it is prepared to leave to the Executive. In addition, it is increasingly the case that draft regulations (setting out how it is intended that a power will be used) are available at stage 2 of the Bill’s consideration. The SLC report to the Parliament on the basis of the Delegated Powers Memorandum, and the Parliament then approves or adjusts the balance.

5. It is correct, as the consultation paper points out, that under either procedure the Parliament technically does not have the capacity to amend an instrument substantively: its options are simply to accept it fully or reject it fully. It is however entirely possible, for example, for the Parliament to reject an instrument and, in doing so, to make clear that specific changes are required before a subsequent instrument will receive more favourable treatment. It is also possible for the Parliament to approve an instrument having first obtained a Ministerial commitment that a further instrument will be introduced to effect desired changes. The Executive’s experience has been that this level of flexibility has been generally sufficient. Moreover, while recognising some attractions in giving the Parliament power to make amendments to statutory instruments more directly, the Executive would have serious concerns that this would fundamentally change the nature of the process with unwelcome consequences in practice. Therefore, the Executive’s initial view is that the disadvantages are likely to outweigh any advantages.

Consultation

6. The Executive is fully committed to meaningful consultation as part of an overall commitment to civic participation, with policy being developed and implemented on the basis of partnership and engagement in line with the founding principles of the Parliament. However, the Executive does not engage in consultation simply for consultation’s sake. The process can be demanding for those who consult and those who are consulted, so it is important that it is undertaken only when it will be of benefit. Judgements on the degree of consultation therefore require to be made on a case-by-case basis.

7. The Executive’s approach to the specific issue of consultation with the Parliament on draft instruments reflects that wider approach. And, in coming to a view on the case for such consultation on any particular instrument, the Executive takes account of the fact that in any event the Parliament will have 40 days in which to consider instruments under the formal procedures. Imposing a requirement to consult the Parliament on all draft instruments seems likely to cause delay and not to be necessary in many cases.

8. That said, the Executive accepts that there are cases where prior consultation is appropriate and valuable, and, exceptionally, where the nature of the subject-matter means that it will be appropriate for the legislation to provide that a draft instrument, or proposal for a draft instrument, should be laid before Parliament for a period of consultation prior to commencing the formal approval process. The Executive also takes the view, however, that the standard affirmative procedures are rigorous and that – given the implications, not least for delays in legislating – the circumstances in which it will be appropriate will be limited and exceptional.
9. It is also appropriate to recall that, more often than not, statutory instruments are often downstream components in the implementation of a policy that has been developed and implemented on the basis of considerable prior consultation. They should be considered against the general context of consultation that has helped to inform that policy.

**Definition of SSIs**

10. The consultation paper canvasses views on whether guidelines, codes of conduct etc “of a legislative character” should require to be SSIs and subject to formal Parliamentary procedure. Generally speaking, the character and status of such material is such that it is not necessary or appropriate for it to be and that is why it is not subject to the same formal procedures as subordinate legislation. Such material, however, is potentially subject to Parliamentary supervision, not least through the general accountability of Ministers for their actions. The Executive sees little benefits in imposing additional formal procedures on such material. Again the form of Parliamentary procedure to be applied to guidelines, codes of conduct etc is considered by the Parliament during the passage of a Bill and this allows for a bespoke approach to applying more formal procedures in any case where that is thought, exceptionally to be appropriate.

**Existing Parliamentary procedures**

11. The Executive notes the consultation paper’s description of the various classes of SSI and types of parliamentary control. The Executive’s comments on the ‘super-affirmative’ procedure have been set out above.

12. As regards the timing of negative and affirmative consideration, the Executive appreciates why there is a desire to increase both the time that the Parliament has to consider SSIs and the time given for negative instruments to come into force. On the other hand, it is important to recognise that such increases would likely mean that the coming into force of laws aimed at benefiting Scotland would be delayed. There is clearly a balance to be struck and the current balance seems about right. The Executive does feel, however, that consideration ought to be given to allowing recess days to count for the purposes of the “21 day rule” that applies in relation to negative SSIs. One benefit of such a change would be to smooth the SSI workload profile by removing one of the reasons for routine but unhelpful peaks in activity before recesses.

13. The Committee might also want to consider the merits of the SLC and the lead Committee considering instruments simultaneously. Both Committees could have up to say 30 days to consider instruments; with a further 10 days for the lead Committee to take on board comments from the SLC.

14. As the consultation paper points out, there are instances where instruments are not subject to Parliamentary procedure. In the Executive’s view, it is wise to retain provision for flexibility to accommodate appropriately the wide range of instruments that come forward. The Executive sees little evidence of the need for change in this area.
Numbering, classification and publication of SSIs

15. The consultation paper raises the question of whether drafts of affirmative SSIs ought to be published by the Queen’s Printer for Scotland. The Committee will wish to be aware that, from 1 July 2005, draft affirmative orders and accompanying Executive notes are being published on the OPSI website (formerly HMSO website).

Consequences of not laying

16. In general the Executive aims to tell the Parliament as much as it can as soon as it can, and in line with this approach would, in principle, have no objection to the notion that an instrument should be required to be laid as soon as practically possible. That said, however, the ultimate consideration ought to be the value of the output rather than adherence to process. With this in mind, the Executive would be reluctant to see valuable legislation struck down and the benefits lost because of an inadvertent failure to lay an instrument as required.

Scottish Executive
September 2005
SUBORDINATE LEGISLATION COMMITTEE

32\textsuperscript{nd} Meeting, 2005 (Session 2)

Tuesday 22\textsuperscript{nd} November, 2005

Delegated Powers Memorandum

Housing (Scotland) Bill as amended at Stage 2

Purpose

1. This supplement to the memorandum dated 7 March 2005 has been prepared by the Scottish Executive, in accordance with Rule 9.7.10 of the Parliament’s Standing Orders, to assist consideration by the Subordinate Legislation Committee of the Housing (Scotland) Bill (the Bill) as amended. It describes the purpose of each provision conferring powers to make subordinate legislation that was introduced or amended during the Bill’s Stage 2 process, and explains why the matter is to be left to subordinate legislation rather than being included in the Bill. The supplement should be read in conjunction with the original memorandum.

Amendments to delegated powers

2. During the Stage 2 proceedings, three new powers for the Scottish Ministers to make regulations were introduced to the Bill. In three cases powers were extended or altered. Another seven powers to make regulations and orders, which were originally to be subject to negative resolution procedure in the Scottish Parliament, were amended so as to be subject to affirmative resolution procedure. The changes from negative to affirmative procedure were recommended by the Subordinate Legislation Committee or the Communities Committee, which recommended in its Stage 1 report that all Part 3 regulations (on the provision of information on the sale of a house) should be subject to affirmative resolution procedure. It considered that this was necessary so that the regulations establishing the new scheme would be subject to thorough Parliamentary scrutiny, given that most of the detail of the scheme would be set out in regulations. On consideration, the Executive agreed with the recommendations of both Committees.

3. Below are descriptions of the relevant powers and explanations as to why affirmative resolution procedure is considered to be appropriate.

Part 1 Chapter 8: Supplemental provisions, including appeals

Section 64A – Adaptations: power to change method of appeal

\begin{verbatim}
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament
\end{verbatim}

4. Section 64A was introduced by an amendment at Stage 2. It gives Ministers power to change the route of appeal from the sheriff (as set out in section 62(6)) to the Private Rented Housing Panel, for appeals by a tenant when a private landlord refuses consent for, or imposes conditions on, adaptations to meet the needs of a disabled occupant or the installation of central heating or other energy efficiency
measures. Regulations may require that relevant guidance issued by the Disability Rights Commission is taken into account when determining the appeal.

Reason for taking power
5. Dealing with this matter by regulations means that Ministers can assess whether the Panel would be a more appropriate route than the sheriff court in the light of the establishment and operation of the Panel, experience of the number of appeals arising and evidence in practice of the relative merits of the two routes and other approaches to resolving the disputes involved. Other factors could be taken into account, such as the capacity of the Panel system.

6. The main factors which would lead to a decision to regulate are on record and Ministers expect to act on that basis. Changing the route of appeal would be essentially procedural rather than an expansion of policy. For these reasons it is considered appropriate that the regulations should be subject to negative resolution procedure.

Part 2: Scheme of Assistance for Housing Purposes

Section 68(4) – Assistance for housing purposes
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

7. As originally drafted, section 68(4) gave Ministers powers to make provision in relation to specific forms of assistance other than grants and loans. As amended, the section allows Ministers to make further provision about any type of assistance in relation to the acquisition or sale of a house or work on land or premises for specified purposes.

Reason for amendment
8. This change was part of wider amendments to section 68, in order to ensure that local authorities can provide effective assistance in a wide range of circumstances, including assistance to sellers to help with the costs of the single survey. It is appropriate that Ministers should have a wide power to make provisions on such matters as the procedures to be followed by local authorities in considering whether to provide assistance and in providing it and the circumstances in which different types of assistance are appropriate, given the range of situations in which assistance may be given and the scope for good practice to develop as local authorities make use of their extended powers.

Section 70(2A) – When assistance must be provided
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

9. Section 70(2A) was introduced by an amendment at Stage 2. This section will allow Ministers to make regulations making further provision about the type of assistance that must be provided in connection with adaptations to make a house suitable for a disabled person’s needs, where the house is the disabled person’s only
or main residence. This goes beyond the existing requirement that assistance for adaptations to give access to standard amenities must be in the form of grant. The powers could be used to prescribe, for example, the type of assistance that should be provided in connection with particular types of adaptation or when defined criteria about the applicant’s circumstances are met. In particular they can be used to prescribe circumstances when grant must be provided.

Reason for taking power
10. The Communities Committee called for a broadening of the circumstances in which grant must be available to help with adaptations. Ministers wish to respond but given the current nature of available information it is not possible either to judge what the financial implications of particular approaches would be or to make a clear comparison with the arrangements in England and Wales as requested by the Communities Committee, since those arrangements are changing. A power for Ministers to make regulations was therefore considered appropriate. This new power would allow Ministers to make grant mandatory in certain circumstances. The political and financial significance of this means that full Parliamentary scrutiny is appropriate, so the regulation will be subject to affirmative resolution procedure.

Section 88(4) – Local authority payments to not for profit lenders

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

11. Section 88(4) is subject to negative resolution procedure in the published Bill.

12. Instead of making loans directly to individuals, a local authority may make arrangements with certain designated lenders for that lender to make loans on the authority’s behalf. Designated lenders are specified in terms of section 88(2) as being not for profit organisations who are in the business of providing assistance by way of loans for housing purposes. The arrangements may involve the local authority making payments into the lender’s loan fund, or to cover the lender’s administrative costs. Ministers may make regulations to amend the definition of a “designated lender” and to make provision as to the terms on which such payments may be made.

Reason for taking power
13. As explained in the original Memorandum, the policy is that local authorities should be free to make whatever arrangements they think fit with lenders who will make loans to individuals for housing purposes. No such arrangements exist in Scotland as yet. However, as they develop, it may appear that standard terms should be placed on the payments made to such lenders. There may also be a need to fine-tune the definition of a “designated lender”, as the loans market evolves.

Reason for amendment
14. The Subordinate Legislation Committee recommended that regulations introduced under section 88(4) should be subject to affirmative resolution procedure. Section 88(4) allows Ministers to make regulations changing the definition of “designated lender” and making provision as to the terms which local authorities may impose on the payments they make to such lenders. Since there is no restriction on how Ministers may change the definition of “designated lender”, and it is a power to
amend the Bill itself, it was felt that this power should be subject to scrutiny by affirmative procedure. The Executive therefore accepted this recommendation.

Part 3: Provision of information on sale of house

Section 96(2) – Duty to provide information to potential buyer
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

15. Section 96(2) is subject to negative resolution procedure in the published Bill.

16. Section 96(1) requires the person who is responsible for marketing a house that is on the market (that is, either the seller or the seller’s agent) to provide a copy of prescribed documents relating to the house to a potential buyer who requests a copy. Section 96(2) confers on the Scottish Ministers a power to set out in regulations the period within which the responsible person must comply with such a request.

Reason for taking power
17. This power is needed since it may be necessary in the light of experience to vary the timescale for compliance with the requirement to provide information. This flexibility would allow Ministers to set a timescale that meets the aims of the legislation.

Reason for amendment
18. The Communities Committee recommended that these regulations should be subject to affirmative resolution procedure, so they would receive thorough Parliamentary scrutiny. The Executive agreed, given the importance of the matter that they cover to the working of the scheme.

Section 101(1) – Information to be held or provided to potential buyers
Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

19. Section 101(1) is subject to negative resolution procedure in the published Bill.

20. Section 101(1) confers on the Scottish Ministers a power to make regulations prescribing the documents in relation to a house on the market that a responsible person must hold and provide to a potential buyer. The regulations may make further provision about the prescribed documents, as the Scottish Ministers think fit. Subsection (2) specifies that a document may be prescribed only if the Scottish Ministers consider that it relates to the physical condition or value of a house, or any other matter connected with a house or its sale that would be of interest to potential buyers. Subsection (3) provides that the regulations may deal with the form and content of a prescribed document, who can prepare a document, the maximum period between preparation of a document and the date on which the house is put on
the market, and the period for which a document is valid and circumstances that will invalidate it.

**Reason for taking power**
21. It is essential that Ministers have the flexibility to respond to buyers’ changing needs for information about houses for sale and to changing conditions in the housing market. This section sets out the kind of information that could be required, but the specific details, which may need to be varied, would be more appropriately dealt with in regulations.

**Reason for amendment**
22. The Communities Committee recommended that these regulations should be subject to affirmative resolution procedure, so they would receive thorough Parliamentary scrutiny. The Executive agreed, given the centrality of the matters that they cover to the working of the scheme.

**Section 102 – Exceptions from duty to have or provide information**

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

23. Section 102 is subject to negative resolution procedure in the published Bill.

24. Section 102 confers on the Scottish Ministers a power to make regulations setting out exemptions from the duties to hold and provide prescribed documents. Exemptions may apply to categories of people, periods of time or circumstances in which a person does not need to hold or provide a prescribed document, or other specified exceptions.

**Reason for taking power**
25. It is expected that it would be appropriate that certain types of property transactions will be excluded from the duty to provide information. This power will allow Ministers the flexibility to vary these exceptions as required.

**Reason for amendment**
26. The Subordinate Legislation Committee recommended that regulations introduced under section 102 should be subject to affirmative resolution procedure, since they would specify exemptions from duties in Part 3 relating to the possession and provision of prescribed documents when houses are marketed for sale and therefore, according to the recommendation, effectively amend the Bill itself. The Executive accepts this recommendation.

**Section 108(4) – Penalty charge notices**

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

27. Section 108(4) is subject to negative resolution procedure in the published Bill.
28. Section 108(4) confers on the Scottish Ministers a power to make regulations making further provision about penalty charge notices and other notices mentioned in schedule 3. Such regulations may prescribe the form of notices, circumstances in which penalty charge notices may not be given, methods by which notices must be given and methods by which penalty charges may be paid.

Reason for taking power
29. These detailed technical matters are more appropriately dealt with in regulations rather than in primary legislation. Provisions may need to be adjusted as processes develop and conditions change.

Reason for amendment
30. The Communities Committee recommended that these regulations should be subject to affirmative resolution procedure, so they would receive thorough Parliamentary scrutiny. The Executive agreed. Although the regulations deal with technical matters, these are important, especially since they can specify circumstances in which penalty notices would not be given.

Section 110(3) (inserts section 63A into the Housing (Scotland) Act 1987) – Information for tenants exercising right to purchase

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

31. Section 110(3) is subject to negative resolution procedure in the published Bill.

32. Section 110(3) inserts a new section 63A into the Housing (Scotland) Act 1987. This new section confers on the Scottish Ministers a power to make regulations prescribing additional information to be supplied by a landlord to a tenant who has served an application to purchase under the “right to buy” provisions contained in the 1987 Act. The regulations may also make further provision about that information. The prescribed information may include a reasonable estimate of costs of maintaining the house and any common parts; how long common parts, fixtures and fittings and other prescribed items are expected to last, with an estimate of replacement costs; and other matters that may be of interest to the tenant who has applied to purchase.

Reason for taking power
33. The additional information is of a detailed nature and best dealt with in regulations. Ministers will also have the flexibility to respond to changing conditions. This regulation making power will ensure that the required information best meets the needs of both disposing landlords and tenants.

Reason for amendments
34. An amendment to section 110(3) inserts subsection (2A) into the new section 63A of the 1987 Act. This subsection provides that regulations under section 63A may specify prescribed information that would only be provided to a prospective right to buy purchaser if that tenant paid the landlord for its provision. The sum to be paid would be specified in the regulations.
35. The Communities Committee expressed the view that prospective right to buy purchasers should receive information similar to that in the single survey. The amendment means that Ministers could use their powers under section 63A of the 1987 Act to prescribe additional information on house condition that landlords would provide to prospective right to buy purchasers, but only if the latter paid for it. It is reasonable to have the capacity to charge for information that is useful to the prospective buyer. If this capacity did not exist, the costs of improved information could impact on other services.

36. The Communities Committee recommended that regulations under the new section 63A of the 1987 Act should be subject to affirmative resolution procedure, so they would receive thorough Parliamentary scrutiny. The Executive agreed, given that the additional information may be quite extensive and that the tenants may have to contribute to the costs of providing it.

**Part 3A: Tenancy deposits**

**Section 116B(1)**

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

37. A new Part was introduced at Stage 2, dealing with tenancy deposit schemes. Ministers will have the power to prescribe arrangements for the handling of tenancy deposits. They will be able to approve tenancy deposit schemes, in accordance with regulations made by them under Section 116B(1) after publicising and consulting on a proposed scheme.

**Reason for taking power**

38. In its Stage 1 report on the Bill, the Communities Committee recommended, in the light of representations made by various groups, that the Executive should take powers to make regulations to safeguard tenancy deposits in the private rented sector and that these should be introduced after consultation. After consideration, the Executive agreed to make provision for such powers. The Bill therefore gives Ministers powers to approve a tenancy deposit scheme or schemes and to make regulations setting out the conditions a tenancy deposit scheme must meet before it could be approved by Ministers. Such conditions might include the manner and circumstances in which deposits must be paid, held and repaid; the sanctions for non-compliance; any dispute resolution mechanism; the types of persons who may operate such schemes; any fees that might be payable; and the publicising of schemes.

39. There are various ways to safeguard tenancy deposits and Ministers will consult widely before deciding on the most effective method of doing so prior to developing the detail of any regulations.

40. The introduction of tenancy deposit schemes would be a significant step, with financial and organisational implications on landlords and tenants and various other
interests. It is appropriate that the regulations should be open to full Parliamentary scrutiny and, as such, are subject to the affirmative resolution procedure.

Part 4: Licensing of Houses in Multiple Occupation

Section 120(1) – Power to designate HMOs capable of being exempted by local Authorities

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

41. Section 120(1) is subject to negative resolution procedure in the published Bill.

42. Subsection (1) gives Scottish Ministers power by order to designate types of HMOs which may be exempted from licensing by a local authority. Subsection (2) provides that a local authority may then, by order, exempt such HMOs in all or part of their area.

Reason for taking power
43. As explained in the original Memorandum, it is thought that registration, and other developments, may provide sufficient control over some categories of HMO, without the need for licensing. This power would enable the Scottish Ministers to indicate that in general such HMOs need no longer be licensed. However, there could still be problems in particular areas, for example where that type of HMO is typical accommodation for students or temporary workers in that particular area, but not in other areas. Subsection (2) allows local authorities to exempt these HMOs from the licensing requirement if they consider it appropriate. Such exemption may be limited to specified parts of the local authority’s area.

Reason for amendment
44. The Subordinate Legislation Committee considered that this order-making power should be subject to affirmative resolution procedure, since it would remove some HMOs from the protection of the licensing system in the Bill. The Executive accepts this.

Section 145(3) – Fees

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

45. Section 145(1) allows local authorities to charge fees in relation to HMO licensing. Subsections (2) and (3) empower Ministers to make provisions about the charging of fees, including setting a fixed or maximum amount, setting out how fees are to be arrived at and specifying circumstances in which no fee will be payable.

Reason for taking power
46. The level of fees charged for HMO licensing, and the wide variation in fees across Scotland, has been a significant cause of complaint and concern under the existing system. These provisions will help to ensure that local authorities charge at
an appropriate level, and provide for greater consistency. The actual determination of fees and fee structures is a level of detail which it is appropriate to place in secondary legislation.

Reason for amendment

47. An Executive amendment has made a slight change to this section by adding “circumstances in which fees are to be refunded” to the list in subsection 145(3) of examples of factors that may be specified in an order. This is for reasons of clarification.
The Fundable Bodies (Scotland) Order 2005, (SSI 2005/draft)

On 15 November 2005 the Committee asked the Executive –

“for an explanation as to why the Explanatory Note accompanying the Order did not contain information as to the content of schedule 2 to the Further and Higher Education (Scotland) Act 2005 (‘the 2005 Act’) and the meaning of ‘fundable body’.”

The Scottish Executive responds as follows:

1. The Executive thanks the Committee for these comments on the Orders.

2. The Executive acknowledges the Committee’s view that the Explanatory Note could have contained more information which might have been helpful to the reader. However, as the Committee will recognise, the Explanatory Note is not part of the Order and we would hope that the Committee can accept that this omission does not therefore invalidate the effect of the Order.

3. Although the Executive now accepts the view that it might have been more helpful to include fuller information in the Explanatory Note as to the content of schedule 2 to the 2005 Act and the meaning of “fundable body”, we believed that the term was reasonably self-explanatory in the context of the Order and consequently that fuller explanation was not necessary. While we remain of the view that the Order is not invalid by reason of this omission, we have carefully noted what the Committee has said about the need to ensure that the effect of an Order should be made absolutely apparent in the Explanatory Note.
The Contaminated Land (Scotland) Regulations 2005, (SSI 2005/draft)

In its letter of 15 November the Committee asked the Scottish Executive the following question in respect of the above instrument.

“The Committee notes that the changes made to the Act are complex and difficult to follow and asks the Executive whether it considered including a Keeling Schedule with these Regulations to assist users of the legislation.”

The Scottish Executive responds as follows:

The Scottish Executive did not think it was necessary to include a Keeling Schedule in this case. The bulk of the amendments contained in the Regulations have the effect of substituting references to “controlled waters” with references to “the water environment”, and it was hoped that these were sufficiently clearly expressed. These are also the first amendments to the provision of the Act concerned.

Further Regulations which seek to modify either the terms or the effect of Part IIA of the Environmental Protection Act 1990 have now issued for consultation(1). Once the outcome of that consultation is known, the Executive will take the opportunity to give further consideration to the Committee’s comments with regard to improving the clarity of the text.

On 15 November 2005 the Committee asked the Executive –

“2. The Committee notes that the transitional provision in article 1 of the Order refers to “elected” Governors while the principal Order provides for the appointment of Governors, only some of whom are elected. The Executive is asked for clarification as to whether this provision is intended to apply only to those Governors who are elected; and

3. It was not clear to the Committee whether the exception in this article is a personal exception or an exception which applies only for the duration of the present period of office of a Governor. The Executive is asked for clarification.”

**The Scottish Executive responds as follows:**

1. The Executive thanks the Committee for these comments on the Order of Council.

2. The Executive is very grateful to the Committee for having brought to our attention that the provision disapplying article 2 referred only to elected Governors, rather than elected or appointed Governors. The Executive apologises for this drafting error. The provision in article 1 was intended to apply only to a small group of Governors who were elected or appointed prior to 6th May 2003.

3. The exception in article 1 is personal to each of those Governors elected prior to 6th May 2003 and is not limited to the present period of office. Naturally once the current maximum period of office of 12 years has been served in each case then this exception will no longer apply.

4. The Executive acknowledges that article 1 does not achieve the objective of disapplying article 2 for all Governors who were either elected or appointed prior to 6th May 2003. However, notwithstanding the drafting error, the Executive’s view is that the Order of Council is not invalid by reason of the omission described in paragraph 2. It is appreciated that the Order as framed does not achieve all of the objectives of the Executive and further consideration will be given to whether or not to bring forward an amending instrument.
On 15 November 2005 the Committee asked the Executive what plans there are for consolidation of the Regulations amended by this instrument.

The intention of the Executive would be to consolidate the Regulations in question before the beginning of the academic year 2006/2007. It might in normal circumstances be appropriate to consolidate with the next amendment. I should however mention that the Civil Partnership Act 2004 (Modification of Subordinate Legislation) Order 2005 (SSI 2005/572) was laid on 11 November 2005 and will come into force on 5 December. It effects numerous amendments consequential upon the Civil Partnership Act 2004 to a wide range of subordinate legislation including the Education Authority Bursaries (Scotland) Regulations 1995, the Education (Fees and Awards)(Scotland) Regulations 1997, the Students’ Allowances (Scotland) Regulations 1999, and the Graduate Endowment (Scotland) Regulations 2001. In the light of this Order being made it was not considered that the instrument in question represented an appropriate vehicle for consolidation.
The Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2005, (SSI 2005/549)

On 15 November 2005 the Committee asked the Executive –

“2. In relation to article 10(m), the Committee asks the Executive for clarification of whether the amendment applies to payments accrued prior to the original date of coming into force of subsection 10, 1 October 2001, or prior to the date of coming into force of the new amendment; and

3. the Committee also requests explanation of the use of the words “came into effect” instead of the more usual reference to coming “into force”.”

The Scottish Executive responds as follows:

1. The Executive thanks the Committee for these comments on the Order.

2. Section 33 of the Electricity Act 1989 as modified by article 10 will be used to make regulations to set up the new arrangements. In relation to article 10(m), the amendment applies to payments accrued before the coming into force date of the new amendment. The reason for this is to allow payments and any associated benefits still to continue to be made to the supply successor companies before 1 April 2006 which is the anticipated date the new arrangements will come into force. The purpose of the article is to allow the making of regulations which do not leave payments made before 1 April 2006 with an unclear status. In the view of the Executive, the words “this subsection” clearly refers to the amending subsection as opposed to the original subsection 10.

3. The words “came into effect” were used rather than coming “into force” as section 33 of the Electricity Act 1989 continues to have effect in Scotland by virtue of article 11 of the Non-Fossil Fuel Sources Saving Arrangements Order 2000, notwithstanding the repeal of section 33 by section 66 of the Utilities Act 2000. Therefore, the Executive’s view is that “into effect” is more appropriate than “into force” as the section being modified is no longer simply “in force”.

4. The Executive acknowledges that the point referred to in paragraph 3 could have been clarified in the Explanatory Note in order to assist the reader. However, it is the Executive’s view that the Order is not invalid by reason of this omission.