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

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

   Police, Public Order and Criminal Justice (Scotland) Bill at Stage 1.

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

   Scottish Schools (Parental Involvement) Bill at Stage 1.

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

   - the Criminal Legal Aid (Scotland) (Fees) Amendment (No.2) Regulations 2005, *(SSI 2005/584)*
   
   - the Bovine Products (Restriction on Placing on the Market) (Scotland) (No.2) Regulations 2005, *(SSI 2005/586)*.

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

   - the Scotland Act 1998 (Modifications of Schedule 5) Order 2006, *(SSI 2006/draft)*.

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

   - the Town and Country Planning (Limit of Annual Value) (Scotland) Order 2005, *(SSI 2005/594)*
   
   - the Fishery Products (Official Controls Charges) (Scotland) Regulations 2005, *(SSI 2005/597)*
the Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuffs) (Scotland) Regulations 2005, (SSI 2005/599)

the Feeding Stuffs (Scotland) Regulations 2005, (SSI 2005/605)

the Contaminants in Food (Scotland) Regulations 2005, (SSI 2005/606)

the Meat (Official Controls Charges) (Scotland) Regulations 2005, (SSI 2005/607)

the Feed (Hygiene and Enforcement) (Scotland) Regulations 2005, (SSI 2005/608)

the Scottish Homes (Dissolution) Order 2005, (SSI 2005/609)

the Regulation of Care (Social Services Workers) (Scotland) Amendment Order 2005, (SSI 2005/611).

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


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

   the Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Amendment Regulations, (SSI 2005/595)

   the Marriage (Prescription of Forms) (Scotland) Amendment Regulations 2005, (SSI 2005/596)

   the Civil Partnership Act 2004 (Commencement No.2) (Scotland) Order 2005, (SSI 2005/604).

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

**Agenda Items 1 - 7**

Legal brief (Private) – to follow  
SL/S2/05/34/1

**Agenda Item 1**

Executive response  
SL/S2/05/34/2

**Agenda Item 2**

Delegated powers memorandum  
SL/S2/05/34/3
Bill and accompanying documents (circulated to Members only)

**Agenda Item 3**

Executive responses  
SL/S2/05/34/4

**Agenda Items 4 - 7**

Copies of instruments (circulated to Members only)
Executive Response

Police, Public Order and Criminal Justice (Scotland) Bill at Stage 1

1. Thank you for your letter of 21 September, concerning the Subordinate Legislation Committee’s consideration of the Police, Public Order and Criminal Justice (Scotland) Bill. I trust the following response will prove helpful in resolving the queries you have raised.

Section 22(1) – Power to amend the list of police support services.

2. We note the Committee’s suggestion that this power should be subject to super-affirmative procedure, however we remain of the view that affirmative procedure is appropriate in the circumstances. The power has been included to allow the Scottish Police Services Authority to adapt and develop in order to keep pace with changes to modern policing without the need for further primary legislation. Whilst the power to amend the list of police support services provided for at section 3 of the Bill is a significant one we are of the view that it is neither exceptional nor contentious. Under the Police (Scotland) Act 1967 the range of common services provided and maintained by the Scottish Ministers under section 36, to police forces across Scotland has been extended over time without any parliamentary scrutiny. Additions to the range of services have been arrived at consensually and following consultation with the aim of helping forces improve efficiency and cost effectiveness across a wide range of activities. We are not aware of any difficulties or disagreement between stakeholders in this regard or of services being imposed without a consensus being reached. Section 22(2) of the Bill imposes a duty on Scottish Ministers to consult with a range of persons or bodies and as such all those who have an interest in the police support services will have an opportunity to express their views prior to the power being exercised. In our view this extensive consultation requirement coupled with affirmative procedure provides a sufficient and appropriate level of parliamentary scrutiny.

Section 23(1) – Power to require the use of police support services

3. We note the Committee has suggested that this power should be subject to affirmative procedure in the Parliament rather than the negative procedure which is provided for in the Bill. Section 23(1) allows the Scottish Ministers to make regulations requiring police forces to use such police support services as are specified if they think that it would be in the interests of the efficiency or effectiveness of the police to do so. A similar provision is contained in section 36(2) of the Police (Scotland) Act 1967 allowing the Scottish Ministers to require police forces to use services provided and maintained by them under section 36(1). This power has never been used and under the 1967 Act the 8 police forces currently all use the
range of common police services provided without being compelled to do so. We do not anticipate any difficulties with forces' willingness to continue to use the police support services provided for in the Bill or indeed any new police support services which may added following a process of consultation and parliamentary scrutiny and as such we expect that this power would only require to be used in exceptional circumstances. In passing the Bill Parliament will have approved the establishment of the Authority and the support services that it will provide to police forces across Scotland. Any additional support services which may be added by virtue of an order under section 22(1) will themselves have been subject to a process of consultation with interested parties and approval by affirmative resolution of the Parliament. It therefore seems unusual that the Parliament would want to have further approval before any police force was required to use these services. We therefore consider that the use of the negative procedure along with the consultation requirements provide a sufficient degree of parliamentary scrutiny.

Section 32(3) – Power to prescribe exceptions from notifying complainer of the outcome and action to be taken following a complaint handling review

4. The Committee has asked for clarification as to when this power will be used. Section 32(3) of the Bill provides that, in certain circumstances, the Commissioner will not have to provide information to complainers at the end of a complaint handling review about why a certain course of action has been decided upon. We want to ensure that complainers are given as much information as possible but we consider that there will be certain rare circumstances when it will not be appropriate for the Commissioner to inform a complainer of why certain decisions were reached. We want the Scottish Ministers to have the power to prescribe what these circumstances are as it is our view that this should not be left to the discretion of the Commissioner. Giving the Scottish Ministers the power to restrict when information is given to complainers will also give the Parliament the opportunity to scrutinise these exceptions.

5. As we feel it is important that complainers are given as much information as possible about the progress of their complaint, the Bill provides that the Scottish Ministers should only prescribe exceptions to the information which the Commissioner can disclose if it is necessary to prevent the release of information which may be used in criminal proceedings; where non-disclosure is in the interests of national security or for the purposes of the prevention and detection of crime; or to prevent disclosure of information which is not considered to be in the public interest.

6. Examples of the kinds of information which might fall into these categories would be criminal intelligence or any material which if released might prejudice criminal proceedings; or information (such as names, addresses or personal details) on witnesses or anyone else whose safety or wellbeing might be jeopardised by any release. By prescribing the exceptions in regulations it will provide flexibility to modify the circumstances in which the Commissioner should not be disclosing information to complainers, provided this is considered necessary for one of the reasons stated above. We consider it more appropriate to address this in regulations than on the face of the Bill.
Section 33 – Power to make regulations in relation to the discontinuation of a complaint handling review

7. The purpose of a complaint handling review is to allow the new Commissioner to ascertain whether there is any cause for concern over how a complaint against the police has been handled and, if so, whether that complaint should be re-considered. There will be circumstances when it will not be appropriate for the Commissioner to proceed with a complaint handling review. This will be the case if a complaint contains an element of criminality which has not been previously identified or where the complainer has subsequently agreed that their complaint can be resolved with the police force. It would also not be appropriate for the Commissioner to proceed with a complaint handling review if he or she considers that a complaint is vexatious or an abuse of the complaints procedures; or where the complainer refuses to co-operate to the extent that the Commissioner feels it is not practical to continue.

8. In our view, the detail of all the categories in which a complaint handling review should be discontinued should be set out in regulations as opposed to on the face of the Bill as the Committee have suggested. Once the post of Commissioner is up and running other circumstances may become apparent in which the Commissioner should not be required to carry out a complaint handling review. Specifying these circumstances in regulations gives flexibility to modify them in accordance with the day to day experience of the new Commissioner. The regulation making power will also give the Parliament the opportunity to scrutinise the circumstances in which the Commissioner should not be required to conduct a complaint handling review, rather than this being left to the discretion of the Commissioner.

9. We envisage that some of the procedures which should be followed if the reconsideration of a complaint has to be discontinued would include key steps such as informing the complainer; producing a report which explains the decision to discontinue; and committing to the local resolution process where this has been agreed with the complainer. Again, in our view it is better to specify the detail of the procedures which the Commissioner must follow (and the steps which the Commissioner can require an appropriate authority or anyone else appointed to reconsider a complaint to follow) in regulations as opposed to putting this detail on the face of the Bill. This approach again provides flexibility for any of the procedures to be modified as the role of the Commissioner evolves, while still allowing Parliament the opportunity to scrutinise such modifications. By setting this process out in primary legislation we would make it difficult to bring about any change in what is intended to be a practical working process.

Section 36(3) – Power to prescribe exceptions from notifying complainer about the outcome, findings and action to be taken following the reconsideration of a complaint

10. The Committee has sought clarification in relation to the expected use of this power. Under section 36 of the Bill, if the Commissioner supervises the reconsideration of a complaint he or she is under a duty to inform the complainer of the findings of that reconsideration process, what action will be taken and what the outcome of that action was. The regulation making powers under section 36(2) will
set out the exceptions to the duty to provide information to the complainer. Such restrictions can only be placed in regulations if it is considered necessary to prevent the disclosure of information which may be used in criminal proceedings, where non-disclosure is in the interests of national security or for the purposes of the prevention and detection of crime or to prevent disclosure of information which is not considered to be in the public interest.

11. We consider that the regulation making powers under section 36(2) would be used in the same circumstances as those outlined in paragraphs 4 to 8 above.

Section 65(2) – Power to modify the definition of the enforcing authority

12. The policy is that the “enforcing authority” for football banning orders will be a unit within Strathclyde police force and this is provided for in section 65 (1) of the Bill by referring to the chief constable of that force who will be responsible for the unit. However in future, in the light of experience, it may well be considered appropriate for the functions of the “enforcing authority” to be carried out by a different body or person. For example, the role could be given to another police force or (once it is established) the Scottish Police Services Authority, or another body or person.

13. Accordingly section 65(2) provides that the Scottish Ministers may by order modify the definition of the “enforcing authority. This power is subject to negative procedure therefore if the Parliament thought it appropriate to “veto” any change in the enforcing authority then it could do so by passing a motion to annul any order made by the Scottish Ministers which sought to change the definition of “enforcing authority”. We are satisfied that the provisions as drafted would allow the Scottish Ministers to provide that a different body was to be the “enforcing authority” in the future. However, we note the concerns of the Committee and as such propose to consider further whether it is necessary to bring forward an amendment at Stage 2.

Section 86 – Power to make procedure in relation to review of sentence and appeal against a decision in a review of sentence

14. The Committee has sought clarification as to why we consider affirmative procedure appropriate. The Executive agrees with the Committee that the provisions of an order under section 86 will be largely matters of administrative and procedural detail. The question of whether the power ought to be negative or affirmative was fairly finely balanced and we ultimately opted for affirmative procedure on the basis that the provision gave Scottish Ministers a power to modify Part VIII of the 1995 Act. In the light of the Committee's views, we have looked at this matter again. In particular, noting that there is a similar power in section 24F of the 1995 Act which gives Scottish Ministers power to make amendments to the bail provisions in the 1995 Act for the purposes of extradition hearings. This power is subject to negative procedure, presumably also on the basis that the power will relate to matters of procedural detail. In the light of this precedent and for the reasons given by the Committee, we are content to agree that affirmative procedure is not necessary for the section 86 power. Accordingly, an amendment will be brought forward at Stage 2 to change the procedure required under section 86 to negative procedure.

Schedule 3, paragraph 5 – transfer of property rights and liabilities
15. The Committee have asked for our views as to whether the transfer scheme ought to be incorporated into a statutory instrument. The Bill provides that the Scottish Ministers may make a transfer scheme and in addition makes further provision in respect of any such scheme. The transfer scheme will by necessity be of a very detailed nature setting out all property, rights and liabilities which are to transfer to the new Authority from police authorities, joint boards and the Scottish Ministers. For example, we expect the scheme will contain a list of building names, addresses, descriptions of properties and other such details. We therefore do not consider it appropriate for such a scheme to be subject to parliamentary scrutiny or contained in a statutory instrument. The Committee will have noted that we have not provided for the staff transfer scheme, which will be similarly detailed in nature, to be subject to parliamentary scrutiny for the same reasons.

16. I hope that the information set out above satisfactorily answers the questions which the Committee has raised.
MEMORANDUM ON DELEGATED POWERS

SCOTTISH SCHOOLS (PARENTAL INVOLVEMENT) BILL

Purpose
1. As required under Rule 9.4A, this Memorandum has been prepared by the Scottish Executive to accompany the Scottish Schools (Parental Involvement) Bill introduced in the Scottish Parliament on 28 September 2005. It details the provisions in the Scottish Schools (Parental Involvement) Bill that confer powers to make subordinate legislation. It describes the persons upon whom the powers are conferred, the form in which the powers are to be exercised, the Parliamentary procedure to which the powers are to be subject and why it is considered necessary to delegate the powers. It does not form part of the Bill and has not been endorsed by the Parliament.

Background to the Bill
2. The following paragraph outlines the main provisions of the Bill. Further information about the Bill's provisions are offered in the Explanatory Notes, Policy Memorandum and Financial Memorandum.

3. This Bill has been introduced as part of the Scottish Executive’s commitment to review and reform the legislation governing school boards (the School Boards (Scotland) Act 1988 (the “1988 Act”) and associated Regulations), made in Educating for Excellence: Choice and Opportunity (The Executive’s Response to the National Debate on Education) (January 2003). The 1988 Act established statutory parental representation in public schools (schools under the management of education authorities). The Bill has a broader focus in that it also extends to parents’ involvement in their own child’s education. The Bill also has to be considered in the context of other education legislation. At present the main statutory provisions relating to education are to be found in the Education (Scotland) Act 1980 (the “1980 Act”) and in the Standards in Scotland’s Schools etc. Act 2000 (the “2000 Act”). In relation to the education provided in public schools, the Bill places a duty on Scottish Ministers to promote parents’ involvement in their child’s school education; builds on and strengthens the existing duties placed on education authorities by the 2000 Act with regard to parents’ involvement in their own child’s school education and in school education generally; repeals the 1988 Act and associated legislation and makes provision for new arrangements for parental representation in schools; places a duty on education authorities to give advice and information to parents on the education of their own child; and requires education authorities to have a complaints procedure covering how they carry out their functions under the Bill.

Delegated Powers

Section 8(7) Functions of a parent council
4. Section 8(7) confers powers on the Scottish Ministers to add to or alter the functions of a Parent Council set out in the Bill.  

**Justification for taking this power**  
5. The 1988 Act, which part of this Bill replaces, set out the functions and duties of a school board in detail. The main role of the new Parent Councils to be introduced by this Bill is in communicating with and representing parents and in doing so to support those managing the school. This power allows Ministers to amend the functions of Parent Councils without requiring primary legislation where a change is deemed appropriate. For example, once Parent Councils are established it may become apparent that existing functions should be altered, or new ones added. Any such additions or alterations would be brought about by means of statutory instrument subject to affirmative resolution procedure. As is normally the case with powers which allow amendment of primary legislation, affirmative procedure is considered appropriate in relation to adding to or altering the functions of parent councils currently listed in the Bill because of the greater opportunity for scrutiny and debate by the Parliament afforded by this procedure.

**Section 14(3)(a) Procedures for appointment of headteacher or deputy and participation of a Parent Council**

6. Section 14(3)(a) confers on Scottish Ministers the power to make regulations imposing requirements which the process involved in relation to headteacher and deputy headteacher appointments must satisfy.  

**Justification for taking this power**  
7. Section 14 replaces the current prescriptive appointment procedures for headteachers and deputy headteachers set out within Schedule 2 to the 1988 Act.  

8. Instead of prescribing a new system centrally for senior management appointments, the Bill requires each education authority, in terms of section 14, to inform Ministers and Parent Councils about their procedures for filling such posts, and to involve the Parent Council (where one exists) in the appointment process. While provision has therefore been made for what is a more flexible appointment procedure, section 14(3) will enable Scottish Ministers to make provision by way of regulations setting out the specific requirements which those processes must satisfy. It is considered that negative resolution procedure is appropriate on the basis of the procedural nature of the subject matter.

9. Power is also conferred on Ministers enabling them, by notice, to require education authorities to change their appointment process to the extent set out in the
notice. The power is considered necessary to allow action to be taken at short notice, where this is considered necessary in relation to that appointment process.

Section 21(1) Transitional provisions etc.

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution (but affirmative in relation to amendment or repeal of another enactment)

10. Section 21(1) confers powers on Scottish Ministers by order to make incidental, suppletmental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence, of the Bill. The power would be appropriate to allow Ministers to make changes to other legislation as a consequence of the Bill that are not apparent at the moment. In terms of section 22(3)(b) a statutory instrument containing an order under section 21(1), where the effect of that order would be to amend or repeal primary legislation, requires to be made by affirmative procedure. It is considered that an order which makes such an amendment or repeal should be subject to full scrutiny and debate by the Parliament and therefore made by affirmative procedure. In respect of other orders or regulations (aside from any made under section 8(7) as referred to earlier in this Memorandum) it is not considered necessary or desirable to require a higher level of Parliamentary involvement than that afforded by negative procedure, as provided for under section 22(2).

Section 24(2) Short title and commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: No parliamentary procedure

11. Section 24(2) gives the Scottish Ministers power to commence provisions of the Act by order. Provision is made for different days being appointed for different provisions, for different areas, for different purposes or for different cases or classes of case. This would allow a phased approach to commencement for example by reference to education authority areas, or for different provisions in the Bill. No commencement date is specified in the Bill as Ministers are yet to determine when it would be appropriate to bring the substantive provisions of the Bill into force. As is normal with commencement orders, no form of parliamentary procedure is required.
THE CRIMINAL LEGAL AID (SCOTLAND) (FEES) AMENDMENT (No.2) REGULATIONS 2005, (SSI 2005/584)

In its letter of 29 November 2005 the Subordinate Legislation Committee sought an explanation from the Executive of the following matter.

“2. The Committee noted that regulation 2(1) provides that the new fees and outlays will apply “only in respect of proceedings concluding on or after 4 April 2005”. It appears to the Committee that this may give retrospective effect in relation to proceedings concluding on or after 4th April 2005 but which commenced prior to the coming into force of these Regulations on 10 December 2005.

3. Given that the enabling powers cited in the preamble to the instrument do not appear to provide for such retrospection, the Executive is asked for an explanation of the *vires* of regulation 2(1).”

The Executive responds as follows.

1. The Criminal Legal Aid (Scotland) (Fees) Amendment (No.2) Regulations 2005 (“the Regulations”) provide for the payment of certain fees to counsel. The Regulations have retrospective effect in so far as they apply in respect of proceedings that commenced before the coming into force date of 10 December 2005.

2. The Legal Aid (Scotland) Act 1986 does not contain an express enabling power allowing for the making of retrospective provision. It does, however, provide for a comprehensive and flexible system of payment in respect of publicly funded legal representation. Relevant to the question of retrospection, there is a general principle that Parliament is presumed not to have intended to alter the law applicable to past events or transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. Looking at the matter from this “unfairness” angle, it is considered that the 1986 Act powers do not prevent the approach that has been taken in the Regulations, provided that their retrospective application does not create any unfairness for those affected by them. This is achieved by the saving provision made in regulation 2(2) to the effect that the previous fee levels should apply in any case where that would result in a greater sum being payable.

3. This is consistent with the approach taken in *McCall v The Scottish Ministers* (29 November 2005). In that case Lord Carloway held that the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005 (SSI 2005/113) were *ultra vires* as
regards the applicability of new fees to work done prior to the commencement of those Regulations solely on the grounds that this was an unfair interference with the Petitioner’s right to peaceful enjoyment of the (higher) fees which she had earned before commencement.