Local Government Committee
4th Meeting, 2002 (Session 1)

Tuesday 29 January 2002

The Committee will meet at 2.00 pm in Committee Room 1

1. Items in private: The Committee will consider whether to take items 5, 6 and 7 in private.

2. Local Government Finance Inquiry: The Committee will take evidence from—
   
   Scottish Executive:
   Mr Andy Kerr, MSP, Minister for Finance and Public Services
   Neil Rennick, Head of Local Government Expenditure and Council Tax Branch
   Miss Nikki Brown, Head of Local Government Distribution and Non-Domestic Rates Branch
   Christie Smith, Head of Local Government Finance and Performance Division

3. Education (Disability Strategies and Pupils’ Records) (Scotland) Bill: The Committee will take evidence on the general principles of the Bill at Stage 1 from—

   Scottish Executive:
   Mr Andy Kerr, MSP, Minister for Finance and Public Services
   Neil Rennick, Head of Local Government Expenditure and Council Tax Branch
   Mrs Sam Baker, Pupil Support and Inclusion Division
   Lindsey Wright, Teachers and Schools Division

   COSLA:
   Councillor Helen Law, Education Spokesperson
   Maggi Allan, Executive Director, Education Resources, South Lanarkshire Council

   Glasgow City Council:
   Margaret Orr, Senior Education Officer
4. **Subordinate Legislation:** The Committee will consider the following negative instruments—

   SSI 2001/459: The Police Pensions (Pension Sharing on Divorce) (Scotland) Amendment Regulations 2001

   SSI 2001/460: The Local Government Pension Scheme (Scotland) Amendment Regulations 2001

   SSI 2001/461: The Police Pensions (Additional Voluntary Contributions and Increased Benefits) (Pension Sharing) (Scotland) Amendment Regulations 2001

5. **Budget Process 2003/04:** The Committee will consider details relating to the appointment of an adviser.

6. **Land Reform (Scotland) Bill:** The Committee will consider a draft Stage 1 report.

7. **Public Appointment (Parliamentary Approval) (Scotland) Bill:** The Committee will consider a draft Stage 1 report.

   Eugene Windsor
   Clerk to the Committee
   Room 2.05, Committee Chambers
   85217
   e mail: eugene.windsor@scottish.parliament.uk

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The following papers are attached for this meeting:

**Agenda item 2**

Memorandum from the Scottish Executive on Local Government Finance

**LG/02/4/1**

**Agenda item 3**

Memorandum from the Scottish Executive on the Education (Disability Strategies and Pupils' Records) (Scotland) Bill

**LG/02/4/2**

Submission from COSLA

**LG/02/4/3**

Submission from Glasgow City Council

**LG/02/4/4**
Agenda item 4

The Police Pensions (Pension Sharing on Divorce) (Scotland) Amendment Regulations 2001 (SSI 2001/459)  

The Local Government Pension Scheme (Scotland) Amendment Regulations 2001 (SSI 2001/460)  

The Police Pensions (Additional Voluntary Contributions and Increased Benefits) (Pension Sharing) (Scotland) Amendment Regulations 2001 (SSI 2001/461)  

Extract from the 1st Report of the Subordinate Legislation Committee  

Extract from the 2nd Report of the Subordinate Legislation Committee

Agenda item 5

Budget Process 2003/04: Details relating to the appointment of an Adviser [PRIVATE]  

Agenda item 6

Land Reform (Scotland) Bill: Summary of evidence [PRIVATE – to follow]  

Agenda item 7

Public Appointments (Parliamentary Approval) (Scotland) Bill: Draft Stage 1 Report [PRIVATE – to follow]  

Memorandum from the Scottish Executive on the Public Appointments (Parliamentary Approval) (Scotland) Bill [PRIVATE]

The following papers are attached for information:

Minutes of the 3rd Meeting 2002
LOCAL GOVERNMENT COMMITTEE INQUIRY INTO LOCAL GOVERNMENT FINANCE

Submission from the Minister for Finance & Public Services

1. Since devolution, the Scottish Executive has confirmed and enhanced the central role of local government in delivering national policy commitments and local services. We welcome, therefore, the Local Government Committee’s inquiry into local government finance in raising discussion about the funding of vital public services delivered by local authorities.

The Renewal of Local Government Finance & 3 Year Settlements

2. Throughout the period of the inquiry we have continued our work with local government, through COSLA, to review and renew the local government finance arrangements, delivering real improvements which are helping to support more effective local budget planning and service delivery. This includes providing the stability of 3 year revenue grant and capital allocations – something not available to authorities in any other part of the UK. We have given local authorities more flexibility with the abolition of spending guidelines and a reduction in ring-fenced controls. We have also ensured a fairer distribution of revenue grant, guaranteeing every council above inflation increases in this and the next 2 years.

3. The Spending Review in 2000 provided local government with over £1 billion in additional revenue grant support over 3 years and a 40% increase in the allocations for non-housing capital investment. The local government settlement announcement in December 2001 confirmed the allocation of further substantial additional resources to local government for 2002-03 onwards. The allocations provide full financial support for the additional costs of new policy initiatives, including the modernisation of the teaching profession, enhanced concessionary travel and improved care services for older people, as well provision towards pay and price inflation across the range of local authorities’ existing service responsibilities. Local authorities in Scotland are receiving unprecedented levels of funding support, totalling over £7 billion by 2003-04.

Capital Controls and Local Outcome Agreements

5. The 3 year allocations are providing a vital period of stability for local government. However, we are continuing to work with COSLA to introduce further improvements to the local government finance system, including options for improving the framework for local authority capital investment, through a prudential system. This should allow authorities more flexibility in determining their investment levels, whilst ensuring that they continue to seek best value when choosing between funding options.

6. For 2002-03 ring-fenced specific grants account for less than 10% of total Scottish Executive revenue grant support for local government, with around £150m in ring-fenced programme funding transferring to unhypothecated general grant. We are looking at the potential to further reduce ring-fenced controls through local outcome agreements. Local authorities have already been asked to agree specific outcome targets linked to national
priorities for community care, adult literacy, homelessness and social justice and we are piloting, with COSLA, wider agreements for education and children’s services. The lessons from these outcome agreements will help inform arrangements for the allocation of resources from the Spending Review later this year.

Local Taxation

7. Local authorities have control over the vast majority of their total resources from Executive grant and local taxation in establishing their expenditure priorities. The council tax maintains the link between local budget decisions and locally raised income. Council tax payers in Scotland now have the certainty of knowing their authorities’ indicative budget and council tax plans over 3 years. We are working with authorities to further improve council tax collection levels and to better target support or action for those in arrears. I note that the Committee has commissioned research into the operation of the council tax and we will be interested to see the conclusions. We are also making the non-domestic rating system more responsive to the circumstances of individual businesses, including through the introduction of a relief scheme for small businesses from 1 April 2003, benefiting an estimated 70% of Scottish businesses, and various rate relief measures for rural communities.

Spending Review 2002 & Grant Distribution

8. The Spending Review later this year will set the total local government settlement allocations for the next 3 year period from 2003-04. We will involve COSLA fully in this process. In preparation for the next 3 year settlement we will also consider with COSLA the operation of the grant distribution formula. The priority will continue to be to deliver a distribution formula that is as transparent as possible and provides all councils with an equitable allocation of resources and the stability to plan service improvements.

Local Government Bill & White Paper

9. If we are to provide modern and effective local services we cannot focus narrowly on the structure of the local government finance system. The quality of services is not just dictated by the level of resources available but how those funds are used. We are consulting on new statutory measures to ensure that authorities seek Best Value and continuous improvement in their services delivery and continue to develop effective joint working with their local partners, through Community Planning. We are also proposing to give councils a general power to improve the well-being of their areas, removing unnecessary controls and red-tape and encouraging innovation. Where there are examples of good practice and innovation we want to encourage these and promote their wider application.

10. We have also announced our intention to publish a White Paper on the future of local government, based on the principles in the Kerley report. The White Paper will not simply address the question of electoral reform, but will cover a wide range of issues as part of our agenda for modernising local government and ensuring the delivery of high quality public services.

Summary

11. In recent years we have introduced substantial improvements to the system of local government finance to provide local government with a stable financial platform. We will
continue to consider further reforms and improvements, taking account of the impact on local government, taxpayers, businesses and service users, to ensure that authorities and their partners have the resources, powers and flexibility to deliver quality public services. In that context, we will consider with interest the findings of the Local Government Committee’s inquiry when it reports.

January 2002
EDUCATION (DISABILITY STRATEGIES & PUPILS' RECORDS) BILL

Submission from the Minister for Finance and Public Services

1. This submission provides the Local Government Committee with a summary of the policies behind and provisions of the Bill, which will make provision for improvements in two separate areas of access in education: access to education for pupils with disabilities and parental access to their children’s educational records.

Access to education for pupils with disabilities

2. Sections 1 to 3 of the Bill will require local authorities and independent and grant-aided schools to prepare strategies to improve access to the curriculum, the school environment and school information for pupils with disabilities.

3. Scottish Ministers are committed to giving all children and young people in Scotland the best possible education, regardless of where they live or of any disability they may have. Although many schools already provide excellent, inclusive education for pupils with disabilities, we recognise that there are many others which still do not provide a fully accessible curriculum and facilities. This Bill aims to ensure that responsible bodies tackle existing barriers to participation in education for pupils with disabilities in order to promote, as far as possible, the inclusion of pupils with disabilities in Scottish schools. Over time, the changes proposed will help pre-school and school age children with disabilities to reach their full educational potential by making it easier for them to participate in classes and activities.

4. The Bill will require responsible bodies to plan for access for pupils with all types of disabilities. This therefore includes children with mental impairments – not just those with physical or sensory impairments. Following the implementation of the presumption in favour of mainstreaming in section 15 of the Standards in Scotland’s Schools etc. Act 2000, Scottish Ministers expect that the great majority of children with disabilities will be included within mainstream schools, although there will continue to be some children with complex needs who will require special school placements. This Bill aims to support mainstreaming by ensuring that local authorities plan to make their schools fully accessible to those children who previously may have been educated within special schools.

5. The preparation and implementation of accessibility strategies will also support the Disability Discrimination Act 1995 (as amended) which, from September 2002, will make it unlawful for a responsible body to discriminate against pupils with disabilities in the provision of education and associated services. By proactively planning to ensure that access to pre-school and school education is improved and that awareness and understanding of disability are raised amongst staff and pupils, schools and local authorities should as a result be able to comply with the requirements of the Disability Discrimination Act.

6. Comprehensive draft guidance will be issued for consultation over the summer to help responsible bodies in preparing and implementing their strategies. In preparing strategies, they will be expected to consult widely with children and young people, and with parents and school staff. Local authorities and independent and grant-aided schools will also probably wish to consult relevant voluntary organisations, health and education professionals,
architects or other design professionals and other bodies with relevant knowledge or expertise, such as the Disability Rights Commission, in order to obtain advice regarding improvements to access.

7. Sections 1 to 3 of the Act are expected to come into force in Autumn 2002, following which responsible bodies will be given approximately six months during which to prepare their strategies, after which implementation should begin. Regulations are expected to prescribe that each strategy should initially cover a period of three years, during which time they should be reviewed and revised as necessary. New strategies would then be prepared after three years.

8. In order to assist local authorities in implementing their accessibility strategies, the Scottish Executive will include £9 million in general local government revenue grant in 2003-04. In addition to this, the Scottish Executive is increasing allocation of funds to the Inclusion Programme (part of the Excellence Fund), which aims to promote inclusion and equality in Scottish schools by improving access to school buildings and the curriculum for pupils with special educational needs. The majority of Inclusion Programme funding is already used by local authorities to improve access to education for pupils who, within this Bill, would be defined as having a disability. £14.3 million is available through the Inclusion Programme in the current financial year. This will be increased to £17.5 million in 2002-03 as preparation of accessibility strategies begins and then to £19.5 million in 2003-04 as strategies are implemented. Consideration will be given to funding beyond 2003-04 at the Spending Review.

Access to pupils’ educational records

9. Section 4 of the Bill will allow the Scottish Ministers to make provision, in regulations, relating to the keeping, transfer and disclosure of pupils’ education records. Subject to certain exceptions relating to sensitive personal data, the Executive believes that parents should have an independent right to access information contained within their children’s educational records. The Data Protection Act 1998 does not provide parents with an independent right to access their children’s school records and its introduction effectively removed that right, previously provided by the School Pupil Records (Scotland) Regulations 1990. Scottish Ministers therefore intend to exercise this regulation making power as soon as possible to reinstate an independent right for parents in Scotland to access their children’s school education records.

10. The Scottish Executive will carry out a public consultation on draft regulations after the Bill has completed its passage through Parliament. The new regulations will be consistent with data protection legislation, and will be brought into force as soon as possible. The regulations should not result in any additional costs on local authorities because parents previously had a right to access their child’s records, and procedures were put in place by authorities to process such requests before the Data Protection Act 1998 came into force. The regulations to be made under the Bill will not require any significant change to those processes.

January 2002
EDUCATION (DISABILITY STRATEGIES AND PUPILS’ RECORDS) (SCOTLAND) BILL

General

1. COSLA welcomes the opportunity to comment on the general principles of the Education (Disability Strategies and Pupils’ Records) (Scotland) Bill. Briefly COSLA

- supports the Bill in principle with its aim of complementing the Scottish special educational needs framework and building on existing good practice;
- wishes to register concern relating to the resource implications of both sections of the Bill and to stress the consequent need for adequate Executive funding;
- seeks an assurance that there will be flexibility to allow councils to build on their present position and to reflect local circumstances; and
- emphasises the need for co-ordination with relevant existing legislation.

The following paragraphs expand on these points and, in addition, highlight some areas where clarification is required.

Financial Implications

2. The Bill includes proposals for a duty on councils to plan for access for pupils with disabilities and also for the right of parents to have access to their children’s school records. As always when new duties are proposed for local authorities, it is essential that the Scottish Executive recognises this in full and makes financial provision to meet the consequent additional costs on councils. These costs could be considerable if school buildings – frequently designed for an earlier era – require to be adapted. The new duties will come at a time when there are already concerns that the current level of capital consents is insufficient to cover existing commitments for capital investment in buildings and/or new build and when, in addition, councils must meet the requirements of the Disability Discrimination Act 1995. Additional costs may not necessarily be directly related to building costs. For example, a pupil with special educational needs who requires specialist equipment in the classroom could reduce the classroom capacity by, say, one place, which would have implications if that particular class had reached maximum size.

3. The issue of accessibility cannot be restricted to buildings and must also address accessibility to the curriculum, again with resultant resource implications. Councils are auditing policies, practices and procedures to ensure that access to the curriculum is being proactively addressed. Whilst some resulting changes will be procedural, others will have cost implications, eg staff training, additional learning support assistants, aids/equipment to access the curriculum etc. The new provisions relating to access to pupil records will also have additional cost implications, particularly if increased parental demand for access to records is generated. As indicated above, all of these changes will need to be supported by additional financial resources from the Executive.
Flexibility – avoidance of prescription

4. COSLA’s Education Executive Group adheres to certain key principles which underpin its work and a number are relevant to this consultation –

- the need for children always to come first, with arrangements which are disruptive to their educational provision being avoided; and

- local authorities’ ability to provide services which are flexible, local and responsive.

COSLA would therefore argue that rigid prescription should be avoided to allow councils maximum flexibility in ensuring, from a starting point that the needs of the individual child are paramount, that an appropriate package of services are provided.

Co-ordination with existing legislation

5. Reference is frequently made to the plethora of plans required in connection with the provision of children’s services. It is essential that the new legislation fits as seamlessly as possible with current requirements (including, for example, children’s services plans, school development plans required under the Standards in Scotland’s Schools Act) if properly co-ordinated provision is to be made and wasteful duplication avoided.

Clarification

6. A number of areas have been identified where clarification/future guidance would be helpful. These include:-

- Accessibility Strategy
  i. Frequency of publication? One possibility would be to publish every three years, incorporating it with the Children’s Services Plan so combining it with existing planning structures rather than introducing another layer;
  ii. Implications for pre-school providers and their responsibilities to meet the accessibility requirements.

- With regard to school pupil records:
  i. A clear definition of ‘educational records’ would be helpful is determining what parents should be able to access? For example, should notes made during telephone conversations, with their characteristics of informal communication rather than a prepared and considered report, be included?
  ii. Consistency is required with the Children (Scotland) Act. With regard to the age of children, could the parent of a thirteen year old have access to their records, against the wishes of the child? Should the permission of the child be required?
  iii. The need to exclude access to sensitive personal data is acknowledged. It must be recognised, however, that there can be instances where not making a parent aware of, say mental health problems being experienced by their child, could be unhelpful.

LOCAL GOVERNMENT COMMITTEE MEETING - 29 JANUARY 2002

1. ACCESSIBILITY STRATEGIES

   a. It is estimated that up to £100k would be necessary to undertake an in-depth survey of the building stock. This is based on surveys focusing on outstanding maintenance in the SEN sector at a cost of £40k and on the primary sector at a cost of £400k.

2. a. Curriculum differentiation is ongoing. No major cost implications. Excellence Fund Core Programme Inclusion has greatly facilitated the production of teaching and learning materials.

   b. Outwith an overall accessibility strategy, the authority has responded on a case by case basis and within budgetary constraints. In practice, most requirements for minor adaptations are met e.g. ramps, handrails, toilet facilities, customised seating and work surfaces. In financial year 2001/2002 £112k was spent on 12 primary schools. These costs were met from the Excellence Fund Core Programme Inclusion. Where major adaptations are required e.g. installation of lifts, or where the physical design of the building militates against major works, children are transported to the nearest local school which can afford the necessary access. In the primary sector if internal access to an upper floor is the issue, the class will be relocated on the ground floor.
2.

In terms of the city estate, the rebuild or refurbishment of our 29 mainstream secondary schools has ensured physical disabled access both externally and internally. Additional customisation has been undertaken in the schools with integrated unit provision for children with sensory impairment, communication disorder and speech and language difficulties.

c. The city is developing its Braille provision but ongoing investment is required in this area. This is a particularly expensive resource in terms both of equipment and staff expertise and time.

3. ACCESSIBILITY STRATEGIES: PROCEDURE

a. The capital programme is the main mechanism to bid against finite resources. The Department Service Plan indicates an estimated £100k per year to address a rolling programme of adaptations. It is anticipated that costs will be met from the Excellence Fund Core Programme Inclusion as the base capital budget cannot meet the combination of remedial works and accessibility requirements. Given the budget limitations, priority work will be against individual pupil need.

b. No major costs linked to consultation exercise.

c. Costs associated with translating strategy documents into eg Braille or auditory format.
**SSI Title and No:** The Police Pensions (Pension Sharing on Divorce) (Scotland) Amendment Regulations 2001, (SSI 2001/459)

**Laid Date:** 17th December 2001  
**Responsible Minister:** Andrew P. Kerr, Minister for Finance and Public Services

**SE Contact:** Malcolm MacPherson, 43216

**Standing Order:** 10.4 Subject to negative procedure within 40 days.

**RECOMMENDATION**

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<th>Lead Committee:</th>
<th>Local Government</th>
<th>Other Committees:</th>
<th>1. 2. Justice 1 &amp; 2</th>
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<td>Clerk Contact No:</td>
<td>1. Lynn Tullis 2. Gillian Baxendine</td>
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**Reason:** These Regulations amend the Police Pensions Regulations 1987 and associated Regulations to provide for pension sharing on divorce in the Police Pensions Scheme. Couples will be able to achieve a clean break in pension terms upon divorce.

**Time Limit for Parliament to Deal with Instrument**  
6th February 2002  
**1st SLC Meeting**  
8th January 2002  
**SLC reporting deadline**  
18th January 2002

**Lead Committee To Report By:** 4th February 2002  
**Other Committees To Report to the Lead Committee:** 21st January 2002

**SSI Attached**  
*Draft Motion Attached if Required*  
**Date Motion and Designation Form E-Mailed to the Bureau**  
**Laying Clerk Advised of Designated Lead Committee**

* 10 days before the lead committee reporting date. “Other” committees may wish to negotiate timing of their report with the lead committee.
**SSI Title and No:** The Local Government Pension Scheme (Scotland) Amendment Regulations 2001, (SSI 2001/460)  

<table>
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<th>18th December 2001</th>
<th>Responsible Minister:</th>
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**SE Contact:** David Lauder, 43218  

**Standing Order:** 10.4 Subject to negative procedure within 40 days  

**RECOMMENDATION**  

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<th>Clerk Contact Room &amp; No:</th>
<th>Eugene Windsor 85217</th>
<th>Clerk Contact No:</th>
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**Reason:** The regulations protect the pension position of Scottish Homes employees who transferred to the Executive Agency, Communities Scotland on 1 November 2001. Notwithstanding their transfer they may remain as members of the Local Government Pension Scheme rather than transferring to the PCSPS.  

**Time Limit for Parliament to Deal with Instrument**  

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<th>7th February 2002</th>
<th>1st SLC Meeting</th>
<th>8th January 2002</th>
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**1st SLC Meeting**  

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<th>SLC reporting deadline</th>
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**Lead Committee To Report By:**  

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<th>4th February 2002</th>
<th><em>Other Committees To Report to the Lead Committee:</em></th>
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**SSI Attached**  

| X | Draft Motion Attached if Required | Date Motion and Designation Form E-Mailed to the Bureau | Laying Clerk Advised of Designated Lead Committee |

* 10 days before the lead committee reporting date. “Other” committees may wish to negotiate timing of their report with the lead committee.
<table>
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<th>SSI Title and No:</th>
<th>The Police Pensions (Additional Voluntary Contributions and Increased Benefits)(Pension Sharing) (Scotland) Amendment Regulations 2001, (SSI 2001/461)</th>
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<tr>
<td>Laid Date:</td>
<td>17&lt;sup&gt;th&lt;/sup&gt; December 2001</td>
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<tr>
<td>Responsible Minister:</td>
<td>Andrew P Kerr, Minister for Finance and Public Services</td>
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<tr>
<td>SE Contact:</td>
<td>Malcolm MacPherson, 43216</td>
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<tr>
<td>Standing Order:</td>
<td>10.4 Subject to negative procedure within 40 days.</td>
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**RECOMMENDATION**

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**Reason:** These Regulations principally amend the regulations which govern the in-house Additional Voluntary Contributions (“AVC”) scheme for police officers in Great Britain.

**Time Limit for Parliament to Deal with Instrument:**
- 6<sup>th</sup> February 2002
- 1<sup>st</sup> SLC Meeting reporting deadline: 8<sup>th</sup> January 2002
- 18<sup>th</sup> January 2002

**Lead Committee To Report By:**
- 4<sup>th</sup> February 2002

**Other Committees To Report to the Lead Committee:**
- 21<sup>st</sup> January 2002

**SSI Attached**
- X Draft Motion Attached if Required

- Date Motion and Designation Form E-Mailed to the Bureau

- Laying Clerk Advised of Designated Lead Committee

* 10 days before the lead committee reporting date. “Other” committees may wish to negotiate timing of their report with the lead committee.
Subordinate Legislation Committee

Remit and Membership

Remit:

The remit of the Committee is to consider and report on—

(a) (i) subordinate legislation which is laid before the Parliament;

(ii) any Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation; and

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

(Standing Orders Rule 6.11)

Membership:

Bill Butler
Colin Campbell
Murdo Fraser
Gordon Jackson QC
Ian Jenkins (Deputy Convener)
Margo MacDonald (Convener)
Bristow Muldoon

Committee Clerks:

Alasdair Rankin
Steve Farrell
Alistair Fleming
Subordinate Legislation Committee

1st Report, 2002

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. The Committee met on 8th January 2002 and determined that the attention of the Parliament need not be drawn to the instruments listed at Annexe A.

2. The report is also addressed to the following committees as lead committees for the instruments specified:

- Rural Development
  - SSI 2001/458
  - SSI 2001/484
- Local Government
  - SSI 2001/459
  - SSI 2001/461
- Justice 1
  - The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2002, (Draft)
  - SSI 2001/464
- Health and Community Care
  - SSI 2001/465
  - SSI 2001/466
Instruments subject to approval

The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2002, (Draft)

Instruments subject to annulment

The Sheep and Goats Spongiform Encephalopathy (Compensation) Amendment (Scotland) Order 2001, (SSI 2001/458)

The Police Pensions (Pension Sharing on Divorce) (Scotland) Amendment Regulations 2001, (SSI 2001/459)

The Police Pensions (Additional Voluntary Contributions and Increased Benefits) (Pensions Sharing) (Scotland) Amendment Regulations 2001, (SSI 2001/461)

The Legal Aid (Scotland) Act 1986 (Availability of Solicitors) Regulations 2001, (SSI 2001/464)

The National Health Service (Scotland) (Superannuation Scheme and Additional Voluntary Contributions) (Pension Sharing on Divorce) Amendment Regulations 2001, (SSI 2001/465)

The Road Traffic (NHS Charges) Amendment (Scotland) Regulations 2001, (SSI 2001/466)

The Rural Diversification Programme (Scotland) Amendment Regulations 2001, (SSI 2001/484)
Subordinate Legislation Committee

Remit and Membership

Remit:

The remit of the Committee is to consider and report on—

(a) (i) subordinate legislation which is laid before the Parliament;

(ii) any Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation; and

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

(Standing Orders Rule 6.11)

Membership:

Bill Butler
Colin Campbell
Murdo Fraser
Gordon Jackson QC
Ian Jenkins (Deputy Convener)
Margo MacDonald (Convener)
Bristow Muldoon

Committee Clerks:

Alasdair Rankin
Steve Farrell
Alistair Fleming
The Committee reports to the Parliament as follows—

1. The Committee met on 15\textsuperscript{th} January 2002 and determined that the attention of the Parliament need not be drawn to the instruments listed at Annexe A. The Committee draws the attention of the Parliament to the instruments listed at Annexe B.

2. The report is also addressed to the following committees as lead committees for the instruments specified:

- Local Government SSI 2001/460
- Rural Development SSI 2001/483
- SSI 2002/1
- Education, Culture and Sport SSI 2001/476
- SSI 2001/477
- SSI 2001/478
- Transport and the Environment SI 2001/3917
Instruments subject to annulment

The Import and Export Restrictions (Foot-and-Mouth Disease) (Scotland) (No.3) Amendment (No.2) Regulations 2001, (SSI 2001/483)


The BSE Monitoring (Scotland) Amendment Regulations 2002, (SSI 2002/1)

Instruments not laid before the Parliament

The Ethical Standards in Public Life etc. (Scotland) Act 2000 (Commencement No.2 and Transitional Provisions) Order 2001, (SSI 2001/474)

1. Although the Committee did not take any formal point on the Order, a member questioned the references to the Accounts Commission and the Controller of Audit. The Committee therefore indicated to the Executive that it would welcome further background on the references in the Order to the Accounts Commission and the Controller of Audit rather than to Audit Scotland.

2. The Executive replied with a helpful summary of the position, reproduced at Appendix A.

Act of Adjournal (Criminal Procedural Rules Amendment) (Convention Rights (Compliance) (Scotland) Act 2001), (SSI 2001/479)

The Police Act 1997 (Commencement No.8) (Scotland) Order 2001, (SSI 2001/482)


Instruments subject to annulment

The Local Government Pension Scheme (Scotland) Amendment Regulations 2001, (SSI 2001/460)

1. The Regulations have been made as a consequence of the Housing (Scotland) Act 2001. By amending the Local Government Pension Scheme they allow for those staff of Scottish Homes who have been transferred to the Scottish Executive following the winding up of Scottish Homes to continue to be members of the Local Government Pension Scheme if they so wish. It appears that remaining members of the Local Government Pension Scheme may be more beneficial to certain transferees than joining the Principal Civil Service Pension Scheme (PCSPS). The Executive may therefore be obliged under employment law to ensure that such persons are not disadvantaged by their transfer to the Executive.

2. The Committee notes that the Housing Scotland Act 2000 made provision for the dissolution of Scottish Homes and that the property of that body was transferred to the Scottish Ministers by SSI 2001/396 made under powers conferred by that Act. The Committee also notes that provisions relating to Scottish Homes contained in that Act (namely sections 84, 85 and 87) have been commenced by order. Section 86 which made specific provision in relation to the transfer of staff and conferred order-making powers for the purpose on the Scottish Ministers however has not been commenced.

3. The Executive has not explained in the Executive Note how the transfer of staff from Scottish Homes to the Scottish Administration has been effected in the absence of an order under section 86 but it appears that the personnel in question are now civil servants. It may be that the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) are relevant. In the light of the decision of the House of Lords in R .v Secretary of State for the Home Department ([1995] 2 A. C. 513) it seems to the Committee that there may be a general doubt as to whether the transfer of staff has been properly effected and therefore directly and indirectly as to the vires of the instrument in addition to the specific concerns discussed below. Where primary legislation makes specific provision for a particular situation, it may not be open to Ministers to fail to commence that legislation and proceed by way of alternative general powers.

4. The Local Government Pension Scheme which these Regulations purport to amend is made under sections 7 (and 12) of the Superannuation Act 1972, which makes provision for Regulations to prescribe a Scheme specifically for local government employees. Section 7(1)(b) allows regulations to be made under the section for persons other than local government employees for whom it is considered appropriate to make provision under the section.

5. The difficulty that arises, it appears to the Committee, is that, leaving aside the concerns outlined above, the employees for whom these Regulations are made are now members of the staff of the Scottish Administration and therefore by virtue of section 51 of the Scotland Act civil servants. Pensions of civil servants are specifically provided for under section 1 of the Superannuation Act 1972, which is
amended to take account of devolution, by section 51 of the Scotland Act. In addition, the Civil Service is reserved under the Scotland Act (Schedule 5 Part 1, paragraph 8). The Committee therefore asked the Executive to explain why it considered the Regulations to be within the competence of the Scottish Ministers.

6. In reply, the Executive has submitted two letters explaining its position. In the first letter, reproduced at Appendix B, it explains how the powers under which the Regulations are made have devolved to the Scottish Ministers.

7. As this did not directly address the Committee’s concerns, the Executive was asked to expand further with particular reference to section 1 of the Superannuation Act 1972, which makes specific provision in relation to Civil Service pensions (and which is not devolved).

8. This second reply, reproduced at Appendix C, explains that the purpose of the Regulations is not to make provision for Civil Service pensions but to amend the local government pension scheme. The Regulations, in the Executive’s view, therefore fall within devolved competence.
9. The Committee has no difficulty in agreeing sections 7 and 12 of the Superannuation Act are devolved both by virtue of the Order under the Scotland Act and also by virtue of the exception from the “pensions” reservation in section F3 of Schedule 5 to the Scotland Act. Accordingly, there can be no doubt that in principal the Executive has powers to make and amend the Local Government Pension Scheme. However specific and detailed provision is made for the pensions of serving civil servants under section 1 of the Superannuation Act. There is therefore doubt whether the powers under section 7(1)(b) can be used to extend the local government scheme to civil servants or indeed (irrespective of devolution) any other group of persons for whom specific provision is made under the 1972 Act for example Health Service Workers.

10. According to the normal rules of interpretation, an Act must be construed as whole and general provisions cannot normally be read as overriding specific provisions for a particular case. The Committee therefore considered that there might be a risk that, in addition to the concerns mentioned above, the Regulations might represent an unusual or unexpected use of the power or at worst be ultra vires and outwith devolved competence.

11. The Executive has attempted to deal with this point in its letter of 14 January and the Committee has considered the arguments carefully. The Committee of course agrees with the Executive that to allow civil servants to opt for membership of the Local Government Scheme, an amendment is needed to that Scheme and that amendments to that Scheme could not have been made under section 1 of the 1972 Act and must in general be made under section 7 and 12.

12. Section 7(1)(b) is also undoubtedly wide enough to allow regulations to be made under section 7, extending the local government scheme to persons other than local government employees. Where the Committee has difficulty is whether these “other persons” can include civil servants. Although the persons affected were formally employees of Scottish Homes, they are now serving as civil servants.

13. The Committee did not question the merits of or need for the instrument, which are not in any case matters within its remit. It is the means of achieving the end that appear to it to be problematic.

14. The Committee acknowledges that this is not an easy issue to resolve and has given much thought to the issues raised. The Committee is also alive to the fact that the arguments in support of the instrument could have wider implications for the future. In principal if the Executive is correct, it seems to the Committee that by making Regulations under section 7 of the Superannuation Act the Scottish Ministers could open the Local Government Scheme to all Scottish civil servants. The Committee doubts whether this was the intention of Parliament in enacting the 1972 Act or, given the express reservations, the Scotland Act.

15. Despite the Executive’s courteous letters the Committee therefore remains concerned about the vires of this instrument.

16. The Committee therefore draws the instrument to the attention of the Parliament and lead committee on the ground that there is a potential doubt
about the vires of the instrument and as to whether it is within devolved competence.

THE LOCAL GOVERNMENT PENSION SCHEME (SCOTLAND) AMENDMENT REGULATIONS 2001, (SSI 2001/460)

On 8 January 2002, the Committee wrote in the following terms:

“The Committee notes that the Civil Service is reserved through paragraph 8 of Part 1 of Schedule 5 to the Scotland Act 1998. As the reservation in the fifth paragraph of Section F3 of Schedule 5 may also be relevant the Executive is asked to explain why it feels the instrument falls within devolved competence.”.

The Scottish Public Pensions Agency has noted the question asked by the Committee and responds as follows:

1. The Committee will note that the instrument is made in terms of powers conferred by sections 7 and 12 of the Superannuation Act 1972, and is to effect an amendment to the Local Government Pension Scheme (Scotland) Regulations 1998.

2. In Schedule 1 to the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (SI 1999/1750) there is a list of enactments conferring functions transferred to the Scottish Ministers, which includes sections 7, 8, 9, 10, 11(2), 12, 15(5), 16 and 24 of the Superannuation Act 1972. There is a proviso about Treasury consent in respect of sections 9(1) and 10(1), but that is not relevant here.

3. In terms of the same Schedule, the Local Government Pension Scheme (Scotland) Regulations 1998 is also listed as an enactment where functions are transferred to the Scottish Ministers. The transfer of these functions is described in footnote (a) to the Regulations.

4. It is clear therefore that the Scottish Ministers have specific powers to enable them to make the instrument.

5. It is hoped that this information is sufficient to allay any concerns the Committee may have had over competence of the instrument. Obviously if further clarification is required, then we would be happy to assist.

Shirley Ferguson
for the Scottish Public Pensions Agency

Date 10th January 2002
THE LOCAL GOVERNMENT PENSION SCHEME (SCOTLAND) AMENDMENT REGULATIONS 2001, (SSI 2001/460)

Further to the response of 10 January 2002 to the Committee’s question of 8 January 2002 on the above instrument, clarification has been requested on whether there might be a concern over competence with reference to section 1 of the Superannuation Act 1972.

This has been fully considered, and I would offer the following response:

1. The Superannuation Act 1972 section 1(1) provides that the Minister for the Civil Service “may make, maintain and administer schemes (whether contributory or not) whereby provision is made with respect to pensions, allowances or gratuities which, subject to the fulfilment of such requirements and conditions as may be prescribed by the scheme, are to be paid, or may be paid, by the Minister to or in respect of such persons to whom this section applies as he may determine;…”

2. The Principal Civil Service Scheme (PCSPS) has been made in terms of this section. While civil servants are entitled to membership of the PCSPS, they may opt out. Any civil servant who has opted out of the Scheme may have an opportunity to rejoin at a later stage.

3. It is accepted that any amendment to the PCSPS or any other scheme set up in terms of powers given by section 1 of the 1972 Act, would be for the Minister for the Civil Service, unless he exercised his powers of delegation under section 1(2) of that Act, in favour of another Minister, which in terms of section 51(6) of the Scotland Act 1998 could include the Scottish Ministers.

4. The Regulations under consideration by the Committee are not being made in terms of section 1 of the 1972 Act, as their purpose is to effect an amendment to the Local Government Pension Scheme, which is a scheme set up under section 7 of the 1972 Act in terms of the Local Government Pension Scheme (Scotland) Regulations 1998. The functions under section 7 have been specifically transferred to the Scottish Ministers as have functions relating to the Local Government Pension Scheme by virtue of The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999 (SI 1999/1750).

5. The purpose of the Regulations is to allow those former employees of Scottish Homes who have transferred to the Scottish Administration with effect from 1 November 2001, to remain, if they wish, as members of the Local Government Pension Scheme. There is no intention of excluding any such individual from the PCSPS if they wish to join that pension scheme, and consequently there is no requirement to amend the terms of that scheme. Rather, it is intended to avoid the necessary exclusion of that group of employees from eligibility of the Local Government Pension Scheme which is presently the position in terms of regulation 5 of the 1998 Regulations.

6. As previously explained, Scottish Ministers have the requisite powers to make the instrument in terms of sections 7 and 12 of the 1972 Act, the functions of which are clearly devolved to them. Where executive devolution of powers has taken place,
there is no requirement for Scottish Ministers to act within devolved competence when exercising these powers.

I trust that this now adequately addresses any concerns which the Committee may have had.

Yours faithfully

SHIRLEY FERGUSON
for the Scottish Public Pensions Agency

14th January 2002