Local Government Committee

15th Meeting, 2002

Tuesday 21 May 2002

The Committee will meet at 2.00 pm in Committee Room 4

1. Items in private: The Committee will consider whether to take items 4 and 5 in private.

2. Renewing Local Democracy - the Next Steps: The Committee will take evidence on the White Paper from—

   Professor John Curtice, Department of Government, University of Strathclyde;

   Fairshare:
   Councillor Andrew Burns, Chair
   Stewart Maxwell, Fairshare Campaign Committee Member
   Amy Rodger, Fairshare Campaign Co-ordinator
   Willie Sullivan, Fairshare Campaign Consultant.

3. Subordinate Legislation: The Committee will consider the following affirmative instrument—

   The Marriage (Approval of Places) (Scotland) Regulations 2002 (draft).

4. Debt Arrangement and Attachment (Scotland) Bill: The Committee will consider proposals for consideration of the Bill at Stage 1.

5. Renewing Local Democracy - Phase 2 Inquiry: The Committee will consider details relating to the appointment of an adviser.

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The following papers are attached for this meeting:

Agenda item 2
Submission from Professor John Curtice   LG/02/15/1
Submission from Fairshare   LG/02/15/2

Agenda item 3
The Marriage (Approval of Places) (Scotland) Regulations 2002 (draft)   SL/02/24R
Extract from 24th Report of the Subordinate Legislation Committee   LG/02/15/3

Agenda item 4
Debt Arrangement and Attachment (Scotland) Bill – paper from the Convener [PRIVATE]   LG/02/15/4

Agenda item 5
Renewing Local Democracy – Phase 2 Inquiry: Details relating to the appointment of an Adviser [PRIVATE]   LG/02/15/5
Evidence from John Curtice, Scottish Parliament Local Government Committee, 21 May 2002

1. I have been asked to address three aspects of Chapter 3 of the Scottish Executive white paper entitled, Renewing Local Democracy: The Next Steps. The first is to provide an overview of the various electoral systems mentioned in the chapter. The second is to comment on the degree to which the various systems meet the criteria that Ministers have identified should be used in determining which electoral system should be used in future local government systems. The third is to discuss the implications for the choice of electoral system of the Executive’s decision that the number of councillors should not be reduced as recommended by the Kerley Committee. In so doing I have been asked to advise the committee of any recent research I may have conducted on any of these subjects.

2. I propose to discuss these three topics in turn. However as no attempt can be made to assess how well any system meets any given set of criteria without a clear understanding of what those criteria may be, before embarking on my second task I propose to elucidate my understanding of the criteria proposed in the white paper.

Alternative Electoral Systems

3. Five separate electoral systems are mentioned in Chapter 3 of the white paper. One of these is the system currently in use in Scottish local government elections, commonly known as ‘first past the post’ (FPP). Four alternatives are also discussed, the Single Transferable Vote (STV), the Additional Member System (AMS), the Alternative Vote (AV), and the Alternative Vote Plus (AV+).

4. The Single Transferable Vote is currently used in the United Kingdom at all elections in Northern Ireland. It has also been used in the past to elect Scottish Education Boards between 1919 and 1928 and University MPs (including those representing Scottish Universities) until their abolition in 1950. It is also used in the Republic of Ireland, Malta, the Australian senate, Tasmanian state elections, in local elections in Cambridge, Mass. and in New York School Board elections.

5. The system requires that two or more councillors should be elected for the same ward (with the minimum usually being three). Voters are presented with a list of candidates that they are required to place in rank order of preference. To be elected a candidate needs to meet the quota, which is defined as the 1+ total vote/(seats+1), this being the minimum number that only the number of candidates to be elected can achieve. Those candidates whose total of first preference votes exceed the quota are automatically elected. In the (likely) event that fewer candidates have met the quota than there are seats to be elected, a process of redistribution of both votes surplus to quota and votes cast for bottom placed candidates takes place in accordance with the second and lower preferences expressed by voters until sufficient candidates have met the quota.
6. The Additional Member System (AMS) also known as Mixed Member Proportional (MMP) initially became well known because of its use in Germany. It was subsequently adopted in New Zealand in place of FPP in the 1990s and is now also in use some parts of former Central and Eastern Europe such as Lithuania and Ukraine. Within the United Kingdom it is now used to elect the Scottish Parliament, the National Assembly of Wales and the Greater London Authority, while the UK government has recently proposed that it should also be used in elections to any future English regional assemblies that might be created. This system comes in two halves. In the first half candidates are elected by FPP. In the second half they are elected by a party list system such that the combined total of FPP and party list seats won by a party is as proportional as possible to the votes it wins. Commonly under this system, voters cast two votes, one for the candidate of their choice in the local FPP contest and one for their preferred party list, but are unable to express a preference amongst the candidates on a party list. However neither of these features is a necessary feature of an AMS system.

7. The Alternative Vote is simply STV in a single member constituency. In such a constituency the quota becomes 50%+1, and thus votes for bottom placed candidates are redistributed in accordance the second and lower preferences until the quota is reached. It is used in elections to the Australian lower house. Meanwhile the Alternative Vote Plus is simply a variant of the AMS in which the single constituency members are elected by AV rather than FPP. It was recommended by the Jenkins Commission for use in future elections to the House of Commons but is not currently in use elsewhere.

The Scottish Executive’s criteria

8. In their white paper, the Scottish Executive proposes that any new electoral system for Scottish local government elections should satisfy three criteria. These are:
   i) the retention of the councillor-ward link
   ii) ensures that voters’ preferences are clearly reflected in the result of an election, does not unduly favour either large or small parties, can be used in urban and rural areas, and does not unduly act against the interests of independent candidates
   iii) has clear support
In addition the Executive has indicated that it is not convinced that the number of councillors should be significantly altered as proposed by Kerley.

9. In many respects these criteria are similar to those proposed by the McIntosh Commission and for which the Kerley Committee was instructed by the Executive to find the most appropriate system. McIntosh’s criteria included the councillor-ward link, allowing for the diversity between urban and rural areas, and fairness to independents. One criterion has been dropped – a close fit between council wards and communities – probably quite sensibly as it largely reflected discontent that was expressed to the Commission about the operation of the existing rules for drawing ward boundaries. And one criterion has been added, the existence of ‘clear support’.
10. This leaves McIntosh’s final criterion, proportionality. It might be thought that ensuring ‘that voters’ preferences are clearly reflected in the result of an election’ implies proportionality. However, advocates of a majoritarian electoral system might argue that an overall majority is a ‘clearer reflection’ of voters’ preferences than is a council where party strengths are at least roughly proportional to their electoral support. Moreover they would doubtless argue that such a system avoids the pitfalls of being ‘unduly’ favourable to small parties. Thus the Executive’s white paper would appear to contain a fatal ambiguity on this vital point.

11. This ambiguity inevitably makes it difficult to evaluate any particular electoral system against the Executive’s criteria. In order to be of some assistance to the committee I propose to (i) examine the degree of proportionality of the four alternative systems (ii) the extent to which FPP does provide clear majorities. In short I will assess each system by the degree to which they meet the interpretation of ‘clear reflection’ with which they are most commonly associated. In so doing it will also be possible to consider how far in their own terms the systems may be considered to favour either large or small parties ‘unduly’.

The Councillor-Ward Link

12. The councillor-ward link has been much invoked in the debate about Scottish local electoral reform, but only rarely defined. Often its advocates appear to mean that there should only be councillor per ward. As multi-member wards are an essential feature of proportional electoral systems, this view can appear to amount to ruling our any more proportional system by definitional fiat.

13. There is however a commonly cited argument in favour of single member representation that amounts more than definitional fiat. This is that single member wards encourage local councillors to act as local champions both in respect of the interests of their ward as a whole and the concerns and difficulties that local citizens may have in their dealings with their local council. This incentive arises because such activity can help a local councillor establish a ‘personal vote’ that will help him or her secure re-election. Moreover as a councillor’s fate depends not on their popularity amongst their own party’s supporters, that incentive extends to helping all local citizens, irrespective of their party affiliation. And of course if this activity does produce a ‘personal vote’ we might also anticipate that voters are more likely to think that they are well represented in the council chamber.

14. This argument then implies that what is meant by the councillor-ward link is a system which encourages local councillors to act as local advocates, and as a result voters to feel represented. Interpreted in this way we can then assess the relative success of alternative electoral systems in facilitating the councillor-ward link rather than making it a definitional property of single member representation.

15. Although there is a commonly cited argument that single member districts encourage local advocacy proponents of both STV and AMS argue that their systems have the same
or similar qualities. Advocates of AMS argue that that system retains the same quality as FPP because a significant proportion of councillors are still elected in single member districts. Advocates of STV argue that that system provides an even stronger incentive than does FPP for local councillors to act as local advocates because candidates of the same party have to compete with each other for votes and thus need to cultivate a ‘personal vote’. Some advocates of AMS might also argue that the fact that the rivalry that can arise between single member and party list councillors can serve a similar role.

16. Although there is much theoretical argument in favour of these respective positions, evidence to support them is thinner on the ground. The debate about which electoral system best promotes local advocacy has received far less attention from scholars than has the debate the merits of proportionality versus majoritarianism. There are however two pieces of recently available evidence to which I would draw the Committee’s attention.

17. The 1999/2000 Scottish Household Survey (SHS), found that just 8% of people said that they had contacted their local councillor with an enquiry, complaint or problem in the past twelve months. Thus although the role of acting as a local advocate may loom large in the day to day work of a local councillor, we should bear in mind that even under the current electoral system no individual councillor is in contact with more than a minority of the electorate. Still, perhaps most voters know who to go to should they have a problem with their local councillor. However, in the same survey only 43% of people said that they knew who their local councillor was – and as the accuracy of their claim was not tested by the survey it is not unreasonable to anticipate that the true level of knowledge is even lower than this. The survey certainly does not support the argument made in the white paper that under FPP, ‘voters should be in no doubt as to the identity of their local councillor’.

18. I have recently undertaken international comparative work (with Prof. Phil Shively of the University of Minnesota) on the degree to which different kinds of electoral systems are associated with (i) reported contact with MPs, and (ii) knowledge of candidates standing at an election. If the claims of the advocates of single member representation are correct, then we should expect to find that both reported contact and knowledge of candidates is higher in those countries that use single member districts. The data come from the Comparative Study of Electoral Systems project that has collected data on voters’ attitudes and behaviour in a systematically comparable fashion in nearly 30 countries between 1999 and 2000. The data are about MPs rather than councillors, but they test the same theoretical claims as those being made by the advocates of the councillor-ward link.

19. On average it is the case that people living in countries that only use single member districts are more likely to report some kind of contact with their MP in their last twelve months (though it should be noted that that contact could have been the result of campaigning activity by the MP rather than local advocacy). On average 15% of voters living in countries where all MPs are elected in single member districts reported having contact, compared with 11% of those living in countries where MPs are elected in multi-
member districts and voters can express a preference for an individual candidate (as they can under STV) and 10% in those countries using a mixture of single member and multi-member districts (such as AMS).

20. However, at the same time, voters living in countries with single member districts are less likely to be able to recall the name of at least one candidate standing in their area than are those living in countries with multi-member districts that allow voters to express a preference for an individual candidate. On average as many as 60% of voters in the latter were able to name an election candidate compared with 47% of those in single member districts. (Those living in countries with mixed systems averaged 57%).

21. Moreover, this study confirms the impression of the SHS that in any year only a minority of voters are ever in contact with their elected representatives. It should thus come as no surprise that voters living in countries with single member districts are no more likely to think that ‘Mps know what people think’ than are those living in countries with multi-member districts (with just over a quarter in each case taking this view). Such marginal extra contact between elected representatives and voters as may be generated by single member districts apparently does nothing to persuade voters that they are better represented.

22. There would thus not appear to be an overwhelming case in favour of any of FPP, AMS or STV as a means of delivering a councillor-ward link. And certainly such case as may be made in favour of any them is not sufficiently strong to rule any out of contention irrespective of how well their perform on the other criteria put forward by the Executive.

Clearly Reflecting Voters’ Preferences

23. There can be little doubt that both STV and AMS are capable of producing more proportional results than is often generated by FPP. But the degree to which they do so depends on how they are implemented. As the white paper acknowledges in the case of STV its degree of proportionality is normally greater, the greater the number of councillors elected per ward. But in the case of AMS an equivalent rule applies, that is the greater the proportion of additional to single constituency members the more proportional the system is likely to be. In addition, AMS is more likely to be proportional if the additional members are elected across the council as a whole rather than across ‘regional’ sub-divisions.

24. These rules can be exemplified by looking at simulations of what would have happened if various versions of either STV or AMS had been in place in 1999, but voters had voted in the same way that they actually did under FPP.

25. The first example comes from Edinburgh.
1999 Votes  22.5  32.5  24.4  20.5
FPP Seats  22.4  53.4  22.4  1.7
STV 3-member  19.6  39.2  21.6  19.6
STV 4-member  17.6  33.3  27.5  21.6
AMS 75:25  21.6  39.2  21.6  17.6
AMS 57:43  23.5  33.3  23.5  19.6

While both the Conservatives and the Liberal Democrats received almost their proportional share of seats under the existing FPP system, Labour won over half the seats on a little under a third of the vote, while the SNP hardly secured any representation at all despite winning a fifth of the vote. In contrast under both STV and AMS Labour would have won no more than 39% of the seats and the SNP would have secured roughly their proportional share. Labour’s advantage is however only removed entirely if as many as 43% of the seats are allocated as additional seats rather than just 25%, or if four councillors are elected per STV ward rather than three.

26. The second example comes from North Ayrshire.

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<thead>
<tr>
<th></th>
<th>Con</th>
<th>Lab</th>
<th>SNP</th>
<th>Other</th>
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<tbody>
<tr>
<td>1999 Votes</td>
<td>18.2</td>
<td>46.9</td>
<td>31.2</td>
<td>3.7</td>
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<tr>
<td>FPP Seats</td>
<td>6.7</td>
<td>83.3</td>
<td>6.7</td>
<td>3.3</td>
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<tr>
<td>STV - 3 member wards</td>
<td>6.7</td>
<td>60.0</td>
<td>33.3</td>
<td>0.0</td>
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<tr>
<td>- 6 member wards</td>
<td>16.7</td>
<td>50.0</td>
<td>33.3</td>
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<tr>
<td>AMS: 50% top-up district</td>
<td>16.7</td>
<td>50.0</td>
<td>33.3</td>
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<tr>
<td>50% top-up regional</td>
<td>16.7</td>
<td>53.3</td>
<td>30.0</td>
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<tr>
<td>25% top-up district</td>
<td>13.3</td>
<td>60.0</td>
<td>23.3</td>
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Under the current system Labour secured over 80% of the seats on a little under half the vote. That figure would be scaled back to 60% under any of the alternative versions of STV and AMS simulated here. But it only falls back to 50% where six rather than three member STV wards are used, or where half the seats are allocated as additional seats and this allocation takes place across the district as a whole rather than in separate ‘regions’.

27. The outcome, and thus the proportionality, of elections under STV depends not only on the number of councillors elected per ward but also on the distribution of voters’ second and lower preferences. If voters are relatively reluctant to give second preferences to a particular party, it may well struggle to secure its proportional share. If a party tends to be everyone’s second choice it can easily secure more than its proportionate share.
28. Evidence on the second preferences of voters at the time of the 1999 Scottish elections was obtained by the 1999 Scottish Social Attitudes Survey undertaken by the National Centre for Social Research. Details of the second preferences of each party’s voters as revealed by that survey are given below.

Proportionality depends on second preferences under STV.

Second Preference Matrix

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<th>First Preference</th>
<th>Second Preference</th>
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<tr>
<td></td>
<td>Con</td>
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<tr>
<td>Con %</td>
<td>-</td>
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<tr>
<td>Lab %</td>
<td>6.0</td>
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<tr>
<td>LD %</td>
<td>19.3</td>
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<tr>
<td>SNP %</td>
<td>9.2</td>
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<tr>
<td>Other %</td>
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It will be noted that at present relatively few voters are willing to give a second preference to the Conservatives. In contrast the Liberal Democrats are relatively popular amongst the supporters of other parties. However a significant proportion of Labour voters have a SNP second preference, and vice-versa, while Labour is also the most popular choice of Liberal Democrats. Thus none of the other parties is particularly likely to lose out from the distribution of second preferences. The impact of these second preferences can indeed bee seen in our Edinburgh STV simulation above, where the Conservatives are projected to win slightly less than their proportionate share.

29. The only difference between AV and FPP is that the former takes into account the second preferences of voters when no candidate has secured at least half of the first preferences. It will only produce a different outcome from FPP when a second placed candidate is (i) not far behind the first placed candidate and (ii) has a higher proportion of second placed candidates than the first placed candidate. It thus should come as little surprise that a simulation of AV in Edinburgh and North Ayrshire produces a similar overall result, except that AV is to the clear disadvantage of the Conservatives. Moreover we also discover in Edinburgh that Labour can profit from AV. As it is preferred to the SNP amongst Conservative and Liberal Democrat supporters this can enable Labour to overturn small SNP majorities. There is thus no argument in favour of using AV on the grounds of proportionality. Indeed it is likely to produce even results that are even less proportional than those of the current system.

Edinburgh

<table>
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<tr>
<th>1999 Votes</th>
<th>Con %</th>
<th>Lab %</th>
<th>LD %</th>
<th>SNP %</th>
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<tr>
<td>22.5</td>
<td>32.5</td>
<td>24.4</td>
<td>20.5</td>
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30. If the claims commonly made in favour of FPP as a majoritarian system were valid, we would expect two things to be true. First, we would expect to find that it produces a majority for one party on most councils in Scotland. Second, it should accurately reflect the rank order of parties. Thus it should always give most seats on a council to the party that gets most votes, it should always give more to the second most popular party than the third most popular, and it should discriminate against all small parties rather than some and not others. However, the experience of FPP in Scottish local government indicates that it fails all of these tests.

31. FPP produced an overall majority for one party in just half of Scotland’s 32 councils in 1999. Of the remainder six had a majority of Independents while in 10, or just under a third, no group had overall control. The use of FPP thus far from ensures that the alleged advantages of majoritarian government are delivered. Moreover, even if four member STV had been in place as recommended by the Kerley commission, nine councils would still have had one party with an overall majority (and four would have been controlled by Independents). It can at most only be argued that FPP has a greater tendency to produce overall majorities than do some alternative systems rather than that overall majorities are an inherent feature of FPP and wholly absent under alternative systems.

32. There is no guarantee under FPP that the party that wins most votes in an election will secure most seats. In the 1999 local elections in Dundee, the SNP with 36.4% of the vote, nudged narrowly ahead of Labour on 36.0%. Yet when it came to seats, Labour retained a lead with 18 seats to the SNP’s 14. Similarly in the 1992 local elections in Edinburgh, Labour with just 29% of the vote was well behind the Conservatives on 40%, yet it was Labour who emerged triumphant in terms of seats with 30 to the Tories’ 23. Even Labour has been known to lose out - in East Kilbride in 1974 Labour were four points ahead of the SNP in votes, but ended up being two behind in seats.
33. There is equally no guarantee that the party that comes second in votes will at least come second in seats. For example, in Fife in 1999, the SNP came second in votes with 26.8% of the vote while the Liberal Democrats came third with 22.3%. Yet the Liberal Democrats won 21 seats and the SNP only nine.

34. FPP cannot be defended on the grounds that it systematically benefits larger parties at the expense of smaller parties. This can be seen by simply comparing the percentage of votes and the percentage of seats won by the parties in 1999 across Scotland as a whole.

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<th>Con</th>
<th>Lab</th>
<th>LD</th>
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<tbody>
<tr>
<td>Votes</td>
<td>13.5</td>
<td>36.3</td>
<td>12.6</td>
<td>28.7</td>
</tr>
<tr>
<td>Seats</td>
<td>8.8</td>
<td>45.1</td>
<td>12.8</td>
<td>16.7</td>
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The system discriminates against the Conservatives but not the Liberal Democrats even though they are similarly sized parties. And it discriminates against the SNP but not the Liberal Democrats even though the former is much larger than the latter.

**Use in Urban and Rural Areas**

35. We have already noted that there is considerable flexibility in how both STV and AMS are implemented. In the case of STV ward sizes can vary while in the case of AMS both the proportion of additional seats and the area over which they are allocated can differ. While cognisance would need to be taken of the possible impact of variations on the proportionality of the system, these features should mean that either system should be capable of being adapted to the circumstances of urban and rural areas (such as a perception that wards in rural areas need to be smaller). This flexibility can be enhanced further if the Executive is willing to be flexible about the overall number of councillors on a council.

**Interests of Independent Candidates**

36. Under STV all candidates stand as individuals rather than as members of a party list. Independent candidates can thus stand on an equal funding (subject to their ability to command campaign resources) with candidates standing under a party label. The experience of the Republic of Ireland also indicates that such candidates can secure election under STV, and the system can probably be regarded as no more unfavourable to Independents than FPP. Under AMS candidates can stand as an Independent on both the single member and party list parts of the ballot, and as Dennis Canavan demonstrated in the 1999 Scottish Parliament elections, may well be able to secure election as a result. But the mechanisms of AMS place a greater emphasis on the role of party in determining who is elected than does STV and thus is likely to provide a more difficult environment for Independent candidates than is STV.
37. It should be noted that in stating that any alternative electoral system should have ‘[clear support’ the white paper fails to indicate amongst whom. The criterion could thus, for example, refer to its acceptability amongst the political parties rather than the public as a whole. In evaluating this criterion I will however assume that public support constitutes at least an important part of what the Executive has in mind.

38. There is relatively little survey evidence on public attitudes towards electoral systems for local government in particular as opposed to attitudes towards electoral systems for Holyrood or Westminster. Two surveys have however addressed the issue.

39. First the Electoral Reform Society placed a question on a System Three omnibus poll in 2000 and found that 70% agreed that ‘Local councils would be more representative of local communities if the shares of the seats won by the parties were broadly reflected in their shares of the vote’. Just 12% disagreed and 18% said they did not know.

40. The second piece of evidence comes from a special module of questions on attitudes towards electoral systems that was carried on the 1999 Scottish Social Attitudes survey and was devised by the National Centre for Social Research in collaboration with the Constitution Unit at University College, London. One of the propositions it put to its respondents was, ‘The new way of voting [that is the Holyrood system] should be used in future local elections in Scotland’. As many as 53% agreed with this proposition while only 14% disagreed and 20% said they neither agreed nor disagreed. Although this might be thought to indicate particular support for the use of AMS, it should be noted that respondents were not made aware of alternatives to AMS, let alone whether they preferred AMS to STV. Together with the evidence in the previous paragraph it is probably best interpreted as indicating general support for the principle of proportionality.

41. Survey research has however demonstrated that voters’ responses to alternative electoral systems depend significantly on the wording of the question asked. For example, on the 1999 Scottish Social Attitudes survey as many as 59% agreed that ‘The UK should introduce proportional representation so that the number of MPs each party gets matches more closely the number of votes each party gets’, whereas only 39% backed changing the electoral system when asked to choose between, ‘Some people think we should change the voting system for general elections to the House of Commons to allow smaller parties to get a fairer share of MPs’ and ‘Others say we should keep the voting system as it is to produce effective government’.

42. However, it may be noted that this sensitivity to question wording is less apparent in attitudes towards the appropriate electoral system for Holyrood. The first pro-PR proposition secures 66% support and the second, 58%. It thus may be the case that the apparent priority given to ‘effective government’ over proportionality may be particular to attitudes towards the House of Commons.
43. The 1999 study also indicates which aspects of the claims commonly made in the debate about electoral reform do or do not strike a chord with the public. Neither the claim that PR produces unstable government nor the claim that it gives too much power to small parties has much support; only 14% and 16% respectively support this view. And less than half (41%) say that they prefer single party government. However, 63% say that they would prefer to have one MSP for a small area than many MSPs for a larger area.

44. It appears that there is broad support for the principle of proportionality at elections. However it is far from the case that all features of PR systems receive public support, doubtless one of the reasons why responses to questions about this subject are sensitive to question wording. Another is likely to be that this is not an issue of high salience for many voters.

45. One other feature of public support is the degree to which voters are willing to participate in any electoral system. It is sometimes claimed that the complexity of PR dissuades voters from voting. However only one in ten respondents to the 1999 study said that they found it very of fairly difficult to fill in the ballot papers in the 1999Holyrood election. And while 40% said they found it difficult to understand how votes were translated into seats, these voters were no more likely to abstain than were those who said that it was not difficult. There thus seems no reason at least to believe that the introduction of AMS would discourage voters from participating in Scottish local government elections.

46. Indeed the academic international comparative literature on the subject is almost unanimous in agreeing that countries that use some system of proportional representation secure a higher turnout on average than do those using a majoritarian system. The only disagreement is about the estimated size of that impact; this varies from around 3% to as high as 11%.

*Keeping The Same Number of Councillors*

47. We have already demonstrated above that the proportionality of STV depends on the number of councillors elected in each ward. The Executive’s decision not to reduce the number of councillors should then make it easier to create wards with a higher average number of councillors per ward. Alternatively, it will make it possible to create four member wards as recommended by Kerley will having a lower average electorate size. As we noted earlier this might be particularly advantageous in implementing STV in more rural areas.

48. We have also demonstrated that the proportionality of AMS depends on the proportion of additional seats. The Executive’s decision will thus make it possible to have a large proportion of additional members for any given average electorate size in the single member wards. Alternatively it will make it possible to create wards of a lower average electorate size for any given proportion of additional members.
49. The Executive’s decision probably makes it easier to introduce a version of either STV or AMS that marries a reasonable degree of proportionality with any wish not to have wards that are considered to be too big. It does not self-evidently make either of these more acceptable than the other.

20 May 2002.
Renewing Local Democracy: The Next Steps

Fairshare welcomes the publication of the Scottish Executive’s White Paper and the opportunity to give evidence to the Local Government Committee on those aspects of the White Paper that relate to electoral reform for Scotland’s councils.

Fairshare believes that to be fully effective, councils must be properly representative of the communities they serve and that councillors must be democratically accountable to their local electorates.

Fairshare agrees with the five principles recommended by the McIntosh Commission to determine the most appropriate voting system for future local government elections.

Fairshare also agrees with the priority the Kerley Working Group gave to the first two of those principles, ie proportionality and the councillor-ward link.

Fairshare strongly supports the Kerley recommendation of the Single Transferable Vote system of proportional representation (STV-PR) as the voting system that best meets the needs of local government.

The Executive’s Position

In the White Paper the Executive reiterates its commitment to making progress on electoral reform in line with the principles of the Kerley Report and sets out the key factors Ministers will take into account when considering the introduction of a new electoral system.

Retention of the councillor-ward link (para 32.1)

The retention and, if possible, the enhancement of a strong, identifiable and direct link between the councillor and his or her constituents must be fundamental for local government. It is the link that gives the councillor legitimacy as an elected representative and makes him or her accountable to the local electorate. However, maintaining that link does not require single-member wards. The overwhelming majority (85%) of councillors in England are elected from multi-member wards (2 to 5 members), and there is nothing to suggest that they are any less strongly linked to their constituents than those elected from single-member wards.

STV-PR would not weaken the councillor-ward link. With STV-PR there would be only one kind of elected member and all would be ward representatives. The ward link would be strengthened with STV-PR because councillors would owe their positions to the support of those who had voted for them individually in the local ward. STV-PR would also strengthen the link because it maximises the number of votes that contribute to the result of an election and therefore maximises the number of voters who feel they have contributed directly to the election of a councillor. Flexible and sensitive implementation would ensure that these benefits were not compromised by inappropriately large wards in rural areas.

Clear reflection of voters’ preferences and fair to all types of candidate (para 32.2)

As a system of proportional representation, STV-PR will ensure that voters’ preferences will be clearly reflected in the result of an election, both at ward level and across the council as a whole. Political parties and other groups would be represented in the wards and on the council in proportion to their support among those who voted. This will encourage parties
and other groups to put up candidates wherever they have significant support and so enfranchise more electors.

Because STV-PR uniquely allows voters free choice among all the candidates within a multi-member ward, it can give PR of political parties or of other ‘communities of interests’ or of both, depending entirely on the preferences of the voters. The McIntosh Commission attached considerable importance to the ‘communities of interests’ other than political parties to which electors might belong. Some of these ‘communities of interests’ may be non-party or cross party boundaries, but others may exist within parties. STV-PR thus encourages parties to offer their supporters choice among their sponsored candidates so that voters can, if they wish, rank candidates on the basis of gender, religious affiliation, locality, ethnicity or policy issues.

STV-PR is a candidate-based voting system that treats all candidates alike no matter whether they are nominated by large parties, small parties or local interest groups, or they stand as independents.

**Usable throughout Scotland and responsive to the needs of urban and rural areas** (para 32.2)

STV-PR could be implemented flexibly to allow for the geographical diversity that exists across Scotland, both between and within local authorities. The numbers of members elected from each ward can be varied to suit local circumstances, with larger numbers in the more densely populated areas and smaller numbers where the population is sparse. There is, however, a trade-off between proportionality and the geographic size of the wards.

The adoption of STV-PR would make it much easier to devise wards that did not divide natural communities. With STV-PR both the numbers of electors and the numbers of elected members within wards can be varied to maintain equality of representation. This offers great flexibility in the determination of locally acceptable wards boundaries.

**Clear support for the voting system** (para 32.3)

The Executive will find there is substantial and widespread support for the view that a change to a PR voting system would be beneficial for local government as reported by the McIntosh Commission which consulted in depth and very widely.

A poll carried out by System Three in February 2000 demonstrated that Scottish voters back a fairer voting system for electing their local councillors by a margin of almost six to one. When asked whether they agreed or disagreed with the statement: ‘Local councils would be more representative of the interests of local communities if the shares of seats won by the parties broadly reflected their shares of the votes’, 70% of respondents said they agreed. Just 12% disagreed, while 18% said that they did not know. These views were consistent across supporters of all political parties.

The poll also asked for views on the statement: ‘A voting system which encourages councillors of different parties to co-operate more is likely to lead to better local government’. In response, exactly three-quarters of respondents (75%) agreed with the statement and just one in ten (10%) disagreed. Again, these views were consistent across supporters of all political parties. To ensure that voters were not simply agreeing with any statement put in front of them, the poll asked for views on the statement: ‘We get better local government

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1. System Three interviewed 1,030 adults in-their homes at 40 sampling points across Scotland during the period 24 - 29 February 2000. The sample was representative of the adult population in terms of age, sex and social class.
when one party gets a large majority of the seats, even if it does not have a large majority of the votes’. Voters disagreed with this statement by around two to one.

In the Rowntree Reform Trust State of the Nation 2000 Survey, 68% of Scottish respondents strongly agreed or tended to agree with the statement ‘Elections for local authorities should use a new voting system that would give parties seats on local councils in proportion to their share of the vote.’ Only 7% disagreed.2

**Fairshare**, campaigning for STV-PR for councils since January 2001, has support from members of all political parties and none.

**Numbers of councillors and boundary changes** (para 32.4)

Implementation of the recommended STV-PR voting system would not require any changes in the numbers of councillors. Ministers have concluded that they do not wish to reduce the number of councillors at this time (para 8). They have, however, indicated that they will consider sympathetically any proposals by individual councils for such reductions. Where a council wishes such a reduction, STV-PR would facilitate that change because it would not be necessary to redraw boundaries for single-member wards.

For the first STV-PR elections the existing single-member wards could be amalgamated into appropriately sized multi-member wards, as was done in Northern Ireland in 1973 when STV-PR was re-introduced for local government elections there. With 26 District Councils, the whole process, including local consultations, took only three months to implement. Full advantage was taken of the flexibility of STV-PR to accommodate the needs of the diverse local communities in both the urban and rural areas.

**The Executive’s Questions**

The Executive sought views on three aspects of the issues raised by its proposals for electoral reform for local government.

**The principles recommended by the McIntosh Commission**

**Fairshare** agrees with the McIntosh Commission that the five criteria set out in its Report are the most appropriate to determine which system of proportional representation should be used for future local government elections in Scotland.

**Proportionality** is essential to ensure that most votes count and that most voters have a councillor for whom they voted. This will ensure that the seats won by groups contesting an election will be broadly proportional to the support each has within the community. ‘Proportionality’ must not, however, be defined solely in terms of PR of political parties and other formally registered groups. As the McIntosh Commission stated: ‘The essence of the case for proportional representation is that it produces a result which more fairly represents the spectrum of opinion within the electorate’ (Report para 82). The Commission reported in its Consultation Paper 2 that many electors identified with communities defined by ethnic origin, religious affiliation and a range of common interests (para 56). Such ‘communities of interests’ typically cut across political party boundaries, but they are no less deserving of proportional representation if councils are properly to represent the spectrum of opinion within they electorates they serve.

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2. ICM Research interviewed a UK quota sample of 2,401 adults in the street between 23 - 28 October 2000
The councillor-ward link is fundamental to the very concept of local government. Because of the current structure of local government in Scotland, based only on single-member wards, this link is often viewed solely in geographical terms. However, as pointed out above, this link is more appropriately seen as the link between the elected councillors and those who voted for them. To maintain this central link, all councillors must be elected on the same basis and all must be directly accountable to an identifiable local electorate.

Independent councillors play an important part in local government in many parts of Scotland and it is essential that the voting system does not discriminate against them. Equally it should not favour them at the expense of other candidates, but rather treat all candidates the same.

Allowance for geographical diversity is essential to ensure effective representation in both the densely populated conurbations and the sparsely populated rural areas.

A close fit between council wards and natural communities will help electors relate to the councils that serve them and engender a more fully participative local democracy. With any voting system based in whole or in part on single-member wards, it is difficult, if not impossible, to avoid the artificial division of natural communities. These problems will be most easily overcome if the system adopted permits flexible implementation so that ward boundaries can be drawn without the need for natural communities to be divided.

The priority the Kerley Working Group attached to the first two principles

Fairshare agrees with the priority the Kerley Working Group gave to the first two of the five criteria recommended by the McIntosh Commission, ie proportionality and the councillor-ward link. It is clear from our own discussions with councillors, political activists and ordinary electors that these are the two aspects of the voting system of greatest general concern.

Proportionality is important to ensure that all significant views in the local community are represented. This means that proportionality must not be limited to proportionality for registered political parties.

Local representation is the essence of local government, from the electors’ point of view, so the link between the electors and their local councillors is important. For proportionality to be achieved, several members must be elected together. However, if the voting system ensures that each councillor elected is the personal choice of a constituency of local voters, the local link would be strengthened despite the use of multi-member wards.

The Kerley recommendation of STV

Fairshare strongly supports this recommendation because we believe, on the basis of our own analysis, that STV-PR is the voting system that will best meet the needs of local government in Scotland. By offering electors real choice, ensuring that parties and independents are represented in fair proportion to their local support and allowing flexible implementation to match local circumstances, STV-PR will make an essential contribution to the renewal of local democracy.
Removing Barriers and Widening Access

In Chapter 2 of the White Paper, Ministers have set out their proposals for implementing many of the recommendations in the Kerley Report concerning ‘widening access’. While Fairshare has no policy on these specific recommendations (though it does support the underlying objectives), we would draw the Committee’s attention to an important linkage between these recommendations and the recommendation of STV-PR as the future voting system.

Institutionalised discrimination is built into the present FPTP voting system. The system forces each party to nominate only one candidate in each single-member ward. (If a party does otherwise, it risks splitting the vote and giving the seat to an opposing party.) Each party must choose the one candidate it believes will have the widest appeal to its potential supporters and so have the best chance of winning the seat. In making this choice, it is inevitable that minorities, of all kinds, will be discriminated against. This discrimination is institutionalised in the system.

In contrast, with STV-PR each party has to nominate a team of candidates in each multi-member ward. So the institutional obstacle is immediately removed. Parties can now offer their supporters a range of candidates: men and women; ethnic minorities; different religious affiliations; differing local interests. But this advantage of STV-PR goes beyond simply removing the discriminatory institutional obstacle. Because STV-PR is a preferential voting system, it positively encourages party managers to ensure that their teams of candidates do, indeed, have the widest possible appeal to their potential supporters. It is then for the voters to decide who shall be elected. If significant minorities want direct representation, they would have the power to achieve that.

The adoption of STV-PR would thus be an important step in the practical implementation of the ‘widening access’ that the Kerley Working Group recommended and the Executive has accepted.
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 of the Scottish Parliament Rule 6.11)

Membership:

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

Committee Clerks:

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

1. The Committee met on 14th May and determined that the attention of the Parliament need not be drawn to the instruments listed in the Annexe to this report.

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

   Local Government          The Marriage (Approval of Places) (Scotland) Regulations 2002, (draft)
   Rural Development          SSI 2002/220
Draft instruments subject to affirmative approval

The Marriage (Approval of Places) (Scotland) Regulations 2002, (draft)

Background
1. The Committee raised a number of points on this instrument. These points and the specific responses of the General Register Office for Scotland (GROS) are considered below. In its reply, reproduced at Appendix 1, the GROS has, however, offered the general comment that the Regulations were prepared with the assistance of a Working Group set up to consider and contribute to the preparation of the Regulations.

2. The intention was to ensure that the arrangements for approving places could be dealt with in a manner as compatible as possible with existing procedures for licences (primarily dealt with under the Civic Government (Scotland) Act 1982 (“the 1982 Act”)). The Working Group, made up of representatives from the General Register Office for Scotland, the Convention of Scottish Local Authorities, the Association of Registrars of Scotland and individual local authorities and registrars, specifically requested various provisions to align the procedure as it felt necessary to achieve this aim.

3. The Committee had been aware of the Working Group and the illustrative drafts of the proposed Regulations submitted to the Parliament and the relevant committees at various stages. Moreover, the principle that the procedures for granting approvals should be in line with existing procedures under the 1982 Act was endorsed and, indeed, strongly encouraged by the lead committee in its Reports on the Bill.

4. This Committee found the illustrative Regulations helpful as background in its consideration. But the fact that Regulations may have been prepared with the assistance of a working party does not place them beyond the technical scrutiny of the Committee, nor does it relieve the lead committee and the Parliament of their scrutinising functions. In the present instance, although the Executive’s response provides a useful explanation of many of the points raised by the Committee, concerns remain about others as set out below.

5. The Committee observes that the provisions of the Regulations have drawn upon provisions in other legislation such as the 1982 Act and, indeed, on English legislation such as the Marriages (Approved Premises) Regulations 1995 (SI 1995/510). In the Committee’s view, as the following indicates, it can be dangerous to lift provisions and place them in another context.

Particular points raised

Question 1
6. The Committee asked why regulation 1(2) defines “local registration authority” when a footnote reference is considered appropriate for the definition of “registration district”.

Answer 1

7. The definition of “local registration authority” is required because it does not benefit from the provision of section 26(1) of the Marriage (Scotland) Act 1977 (“the 1977 Act”), as the term does not appear in the 1977 Act. In contrast, no definition is required of the term “registration district” as it does benefit from the provision given that the term appears in both the 1977 Act and the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (“the 1965 Act”). It was thought helpful, however, to direct the reader to that provision and definition in a footnote.

Report

8. The Committee accepts the explanation, noting that the amendments made to the 1977 Act by the Act of 2001 do not refer at all to the local registration authority but to the “local authority”. Moreover, as the GROS explains, the term “local registration authority” does not occur in the 1977 Act in its original form (although it does in the 1965 Act) so section 26(1) of the 1977 Act, which attracts the definitions in the 1965 Act, cannot apply.

9. The Committee agrees that the footnote reference for the term “registration district” is indeed very helpful.

10. The Committee therefore draws the attention of the lead committee and the Parliament to the instrument on the grounds that its form required explanation in the above respect, which explanation was supplied by the GROS.

Question 2

11. The definition of “place” in regulation 1(2) appeared to contain a substantive requirement as well as a definition. The Committee requested an explanation of this approach, which appeared to it to be inappropriate.

Answer 2

12. The GROS noted the Committee’s point but does not, in this instance, consider that the approach adopted is in any way inappropriate.

Report

13. The Committee agrees with Bennion that it is contrary to good drafting practice to incorporate a substantive enactment in a definition because a definition is not expected to have operative effect as an independent enactment. If it is worded in that way, the courts will tend to construe it restrictively and confine it to the proper function of a definition.\(^1\)

14. It is not clear whether, in this instance, the definition is intended to have substantive effect but the Committee suspects that this may be the case. If so, it seems possible, for the reasons given, that the policy intention will not be achieved. The Committee therefore considers that the definition of "place" is, to this extent, defectively drafted.

**Question 3**

15. Also with reference to the definition of “place”, the Committee queried the purpose of the reference to land covered by water “within the jurisdiction of the registration district” since the enabling power makes reference to “places in their [local authorities’] areas” rather than registration districts. The Committee also asked why such a reference is necessary in any event (standing the Interpretation Transitional Order, SI 1999/1379).

**Answer 3**

16. The definition of “authority” means that, in line with the enabling power, the authority that approves a place will be the authority for the area in which the place is situated. The reference to “registration district” is to enable the existing structure of areas where district registrars operate to be accommodated whilst not deviating from the enabling power provision. It is agreed that the reference to water is strictly unnecessary, but this is, in the view of the GROS, due to the relevant provision in Schedule 1 to the Interpretation Act 1978 rather than that in the Interpretation Transitional Order (S.I. 1999/1379) (which does not apply to these Regulations).

**Report**

17. The Committee had difficulty in understanding the response. It is not clear why a reference to the registration district is included in relation specifically to land covered by water and not in relation to other land and premises. This would seem to indicate that places other than land covered by water could be in any registration district or districts. Given that the singular includes the plural it is, therefore, unclear how the references to “the registration district” in the definition reflect the policy that appears, from what the GROS says, to be that places approved will not straddle registration districts.

18. In any event, as mentioned above, if the policy is as stated this does suggest even more that the definition is indeed intended to have substantive effect, which may not have been achieved for the reasons given.

19. If the definition must be interpreted restrictively for the reasons given in relation to question 2, then there must be doubts about the *vires* of the references to registration districts as the enabling power is drafted in terms of enabling local authorities to grant approvals to places in their areas.

20. In relation to the reference to water, the Committee agrees that the reference should have been to the Interpretation Act 1978 in this instance rather than to the 1999 Order even although the enabling power stems from an Act of the Scottish Parliament to which the 1999 Order usually applies. The 2001 Act inserted provisions into the 1977 Act which is subject to the provisions of the 1978 Act, not the 1999 Order. This does not, however, detract from the point that, as the GROS agrees, it was not necessary to refer specifically to land covered by water and that, in this instance, the additional reference to registration districts may confuse the issue.

21. The Committee therefore draws the attention of the lead committee and the Parliament to the instrument on the ground of defective drafting of the definition of “place” as above and on the ground that there may be doubts about the *vires* of the references to registration districts in that definition.
Question 4
22. The Committee was concerned about the *vires* of regulations 7(4), 15(2)(c) and 17(2). These regulations respectively require a local authority to refuse to grant a period approval and entitle a local authority to revoke or suspend such an approval if they are satisfied that the applicant is not a “fit and proper person”. There appears to be nothing in the parent Act to justify these provisions. It appeared to the Committee that the power in the Act enables Ministers to make regulations “for or in connection with the approval by local authorities of places in their areas”. The Act says nothing about approval of persons. The Committee requested an explanation from the Executive.

Answer 4
23. The Executive is satisfied that regulations 7(4), 15(2)(c) and 17(2) are *intra vires*. The enabling power gives Ministers power to make regulations “for or in connection with the approval by local authorities of places”. In any event, section 18A(2)(c) and (e) of the 1977 Act does, in the Executive’s view, indicate that the power contained in subsection (1) is of wide scope.

Report
24. The Committee did not find the arguments convincing. It is clear from the drafting of the enabling power that it is concerned with the approval of places not persons. The general power is certainly very wide but it is not clear how approval of the personal qualities of an approval holder or applicant is connected relevantly to the approval of a place. In addition, the illustrative list of possible provisions to be covered by the regulations gives no indication that the power is intended to cover approval of persons as opposed to places.

25. The Committee recalls that, during the Act’s passage as a Bill through the Parliament, members of the lead committee and others repeatedly questioned the Executive on this particular point. The Executive emphasised that it had decided as a matter of deliberate policy to proceed by way of licensing places and that it had rejected the idea of licensing people. The Bill was passed by the Parliament on this basis.

26. There is the additional problem in that the Regulations give no indication of the criteria that are to be applied in deciding whether an applicant is a “fit and proper person” and for what purposes the person is to be “fit and proper”. The Regulations do not purport to authorise approval of the persons who are to celebrate marriages, (which in any event is dealt with under other legislative provisions). Furthermore, although this is more a matter for the lead committee, it is not obvious what relevance the character of, say, the owner of premises has to the suitability of the proposed marriage venue.

27. The Committee notes that the regulations cited above reflect provisions in Schedule 1 to the 1982 Act. However, in that case the power is enshrined in primary legislation and, although general is clearly relevant to at least some of the activities licensed e.g. taxi-driving and scrap metal.

28. The Committee also notes that there is no similar provision in the English Regulations, on which these Regulations appear also to be modelled in part.
29. The Committee therefore considers that, in so far as the Regulations authorise local authorities to make a judgement as to whether an applicant or approval holder is a “fit and proper person” to hold an approval, they represent at best an unusual or unexpected use of the power. At worst, there is a doubt as to whether they are *intra vires*.

*Question 5*

30. While regulation 9 provides that an authority shall notify an applicant of its decision within seven days, the Committee noted there does not appear to be any time limit on how long an authority has to come to a decision. The Committee asked for further information on this point.

*Answer 5*

31. The Committee is correct in its observation. The Working Group considering the regulations concluded that the imposition of a time limit was of no practical use as the decision would be taken in line with the procedure of each local authority. If this proves to be a problem in practice, an amendment can be considered.

*Report*

32. The Committee recalls that time limits for consideration of applications by local authorities were raised during the passage of the Bill. The lead committee and others expressed concerns about the time scales for approvals and the impact on those intending to get married. The point is one of policy for the lead committee.

33. It seemed to this Committee that there might be a question whether undue delay in considering an application might impinge on the human rights of an applicant or of those intending to get married. The lead committee mentioned this as a possible problem. It was, however, discounted by the Executive on the grounds that, at least so far as those intending to get married are concerned, they would not be prevented from marrying since other venues are available. As a result, it was considered that no human rights issue arose.

34. The Committee therefore simply draws the Regulations to the attention of the lead committee and the Parliament on the ground that regulation 9 required further explanation, now supplied by the Executive.

*Question 6*

35. The Committee asked why regulation 13(4) was considered necessary given the existence of paragraphs (2) and (3) of that regulation, neither of which require costs to have been incurred before a fee is charged.

*Answer 6*

36. The purpose of regulation 13(4) is to make it clear that an authority does not have to wait until it has carried out any necessary inspections and enquiries and determined the application before it can charge the appropriate fee.

*Report*

37. The Executive has explained the purpose of regulation 13(4) but not why it was thought necessary. It seems to the Committee quite superfluous given the provisions of regulation 13(2) and (3). The references to costs “to be incurred” in
those paragraphs make it clear that costs can be charged in advance of any actions having been carried out in relation to the application by the local authority. The provisions of regulation 3 and 4, which entitle an authority to require a fee or a sum to account of the fee to accompany an application, appear to reinforce this interpretation.

38. **The Committee therefore considers that, although it does no harm, regulation 13(4) is unnecessary and therefore fails to comply with proper drafting practice. The Committee therefore reports the provision to the lead committee and the Parliament on that ground.** The Committee notes that a similar provision appears in the English Regulations.

*Question 7*

39. Regulation 14(b) provides for fees to be payable to the “local registration authority” when the enabling power states that the regulations may provide for the charging of fees by “local authorities”. The Committee asked for the reasons for this divergence.

*Answer 7*

40. The GROS refers the Committee to the definition of “local registration authority” in section 5 of the 1965 Act (see footnote (c) on page 1 in this connection). The local registration authority is defined as “the local authority…”

*Report*

41. The Committee is aware that the local authority and the local registration authority are one and the same, at least for the present. It was partly for this reason that the Committee questioned the use of the term “local registration authority” rather than “local authority” in regulation 14. The GROS has not really answered the question but it is a very minor point and, although the enabling power seems to envisage charges being payable to the local authority, the Committee observes that there is nothing in the power that seems to rule out a provision such as regulation 14(b).

42. **The Committee simply draws the attention of the lead committee and the Parliament to the GROS’s response.**

*Question 8*

43. The Committee had serious concerns about paragraphs 15(3) and 15(4), which did not appear to the Committee to work together. The purpose of paragraph (3) appears to be to give persons a chance to make representations to a local authority before that authority decides to revoke or suspend an approval. Confusingly, however, paragraph (3) appears both to entitle and require an authority to give an opportunity to the approval holder and other persons referred to make representations. The Committee believed that the intention of paragraph (3) might be to require an authority to invite representations in appropriate circumstances.

44. The Committee also noted that paragraphs (3)(b) and (4) refer to “the hearing” but the Regulations make no relevant provision relating to hearings, for example, by whom they are to be heard and in which circumstances. Is it the intention, for example, that a hearing must be held even if there are no representations? If a
hearing is not to be held, it is not clear how it will be possible to comply with the notice provisions.

45. Additionally, it was unclear to the Committee to whom paragraph (3)(b) refers. The Regulations place no obligation on the authority to advertise a proposal to revoke or suspend an approval, so it is not obvious what opportunities there might be to make representations, who can make such representations and on what basis. The Committee requested clarification of these points.

Answer 8

46. The GROS is of the view that paragraphs (3) and (4) of regulation 15 work properly together. These reflect the structure of equivalent provisions in paragraph 10(7) and (8) of Schedule 1 to the 1982 Act. To the knowledge of the GROS, no problems have been experienced in relation to those similarly worded provisions. The purpose is that an authority may consider revoking or suspending an approval but is obliged, before actually deciding to revoke or suspend, to give the persons specified an opportunity to be heard or to make written representations.

47. The GROS is of the view that it is clear that it is the authority that will hold the hearing. Any other interpretation appears perverse. The local authority will deal with each application at a meeting (irrespective of whether there are representations) in a manner compatible with the way in which it deals with other similar applications, such as licence applications.

48. Again, this provision mirrors that contained in the 1982 Act and has not given rise to problems in practice. The Executive was mindful, at the insistence of the Working Group and in recognition of comments made by MSPs during the passage of the Marriage (Scotland) Act 2002, that the Regulations should allow the procedures for determination of applications for approvals to be compatible with existing local authority procedures. The Working Group is satisfied this has been achieved. The notice requirements in regulation 15(4) will be undertaken in the circumstances explained above.

49. Regulation 15(3)(b) gives any person who has made relevant representations, on their own initiative, a right to participate in the hearing.

Report

50. The Committee recognised the origin of these provisions. Schedule 1 to the 1982 Act sets out procedures for the consideration of applications for licences under that Act and for the variation and suspension of such licences. Regulation 16 appears to be based on paragraph 10 of that Schedule. Regulation 15 appears to be based on paragraph 11 (not 10 as stated in the GROS’s response). However, there are certain differences. For example, regulation 15(3) allows the approval holder and any other person to submit written observations (unlike the equivalent provisions in the 1982 Act) as an alternative to appearing at a hearing. If the persons concerned agree to rest on written submissions, then presumably no hearing will be necessary. It is therefore unclear how regulation 15(4) can work as drafted. In other words, paragraph (3) suggests that a hearing may only be necessary in certain circumstances but paragraph (4) suggests that a hearing will always have to be arranged.
51. In addition, with respect to paragraph (3), it is appreciated that, in this respect, the Regulations reflect the wording of the 1982 Act. Nevertheless, the Committee has difficulty in understanding how an authority will know whether or not they wish to revoke or suspend an approval until they have considered the matter. In other words, the need for representations would appear to be at the stage when the authority is considering whether or not to revoke the approval etc. rather than later. This appears to be acknowledged by paragraph (4) where it refers to a “note of the grounds upon which the revocation or suspension of the approval is to be considered”.

52. The Committee welcomes the GROS’s explanation of how it is envisaged that the procedures for a hearing will operate in practice and is reassured that the existing provisions under the 1982 Act work well in practice. Nevertheless, the Committee finds the drafting of the Regulations confused.

53. The Committee therefore draws these provisions to the attention of the lead committee and the Parliament on the ground of defective drafting as above.

54. On the third point, the 1982 Act refers to “complaints” rather than “representations”. Presumably the intention behind the different terminology is to widen the field of persons whose views can be taken into account but this is not explained. This is not, however, a matter for the Committee though it does appear to represent a material difference from the 1982 Act.

Question 9
55. The Executive was asked to confirm that “paragraph” in regulation 15(1) should read “regulation”.

Answer 9
56. The GROS agrees that “paragraph” in regulation 15(1) should have read “regulation” and is grateful to the Committee for pointing this out.

Report
57. The Committee draws this point to the attention of the lead committee and the Parliament on the ground of defective drafting, acknowledged by the GROS.

Question 10
58. The Committee had doubts about the *vires* of paragraph 7 of the Schedule which requires, as a condition of a period approval, that the prior written approval of the district registrar is obtained in respect of the “arrangements” for each civil marriage ceremony. This seems inconsistent with the concept of a period approval and, in any event, appears to give the district registrar a veto over civil wedding ceremonies that the Committee was concerned may not be authorised under the enabling power. The Executive was asked to clarify this point.

Answer 10
59. Paragraph 7 of the Schedule requires as a condition of a period approval that certain arrangements are agreed with the district registrar. This is, in the GROS’s view, within the enabling power in section 18A(1), as amplified further by subsection
(2)(e). The regulation-making power enables provision to be made for and in connection with the approval of places and in particular includes the power to impose conditions. Such conditions will be imposed in order to preserve, within reasonable limits, the solemnity and dignity of civil marriage.

Report
60. The Committee agrees that the enabling power enables conditions to be attached to approvals. The only concern was with the width of the drafting of paragraph 7, which might be interpreted as going beyond the enabling power. However, it is possible to apply a restrictive interpretation to the word “arrangements” and the Executive’s further explanation of the intention behind the provision is welcome.

61. It might be considered that requiring approval of the arrangements for every marriage ceremony is a slightly unusual or unexpected use of the power in relation to a period approval as opposed to a temporary approval but this is perhaps, in this instance, more a matter for the lead committee than the Subordinate Legislation Committee.

62. The Committee therefore draws the explanation to the attention of the lead committee and the Parliament.

Question 11
63. The Executive was asked to explain the purpose of paragraph 6 of the Schedule, having regard to the enabling power.

Answer 11
64. The GROS referred to its response to the preceding question. The purpose of the provision is to ensure that, although a place may be approved, the approval is subject to similar conditions as those which effectively apply within a registration office, such as the unavailability of food and drink (alcoholic or otherwise). Failure to comply may lead to the revocation or suspension of the period approval.

Report
65. The Committee is aware that a similar provision appears in the English Regulations. Those Regulations, however, are drafted on the basis that only buildings, vehicles or boats will be approved. The Scottish Regulations apply also to places in the open air. It is not clear what the “similarly defined space” (to a separate room) referred to in paragraph 6 might be in such circumstances. The Committee therefore considered that paragraph 6 of the schedule represents an unexpected or unusual use of the power as applied to a place in the open air and draws it to the attention of the lead committee and the Parliament on that ground.
Appendix 1

THE MARRIAGE (APPROVAL OF PLACES) (SCOTLAND) REGULATIONS 2002 (DRAFT)

On 7th May the Committee asked:

1. The Committee asks why regulation 1(2) defines “local registration authority” when a footnote reference is considered appropriate for the definition of “registration district”.

2. The Committee notes that the definition of “place” in regulation 1(2) contains a substantive requirement as well as a definition. The Committee requests an explanation of this approach which appears inappropriate.

3. The Committee queries the purpose of the reference to land covered by water “within the jurisdiction of the registration district” since the enabling power makes reference to “places in their [local authorities’] areas” rather than registration districts. The Committee also asks why such a reference is necessary in any event (standing the Interpretation Transitional Order – SI 1999/1379).

4. The Committee is concerned about the vires of regulation 7(4), which requires a local authority to refuse to grant an approval and regulations 15(2)(c) and 17(2) which entitle a local authority to revoke or suspend an approval if they are satisfied that the applicant is not a fit and proper person. There appears to be nothing in the parent Act to justify these provisions. It appears to the Committee that the power in the Act enables Ministers to make regulations “for or in connection with the approval by local authorities of places in their areas”. The Act says nothing about approval of persons. The Executive’s explanation on this is sought.

5. While regulation 9 provides that an authority shall notify an applicant of its decision within 7 days the Committee notes there does not appear to be any time limit on how long an authority has to come to a decision. The Committee seeks further information on this point.

6. The Committee asks why regulation 13(4) was considered necessary given the existence of paragraphs (2) and (3) of that regulation (neither of which require costs to have been incurred before a fee is charged).

7. Regulation 14(b) provides for fees to be payable to the “local registration authority” when the enabling power states that the regulations may provide for the charging of fees by “local authorities”. The Committee seeks an explanation of this divergence.

8. The Committee has serious concerns about paragraphs 15(3) and 15(4), which do not appear to the Committee to work together. The purpose of paragraph (3) appears to be to give persons a chance to make representations to a local authority before that authority decides to revoke or
suspend an approval. Confusingly, however, paragraph (3) appears both to entitle and require an authority to give an opportunity to the approval holder and other persons referred to make representations. The Committee believes that the intention of paragraph (3) may be to require an authority to invite representations in appropriate circumstances. The Committee requests an explanation.

9. Additionally it is unclear to whom paragraph (3)(b) refers. The Regulations place no obligation on the authority to advertise a proposal to revoke or suspend an approval so it is not obvious what opportunities there might be to make representations, who can make such representations and on what basis. An explanation is required.

10. The Committee notes that paragraphs 3(b) and (4) refer to “the hearing” but the Regulations make no relevant provision relating to hearings, for example by whom they are to be heard and in which circumstances. Is it the intention for example that a hearing must be held even if there are no representations. The use of the word “propose” in paragraph (4) appears to suggest that a hearing will not always be held, in which case it is not clear how it will be possible to comply with the notice provisions. Information is sought on these points.

11. The Executive is asked to confirm that “paragraph” in regulation 15(1) should read “regulation”.

12. The Committee has doubts about the vires of paragraph 7 of the Schedule, which requires as a condition of a period approval that the prior written approval of the district registrar is obtained in respect of the “arrangements” for each civil marriage ceremony. This seems inconsistent with the concept of a period approval and in any event appears to give the district registrar a veto over civil wedding ceremonies that the Committee is concerned may not be authorised under the enabling power. The Executive is asked to clarify this point.

13. The Executive is asked to explain the purpose of paragraph 6 of the Schedule, (having regard to the enabling power).

The Scottish Executive responds as follows:

As a general point and as the Executive Note explained, a Working Group was set up to consider and contribute to the preparation of these Regulations. This was to ensure that the arrangements for approving places could be dealt with in a manner as compatible as possible with existing procedures for licences (primarily dealt with under the Civic Government (Scotland) Act 1982 (“the 1982 Act”)). The Working Group, made up of representatives from the General Register Office for Scotland, the Convention of Scottish Local Authorities, the Association of Registrars of Scotland and individual local authorities and registrars, specifically requested various provisions to align the procedure as it felt necessary to achieve this aim.
In relation to the specific points put by the Committee:

1. The definition of “local registration authority” is required because it does not benefit from the provision of section 26(1) of the Marriage (Scotland) Act 1977 (“the 1977 Act”), as the term does not appear in the 1977 Act. In contrast, no definition is required of the term “registration district” as it does benefit from the provision given the term appears in both the 1977 Act and the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (“the 1965 Act”). It was thought helpful however to direct the reader to that provision and definition in a footnote.

2. The Executive notes the Committee’s point but does not, in this instance, consider that the approach adopted is in any way inappropriate.

3. The Committee will note that the definition of “authority” means that, in line with the enabling power, the authority that approves a place will be the authority for the area in which the place is situated. The reference to “registration district” is to enable the existing structure of areas where district registrars operate to be accommodated whilst not deviating from the enabling power provision. It is agreed that the reference to water is strictly unnecessary, but this is in the Executive’s view due to the relevant provision in Schedule 1 to the Interpretation Act 1978 rather than that in the Interpretation Transitional Order (S.I. 1999/1379) (which does not apply to these Regulations).

4. The Executive is satisfied that regulations 7(4), 15(2)(c) and 17(2) are *intra vires*. As the Committee notes, the enabling power gives Ministers power to make regulations “for or in connection with the approval by local authorities of places”. In any event, section 18A(2)(c) and (e) of the 1977 Act does in the Executive’s view indicate that the power contained in subsection (1) is of wide scope.

5. The Committee is correct in its observation. The Working Group considering the regulations concluded that the imposition of a time limit was of no practical use as the decision would be taken in line with the procedure of each local authority. If this proves to be a problem in practice an amendment can be considered.

6. The purpose of regulation 13(4) is to make it clear that an authority does not have to wait until it has carried out any necessary inspections and enquiries and determined the application before it can charge the appropriate fee.

7. The Committee is referred to the definition of “local registration authority” in section 5 of the 1965 Act (see footnote (c) on page 1 in this connection). The local registration authority is defined as “the local authority…”.

8. The Executive is of the view that paragraphs (3) and (4) of regulation 15 work properly together. These reflect the structure of equivalent provisions in paragraph 10(7) and (8) of Schedule 1 to the 1982 Act. To the knowledge of the Executive, no problems have been experienced in relation to those similarly worded provisions. The purpose is that an authority may consider revoking or suspending an approval but is obliged, before actually deciding to revoke or suspend, to give the persons specified an opportunity to be heard or to make written representations.
9. Regulation 15(3)(b) gives any person who has made relevant representations, on their own initiative, a right to participate in the hearing.

10. The Executive is of the view that it is clear that it is the authority that will hold the hearing. Any other interpretation appears perverse. Each application will be dealt with by the local authority at a meeting (irrespective of whether there are representations) in a manner compatible with the way in which it deals with other similar applications, such as licence applications. Again this provision mirrors that contained in the 1982 Act and has not given rise to problems in practice. The Executive were mindful, at the insistence of the Working Group and in recognition of comments made by MSPs during the passage of the Marriage (Scotland) Act 2002, that the Regulations should allow the procedures for determination of applications for approvals to be compatible with existing local authority procedures. The Working Group is satisfied this has been achieved. The notice requirements in regulation 15(4) will be undertaken in the circumstances explained in paragraph 8 above.

11. The Executive agrees that “paragraph” in regulation 15(1) should have read “regulation” and is grateful to the Committee for pointing this out.

12. As the Committee notes, paragraph 7 of the Schedule requires as a condition of a period approval that certain arrangements are agreed with the district registrar. This is in the Executive’s view within the enabling power in section 18A(1), as amplified further by subsection (2)(e). The regulation making power enables provision to be made for and in connection with the approval of places and, in particular, includes the power to impose conditions. Such conditions will be imposed in order to preserve, within reasonable limits, the solemnity and dignity of civil marriage.

13. Reference is made to the terms of paragraph 12 above. The purpose of the provision is to ensure that, although a place may be approved, the approval is subject to similar conditions as those which effectively apply within a registration office, such as the unavailability of food and drink (alcoholic or otherwise). Failure to comply may lead to the revocation or suspension of the period approval.

General Register Office for Scotland

9 May 2002