TRANSPORT AND THE ENVIRONMENT COMMITTEE

AGENDA

26th Meeting, 2002 (Session 1)

Wednesday 25 September 2002

The Committee will meet at 9.15 am in Committee Room 2 to consider the following agenda items:

1. Water Environment and Water Services (Scotland) Bill (in private): The Committee will consider possible lines of questioning for witnesses.

2. Water Environment and Water Services (Scotland) Bill: The Committee will take evidence at stage 1 on the general principles of the Water Environment and Water Services (Scotland) Bill from—

   Willie Halcrow, Director of Operations, Scottish Environment Protection Agency

   Martin Marsden, Water Unit Manager, Scottish Environment Protection Agency

   Ross Finnie MSP, Minister for Environment and Rural Development.

3. Subordinate Legislation: The Committee will consider the following negative instruments—


4. **Highlands and Islands Ferry Services**: The Committee will consider a reporters’ paper on the draft service specification for Highlands and Islands ferry services.

5. **Water Environment and Water Services (Scotland) Bill (in private)**: The Committee will consider the evidence it has taken.

6. **Building (Scotland) Bill (in private)**: The Committee will consider a paper on the arrangements for its consideration of the Bill.

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The following papers are attached for this meeting:

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**Papers not circulated:**

Agenda item 2

Members are reminded to bring the written submissions (on peach paper) and the SPICE briefing notes which were issued in August (plus the Bill; Policy Memorandum and Explanatory Notes).
SEPA’s response to the call for evidence by the Transport and Environment Committee on 3 July 2002 concerning the Water Environment and Water Services (Scotland) Bill

1.0 Introduction to SEPA
SEPA regulates potentially polluting emissions to land, air and water; the storage, transport and disposal of controlled waste; and the keeping and disposal of radioactive materials. It also provides environmental advice and information and works in partnership with many public, voluntary and private sector organisations.

2.0 Part 1 of the Bill: protection of the water environment

Overview
2.1 SEPA welcomes Part 1 of the Water Environment and Water Services (Scotland) Bill. In its view this represents the most important piece of legislation relating to the water environment since the Control of Pollution Act 1974, providing the following key benefits:

i) The introduction of River Basin Management (RBM) Planning. This gives a means of planning the protection and improvement of the water environment, through the participation of several parties. The participatory approach should ensure that no single perspective dominates the system and balances the need for environmental improvement against economic and social priorities.

ii) New regulatory regimes proposing a range of controls that can be used to give a proportionate approach to environmental problems. Most importantly the Bill will allow for the protection of:
   • water quality from the effects of direct and diffuse pollution;
   • water resources from the effects of abstraction and dams; and
   • habitat quality from the effect of engineering work.

2.2 Scotland has seen greatly improved water quality in the past 30 years. SEPA welcomes the proposed opportunity to address problems associated with abstraction, impoundments and engineering. In the future the RBM Planning process will allow the most appropriate and cost effective course of action to be taken.

2.3 S2(6) gives Scottish Ministers’ powers of direction without prior consultation. Ministers already have powers to issue directions under Section 40(1) of the Environment Act 1995. Section 40(6) specifies that Ministers must, except in an emergency, consult with SEPA prior to issuing a direction. SEPA would like to see equivalent consultation provisions applying to all guidance, orders and directions specified within the Bill.

3.0 Response to questions

Role envisaged for SEPA as lead body for RBM Planning
3.1 SEPA welcomes the proposals to make it the lead body for RBM Planning.

3.2 It is recognised that leading the RBM Planning process will represent a major challenge. The requirements for leading RBM Planning need a balanced view of environmental protection in the context of supporting the sustainable use of the water environment. Consequently, SEPA welcomes the explicit duty, in section 2(4) to have regard to the social and economic impacts of exercising its functions.
SEPA recognises it must build further its capacity to facilitate the development of these new environmental plans. SEPA will no longer function solely as a regulator, but will have to develop new skills to allow it to develop plans in partnership. Such plans will be based upon the wider perspective created by involving other parties in the development of the plans.

Provisions in respect to River Basin Management Planning

Transposition of the Directive's provisions on public participation.

In order to develop ideas on how RBM Planning could work, SEPA is planning a series of external workshops with interested parties. Consequently, the views expressed below are provisional and will be further developed over the next six months.

Section 2(2) of the Bill requires SEPA to exercise its functions so as to secure compliance with the requirements of the Directive. In terms of RBM Planning, one of the key Directive requirements is defined within Article 14(1). This Article requires Member States to "encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the river basin management plans".

SEPA's vision of the planning system, as proposed in the Bill, is that it will be developed in conjunction with a range of public organisations together with the active involvement of other interested parties. The Bill provides for the creation of Advisory Groups which will represent one of the mechanisms by which active involvement can be encouraged. SEPA considers that these Advisory Groups will be central to the production of effective plans.

An important aspect of the new planning process will be the scale at which it operates. The Bill proposes powers for Ministers to designate River Basin Districts and the Policy Memorandum indicates that such districts will be defined at a large scale, probably a single District covering most of Scotland with separate Districts covering the border rivers. SEPA does not believe that active involvement can be delivered at a national scale and, consequently, considers that the national Plan should be built up from between three and nine smaller regional components possibly based around Advisory Groups. SEPA considers that such regional Advisory Groups would be more accessible to local interests than a single national group, providing that the group composition adequately reflects the broad range of local interests (e.g. commerce, industry, voluntary sector etc.) that should contribute to the plans.

Another important mechanism for promoting local involvement will be existing sub-basin plans (e.g. catchment plans and estuary fora). Such local initiatives have been effective in addressing a range of problems within individual river catchments. SEPA and the Advisory Groups will have to develop links to ensure that such sub-basin plans can contribute to the planning process and also provide a mechanism for delivery of the RBM Plan's objectives.

In particular, significant interaction is anticipated between RBM Planning, Local Authority Development Planning processes and national planning policy. Developing a synergy between land use planning and RBM Planning will be one of the keys to successful implementation of the WFD. It will require the full and active participation of local authorities in order to be successful.

Further challenges will be faced in ensuring that RBM Planning integrates with the revised land use planning arrangements currently proposed in the Executive's

4.8 More challenge is anticipated in ensuring that RBM Plans are properly built into and aligned with Local Plans, of which there are currently around 180, as it is at this level that many of the detailed Programmes of Measures within the RBM Plans will be implemented.

5.0 The Framework of controls over water abstraction, impoundment, engineering and diffuse and point sources of pollution.

5.1 The framework for regulatory controls is provided by the enabling powers within the Bill and the principles described within the Policy Memorandum. This framework is based upon two key principles. Firstly, the scope of the legislation allows the application of controls over a wide range of activities that damage the water environment. Secondly, these controls can be used in a selective manner so that they are only applied to activities that pose a significant threat to the environmental objectives set in the RBM Plan.

5.2 SEPA considers that this framework will allow regulatory effort to be focused upon the most effective way of delivering improvements. It will avoid unnecessary controls over the very large number of water users who pose no risk to environmental quality. Consequently, it has the potential to deliver substantial environmental benefits for Scotland whilst minimising the bureaucratic burden upon the water users and the regulators.

5.3 SEPA welcomes the Ministerial proposal in the Policy Memorandum that SEPA should be the regulator in most instances. A coherent set of controls that can be applied in a consistent manner should result from this. In considering the implications of these proposals, SEPA is looking for simple mechanisms for providing regulatory control. The proposed “water use licences” will allow SEPA to develop, with water users, a single licence for a site covering all the regulated activities. For example, a distillery may have a dam providing cooling water, several abstractions for process water and a discharge. All these activities can be covered by a single licence, avoiding the necessity of applying for five different licences.

5.4 One of the major areas of concern for SEPA is the timetable for implementing the secondary regulations. In developing controls, one of the most important considerations is to allow industry sufficient time to attract capital and plan the necessary mitigation work. This can require between five and ten years depending on the scale of the work. It is therefore imperative that the regulations implementing these regimes come into force as soon as possible, following an adequate consultation period with relevant groups, to give industry a clear indication of the measures required by 2012.

5.5 The issue is clearly illustrated by the mechanism used to identify Scottish Water's future funding requirements. The previous funding round, Quality and Standards II, projected costs over three years. However, the current proposal from the Water Industry Commissioner is that Quality and Standards III will identify investment requirements from 2005/6 through to 2012/13. The intention is to provide stability for the industry. This requires SEPA to identify the investment requirements for Scottish Water by the end of 2004 and then to issue licences as soon as possible after that to allow maximum flexibility for Scottish Water to profile its spend over the seven year spending round.
5.6 The contractors who service the water industry are also concerned that their capacity to deliver will be compromised if contracts peak across Europe towards 2012. SEPA therefore welcomes the proposals in the Policy Memorandum to implement the controls from 2005. However, for this to be effective, controls over abstraction, impoundment and pollution would all have to come into force to allow a truly integrated control and management regime.

5.7 It should be stressed that timetabling of the regulations will be the single most important factor which will determine the impact upon Scottish industry.

5.8 SEPA is very supportive of the proposals for legislation. However, one area of disappointment covers the proposed offence provisions. Article 23 of the WFD requires that penalties shall be effective, proportionate and dissuasive. It is SEPA's understanding from the Bill and the Policy Memorandum that the key offence provision will be "undertaking a controlled activity without authorisation". This technical offence of operating without a licence, General Binding Rule or registration, will be appropriate for a wide range of situations, but for those circumstances where major damage is caused, SEPA considers that a more serious offence provision should be available. An offence provision of "causing harm to the water environment" is desirable.

6.0 Part 2 of the Bill: water and sewerage services

6.1 Much of this part of the Bill covers technical aspects of Scottish Water's functions. SEPA's interest in Part 2 relates to the opportunity it may offer to address a problem associated with institutional responsibilities for Sustainable Urban Drainage Systems (SUDS).

6.2 Runoff from urban areas, in particular from roads, car parks and yards, poses a major threat to Scotland's rivers. Traditional surface water sewers collect rainwater via road gullies and discharge it untreated into rivers. SUDS are a new and innovative alternative, which allow rainwater to drain into the ground and provides treatment for any remaining excess flow. Treatment typically involves low technology options such as ponds or wetlands. In order to promote the use of SUDS, a partnership of stakeholder bodies was set up, the Sustainable Urban Drainage Scottish Working Party (SUDSWP). This body includes Scottish Executive, SEPA, Scottish Water, Local Authority planners and roads departments and representatives from house builders.

6.3 SUDS are now required for all new developments, but their implementation is being severely hampered by lack of clarity in the Sewerage (Scotland) Act 1968 over responsibility for the maintenance of SUDS. The Water Environment and Water Services (Scotland) Bill would provide an opportunity to remedy this.
Stage 1 Report to the Transport and the Environment Committee on the Water Environment and Water Services (Scotland) Bill

The Equal Opportunities Committee reports to the Transport and the Environment Committee as follows—

Introduction

1. The Water Environment and Water Services (Scotland) Bill was introduced in the Parliament on 18 June 2002 by the Minister for Environment and Rural Development. The Equal Opportunities Committee has considered this Bill and, under Standing Order Rule 9.6.3, reports its views to the Lead Committee.

Mainstreaming Equality

2. The Committee has agreed to adopt the following definition of “mainstreaming”:—

“‘Mainstreaming’ equality is essentially concerned with the integration of equal opportunities principles, strategies and practices into the every day work of Government and other public bodies from the outset, involving ‘every day’ policy actors in addition to equality specialists.”

3. The Committee has commissioned further research on how to ensure equality is mainstreamed into all aspects of parliamentary committee activity. As an interim measure, the Committee has agreed that, as a minimum level of scrutiny of all legislation, it will ask the relevant Bill sponsor the questions set out in Appendix 2.

4. These questions were submitted to the Minister for Environment and Rural Development on 25 June 2002 together with bill-specific questions via a letter from the Convener (Appendix 3). The Committee welcomes the Minister’s detailed response which is reproduced at Appendix 4.

Scope and Policy Intent

5. The Committee notes that the Bill seeks to promote the sustainable management of the water environment in Scotland and to change the arrangements for funding new connections to the public water and sewerage infrastructure. The Scottish Executive has stated that they do not consider the Bill to have a differential impact on equality groups. The Committee agree with this analysis, and comment that the conclusion would appear to have been reached following an effective approach to the policy development process, which is to be commended.

Accessible format

6. The issue that the Committee has concentrated on is not the intent of the Bill, as such, but rather the manner in which the inevitable consequences of the Bill (in its present form) would impact upon any group which might reasonably be

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1 SP Bill 57
2 EOC/CRE document – Questions on Mainstreaming
expected to experience some form of communication difficulties. The Convener therefore asked what specific provisions are in place to make information arising from the Bill (once enacted) accessible and in alternative formats.

7. Section 11(5)(b) of the Bill requires SEPA to make copies of “statement, summary or draft plan available for public inspection free of charge”. The Minister further notes that SEPA is bound by, inter alia, the Disability Discrimination Act. This may reasonably be expected to refer to the provisions on “access to and use of means of communication, access to and use of information sources and… services of any local or other public authority”.

8. The Committee commends the commitment from the Minister to “give guidance to SEPA if necessary to the effect that written and audio submission must be accepted”.

9. The Committee however notes that the Minister states only “that it is expected” that SEPA will provide where possible documents in alternative formats such as audio, large print or Braille”.

10. Whist the Committee accepts the statement from the Minister that “maps, diagrams and illustrations are likely to be integral parts of these documents and not easily transferable [to formats such as audio, large print or Braille]”, it notes there is no further intent to explore other, established methods of communication such as either tactile maps or written descriptions of visual media. A commitment to further exploration of such work is therefore recommended.

11. Whilst the Committee notes and commends the commitment given by the Minister that, in the absence of such transposition into accessible formats, SEPA “will be asked to arrange for a member of staff to talk through the plans either at SEPA offices or over the phone”, the Committee invites the Executive to include this provision on the face of the Bill.

Conclusions

12. The Equal Opportunities Committee recommends to the lead committee that the Executive explores further the use of alternate communication methods (such as descriptive or tactile) to ensure a consistent approach to accessible formats throughout the processes arising from the implementation of this Bill.

13. The Committee is aware of the current groups living in poverty within Scotland, such as those who have disabilities, where the Highest Income Householder is female and ethnic minorities. The Committee would therefore be concerned if the impact of this Bill fell disproportionately on these groups and would welcome further work on the mitigation of effects, such as exemptions (either personal or industry wide) particularly in relation to EC competition law.

3 Examples drawn from the Disability Discrimination Act 1995 (c.50), s.19(3)
APPENDIX 1 – EXTRACTS FROM THE MINUTES

EQUAL OPPORTUNITIES COMMITTEE

EXTRACTS FROM THE MINUTES

14th Meeting, 2002 (Session 1)

Tuesday 10 September 2002

Present:

Kate Maclean (Convener)  Mrs Lyndsay McIntosh
Mr Michael McMahon  Gil Paterson
Tommy Sheridan  Elaine Smith

Apologies: Cathy Peattie, Mr Jamie Stone

APPENDIX 2 – MAINSTREAMING QUESTIONS

Annex A - Equalities Checklist

Introduction

The Equal Opportunities Committee of the Scottish Parliament has endorsed the following checklist it wishes to be used when considering any policy or legislative issue.

It is important to bear in mind that the definition of equal opportunities in the Scotland Act 1998 is as follows:

“the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.”

It is therefore expected that ALL of these areas should be considered when using this checklist.

Please note that this is not meant to be all encompassing guidance on equalities proofing, but it is recommended that this be the minimum standard to be attained.

What is Mainstreaming

- “‘Mainstreaming’ equality is essentially concerned with the integration of equal opportunities principles, strategies and practices into the every day work of Government and other public bodies from the outset, involving ‘every day’ policy actors in addition to equality specialists. In other words, it entails rethinking mainstream provision to accommodate gender, race, disability and other dimensions of discrimination and disadvantage, including class, sexuality and religion.

- It is a long-term strategy to frame policies in terms of the realities of people’s daily lives, and to change organisation cultures and structures accordingly. It puts people, and their diverse needs and experiences, at the heart of policy-making.

- It leads to better government through better informed policy-making and a greater transparency and openness in the policy process and helps to tackle democratic deficit by encouraging wider participation in the policy process through effective consultation mechanisms.

- As a process it tackles the structures in society which contribute to, or sustain, discrimination and disadvantage.

- The application of a mainstreaming approach can avoid the adoption of policies and programmes which replicate discrimination and exacerbate existing inequalities.

- Mainstreaming complements lawful positive action designed to address the historic and current impact of discriminatory structures and practices.”

EOC/CRE document – Questions on Mainstreaming
Questions to Consider when equality proofing

1. **What is the policy for? Who is the policy for? What are the desired and anticipated outcomes?**
   Does the policy properly consider the needs of diverse groups of women and men? Remember that members of the same social group may have different needs; and that some people face multiple discrimination, for example, ethnic minority women.

   Have equalities dimensions been explicitly addressed?

   Keep in mind the goals and outcomes of policies can either perpetuate or overcome existing inequities between women and men and amongst different social groups.

2. **Do we have full information and analyses about the impact of the policy upon all equalities groups? If not, why not?**
   Is the data you have been provided with broken down by gender, race and disability?

   Assume that there is an equalities impact then look for information to prove or disprove that assumption.

   Who has been consulted? There is a need for both experts and ‘ordinary’ voices to be heard. Has the fact that it is harder for some groups than others to speak out been taken into account?

3. **Has the full range of options and their differential impacts on all equality groups been presented?**
   What is the impact of values, assumptions and stereotypes on the options presented and the options favoured?

   How might your own values, opinions and experiences influence your understanding of the issue?

4. **What are the outcomes and consequences of the proposals? Have the indirect, as well as the direct, effects of proposals been taken into account?**

5. **How have the policy makers demonstrated they have mainstreamed equality?**

6. **How will the policy be monitored and evaluated? How will improved awareness of equality implications be demonstrated?**
APPENDIX 3 – LETTER FROM THE CONVENER TO THE MINISTER

Equal Opportunities Committee – Water Environment and Water Services (Scotland) Bill

The Equal Opportunities Committee, as part of its work on mainstreaming equality, has agreed the structured scrutiny of all Bills. I am therefore writing with a request for further information on this Bill.

Given that the Bill Team may have, to date, been working on the original set of 6 questions issued by the Equal Opportunities Committee, these would be an acceptable starting point for the discussion. I would be grateful if the Committee Clerks could receive a reply by 16 August.

An initial analysis of the Bill has also raised some specific issues the Committee would wish to receive further information on, within the same timescale, and these are set out below.

Accessible formats for public documents under the Bill
I note that there are several mentions on the face of the Bill that: “SEPA must keep the [plans, maps etc]….available, at all reasonable times, for public inspection free of charge”. What provisions are in place to allow the accessibility of these maps, plans etc. in alternative formats, and at no extra cost to those requesting copies? It may be necessary to bear in mind the difficulties of travelling, for example, to regional offices where documents or models are displayed.

In addition, given the ability under the Bill (e.g. at s.13 (5)(a)) for SEPA to “publish the approved plan in such manner as it thinks fit” and also (at (c) following) to “make copies of it available for sale at a reasonable price”, what regulatory safeguards will Scottish Ministers bring forward?

Finally, given that there is often a deadline period for accepting responses, what facilities are envisaged to ensure that those requesting an alternative format are not disadvantaged and have the consultation period suitably extended?

Submissions to SEPA
Given the requirements of SEPA to accept comments and submissions made, what safeguards will be in place, or envisaged, to enable communication with SEPA in alternative formats?

If there are any queries from your officials perhaps they could contact Richard Walsh, Senior Assistant Clerk to the Committee, in the first instance. A copy of this letter goes to Colleagues and clerks on the Equal Opportunities Committee and the Transport and the Environment Committee.

Kate Maclean
Convener
Equal Opportunities Committee
EQUAL OPPORTUNITIES COMMITTEE: WATER ENVIRONMENT AND WATER SERVICES (SCOTLAND) BILL

Thank you for your letter of 25 June in which you request further information on the equal opportunities aspects of the Water Environment and Water Services (Scotland) Bill.

The Bill seeks to promote the sustainable management and protection of the water environment in Scotland (Part 1) and to change the arrangements for funding new connections to the public water and sewerage infrastructure (Part 2).

The Scottish Executive shares with the Parliament and the Equal Opportunities Committee a strong and clear commitment to equality. The Executive’s approach is outlined in its equality strategy, published in November 2000. That strategy is based on research, consultation and expert advice and is underpinned by a mainstreaming approach to equality. This is a long-term strategy which recognises that effective change requires that equality issues are built into the policy process from the earliest stages and that responsibility for equality lies with everyone.

The Executive is developing tools and guidance to develop effective mainstreaming of equality issues. These are still being developed for roll out across the Scottish Executive. In the meantime, our starting point has been to use the set of six questions developed by the Equal Opportunities Commission for Racial Equality and the Disability Rights Commission as a framework for assessing our work.

Your letter states that the framework of the six questions would form an acceptable starting point for the Committee's discussion. The Scottish Executive's response to these questions is set out in the attached annex. The responses to your specific questions are outlined below.
Accessible formats for public document under the Bill

You ask what provisions are in place to make maps and plans arising from the Bill accessible and in alternative formats. Article 11(5)(b) of the Bill requires SEPA to, "make copies of the statement, summary or draft plan available for public inspection free of charge for such period, which must be at least 6 months beginning with the date of its publication, as SEPA may determine". SEPA is already required by the statutory framework formed by the Race Relations Act (RRA), the Sex Discrimination Act (SDA), and the Disability Discrimination Act (DDA) to ensure that the information and consultation process connected with River Basin Management accessible to all equality groups. It is expected that SEPA will provide where possible documents in alternative formats such as audio, large print or Braille. However maps, diagrams and illustrations are likely to be integral parts of these documents and not easily transferable to these formats. Where this is the case SEPA will be asked to arrange for a member of staff to talk through the plans either at SEPA offices or over the phone. However, this is for the implementation of the Bill and not legislation.

You refer to article 13 (5)(a) and (5)(b). SEPA's ability to publish the plan in the manner it thinks fit does not extend to the format of the plan. This clause refers to the practical arrangements surrounding publication, which it is not though necessary to define in legislation. On the question of the document's price, I expect that SEPA will make available for the same price as the standard version documents in alternative formats.

Submissions to SEPA

On the question of the requirement of SEPA to accept comments and submissions in alternative formats, I will give guidance to SEPA if necessary to the effect that written and audio submission must be accepted in response to the River Basin Management Plan consultation period.

I hope that this and the responses in Annex A are helpful to the committee and that they will assist both the Executive and the Parliament to progress their shared agenda. I am copying this letter to the Clerks of the Equal Opportunities and Environment and Transport Committees.

ROSS FINNIE
1. What is the policy for? Who is the policy for? What are the desired and anticipated outcomes?

Part 1 of the Bill seeks to promote the sustainable management and protection of the water environment in Scotland by establishing a statutory system for water management planning based on natural river basins and comprehensive environmental and economic assessment and monitoring. The Bill will also provide the framework for comprehensive controls over water abstraction, impoundment, engineering works affecting water courses and diffuse and point sources of pollution to water, in order to achieve the best possible ecological status for all surface waters and to protect groundwaters from pollution and over abstraction. In essence, the Water Framework Directive encourages and in some cases requires the integration of policies and actions that can contribute to improving water quality.

The desired outcomes of the Bill are outlined in the policy memorandum. These are:

- The protection and enhancement of aquatic wildlife which will increase the amenity value of watercourses, bringing benefits to tourism generally and fishing and anglers in particular.

- Coherent water management planning leading to cost effective regulation and the better targeting of water protection measures to where they will deliver clear environmental benefits.

- Transparent water management planning that will make it easier for businesses and the public sector to plan and comply with the water protection measures.

Part 2 of the Bill seeks to address the issue of responsibility for funding new infrastructure on the public networks. The provisions amend existing water and sewerage legislation to tackle the current situation where Scottish Water contributes to the cost of laying mains and sewers incurred by developing sites. This is intended to allow Scottish Water to target resources for new infrastructure in a less arbitrary manner.

2. Do we have full information and analyses about the impact of the policy upon all equalities groups? If not, why not?

The Water Environment and Water Services Bill (Scotland) is not considered to have a differential impact on any equality groups. In relation to Part 1 of the Bill care will be taken to ensure that the consultation process for River Basin Management Planning is open and accessible to all groups. This will mean that SEPA will have to provide consultation materials in alternative formats, and offer support to those who require it in explaining maps, diagrams, charts etc. This is an operational matter to be dealt with at the implementation stage of the Bill.

The Executive has made every effort to make sure that there has been a transparent approach towards developing the policies in part 1 of this Bill. An introductory leaflet to the Bill and the Water Framework Directive was widely circulated ahead of two
consultation papers. Additionally, the Executive held a national stakeholder conference where the legislative proposals could be discussed. Seminars have been held on the proposals themselves and on the means by which they can be implemented. Copies of the consultation paper on the Bill’s water environment provisions were sent to all the main national equality groups and no equalities issues were raised during these consultations.

The Executive also consulted on part 2 of the Bill in *The Water Service Bill - The Executive's Proposals*. It was not thought that this was a piece of legislation that was likely to have a differential impact on equalities groups, and the consultation exercise turned up no comments on equalities issues.

As the policy memorandum accompanying the Bill states, "The Bill should not be considered in isolation from existing statutory obligations under the Race Relations Act, the Sex Discrimination Act and the Disability Discrimination Act. All three Acts make discrimination in service delivery unlawful." The RRA places a duty on public authorities to work towards the elimination of unlawful discrimination and promote equality of opportunity and good relations between people of different racial groups. The Commission for Racial Equality produces codes of practice to provide practical guidance to public authorities. SEPA will be obliged to carry out their functions under this Bill in accordance with this legislation.

SEPA is already required by this statutory framework to ensure that the information and consultation process connected with the River Basin Management plans is accessible to all equality groups, in particular disabled and ethnic minority people. As was made clear in the Policy Memorandum, Ministerial guidance produced under the Bill can make it clear the steps that SEPA should take to fulfil these requirements in relation to the River Basin Management Plan.

3. **Has the full range of options and their differential impacts on all equality groups been presented?**

Part 1 requires SEPA to carry out a thorough and extensive consultation process. The timetable for this process is largely established in the Water Framework Directive, and so is not a flexible one. We will therefore give guidance to SEPA to have alternative formats of document available at the start of consultation periods to ensure that no-one is disadvantaged by an attenuated consultation period as a result of having to wait for these documents.

Part 2 of the Bill is not thought to have differential impacts on any equality groups.

4. **What are the outcomes and consequences of the proposals? Have the indirect as well as the direct, effects of the proposals been taken into account?**

Both parts of the Bill have been subject to extensive consultation (see response to question 2) and their outcomes and consequences are well understood. With regard to Part 1 of the Bill we have made clear that the only equality issues which may exist surround the dissemination of information, and consultation process relating to the
River Basin Management Plans. SEPA will act in accordance with best possible practice in this area. This is an area in which the Minister has the ability to give guidance if this becomes necessary.

It is not thought that part 2 of the Bill has any direct or indirect effects in terms of equality issues.

5. How have policy makers in the Executive demonstrated they have mainstreamed equality?

The Executive has been aware of any potential effects for equality groups of this legislation, and has consulted representative organisations. Internal advice was also sought to ensure that the proposals complied with the Executive’s equality strategy.

6. How will policy be monitored and evaluated? How will improved awareness of equality implications be demonstrated?

Ministers have the ability to offer guidance on the form of the plans, and the Executive will keep a close eye on equal opportunities issues during implementation of this legislation. Anyone who feels that they have been discriminated against will have recourse to the usual channels of complaint.
Extract from 34th Report of the Subordinate Legislation Committee:


Background
9. The Committee asked the Executive for an explanation of three matters.

Question 1
10. The Committee noted that article 3 refers to the “Perth and Kinross Council local government area”, whereas the name of the area prescribed by the Local Government etc (Scotland) Act 1994 is effectively Perthshire and Kinross local government area, the Council being Perth and Kinross Council. The Executive was asked to explain this discrepancy.

Answer 1
11. In its reply, reprinted at Appendix 2, the Executive explains that by virtue of section 23 of the Local Government (Scotland) Act 1973, the Council of a local Government area may, by resolution passed by not less than two-thirds of the members, change the name of the area. A special meeting was convened on 1 December 1995 and a resolution passed to change the name of the area from Perthshire and Kinross Local Government Area to Perth and Kinross Local Government Area.

Report
12. The Committee acknowledges this helpful response from the Executive, however, suggests that the necessary information might have been included in a footnote in order to assist the reader who would be unlikely to have ready access to
the resolution in question. The Committee therefore draws the attention of the lead committee and the Parliament to this instrument on the grounds of failure to comply with proper drafting practice.

**Question 2**

13. The Committee asked the Executive to clarify why amendments to the 1991 and 1984 Road Traffic Acts made by the Greater London Authority Act 1999 have not been reflected in the Order, resulting in some results of doubtful competence. Notably, in the application of section 63A of the 1984 Act, the effect appears to be that the Greater London Authority can dictate what uniform Perth and Kinross parking attendants must wear.

**Answer 2**

14. The Executive explains that the effect of the Designation Order is to make new arrangements for enforcing parking controls, which are already available in London and certain other areas in England as well as in Edinburgh and Glasgow. The way that this is to apply to Perth and Kinross is by designating Perth and Kinross as a permitted parking area and a special parking area in accordance with Schedule 3 to the Road Traffic Act 1991. In order to do this the Order makes certain modifications to the Road Traffic Act 1991 and to the Road Traffic Regulation Act 1984.

15. The Executive explains that the long title to the Greater London Authority Act 1999 states that the Act is intended to make provision in relation to London Borough Councils and the Common Council of the City of London. The Act is therefore not intended to apply in the Perth and Kinross area.

16. The Executive accepts that in relation to section 63A(4) of the 1984 Act, there could be confusion as to who will determine the type of uniform to be worn by parking attendants, and acknowledges that this could have been avoided by making a further modification to the 1984 Act. Furthermore, the Executive has agreed to consider making further modifications to both the 1984 and 1991 Acts in order to clarify the position.

**Report**

17. The Committee found the Executive’s explanation rather difficult to follow. In particular the long title to the Greater London Authority Act 1999 does not seem to be relevant. The relevant Parts of the 1991 and 1984 Acts that are modified by the Order themselves apply in their original version only to London. The purpose of the order-making power in the enabling Act is to enable those provisions to be applied, suitably modified, to other areas.

18. By virtue of section 20(2) of the Interpretation Act 1978 where an Act refers to an enactment the reference is to the enactment as amended. The Greater London Authority Act 1999 as it stands may not apply to areas other than London, however, the effect of the enabling Act in its present form is to enable the relevant Parts of the 1984 and 1991 Acts, including the amendments made by the 1999 Act, to be extended to other areas. Whilst the legislative approach could be criticised as not being particularly user-friendly, it is the method that Parliament has chosen for the purpose in question.
19. The Executive appears to accept that, by applying without modification the Parts of the 1984 and 1991 Acts that apply to London, it has conferred certain functions on the Greater London Authority that perhaps might not have been intended. The Committee has some doubts as to whether, as regards the 1991 Act, in purporting, albeit unintentionally, to make provision in relation to transport in London, the Order is either intra vires or within devolved competence.

20. The Committee takes the view that the Order is undoubtedly defectively drafted in failing to reflect the amendments made to the principal Act by the Greater London Authority Act 1999. This has led to some very unusual and unexpected uses of the enabling powers, some of which may raise devolution issues and indeed doubts as to whether the instrument is intra vires. The Committee hopes that the Executive makes the promised amendments as soon as possible. **The Committee therefore draws the attention of the lead committee and the Parliament to this instrument on the grounds of defective drafting as a result of which there appears to be an unusual or unexpected use of the powers, a possible devolution issue and a doubt as to whether the instrument is wholly intra vires.**

**Question 3**

21. The Committee asked the Executive for an explanation of the words “in each place where they occur” in Schedule 2, paragraph 4(12)(a), when there is only one reference to “Joint Committee” in the subsection amended."

**Answer 3**

22. The Executive accepts that the words “in each place where they occur” are unnecessary in the context of this provision, but believe that the meaning of the provision and the modification are nevertheless clear.

**Report**

23. Whilst the Committee acknowledges that the meaning may be clear, it is of the opinion that the provision in question is undoubtedly defectively drafted, as acknowledged by the Executive. **The Committee therefore draws the attention of the lead committee and the Parliament to the instrument on the grounds of defective drafting acknowledged by the Executive.**
SSI Cover Note For Committee Meeting


Type of Instrument: Negative

Meeting: 26th meeting, 25 September 2002

Date circulated to members: 10 September 2002

Motion for annulment lodged: No

T and E deadline to consider SSI: 7 October 2002

SSI drawn to Parliament’s attention by Sub Leg Committee: No
SSI Cover Note For Committee Meeting


Type of Instrument: Negative

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SSI drawn to Parliament’s attention by Sub Leg Committee: Yes

Extract from 34th Report of the Subordinate Legislation Committee:


Background

24. The Committee raised two points with the Executive.

Question 1

25. The Committee recalled that in its consideration of SSI 1999/60 they questioned regulation 4 of that instrument in so far as it failed to make any provision to inform an appellant as to the outcome of a request for an extension to the time limit to appeal. At that time, the Executive indicated that whilst this was the administrative practice, it might have been better to include express provision in the Regulations.

26. The Committee asked the Executive to explain why the current Regulations also make no express provision in this area, and referred the Executive to its letter of 23rd April 2002 requesting the Executive to clarify the meaning and actual effect of SSIs 2002/187 & SSI 2002/188, which raised a similar point.

Answer 1

27. The Executive acknowledges in its reply, reproduced at Appendix 3, that at the time of the Committee’s consideration of SSI 1999/60, it was accepted that it might have been better to include in the Regulations express provision for informing a person of the rights of appeal.
28. The Executive explains that the procedures introduced by the current Regulations are identical to those already in force for Glasgow and Edinburgh and that, in order to ensure consistency for the Perth and Kinross area, the Regulations are framed in identical terms to those for Glasgow and Edinburgh. It was therefore felt that if further provision were to be made to either regulation 3 or 4, then amendments would have been required for the Glasgow and Edinburgh Regulations.

29. The Executive confirms that it has received no comment from either Glasgow or Edinburgh that regulations 3 or 4 of SSI 1999/60 are failing to operate effectively and nor any request from either Council to amend the Regulations in the manner suggested by the Committee. Although it is accepted that the effect of the suggested amendment would be to the benefit of an individual rather than for the benefit of the Council, the Executive suggests that it is not aware of any difficulties in practice from the operation of the Regulations for Glasgow and Edinburgh.

**Report**

30. The Committee suggests that the fact that the Edinburgh and Glasgow Regulations do not make express provision for the purpose in question does not mean that the Perth Regulations should not. The Committee takes the view that there is no need to perpetuate a drafting defect that has been identified by the Committee (and indeed previously by the JCSI in relation to similar English instruments) and acknowledged by the Executive. Moreover, if the procedure adopted in practice in Edinburgh and Glasgow is as indicated by the Executive then including an express provision in the Perth Regulations would not lead to any difference in practice between the various districts. It is suggested that, if anything, it is the Edinburgh and Glasgow Regulations that should be amended rather than that the Perth Regulations should remain silent. The Committee has particular concerns that this error will be replicated in the large number of similar Regulations pertaining to other local areas which are expected to follow. The Committee therefore draws the attention of the lead committee and the Parliament to the instrument on the grounds of defective drafting.

**Question 2**

31. The Committee asked the Executive for an explanation as to why, given the definition of “proper officer” in regulation 2, regulation 11(1)(a) makes reference to “administrative staff”.

**Answer 2**

32. The Executive confirms that the “proper officer” is a member of the administrative staff who performs particular functions in terms of the Regulations. The administrative staff of the Parking Adjudicator’s Office will however comprise other administrative employees in addition to the proper officer. Regulation 11(1)(a) is intended to cover the situation where any member of the administrative staff makes an administrative error and not just the proper officer.

**Report**

33. The Committee notes the Executive’s helpful clarification and draws it to the attention of the lead committee and the Parliament.

**Question 3**

34. Although not asked to do so, the Executive also provided an explanation of the meaning of SSIs 2002/187 and SSI 2002/188.
35. The Executive, whilst pointing out that it responded to this request on 25 April 2002, explains that the effect of both instruments was to make further provision for circumstances in which a penalty charge would be payable.

36. The Committee notes that the Executive appears to have interpreted the reference to the Committee’s letter of 23rd April as a request for an explanation of the meaning of SSIs 2002/187 and 188. In fact, that letter also remarked on the failure of those Regulations to reflect the Committee’s earlier comments on the principal Regulations in relation to the point raised at question 1 above, and it was to that point which the Executive’s attention was drawn. The meaning of SSIs 2002/187 and 188 was not in doubt.

37. The Committee nevertheless thanks the Executive for its courteous response and apologises if the terms of its letter were misleading.
REPORTERS’ PAPER ON HIGHLANDS AND ISLANDS FERRY SERVICES

Subject: The Scottish Executive proposals for tendering Clyde and Hebrides lifeline ferry services

Meeting: 26th Meeting, 25 September 2002

Authors: Des McNulty MSP and Maureen Macmillan MSP

Introduction

1. This paper outlines work undertaken by Des McNulty MSP and Maureen Macmillan MSP, and the Transport and the Environment Committee as a whole, into the Scottish Executive’s draft service specification for the tendering of the Clyde and Hebrides lifeline ferry services.

Background

2. On 23 January 2001 the Minister for Transport announced the Scottish Executive’s proposals for the tendering of Highlands and Islands Ferry Services. The proposals were subsequently put to the European Commission for consideration as required under the Regulations on State Aid to Maritime Transport.

3. The Committee considered the proposals on 28 February 2001 and agreed to appoint Des McNulty and Maureen MacMillan as reporters. It was agreed that the reporters would consider this issue further and report back to the Committee with proposed terms of reference for an inquiry into this issue.

4. On 12 June 2001 the Committee approved terms of reference for the reporters as follows:

Reporters will investigate

- the justification for and implications of the decision to tender lifeline ferry services in order to comply with EC guidelines on State aid in maritime transport.
- the development of the service specification for these services
- the need for an independent regulator, and an appropriate operator of last resort
- the structural, organisational and service delivery implications of this decision (including employment, pensions and Transfer of Undertakings (Protection of Employment) (TUPE) Regulations issues relating to Caledonian MacBrayne staff and the need for the service to be integrated with other modes of transport)

5. In addition to appointing reporters, the Committee also took evidence on the proposals from the Highlands and Islands Strategic Transport Partnership, local authorities, trade unions, and representatives of Caledonian MacBrayne on 18 June 2001, and the Minister for Transport and officials on 26 June 2001.
Initial Reporters’ Work

6. Reporters met informally with the Minister for Transport on 3 April 2001, and received background briefing on the issues from Executive officials on 28 April 2001.

7. On 11 July 2001 Reporters travelled to Brussels. They attended a meeting at Scotland Europa with representatives from CalMac, local authorities, Scotland Europa, the Scottish Executive and MEPs. Reporters also met with officials of the European Commission.

8. During the 2001 Summer Recess reporters travelled to the Highlands and Islands and Argyll and Bute, and engaged in discussions with local communities regarding the proposals.

9. The Executive appointed two sets of consultants to take forward matters relating to the tendering process. Burness Corlett and Partners (Maritime Consultants) were appointed to take forward the development of the service specification, reporters met with representatives of this firm on Tuesday 11 September 2001. Shepherd & Wedderburn WS and PriceWaterhouseCooper are taking forward the development of the structuring of the Vessel Owning Company (VesCo) and the Operating Company (OpCo), reporters met with representatives of these firms on 8 November 2001.

Reporters’ Interim Report

10. In September 2001, reporters made an interim report on the key issues emerging from Committee evidence taking sessions and reporters meetings prior to this date. The Committee as a whole considered the recommendations of the report at its meeting on 26 September 2001.

11. The Committee agreed to endorse the reporters’ report and forward it to the Executive. Lewis Macdonald MSP, the then Deputy Minister for Transport, issued a formal response to the report on 21 November 2001.

12. Summaries of both the reporters’ interim report and the Executive’s response to it are attached at Annex A and Annex B respectively.

Reporters’ Visit to Orkney

13. On 19 December 2001 the Committee considered and agreed a reporters’ trip to Orkney where a similar, although much smaller scale, tendering exercise has been undergone in relation to the Northern Isles ferry services. During the 2002 February recess reporters travelled to Orkney and engaged in discussions with representatives of local authorities and service users to gain an insight into the tendering process and lessons that might be applied to the tendering process for the Highlands and Islands ferry services.
Draft Service Specification

14. The Executive released the draft service specification for the Highlands and Islands ferry services network at the end of June 2002. The consultation period for the draft service specification is 12 weeks.

15. At its meeting on 22 May 2002 the Committee agreed a programme for reporters to consult on the draft service specification. The Committee further agreed that the Committee as a whole would then take evidence from the Deputy Minister for Enterprise, Transport and Lifelong Learning on the specification. Finally, the Committee agreed that, following this evidence taking session, reporters would produce a report on the specification for the Committee to consider and amend as necessary which would then be submitted to the Scottish Executive’s consultation.

Reporters’ Work on the Specification

16. The reporters consulted on the specification during the 2002 Summer Recess. Reporters held meetings in the Clyde and Western Isles area and spoke to individuals who will be involved in or affected by the tendering process regarding the possible impact of the proposed service specification. Reporters met with local authorities, representative groups of local service users, local service users, academics, economic development bodies, trade unions and representatives of Caledonian MacBrayne.

17. Reporters also met with the Executive officials who are taking forward the development of the service specification and also the structuring of VesCo in order to discuss the main proposals of the specification and also those aspects of VesCo which fall outwith the remit of the service specification.

Committee’s Work on the Specification

18. At its meeting on 4 September 2002, the Committee considered the key issues emerging from meetings held by reporters on the draft service specification. The Committee then took evidence from the Deputy Minister for Enterprise, Transport and Lifelong Learning on the specification at its meeting on 11 September 2002. The Official Report of the meeting is attached at Annex D.

19. The key issues emerging from the Reporters’ work and the Committee’s evidence taking session on the specification include:

- Scope of the specification
- Bundling of services
- Competition
- Costs and transparency
- Service levels and service development plans
- Fares
- Local employment issues
- Integration
- Transfer of services
• Provision of last resort

These issues are explored further below:

20. As a preface to the discussion of these issues, reporters would want to highlight the fundamental importance of the ferry services to the economic and social sustainability of remote and island communities. Certain mainland peninsulas and all the islands off the west coast of Scotland are almost completely dependent on ferry services. The economies of the Hebrides and some of the more isolated Argyll islands are especially vulnerable to changes in the level of service.

21. Reporters consider that the draft service specification should form a framework for a service which not only provides a financially viable transport service but also forms the most effective basis for sustaining island life. While it is not part of the reporters remit to consider issues beyond the immediate impact of the tendering process, it was felt that the Executive’s proposals required to be considered in the broader context of rural strategy and in particular strategies in respect of island communities. So far as possible the reporters have assessed the proposals set out in the draft service specification with this in mind.

Overview of the Specification

22. Overall, the draft service specification was very much welcomed by the individuals and organisations consulted by reporters, including the Scottish Trades Union Council (STUC), Highlands and Islands Strategic Transport Partnership (HISTP) and Highlands and Islands Enterprise (HIE). In particular, reporters found there was strong support from the majority of individuals and organisations for the protection of current maximum fares and minimum service levels\(^1\). In addition, the commitment within the specification to maintain current safety levels was strongly endorsed as the current Caledonian Macbrayne services were generally perceived to maintain excellent safety standards.

23. Reporters support the fact that the central provisions of the specification reflect the idea that the first tendering contract should, to a large extent, create a continuance of the practices on the current network, in order to assure service users that the tendering process will not destabilise the network.

Scope of the Specification

24. The reporters are of the opinion that the purpose of releasing a draft service specification should be to consult with interested parties on all subjects intended for the final specification. Concerns were expressed to reporters about the lack of detail in the draft service specification with regard to key areas of service provision including channels for consultation, fare structure and the provision of last resort for the network.

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\(^1\) The specification proposes that the successful bidder must not exceed current maximum fares and must run all the services according to the Summer and Winter timetable operated by Calmac prior to the transfer.
25. HISTP is currently working on proposals for methods of consulting with service users during the initial 5 year contract. The Executive intends to use these proposals as a basis for its proposals in the final specification. In terms of fares, the Executive has identified the need for research to review the fares structure. However the results of this research will only be available in time to inform the second tendering process. Finally, although the provision of last resort will be the responsibility of the VesCo, the conditions for its provision are of central importance to the provision of services should the OpCo cease to serve the network. The draft service specification states that as soon as the VesCo is established it should begin producing proposals on the provision of last resort for consideration by the Executive.

26. Reporters are aware of the importance of consulting fully on all proposed provisions for the specification in order to ensure that the final specification is a comprehensive framework which takes into account the views of those organisations and individuals with relevant expertise. For this reason, reporters recommend that the Executive takes the steps necessary to ensure that the draft service specification for the second tendering process is a comprehensive document and that it consults on the document as widely as possible.

**Bundling of Services**

27. The draft service specification proposes that the Clyde and Hebrides ferry services network (services considered eligible for subsidy by the European Commission and subsidised by the Scottish Executive) should be tendered as a single bundle. It also proposes the inclusion of routes within the single bundle which were previously outside the network, the creation of new routes and the inclusion of mainland to mainland routes (namely Gourock-Dunoon (passenger only) and Tarbet-Portavadie) following the Commission’s confirmation that these services are eligible for subsidy.

28. Reporters found that there was general support for extending the network and tendering it as a whole as this is likely to reduce the potential for “cherry picking” of routes, provide the optimum value for public money and aid the integration of ticketing and marketing services.

29. The main point of contention expressed by various organisations regarding the bundling of the network is the proposal that the Gourock-Dunoon service should be restricted to a passenger only service. The importance of the issues relating to this route to the tendering of the network are explored further in the section below on Competition.

**Competition**

*Competition and State Aids Rules*

30. The Executive has said that, in order to comply with State Aid rules and Regulation 3577/92/EEC on Maritime Cabotage, it is required to put the Clyde

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2 see Article 87 (1) of the EC Treaty
and Hebrides network out to tender.\textsuperscript{3} The Regulations provide for freedom to provide such services within the Community. However, they also recognise that account should be taken of the nature of certain specific services and of differences in economic development between Community members.

31. Specifically, the Regulation takes into account the transport needs of island regions and establishes in Article 4 the conditions under which Member States may conclude public service contracts or impose public service obligations (PSOs) as a condition for the provision of cabotage services on shipping. PSOs are defined as obligations which the shipowners, if they were considering their own commercial interest, would not assume or would not assume to the same extent or under the same conditions.

\textit{Implementation of Competition Rules}

32. The draft specification states that EU competition rules are such that a vehicle ferry across the Clyde does not qualify for a subsidy as a lifeline service since there is an unsubsidised private sector competitor operating a vehicle service nearby. The passenger service is not considered to be in direct competition with the private sector competitor as it provides a different form of service and therefore the passenger service is eligible for subsidy. Following discussions with the Commission, the Executive announced that the passenger service would continue as a stand alone service within the undertaking. It was considered that the current passenger and vehicle service could not continue to carry vehicles and subsidise only the passenger service as this allowed for ‘subsidy leakage’.

33. It is unlikely that the OpCo would have the resources to lay on an additional unsubsidised vehicle service separate to the passenger service. Concerns have been expressed that, should the vehicle service cease on the Gourock-Dunoon crossing, Western Ferries will become a private monopoly.

34. Should private companies such as Western Ferries set up rival services on similar routes where aspects of the ferry service are anticipated to be profitable, then these profitable aspects of the routes may be removed from future undertakings. The result may then be the eventual creation of private monopolies on routes which had previously been deemed to be lifeline ferry services and therefore worthy of subsidy. This process, it has been suggested, amounts to ‘cherry picking’. It is argued that a consequence of this would be that the least profitable aspects of the routes would remain available to tender and this may not be a financially profitable venture for future potential bidders. As a consequence the bidder may be deterred or the subsidy may have to be increased.

35. Related to the possibility of private monopolies being created on lifeline routes are the potential difficulties that would arise if a private company stopped servicing a route. It was suggested to reporters that any service considered a lifeline route should have a provision for last resort provided by the VesCo regardless of whether or not OpCo ran the ferry service on the route.

\textsuperscript{3} Ministerial Statement on CalMac and State Aids
36. The Committee raised issues on competition with the Deputy Minister at its meeting on 11 September. Members pointed out that enforcement of European Competition rules could create a private monopoly and outlined the implications of this on the network as a whole. The Deputy Minister responded by stating that the Commission would not be concerned if a service was run by a private monopoly and argued that, where no subsidy is involved, competition is a matter for the marketplace and that any anti-competitive behaviour was a matter for the Office of Fair Trading⁴.

37. Reporters are concerned that there seems to be no scope for interpreting European Competition rules to address the circumstances of the network where some routes may be profitable but the overwhelming majority are subsidised. Reporters take the view that the Commission’s rigid requirements for the enforcement of European Competition rules should be challenged since it seems illogical that the application of rules designed to protect and advance competition should have the effect of creating a monopoly on an important route for a single private provider. Rather than simply implement these rules, the Executive should strive to persuade the Commission to accept an interpretation which takes into account the unique circumstances of the network.

38. Another option outlined by the Deputy Minister for the Gourock-Dunoon route would be to remove the route from the undertaking and offer it to bidders prepared to run the service without subsidy. While it would be preferable to secure the agreement of the Commission to a relaxation of the rules the reporters recommend that the Executive adopts a twin track approach, working with the relevant local authorities, to market-test the route for profitability and consider removing the service from the undertaking if it proves profitable.

Costs and Transparency

39. In evidence, the Deputy Minister did not contest the fact that the vehicle service may be profitable and therefore that cross subsidy may not occur. However, he explained that the Executive had not been able to develop an accounting mechanism that could demonstrate this argument to the Commission.

40. Reporters are of the view that this problem highlights the importance of setting up a transparent system of accounting to allow the Executive to provide a financial breakdown of route costs wherever necessary. Therefore reporters strongly recommend that the Executive continues to invest in developing transparent accounting systems in order to be able to justify policies for the second tendering exercise.

Service Levels and Service Development Plans

41. HIE’s key concern following tendering, was the lack of sailings to remote islands. For example there are no sailings at weekends to Coll during the Winter meaning that schoolchildren have to stay in youth hostels on the mainland throughout term time.

⁴ Per Deputy Minister for Enterprise, Transport and Lifelong Learning, Col, Official Report
42. Local residents and service users have also told reporters that at present the service levels are unresponsive to changes in demand such as the needs of growing industries of importance to island economies such as fish farming.

43. The specification acknowledges the existence of unmet demand on the current network and encourages the OpCo to try to tap into this demand by stating that the successful bidder can put on extra sailings or extra routes. The specification provides an incentive by allowing the OpCo to keep any profits arising from these initiatives.

44. Reporters note that, regardless of this incentive, the OpCo may lack the resources to experiment with new initiatives in order to develop its services given the constraints laid down in the specification in relation to fares and service levels. Although Reporters appreciate the need for these constraints within the initial tender, they recognise the need for flexibility in the long term in order to develop these services.

45. Reporters also believe that there is no incentive mechanism to encourage the OpCo to develop services which may not prove to be profitable in the short to medium term but may be valuable in relation to other important performance indicators such as increasing employment levels on remote islands. Reporters also note that the limited contract period may deter the OpCo from developing longer term plans to respond to changing demands. Reporters also question the ability of VesCo to carry out this task.

46. Reporters wish to stress the importance of exploring how service levels can be increased on the network and what mechanisms are required to allow services to develop in response to changes in levels in demand and changes in the needs of local residents. The reporters are of the view that there is a need for structure separate from OpCo and VesCo to take responsibility for long term planning for the network. Reporters are also of the view that schemes should be established to test potential changes to service levels for consideration by this structure. In addition, Reporters consider that the structures for consultation should be restructured to reflect the creation of the OpCo, the VesCo and any new planning structure.

47. Various proposals have been put to reporters in respect of schemes to test new initiatives. For example HIE and HITRANS suggested proposals for a route development fund jointly funded by economic development bodies such as themselves and the Executive. Local authorities would then bid for funds to run new routes and ascertain the demand and potential improvements these routes could provide. Reporters consider this to be a valid proposal and suggest that a route enhancement fund to maximise the potential of variable costs on existing routes would also be an effective mechanism for the development of services.

48. Reporters recommend that the Executive require potential bidders to contribute to the planning process in order to gain ideas from organisations with commercial expertise for new initiatives and development plans. Reporters advocate the proposal by the Calmac Consultative Users’ Committee to require bids for the
actual specification and an additional bid detailing suggestions for a service which is not constrained by fares and service levels. This is similar to the ‘enhanceable franchise’ idea developed by the Strategic Rail Authority. Reporters also endorse the idea of requiring bidders to make additional bids for longer periods such as 10 years in order to set their plans into the context of long term planning.

49. Reporters also propose a way of assessing potential demand would be to oblige the OpCo to monitor the number of requests for services which are not provided by the OpCo in order for a planning structure to gain an idea of where unmet demand lies. Reporters recommend that the Executive seriously considers the idea of a route enhancement fund, a route development fund and also systems for monitoring unmet demand.

Safety

50. The specification allows the OpCo to lay on any additional services beyond those detailed in the specification. Representatives from the STUC noted that the specification does not stipulate that these additional services should maintain the same safety levels and staff conditions as those prescribed in the document. Reporters can find no justification for a distinction being made between services within the undertaking and those outwith the undertaking. Reporters therefore recommend the inclusion of a provision within the specification for consistent safety levels and staff conditions on all ferry services laid on by the successful bidder.

Fares

Freight

51. The specification does not include a provision for the current discount scheme for hauliers as it is seen to contradict European competition law. Hauliers, such as DR MacLeod, expressed their concern to Reporters at the lack of such a scheme since even with the discounts under the current scheme, the fares on certain routes make it financially unviable to transport high volume, low cost goods. Concerns were also expressed by hauliers that high fares for freight were subsidising other users. Reporters acknowledge the need for an equitable discount scheme to redress the balance for hauliers, including small hauliers carrying small loads relatively infrequently who do not benefit from the current system based on volume and the number of crossings per year.

52. In evidence, the Deputy Minister stated that Caledonian MacBrayne was developing a discount scheme based on volume and long term commitment which he believed would not breach European competition law. He also stated that he was confident that a discount scheme would be included within the final draft service specification. Reporters were very encouraged by the Deputy Minister’s comments and recommend that the Executive continues to develop an equitable discount scheme.

Peak Fares
53. Currently the peak fare system is used on various ferry routes on the network including islands with infrequent lifeline services. Local residents such as representatives of Tiree Community Council have noted that the price of peak fares are extremely prohibitive and that a lifeline service should function on a first come first served basis. Reporters are of the view that the specification should encourage alternatives to peak fares on lifeline routes as they are inappropriate on routes with limited weekly sailings. Reporters note that the fare system for such services should place an onus on maximising the number of people on board paying lower fares rather than maximising revenues.

54. Various organisations, specifically the Western Isles Tourist Board and the Calmac Consultative Users’ Committee, considered that there was scope for increasing the economic efficiency of the fare structure on the network by basing it on the idea of high volumes of traffic paying lower prices rather than on an excessive use of peak fares. In addition, Reporters are of the view that the Executive should research the advantages of discount schemes such as:

- transferable discount cards for businesses
- ferry passes for purchase by frequent users
- multiple journey tickets (beyond the current 10 journey maximum)
- young persons’ discount cards

**Local Employment Issues**

**TUPE and Pensions**

55. The specification states that whether the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations will apply to the tendering process is a matter of law and whether it applies to the tendering process will not be confirmed unless the issue is taken to court. Consequently the specification does not dictate whether or not the successful bidder must comply with TUPE. However, the specification does include a proviso that the OpCo should work on the assumption that TUPE does apply. The specification also states that if the courts rule that TUPE does not apply then the equivalent amount to that which the OpCo would have invested enforcing TUPE will be removed from its overall subsidy. If it is found by the courts that it does not, the subsidy will be reduced by the equivalent amount that enforcing TUPE would have cost the OpCo. It is intended that this proviso will remove any financial gains to be made by the OpCo from mounting a legal challenge against TUPE regulations. The specification includes a similar proviso for the application of the Cabinet Office Statement of Practice in relation to the transfer of pensions.

56. Reporters found that groups were keen to retain the expertise of the Caledonian MacBrayne workforce and therefore wished to see TUPE implemented during the transfer of services. Trade union representatives, in particular argued that the specification should contain the employees terms and conditions detailed in TUPE in order to ensure the effective application of TUPE regardless of whether the legal system rules that it applies as the specification is a legally binding document in itself.
57. Members of the Committee outlined this proposal to the Deputy Minister in order to seek his views. The Executive’s view is that the provision of TUPE could not be incorporated into the specification as the provisions are extremely detailed and therefore their inclusion would make for a final document of an unwieldy size.

58. In response to this argument, reporters consider that there would be merit in including at least the baseline principles of TUPE within the specification and recommend that the Executive investigates the practicalities of this approach.

59. In evidence, one of the Deputy Minister’s officials argued that the inclusion of TUPE within the specification, without confirmation from the courts that TUPE, would reflect a certain amount of presumption on the Executive’s part.

60. Reporters were not entirely convinced by this reasoning, arguing that the provisions already in the specification regarding TUPE suggests that the Executive is of the view that TUPE should apply. Therefore, reporters do not appreciate why the inclusion of the provisions within the final specification would be considered more presumptuous than the Executive’s existing policy of discouraging legal challenges to the provisions within the current specification.

61. Reporters were encouraged by the Deputy Minister’s comments on his intention to provide effective safeguards to ensure the successful bidder enforces TUPE. Reporters would endorse a robust financial penalty system to ensure the application of TUPE at the point of transfer and also to ensure that the provisions of TUPE are not abandoned following the transfer. Reporters recommend that these financial penalties are clearly set out in the final specification.

Gaelic

62. The specification states that ferries on certain routes should have announcements and signs in Gaelic as well as in English. However, it does not include any requirement for ferry crews to have any knowledge of Gaelic. Argyll and Bute Council and Western Isles Council noted to reporters that the ferry routes serve communities with a strong Gaelic tradition and that certain islands have a high population of people who are native Gaelic speakers. The reporters therefore consider it important for the specification to require each of these routes to be served by at least one crew member who can speak fluent Gaelic. Reporters consider that this provision would be particularly in the event of an emergency during a crossing.

63. Trade Union representatives were of the opinion that Argyll and Bute Council’s proposal would not contradict EC procurement rules as the ability to speak Gaelic would not need to be a statutory requirement of all staff. At the Committee meeting, the Deputy Minister stated that the Executive was content to explore Argyll and Bute Council’s suggestion and agreed that this proposal may not be in breach of EC procurement rules. Reporters recommend that the Executive discusses the trade union proposal with the Commission. In the event that the Commission advises that the proposal breaches Procurement rules, reporters recommend that the Executive at least strengthen the wording within the
specification encouraging the employment of one gaelic speaking member of crew on specific routes.

Integration

Tourism and Marketing

64. During meetings held in Stornoway, reporters heard various accounts of the lack of integration between different forms of transport in the Hebrides and the lack of accessibility to information on the ferry services. Reporters were concerned that the lack of integration combined with the lack of information would deter tourists from visiting the islands.

65. In terms of integration, reporters recommend that the specification includes wording which encourages the successful bidder to build partnerships with local bus and train companies and other ferry service operators. In terms of marketing and the provision of information, reporters recommend that the specification encourages the successful bidder to establish links with local tourist boards.  

Performance Indicators

66. The performance levels outlined in the specification are tighter than those currently applied to Caledonian MacBrayne. Although good performance levels were deemed to be of importance, various organisations suggested that the rigidity of those in the specification prevented ferries from linking up with other forms of transport which run late and this is very important, particularly when ferries may only sail three times a week to certain islands.

67. Reporters recommend that the Executive reviews the proposed performance indicators to ensure that they will not effect the successful bidder’s potential to integrate its ferry services with other forms of transport.

Transfer of Services

68. During the trip to Orkney reporters heard accounts from local service users of the problems encountered during the tendering process for the Northern Isles contract. The main problems seemed to be associated with the length of the tendering process with the final contracts being signed out approximately one year late. In addition, the stop-start nature of this procurement process appeared to put off potential bidders. Finally, the change of vessels on certain routes led to the need for changes to infrastructure at the ports including major new pier building projects. Unfortunately the delay in awarding the ferry contract meant there has been insufficient time available for port authorities to finalise capital schemes and deliver changes before the transfer of services (due to take place on 1 October 2002).

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5 During a meeting with reporters, Neil McArthur, Chairman of the Western Isles Tourist Board stated that the Board would be very keen to build links with the local ferry services in order to capitalise on potential tourism markets.
69. Reporters wish to encourage the Executive to take note of the problems encountered in Orkney, analyse the reasons for the time delays in the tendering process and prevent their reoccurrence during the tendering of the Clyde and Hebridies ferry services.

**Provision of Last Resort**

70. As previously outlined, the specification provides very little detail on the provision of last resort. One of the few details it provides is that VesCo will be responsible for the provision of last resort and that if the OpCo fails to run a service for 7 consecutive days the VesCo will have the right to ensure provision of services.

71. Alastair Gow, Director of Transportation and Property from Argyll and Bute Council has informed Reporters that the Council consider 7 days to be too long a period to leave isolated islands such as Colonsay without a ferry service. Reporters endorse this view on the basis of the evidence they have gathered on the dependency of island communities on their ferry services and recommend that the Executive reviews this provision accordingly.

**Recommendation**

72. The Transport and the Environment Committee is invited to consider and comment on this paper. An agreed paper could then be submitted as part of the Scottish Executive’s consultation on the draft service specification.

*Des McNulty MSP*
*Maureen Macmillan MSP*
*20 September 2002*
REPORTERS’ INTERIM REPORT – KEY CONCLUSIONS

The Justification for Competitive Tendering

Groups such as trade unions raised doubts as to whether the competitive tendering exercise was necessary. Reporters came to the view that the tendering of the network of ferry services was necessary in order to allow for payments to be made in relation to Public Service Obligation contracts in line with Community law.

Consultation

The Executive has previously consulted on draft proposals for tendering these services in the document ‘Delivering Lifeline Ferry Services’. The Executive intends to conduct a wide-ranging consultation before this is finalised, with the objective of achieving innovation and improving service delivery. The reporters supported the objectives of the Executive and urged them to consult as widely as possible.

Issues relating to costs and transparency

Reporters noted that the Minister for Transport gave a commitment to protect current fares and levels of services. Reporters welcomed this commitment and also encouraged the Executive to examine whether there was scope for either reducing fare levels or improving levels of services within the budget for delivering these services.

Reporters noted that the OpCo should be set up in a manner that would allow it to be responsive and flexible both in providing commercial services, and in responding to the needs of communities. Reporters also noted that achieving this objective may require the OpCo to be granted a higher degree of commercial freedom than CalMac currently possesses.

Reporters raised concerns as to the transparency of current services operated by CalMac and the need to provide a financial breakdown of route costs in relation to those services.

Regulation of Service Delivery

Written evidence to the Committee from Professor Tony Prosser and Professor Neil Kay criticised the lack of a legislative framework and/or regulatory body to regulate such issues as fares, service standards and consultation with users.

The Executive have previously stated that, they do not see the need to implement primary legislation, or to appoint a regulatory body, in advance of the tender process and that they will monitor the situation over the term of the first contract and make an assessment of whether legislation is needed at that point in time. Reporters encouraged the Executive to fully examine the question of whether an independent regulator was needed, particularly in the event of the route being tendered in more than one bundle.
Reporters expressed concern regarding the accountability of the OpCo to communities. Reporters considered that any OpCo must be accountable to the communities that it serves, and responsive to their needs and concerns. The Executive was urged to consider ways of making an OpCo more responsive to its users.

**Security of Service and the Need for an Operator of Last Resort**

The Executive proposals envisage a split between the vessel owning company (VesCo) and the operating company (OpCo) with the VesCo leasing the vessels to the successful tenderer (OpCo). The Executive has also proposed that the VesCo operate in a management role to procure ferry services as necessary should an operator fail to deliver its contractual obligations. It is seen by reporters as essential that the Executive ensures that an operator of last resort could step in to deliver services immediately and ensure uninterrupted service provision.

**Bundling Of Services**

Groups giving evidence to the Committee were united in wishing to see the network tendered as a single bundle. Reporters were also supportive of these proposals, considering it likely that tendering the network as a whole would reduce concerns over “cherry picking” of routes, provision of relief vessels and integration of through ticketing and marketing services.

**Local Employment Issues**

Groups giving evidence to the Committee were keen to retain the expertise of the current CalMac workforce, and to ascertain the extent to which the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) will apply to any transfer of CalMac employees to a new operator.

The Minister for Transport previously stated that the application of TUPE is a legal matter which would be addressed at the time of transfer, and that issues such as this would be addressed in the draft service specification. It is understood that TUPE does not apply to the issue of pension rights, and reporters urged the Executive to investigate the pension rights of employees and provide some clarity on this issue.

Reporters noted that Regulation 3577/92/EEC allows a member state in imposing a PSO, to stipulate requirements in respect of ‘manning of the vessel’ and urged the Executive to explore the amount of flexibility that this provision allows, and to investigate to what extent they may specify matters relating to the manning of vessels in the service specification.
EXECUTIVE RESPONSE – KEY POINTS

Within the response the Deputy Minister was pleased to note that the Committee’s report welcomed the Executive’s commitment to protect fares and levels of service and noted the Committee’s points about transparency. The Deputy Minister added that the Executive would be making its approach to fares explicit within the draft service specification.

In response to the Committee’s concerns regarding the length of the tendering contract, the Deputy Minister stated that it would be preferable to be able to offer a longer contract, however five years is the length of contract allowed for a PSO under EC rules.

The Deputy Minister reiterated the Executive’s intention to consult widely on the draft service specification, noting that it would be consulting with all those consulted previously in relation to its paper ‘Delivering Lifeline Ferry Services’ and any other parties who have since expressed an interest.

The Deputy Minister also detailed a number of key players who were consulted at an early stage by consultants preparing the draft specification. These included trade unions, local authorities, the Shipping Services Advisory Committees (SSACs), the Caledonian MacBrayne Users’ Consultative Committee (CMUCC), the Highlands and Islands Strategic Transport Partnership (HISTP) and VisitScotland.

In terms of the bundling of services, the Deputy Minister noted that the Executive had received confirmation of the European Commission’s views on its proposal against splitting up the Calmac network and confirmed that the network would be tendered as a whole.

The Executive stated that it could not comment on VesCo’s role as the procurer of last resort as work was still ongoing on this proposal.

The Deputy Minister reiterated the Executive’s position on the need for a service regulator, claiming that the service specification will regulate fares and service levels and the operator’s contract will establish appropriate monitoring and performance regimes. In addition, he noted that a number of organisations including HISTP will be monitoring and reporting on the quality of service provided.

Finally, on the subject of local employment, the Deputy Minister recognised the concerns of the CalMac workforce and the importance of TUPE. The Deputy Minister stated that the Executive was still considering how best to address this issue and that of pensions.
The Convener: I welcome for the item on Highlands and Islands ferry services Lewis Macdonald MSP, the Deputy Minister for Enterprise, Transport and Lifelong Learning, and a number of officials from the Scottish Executive: Sandy McNeil, David Hart, Fiona Harrison and Claire Mollision. I understand that the minister wishes to make a brief introductory statement, following which we will move to questions. Jamie McGrigor MSP is interested in this issue and joins us today. I officially welcome him to the meeting.

The Deputy Minister for Enterprise, Transport and Lifelong Learning (Lewis Macdonald): I thank the committee for inviting me to give evidence today. I have a brief introductory statement to make, and I look forward to answering the committee's questions afterwards.

I will begin with the background. As members know, we have been required to undertake competitive tendering to meet European Commission regulations on competition for subsidised services and on the provision of state aids to maritime transport. Following a period of wide consultation last year, we submitted proposals to the Commission, including a strong case for a single bundle and for the inclusion of two mainland-to-mainland routes. The Commission responded in November last year, making it clear that it would not oppose our proposals to tender the network as a whole, which was a welcome development.

On 27 June this year, I published for consultation the draft invitation to tender service specification, which outlines our proposals for taking forward the tendering process. The document explains the principles that we have adopted and seeks views on the options that are open to us. It is a substantial document, as members will all now be aware, but people will be reassured to see the degree of detail to which we are determined to specify the service. We have been keen to give as many people as possible the widest possible opportunity to comment on the document.

We propose to tender the network as a whole, or as a single bundle, which reflects the overwhelming preference of those who responded to our initial consultation paper. That will maximise the economies of scale and will, we believe, maximise service reliability. It will also help to deliver our overriding aim of integrated transport. We hope that it brings the further advantage of addressing the potential cherry picking of routes. It is likely to provide the optimum value for public money.

Following last year's discussions with the European Commission, we concluded that it would not oppose our inclusion of both mainland-to-mainland routes—Tarbert to Portavadie and Gourock to Dunoon—in the undertaking. It was equally clear that the Commission would not support a vehicle ferry subsidy on the Gourock to Dunoon route given the operation of a non-subsidised commercial company on the same route. Despite that, we believe that a robust case can be made for a service that would allow a direct connection for foot passengers between the bus station at Dunoon and the railhead at Gourock as part of an overall integrated transport strategy.
We would have preferred to continue the present provision of a passenger subsidy to a service that also carries vehicles but, following discussion with the Commission, we concluded that we should instead propose a passenger-only service as part of the single bundle.

With that one exception, we have been able to make proposals in the draft service specification to protect existing fare and service levels throughout the network. I was pleased to propose in our consultation paper a number of new and enhanced services, including the Mallaig to Armadale and Tarbert to Portavadie winter services; a new service across the Sound of Barra; an enhanced service across the Sound of Harris; the winter passenger service between Kilchoan and Tobermory; and enhanced services from Oban. Some of those improvements are scheduled to commence prior to the estimated date for the contract handover, and we are confident that they will be widely welcomed.

We have set out plans for a vessel-owning company, which will own Caledonian MacBrayne’s vessels, piers and harbours.

I remind the committee of the proposed timetable to which we are working. The consultation period is due to close on 27 September. There has already been a strong response, and I expect more comments to arrive over the next couple of weeks. All of them will be considered fully, and they will help us to make decisions about the final invitation to tender. A prior information notice was issued to potential bidders over the summer to bring the consultation to their attention and to allow them to take part. We hope to commence the tendering process early in 2003, with the anticipated contract handover planned for late 2004.

I emphasise the fact that this is a consultation process. We have developed a draft of what we believe will best deliver a stable and expanding west coast ferry service over the next few years. We will, of course, take the views of the committee and of respondents to the consultation into account.

The Convener: Thank you for your introductory remarks. We have a number of areas of questioning on the specification and on your introductory remarks.

You recognise that there is considerable interest in the Gourock to Dunoon proposals. That is the first area to which we will turn. Maureen Macmillan, who has been one of the committee’s reporters on Highlands and Islands ferries, will open the questioning.

Maureen Macmillan: Des McNulty and I spent time in the summer going around the Western Isles and Argyll, gauging opinion on the draft proposals. Although the draft proposals were welcomed on the whole, some areas of concern were expressed. I want to discuss first the Gourock to Dunoon service.

The minister explained the reasoning behind the decision to restrict the Gourock to Dunoon ferry service to a passenger-only service. He told us that, after discussions with the Commission, it was felt that it had to be a passenger-only service because of the lack of transparency about cross-subsidy. However, there is a feeling in Dunoon that the situation has not been properly explained to the Commission. The vehicle service is not subsidised—it is profitable—and people feel that, if it was enhanced rather than abandoned, it could be even more profitable, meaning that less of a subsidy would be needed. People feel that the Commission should have taken that into account and that it would be only sensible to produce a solution that would require less of a subsidy.
There is also a fear that the proposals will result in the creation of a private monopoly on the Dunoon run across the Clyde. Has that been put to the Commission? Would that have any effect on the Commission's advice?

**Lewis Macdonald:** You raise several important points. The discussions that we have had with the European Commission have focused on the options for the service from Gourock to Dunoon. As committee members know, the current subsidy—the public service obligation support that is provided by the Government—is for the passenger service only. As I said in my introductory remarks, we had first to convince the European Commission to permit a mainland-to-mainland service. Having made that argument, we had to address the question of what kind of service between the two mainland points would be likely to be acceptable to the Commission.

The fundamental difficulty, which became clear following our discussions with the Commission, is the one that Maureen Macmillan has identified—the Commission's view of the question of subsidy. At the moment, we provide a subsidy for passengers only, but on a vessel that also carries vehicles. The Commission was not satisfied that the subsidy could be shown to subsidise only the passenger service and not the vehicle service. Had we been able to produce a proposal for the subsidy that demonstrably did not bring benefits to the vehicle side of the operation, we would be in a different position today. We explained in detail the history and nature of the service, and we ran through the options with the Commission.

You asked whether the vehicle service could run profitably. That is close to the heart of the issue. The fact that a profitable commercial vehicle service also operates on the route means that a subsidised vehicle service is not possible. Our difficulty was making that case. We wanted to demonstrate that there was a way of providing a subsidy for the passenger service that would not feed through to the vehicle side. However, we were unable to come up with a mechanism—an accounting system, if you like—that provided the reassurance that the Commission sought.

You wondered what the Commission was likely to look for. Although it has an overall responsibility to enforce European regulations and guidelines, it is not concerned with the level of public subsidy. The key judgment that it makes is not whether proposed service A costs the public purse more than proposed service B. Instead, the competition aspect and the question whether a subsidy will undermine the existing competitive position are fundamental to its considerations.

I was also asked whether the Commission would be interested in running a private monopoly on the service. The answer is no, because if no subsidy is involved, it is a matter for the marketplace. For example, bus operators provide other transport services for which there is no competition. The Commission would not require a public sector participant to enter the market in order to compete. [**Interruption.**]

**The Convener:** I suggest that, before we go on, Maureen Macmillan switches her pager to silent.

I have a supplementary question. Is it not possible for the specification to tender out a subsidised passenger service and then for the successful operator to make a commercial decision to operate above the level stipulated in the specification? For example, if a car service turned out to be profitable, would the proposed set-up restrict commercial developments that would enhance the service? Does not the fact that the current private operator on the crossing is able to bid for the franchise influence the competitive side of things?
Just to move things forward, I ask Jamie McGrigor and Fiona McLeod to put their questions to the minister, who will then be able to answer them in bulk.

**Fiona McLeod:** You said that the decision was made following discussions with the European Commission. Are you prepared to make those discussions available publicly to allow us to find out what you said to the Commission and how it responded? I am still puzzled by your comment that the Executive was unable to propose to the Commission a transparent accounting system that showed that the PSO was not subsidising vessels. You were able to satisfy the Commission about the NorthLink contract, which contains both a PSO element and an element of commercial gain against a private operator. It would be interesting to see what questions you were asked and the answers that you gave.

**The Convener:** I ask the minister to respond to those two substantive questions before I bring in Jamie McGrigor.

**Lewis Macdonald:** On additional services, I should make it clear that our draft service specification mentions a passenger-only service between Gourock and Dunoon. Nothing in the draft service specification or in European law would prevent an operator from providing a vehicle service at their own risk as a commercial undertaking. However, although one could provide an additional service over and beyond the subsidy, the difficulty lies with the vessel that carries the subsidised service.

11:45

In other words, if the vessel is a passenger vessel that is carrying passengers only, there is no difficulty in showing that the subsidy is being used only for the purpose for which it is intended. If subsidy is provided for passengers on a vessel that can do other things, perhaps commercially for a profit, it is not possible to show in the same way that the subsidy is ring fenced. There is nothing to prevent an operator from providing a vehicle service, but it cannot be the same vehicle service that uses public subsidy for passengers.

The convener asked whether Western Ferries, which is the private operator on the route to Dunoon, would be free to bid for the subsidised service and, if it were able to do so, whether that would make a difference to the question about fair or unfair competition. Part of the answer to that question lies in the approach that we have taken, on the basis of our earlier consultation, to pursue a single bundle. Under the bidding process, it will be open to any shipping operator to apply for all 26—or, as it will be—27 routes. Operators cannot apply for individual routes. I understand the convener's point, but I do not think that a direct correlation exists between the freedom to bid for the entire west coast ferry network and a single-route operator being undermined by a subsidised service on the same route.

I return to an important point that relates to Maureen Macmillan's earlier questions. If Western Ferries, as the private sector operator, behaves in an anti-competitive fashion, the community or any other user of the service can make a complaint to the Office of Fair Trading under competition law. Where competition is unfair, that option is always available.

Fiona McLeod asked whether we would publish our exchanges with the European Commission. We will not do that, as the code of access to those documents requires that we do not do so. Our discussions with the European Commission are, by their nature, confidential. It is worth noting that when we discuss matters with the
European Commission, as we have done, the discussions are informal. No formal process of prior approval for a tendering proposal exists in the way that the European Commission operates.

Formal procedures would apply either if the Commission judged that we had breached European law, in which case it would take infraction proceedings against us, or if a complaint was made by a private sector operator—for example, that the way in which we had provided subsidy was a breach of competition law—in which case the Commission would have a quasi-judicial role in making a judgment on that complaint. The Commission's quasi-judicial role means that it will not issue a view formally in advance of a tendering process or of a complaint being made.

Fiona McLeod also mentioned NorthLink. I will deal briefly with that question now—it may arise again later. The specification of the NorthLink PSO is different, as I think the member knows, from the west coast PSO. The competitive position that applies in the northern isles is not the same as that which applies on the Gourock to Dunoon route. When the PSO was let for the northern isles services, there was no competition for roll-on-roll-off freight services, for example, and there was no alternative lifeline service for Orkney or Shetland. That meant that no private sector competitor could say that the position undermined their market position and that they therefore had a complaint under European law.

The Convener: I will take Jamie McGrigor next. Des McNulty has also indicated that he wishes to ask a question. I ask both members to be as brief as possible, as we want the minister to cover a range of other issues this morning.

Mr McGrigor: The minister mentioned the phrase "fundamental to its considerations". Surely "fundamental to its considerations" must be the needs of the people of Dunoon. It is perfectly obvious to me from the meetings that I have attended that those people feel that they will be presented with an inferior ferry service from now on. How will you provide a sustainable ferry service to the people of Dunoon and the Cowal peninsula? How will you provide a service that is legal under European rules? Is not the interpretation of those rules at the heart of the issue? Proposals that have been made recently, including those by Professor Neil Kay, show that the way forward could be a roll-on-roll-off ferry service that would be legal under European rules. What in that proposal would be illegal?

The Convener: If Des McNulty asks his question, the minister can respond to both.

Des McNulty: The concern in Dunoon is twofold. People see it as paradoxical that, in supporting competition rules, one could end up with a situation where competition is actually denied. There seems to be a catch-22 element in the way that things are working. There is a prejudice towards common sense in such matters, but perhaps there is a commonsense solution.

The other issue is the relevance of the findings of the Deloitte & Touche report, which seemed to show that there could be a profitable vehicle service alongside a passenger service, which might be a way of getting round the competition requirements, linked through a public service obligation. That is what certain local councillors are suggesting.

Lewis Macdonald: Those questions raise several issues. I visited Dunoon three weeks ago and met community representatives and local councillors. I had a full discussion with them, from which I was able to glean the views of the community. I do not dispute that people in Dunoon would very much prefer to continue with the present service, which is why we tried to put that case to the European Commission.
The issue is about what service we can provide within European rules. The interpretation of those rules is a matter for the European Commission, which has a quasi-judicial role in interpreting those rules. In performing our duty of the stewardship of public funds and delivering services, we must have regard to the discussions with the Commission and reach conclusions on what would be permitted on the basis of those discussions.

On that basis, we have pursued and included in the draft service specification a passenger-only service because we believe that there is a clear case for that. Our conclusions lead us to believe that such a service can be sustained and will pass muster in that it will not be an infringement of European rules.

Des McNulty referred to the Deloitte & Touche report, which we have considered carefully. The report concluded that it was difficult to make a value-for-money case for any service on the route and we took account of that. We took our own view about what is defensible and desirable. That is why we have pursued the option of a passenger-only subsidy. Providing a separate vehicle service is a possibility, but not as part of the current public service obligation.

When I met community groups in Dunoon, I made it clear that we would consider carefully the responses to the consultation and take some guidance from the community about its wishes. We propose to include within the PSO a passenger-only service. At least one person who attended the meeting I was at in Dunoon suggested that it would be better to take that service out of the undertaking altogether. That would work only if the route were potentially profitable. We are sceptical about whether a combined passenger and vehicle service from Gourock to Dunoon could be made profitable. I do not think that the Deloitte & Touche report provides any substantial grounds for reaching that conclusion, although it suggests ways in which the service might be profitable. Our judgment of the current position in the marketplace is that it would be difficult for that service to operate at a profit.

However, in consulting, we are open to what people have to say to us. The possibility of taking that service out of the PSO was raised with me in Dunoon. We will consider that along with the other consultation responses.

The Convener: I ask Des McNulty to be brief, because we want to make progress.

Des McNulty: The minister’s comment was helpful. Can Argyll and Bute Council and other interested parties be consulted on market testing? Are opportunities available to consider the issue in a serious commercial way, before the die is cast?

The Convener: Before the minister responds, I will give Maureen Macmillan another chance to speak. Some of the questions that she wanted to ask have been asked by other members. She can add comments before we move off the topic of the Gourock to Dunoon route.

Maureen Macmillan: I have been told that the vessel causes the problem for profitability and that a new vessel would have to be obtained. Does not the split between opco and vesco supply a mechanism for providing a vessel so that the service could be run profitably? I do not know whether that would be out of the undertaking in the bundle or whether a case can be made for taking the Dunoon to Gourock route out of the bundle and making it separate. Those alternatives must be considered.

The present Dunoon to Gourock service does not pose any threat to the competition. The competition is not cut-throat, because the other operator has 80 per cent of the vehicle traffic. Could not that be part of the equation? If the Dunoon to Gourock route
were separated from the rest of the CalMac bundle, it might not be challenged. If a
challenge were made, it would not unravel the whole network. I do not know whether
that is a possibility.

Mr McGrigor: The two routes are different. One is 70 per cent longer than the other
and goes to a different place that is miles away. Both ferry services appear to be well
used. If anything, there are queues to get across, so there is not a lack of people
who are trying to use the services. If half the vehicle service is taken away, we will
be left with an inferior service. That does not bode well for Dunoon, which is being
paraded as a gateway to Scotland's first national park.

Lewis Macdonald: Maureen Macmillan is right to say that yet another option exists.
At the end of the consultation, we will consider whether any mechanism has arisen
from the responses that allows us to revisit with Europe the idea of ring fencing
subsidy. We wish to have a result on that. We have not yet seen any proposal that
would satisfy the European Commission's requirements on the competitive impact of
public subsidy. That is a difficulty. However, as I say, we intend to continue
discussions with the European Commission until we reach our final conclusions and
publish our final service specification.

If we conclude that the current service configuration will be unacceptable to the
European Commission, three options will exist. One will be the proposal in the draft
service specification—a passenger-only service in the PSO. The second option
would take the existing service out of the undertaking and encourage a commercial
operator—possibly the winner of the tender for the network as a whole—to run the
service as an out-of-undertaking service. The third option will be the suggestion that
Maureen Macmillan highlighted—the possibility of unwrapping our single bundle,
proposing the current Gourock to Dunoon service as a separate PSO and seeking
Europe's support for that.

The third option has clear disadvantages. To avoid cherry picking and to keep the
network together we have always argued for a single bundle. It would be difficult for
us to change our position, but we would consider doing so if we felt that it would
produce the result that we wanted with Europe. However, if we come to the
conclusion that a passenger and vehicle service will not be acceptable to Europe as
part of the wider package, it is no more likely to be acceptable as a stand-alone item.

Maureen Macmillan is right to suggest that the proposal would have the advantage
of not jeopardising anything else in the single bundle. However, it would jeopardise
our current proposal for a passenger service. We could not propose a combined
passenger and vehicle service as a separate undertaking and, having seen that
rejected, restore the proposal for a passenger service to the single bundle.

There are difficulties with proposing a separate PSO for the Gourock to Dunoon
service, but that is one of the options available to us. We may conclude that a case
can be made for the profitability of the route as a passenger and vehicle service, and
that the community would prefer such a service to the one that we propose.
However, before taking the next step we would need to consider Des McNulty's point
about investment.

In my view, a passenger-only service within the single bundle is the best option. That
is why we included it in the draft service specification. However, we are open to other
suggestions.

Jamie McGrigor suggests that the routes are different and therefore not comparable.
That would not be the Commission's view. It has accepted our argument that for foot
passengers alighting from buses or trains these are different routes, because the terminuses are several miles apart. However, the distance between the two points on either side of the Clyde is not significant for motor vehicle users. It does not affect the Commission's judgment that the routes serve the same market.

Nora Radcliffe: The Executive has not included the current freight discount scheme in the specification, as it is seen to contravene European competition regulations. What steps has the Executive taken to develop freight discount schemes that comply with European regulations? If no discount scheme is included in the specification, it could be cheaper for hauliers to set up their own ferry services. What would be the knock-on effects of the establishment of private freight services?

Lewis Macdonald: CalMac has just announced that it does not intend to increase freight rates in the financial year 2003-04. Freight charges will be included in the specification at a lower level than would have been the case had CalMac increased them.

Nora Radcliffe is right to say that some aspects of the current freight discount schemes are dubious as regards equity of treatment. CalMac is investigating what discount schemes would comply with European law. The essential points are competition and equity. In other words, discounts cannot be made on the basis of the nationality or place of residence of a haulier. However, they can be made on the basis of the long-term commitment of a haulier to a route and the volumes that they intend to carry. That would allow for a scheme to be introduced that provides significant discounts for hauliers who have a long-term interest in the service. We are monitoring the development of CalMac's proposals and hope that they will be helpful to hauliers on the west coast.

Nora Radcliffe: So you are confident that private arrangements will not be seen as desirable?

Lewis Macdonald: I am confident that we will be able to develop a discount scheme that is consistent in its application to all users and that will be attractive.

Nora Radcliffe: So the aim is to achieve the best service possible within the spec.

Lewis Macdonald: Yes.

Maureen Macmillan: When I took evidence, hauliers raised with me the problems of small hauliers who perhaps do one journey a week and have done so for the past 30 years. They feel that they do not get any discount. They are local people who regularly take loads to places such as Mull or Tiree, but they never build up enough air miles or sea miles, if you like, to get their discount. Can you consider their situation?

Lewis Macdonald: CalMac is examining two aspects. One is volume, which clearly would not help those individual hauliers, and the other is long-term commitment to the route, which clearly has the potential to help those individuals. I hope that what CalMac proposes will include elements of both aspects.

Maureen Macmillan: I am conscious of the developing aquaculture industry in the islands. Issues have been raised about the frequency of ferry services, because the aquaculture industry obviously needs to deliver its goods fresh to market daily and not a couple of times a week. Are you examining that issue more closely?

Lewis Macdonald: Yes. Again, the current operator is undertaking some of that work. For example, in the Argyll islands CalMac is consulting on timetable enhancements that would provide a more regular service to several islands that are in the position that you described. CalMac takes on board a wide range of considerations, including economic development aspects and others such as the use
of ferries by passengers and tourists. We would expect that process of going from
the draft service specification to the final specification to include enhancements that
are proposed in the interim period.

Des McNulty: Maureen Macmillan and I got a lot of information from the work that
we did in the

Col 3431

islands. There was general satisfaction that the specification would be based on
current and projected timetables and that there would be a measure of stability and
continuity. However, there was a view that that could lead to lack of flexibility in
relation to future needs and development opportunities.

It was suggested that there should be a separate route development or route
enhancement fund against which operators, local authorities or users could suggest
proposals for service enhancement. That could be funded temporarily or in the long
term as a means of route development outwith the specification. What is your view of
that suggestion? What criteria other than revenue criteria would be appropriate to
apply to a route enhancement or route development fund?

Lewis Macdonald: That is an interesting suggestion that we will consider carefully.
We have indicated our intention, during the initial tender period, to carry forward
work on enhancements for the second tender period. However, that would not just
come to conclusions every five years. We envisage that as a continuous process.
Any organisation that contributed to the support of services would obviously be
included in the decision-making process on such services.

The service specification is not set in stone. There is provision for some flexibility.
We would like to have flexibility for service enhancements of between 5 and 10 per
cent of the contract value. That would allow a fair amount of room for the
enhancement of services, when a good case can be made. Revenue would be part
of the grounds for such a case, but we would consider a range of other criteria that
apply to a lifeline service, including economic and tourism development and other
opportunities, as well as social need.

Des McNulty: You envisage the possibility, during the contract period, of being able
to access route enhancement or route development funds from a source that would
allow the provision of an improved service.

Lewis Macdonald: Potentially, as a continuing process.

Maureen Macmillan: There is a feeling, particularly in the Argyll islands, that the
enhancements need to be done speedily because of the deteriorating social and
economic conditions of some of the islands such as Tiree and Islay, where people
feel that their economy and lifestyle are stifled by the fact that there are not enough
ferry sailings. I would like to think that the enhancements will happen as soon as
possible rather than in the distant future.

Lewis Macdonald: I know that the consultation

Col 3432

on the enhanced timetables for Tiree is under way. We expect that to be a
continuous process.

Des McNulty: The contract will last for five years, but people have told us that the
planning framework for the development of these services may be eight, 10 or even
15 years, in the context of vessel acquisition policy and people making economic
commitments in the islands based on transport links and so on. Do you recognise
the fact that there is a need for a planning framework to be constituted, perhaps
separately from the direct relationship between the Executive and opco? It could be
a consultative element that would allow people to contribute to the development of a planning framework for those services.

**Lewis Macdonald:** We are consulting on our consultative structure, which, as members will know, is rather haphazard. At the moment, the west coast Scottish ferries have a more thorough consultative structure than exists in the northern isles, for example. We will shortly begin consulting on our proposals for strengthening the consultative structure across Scotland's ferry services.

As I indicated in response to your point about the rural development fund, the Mull overland route and the Islay-Jura overland route are substantial projects. They are some way from being included in the service specification, but we will continue to work with all interested parties in developing those ideas and looking to incorporate them at an important stage in the process.

**Des McNulty:** Almost everyone to whom we have spoken has said that the provision of lifeline services not only is a transport matter but is to do with the maintenance of the whole social and economic fabric and development of the areas that depend on them. In that context, do you think that there is a role for something like a strategic transport authority in the Highlands and Islands that would link together the transport issues with the economic development issues? How do you see the necessary joined-upness being created?

**The Convener:** I will allow Jamie McGrigor to ask a supplementary question before the minister answers.

**Mr McGrigor:** I actually have two questions on two separate points. The first is to do with the Ballycastle to Campbeltown service. I heard this morning on—

**The Convener:** Excuse me, but I do not think that that is directly relevant to the service specification.

**Mr McGrigor:** I thought that we were talking about Highlands and Islands ferry services. Campbeltown is in the Highlands and Islands.

**The Convener:** We are asking specifically about the consultation on the draft specification. That is a separate issue.

**Mr McGrigor:** The second point that I wanted to raise concerns NorthLink Ferries. Does that come under the subject that we are discussing?

**The Convener:** Again, it is separate. The session today is specifically about the Executive's consultation on its draft service specification.

**Mr McGrigor:** Perhaps I could ask about the consideration of livestock sailings. What services will be available for the carriage of livestock from the inner isles of Tiree, Coll, Barra and Mull?

12:15

**Lewis Macdonald:** On the issue of a Highlands and Islands transport authority, I believe that the committee will be familiar with the Executive's position. There were discussions in the Highlands and Islands Strategic Transport Partnership about its development and the establishment of such an authority on the Strathclyde Passenger Transport Authority model. Those discussions have not reached a point at which that will happen in the short term. Perhaps the question will arise again should the HISTP choose to develop its partnership in that direction. That is perfectly feasible, but we have not yet reached that point.

The Ballycastle to Campbeltown route is an entirely separate service specification. The northern isles contract was entirely separate and the provisions are different. There is no specific provision in the Clyde and Hebrides ferry services specification that sets livestock aside from other freight and vehicle carriage.
The Convener: We now move to issues relating to the Transfer of Undertakings (Protection of Employment) Regulations.

Des McNulty: Is there any scope for the specification to contain a contractual requirement to ensure the effective application of TUPE regulations, regardless of whether they are found to apply by the courts?

Lewis Macdonald: No. The application of TUPE regulations is a matter for law. In the Clyde and Hebrides ferry services specification, we deliberately required bidders to bid as though TUPE regulations apply and to apply those regulations if they are successful in their bid. Those are firm and clear requirements on the bidders. However, at the end of the day, if a party decides on a court case and the conclusion is reached that TUPE regulations do not apply, the court ruling will overrule what is in the contract. The court’s legal judgment on whether the regulations should apply will override anything in our tendering documents or the contract.

Des McNulty: My supplementary question relates to how such a situation will be dealt with. Irrespective of whether there is a court ruling, if a successful bidder were to begin to undermine the conditions that are apparently part of the agreement on maintaining the regulations, what steps could you take to ensure that those conditions are sustained? What would you do in such circumstances?

Lewis Macdonald: I hope to provide a safeguard against such a possibility. However, in the invitation to tender, we made it clear that the subsidy will be accordingly adjusted if TUPE regulations are found not to apply. We have removed any financial incentive for the operator to seek not to apply TUPE regulations, as the level of subsidy that they will receive for operating the PSO will be reduced. That is the best mechanism that is available to us to ensure that there is no reason for an operator to seek to overturn the application of the regulations.

Des McNulty: Will you apply financial penalties speedily? Are you sure that you have the legal basis to do so?

Lewis Macdonald: We are confident that we do. The penalties are built into the contract, so they would be immediate.

The Convener: I am not clear why it would not be possible to build in many TUPE protections in the contract. The contract for the service would be knowingly and willingly entered into by the bidder and I do not understand why that is not possible. The other issue that I want to raise does not relate only to TUPE regulations. In many areas, the Executive has given a commitment that it wants to see an end to two-tier workforces. With the contract, a two-tier workforce could potentially apply if subsequent employees are offered lesser terms and conditions than existing employees. How does the Executive intend to address that issue?

Lewis Macdonald: On your first point, there is no mechanism in law that would allow us to override the law. The fundamental difficulty with the application of TUPE regulations is that the judgment on whether they apply is a matter for the law and not the Executive.

The Convener: Why is it not possible to define terms and conditions in the contract? That would not override the law. Operators could then bid for the contract on that basis.

Lewis Macdonald: Is your suggestion that we should specify the terms and conditions of contracts of employment in the contract for the tender?

The Convener: Yes.
Lewis Macdonald: That would be unwieldy and difficult to implement. We have gone as far as we can in laying down the contractual parameters within which potential operators must make their bids. I suspect that contracts of employment and contracts for provision of subsidised services are and will remain separate, but perhaps Sandy McNeil has a legal view on that.

Sandy McNeil (Scottish Executive Legal and Parliamentary Services Department): The foreseeable difficulty with the convener's suggestion is that there might be a certain arrogance on the part of the Executive in trying to specify the terms and conditions, given that the courts could unravel the contract at a later stage. Also, specifying all of the position points in the contract would make the contract decidedly unwieldy. The best method is to get the bidders to do the homework as though TUPE applied and to bid on that basis. We should not give employers any incentive to try to make TUPE not apply, which would reduce the financial consideration.

Lewis Macdonald: That is the legal position. As the responsible minister, I would be concerned about setting in stone the terms and conditions. I would not want to prevent the operator from enhancing terms and conditions during the term of the contract.

The Convener: I meant that a baseline set of conditions could be given.

Des McNulty: I want an assurance that, in the due diligence exercise in which I know you will engage, the employment conditions and job security issues are taken into account. Will you check that the bidders have planned to maintain the employment conditions?

The Convener: Will you also address the issue of the potential for a two-tier work force?

Lewis Macdonald: In considering bids, we will ensure that they comply with the specification, which includes the specification on the application of TUPE. TUPE has a number of difficulties, one of which is that it applies only at the point of transfer and does not impose on the future terms and conditions of members of staff, which would be the same with or without TUPE. That is not a matter that the Scottish Parliament can amend.

The best protection that the work force has in such circumstances is collective bargaining power. I expect the work force to use collective bargaining power so that the successful operating company protects the terms and conditions of existing members of staff and new employees. That is the extent to which we can provide protection for future terms and conditions.

Robin Harper: I gather that the Executive has concluded that a requirement for Gaelic-speaking ferry crews is counter to EC procurement rules, which means that the specification does not include any such requirement. Trade union representatives have informed us that it is important to have one Gaelic-speaking crew member on routes with a strong Gaelic tradition, particularly in an emergency. The trade unions are of the view that that would not contradict EC procurement rules because the ability to speak Gaelic would not be a statutory requirement of all staff. What is your view on that?

Lewis Macdonald: We considered carefully whether a case could be made for a requirement for Gaelic speakers on safety grounds. The Maritime and Coastguard Agency requires that crews should be able to communicate effectively with passengers, which provides general support for employing crew members who are...
of the same language group as the majority of passengers. As I am a Hebridean, I considered the matter closely, but there is no longer a population on the west coast of Scotland that is unfamiliar with English. Therefore, the argument for a requirement for fluency in Gaelic on the basis of safety is not easy to sustain.

A number of points in the specification are designed to encourage the use of Gaelic. We are content to explore further with the appropriate authorities what minimum requirement might be imposed. I take on board the point that was made by the trade union side that it might not be a breach of European procurement rules to have a requirement for one Gaelic speaker on vessels that serve routes where there are many Gaelic-speaking residents. We must be confident that our solution does not breach the rules.

**Robin Harper:** Does that mean that signage on the ships will not have to be in both languages?

**Lewis Macdonald:** Part of the specification is that Gaelic signage on vessels that serve those routes should continue. We will also require the continued use of welcome announcements in Gaelic and English.

**Maureen Macmillan:** Which routes will have dual signage?

**Lewis Macdonald:** That will be decided after consultation with the appropriate structures, such as local authorities.

**The Convener:** That brings us to the end of our questions. I thank the minister and the various officials from the Scottish Executive.
Finance Committee

Report on Financial Memorandum for the Water Environment and Water Services (Scotland) Bill

The Committee reports to the Transport and the Environment Committee as follows—

Background

1. Under Standing Orders, Rule 9.6, the lead committee in relation to a Bill must consider and report on the Bill’s Financial Memorandum at Stage 1. In doing so, it is obliged to take account of any views submitted to it by the Finance Committee.

2. This report sets out the views of the Finance Committee in relation to the Financial Memorandum published to accompany the Water Environment and Water Services (Scotland) Bill, for which the Transport and the Environment Committee has been designated as lead committee at Stage 1.

Introduction

3. At its meeting on 10 September, the Committee took evidence on the Financial Memorandum from:

   • Dr. John Hargreaves, Chief Executive, Scottish Water;
   
   • Professor Alan Alexander, Chairman, Scottish Water;
   
   • Douglas Millican, Finance Director, Scottish Water;
   
   • John Ford, Director of Finance and Corporate Support, Scottish Environment Protection Agency;
   
   • Evan Williams, Sustainable Development Team Leader, Scottish Environment Protection Agency;
   
   • John Thomson, Director of Operations and Strategy, Scottish Natural Heritage; and
   
   • David Howell, Water Framework Directive Officer, Scottish Natural Heritage.
4. The Committee held a separate session at the same meeting with witnesses from the Scottish Executive. At that session, the Committee heard from:

- Michael Kellet, Team Leader, Water Framework Directive Team;
- Elinor Mitchell, Head of Division, Water Environment Unit;
- Emmie Bidston, Water Environment and Water Services (Scotland) Bill Team; and
- David Reid, Head of Division, Finance and Central Services Department.

5. All organisations that gave oral evidence also provided written evidence, as did several local authorities and other organisations. These submissions are reproduced at Annexe X. We would like to express our thanks to all of those who took time to provide evidence in relation to this Financial Memorandum.

Summary of Evidence

6. The Committee was struck by the complete lack of clarity in relation to the financial implications of the Water Environment and Water Services (Scotland) Bill. It is clear that there are substantial financial implications attached to the implementation of this Bill, running to hundreds of millions of pounds and much of it falling on the public purse.¹ What became clear from the evidence we heard was that the actual amount that the Bill will cost is extremely difficult, if not impossible to state.

7. This lack of clarity makes it difficult for some of the organisations that provided evidence to be certain of the costs that they may incur as a consequence of the Bill. For example, the Financial Memorandum sets out an estimation of the costs likely to fall on Scottish Water.² However, in evidence to the Committee, Scottish Water stated that they were “somewhat concerned about the fact that, in the absence of knowledge of the detailed delegated legislation that is promised by the bill, the bill’s financial consequences for Scottish Water are difficult to quantify”³. Later, when pressed to give a range of estimates of the costs likely to fall on Scottish Water, we were told that “it is extremely difficult – if not dangerous – to put a figure on [those] costs.”⁴ Scottish Natural Heritage was also unable to quantify exactly the additional costs it would be faced with as a result of the Bill.⁵

8. The Memorandum states that the administrative and regulatory costs will fall mainly on the Scottish Environment Protection Agency (SEPA) and refers to “significant up front costs" for various initiatives.⁶ It goes on to state that “in the longer term, SEPA will be able to recover the large majority of these costs through charges.”⁷ As those costs will largely fall on Scottish Water, it was naturally a

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¹ Financial Memorandum, pp 21-24
² Financial Memorandum, para 153
³ Alexander, Col 2167 Official Report
⁴ Millican, Col 2173 Official Report
⁵ Thomson, Col 2170 Official Report
⁶ Financial Memorandum, para 152.
⁷ Ibid.
matter of concern to the Committee that these costs will in turn be passed on to consumers.

9. We were interested to learn that the capital costs of implementing similar directives have traditionally proven to be higher than initially anticipated. That adds to the difficulty of establishing costs for this Bill and gives us greater concern about the impact it is likely to have on public finances. In relation to our concerns about the cost to consumers, it was explained to us that the Water Industry Commissioner is pushing Scottish Water in the direction of ensuring more economical use of water, rather than the introduction of metering. Despite this, we remain concerned that the result of this legislation will be a large bill which will ultimately have to be met by the public through higher charges.

10. The figures used in the Financial Memorandum are largely derived from research carried out for the Executive by WRC plc, in conjunction with Glasgow and Dundee Universities. The results of that research, entitled “Costs and Benefits of Implementation of the EC Water Framework Directive in Scotland”, is available on the Executive’s website.

11. In its written submission, SEPA highlighted the fact that the WRC report identifies “substantial benefits arising from the implementation of the Water Framework Directive in the range £131m to £325m.” It was clarified for us by SEPA, that this did not include any actual savings, but was in fact an estimation of the benefits that the Bill could provide. The calculation of these benefits is in our view subjective, if not extremely difficult. The wide range of potential benefits adds to our belief that it is very difficult to be precise about any of the financial matters in relation to this Bill at this stage. As a result, we find it misleading for the Executive and others to seek to rely on such figures which can in no way be substantiated.

12. We were particularly concerned about the funding of maintenance costs of sustainable urban drainage systems (“suds”). There is a lack of clarity in how the systems will be implemented and maintained and the effect on householders in terms of costs. We note that discussions in relation to this matter are ongoing and we expect that the Transport and the Environment Committee will take a close interest in this matter.

The Executive’s response

13. In evidence, the Executive agreed with witnesses that it was difficult to be precise about the costs of the Bill at this stage. It was explained to us that, as the Bill is effectively introducing a new planning system for the water environment, “it is only when the planning system has been established and has worked its way through that we will be able to determine costs.”

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8 Hargreaves, Col 2172 Official Report
9 Hargreaves, Col 2172 Official Report
11 Written submission, para 2.3, Annexe X
12 Williams, Col 2178, Official Report
13 Hargreaves, Col 2175, Official Report
14 Kellet, Col 2189 Official Report
14. In written submissions to the Committee, several local authorities expressed concerns about capital and revenue costs that will fall directly on them and that they may be expected to cover those costs from existing budgets. They feared that they may face additional burdens, without a guarantee of full additional funding from the Executive to cover those costs. Moreover, local authorities were not consulted about the detail of the financial implications of the Bill which the memorandum sets at between £25m and £65m. Although we received an assurance that the Executive’s normal approach of financing new burdens on local authorities would apply in this case, given the concerns expressed, we would welcome a commitment from the Executive that additional costs resulting from the Bill on local authorities will be met in full, taking account of any cost savings that may be identified.

15. We also expressed our reservations about the approach to the implementation of the policy behind this Bill. It appears to us that policy implementation is taking place in a financial vacuum with little or no real regard being paid to the costs attached to it. The Executive explained to us that “the up-front work has to be done before we can determine the state of the water and what we can do to control and manage it. Once that work has been done, we will be able to get round the table again and…work out the costs and how to fund them.” We note that in a subsequent follow-up letter to the Committee, the Executive has confirmed that it has commissioned further research in respect of the impact of abstraction controls, which is due for completion this month. That information will, however, come too late for our consideration.

16. The lack of specification of overall costs gives us great cause for concern. In effect, the Executive is asking the Parliament to agree to legislation that will have very significant financial implications, even though that final figure is impossible to state. We believe that the Parliament and the public have a right to much greater clarity in relation to costs, and that more information should be provided before the Bill progresses much further.

Conclusions and recommendations

17. The Committee is greatly concerned that the financial impact of the Bill and the necessary sources of funding are not at all clear from the Financial Memorandum. The information currently available is not sufficient to allow for a proper quantification of the costs of implementing the Bill and how those costs will be met.

18. We recommend that the Executive provides a more detailed specification of the total financial costs attached to this Bill, setting out an assessment of both the most optimistic and the worst case scenarios for those costs, including margins for error.

15 Annexe X
16 Financial Memorandum, para 156
17 Reid, Col 2192, Official Report
18 Mitchell, Col 2193 Official Report
19 Written submission, para 3.
19. We further recommend that the Transport and the Environment Committee gives serious consideration to the concerns we raise. It is a matter for that committee to consider whether, in the light of our concerns, a recommendation should be made in its report to the Parliament, that the Bill should not pass Stage 1 until more specification of costs is provided by the Executive.

20. We recommend that the Executive notes our concerns in relation to the quality of information contained in this Financial Memorandum and ensures that other such enabling Bills are accompanied by the level of detail which we call for in relation to this report. We recognise that there will on occasion be a need for enabling legislation, but believe that such legislation does not preclude the provision of detailed financial information. Estimates should be provided for the anticipated costs of secondary legislation in financial memoranda.

21. We suggest that for all future Bills, a table is provided in the Financial Memorandum summarising the anticipated additional costs attaching to that Bill. It would be helpful if the table was cross-referenced to those paragraphs in the Explanatory Notes setting out the effect of the cost-bearing provisions in the Bill.

22. Finally, we call on the Executive to carry out a business impact assessment to determine the full costs of future Bills which will fall on the business community, in complying with Standing Orders (Rule 9.3.2). We would wish to highlight our recommendation in our report in relation to the Financial Memorandum published to accompany the Criminal Justice (Scotland) Bill, that margins of error be set out in such memoranda. This, together with best estimates of timescales over which costs arise, is a requirement of rule 9.3.2 and is rarely included in Executive Memoranda. We recommend that the Executive takes steps to ensure that Rule 9.3.2 is complied with in full for all future memoranda.