LOCAL GOVERNMENT AND TRANSPORT COMMITTEE

AGENDA

25th Meeting, 2006 (Session 2)

Tuesday 24 October 2006

The Committee will meet at 2 pm in Committee Room 3.

1. **Budget process 2007-08**: The Committee will take evidence on the Draft Budget 2007-08 from—

   Tavish Scott MSP, Minister for Transport, John Ewing, Head of Transport Group, David Dow, Team Leader, Finance and Central Services Department, and Claire Dunbar-Jubb, Group Accountant, Scottish Executive;

   Malcolm Reed, Chief Executive, Transport Scotland.

2. **Prostitution (Public Places) (Scotland) Bill**: The Committee will take evidence on the Bill from—

   Ruth Morgan Thomas, Manager, Scot Pep, Jinty Kerr, Co-Chair, Scot Pep Board of Directors, George Lewis, Co-Chair, Scot Pep Board of Directors;

   Cath Smith, Routes Out Intervention Team and Anne Fallon, Routes Out Intervention Team

   and then from —

   Amanda Bell, Chairperson Calton for All, Jennifer McCarey, Committee Member Calton for All;

   Alan Beatson, Chair, Leith Links Residents Association and Senga Bethune, Member Leith Links Residents Association.

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

   the Local Governance (Scotland) Act 2004 (Severance Payments) Regulations 2006, (SSI 2006/471); and

   the Local Government Pension Scheme (Scotland) Amendment (No.2) Regulations 2006, (SSI 2006/468).
4. **Provision of Rail Passenger Services (Scotland) Bill**: The Committee will consider its approach to the Bill.

5. **Prostitution (Public Places) (Scotland) Bill — witness expenses**: The Committee will be invited to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any expenses of witnesses for the Prostitution (Public Places) (Scotland) Bill.

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**Agenda Item 1**

Paper from the Clerk

**LGT/S2/06/25/1**

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**Agenda Item 2**

Submission from Scot Pep

**LGT/S2/06/25/2**

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**Agenda Item 3**

Covering note on The Local Governance (Scotland) Act 2004 (Severance Payments) Regulations 2006, (SSI 2006/471)

**LGT/S2/06/25/3**

**The Local Governance (Scotland) Act 2004 (Severance Payments) Regulations 2006, (SSI 2006/471)**

**LGT/S2/06/25/4**

Covering note on The Local Government Pension Scheme (Scotland) Amendment (No.2) Regulations 2006, (SSI 2006/468)

**LGT/S2/06/25/5**

**The Local Government Pension Scheme (Scotland) Amendment (No.2) Regulations 2006, (SSI 2006/468)**

**LGT/S2/06/25/6**

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**Agenda Item 4**

Paper from the Convener

**LGT/S2/06/25/7**
LOCAL GOVERNMENT AND TRANSPORT COMMITTEE

BUDGET SCRUTINY 2007-08

Introduction

1. This paper contains information on the Committee’s scrutiny of the Scottish Executive’s 2007-08 Draft Budget. It is intended to inform the evidence-taking session with the Minister for Transport on 24 October 2006. An evidence session with the Minister for Finance and Public Service Reform will be scheduled for 14 November 2006.

2. Following these evidence sessions, the Committee will be asked to prepare a response to the Finance Committee to inform its report on the Draft Budget.

Relevant documents and information

Annexes to this paper

3. The Finance Committee has issued guidance to subject committees on the format of budget scrutiny this year and this is attached at Annexe A.

4. The Committee’s last budget report to the Finance Committee was published in November 2005, and the recommendations and conclusions from this report are reproduced at Annexe B.¹

5. The Scottish Executive has published a document 'The Efficient Government - Efficiency Outturn Report for 2005/06', and relevant extracts are reproduced at Annexe C.²

Documents circulated separately with committee papers

6. In addition, the following relevant documents are circulated separately in hard copy with this week’s papers:

   - Relevant extracts from the Scottish Executive Draft Budget 2007-08³

¹ Full report can be found here: http://www.scottish.parliament.uk/business/committees/finance/reports-05/fir05-05-07.htm#annexej
² Full document: http://www.scotland.gov.uk/Publications/2006/09/efficientgovernment
³ Full document: http://www.scotland.gov.uk/Publications/2006/09/05131713/0

Last year's draft budget: http://www.scotland.gov.uk/Publications/2005/09/06112356/23573
Scottish Executive’s final progress report on the targets that were set in September 2002, as part of the 2002 Spending Review

SPICe research briefing ‘Draft Budget 2007-08: Transport’

Audit Scotland report: ‘Scottish Executive: an overview of the performance of transport in Scotland’

**Recommendation**

7. The Committee is invited to consider the Draft Budget 2007-08 and the accompanying information, and to question the Minister for Transport when he appears before the Committee.

Alastair Macfie
Senior Assistant Clerk
Local Government and Transport Committee
October 2006

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5 SPICe briefings can be found on the Scottish Parliament website: [http://www.scottish.parliament.uk/business/research/subject/budget.htm](http://www.scottish.parliament.uk/business/research/subject/budget.htm)

6 [http://www.audit-scotland.gov.uk/index/06pf06aq.asp](http://www.audit-scotland.gov.uk/index/06pf06aq.asp)
ANNEXE A:

Budget Process 2007 – 08 – Draft Budget Guidance to Subject Committees: Paper by the Budget Adviser

1. The budget process this year is again a short one, because of the postponement of the Spending Review until 2007, there has been no Stage One.

2. Members will also be aware from the figures that this is the tightest budgetary context in this Parliament with spending growing by 2.4 % in real terms over 2006-7.

3. Therefore, there is no need for Committees to make recommendations for additional spending, but proposals to reorder priorities within portfolios would be considered.

4. The document also highlights changes in plans since last year, and Committee comments on these would be helpful.

5. This is the last budget in the current Parliament. The Finance Committee has put considerable effort into improving the quality of financial information in the document. Concerns remain over the Executive’s ‘objectives and targets’ approach. It would be helpful if Committees could reflect on the usefulness of the financial and performance information to them, and suggest ways of improving the presentation of the budget in the next Parliament.

6. In addition, Committees may also feel able to reflect on spending priorities within their portfolios and recommend any programmes they feel need to be prioritised for the next Parliament.

7. Last year, Committees were asked for views on the Executive’s Efficient Government Initiative. The Executive has recently published an Outturn Report for 2005-06 and the Finance Committee would be interested in any observations that subject committees may have on Efficient Government within their remit.

8. With these comments in mind, the Finance Committee would welcome responses on the undernoted key topics:

   a) Is the Committee satisfied with the responses from Ministers to its recommendations for the 2006-7 budget?
   b) Does the Committee wish to make any comments on the budgetary changes reported in the “New Resources” section?
   c) Does the Committee wish to recommend any transfers of funding between programmes within its portfolio, with an explanation for the proposal?
d) Does the Committee have any proposals for improving the quality and relevance of financial and performance information in the Draft Budget which could be considered after the 2007 election?

e) Does the Committee wish to make any recommendations in budget proposals to its successors in 200x7? Is there any programme with a clear need for additional expenditure, or which members think is overfunded?

Professor Arthur Midwinter
September 2006
ANNEXE B:

Extract from Local Government and Transport Committee Report to the Finance Committee on the Scottish Executive Budget 2006-07

November 2005

SUMMARY OF RECOMMENDATIONS

1. In relation to the local government budget, the Committee recommends as follows—

2. The Committee recommends that the Deputy Minister provides details of the results of the discussions with COSLA on pay agreements and his assessment on the likely impact of the pay agreements on local authority funding. (Paragraph 29)

3. The Committee requests a copy of the report which it has commissioned on levels of non-payment of council tax and the reasons why people do not pay the tax, when it is available. (Paragraph 34)

4. The Minister told the Committee that he could confirm in writing the scope for improvement in take-up of council tax benefit, and the Committee would welcome a statement from the Executive as to the measures it is taking, in partnership with local authorities, to improve council tax benefit take-up. (Paragraph 36)

5. The Committee recommends that the Finance Committee investigates further the apparent difference of interpretation between the Minister and the adviser to the Finance Committee on the amounts of efficiency savings being made, if necessary seeking the comments of the Executive. (Paragraph 45)

6. The Committee requests a copy of the report which the Executive expects to receive on how every local authority proposes to go about making efficiency savings, when it is made available. (Paragraph 48)

7. The Deputy Minister indicated that he could respond to the Committee on the issue of the impact of business rates, and the Committee requests the Minister’s view on this matter. (Paragraph 52)

8. The Committee therefore recommends that the Executive prioritise the development and implementation of the framework for local authorities for monitoring efficiency savings on an output basis as a matter of urgency and wishes to be informed of developments in this area. (Paragraph 57)

9. In relation to the transport budget, the Committee recommends as follows —
10. The Committee agrees with the Minister’s approach on ministerial accountability in relation to the new Transport Agency and recommends that at future evidence sessions with the Minister on the transport budget, senior officials from Transport Scotland are also present. (Paragraph 60)

11. The Committee recommends that the Executive responds to the recommendations contained in paragraphs 69, 70, 72, 75 and 79 in the Committee’s 2004 report on last year’s budget process. (Paragraph 63)

12. The Committee recommends that the Draft Budget should more explicitly set out how the Executive proposes to meet objective 2 of the Draft Budget in relation to social inclusion. (Paragraph 66)

13. The Committee requests further information on the timescale for publishing the results of its review of capital transport projects, and also requests that a copy is provided to the Committee. (Paragraph 68)

14. The Committee considers that the concept of a preparation pool in relation to capital transport projects is still relevant, and requests a response to the Committee’s recommendations on this subject contained in its 2004 report to the Finance Committee. (Paragraph 71)

15. The Committee requests further information on how much it is anticipated that ticketing gates will improve First ScotRail’s revenue collection, and what proportion of any increased revenue will return to the franchise holder and what proportion will be payable to the Scottish Executive. (Paragraph 75)

16. The Committee notes the importance of investment in the maintenance of non trunk roads and recommends that the Minister consults SCOTS regularly on this issue. (Paragraph 77)

17. The Committee asks that it is informed if the timescale slips for the negotiations on the buy out of the Inverness Airport Terminal Private Finance Initiative contract. (Paragraph 80)

18. The Committee notes the concerns which have been expressed about the technology required to implement the concessionary fares scheme and asks to be informed of any problems which might lead to delays in meeting the April 2006 deadline. (Paragraph 82)
FINANCE AND CENTRAL SERVICES

Head of Department Statement of Efficiency Savings

As Head of Department, I am aware of the overall need to ensure the delivery of government services as efficiently as possible. In terms of the Efficient Government Plan (Building A Better Scotland: Efficient Government - Securing Efficiency, Effectiveness and Productivity) I acknowledge my responsibility to plan accordingly to achieve £113million of cash-releasing and no time-releasing savings for the year ending 2005/06.

Subsequent to the minute from Peter Russell (8 November) setting out the target for FCSD for 2005/06 of £109.311 million, it was agreed that the cash releasing savings target of £4 million for the Scottish Police Service would also be included within the FCSD target.

I am satisfied, on the basis of supporting assurance statements from the responsible delivery organisations and/or departmental managers that, in the case of cash-releasing savings, the costs of the activities in question have been reduced by the amounts shown below without material detriment to the quality or quantity of service provided.

I confirm that the actual saving achieved was £156m of cash-releasing savings for the year ended 2005/06. This exceeds our target by £43m. The attached table shows outturn against target and records any changes to the target since the first publication of the relevant Efficiency Technical Notes.

In the course of the year it has become apparent that procurement savings accruing to local government should be monitored as part of all local government savings and not within non-NHS procurement. Consequently the target of £27 million local government procurement savings is now shown against local government rather than non-NHS procurement - this obviously does not affect the overall FCSD target.

I am satisfied that the savings identified fall within the published definition of an efficiency gain.

Andrew Goudie
Head of FCSD
28 June 2006
## Efficient Government: Delivery of Efficient Government Savings

### PORTFOLIO OUTTURN SUMMARY: FCSD

<table>
<thead>
<tr>
<th>Project Number and Title</th>
<th>Cash or Time</th>
<th>Published Planned Saving (£m) 05-06</th>
<th>Agreed amended target</th>
<th>Project Outturn Saving (£m) 05-06</th>
</tr>
</thead>
<tbody>
<tr>
<td>O/C1 - Non NHS Procurement (Central Government)</td>
<td>Cash</td>
<td>50.0</td>
<td>23.0 (1)</td>
<td>24.6</td>
</tr>
<tr>
<td>A/C2 - Better Procurement</td>
<td>Cash</td>
<td>0.6</td>
<td>No change</td>
<td>0.6</td>
</tr>
<tr>
<td>A/C5 - Savings from non-staff/better staff deployment</td>
<td>Cash</td>
<td>0.4</td>
<td>No change</td>
<td>0.439</td>
</tr>
<tr>
<td>FPSR - C/C1 Standards Commission</td>
<td>Cash</td>
<td>0.016</td>
<td>No change</td>
<td>0.0</td>
</tr>
<tr>
<td>FPSR - C/C2 Inspectorate of Prosecution</td>
<td>Cash</td>
<td>0.02</td>
<td>No change</td>
<td>0.016</td>
</tr>
<tr>
<td>FPSR - C/C3 Internal efficiency savings in SPPA</td>
<td>Cash</td>
<td>0.4</td>
<td>No change</td>
<td>0.410</td>
</tr>
<tr>
<td>FPSR - LG/C1 Assumed Local Government efficiency savings</td>
<td>Cash</td>
<td>54.1</td>
<td>81.1 (1)</td>
<td>122</td>
</tr>
<tr>
<td>FPSR-LG/C3 Efficiency Savings in the Scottish Police Service</td>
<td>Cash</td>
<td>4.0</td>
<td>No change</td>
<td>4.0</td>
</tr>
<tr>
<td>FPSR - LG/C5 Modernising Government and Efficient Government Fund</td>
<td>Cash</td>
<td>4.0</td>
<td>No change</td>
<td>4.237</td>
</tr>
<tr>
<td><strong>Total cash</strong></td>
<td></td>
<td><strong>113.536</strong></td>
<td></td>
<td><strong>156.302</strong></td>
</tr>
<tr>
<td><strong>Total time</strong></td>
<td></td>
<td>0</td>
<td></td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>113.536</strong></td>
<td></td>
<td><strong>156.302</strong></td>
</tr>
</tbody>
</table>

(1) Local Government target procurement savings (£27m) now to be monitored as part of assumed Local Government efficiency savings, rather than non-NHS procurement.
ENTERPRISE TRANSPORT & LIFELONG LEARNING

Head of Department Statement of Efficiency Savings

As Head of Department, I am aware of the overall need to ensure the delivery of government services as efficiently as possible. In terms of the Efficient Government Plan (Building A Better Scotland: Efficient Government - Securing Efficiency, Effectiveness and Productivity) I acknowledge my responsibility to plan accordingly to achieve £15.67m of cash-releasing and £12.3m of time-releasing savings for the year ending 2005/06.

I am satisfied, on the basis of supporting assurance statements from the responsible delivery organisations and/or departmental managers that, in the case of cash-releasing savings, the costs of the activities in question have been reduced by the amounts shown below without material detriment to the quality or quantity of service provided; and that, in the case of time releasing savings, the amounts shown below are a fair estimate of the value of time released from the activities in question for other productive purposes.

I confirm that the actual saving achieved was £24.465m of cash-releasing and £18.0m of time-releasing savings for the year ended 2005/06. The attached table shows outturn against target and records any changes to the target since the first publication of the relevant Efficiency Technical Notes.

I am satisfied that the savings identified fall within the published definition of an efficiency gain.

Philip Rycroft
23 June 2006

Efficient Government: Delivery of Efficient Government Savings

PORTFOLIO OUTTURN SUMMARY: Enterprise, Transport and Lifelong Learning

<table>
<thead>
<tr>
<th>Project Number and Title</th>
<th>Cash or Time</th>
<th>Published Planned Saving (£m) 05-06</th>
<th>Agreed amended target</th>
<th>Project Outturn Saving (£m) 05-06</th>
</tr>
</thead>
<tbody>
<tr>
<td>ELL/C1 - Scottish Enterprise</td>
<td>Cash</td>
<td>2.3</td>
<td>No change</td>
<td>5.0</td>
</tr>
<tr>
<td>ELL/C4 - Scottish Enterprise (Review of Overhead costs)</td>
<td>Cash</td>
<td>0</td>
<td>No Change</td>
<td>0.958</td>
</tr>
<tr>
<td>Project Description</td>
<td>Cash</td>
<td>Time</td>
<td>Change</td>
<td>Total</td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
<td>------</td>
<td>-------</td>
<td>--------</td>
<td>-------</td>
</tr>
<tr>
<td>ELL/C2 - Scottish Science Centres</td>
<td>Cash</td>
<td>0.47</td>
<td>No change</td>
<td>0.62</td>
</tr>
<tr>
<td>ELL/C3 - Scottish FE and HE</td>
<td>Cash</td>
<td>1.0</td>
<td>No change</td>
<td>1.0</td>
</tr>
<tr>
<td>T/C1 - Rail Franchise Procurement*</td>
<td>Cash</td>
<td>10.0</td>
<td>No change</td>
<td>13.3</td>
</tr>
<tr>
<td>T/C3 - Rail Franchise - Ticket machines</td>
<td>Cash</td>
<td>1.2</td>
<td>No change</td>
<td>1.2</td>
</tr>
<tr>
<td>T/C5 - Highlands &amp; Islands Airport Ltd</td>
<td>Cash</td>
<td>0.5</td>
<td>No change</td>
<td>2.187</td>
</tr>
<tr>
<td>T/C6 - Caledonian MacBrayne</td>
<td>Cash</td>
<td>0.2</td>
<td>No change</td>
<td>0.2</td>
</tr>
<tr>
<td><strong>Total cash</strong></td>
<td></td>
<td>15.67</td>
<td></td>
<td>24.465</td>
</tr>
<tr>
<td>ELL/T1 - Scottish FE and HE</td>
<td>Time</td>
<td>5.0</td>
<td>No change</td>
<td>11.0</td>
</tr>
<tr>
<td>ELL/T3 - Scottish Enterprise</td>
<td>Time</td>
<td>7.3</td>
<td>No change</td>
<td>7.0</td>
</tr>
<tr>
<td><strong>Total time</strong></td>
<td></td>
<td>12.3</td>
<td></td>
<td>18.0</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>27.97</td>
<td></td>
<td>42.465</td>
</tr>
</tbody>
</table>

* Subsequent to this year-end, this project's efficiency target savings will be reclassified as time from 06/07 onwards.
Evidence to Local Government & Transport Committee from SCOT-PEP
Re: Prostitution (Public Places) (Scotland) Bill - October 2006

There are diverse ideological perspectives and political stances around sex work, but regardless of those, what remains undeniable is the vulnerability of sex workers in society today, and the most vulnerable are undoubtedly those involved in street prostitution. Zero tolerance of the sex industry does not work. The sex industry adapts to whatever strategy is implemented to try and eradicate it and the result of such approaches globally have all too often been seen to drive prostitution further underground opening it up even further to criminal influences and the exploitation and abuse of sex workers - as witnessed in the street prostitution environment in Edinburgh over the last five years.

It is important to note that prostitution – the selling of sexual services by an individual – is not illegal in Scotland or the rest of the United Kingdom. Sex workers are not criminals for selling sex, but street based sex workers have been criminalised to date as a public nuisance.

In an ideal world the need for individuals to sell or buy sexual services would not exist in that world. The root causes of an individual’s entry to the sex industry such as debt and poverty, gender inequality and gender politics, lack of economic opportunity, low educational attainment, childhood neglect and abuse, drug dependency would have been eradicated and every citizen would be able to achieve both economic independence and security and sexual fulfilment without recourse to selling or buying sexual services. There can be no disagreement that this is the aim of any civilised society.

However, we are a long way away from such a society. The selling and buying of sexual services can not be viewed in isolation from the sexual – economic behaviour continuum that exists within our society today or the reality of the current economic order. It is essential that a holistic approach is developed to deal with the social phenomenon of the sex industry, which includes respecting the human and civil rights of sex workers and their clients.

Sex workers should not be perceived purely as victims to be assisted, criminals to be arrested or targets for public health interventions - they should be considered as citizens, with needs and aspirations, who have the potential to make a real contribution to our community.

The Expert group put forward a holistic approach, which was accepted by the Scottish Executive and which SCOT-PEP is for the most part supportive of. However, if such an approach is to be effective any legislative change must explore and take cognisance of any unwanted consequences that could potentially conflict with other components of the strategy.
The Expert Group stated that it was important that in considering legislative change that the following be taken into account:

- Not criminalise on a moral basis
- Address the imbalance between purchasers and sellers
- Seek to reduce stigma which attaches disproportionately to the seller as against the purchaser
- Minimise the use of imprisonment of women selling sexual services
- Ensure protection to vulnerable groups from exploitation
- Provide effective protection to general public from offensive behaviour
- Avoid tendency to increase risk to vulnerable people and to communities through unplanned displacement
- Provide a constructive legal framework to support achievement of broader strategic obligations for tackling prostitution in Scotland
- Repeal the criminalisation of soliciting per se and replace with an offence targeting offensive behaviour or conduct arising from a prostitution related sexual transaction

It is SCOT-PEP’s opinion that the Bill in its current form does not measure up to the findings and recommendations of the Expert Group or the Scottish executive’s commitment to equalise the treatment of sellers and purchasers of sexual services.

In making the offence relate to public order the proposed legislation is not founded on a moral basis. However, the proposed legislation:

- fails to equitably address the imbalance between purchasers and sellers
- fails to address or reduce the stigma and thereby discrimination against street based sex workers – and is likely to result in increased stigma and thereby discrimination against purchasers of sexual services and their families
- fails to address alternatives to fines as a sentence, which result in women having to work more often or face imprisonment for non-payment, and thereby does not address the imprisonment of women selling sexual services.
- fails to ensure protection to vulnerable groups from exploitation
- fails to provide effective protection to general public from offensive behaviour
- fails to consider and avoid tendency to increase risk to vulnerable people and to communities through unplanned displacement such as happened in Edinburgh at the loss of the designated area
- fails to provide a constructive legal framework to support achievement of broader strategic obligations for tackling prostitution in Scotland
- fails in reality to repeal the criminalisation of soliciting per se and replace with an offence targeting offensive behaviour or conduct

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1 Page 73 12.5.7 Being Outside: constructing a response to street prostitution
arising from a prostitution related sexual transaction whether caused by purchaser or seller.

SCOT-PEP remains to be convinced that the proposed legislation gives serious and in-depth consideration to the above or its impact on the broader holistic strategy. In addition we remain to be convinced that the legislative changes proposed will support and lead to a reduction in street prostitution in Scotland or positively impact on the vulnerability of either street based sex workers or local communities and residents affected by street prostitution.

There are a number of specific concerns that we wish to raise in relation to the Bill, its notes and their relationship to the Draft Guidance to local authorities on street prostitution.

- The fact that the proposed offences are not intended to be complaint led and use the term ‘likely to cause alarm, offence or nuisance ....’ gives no clear guidance on what sort of behaviour and under what circumstances selling or purchasing sexual services will not be seen as likely to cause alarm, offence or nuisance in a public or relevant place. This fails to allow the flexibility recommended by the Expert Group, the original intention was to reduce the burden on what is recognised as a vulnerable group but in reality there will be no significant change for those selling sexual services. The current proposal leaves individual police officers significant scope to interpret what they believe may cause alarm, offence or nuisance. It will be a potential barrier to enabling the management of street prostitution and prevent safer areas evolving for women to work in if they are outwith residential areas. There is no incentive for street based sex workers to move out of residential areas, which offer them some concealment and protection. Nor is there an incentive for their clients to avoid residential areas if they may be charged regardless of whether they have caused anyone alarm, offence or nuisance.

- The proposed offence relating to loitering will disproportionately affect sex workers, in that it has excluded any individuals in private motor vehicles. It thereby fails to remove the inequity of current legislation in retaining an offence that is defined in such a way that it can in reality only be used against those selling sexual services - as 95% of the purchasers of sexual services in public places do so from a vehicle.

- The legislation has retained the terms 'soliciting' and 'loitering' and has not defined them - despite the fact that they have defined other terms such as 'relevant places'. The retention of the terms 'soliciting' and 'loitering' limits the offence of causing alarm, offence and nuisance in relation to street prostitution to only the buyers and sellers of sexual services and does nothing to address members of the public who specifically target street based sex workers with abuse, harassment and violence. In reality the individuals who commit these offences do not see themselves as breaking any current laws since sex workers are seen as outside of the law and are
not perceived to have the right to the same protection of the law as other ‘decent’ citizens.

- The legislation proposes a new power of arrest which will result in sex workers being taken to the police station and potentially detained until their appearance in court (this is the norm in many English cities) which may significantly affect the financial projections made in the Financial Memorandum. This is upping the ante for women. It is well known that the vast majority of the women are drug dependent and that no prescribing occurs while women are held in custody. In addition it also has implications for women who have children in their care who have made arrangements for short term child care but for whom overnight detention may create problems.

- The title of the Bill may in itself present additional barriers to those wishing to move on from prostitution. It is well known that cautions and convictions for prostitution related offences are a barrier to women being able to move into alternative employment when they are ready and wish to do so, even when convictions are listed under the Civic Government (Scotland) Act. The fact that convictions will potentially refer to a Prostitution Act offence will do nothing to promote and support women moving into alternative employment as sex workers have no legislative protection from discrimination. Given the emphasis of supporting women to move on from prostitution in both the Expert Group Report and Scottish Executive Response this requires urgent thought.

Given that no government, legislation or law enforcement strategy has managed to eradicate prostitution or provide real choices and routes out of prostitution for all sex workers, please do let us not abandon those who are working in the sex industry today and those who will be working in it next week, next year and next decade to fend for themselves.

It is essential that the impact of the proposed legislation be assessed in relation to reducing vulnerabilities of street based sex workers and removing barriers to their moving on from prostitution, reducing vulnerabilities within communities, and reducing street prostitution.
SSI Cover Note For Committee Meeting

SSI title and number: The Local Governance (Scotland) Act 2004 (Severance Payments) Regulations 2006, (SSI 2006/471)

Type of Instrument: Negative

Meeting: 24 October 2006

Date circulated to members: 18 September 2006

SSI drawn to Parliament’s attention by Sub Leg Committee: Yes (see Annex and Appendix)

Purpose: The purpose of this instrument is to allow serving councillors who meet specified criteria to receive a severance payment should they decide to stand down at the next ordinary local government elections.
ANNEX

The Local Governance (Scotland) Act 2004 (Severance Payments) Regulations 2006, (SSI 2006/471)

1. The Committee asked the Executive 2 questions on this instrument.

Point 1

2. The Committee, with respect to regulation 3, asked the Executive to explain the purpose and effect of the words “before the date of the next ordinary election to be held” in paragraph (1) which did not appear to add anything to the requirements of paragraphs (3) to (5) of that regulation.

3. The Executive, in its response printed in the Appendix, acknowledges that the words “before the date of the next ordinary election to be held” may not strictly be required. Nevertheless, the Executive considers that they assist the reader in so far as each of the conditions in paragraphs (3) to (5) require to be implemented prior to the date of the next ordinary election, but at different points in time.

4. While the Committee acknowledges that the inclusion of unnecessarily repetitious provisions does not invalidate the instrument, it considered that it is not good drafting practice to include unnecessary provisions in legislation since it can confuse the reader and make the legislation harder to understand.

5. The Committee draws the attention of the lead Committee and Parliament to this instrument on the grounds of failure to follow proper legislative practice.

Point 2

6. The Committee also asked, with reference to regulation 6, for an explanation of the purpose and effect of the reference to the date of making an application in paragraph (3) and the 3 week time limit specified in that paragraph. In particular, how it is proposed to verify that the time limit has been complied with.

7. The Executive, in its response, explains that the purpose of regulation 6(3) is to provide that in the exceptional circumstances stated, an application may be submitted by a member of a local authority later than the date provided for in regulation 6(2), but (as regulation 6(3) provides) it must be submitted on or before 22 March 2007. The purpose and effect of the reference to the date of making an application in paragraph (3) is that to be eligible to submit an application by that extended date, the stated exceptional circumstances must apply to the member, and those circumstances must apply at the date of making the application.

8. To be eligible to make such a late application in the circumstance of a recent death of a connected person, then that person requires to have died within 3 weeks prior to the date of making the application. The period of 3 weeks is considered an appropriate period in these personal circumstances.

9. With regards to how it is proposed to verify that this 3 week time limit has been complied with, the Executive considers it sufficient that, in terms of regulation 6(5)(g), a person makes a declaration in the application that confirms the information in the application is accurate as far as the member is aware, and subsequently the relevant officer of the local authority, in terms of regulation 6(6)(b)(ii) confirms that they have examined the information and consider it is accurate.
10. The Executive acknowledged that the policy purpose and effect of the provision in regulation 6(3) is unusual, and refers to the personal circumstances of members. However, these provisions were added to the Regulations in response to representations made during the consultation process, to the effect that an extended date for applications should apply, where such personal circumstances apply to Council members.

11. The Committee appreciates that the purpose of this provision is to allow some leeway in the submitting of applications to take account of exceptional circumstances. However, it considers the specified circumstances to be strange, and particularly the reference to the 3 week period. The Regulations appear to draw a distinction between the making of an application and the submission of that application, however it would appear that these were being confused.

12. However, the Committee believed that further examination of this issue is more one of policy for the lead committee to consider.

13. The Committee draws the attention of the lead Committee and Parliament to this instrument on the grounds that further information was requested from and supplied by the Executive.

Point 3

14. The Committee asked for an explanation of the purpose and effect of paragraph (10) of regulation 6. It asked whether the reference to January 2007 refers to the publication of the names of applicants or to applications made during January 2007 and also what, if any, arrangements there are for publication of the names of those who have exercised rights under regulation 6(3) to make late application.

15. The Executive, in its response, explains that regulation 6(10) obliges Ministers to publish, at any time during January 2007, the names of the members who have applied for a severance payment. Regulation 6(10) clearly requires publication of the names of the members, not publication of the applications made during January 2007. It added that there is a difference in effect between “shall publish the names of the members who have applied……….at any time during” and “shall publish the names of the members applying……….at any time during”.

16. Where members have exercised rights under regulation 6(3) to make an application subsequent to January 2007, there is no provision that their names shall be published and none is intended.

17. While it is thought that regulation 6(10) would be interpreted in the manner intended, the Committee believes that as drafted the provision is ambiguous and to that extent defectively drafted.

18. The Committee acknowledges the Executive’s response in relation to the arrangements for publication.

19. The Committee draws the attention of the lead Committee and Parliament to this instrument on the grounds that further information was requested from and supplied by the Executive; and on the grounds of defective drafting though not so as to affect the validity of the instrument.
APPENDIX

The Local Governance (Scotland) Act 2004 (Severance Payments) Regulations 2006, (SSI 2006/471)

On 26 September, the Committee asked the Executive for an explanation of the following matters:

1. The Committee seeks, with respect to Regulation 3, an explanation of the purpose and effect of the words “before the date of the next ordinary election to be held” in paragraph (1) which do not seem to add anything to the requirements of Paragraphs (3) to (5) of the regulation.

2. The Committee also seeks, with reference to regulation 6, an explanation of the purpose and effect of the reference to the date of making an application in paragraph (3) and the 3 week time limit specified in that paragraph. In particular, the Committee seeks an explanation of how it is proposed to verify that the time limit has been complied with.

3. The Committee also seeks an explanation of the purpose and effect of paragraph (10) of regulation 6. The Committee asks if the reference to January 2007 refers to the publication of the names of applicants or to applications made during January 2007. The Committee also asks what, if any, arrangements there are for publication of the names of those who have exercised rights under regulation 6(3) to make late application.

The Scottish Executive responds as follows:

First Question

4. The Executive acknowledges that the words “before the date of the next ordinary election to be held” may not strictly be required, because the conditions to be satisfied are set out in paragraphs (3) to (5), but considers that they assist the reader in so far as each of the conditions in paragraphs (3) to (5) require to be implemented prior to the date of the next ordinary election, but at different points in time.

Second Question

5. (i) The purpose of regulation 6(3) is to provide that in the exceptional circumstances stated, an application may be submitted by a member of a local authority later than the date provided for in regulation 6(2), but (as regulation 6(3) provides) it must be submitted on or before 22 March 2007. The purpose and effect of the reference to the date of making an application in paragraph (3) is that to be eligible to submit an application by that extended date, the stated exceptional circumstances must apply to the member, and those circumstances must apply at the date of making the application.

(ii) As to the reference to the 3 week time limit, the purpose and effect is that to be eligible to make such a late application in the circumstance of a recent death of a connected person, then that person requires to have died within 3 weeks prior to the date of making the application. The period of 3 weeks is considered an appropriate period in these personal circumstances.

(iii) As to how it is proposed to verify this 3 week time limit has been complied with, it shall be considered sufficient by the Executive that, in terms of Regulation 6(5)(g), a
person makes a declaration in the application that confirms the information in the application is accurate as far as the member is aware, and subsequently the relevant officer of the local authority, in terms of Regulation 6(6)(b)(ii) confirms that they have examined the information and consider it is accurate.

6. It is acknowledged by the Executive that the policy purpose and effect of the provision in Regulation 6(3) is unusual, and refers to personal circumstances of members. However, these provisions were added to the Regulations in response to representations made during the consultation process, to the effect that an extended date for applications should apply, where such personal circumstances apply to Council members.

Third Question

7. The purpose and effect of Regulation 6(10) is that the Scottish Ministers shall publish, at any time during January 2007, the names of the members who have applied for a severance payment. Regulation 6(10) clearly requires publication of the names of the members, not publication of the applications made during January 2007. There is a difference in effect between “shall publish the names of the members who have applied.............at any time during” and “shall publish the names of the members applying.............at any time during”. Where members have exercised rights under regulation 6(3) to make an application subsequent to January 2007, there is no provision that their names shall be published, and none is intended.
SSI Cover Note For Committee Meeting

SSI title and number: The Local Government Pension Scheme (Scotland) Amendment (No.2) Regulations 2006, (SSI 2006/468)

Type of Instrument: Negative

Meeting: 24 October 2006

Date circulated to members: 18 September 2006

SSI drawn to Parliament’s attention by Sub Leg Committee: Yes (see Annex and Appendix)

Purpose: The purpose of this instrument is to introduce flexibilities into the Local Government Pension Scheme (Scotland) Regulations 1998 legal framework to reflect the simplified tax regime provided by the Finance Act 2004.
ANNEX

The Local Government Pension Scheme (Scotland) Amendment (No. 2) Regulations 2006, (SSI 2006/468).

26. The Committee noted that this was the fifth substantive amendment of the principal Regulations and asked the Executive whether it has any plans for consolidation.

27. In its response printed in Appendix 5 (see below), the Executive explains that it is currently taking forward the new Local Government Pension Scheme and in the circumstances it does not consider it appropriate to consolidate the principal Regulations at this time, but keeps the need for such consolidation under constant review.

28. The Committee draws the attention of the lead Committee and Parliament to this instrument on the grounds that information was requested on the progress towards consolidation of these Regulations and to the Executive’s response.

APPENDIX

The Local Government Pension Scheme (Scotland) Amendment (No. 2) Regulations 2006, (SSI 2006/468)

On 19 September the Committee commented as follows with regard to the above Regulations-

“The Committee notes that this is the fifth substantive amendment of the principal Regulations and asks the Executive whether it has any plans for consolidation.”

The Scottish Executive responds as follows:

While the Executive notes the Committee’s concern about the amendments to the principal Regulations, it is currently engaged in an extensive and time-consuming consolidation of the National Health Service pension scheme which is not expected to be laid before the end of this year. That consolidation was at the request of the Parliament and has diverted significant resources away from other pensions work. A new Local Government Pension Scheme is currently being taken forward by the Executive and in the circumstances it does not consider it appropriate to consolidate the principal Regulations at this time, but keeps the need for such consolidation under constant review.
LOCAL GOVERNMENT AND TRANSPORT COMMITTEE

APPROACH PAPER

Provision of Rail Passenger Services (Scotland) Bill

Paper by the Convener

Introduction

1. The Provision of Rail Passenger Services (Scotland) Bill was introduced, by Tommy Sheridan MSP, on 29 September 2006. The aim of the Bill, according to its long title is to direct the Scottish Ministers as to how they shall exercise the powers conferred on them by the Railways Act 1993 as amended by the Railways Act 2005 in relation to the provision of rail passenger services.

2. The Policy Memorandum to the Bill states that:

“The Railways Act 2005, an Act of the UK Parliament, significantly overhauls the previous position in relation to the provision of rail passenger services in Scotland and hands new and important powers to Scottish Ministers. The proposal and the Bill seeks to direct Scottish Ministers to use these new and far-reaching powers over rail passenger services in Scotland to remove the profit motive from the service, thus delivering a not-for-profit rail passenger publicly or by another appropriate not-for-profit provider from the end of the current ScotRail franchise in 2011.”

3. The Parliamentary Bureau, at its meeting of 3 October 2006 agreed to refer the Bill to the Local Government and Transport Committee for consideration at Stage 1. In considering all Members’ Bills, the Bureau noted the difficulties committees had in managing existing workloads and agreed not to set a deadline for Stage 1.

Legislative competence

4. Rule 9.3.1 of Standing Orders states that:

“A Bill shall on introduction be accompanied by a written statement signed by the Presiding Officer which shall—
(a) indicate whether or not in his or her view the provisions of the Bill would be within the legislative competence of the Parliament; and
(b) if in his or her view any of the provisions would not be within legislative competence, indicate which those provisions are and the reasons for that view.”
5. On 28 September 2006 the Presiding Officer made the following statement under Rule 9.3.1 as regards the Bill:

“In my view the provisions of the Rail Passenger Services (Scotland) Bill are not within the competence of the Scottish Parliament.

“The reason for this view is that in my opinion the provisions of the Bill relate to the provision and regulation of railway services, a matter reserved under Section E2 of Schedule 5 to the Scotland Act 1998. Section 29(2)(b) of that Act states that a provision is outside the legislative competence of the Parliament if it relates to reserved matters.”

6. The Parliament is able to proceed, if it wishes to do so, with consideration of a Bill, even where the Presiding Officer has decided that the Bill is not within legislative competence. However, if the Bill were to be passed by the Parliament, then the Advocate General, the Lord Advocate or the Attorney General could refer it to the Judicial Committee for decision on whether the Bill was competent. The Presiding Officer could not submit the Bill for Royal Assent if the Judicial Committee decided that the Bill was not within competence.

7. The Committee may decide to take evidence on the Bill and submit a Stage 1 Report in the usual way. Nevertheless members may consider that it would be unadvisable to proceed with a Bill whose provisions, in the view of the Presiding Officer, are not within the competence of the Parliament.

Options

8. If the Committee is of the view that it wishes to proceed with consideration of the Bill, then it may request the clerks to prepare a further paper which would propose a programme of evidence taking. Bearing in mind the Committee’s existing commitments to legislation and to other matters, some time would be available to take evidence after the Christmas recess.

9. Standing Orders allow a Committee to recommend to the Parliament, on a motion of the Convener, that it does not agree to the general principles of a Bill where the Bill appears to be outwith the competence of the Parliament and it is unlikely to be possible to amend it to bring it within competence. The full text of Rule 9.14.18 is as follows:

‘At Stage 1 of a Member’s Bill, the lead committee may recommend to the Parliament, on a motion of the convener of the committee, that the general principles of the Bill not be agreed to if (in the opinion of the committee)—

(a) the consultation on the draft proposal, or the published material referred to in the statement of reasons, does not demonstrate a reasonable case for the policy objectives of the proposal or does not demonstrate that legislation is necessary to achieve those policy objectives;

(b) having regard to the terms of the Presiding Officer’s statement on legislative competence under Rule 9.3.1, the Bill appears to be clearly outwith the legislative competence of the Parliament and it is unlikely to
be possible to amend it at Stages 2 and 3 to bring it within legislative competence; or

(c) the Bill has deficiencies of drafting that make it unfit to be passed and which are sufficiently serious as to make it difficult or impractical to resolve them by amendments at Stages 2 and 3.’

10. Rule 9.14.19 provides that:

‘If the Parliament agrees to a recommendation under paragraph 18, the Bill falls. Otherwise, the lead committee shall consider and report on the general principles of the Bill in accordance with Rule 9.6.1.’

11. The annexed note from the Directorate of Legal Services and Legislation Clerks, which I requested the Clerk to the Committee to obtain, gives information on the powers of the Parliament, the exercise of functions by Ministers and advice on whether it is likely to be possible to amend the Bill at Stages 2 and 3 to bring it within legislative competence. The paper indicates that it is unlikely that the Bill could be brought back within legislative competence by amending it at Stage 2 or Stage 3. To be admissible, amendments must be consistent with the general principles of a Bill. A briefing paper from SPICe is also attached at Annex 2.

Conclusion and Recommendation

12. In my view, it would not be advisable for the Committee to proceed to consider the Bill at Stage 1 in the normal way, because

- it appears to be outwith the legislative competence of the Parliament;
- it appears to be unlikely that it can be brought back within legislative competence; and
- if the Judicial Committee were to decide that the Bill was not competent, then the Presiding Officer could not submit the Bill for Royal Assent.

13. On the basis of the paper set out above, I recommend:

(a) that the Committee recommends to the Parliament that the general principles of the Bill not be agreed to on the grounds that, in the opinion of the Committee, having regard to the terms of the Presiding Officer’s statement on legislative competence under Rule 9.3.1, the Bill appears to be clearly outwith the legislative competence of the Parliament and it is unlikely to be possible to amend it at Stages 2 and 3 to bring it within legislative competence; and

(b) that the Committee agrees that I should lodge the appropriate motion under Rule 9.14.18.

Bristow Muldoon
Convener
Local Government and Transport Committee
ANNEX 1

PROVISION OF RAIL PASSENGER SERVICES (SCOTLAND) BILL
STANDING ORDER 9.14.18(b)

Background

1. The provisions which create the Scottish Parliament, its members, its powers and its proceedings are set out in Part I of the Scotland Act 1998 ("the Act"). In particular, the power of the Parliament to legislate, and the extent of its competence to do so, is set out in sections 28 to 30 and Schedules 4 and 5 of the Act. Section 28 sets out the general power to make laws, and sections 29 and 30(1), and Schedules 4 and 5, describe the limits of that power. Section 30(2) to (4) makes provision for modifications of those limits by Order in Council. That is a piece of subordinate legislation which has to be approved by both the UK Parliament and the Scottish Parliament. This part of the Act includes the provision in section 31(2) under which the Presiding Officer takes a view on whether or not the provisions of a Bill would be within the legislative competence of the Parliament and also the provisions to allow for final checking of a bill which has completed its parliamentary passage (sections 32 to 35).

2. The provisions that create the Scottish Administration, its Ministers, their functions and the extent of those functions are set out in Part II of the Act. Section 53, confers devolved functions on the Scottish Ministers, and provides that Scottish Ministers, instead of UK Ministers, exercise those functions. Section 54 explains that to be within devolved competence a function must be exercised in a way that would be within the legislative competence of the Scottish Parliament. The key point here, which can be overlooked, is that while in regard to legislative competence Westminster has retained power to pass Acts in devolved areas, UK Ministers generally speaking have no power to make subordinate legislation or undertake other functions if they have been devolved, under section 53, to Scottish Ministers.

3. There are some exceptions to that rule in that the Act provides that some devolved functions can be exercised by Ministers of the Crown as well as by Scottish Ministers (sections 56 and 57). An example which will be familiar to members who have been on the European and External Relations Committee concerns the implementation of EC law.

4. The Act also allows for the transfer of additional functions ie functions that are not within devolved competence. Under section 63 an Order in Council may make provision for reserved powers exercisable by a Minister of the Crown in or as regards Scotland to be exercisable instead by the Scottish Ministers on their own, or concurrently with a Minister of the Crown, or by the Minister of the Crown only after consultation with the Scottish Ministers.

5. The power under section 63 of the Act has been exercised 13 times so far to transfer functions to the Scottish Ministers. For example, specified functions under the Pipe–lines Act 1962, the Abortion Act 1967, the Taxes Management Act 1970, the Race Relations Act 1976, the Industrial Development Act 1982, the Financial Services Act 1986, the Income and Corporation Taxes Act 1988, the Electricity Act
1989, the National Lottery etc. Act 1993, Data Protection Act 1998, the Regulation of Investigatory Powers Act 2000, the Transport Act 2000, the Fireworks Act 2003, the Energy Act 2004 have all been transferred to Scottish Ministers. Sometimes the functions transferred include the power to make subordinate legislation. Another way in which Scottish Ministers can get functions in reserved areas is if these are conferred on them by an Act of the UK Parliament. Part I of the Energy Act 2004 contains some examples of that.

6 This means that, although the Scottish Parliament only has power to make laws (ie ASPs) about devolved matters, the Scottish Ministers have functions in both devolved and reserved areas. The fact that the Scottish Ministers have a particular function does not mean that that function is devolved within the meaning of section 54 of the Act. They have many functions that are not devolved, whereas the powers in the Act only entitle the Parliament to make law within legislative competence as defined in sections 29 and 30(1) and Schedules 4 and 5 of the Act.

7. It is against that background that the Provision of Rail Passenger Services (Scotland) Bill must be considered.

The Bill

5 The Provision of Rail Passenger Services (Scotland) Bill was introduced on 29th September 2006. It is a member’s Bill sponsored by Tommy Sheridan MSP. On 28th September 2006 the Presiding Officer made the following statement as regards the Bill-

“In my view the provisions of the Rail Passenger (Services) Bill are not within the competence of the Scottish Parliament.

The reason for this view is that in my opinion the provisions of the Bill relate to the provision and regulation of railway services, a matter reserved under Section E2 of Schedule 5 to the Scotland Act 1998. Section 29(2)(b) of that Act states that a provision is outside the legislative competence of the Parliament if it relates to reserved matters.”

6 Rule 9.14 of the Standing Orders makes specific provision for Members’ Bills. Rule 9.14.18 makes provision for the circumstances in which, at Stage 1 of a Members’ Bill, the lead committee may recommend to the Parliament that the general principles of the Bill not be agreed to. In particular, Rule 9.14.18(b) enables the Committee to make such a recommendation, if in its opinion –

“(b) having regard to the terms of the Presiding Officer’s statement on legislative competence under Rule 9.3.1, the Bill appears to be clearly outwith the legislative competence of the Parliament and it is unlikely to be possible to amend it at Stages 2 and 3 to bring it within legislative competence;........”

Advice requested - likely to be possible to amend?

7 You have asked for advice on whether it is likely to be possible to amend the Bill at Stages 2 and 3 to bring it within legislative competence. This request for
advice has both legal and practical aspects, which are so intermingled that it is thought best that the advice be given jointly by the Directorate of Legal services and the Legislation Clerks. It has been prepared on that basis.

8 Rule 9.10.5 deals with the admissibility of amendments to Bill. The relevant parts of that Rule provide that an amendment is not admissible when-

“(b) it is not relevant to the Bill or the provisions of the Bill which it would amend; and
(c) it is inconsistent with the general principles of the Bill as agreed by the Parliament

9 The requirement in Rule 9.10.5(b) that an amendment be relevant to the Bill or the provisions of the Bill is determinative of what can, or cannot, be done to bring the Bill within competence. The Guidance on Public Bills offers advice on this rule at paragraphs 4.11 to 4.18. Whilst the long title of a bill can give an indication of whether a particular amendment would be likely to be relevant, it is the purpose (or purposes) of the Bill that will be considered by the Legislation Clerks when they advise whether an amendment is relevant.

10 In this instance, the purpose of the Bill, as stated in the long title, and as provided for in the individual sections of the Bill, is to modify the provisions of the Railways Act 1993 (“the 1993 Act”), as amended by the Railways Act 2005, so as to direct Scottish Ministers as to how they should exercise those powers, and in particular to secure that rail passenger services are run on a not-for-profit basis. The reason given in the Presiding Officer’s statement on legislative competence was that the provisions of the Bill relate to the provision and regulation of railway services, a matter reserved under Section E2 of Schedule 5 to the Scotland Act 1998. If you consider the purpose of the Bill as a whole in light of the reasons given in the Presiding Officer’s statement, then the conclusion is that the purpose of the Bill is so restricted that it cannot be relevantly amended to bring it within competence.

11 It is appropriate to consider whether the individual provisions of the Bill could be amended to bring any of them within competence. Section 1 (which would direct Ministers how to exercise their functions under section 26ZA(1)(b) of the 1993 Act) could only be relevantly amended if the amendment related to reserved matters. Similarly sections 2 (which would prescribe when Ministers would themselves provide services for the carriage of passengers), 3 (which would make provision for the effect of the Bill on Ministers’ obligations to issue tenders) and 4 (provision to calculate the length of time Ministers would run rail passenger services) could only be relevantly amended if the amendment related to reserved matters. Sections 5 to 8 only have meaning when placed in context with the rest of the Bill and are general provisions which support the other provisions of the Bill. As their purpose is to support provisions that cannot be amended to be within competence, they cannot themselves be relevantly amended to come within competence.

12 We conclude that for the purposes of that Rule 9.10.5(b), it is unlikely to be possible to amend the provisions of the Provision of Rail Passenger Services (Scotland) Bill at Stages 2 or 3 to bring any of them within legislative competence.
13 The requirement in Rule 9.10.5 (c) that an amendment be consistent with the general principles of the Bill. The Guidance on Public Bills offers advice on this rule at paragraphs 4.19 and 4.20. The Bill proposes a particular mechanism (by requiring that the franchising rules in the 1993 Act be applied in a particular way) to achieve its purpose. Any amendment that made that mechanism ineffective would be inconsistent with that mechanism and so with the general principles of the Bill. Leaving out section 1 or 2 of the Bill would therefore be inconsistent with its general principles. Whilst there are likely to be some amendments that could be made that would be consistent with the principles of the Bill (e.g. changes to the saving provision in section 7), such amendments would either relate to reserved matters, or support provisions which relate to reserved matters. Because of the drafting approach taken in this Bill any amendments admissible under Rule 9.10.5 (c) would inevitably be outside competence.

Conclusion

14 It is unlikely to be possible to amend the Bill at stages 2 and 3 to bring it within the legislative competence of the Parliament.

Directorate of Legal Services and Legislation Clerks
17 October 2006
Local Government and Transport Committee
Scottish Passenger Rail Franchising Process
Briefing from SPiCe

Background

The current privatised railway system was established by the Railways Act 1993 (c.43) as amended by the Transport Act 2000 (c.38) and the Railways Act 2005 (c.14).

The vast majority of passenger train services in the UK are provided by franchised passenger Train Operating Companies (TOCs), i.e. companies which have been granted a ‘franchise’ to provide passenger rail services by the Department for Transport (DfT) or for Scottish rail services the Scottish Executive. The granting of franchises was previously carried out by the Strategic Rail Authority (SRA), which was wound up following the passage of the Railways Act 2005.

26 franchised TOCs were created when British Rail was privatised. Each franchise, i.e. a concession to operate trains on designated lines or geographic areas for a fixed period of time, was awarded to the bidder that provided the Government with the greatest return or required the least amount of subsidy to operate an agreed level of service. Franchises are currently undergoing a remapping exercise, with some of the smaller franchises being subsumed into larger units.

The Scottish Passenger Rail Franchise

The ScotRail franchise was the last of British Rail’s passenger TOCs to be privatised on 1 April 1997, and is currently the largest franchise in terms of route-kilometres, number of trains run and stations operated. The original ScotRail franchise was awarded to the National Express Group. ScotRail provides approximately 95% of passenger train services in Scotland plus the overnight Anglo-Scottish Caledonian Sleepers linking Edinburgh, Glasgow, Aberdeen, Inverness and Fort William with London. The remaining 5% of rail services in Scotland are long distance cross-border trains provided by GNER on the East Coast and Virgin Trains on the Cross Country and West Coast franchises.

The current ScotRail franchise was awarded to Aberdeen based First group on 20 August 2004 and runs from 17 October 2005 until October 2012, with an option for a three year extension.

Legislative Basis for Passenger Rail Franchising

The system of rail franchising was established by the then Conservative UK Government under the Railways Act 1993. The 1993 Act requires the franchising authority, in Scotland this is the Scottish Executive, from time to time to hold an open
competition for the award of a franchise to provide designated Scottish passenger rail services. The Act is clear that franchised rail services cannot be provided by a publicly owned company. Section 25 of the 1993 Act lists a series of people and bodies which cannot operate rail franchises, these include:

- any Minister of the Crown, Government department or other emanation of the Crown
- any local authority
- any body corporate whose members are appointed by a Minister of the Crown, a Government department, a local authority or a metropolitan county passenger transport authority or by a body corporate whose members are so appointed
- a company:
  - a majority of whose issued shares are held by or on behalf of any of the bodies or persons listed above
  - in which the majority of the voting rights are held by or on behalf of any of those bodies or persons
  - a majority of whose board of directors can be appointed or removed by any of those bodies or persons
  - in which the majority of the voting rights are controlled by any of those bodies or persons, pursuant to an agreement with other persons
- a subsidiary of a company as described above

However, the 1993 Act gives the franchising authority reserve powers to provide rail services as the operator of last resort. These powers can be used when an existing franchise comes to an end and no new franchisee has been appointed, a situation which could arise if no bids had been submitted or bids that had been submitted did not meet the requirements set out by the franchising authority. In addition an existing franchise holder can be stripped of its franchise if it fails to meet the terms of its franchise agreement, as happened with the Connex South Eastern franchise.

The 1993 Act was substantially amended by the Railways Act 2005. The 2005 Act gave the following additional powers to the Scottish Ministers

- Specify and fund outputs required from Network Rail in Scotland
- Publish a Scottish Railway Strategy
- Designate, let, fund and manage the ScotRail franchise, and publish a Statement of Policy on franchising
- Set certain types of fare, including penalty fares
- Publish a code of practice for disabled passengers
- Appoint a member of the UK Rail Passengers Council
- Give financial assistance to any person for the purpose of developing Scottish railways, e.g. through freight facility grants
- Publish guidance on proposals for closures of Scottish railway services/facilities; and make any proposals to ORR for closures of services that the Scottish Ministers fund or that a Scottish operator wishes to withdraw
- Designate, where applicable, new Scottish services as experimental for a trial period of five years
• Approve railway operators' byelaws in respect of services and facilities within Scotland. Approve byelaws for cross-border operators jointly with the Secretary of State for Transport.
• Be the Operator of Last Resort if the ScotRail franchise is withdrawn or ends and another franchisee has not been appointed
• Be able to apply to the courts for railway administration orders in respect of the ScotRail franchise
• Have powers to make secondary legislation in Scotland in a number of circumstances where there is a power for the Secretary of State to do so in England and Wales, e.g. Penalty Fares Regulations

While the 2005 Act gave the powers described above to Scottish Ministers it did not amend the Scotland Act 1998.

South Eastern Trains

The Connex South Eastern franchise was ended by the SRA on 9 November 2003, due to poor financial management, and replaced by a subsidiary of the SRA, South Eastern Trains, which ran the franchised rail services until 31 March 2006 when the franchise was re-let by the Department for Transport to public transport operator Govia.

The following UK Parliamentary Question (26520) indicates that the UK Government re-privatised South-Eastern Trains as a matter of policy rather than a legislative requirement under the 1993 Act.

Mr. George Howarth: To ask the Secretary of State for Transport (1) in light of the improved performance of South East Trains since it was returned to public hands, what lessons can be learned by private sector franchises; (2) what assessment he has made whether there is a case for South East Trains to remain in public hands given its improvement in performance since its private sector franchise was removed.

Derek Twigg: The Future of Rail White Paper made it clear that our policy would be for rail franchises to continue to be operated by the private sector. Recent improvements in the performance of South East Trains (SET) have been encouraging, as has been the performance of other train operating companies. The improved performance of Network Rail has played a significant role in this.

Not For Dividend/Profit Rail Operators

The fact that the 1993 Act would normally prevent a Government body from running franchised rail services does not mean that rail services could not be provided by a not-for-dividend company¹, along the same lines of Network Rail, under current legislation. A not-for-dividend company established entirely separately from

¹ Network Rail is sometimes referred to as a not-for-profit company, which is not entirely correct. Network Rail can make a profit. However, as it has no shareholders any profit would be re-invested in the rail infrastructure rather than paid out in dividends to shareholders.
Government could bid to run any rail franchise, e.g. Britain’s largest social enterprise, ECT, already runs one franchised London Bus route.

However, it is perhaps debatable that any social enterprise currently has the expertise, manpower or financial backing to run a passenger rail franchise, particularly when these are awarded in open competition with major public transport operators such as First Group and National Express.

**The Provision of Rail Passenger Services (Scotland) Bill**

Tommy Sheridan MSP introduced the Provision of Rail Passenger Services (Scotland) Bill in the Parliament on 29 September 2006. Consultation on the proposals in the Bill ran from 31 May 2006 until 23 August 2006 and elicited seven responses. A summary of the issues raised by the respondents has been produced by Tommy Sheridan MSP, full details of which can be found on the Parliament’s website.

In summary, three of the responses were from trade union related bodies, which were all supportive of the proposals in the Bill as was the one individual response. This support was based on a view that a not-for-profit operator would provide value for money and a better working environment for rail staff. Two responses were from TOCs, which were opposed to the proposals in the Bill and the general assertion that privately provided rail services provided poor value for money. The TOCs point to record passenger numbers in recent years as evidence of their success. The Scottish Chambers of Commerce were also opposed to the proposals in the Bill and argued that privately owned TOCs had made significant investments in the rail industry.

On 28 September 2006 the Presiding Officer ruled that:

*In my view the provisions of the Provision of Rail Passenger Services (Scotland) Bill are not within the competence of the Scottish Parliament.*

*The reason for this view is that in my opinion the provisions of the Bill relate to the provision and regulation of railway services, a matter reserved under Section E2 of Schedule 5 to the Scotland Act 1998. Section 29(2)(b) of that Act states that a provision is outside the legislative competence of the Parliament if it relates to reserved matters.*

**What does the Bill Propose?**

The provisions of the Bill would limit the type of organisation that Scottish Ministers could award any new ScotRail franchise to. The Bill would require Scottish Ministers to reject any tender submitted to operate the franchise where either the service is to be operated for profit or the potential operator intends to pay shareholder dividends from the turnover, or profit, of the franchise. This would mean that a franchise could only be awarded to a not-for-dividend/profit company.

Where no suitable bid to run the franchise was submitted then Scottish Ministers would be required to provide rail services as the operator as last resort. The Bill
would require the Scottish Ministers to provide services for a period of seven years, which could be reduced to a period of no less than four years. After this period Scottish Ministers would again have to tender for a new franchised rail operator under the rules explained above.

**Franchising Costs and Train Operating Company Profits**

Tommy Sheridan MSP argues that the introduction of the Bill will save the taxpayer money by doing away with the need to administer expensive franchising exercises and the requirement for privately owned companies to provide returns to their shareholders.

The costs to the SRA of awarding the ScotRail franchise were highlighted in a Westminster PQ, which is reproduced below:

John McDonnell: *To ask the Secretary of State for Transport what costs have been incurred by the Strategic Rail Authority in respect of the tendering process for the (a) Scotrail and (b) Northern franchise; and what the anticipated final costs are in each case.* [176271]

Mr. McNulty: *To date, the Strategic Rail Authority has spent £2.8 million tendering the Scotrail franchise, and £2.6 million tendering the Northern franchise. The final cost is expected to be £3.9 million in both cases. The anticipated final costs include prudent provisions for evaluation and completion expenditure.*

The current level of service provided through the ScotRail franchise will always be loss making, as very few Scottish rail services cover their full operating costs. However, the Scottish Executive has decided that this level of rail service is necessary and provides an annual subsidy for the ScotRail franchise in the region of £261m for financial years 2006-07 and 2007-08. This subsidy ensures that the Scottish Executive specified level of rail service is provided. A private sector operator will expect to run the service at a profit, which must come from either fare revenue or Executive subsidy.

It is difficult to identify the cash value figure of any profits made from the First ScotRail franchise, as First Group does not publish individual financial results for any of its four rail franchises. The Scottish Executive will not release First ScotRail profit information as they consider it to be commercially confidential.

An article in The Scotsman of 18 May 2006² reports that First Group made a profit of £13m for financial year 2005-06 from the ScotRail franchise. This represents approximately 5% of the £260.26m Scottish Executive franchise payment to First Group for 2005-06. It is not clear where The Scotsman sourced these figures as they do not appear to be publicly available.

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SPICe

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² ScotRail growth helps FirstGroup’s profits rise despite hefty fuel costs, The Scotsman, 18 May 2006