The Committee will meet at 10.15 am in Committee Room 6.

1. **Private Bills:** The Committee will consider a report by a group of Parliamentary and Executive officials on a number of models for a future system of handling private legislation, and then consider how to take the inquiry forwards.

2. **Work programme:** The Committee will consider options for its next main inquiry and other items of outstanding business.

3. **Minor Rule-changes:** The Committee will consider a paper on minor changes to Rules 9.16.3, 9.21.3 and 11.3.1.

4. **Final review of oral questions (in private):** The Committee will complete its consideration of the timing of First Minister’s Question Time and Question Time.

Andrew Mylne
Clerk to the Committee
Room TG.01
Ext 85175
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The following papers are attached for this meeting:

**Agenda item 1**
Report by Parliament and Executive officials  
Note by the Clerk on next steps in the inquiry

**Agenda item 2**
Note by the Assistant Clerk
Note by the Clerk on Sewel motions (recent developments)

**Agenda item 3**
Note by the Clerk

**Agenda item 4**
Letter from the Minister for Parliamentary Business *(note: this had not been received at the time of circulation but will be sent out separately if received before the meeting)*

Letters from the Independents Group, the Conservative and Unionist Party and the Scottish Socialist Party

The following papers are attached for information:

Letter from Visitor and Outreach Services (on ticketing arrangements in the gallery)
Note by the Clerk on Freedom of Information
Minutes of the last meeting

**Note:** The following paper, circulated for the last two meetings, is also relevant to this meeting agenda:

**Agenda item 4**
Paper on Scheduling Options
PROCEDURES COMMITTEE

Private Bills inquiry

Report by Parliament and Executive officials

Background

1. At the meeting on 26 October, the Committee agreed in principle to a suggestion by the Minister for Parliamentary Business that Executive and Parliament officials should consider in more detail the various options for change so far proposed. At its meeting on 9 November, the Committee agreed a remit for that work – namely to consider and report to the Committee on:

   (1) The technical implications (legal, procedural and practical) of the various models proposed for handling Private Bills (especially, but not necessarily exclusively, "works" Bills) – including in particular:

   - a TWA-type model – orders made by Ministers, referred to the Parliament for approval only if of “national significance”;
   - a 1936 Act-type model – draft orders made by Ministers, confirmed by the Parliament;
   - a semi-Parliamentary model – Bills (or draft Bills) submitted to the Parliament, with the Parliament given (statutory) power to set up local inquiries to consider and report to it.

   (2) To consider what role might be played in the future by Hybrid Bills, and how moving to one of the models mentioned above would affect the sort of procedures for handling such Bills that might be developed.

2. The Committee also agreed that we should report back to the Committee for its meeting on 21 December. The rest of this paper constitutes our report.

3. The officials who contributed to the report are:

   Andrew Mylne, Procedures Team (SP) (Chair)
   Fergus Cochrane, Private Bills Unit (SP)
   Alicia McKay, Legal Directorate (SP)
   Colin Miller, Constitution Unit (SE)
   Andrew McNaughton, Parliamentary Liaison Unit (SE)
   Damian Sharp, Transport Department (SE)

Approach taken

4. Our initial discussion of the various models under consideration led to the compilation of a list of criteria for assessment. Each model was then assessed against these criteria in order to establish its main strengths and weaknesses. This in turn led to some refinements in the descriptions of the models themselves, and also to some amalgamation of criteria that had proved difficult to distinguish when applied to the assessment of individual models. We hope
that the assessment arrived at through this iterative process will assist the Committee in identifying the most appropriate model, according to its evaluation of the relative importance of the criteria.

5. Accordingly, in the remainder of this report, we:

- list the criteria (together with the sorts of questions we have tried to ask, in applying each criterion);
- describe each model in general terms (focusing on structure rather than detail);
- give an overall analysis of the strengths and weaknesses of each model, both by comparison with the existing system (Chapter 9A of the standing orders) and the other models, referring where appropriate to the various criteria; and
- indicate ways in which elements of different models might be combined, or in which variations within a model might be allowed for, in order to achieve the best combination of advantages, and to accommodate the various types of Bill that might be introduced.

The criteria

6. The criteria that we identified as being relevant to the assessment of any effective process for handling private legislation are as follows:

(1) Time-efficiency and cost-effectiveness

Does the process deliver results as quickly as is consistent with the other criteria? Is the amount of time taken in each case responsive to the particular circumstances, and is the time usefully spent? Does the process deliver value for money both to the promoter and to the taxpayer?

(2) Fairness and transparency

Is the process fair (and seen to be fair) in the balance it strikes between promoters and objectors? Does it give the parties a proper opportunity to be heard and to influence the outcome according to the merits of their arguments?

(3) Coverage of technical detail and issues of principle

Does the process enable promoters and objectors to express views on, or provide information about, both the overall merits of the scheme and particular details, at appropriate points in the process? Does it ensure that technical matters are assessed by appropriately qualified persons, while leaving judgements on the overall merits to politicians?
(4) Role for the Parliament and Executive

Does the process give the Parliament an appropriate degree of oversight of the process, and opportunity to scrutinise the legislation proposed? Does it give the Executive a role appropriate to any policy or financial interest that it may have?

(5) Clarity and robustness

Can the process be clearly explained and justified to those who need to engage with it? Does it involve a clear and appropriate division of roles, allowing decisions to be accountable, enforceable and (so far as possible) resistant to legal challenge?

(6) Adaptability to different types of proposal

Can the process adapt appropriately to accommodate the range of proposals for private legislation that might arise – from a narrow, local issue affecting only an individual or organisation through to major works projects with implications for matters of national significance or public policy? Could it accommodate Hybrid Bills, or could elements of it be adapted to provide a Hybrid Bill procedure?

(7) Speed of implementation

Is the model capable of being developed, (if necessary) legislated for and then implemented reasonably quickly, so it will be available for some of the Bills currently in prospect?

Applying the criteria

7. A number of factors need to be recognised about these various criteria and how they are used to assess the merits of any particular model.

8. While we consider all the criteria to be important, we have not attempted to rank them in order of importance. It will be for the Committee to decide on the relative weight to attach to each one.

9. With some criteria, there is likely to be universal agreement on what the ideal assessment would be. For example, we assume that, all other things being equal, it is desirable for any process to be as time-efficient and cost-effective as possible. With other criteria, however, it is less straightforward – for example, there may be quite different, but equally legitimate, opinions on whether it is better to give the Parliament a major scrutiny role throughout a process or to keep that role to a minimum. Again, these judgements are ones for the Committee to make.

10. Another factor is the extent to which the various criteria are compatible with each other. In some cases, there is likely to be an unavoidable tension between them. For example, achieving fairness and transparency is likely to require a thoroughness of process that (at least to some extent) runs counter to the achievement of time-efficiency and cost-effectiveness. However, this is not a
“zero-sum game” (where a gain in one respect is matched by a corresponding loss elsewhere) – while even the best process will not be able to resolve these tensions entirely, there should certainly be ways of securing a better compromise. Again, to put it crudely, the aim is to find a system that achieves the best overall “score” against the criteria as a whole, even though it may not achieve a maximum “score” in relation to any single criterion.

11. A general problem we have encountered in assessing the models against the criteria involves distinguishing the inherent features of the models themselves from the incidental or superficial characteristics of actual systems that exemplify the models. For example, experience suggests that one of the criticisms made of the Transport and Works Act system as it currently operates in England and Wales is that the orders themselves tend to be expressed in language that, even by legislative standards, is particularly dense and impenetrable. This may be at least partly attributable to features of the model itself (for example, the fact that the orders are rarely scrutinised by parliamentarians). But this may be more fairly attributable to other factors that are incidental to the model (for example, the nature of the subject-matter and the traditions of drafting in different jurisdictions) – and, to that extent, this feature need not transfer to Scotland if a TWA model was adopted here.

12. In our assessments – which make no claim to having an objective or scientific basis – we have endeavoured to focus on the structural features of the models, together with our judgement about what constitutes good process from a practical and political point of view.

13. We assess each model separately below. In doing so, our principal standard of comparison is with the existing system (contained in Chapter 9A). But we have also tried to acknowledge where points made in relation to one model are likely to apply more-or-less equally to alternative models, to facilitate comparison between them.

**TWA model**

**Outline of model**

14. The main features of this model are:

- it applies only to applications in relation to transport infrastructure projects (not all private legislation)
- promoter submits application to the Executive (in practice, some sort of “orders unit”) together with draft order, supporting documentation, evidence of notification etc.
- objectors then submit objections to the Executive (orders unit)
- if (unusually) the Minister decides the proposal is of “national (or regional) significance”, he/she may refer it to Parliament for consideration of the general principles of the scheme, prior to any inquiry
• Minister decides whether to refer the application to a public inquiry by an Executive-appointed (but independent) reporter, to a hearing, or for consideration of written representations only

• Minister considers the outcome of the inquiry (or other process) and then makes the order (with or without modifications) or refuses it. Made orders are not subject to any (further) Parliamentary scrutiny.

15. In other words, this is a model that applies only to a particular category of applications, and gives almost all responsibility for handling and deciding on the applications to Ministers (rather than Parliament).

Assessment

16. This model has some advantages over Ch 9A in terms of time-efficiency and cost-effectiveness. As it takes place wholly or largely outside the Parliament, it would not be constrained by the Parliamentary timetable. Draft orders could be submitted and hearings could take place at any time of year, including during Parliamentary recess. Inquiries could be completed more quickly, since they could meet continuously for 4 or 5 days rather than being limited to the one (or at most two) meetings a week that is currently possible for Private Bills.

17. There may be some disadvantages – having a professional reporter conducting an inquiry would involve an additional cost. Costs of staff and administration could be slightly greater if independent inquiry teams were used, which would not get the same economies of scale as the Parliament, but this would not apply if responsibility was transferred to the existing Executive Inquiry Reporters Unit (SEIRU) – which would then require additional resources. On the other hand, there may be savings from a quicker and more efficient process, and the apparent cost benefits of the current system are reduced in practice by the fact that the Parliament has found it necessary to employ expert advisers to Private Bill Committees at daily consultancy rates.

18. In relation to fairness and transparency, statutory notification requirements and public inquiries operating according to a clear remit should provide a suitable structure, but much would depend on the detailed rules relating to the admissibility of objections, and the way the proceedings are handled at the inquiry. There is a risk that professional or expert reporters will be (or appear to be) less sympathetic to the individual objector, and closer in background and approach to the promoter than “lay” MSPs. There would be some loss of transparency, in that the key decision is taken by a Minister at one step removed from the open and public inquiry process (and it is likely that official advice to Ministers on whether to accept the reporter’s conclusions would not be published).

19. Also, it may be difficult to maintain the perception of fairness in cases where the Executive is known to be in favour of a scheme, or providing financial backing (i.e. where it is effectively the promoter in all but name). There may also be some loss of transparency compared with the current Parliamentary process, which has openness built into every stage of its procedures, and which provides a clear and direct connection between the people who hear the parties (i.e. the
MSPs on the committee) and those who make the final decisions (MSPs generally).

20. **Coverage of technical detail and issues of principle** would be brought together into the inquiry process, which would have the expertise to consider technical aspects and to arbitrate on points of detail, while still having a remit broad enough to take an overall view of the merits of the application. This should save time and avoid what are sometimes artificial or arbitrary distinctions between stages. But the ability of Ministers to re-assess the whole application, taking account of wider factors in addition to the inquiry report, muddies the waters to some extent. The situation would also be different with a scheme deemed to be of “national significance” (or the Scottish equivalent of that term), where there would be early Parliamentary scrutiny of the principles of the application. Care would then be needed to ensure that the Parliament, in giving early general approval, did not compromise the ability of objectors to challenge the application outright at the later inquiry.

21. Of all the models, this is the one that gives the smallest role for the Parliament (and the largest to the Executive). This may reflect the reality that most schemes suitable for this model will need Executive funding and backing, but it also removes a level of democratic scrutiny and accountability.

22. In relation to **clarity and robustness**, the overall structure of the process is relatively easy to explain, although here too much would depend on the detailed rules. However, the Executive (despite an organisational commitment to openness) is perhaps less accustomed to conducting business of this nature in a public forum. There is also potential for confusion about the boundaries between different decision-making responsibilities (including the Parliament’s role in relation to projects of national significance) and how this affects the rights of objectors.

23. Moving to a system founded in statute would offer practical advantages in terms of being better able to regulate pre-introduction matters (consultation and notification requirements). Since standing orders can only regulate proceedings of the Parliament, Ch 9A governs such matters only indirectly. Ministers are well equipped to make decisions of this sort, having access to the resources needed to ensure they are well informed and legally robust. However, there could be the perception that Ministers were acting as the final arbiter on projects to which they were already committed in policy or financial terms – although this would not be as marked as in the case of trunk roads orders where Ministers determine orders on schemes which they promote. This appearance of conflict could create a vulnerability to legal challenge (with attendant delays for early schemes using the new process).

24. A TWA model has only limited **adaptability to different types of proposal**. It could not accommodate Executive-promoted orders, so any such project would still need to go through a separate Hybrid Bill procedure. A Private Bill process would also still be needed to handle non-transport infrastructure projects.

25. In terms of **speed of implementation**, a TWA model would be difficult to put in place quickly. The 1992 Act already requires updating, and would also require
adaptation to a Scots law context. As with any legislative solution, time would be needed to draft a Bill, take it through its parliamentary stages and prepare and implement the necessary subordinate legislation. As this model is the most different from the current system, a longer lead-time might be needed for promoters to prepare for the first applications under the new system. For these reasons, it is difficult to see how any new system based on the principles of the TWA could be operational before the beginning of the next Parliamentary session.

1936 Act model

Outline of model

26. The main features of this model are:

- applies to all applications that are currently handled by Private Bill
- promoter submits application to the Executive (orders unit) together with draft order, supporting documentation, evidence of notification etc.
- a role for the Parliament (perhaps the Presiding Officer, advised by an Examiner) checking compliance with the rules, and determining whether the application raises questions of public policy of such novelty and importance that it should instead proceed by Private Bill
- if objections are made, the Executive must establish a local inquiry with Commissioners drawn from a panel of experts (but, unlike 1936 Act itself, not including parliamentarians)
- the Commissioners recommend making the order (with or without modifications), or rejecting it, in a report to the Minister
- if appropriate, the Executive introduces an “order confirmation Bill” into the Parliament to give effect to the order – but subject to a level of scrutiny closer to an affirmative instrument than a Bill.

27. In other words, this model still puts the Executive at the centre of the system, handling applications and establishing inquiries, but gives the Parliament a greater role than under the TWA model, checking compliance at the beginning and confirming the legislation at the end.

Assessment

28. This model, like the TWA model, has some general advantages in terms of time-efficiency and cost-effectiveness. It concentrates most of the scrutiny into a single process (the inquiry), which may meet continuously and at any time of year. But it’s still a linear process involving a number of separate stages, the last of which is contingent on the Parliamentary timetable.

29. Also, like the TWA model, there may be some disadvantages in terms of cost in relation to the inquiry process (see above).
30. In relation to **fairness and transparency**, the issues are similar to the TWA model, although the greater Parliamentary role may help to offset doubts about the Executive handling applications in which it has a direct interest.

31. As with the TWA model, the external, expert inquiry should enable coordinated **coverage of technical detail and issues of principle**. The difference is that it would be the Parliament (at the confirmation Bill stage), rather than the Executive (at the post-inquiry decision stage) which would bring a policy perspective to bear. There is also a clearer distinction here (compared with the TWA model) between how the normal application is handled and the handling of a project of major significance.

32. This model gives more of a **role for the Parliament**, while still handing over most of the administrative responsibility to **the Executive**. However, although the Parliament’s main role at the end of the process gives it a limited opportunity to scrutinise before deciding whether to pass the legislation, this is arguably too late, since it would be difficult (inefficient, costly) to reject the whole proposal once the detailed examination had already been conducted. As with the TWA model, this division of roles could also create (the perception of) a conflict of interest where the Executive is closely associated, in financial or policy terms, with an application.

33. In relation to **clarity and robustness**, this model is less easy to explain than TWA (or Ch 9A), as it involves more “players” whose roles in practice may differ from the roles they might initially appear to have. In particular, it may be difficult to explain the role of the Executive in the process, either in relation to proposals that have no public-policy component or (as with the TWA model) in relation to those that do. On the other hand, the separation of roles and stages should enable clear decisions to be made by persons well-qualified to make them (particularly if clear criteria are laid down in statute).

34. Unlike the TWA model, this one is intended to accommodate all applications for private legislation (except those considered to raise major issues of public policy, which would still proceed as Private Bills). It builds in some **adaptability to different types of proposal**, particularly by avoiding the need for an inquiry where there are no objections. However, like the TWA, it is difficult to see how this process could easily be adapted to accommodate Hybrid Bills, since the Executive cannot apply to itself for an order – so an entirely separate process would be required.

35. The **speed of implementation** might be slightly greater than for the TWA model, since existing statutory provision, while it would need some updating, could be used as a model for new legislation without adaptation to a Scots law context. There is also greater familiarity with this process among Parliamentary agents and practitioners. However, some time might also be needed to put in place new standing orders to mesh the Parliamentary aspects with the new statutory process.
A semi-Parliamentary model

Outline of model

36. Unlike with the TWA and 1936 Act models, there is no clear, existing blueprint for a semi-Parliamentary model, and what is set out below is certainly not the only way it could operate. The underlying idea is to keep the Parliament at the centre of the process – as the body to which promoters and objectors apply in the first place, as well as the one that "signs off" the legislation sought – while still transferring responsibility for the detailed scrutiny and the arbitration of disputes between the parties to an external inquiry process. That would still require primary legislation to provide a clear statutory framework for the inquiry process (e.g. role and duties of reporters, their powers to demand evidence, take evidence on oath, etc.), and it would be beneficial also to impose directly the pre-introduction requirements of notification and consultation (currently imposed only indirectly through the standing orders governing the content of accompanying documents).

37. The particular semi-Parliamentary model that is assessed below has the following features:

- The promoters would lodge with the Parliament a Bill and accompanying documents, having already fulfilled statutory consultation, notification and advertisement requirements (including consultation with the Executive and environmental regulators).

First stage

- The Bill would be referred to a committee to consider and report on (a) whether the relevant statutory requirements (e.g. on consultation) and standing orders (e.g. on accompanying documents) had been complied with (probably on the basis of a report to the committee by an Examiner); and (b) whether the promoter could make a basic, provisional case for the Bill. The committee would be expected to hear only from the Examiner and the promoter (and perhaps also statutory consultees, but not objectors) at this stage.

- The Parliament would then decide whether the Bill should proceed, but on the clear understanding that this was a provisional decision without prejudice to the rights of objectors. If the Bill was allowed to proceed, the Parliament (on the Committee’s recommendation) would normally refer it out to a local public inquiry, but if it raised no significant technical issues and/or was unopposed, it could instead be referred promptly back to the committee.

Second stage

- (If referred to an inquiry:) The inquiry would consider the overall merits and details of the Bill, taking evidence on any technical issues and/or hearing the opposing parties (in adversarial proceedings). In doing so it might need to resolve any doubts about who is entitled to object (perhaps based on initial consideration by an Examiner). It would then report on whether the Bill should be accepted (with or without amendments) or rejected. The committee would then consider the report of the inquiry and make (or invite...
the promoter to make) any amendments recommended by the inquiry which it endorsed. The committee would then report to the Parliament (briefly, going into detail only where it differed from the inquiry report).

- (If referred to a committee:) The committee would take any evidence needed and report on whether the Bill should be accepted (with or without amendments) or rejected. The committee would then make (or invite the promoter to make) any amendments it recommended, and then report to the Parliament.

Third stage
- The Parliament would consider the Bill and decide whether or not to pass it – with a limited opportunity for further amendments to address any outstanding technical or legal problems.

Assessment

38. This model should secure some of the same benefits in terms of time-efficiency and cost-effectiveness as the other models, in that the inquiry process can run continuously, including during Parliamentary recesses. Other parts of the process, however, would need to fit in with the Parliamentary timetable (including the possibility of Bills falling at the end of a session and having to be re-introduced).

39. This model (like the other two) would involve the additional costs of professional reporters, though some of the administrative costs would benefit from the economies of scale of the Parliament. The Parliament might still need to pay for advisers (though for much more limited purposes).

40. As with the other models, fairness and transparency for promoters and objectors will largely depend on how the local inquiries (or committee proceedings, with straightforward Bills) are conducted. More generally, however, the aim of the 3-stage structure is to ensure that promoters must establish a basic, provisional case for a departure from the general law, at the outset, while ensuring that all objections can still be given a fair hearing on their merits – if the balance of evidence and arguments against the Bill presented at the second stage (from objectors and others) outweighs the promoter’s case for it, the Bill can still be rejected entirely. Having the whole process conducted on the basis of a Parliamentary document, with committees or the Parliament taking the decisions (in a more open and accountable forum than a Ministerial office), should help to maintain transparency throughout. Problems of perceived conflict where the Executive is backing a particular Bill should be largely avoided.

41. Again, as with other models, coverage of technical detail and issues of principle would largely be amalgamated in the inquiry process. The definitions of the three stages should achieve an appropriate division between the expertise of the inquiry reporter in considering details with a general oversight for politicians, primarily at the end of the process.
42. Of all the alternatives to Ch 9A, this model gives the greatest direct role to the Parliament (and the least to the Executive). The Executive could, however, be a mandatory consultee prior to introduction – and where a Bill was dependent on Executive funding, this would presumably be set out in accompanying documents which could be checked by the Examiner (first stage) and then scrutinised by the inquiry/committee (second stage).

43. This model (like the TWA model) has a simple overall structure that is probably no more difficult to explain than Ch 9A, although it involves a different distinction between the different stages. It has greater clarity than the more complex 1936 Act model, with its greater number of players. There is perhaps a conceptual neatness about a process that keeps the legislature in overall charge of an application for a change to the law, while having individuals engaging with an inquiry process similar to those familiar from other, comparable contexts. As with the other models, the statutory framework should enhance the general robustness of the process (while reducing any vulnerability to legal challenge in the case of Executive-backed proposals).

44. Like the 1936 Act model, this semi-Parliamentary model would apply to all different types of proposal – and so has the adaptability needed to vary the process according to circumstances (e.g. where there are no objectors). Because it is already a Parliamentary, Bill-based process, it would be easier to adapt it to accommodate Hybrid Bills – which might follow the first and second stages of this process before then following most of the normal procedures applicable to a Public Bill.

45. For similar reasons, there could be benefits (at least over the TWA model) in terms of speed of implementation, since some of this model could be put in place by means of adapting existing Rules in Ch 9A. However, time would still be needed to prepare, pass and implement the necessary primary (and subordinate) legislation.

**Further general considerations**

46. In the remainder of this report, we set out a few further general points that the Committee may wish to keep in mind during any consideration of the various models outlined and assessed above. Some of these arise from experience with aspects of the current Ch 9A process.

47. A key issue for any alternative model is whether to retain a decision on general principles at an early stage in the process. This ensures that the time and cost of hearing the parties can be avoided if the Bill runs counter to the prevailing political mood, but arguably has also led to an artificial separation between hearing objections to the whole Bill (at Preliminary Stage) and hearing objections to specific aspects (at Consideration Stage). Such a separation was made to prevent objectors to the whole Bill feeling the “pass had already been sold” by the time they were heard, but the problem is that objections cannot be neatly categorised in this way. For example, local objectors to a railway might initially express support for the generality of a Bill, while arguing only for a modest change of route, only to find themselves forced by the practical
constraints (e.g. the promoter’s rejection of a change of route on cost grounds) into adopting a position of outright opposition.

48. For these reasons, the whole concept of an early decision on “general principles” – which works well in the Public Bill context – may not be appropriate with a Private Bill. More relevant is to expect a promoter to establish (at the outset) a general, but provisional case for the Bill, on the grounds that there should be some initial presumption against making departures from the general law. This could be achieved by requiring an early decision, taken at political level (but not on public policy grounds), to allow a Private Bill to proceed – but only on a provisional basis, making clear that this could be revisited (and the Bill rejected) if, having heard all the arguments in detail, it became clear that the overall merit of the objections outweighed the case made by the promoter. This is similar to what applies in the House of Commons, where 2nd Reading of a Private Bill is provisional and the committee has the power to reject the Bill outright, having heard the parties – and has been reflected in the outline of the semi-Parliamentary model described above.

49. Exactly what that initial (1st stage) test would involve would need to be defined more precisely, but is likely to involve establishing that the promoter is entitled to introduce a Bill; that legislative changes are necessary to achieve the promoter’s objective; that statutory and standing order pre-conditions (of notification, consultation, etc.) have been undertaken; and that other conditions for the project’s success (funding, other necessary consents) have been, or are likely to be, secured – but would exclude any consideration of the desirability of the project (including whether any Executive funding for it is a good use of public money) – and hence is a very different test from “general principles”. It might also include some preliminary consideration of objections (if this was not to be done at the beginning of the 2nd stage).

50. Another issue that has arisen with Ch 9A is the narrow scope for objections – i.e. the requirement to establish a clear adverse effect attributable to the Bill. On any model, the question arises of whether (and, if so, how) to allow representations to be made on the general merits of a proposal by other interested parties – i.e. those who cannot meet that requirement or who do not in any case wish to be categorised as objectors.

51. We also recognise a need for any process to encourage good consultation at an early stage. This should minimise the number of formal objections and ensure that the hearing of what objections remain yields few “surprises”. Whatever the process, it is in the nature of major infrastructure projects of the sort currently being pursued that the outcome is always likely to leave some disgruntled individuals. But the aim should be that such individuals, however disappointed they may be with the actual decisions taken, at least recognise the process as having been fair and appropriate.

52. Particular difficulties arise with objections to a transport project that could only be met by a change of route – with all the delay and procedural complexity this involved (i.e. where a new set of prospective objectors would become involved). Here, in particular, it is important to ensure that the possibility of any alternative route is identified at an early stage, and not only after an application that has
been developed on the basis of a single route is already well under way. However, it is not possible to eliminate entirely the possibility that a decision will have to be made, at a relatively late stage, that could lead to a change of route. All the models allow for a robust process of hearing competing views, with a judgement then being made by a person who is independent of any earlier efforts made to resolve those differences. Sometimes that judgement will be unpredictable just because the arguments may be finely balanced or involve competing basic values (e.g. residents’ amenity vs. nature conservation).

53. Another general difficulty that has become apparent with Ch 9A, but which is also likely to arise with any alternative, concerns the scope of any application for private legislation in relation to the whole project. With any major infrastructure project, it is likely that statutory powers will be only a small part of what the promoter needs to secure before the project can go ahead – and for practical reasons, it may be that some of the other components (particularly funding or contractual arrangements) can only realistically be sought once the promoter can demonstrate that the legislation has been or is likely to be obtained. This creates difficulties for objectors in particular, who may easily misunderstand the extent of what they can hope to achieve through objections to the Bill – something that, in turn, presents a challenge to those attempting to manage fairly the process with which these objectors must engage.

54. We also noted the potential problem, with any model reliant on non-Parliamentary inquiries, of finding enough additional suitably qualified reporters. The existing Executive reporters unit does not have the capacity to take on a substantial additional role without new resources.

55. In the course of considering the main models described above, we also briefly considered the Irish model – which is similar to the TWA model, but with a state agency acting as promoter. This was another way to establish a degree of separation between those backing a project and those required to sit in judgement on it. However, we recognise that this approach may be less attractive to the Executive, given the policy direction already set out in the Transport White Paper. The Transport (Scotland) Bill, currently at Stage 1, provides for the creation of regional transport partnerships (RTPs), while a national Transport Agency was also to be established (not through primary legislation) – but this would have the very different purpose of coordinating transport policy at a strategic level.
1. The Committee has now heard from all the oral witnesses it previously agreed, and has received all the written evidence that is expected. A summary of that evidence is being prepared, and will be circulated for the Committee’s next meeting (18 January).

2. The work done by Parliamentary and Executive officials is now complete and the resulting report is circulated separately.

3. The Committee might now wish to consider – at least on a preliminary basis – whether, informed by the officials’ report, it wishes to recommend to the Parliament the adoption of one of the models assessed in that report as the basis for a new private legislation process. The Committee may feel that it would need to hear further from some of those involved in preparing the report before reaching a view. If so, it would be possible to arrange for relevant officials from the Executive and/or the Parliament to attend the next Committee meeting.

4. If the Committee was able to recommend one of the models assessed in the report, that would involve primary legislation being put in place. It would then be worth establishing the timescale within which that legislation might be brought forwards. Perhaps the best way of doing this would be to agree a short, interim report to the Parliament, to which the Executive would be invited to respond.

5. A related question that would need to be addressed (though perhaps at a later stage) is whether that legislation should be introduced as an Executive Bill. (The alternative would be for the Committee to introduce a Committee Bill.) There are procedural, presentational and practical issues (including issues of timescale) that would need to be taken into account in making this choice. In either case, however, it is expected that Executive expertise and experience would need to be brought to bear in the preparation of the Bill.

6. A further issue for the longer term is the second “strand” of the Committee’s inquiry – namely what changes to recommend to Chapter 9A. Some changes will be needed even if a whole new system is to be introduced at the earliest opportunity by primary legislation – to ease the passage of Bills already in progress or expected to be introduced before primary legislation can be brought into force. Furthermore – depending on the model recommended – some capacity for continuing to handle some Private Bills will continue to be needed in the longer term. The extent of the changes that the Committee considers appropriate to make will be conditioned by the decisions it takes on the longer-term solution (and the response it receives to any interim report).
7. This second phase of the inquiry may require the taking of some further evidence, and is in any case likely to take at least a few months to complete (allowing time for clarifying problems, choosing solutions, and drafting appropriate Rule-changes). As a result, it is likely (depending on the approach the Committee prefers) that the whole inquiry will not be completed until Easter next year, at the earliest.
PROCEDURES COMMITTEE

Forward work programme

Note by the Assistant Clerk

Purpose

1. This paper invites the Committee to consider the completion schedules for its current inquiry work and to agree its forward work plan for the first quarter of the forthcoming calendar year to 25 March 2005 (i.e. the start of the Easter recess). The paper also contains information on the related issues of securing Parliamentary debating time and the possibility of commissioning external research. A list of suggested meeting dates from January to April 2005 is also included at the end of the paper.

Completion schedule for current inquiries

Private Bills

2. The Committee has now heard all the oral evidence previously agreed.

3. How the Committee agrees to take this inquiry forward and the approximate corresponding timeframe for its conclusion will depend on the decisions taken in relation to paper PR/S2/04/17/.

Review of oral questions

4. At its meetings on 9 and 23 November, the Committee made a number of decisions, particularly on the selection of questions for Question Time. The Committee is due to decide today the remaining issues, particularly the scheduling of FMQT and Question Time in the Parliamentary week.

5. This would allow the Committee to consider a draft report at its next meeting on 18 January, with a view to concluding its review and publishing a final report before the start of the February recess.

Commissioner for Public Appointments

6. As Karen Carlton, Commissioner for Public Appointments in Scotland, said in her oral evidence at the last meeting, her office’s consultation document on a code of practice has been delayed and will not now issue until April 2004. The Committee needs to report far enough in advance of that date to allow the report to be debated and the new Rules brought into effect.

7. The Committee awaits a response from the Standards Committee as to whether it would support a move to extend its remit to include the functions of considering statutory consultation documents issued by the Commissioner and reports of non-compliance with the code of practice. It is, therefore, suggested that the draft report be put before the Committee at its meeting on 1 February.
This minor inquiry is expected to be concluded, as with the review of oral questions, before the start of the recess on 12 February 2005.

**Possible future (major) inquiries**

8. The suggested completion schedules for the current major inquiries, as above, allow for:

- a major inquiry to be initiated after the end of the recess on 20 February, i.e. from the meeting on 22 February 2005, in place of the oral questions review.

- a second major inquiry to be initiated at a later date, in place of the Private Bills inquiry – but this is unlikely to be before Easter.

**Sewel motions**

9. At its meeting on 2 December 2003, the Committee agreed that its next major inquiry after that on the timescales and Stages of Bills would be an inquiry on Sewel motions. Subsequently, at its meeting on 22 June 2004, the Committee continued its commitment to initiate an inquiry on Sewel motions, but agreed an inquiry on Private Bills procedures would be held first. Then, at the Committee awayday on 13 September, the clear indication was that an inquiry on Sewel motions was next in line and that such an undertaking would be likely some time in early 2005.

10. Since these decisions have become public knowledge, there is an expectation that the Committee will begin a Sewel inquiry at the next available opportunity.

11. The Committee will be aware that the issue of Sewel motions and the application of the Sewel Convention have been the topic of Parliamentary discussion, and that there is also considerable interest from outside the Parliament, including in the press, on the subject. Thus, an inquiry on Sewel motions is likely to be seen as a relatively high profile inquiry for the Committee. Details of some recent developments in public discussions about the Sewel Convention are included in a separate paper circulated for this meeting.

12. We were sent in April a study of the Sewel procedure by a final-year politics student at Edinburgh University prepared during his placement at the Scottish Executive. The study involves a detailed analysis of the process along with a number of recommendations for how the procedure might be improved. The author has indicated his willingness to give evidence to the Committee if invited to do so. This, together with the evidence taken by the previous Committee, would provide a good starting point for an inquiry on this topic.

13. In addition, the Enterprise and Culture Committee and the Justice 1 Committee have separately written to the Committee in relation to aspects of the Sewel process. The relevant correspondence was circulated as papers PR/S2/04/7/10 and PR/S2/04/10/10, respectively.
14. As a previous discussion paper highlighted, there are two main ways in which the Committee could approach an inquiry on the Sewel process. The Committee could choose to adopt a broad remit looking at the operation of the Sewel system at UK and Scottish levels, or a narrower remit that focused on the internal procedures surrounding the Parliament’s handling of Sewel motions. At its awayday, Committee members indicated a preference for an inquiry with a broader remit, although no firm decision on this issue was reached.

15. Under the broader option, the inquiry might consider the following issues:

- the general process by which it is decided that a particular devolved matter should be dealt with by Westminster legislation rather than by Scottish Parliament legislation, and why such decisions are made more frequently than was originally envisaged;

- whether general changes are needed to the mechanism used to seek the Parliament’s consent to Westminster legislating on a devolved matter (currently by the Executive lodging a motion, accompanied by a written memorandum, with the motion usually debated in the Chamber);

- whether adequate mechanisms are in place to ensure that Westminster stays within the bounds of any consent given and how, if an amendment is tabled or agreed to in Westminster that would take the legislation beyond the scope of that consent, the Parliament’s further consent should be sought.

16. Alternatively, the narrower option for the inquiry would investigate whether there should be a specific Rule governing the lodging and consideration of Sewel motions, and in particular, might consider:

- whether standing orders should require the Executive to lodge a memorandum to accompany the motion for publication by the Parliament (and specify what the memorandum should cover);

- whether there should be an agreed mechanism for the referral of Sewel motions to committees for consideration;

- whether there should be a timeframe for committee consideration of Sewel motions; and

- whether standing orders should specify what committees are expected do in consideration of a Sewel motion.

17. Committee members’ views are invited on the timing and remit of an inquiry on Sewel motions.
Review of the Parliamentary week

18. The second option for a major inquiry would be for the Committee to conduct a broad review of the Parliamentary week.

19. The previous Procedures Committee looked at this issue and produced a “Time in the Chamber” legacy paper (circulated as PR/S2/03/1/5), which outlined the background to a suggested inquiry and set out possible options for an alternative model of the working week for consideration by the current Procedures Committee. Such an inquiry could look specifically at:

- the proportion of the normal sitting week allocated to Chamber business, and whether to relax the rule preventing committees and the Chamber meeting at the same time;

- how Chamber time is divided according to the various categories of business (motion-and-amendment debates, other debates, questions, etc.) and between categories of members (Executive time, opposition parties’ time, backbenchers’ time); and

- how the available speaking time is divided up within each debate or item.

20. It seems clear from the paper produced by the previous committee that there is an appetite among members for this issue to be looked at (82% of responses to the questionnaire issued in autumn 2002 agreed that it would be helpful for the Procedures Committee to investigate in detail whether the overall time allocated to chamber business was appropriate).

21. Furthermore, during the debate on the previous Procedures Committee’s Founding Principles Report on 26 November 2003, a number of Members raised concerns about issues such as the balance of time available for backbench speakers and the time limits on speeches.

22. A review of the time in Chamber would be a major piece of work for the Committee and it is unlikely that an inquiry of this size and scope could be embarked upon until the review of Private Bills procedures had been completed. In all probability this would mean the Committee could not consider this issue until summer 2005. However, it could be argued that this would be an opportune time for such an inquiry to take place. The Parliament would be mid-way through Session 2 and so well placed to consider, with the benefit of experience, what changes might be advantageous – but still with time to complete the inquiry and get any changes introduced in time for the start of Session 3.

23. Committee members’ views are invited on the timing and remit of a review of the Parliamentary week.
Possible future (minor) inquiries

24. In addition to one or two major inquiries at any time, it may sometimes be possible to handle a smaller inquiry when time permits. The following are issues in the latter category that have been proposed to the Committee.

Re-appointment of Crown appointees nominated by the Parliament

25. The various office holders that the Parliament has nominated for Royal appointment (e.g. the Scottish Information Commissioner, Scottish Public Services Ombudsman (and deputies)) are appointed in accordance with Rule 3.11 of the Standing Orders. Despite their terms of office being limited, there is no re-appointment procedure, thereby meaning that in order to re-appoint current office holders for a further term, the Parliament must go through the full appointment procedure.

26. In order to streamline the process of re-appointment by avoiding the requirement to appoint a full selection panel and the associated time and financial costs that go with it, the SPCB has requested that the Procedures Committee change the Standing Orders to provide an appropriate mechanism for the re-appointment of these posts. The Presiding Officer’s letter, on behalf of the SPCB, was circulated as paper PR/S2/04/15/6.

27. Such a re-appointment procedure would only be for use where a candidate had fully met their statutory duties and there has not been any resolution, on a motion from any Member of the Parliament, seeking their removal from office. As a result, the change to Standing Orders would simply constitute an administrative procedure and would be expected to be an uncontroversial and straightforward minor inquiry.

28. Although the first terms of office are not due to expire until 2006, it is suggested that in order to give colleagues sufficient time to make the appropriate arrangements, the new re-appointment procedures be in place in summer or autumn 2005.

Consolidation Bill procedure

29. The Parliament has so far considered and passed a single Consolidation Bill – the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill 2002. The Consolidation Committee which considered that Bill has made a number of recommendations for improvements to the process applicable to such Bills and Rule 9.18 of the Standing Orders.

30. The Consolidation Committee recommended that the Procedures Committee considers various amendments to the Standing Orders to, for example, provide more guidance to Consolidation Bill Committees on the matters that they should take into account in conducting Stage 1 scrutiny of a Consolidation Bill; to provide for the Subordinate Legislation Committee to examine only those new powers to make subordinate legislation that are created as a result of a Consolidation Bill (and not to consider those that already existed under
existing legislation); and whether there should be some provision for a debate at Stages 1 and 3 of a Consolidation Bill’s consideration.

31. As there are no further Consolidation Bills planned in the near future, there is no particular urgency for the Committee to consider the recommended changes to the Standing Orders. However, it would clearly be beneficial to address the recommendations made by the Salmon and Freshwater Fisheries Consolidation Committee while the experience of dealing with that Bill is still reasonably fresh in the minds of those involved. Such an inquiry might include taking one short oral evidence session, which could include the former Convener of, and the adviser to, the Consolidation Bill Committee.

32. For these reasons, it is suggested that the Committee agrees to undertake this short inquiry at an appropriate time during the next few months.

Hybrid Bills procedure

33. In correspondence with the Presiding Officer in relation to Private Bills procedure (paper PR/S2/04/13/14), the Minister for Parliamentary Business stated that the Executive has been considering the possibility of bringing forward some major infrastructure projects by means of Executive legislation. Because such projects would inevitably deal with private interests, the Executive would therefore be required to deal with them under a Hybrid Bills procedure (a mixture of both public and private legislation procedures).

34. As the Minister for Parliamentary Business pointed out in her letter, although the Standing Orders do not preclude the possibility of Hybrid Bills, neither do they set out a procedure for dealing with them.

35. The previous Procedures Committee also considered the issue of Hybrid Bills at the time of its establishment of the current Private Bills procedure (Chapter 9A of the Standing Orders). That Committee’s 2nd Report, 2000 (SP Paper 205) recommended that once procedures had been fully developed and bedded down for private legislation then proposals for the handling of Hybrid Bills should be brought forward, making best use of the Rules for public and private legislation.

36. An inquiry on a Hybrid Bills process could perhaps be more time-consuming than some of the other minor inquiries listed here – though this will depend on what Private Bill system is put in place and how easily adapted it is to accommodate Hybrid Bills. In any case, it is difficult to see how this inquiry could be undertaken until at least the general shape of any new Private Bill process has been agreed.

Admissibility of petitions

37. The Public Petitions Committee (PPC) has recently concluded a consultation on its proposals to seek a change to Rule 15.5 of the Standing Orders to limit the resubmission of public petitions within a specified timescale. The PPC has also consulted MSPs on its proposals to prevent MSPs from lodging petitions
in their own name and may also seek a similar change to the relevant Rules on this issue.

38. The PPC is scheduled to consider a report on its consultation at its meeting on 19 January 2005. Should the PPC subsequently agree to recommend changes to the Standing Orders, it may be in a position to do so after the recess in February 2005.

39. Given that this inquiry is likely to be short (probably requiring only a single evidence session with the Convener of the PPC), it is suggested that the Committee agree to undertake this work at the earliest convenient opportunity thereafter.

**Remit of the Finance Committee**

40. It is understood that a formal request may be received shortly from the Finance Committee to extend its remit to cover that part of the portfolio of the Minister for Finance and Public Service Reform that deals with the civil service. If such a request was made, it would be unlikely to require a large investment of Committee time to consider.

**Allocation of non-Executive business in the Chamber**

41. Dennis Canavan requested, in a letter to the Committee in October 2003, an amendment to Rule 5.6.1(b) to the effect that independent MSPs be included among those entitled under that Rule to a share of the 16 half sitting days in the Chamber each Parliamentary year. That issue has now been superseded by events to the extent that Mr Canavan and the other independent MSPs are now formally represented in the Bureau through the Independents Group, and so entitled to a share of those half sitting days. The underlying issue could, however, still be considered should the Committee (and Mr Canavan) wish to pursue it.

**Parliamentary debating time**

42. The Committee will need to secure Parliamentary debating slots, probably in February or March, for the review of oral questions and for the Commissioner for Public Appointments inquiry. Debating time for the Private Bills inquiry is not likely to be needed until later in the year.

43. Appropriate applications will be made by the Convener, usually through the Conveners’ Group (which allocates Committee half days), and dates of debates will be advertised to members as far ahead as possible.

**External research**

44. In considering how to approach the major inquiry topics, the Committee may wish to look at whether it would be worthwhile commissioning external research, or civic participation events. Minor inquiry topics are less likely to warrant such activities.
45. In terms of Sewel motions, there is already a substantial amount of research information available – SPICe briefing and statistical data, submissions received by the previous Committee, study mentioned above, and other published (or forthcoming) academic papers.

46. The Committee may consider that the review of the Parliamentary week could provide the opportunity for wider consultation with external organisations and the general public. If so, it would be worth identifying any research need as far ahead as possible, as there is a long lead-time involved in applying for the relevant funding and then commissioning appropriate research.

Schedule of meetings

47. The Parliament will resume after the Christmas recess on Monday 10 January 2005. The current allocation for meetings of the Committee is as follows:

- Tuesday 18 January
- Tuesday 1 February
- Tuesday 1 March
- Tuesday 15 March
- Tuesday 12 April

48. Members are invited to put these dates in their diaries. Where any change of day is required, as much advance notice as possible will be given. It is expected that most Procedures Committee meetings will continue to take place in Committee Room 6, but members should check each agenda for confirmation of venue.

Recommendation

49. The Committee is invited to:

- agree which major inquiry to initiate after the February recess, in place of the current oral questions review;
- agree to undertake the various minor inquiries listed;
- consider whether to embark upon any external research activities or civic participation events in relation to any of its new inquiries; and
- note the schedule of forthcoming meetings.
PROCEDURES COMMITTEE

Sewel motions – recent developments

Note by the Clerk

1. Members may be interested to note a number of recent developments in public discussions about the Sewel convention.

House of Lords Constitution Committee reports

2. The above Committee published a major report in December 2002 on *Devolution: Inter-institutional relations in the United Kingdom* (2nd Report, 2002-03) which commented adversely on some aspects of the Sewel process, and made a number of recommendations. The two main points were:

- that the nature of consent given is “very often in the nature of a blanket permission – a ‘blank cheque’”; and that something equivalent to the EU “scrutiny reserve” might be worth considering in relation to amendments to Sewel Bills\(^1\); and
- that the process of seeking and conferring consent should be a matter for direct communication between the two Parliaments, and not mediated through the UK Government and the Scottish Executive.

3. The relevant extracts of the report – which refer to evidence taken from Professor Alan Page of the University of Dundee, who has also given evidence to this Committee – are set out in Annexe A. The Government’s response to the report\(^2\) does not comment on the first of these recommendations, and rejects the second, saying that “it is entirely appropriate that the Government and the Scottish Executive should communicate on whether or not to legislate on a devolved matter” (citing the evidence given by the Minister for Parliamentary Business to this Committee).

4. The most recent report of the Constitution Committee is entitled *Devolution: its effect on the practice of legislation at Westminster* (15th Report, 2003-04).\(^3\) This short report is largely informed by a research paper commissioned by the Committee from Professor Chris Himsworth of Edinburgh University (and reproduced in an appendix to the Report). Although the paper covers Scottish, Welsh and Northern Irish devolution and their impact on a range of sometimes technical aspects of Westminster legislation, the Sewel convention is mentioned in a number of places. In particular, the paper says (paragraph 54):

“The Procedures Committee of [the Scottish] Parliament is committed to a further review. It may be that the principal focus will be on the scrutiny of proposals subject to the convention in the Scottish Parliament and its

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\(^1\) The “scrutiny reserve” is a convention applied to the consideration of proposed EU legislation by both Houses at Westminster, according to which the Government undertakes not normally to agree to any such legislation before the two Houses have had an opportunity to consider it.

\(^2\) Command paper Cm 5780, accessible at: [www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_609018.pdf](http://www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_609018.pdf)

\(^3\) Accessible in PDF or HTML ( browsable) formats at: [http://www.publications.parliament.uk/pa/ld/ldelecd.html#reports](http://www.publications.parliament.uk/pa/ld/ldelecd.html#reports)
Committees and on the opportunities for further consideration of Bills by that
Parliament when they are subjected to significant amendment at Westminster.
There are obvious problems here and, almost certainly, scope for
improvement. There have also been concerns expressed at Westminster
about the degree of sensitivity and care shown by that Parliament in the
handling of devolved Scottish business and there is scope for procedural
improvement there as well."

Commentary in the Herald

5. Immediately after the Queen’s Speech at the beginning of the new Westminster
session, the Herald newspaper ran a major front-page story on the number of
Bills likely to require Sewel consent from the Parliament under the heading
"Westminster steamrollers key new laws past MSPs". The article suggested
that “highly sensitive reforms on legal and constitutional issues, gambling,
disabled rights and policing will be rubber-stamped by the Scottish Parliament
using Sewel motions”. A leader article the same day (24 November) argued
that the use of Sewel motions deny MSPs a proper chance to debate
controversial measures and were being used more widely than originally
intended.

6. These articles were followed by an exchange of letters over the next few days,
including one from the Minister for Parliamentary Business (27 January) robustly
defending the Sewel process as a “commonsense approach to getting the best
deal for the Scottish people”. The Minister said that the Executive gives the
Parliament detailed information before asking it to decide, and that the
Parliament sometimes would not be able to legislate itself on these matters
without delaying its own legislative priorities: “By using Westminster Bills, we get
benefits without the delay: it’s a win-win situation.”

Comments by Lord Sewel

7. Around the same time, Lord Sewel commented publicly for the first time, during
a debate on the Queen’s Speech, on the practical operation of the convention
that bears his name (from when he was a junior Minister responsible for steering
the Scotland Bill through the House of Lords). His main points are:

- that while Sewel motions have been used more often than some predicted,
  they have mostly been used appropriately – but should not be used “as a
  means of securing political convenience by avoiding controversy”;

- that there is “a case for radical review of how Sewel motions operate”, and
  that the Parliament could establish a committee to “comment on the
  appropriateness of using the Westminster route for a particular piece of
  legislation”; and

- that the Sewel process is about the relationship between the two
  Parliaments but “has rather unintentionally been hijacked by the Executive
  [i.e. the UK Government and Scottish Executive].

8. The relevant parts of Lord Sewel’s speech are reproduced in Annexe B.
126. We also heard much evidence about the way Westminster continues to legislate for devolved matters in Scotland. As we have noted, the principles governing this were first stated by Lord Sewel in the Lords Second Reading debate on the Scotland Bill, and are now set out in the Memorandum of Understanding. Agreement to Westminster legislating for Scotland is given, as described above (Box 3), in Sewel motions.

127. Professor Page's evidence to us emphasised that Westminster legislation on devolved matters was expected to be rare, but has in fact turned out to be common. To the end of June 2002, there had been 34 Sewel motions. Some bills have been the subject of more than one Sewel motion, while other motions have been passed for bills which have failed to complete their passage at Westminster. Professor Page's explanation for the frequency of legislation emphasised pulls toward uniformity across the UK despite the existence of a Scottish Parliament. These arose from a variety of factors, including electoral expectations, the administration of policies by UK bodies, avoiding 'regulatory arbitrage', applying EU or international law, or simply seeing no good reason why the law should differ between Scotland and other parts of the UK. Professor Page also highlighted reasons why such legislation may be attractive to the Scottish Executive, including the reliance on the UK Government to initiate reforms, avoiding disruption to the Executive's legislative programme for the Scottish Parliament, and avoiding any risk of legal uncertainty about the validity of Scottish legislation.

128. From the point of view of the Executive, we note that the convention offers significant benefits – in particular, enabling legislation to apply to Scotland without having to find legislative time for it.

129. A number of aspects of the operation of the Sewel convention cause us concern. One of these is the nature of the consent the Scottish Parliament gives when it assents to a Sewel motion put before it. It appears to us that this is very often in the nature of a blanket permission – a 'blank cheque' – for the Westminster legislation. If the matter were the subject of legislation before the Scottish Parliament, the Parliament would have several opportunities to consider the bill and propose amendments. When the matter is dealt with at Westminster, the Scottish Parliament receives only the one opportunity to consider the matter. It cannot propose amendments or, it appears, make its consent conditional on desired changes being made to the UK bill. It also gets no opportunity to consider the UK bill again, even if that has been the subject of extensive amendments. (The only circumstances in which the bill will return to the Parliament is if further amendments are made extending to Scotland provisions which did not apply there earlier, as with the Adoption and Children Bill.) From the point of view of the Scottish Parliament there appears to us to be a loss of control over legislation affecting devolved matters when that is made at Westminster, compared with the mechanisms that apply in the Scottish Parliament. The idea that amendments affecting devolved matters should be subject to a 'scrutiny reserve' in a way similar to EU measures, and so require further
approval by the Scottish Parliament was put to us by Professor Page, and is one that interests us.

130. Second, we find it strange that an issue which is fundamentally about co-operation between legislatures has turned in practice into co-operation between executives. The convention itself states that it is for the UK Government to determine whether an approach should be made to the Scottish Executive, and for the Executive to signal whether that consent has been given. That appears to us to be inappropriate.

131. While the UK Government may have a view about whether a Bill affects devolved matters or not, and what action should be taken as a result, we recommend that such communication should be between the UK Parliament and Scottish Parliament, not mediated by the executives at each end.

132. Making such communication a parliamentary and not a government matter would involve considerable changes. Whether those changes should be made and what they should be are of course matters for the Scottish Parliament as well as the UK Parliament to determine. The Committee consider that these would include ensuring that the UK Parliament had access to advice so that it could determine whether a bill affected devolved matters or not. They would also include the establishment of a formal arrangement between the UK Parliament and Scottish Parliament to deal with procedural issues arising from such consent, and enabling the Scottish Parliament more routinely to express its views on amendments made during a bill's passage at Westminster. Such changes would of course also require the Scottish Parliament to make changes to its procedures as well, and improving procedures will require a shared will for the two parliaments to take control of this matter. However, in the interests of promoting a proper separation between the executive and the legislative functions, we think that should be undertaken.
Annexe B: Lord Sewel’s remarks on the use of the Convention

**Lord Sewel:** [...] I want to say a few words—partly in response to the noble Earl [of Mar and Kellie]—about one aspect of devolution that has been the subject of recurrent comment in Scotland: Sewel Motions. The Sewel convention simply states the desired working arrangement between a sovereign Westminster Parliament and the devolved Scottish Parliament so that it is accepted that Westminster would not normally legislate in a devolved area except with the approval of the Scottish Parliament. The passing of a Sewel Motion is the means by which the Scottish Parliament invites the Westminster Parliament to legislate in a devolved area. Sewel Motions are at the interface of the relationship between the two Parliaments—that is the point that must be underlined.

I understand that, thus far, a Sewel Motion has been adopted on slightly more than 50 occasions. The question is: is that more than we anticipated and is it too many? The honest answer is that we did not know. We were looking into a darkened room. We did not know how the arrangements would work in practice. To those who argue that the use of a Sewel Motion inevitably erodes devolution, I say that I do not agree. The basis of the devolved settlement is there, and it is a matter of convenience and judgment when and how often a Sewel Motion is moved. I think that such Motions provide a commonsense way for the Scottish Parliament to use a Westminster route for legislation when it does not consider that there is merit for separate legislation in Scotland, where the issue is basically technical and raises no controversial policy issues, or where, indeed, if the same legislative framework were not in place north and south of the Border, a major loophole or a significant back door would be opened. Clearly, that is relevant when we come to the subject of national security. So, on the whole, I think that the Motions have been used appropriately.

However, I do have a concern, which is that I believe there is an understandable temptation in Scotland to use the Westminster route for legislation that might be controversial and raise sensitive presentational problems. Arguably, the use of a Sewel Motion for the Civil Partnership Bill came close to falling into this category.

A parliament is nothing unless it allows the different voices of the nation to be heard, no matter how uncomfortable that may be to the executive or those in charge of a parliamentary programme. A Sewel Motion should not be used as a means of securing political convenience by avoiding controversy.

The difficulty with Sewel Motions is not the number of times that they are used but the inability of the Scottish Parliament to have anything but a perfunctory involvement in the process. I think that the noble Earl also made that point. Although Sewel Motions mediate the relationship between the Parliaments, they are managed almost entirely by the two Executives. It is the Executive that sets in train the whole process and it is the Executive that decides whether a Bill has been so amended during its passage at Westminster that it goes beyond the terms of the original Motion.
There is a case for radical review of how Sewel Motions operate. I believe it would be preferable if the Parliament established a committee that could comment on the appropriateness of using the Westminster route for a particular piece of legislation. It could then monitor the progress of the Bill through its parliamentary stages at Westminster and reach a view on whether the final outcome delivered the original intention. The decision on whether the legislation should apply to Scotland—this would be a major change in the process—would be taken when the final version of the Bill was before Parliament. That would put Parliament at the heart of the process which is, after all, about the relationship between the two Parliaments but which has rather unintentionally been hijacked by the Executive.

From House of Lords Hansard, 29 November 2004, Debate on the Queen’s Speech, cols 343-4.
PROCEDURES COMMITTEE

Minor Rule-changes

Note by the Clerk

Decisions at times other than Decision Time

1. As members will recall, one of the Rule-changes recommended in the Committee’s last report on *Timescales and Stages of Bills* (7th Report, 2004) is to provide that, where a lead committee report has not been published 5 sitting days before the date proposed for the Stage 1 debate, any member may by motion propose that the debate should still go ahead on that day (new Rule 9.6.3A).

2. The *Timescales* report does not, however, recommend any Rule-change to include decisions on this new category of motion among those decisions that are not taken at Decision Time (under Rule 11.3.1).

3. On reflection, it would be preferable to include decisions on Rule 9.6.3A motions in that list. This is because there may be situations where it would be convenient to make the decision (on whether to proceed with the Stage 1 debate as planned) earlier on the same day allocated for that debate (in practice, this would probably be done immediately before the debate). That would require making that decision straight away, rather than at Decision Time.

4. It is not essential to add decisions on Rule 9.6.3A motion into the list in Rule 11.3.1 to make this possible. The Presiding Officer has a general discretion (under Rule 11.3.3) to allow any decision to be taken at a time other than the default time established under the Rules. But this is a fall-back for the unanticipated situation, and it would not be desirable to rely on this in situations where it is known in advance that a decision before Decision Time will be needed.

5. The Rule-change proposed to address the above point is as follows:

   In Rule 11.3.1, after paragraph (e), insert—

   “(ea) a motion under Rule 9.6.3A that is moved on the day the general principles of the Bill referred to in the motion are to be considered;”

6. It should be noted that the above wording only requires such decisions to be taken straight away where circumstances make that necessary. If the Rule 9.6.3A motion can be moved on an earlier day from the Stage 1 debate, it would be decided at Decision Time as normal.

7. **The Committee is invited to decide whether it wishes to recommend this Rule-change to the Parliament.**
Minor consequential changes

8. The Rule-changes recommended in the *Timescales* report include changes that split the existing Rule 9.8.5 into four separate paragraphs, Rules 9.8.5, 5A, 5B and 5C. However, there are a couple of cross-references elsewhere in the Rules to Rule 9.8.5 which will be rendered technically inaccurate by this change. Unfortunately, the need for consequential Rule-changes needed to correct these cross-references was missed at the time the Rule-changes were being drafted. It would therefore be a good idea to have these additional Rule-changes put in place at the next convenient opportunity.

9. The necessary changes are:

   In Rule 9.21.3, for “9.8.5” substitute “9.8.5C”.

   In Rule 11.3.1, for sub-paragraph (g) substitute—

   “(g) a motion under Rule 9.8.5;
   (ga) a motion under Rule 9.8.5C;
   (gb) a motion under Rule 9.8.6;”.

   [Note: the existing sub-paragraph (g) describes particular motions, but this was necessary only in the context of a large Rule 9.8.5 which referred to a number of different motions, to ensure it was clear which of those motions Rule 11.3.1 applied to. Now that Rule 9.8.5 has been split into separate, smaller Rules, it is sufficient to list the motions under those Rules in Rule 11.3.1, as proposed above.]

10. Separate Rule-changes (to Rule 9.6.2) recommended in the *Timescales* report has the effect that provisions in Bills conferring power to make subordinate legislation are no longer referred to the Subordinate Legislation Committee – instead the Committee is directly required to consider those provisions (i.e. without prior referral being needed).

11. However, a minor consequential amendment is needed to Rule 9.16 (Budget Bills). The 3rd sentence of paragraph 3 of the Rule currently reads “If the Bill is referred to the Subordinate Legislation Committee under Rule 9.6.2, that Committee shall report to the Parliament on the relevant provisions before Stage 3”. This should now be amended as follows:

   In Rule 9.16.3, in the third sentence, for “referred to” substitute “considered by”.

12. The Committee is invited to agree to recommend these Rule-changes to the Parliament.
LETTER FROM THE INDEPENDENTS GROUP

[Note by the Clerk: The Senior Assistant Clerk and I attended the Independent Group’s weekly group meeting on 8 December and the SSP group meeting on 14 December to outline the background to the current inquiry and the issues still remaining to be resolved.]

Firstly on behalf of the other Members of the Independents Group, may I thank both you and Jane for listening to our gripes so patiently.

As promised, what follows is précis of our Group’s view on the matter of Oral Questions.

- Our preferred option is to split Question Time over two days, with themed questions taken on a Wednesday and general questions taken on a Thursday.

- General questions should follow immediately before First Minister questions.

- General and First Minister questions should return to an afternoon slot.

- A system of balloting members should be adopted, preferably two weeks ahead of the relevant question time, giving the Member a further week to identify and lodge the specific question that they wish to ask.

- If a Member is successful in one ballot in any given week, they should then be removed from the ballot for the other Question Time slots on that same week.

- We agree that the overall number of questions in any category should be reduced, giving questions further down the list more chance of being reached.

- We agree, with some reservation, that the Presiding Officer should have some scope to ‘group’ questions in a given category that may not necessarily be concurrent on the Order Paper, to allow a smoother flow of questioning to the Minister. However, we would be concerned if this stopped questions near the top of any list from falling through lack of time.

- Finally, whilst not being subject to review at the moment, the Group would like to highlight its concern at the form of FMQ’s. There is
disquiet that the opposition party leaders are allowed to offer 'open-ended (diary) questions' whilst back-bench MSPs are required to ask specific questions, which then are vetted and selected by the Presiding Officer.

- The Group’s preferred and strongly held view is that FMQ’s should be consistent in that all the questions asked should either be open-ended, as they are for the party leaders, or indicative as they are for back-benchers. The consensus view was that FMQ’s should also be balloted. There was also a view that the allocated time given to the opposition leaders was disproportionate to the overall time allotted for FMQ’s and that the style adopted by Westminster, for Prime Minister’s Questions, was a far better model.

Once again, the Group thank you for your time and we would hope that we will have the opportunity to continue our dialogue on other matters in the coming year.

Margo MacDonald MSP
On behalf of the Independent Group
10 December 2004

LETTER FROM THE CONSERVATIVE GROUP

I refer to the submission made by Jamie McGrigor MSP with regard to a format for Ministerial Question Time in the future and I am writing simply to confirm that Mr McGrigor’s submission is on behalf of the Conservative Group and has our full agreement.

Bill Aitken MSP
On behalf of the Conservative Group
15 December 2004

LETTER (BY E-MAIL) FROM THE SSP

On behalf of the SSP I wish to thank you and Jane for your visit to our group meeting yesterday. Please find below our response:

In the SSP’s view the reorganisation of Ministers’ and First Ministers Questions (FMQ) should take place each Thursday from 2 - 3 p.m. (Ministers’ Questions) and FMQ from 3 - 3.30 p.m. This retains 4 1/2 hours for debating within the chamber: 3 hours in the morning and 1.5 hours in the afternoon.
However, such a change would ensure Questions to both Ministers and FMQ would be more of a parliamentary highlight and guarantee better attendance and attention on this weekly, 90-minute session. Both selected backbenchers AND very highly paid Ministers would have to raise their performance accordingly.

The one hour session of Minister's Questions should return to a generalised theme and selection of Members instead of questions two weeks in advance should be applied for at least a six-month period as long as similar proportionality as is presently applied can be guaranteed. Members then have the opportunity one week before question time to lodge topical, appropriate and locally relevant questions to whichever Minister necessary. This approach delivers no loss to general debating time but significantly improves the importance of and attention paid to Questions to other Ministers.

Tommy Sheridan MSP
On behalf of the SSP
15 December 2004
Thank you for your letter of 15th November 2004 regarding ticketing for the public gallery. I must apologise for the delay in responding. As you may know, we have had over 141,000 visitors to the Parliament since we opened and the Visitor Services team is not yet up to full strength.

We are reviewing the ticketing arrangements for the Debating Chamber public gallery with a view to implementing a revised arrangement from after Easter recess 2005. We will feed the Procedures Committee’s views into this.

I am sure that the Committee may appreciate that one of the issues with timed tickets is the current timing of FMQT at 12 noon on a Thursday. As FMQT is a consistently popular item of business, this does lead to the current effect of empty galleries earlier in the morning as most people are coming mainly for FMQT. Under the likely revised system, it will create a need to clear the gallery of visitors who come in for the earlier business so that the people with tickets for FMQT can be allocated their seats.

Further information about the revised system of ticketing will be published on SPEIR and will be publicised to Members in good time for advance bookings to be made.

Rosemary Everett
Head of Visitor and Outreach Services
15 December 2004
PROCEDURES COMMITTEE

Freedom of information

Note by the Clerk

1. As you are probably aware the Freedom of Information (Scotland) Act comes fully into force on 1 January 2005 and from that date the Parliament can expect to receive requests for information under the Act.

2. This note is simply to request that if you receive any requests for information that relate to the Procedures Committee, please could you forward them to me or Lewis McNaughton as soon as possible after you receive them. This is important because we are bound to respond within 20 days of having received a request, and the clock starts running from the date that you received the request.

3. A request for information under the Act does not have to be flagged as such, so, if in doubt please forward the request to me in any case.

4. Under the Act decisions on how to handle requests are delegated to a number of ‘decision takers’. For the Parliament’s Committees the Clerks to the Committees have been designated as the decision takers and will handle all requests. This arrangement has been endorsed by the SPCB.

5. Members interested in further information about the Act should consult, in the first instance, the FOI pages on the Parliament’s intranet: Organisation > Corporate > Other teams > Freedom of information. – or contact Lewis or myself.
Present:

Mr Richard Baker
Cathie Craigie
Jamie McGrigor
Mark Ballard
Karen Gillon (Deputy Convener)
Iain Smith (Convener)

The meeting opened at 9.32 am.

1. **Item in private:** The Committee agreed to take item 5 in private.

2. **Private Bills:** The Committee took evidence from—

   Alison Gorlov, partner, John Kennedy & Co., and Ian McCulloch, partner, Bircham Dyson Bell, on behalf of the Society of Parliamentary Agents; and

   Tom Adam, Clackmannan Railway Concern Group (objectors to the Stirling-Alloa-Kincardine Railway and Linked Improvements Bill).

3. **Commissioner for Public Appointments:** The Committee took evidence from—

   Karen Carlton, Commissioner for Public Appointments in Scotland.

The Committee agreed that statutory consultation documents issued by the Commissioner should be laid before the Parliament and referred to a committee, and that the committee’s report should be debated in the Parliament; that reports of non-compliance with the code of practice should be referred to the same committee and considered in private. It also agreed that the Convener would write to the Standards Committee...
(copied to relevant Ministers) to seek its views on whether that Committee’s remit should be extended to include these functions.

4. **Visit to Dublin**: Members who participated in the fact-finding visit to Dublin in connection with the Private Bills inquiry on 29 and 30 November reported back to the Committee.

5. **Final review of oral questions (in private)**: The Committee agreed to defer decisions on the remaining issues in this inquiry until its next meeting.

The meeting closed at 11.22 am.

Andrew Mylne  
Clerk to the Committee