At its meeting on 28 January the Committee considered its response to the SPPA Committee’s inquiry into the procedures for considering legislation. In so doing, the Committee agreed to draw your committee’s attention to a number of matters impacting upon the ability of the Committee to perform effectively its scrutiny role.

Specifically, the Committee wishes to invite the SPPA Committee to explore five matters.

The Committee’s first concern relates to Rule 9.4A of standing orders which requires the Scottish Government to lodge a delegated powers memorandum when introducing a bill which confers any power to make subordinate legislation.

This rule only obliges the Scottish Government to produce of a memorandum in relation to any provision conferring power to make subordinate legislation, not on other delegated powers. The remit of this Committee is not, however, limited to the scrutiny of subordinate legislation. Rule 9.6.2 sets out the Committee’s role in relation to primary legislation, requiring the Committee to consider and report to the lead committee on those provisions conferring power to make subordinate legislation and providing that the Committee may also consider and report to the lead committee on any provision in such a Bill conferring other delegated powers.

There is therefore an inconsistency between what the Scottish Government is obliged to explain in its delegated powers memorandum and what this Committee may report upon.

Delegated powers memoranda very rarely contain any information on delegated powers other than on those conferring powers to make subordinate legislation. This means that almost every time a bill contains other delegated powers the Committee is required to write to the Scottish Government seeking an explanation of those other delegated powers. As such, the Scottish Government has already to explain these other powers just not in the context of the delegated powers memorandum.

The Committee therefore invites the SPPA Committee to explore whether a change to Standing Orders requiring the Scottish Government to explain all delegated powers in their delegated powers memoranda would be beneficial.

In addition, insofar as Rule 9.4A is concerned, the Committee invites the SPPA Committee reflect on the fact that only the Scottish Government is obliged to produce a delegated powers memorandum in support of a public bill. Currently non-government members or committees who introduce public bills are not obliged to produce a delegated powers memorandum. In practice where delegated powers have been contained within non-government bills then a delegated powers
memorandum has more often than not been supplied. It should be noted, however, that delegated powers within non-government bills have been relatively rare. Furthermore it should be noted where delegated powers have been contained within non-government bills and a delegated powers memorandum has been supplied it has mostly been in relation to bills supported by the non-government bills unit.

If a delegated powers memorandum is not supplied then the Committee has to write to the Member asking for an explanation of the power.

For the purposes of clarity and to assist the DPLR Committee in its role it might be helpful to amend standing orders to extend the obligation to produce a delegated powers memorandum to anyone introducing a public bill.

At the same time, however, this would impose a further obligation on non-government members wishing to introduce bills. It is unlikely that this further obligation will have an impact on those members being supported by the non-government bills unit, but it might have an impact on those members not so supported. Indeed providing this document in addition to the documents that members are already obliged to provide might deter some members from introducing a bill.

The Committee therefore invites the SPPA Committee to explore whether it would be beneficial to amend standing orders to require all public bills containing delegated powers to be accompanied by a delegated powers memorandum.

The Committee’s next concerns relate to its role between stages 2 and 3. Where a bill has been amended at stage 2, so as to insert or substantially alter provisions conferring powers to make subordinate legislation, the Committee is obliged to report to the Parliament on those provisions. At that juncture the Committee may also consider and report on any new or substantially altered provisions conferring other delegated powers. This is provided for at rule 9.7.9.

The Committee’s concerns, however, relate to rule 9.7.10. Rule 9.7.10 is as follows—

“10. Where a Government Bill is to be considered by the Delegated Powers and Law Reform Committee under paragraph 9, the member in charge shall lodge with the Clerk, not later than the end of the second week before the week on which Stage 3 is due to start, a revised or supplementary memorandum setting out, in relation to each provision of the Bill conferring a power to make subordinate legislation which has been inserted or substantially altered at Stage 2, the information referred to in Rule 9.4A.1. The Clerk shall arrange for the revised or supplementary memorandum to be published.”

Insofar as this rule is concerned, the Committee invites the SPPA Committee to consider two matters.
Firstly, for the purposes of consistency, the Committee invites the SPPA Committee to explore whether there would be value in extending the obligation to produce a revised or supplementary delegated powers memorandum to any person lodging a public bill and not just the Scottish Government.

The Committee also invites the SPPA Committee to reflect upon the timeframe in which the revised or supplementary delegated powers memorandum is to be supplied. As it stands, if the required timeframe is strictly observed then the revised or supplementary delegated powers memorandum will be lodged on the Friday of the second week before the week on which the stage 3 is to take place. Lodging the memorandum at this time almost precludes the Committee from considering it the following week meaning the Committee will almost inevitably be considering the memorandum after the stage 3 deadline for amendments has passed. This means that the Committee’s report on the bill after stage 2 will not be available to inform members prior to the deadline, and should any member wish to lodge an amendment on the basis of the report it would have to be done as a manuscript amendment and it would be up to the Presiding Officer as to whether to admit it.

In practice, memorandums are often lodged earlier, so as to give the Committee an opportunity to consider them in advance of the stage 3 deadline. However, even with this early provision of a revised or supplementary delegated powers memorandum the time between stages 2 and 3 is still often so short and the changes to the bill so complex that the Committee is unable to consider the bill before the stage 3 deadline.

The minimum time period between stages 2 and 3 is 10 sitting days as expressed at rule 9.5.3B. It is not uncommon for this minimum period to be observed.

Within the constraints of this minimum time period it is not possible to extend the time available to the Committee to consider a revised or supplementary delegated powers memorandum. As such, to allow for greater time to be made available to the Committee, the Committee may wish to invite the SPPA Committee to explore whether the minimum time period between stages 2 and 3 should be extended.

Even with an extension to the minimum time period, however, it would still be necessary to extend the time prior to the stage by which a supplementary or revised delegated powers memorandum must be supplied to provide the Committee with the necessary additional time to scrutinise the bill after stage 2. Changing the minimum period between stages 2 and 3 alone would not resolve the Committee’s problems as regards rule 9.7.10 in terms of the period before stage 3 by which a supplementary or revised delegated powers memorandum must be lodged.

In effect, to enable the Committee to have more time to scrutinise bills after stage 2, the minimum time period between stages 2 and 3 needs to be extended and the time before the stage 3 by which a revised or supplementary delegated powers memorandum must be lodged needs to be extended.
Mindful of the implications of a minimum time period for this Committee, in order to allow the Committee to have sufficient time to consider bills after stage 2, the Committee invites the SPPA Committee to explore whether it would be beneficial to extend the period between stages 2 and 3 and in turn the time before stage 3 by which a revised or supplementary delegated powers memorandum must be lodged.

The final matter which the Committee wishes to highlight is with regard to transitional provisions. This is a matter which you may consider to be outwith the parameters of this inquiry, but it is an issue that the Committee would wish to nonetheless highlight.

When legislation is amended or replaced, provisions are often needed to deal with the transition from the old law to the new law. These are called transitional provisions. There have been two recent examples of transitional provisions where the Parliament and Government have not got them right. Persons affected by them have had to apply to the courts to determine the intended effect of the provisions.

In light of these instances, the Committee agreed with the Government a series of measures to seek to avoid any future such instances.

Specifically, it was agreed that commencement orders containing complex transitional provisions would be accompanied by policy notes. This was not previously the case and has assisted both this Committee and the lead committees in scrutinising these provisions.

In addition, the Government also sought to increase the time available to the Parliament to scrutinise such commencement orders before they come into effect, by agreeing to give the Parliament the full 40 days before the provisions come into force in which to scrutinise them.

While this Government has made these commitments they are not prescribed and as such future administrations need not necessarily observe them.

While these matters are concerned with secondary legislation, they are more generally about the legislative process of transferring from one legislative regime to another. As such, these matters could be considered to be within the auspices of this inquiry.

**Mindful of the problems that have arisen in relation to transitional provisions, the Committee invites the SPPA Committee to reflect upon whether provision should be made for these commitments in standing orders.**

The Committee would be very grateful if the SPPA Committee would take the opportunity afforded by this inquiry to explore the matters set out above.

If I or the Committee can be of any assistance to you in your deliberations, we would be very willing to assist.