Standards, Procedures and Public Appointments Committee

Standing Order Rule Changes - Legislation

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Standards, Procedures and Public Appointments Committee

1. The remit of the Standards, Procedures and Public Appointments Committee is to consider and report on—
   a. the practice and procedures of the Parliament in relation to its business;
   b. whether a member’s conduct is in accordance with these Rules and any Code of Conduct for members, matters relating to members interests, and any other matters relating to the conduct of members in carrying out their Parliamentary duties;
   c. the adoption, amendment and application of any Code of Conduct for members;
   and
   d. matters relating to public appointments in Scotland.

2. Where the Committee considers it appropriate, it may by motion recommend that a member’s rights and privileges be withdrawn to such extent and for such period as are specified in the motion.

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Introduction

1. This report proposes changes to Standing Orders to implement some of the recommendations in the Committee’s inquiry into legislation procedures. The report also proposes some Standing Order changes for dealing with amendments to private and hybrid bills which adversely affect third parties.

Legislation inquiry

Introduction

2. In March 2015, the Committee published a report on its inquiry into whether the Parliament’s legislation procedures are working effectively. The Committee made a range of recommendations for improving the way the procedures operate.

3. Many of the recommendations do not require any changes to the Parliament’s rules to come into force. The Committee intends to monitor how these recommendations have been implemented to ensure progress is made.

4. However, certain other recommendations require Standing Orders to be amended before they can be implemented.

5. This report sets out the rules which are required to be changed. The detailed justification for each of the changes can be found in the Committee’s previous report on its legislation inquiry.

6. Some suggested changes to Standing Orders can be found at Annexe A. They are explained below.

Deadlines for lodging amendments

7. In its report the Committee recommended a rule change to bring forward the deadline for lodging amendments at Stage 2 by one day, to four sitting days. The time of the deadline should remain at 12 noon.

8. The Committee also recommended a rule change to bring forward the deadline for lodging amendments at Stage 3 by one day, to five sitting days. The lodging deadline on the final day should be brought forward from 4.30pm to noon.

9. The purpose of these changes is to allow more time for MSPs and interested people to understand the amendments properly before a decision is taken on them.

10. The Committee proposes amendments to rules 9.10.2 and 9.10.2A to implement this change.
11. The Committee is also proposing a consequential change to rule 9.10.8. This deals with a scenario where Stage 2 takes place over more than one day and new amendments are lodged for Day 2 just after the marshalled list of amendments for Day 1 is published. This situation may become more common once the lodging deadlines are changed.

12. The Committee considers it would be helpful to clarify which amendments should be included in the marshalled list. The Committee therefore proposes a new rule that for a multi-day Stage 2, the first marshalled list should include only those amendments lodged by the deadline for Day 1 and any amendments to provisions expected to be considered on Day 1 that are lodged as manuscript amendments.

Contents of delegated powers memorandums

13. The Committee proposes a rule change to require a wider range of delegated powers to be explained in the delegated powers memorandum.

14. The Committee believes there is currently an inconsistency in the rules. The rules make reference to the Delegated Powers and Law Reform Committee reporting on the delegated powers in the bill. However Standing Orders do not require the delegated powers memorandum to discuss the delegated powers contained in the bill that are not to be exercised through subordinate legislation.

15. The Committee’s proposed amendment to rule 9.4A.1 addresses this inconsistency. It requires delegated powers memorandums to additionally provide information on provisions conferring power on the Scottish Ministers to make any directions, guidance, or code of practice. The Committee believes this approach strikes a good balance between providing additional useful information, without representing an unreasonable extra burden on the member in charge of the Bill.

16. Consequential changes are also required to rules 9.7.10 and 9.17A.4 which cover revised or supplementary delegated powers memorandums.

17. There are further consequential changes to rules 9.6.2, 9.7.9, 9.21.5 and 9.21.6, which cover the matters which the DPLR Committee is required to report on.

Delegated powers memorandum – all public bills

18. The Committee recommended changing the rules to require all public bills containing delegated powers to be accompanied by a delegated powers memorandum, not just Scottish Government bills.

19. The Committee recommended that a similar change should be made to the rules on producing revised or supplementary delegated powers memorandums.

20. This was a proposal raised by the Delegated Powers and Law Reform Committee. The SPPA Committee concluded that requiring a memorandum would help the work of that committee. At present the DPLR Committee has to ask for information on a bill’s delegated powers, if a memorandum is not produced. If a memorandum
was required under the rules this information would be provided as a matter of course.

21. The Committee is proposing changes to rule 9.4A.1 and 9.7.10 to introduce this change. There is also a consequential change to rule 9.17A.4.

**Deadlines for producing documents**

22. In its report, the Committee recommended changing the deadlines for producing revised or supplementary delegated powers memorandums and revised or supplementary financial memorandums.

23. Currently the deadline for producing these documents is the Friday of the second week before Stage 3 is due to take place. However this can restrict the time available for the Delegated Powers and Law Reform Committee and Finance Committee to look at the memorandums. If Stage 3 takes place on a Tuesday there could be as little as six sitting days.

24. Even if there was a long gap between Stages 2 and 3, this would not in itself create more time. This is because the deadline for publication is calculated with reference to a certain amount of time before the start of Stage 3. The Committee suggested that the deadline for producing the memorandum should be calculated by referring to the date of the end of Stage 2 rather than a certain length of time before Stage 3.

25. The Committee has considered how a new rule might be formulated. The Committee considered whether the rule could simply require the memorandums to be produced a certain number of days following the end of Stage 2. However there would be some downsides to this approach.

26. If this formulation was used, in practice the rule would need to state that the memorandums would need to be produced no more than three days after Stage 2. This is because if the number of days was more than three, under the minimum gap between Stages 2 and 3 it would be difficult for the committees to scrutinise the documents before Stage 3. However, if a three-day deadline is used, this would always give the member in charge of the bill a very limited time to produce the documents even if there was a long gap between Stages 2 and 3. If the gap between Stages 2 and 3 happened to be several months, for example, this could be viewed as unduly disadvantaging the member in charge.

27. The Committee believes that a balance should be struck between allowing enough time to be protected for committee scrutiny and allowing enough time for the documents to be prepared following Stage 2.

28. The Committee proposes an amendment to rule 9.7.8B to provide that the deadline for publishing the revised or supplementary financial memorandum should be whichever is the earlier of (a) the tenth sitting day after the day on which
Stage 2 ends or (b) the end of the second week before the week in which Stage 3 is due to start.

29. In circumstances where there was a long gap between Stages 2 and 3, this would protect a reasonable amount of time for the member in charge of the bill to produce the documents (10 sitting days). However it would also protect more time for committee scrutiny as publication of the documents would not be calculated as a set time before Stage 3.

30. On the other hand, if the gap between Stages 2 and 3 was the minimum of 10 days, the current deadline (publication by the end of the second week before Stage 3) would be more beneficial for committees and would continue to apply.

31. The Committee is also proposing a similar change to rule 9.7.10 on the deadlines for producing revised and supplementary delegated powers memorandums.

32. These proposed new rules mean, in many cases, more time will be protected for committees to scrutinise the revised bill documents. However, crucially, neither the member in charge of the bill nor the committees will be any worse off than under the current rules.

Review

33. The Committee believes that, when considered together, these rule changes will help improve the accessibility of the legislation process and protect more time for scrutiny of bills.

34. The Committee recommends that its successor committee monitors how the rules work in practice to ensure that they are operating as intended. If there are any unforeseen consequences to the new rules, then it would be open to the successor committee to revisit them next session.

Hybrid/Private Bills – amendments which adversely affect third parties

Introduction

35. Following a report by the Forth Bridge Crossing Bill Committee (FCBC) on hybrid bill procedures, the SPPA Committee considered a number of rule changes for hybrid bills, and corresponding rule changes for private bills.

36. At its meeting on 26 September 2013, the Committee agreed a proposed procedure for dealing with amendments which adversely affect third parties. The Committee agreed that the proposed procedure would apply to both hybrid and private bills.
37. The Committee agreed to consult the Scottish Government, Presiding Officer and SPCB on the proposal. The Committee considered the responses received (attached at annexe B) and agreed its overall approach to this procedure at its meeting on 30 January 2014. The Committee then agreed to defer consideration of dealing with amendments which affect third parties until the conclusion of the legislation inquiry, so that any relevant changes to deadlines for lodging amendments could be taken into account.

38. The Committee reported on its legislation inquiry on 20 March 2015. Recommendations relating to deadlines for lodging amendments and minimum intervals between Stages do not impact significantly on this new procedure.\(^i\)

39. This report sets out the procedure proposed by the Committee and draft Standing Order rule changes.

**Rule 9C.14.6(e) - admissibility of amendments**

40. Rule 9C.14.6(e) states that any amendment (to a hybrid bill) which affects a private interest is not admissible if the holder of that interest has not had the opportunity to comment on it. It goes on to say that the hybrid bill committee (at Stage 2) or the Parliament (at Stage 3) should give the holder of the interest “reasonable opportunity” to comment, and then consider the amendment.

41. The FCBC said this means that potential objectors to the amendment should be afforded the same opportunities as objectors at the introduction of a hybrid bill. The potential objectors would need to be informed of the amendment and be supplied with accompanying documents.\(^ii\)

**Procedure proposed by the SPPA Committee**

**Stage 2**

42. The current rule is based on identifying the need to consult new affected parties when an individual amendment is lodged and its admissibility is being determined. Ultimately, it is for the Convener of the hybrid bill committee (or the Presiding Officer (PO) at Stage 3), to determine whether an amendment is admissible. However, this requires the Clerks, in advising the Convener or PO on admissibility, to seek to establish whether each amendment affects new people, who they are, and whether they have been consulted. This is not always practical within the time available for lodging amendments.

43. On that basis, the Committee is proposing to change the rule so that before commencing Stage 2 consideration of amendments, the hybrid/private bill

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\(^i\) The Committee recommended that the deadline for lodging amendments at stages 2 and 3 should be increased by one sitting day and that the minimum gap between stages 2 and 3 should be increased from 10 days to 14 days.

committee would be required to assess whether any amendments lodged would adversely affect any private interests.\textsuperscript{iii} If the hybrid/private bill committee decided that any of the amendments did adversely affect private interests, it would then be required to decide whether any of those amendments had any merit. This would involve considering whether there may be a reasonable case for amending the Bill as proposed – enough of a case, in other words, to justify delaying the passage of the Bill in order to allow the amendment to be fully debated.

44. The application of such a merit test would avoid holding up a bill in the interests of an amendment that is never likely to be agreed to for other reasons, regardless of the views of adversely affected private interests. If the hybrid/private bill committee decided that at least one of the amendments in question (i.e. those adversely affecting private interests) had merit, the whole process of formally debating and deciding on Stage 2 amendments would be put on hold until the holders of the private interests in question had been notified and given an opportunity to lodge objections to the relevant amendments, and until the committee (or an assessor) had taken evidence on any admissible objections lodged and given consideration to that evidence. Any amendments adversely affecting third parties that the committee considered to lack merit would fall.

45. If the hybrid/private bill committee decided that none of the amendments in question (i.e. those adversely affecting private interests) had merit, then all the amendments in question would fall at that point, and the Committee would proceed without further delay to debate and decide on the remaining amendments (i.e. those not adversely affecting private interests).

46. Similarly, if the hybrid/private bill committee decided that none of the amendments lodged adversely affected private interests, then the Committee would proceed without further delay to debate and decide on the amendments in the normal way.

47. For the hybrid/private bill committee to carry out this exercise, a single lodging deadline would have to be set for all Stage 2 amendments (even if the Stage is to be taken over more than one meeting). This would enable the Committee to take a view on all amendments before commencing Stage 2. It is expected that in the majority of cases, there would be no amendments adversely affecting third parties and Stage 2 could proceed as normal. However, this change would mean that if Stage 2 takes place over more than one day, members would not be able to lodge any new amendments between Stage 2 meetings (with the possible exception of manuscript amendments – see below). The advantage of this approach would be that if there are several amendments which adversely affect private interests, they would all be identified at one point and consulted on at the same time, thus minimising the delay in the progress of the Bill.

\textsuperscript{iii} The process outlined here would apply in the context of a Private Bill as well as in that of a Hybrid Bill, but for clarity, the text refers only to “Stage 2” and not also to “Consideration Stage” (the equivalent stage of a Private Bill).
48. The proposed new rules are not overly prescriptive in terms of how any objections should be dealt with by the hybrid/private bill committee. Three main tasks are identified (notification, taking evidence, considering evidence), but the way in which these are carried out will depend on the circumstances. In particular, the new rules allow the committee to decide on what is an appropriate duration of any period for lodging objections (to amendments affecting private interests) – which need not match the 60-day period required when a hybrid/private bill is first introduced. The ECHR requirements allow for an approach based on the specific circumstances of the amendment.

49. In summary, the SPPA Committee is proposing the following approach to Stage 2 amendments to hybrid/private bills which adversely affect private interests:

- There will be a single deadline for all amendments at Stage 2 of hybrid/private bills;
- The hybrid/private bill committee will reach a view on whether any amendments lodged adversely affect private interests;
- If the hybrid/private bill committee decides that one or more amendments do adversely affect private interests, the hybrid bill committee will decide whether the amendments have sufficient merit;
- If the hybrid/private bill committee decides that one or more amendments have such merit, the process of debating and deciding on amendments will be put on hold until those affected have had an opportunity to lodge objections to, and give evidence on, those amendments;
- If the hybrid/private bill committee decides that an amendment does not have merit, the amendment will fall at that point.

Response from the Scottish Government

50. The Committee wrote to the Scottish Government and the SPCB seeking their views on the proposed procedure. The Scottish Government was supportive of the Committee’s proposal for a new procedure. The Minister stated that “it strikes an appropriate balance and will provide a suitable level of discretion to the parliament to determine whether an amendment of this type is reasonable in its wider context”.

51. In its initial response, the Scottish Government sought clarification on whether the Committee's proposal for a merit test rests on (a) whether the amendment affects private interests, or (b) whether it affects private interests and the holder of that interest has not had an opportunity to comment. The Scottish Government also said that it would welcome the opportunity to comment further on the deadline for lodging amendments at Stage 2.

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iv Scottish Government response, Annexe B.
52. The Scottish Government’s request for clarification prompted some further development of the proposed Rule-changes to ensure that any work done before an amendment is lodged to consult those likely to be affected by the amendment can be taken into account, thus minimising the delay to the Bill’s progress that may be required.

Manuscript amendments at Stage 2

53. Consideration has been given to the possibility of manuscript amendments which adversely affect third parties being lodged after the single Stage 2 deadline. Such amendments can only be moved if the Convener agrees.

54. The aim of the approach agreed by the Committee is that any hybrid/private bill should have its progress at a particular Stage put on hold only once. One option would be to remove altogether the facility to lodge manuscript amendments at Stage 2 of a hybrid bill (or Consideration Stage of a private bill). However, the Committee agreed that the facility to lodge manuscript amendments provides necessary back-stop flexibility (e.g. to correct problems spotted only at the last minute), and that it could rely on the Convener not normally to allow manuscript amendments to be moved if they would adversely affect private interests and would require an additional delay to the Bill (i.e. beyond any delay already agreed to by the Committee for consultation on amendments lodged before the deadline).

55. The Committee agreed that guidance should be updated to suggest that the Convener should not normally allow Stage 2 manuscript amendments to be moved if they would adversely affect private interests and require an additional delay to the Bill.

Stage 3

56. Amendments lodged at Stage 3 (or Final Stage) are subject to selection by the Presiding Officer. The PO has full discretion about selection. However, in practice, the PO selects amendments according to general criteria that are set out in published guidance. At present, there are no criteria for selection that are specific to either hybrid or private bills.

57. The Committee is proposing that at Stage 3 (or Final Stage), it would be for the PO to determine during the selection process whether any amendments lodged adversely affect private interests. The criteria for selection could be changed to state that the PO will take this into account when considering whether to select an amendment. It is suggested that there should be a presumption against selecting such amendments given the likely delay which would be caused by the requirement to consult at such a late stage. Should the PO decide, however, to select such amendments, it would be necessary to decide also how long a delay would be appropriate, and it would then be necessary for the Parliament to amend

\^ Scottish Government response, Annexe B.
the business programme accordingly (to defer Stage 3/Final Stage proceedings until after consultation was completed).

58. However, delaying Stage 3/Final Stage proceedings is not a decision for the PO alone. It is a decision of the Parliament (on a Bureau motion) when any particular Stage 3/Final Stage is to take place – and that decision must be taken before the PO is called upon to do selection (which is only done very shortly before those proceedings are due to take place). So any PO decision to select an amendment that would require a delay to Stage 3/Final Stage proceedings would require the Bureau to recommend a new date, and for the Parliament to agree it. In practice the PO would have to take soundings from Business Managers first about the viability of deferring the Stage.

59. If reliance is placed in this way on the existing selection mechanism, there should be no need to reproduce for Stage 3/Final Stage the new procedure outlined above for Stage 2/Consideration Stage. Such a procedure would, in any case, be much less practical at Stage 3 as it would require the Parliament as a whole to consider and reach decisions on whether any of the amendments lodged adversely affect private interests and (if so) whether any have merit. This is the sort of detailed consideration better suited to a committee meeting than to plenary business in the Chamber.

60. The Committee is proposing that there should be an earlier deadline for lodging amendments at Stage 3 (or Final Stage) to allow time for such matters to be dealt with by the Presiding Officer and business managers. An extra week (five sitting days) would allow time for discussions to take place and for the business programme to be adjusted if necessary.

Manuscript amendments at Stage 3/Final Stage

61. Both in relation to hybrid and private Bills, the standing orders permit manuscript amendments to be lodged at Stage 3/Final Stage as well as at Stage 2/Consideration Stage. The discretion whether to allow a manuscript amendment at this Stage rests with the PO, and is separate from her power to select amendments. In line with what is outlined above, should a manuscript amendment that would affect private interests be lodged at Stage 3/Final Stage, it can be presumed that the Presiding Officer would deal with it on the same basis as such an amendment lodged before the deadline – i.e. it would normally be refused, particularly if lodged substantially after the deadline.

62. The Committee wrote to the Presiding Officer about its proposals for handling amendments which adversely affect third parties at Stage 3/Final Stage. The proposals were noted by the PO without making any specific comment.

63. The Committee is proposing that the deadlines for lodging amendments at Stage 3/Final Stage of hybrid or private bills should be five sitting days earlier than at present, as set out in paragraph 60 above. Draft standing order changes are attached to reflect this proposal (to increase the minimum interval between
Consulting on amendments

64. Under the existing rules, the onus is on the member who lodged the amendment to carry out the consultation. However, the Committee agreed that this is unrealistic, as members (and their staff) are unlikely to have either the expertise to prepare appropriate documentation or access to the information required to identify all those likely to be adversely affected by the amendment.

65. The Committee agreed that if the amendments have been lodged on behalf of the promoter or by the member in charge then it is reasonable to expect that person to carry out the notification required (as they did in relation to the Bill as a whole, prior to introduction) and to bear the costs involved. If this resulted in objections (to the amendments) being lodged, it would be for the committee (or an assessor, where one has been appointed) to take evidence from the objectors.

66. For other amendments, the Committee has agreed that the hybrid/private bill committee should carry out the notification on behalf of the member. This would ensure that the relevant affected parties are identified and notified in a consistent way. Having the Committee carry out these tasks would require the direct allocation of Parliamentary resources, but this may not necessarily make this a more expensive option than having the member do it, given that the member would use parliamentary allowances to cover any expense in carrying out this work.

67. To date, no such amendments have been lodged by members. It is therefore not expected that the requirement to notify will arise on a regular basis. Under the proposed procedure, the hybrid/private bill committees would act as a filter for such amendments and only those with a prospect of being agreed to would require notification to be carried out or evidence taken.

Responses from the Scottish Government and the SPCB

68. The Scottish Government was supportive of the proposal for the hybrid/private bill committee to carry out the consultation on amendments not supported by the Scottish Government or the promoter. The Scottish Government also noted that “there may be scenarios in which it might be appropriate for the Scottish Government or sponsor of the Bill to provide assistance” in relation to such amendments.

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\[vi\] The minimum interval is increased from 9 days to 14 days for private bills where the bill has been amended and from 10 days to 15 days for hybrid bills. Corresponding changes have been made to the timescales for a bill being referred back to the Private/Hybrid Bill Committee for further consideration. The deadlines for lodging amendments at Final Stage/Stage 3 have been changed from 3 to 8 sitting days for Private Bills and from 4 to 9 sitting days for Hybrid Bills.
69. The SPCB stated that the responsibility for consulting should fall to the Scottish Government or promoter in a case where the amendment forms part of the overall package that it is inviting the Parliament to authorise, but that it makes sense for the committee to consult third parties in relation to other amendments.

70. The SPCB suggested that the full costs of the consultation should be recovered from the promoter in the case of a private bill. In relation to hybrid bills, the SPCB suggested that, in the case of works bills (where an assessor is appointed), the consultation could be carried out by the assessor, on behalf of the hybrid bill committee. According to the SPCB, it might also be convenient for the assessor to be able to take on this role in relation to private bills. If this were the case, there would be an option for the SPCB to recover the costs of that consultation from the Scottish Government by amending existing determinations. For non-works bills (i.e. where there is no assessor), the SPCB envisaged the consultation being carried out by the Committee and funded by the SPCB.

71. Further to the responses summarised above, the Committee agreed to the proposal for consulting on amendments as set out in paragraphs 65 to 67 above, and to incorporate the suggestion from the SPCB that the assessor could carry out the tasks of notification and evidence-taking on behalf of the hybrid/private bill committee.

72. The attached standing order rule changes reflect the proposal that the hybrid/private Bill Committee may either direct any assessor who has been appointed to carry out the relevant tasks, or may do so itself. Where the tasks are to be carried out by the promoter/member in charge or the assessor, the Committee may specify how they are to be performed, including by specifying who is to be notified and the duration of any objection period. Normal proceedings on amendments cannot take place until the Committee has considered the evidence taken (or received the assessor’s report).

**Conclusion**

73. The Committee recommends to the Parliament the Standing Order rule changes in annexe A (arising from the Committee’s legislation inquiry) and annexe C (relating to hybrid and private bills).
Annexe A: Standing Order Rule Changes – Legislation Inquiry

CHAPTER 9
PUBLIC BILL PROCEDURES

Rule 9.4A Memorandum on delegated powers

In Rule 9.4A.1-

(a) omit “Government”;

(b) after “legislation,” insert “or conferring power on the Scottish Ministers to issue any directions, guidance or code of practice,”.

Rule 9.6 Stage 1

In Rule 9.6.2, after “legislation,” insert “or conferring powers on the Scottish Ministers to issue any directions, guidance or code of practice,”.

Rule 9.7 Stage 2

In Rule 9.7.8B, after “not later than”, insert-
“whichever is the earlier of-
(a) the tenth sitting day after the day on which Stage 2 ends;
(b) ”.

In Rule 9.7.9, after "legislation,” insert "or conferring powers on the Scottish Ministers to issue any directions, guidance or code of practice,”.

In Rule 9.7.10-
(a) omit “Government”;

(b) after “not later than”, insert-
“whichever is the earlier of-
(a) the tenth sitting day after the day on which Stage 2 ends;
(b) ”;

(c) for the words from “setting” to the end substitute “The memorandum shall set 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, and each provision conferring a power on the Scottish Ministers to issue any
directions, guidance or code of practice which has been so inserted or altered,
the information referred to in Rule 9.4A.1. The Clerk shall arrange for the revised
or supplementary memorandum to be published.”.

Rule 9.10 Amendments to Bills

In Rule 9.10.2, for each occurrence of “third” substitute “fourth”.

In Rule 9.10.2A-

(a) for each occurrence of “fourth” substitute “fifth”;

(b) for the final sentence substitute- “Amendments may be lodged until 16:30 on any
day when the office of the Clerk is open, except on a final lodging-day, when
amendments may be lodged only until 12:00.”.

In Rule 9.10.8, after the second sentence insert-“At Stage 2, the list shall include only
those amendments which are lodged prior to the deadline for that week’s proceedings
set out in Rule 9.10.2, together with any manuscript amendments to provisions
expected to be considered in that week.”.

Rule 9.17A Scottish Law Commission Bills

In Rule 9.17A.4-

(a) after “legislation,” insert “or conferring powers on the Scottish Ministers to issue
any directions, guidance or code of practice,”;

(b) omit “in the case of a Government Bill”.

Rule 9.21 Emergency Bills

In each of Rules 9.21.5 and 9.21.6, after “legislation” insert “, or conferring powers on
the Scottish Ministers to issue any directions, guidance or code of practice,”.

[These rule changes implement recommendations of the Standards, Procedures and
Public Appointments Committee arising from their inquiry into the Parliament’s
procedures for considering legislation. Rules 9.4A.1, 9.7.10 and 9.17A.4 are amended
to require a Delegated Powers Memorandum (and revised or supplementary
Memorandum, where appropriate) to be produced for all Public Bills and not just for
Government Bills. Rules 9.4A.1, 9.6.2, 9.7.9, 9.7.10 and 9.17A.4 are adjusted to require
the Memorandum to cover powers conferred on the Scottish Ministers to issue
directions, guidance and codes of practice as well as powers to make subordinate
legislation, and to require the Delegated Powers and Law Reform Committee to report
on these. Rules 9.21.5 and 9.21.6 are altered so as to exempt these powers from
DPLR Committee scrutiny where they appear in an Emergency Bill. Amendments to
Rules 9.7.8B and 9.7.10 alter the deadline for lodging a revised or supplementary]
Financial Memorandum or Delegated Powers Memorandum. This must now be lodged no later than whichever is the earlier of (a) the tenth sitting day after the end of Stage 2 or (b) the end of the second week before the week in which Stage 3 is due to start. Amendments to Rules 9.10.2 and 9.10.2A bring forward the deadline for lodging amendments at Stages 2 and 3 by one sitting day in both cases. Rule 9.10.2A is also amended to require Stage 3 amendments tabled on a final lodging-day to be submitted no later than noon (as opposed to 16:30 at present). A consequential change is made to Rule 9.10.8, to deal with a possible scenario where Stage 2 is to be taken over two days and amendments for Day 2 are lodged just after publication of the marshalled list for Day 1. The change (which will also apply as appropriate where Stage 2 is taken over more than two days) will ensure that there is no requirement to publish a revised marshalled list containing the new amendments, which are not to be taken until the following week in any case. ]
Response from the PO/SPCB

Thank you for your letter of 17 October, seeking my views on your committee’s proposal about amendments to hybrid and private bills.

As you know, the SPCB is the Parliament’s legal personality, and is also responsible for ensuring that its budget is wisely spent. As such, it has an interest in ensuring both that the Parliament’s procedures are robust in relation to potential legal challenges, and that the costs involved in the scrutiny process represent value for money.

In terms of legal challenge, it is clearly important to ensure that our procedures are fully compatible with the European Convention on Human Rights. But it is also important that the procedures are practical and proportionate. The SPCB therefore strongly supports your committee’s aim in reviewing the existing procedures (which apply only in relation to hybrid bills) with a view to finding a more effective way of meeting our ECHR obligations, and to apply any such new procedure to private bills as well.

In terms of costs, I believe it may be helpful to start from the underlying principles before offering a view on the specific approach outlined in your letter.

Legislating is a principal function of the Parliament, and we rightly allocate substantial resources to ensuring that legislation is subject to thorough and considered scrutiny. In the context of making changes to the public and general law, the public interest in having the law improved and developed should be balanced by the need to bear the costs involved – including the cost of taking evidence from stakeholders and the public – from public funds.

With private bills, the starting point has always been different. As these are bills introduced by external third parties seeking to secure a particular right or benefit for themselves as a departure from the general law, there is a strong case for ensuring that the additional costs of handling these bills falls on those promoting them, and not on public funds. Accordingly, the Parliament charges promoters (and, to a much lesser extent, objectors) fees, and expects promoters to reimburse certain identifiable costs – with the intention of making the Parliament’s private legislation process broadly cost neutral in terms of public funds.

Hybrid bills are an intermediate case, in that they are public bills, introduced by Ministers, that impinge directly on the private interests of affected parties. Accordingly, there is no fee for introduction, although the Scottish Government must pay any additional costs associated with the appointment of a hybrid bill assessor. Objectors must pay the same fee for lodging an objection as they would in relation to a private bill. In this way, while most of the cost of scrutinising the bill is paid for from the Parliament’s budget, as it would be for any other public bill, certain additional costs arising from the
need to consider directly the impact on private interests are passed on to the competing parties involved.

Your letter explains that your committee is now proposing the changes to the procedures (at Stage 2 / Consideration Stage) for consulting on amendments to hybrid or private bills that could impinge in new ways on the private interests of third parties.

In particular, it suggests that, rather than requiring the member proposing the amendment to carry out that consultation as a pre-condition for the amendment being deemed admissible, it would be for the relevant Parliamentary committee to consider all the amendments lodged and assess whether there are any that impinge on private interests and whether they also have general merit. If so, the committee would be able to put the scrutiny process on hold for a period long enough to enable a consultation exercise to be carried out on the relevant amendments.

The specific suggestion on which the SPCB’s view is sought is that any consultation required in such circumstances should be carried out by the Scottish Government or the promoter in relation to amendments lodged on its behalf (or with its support), and by the relevant committee in relation to any other amendments.

The SPCB agrees that the responsibility for consulting should fall on the Scottish Government or the promoter in a case where the amendment forms part of the overall package that it is inviting the Parliament to authorise. That is entirely consistent with its existing requirements to consult on the general impact of the bill prior to introduction.

Where the amendment is one that the Scottish Government or the promoter opposes, however, it might be seen as inappropriate or unrealistic to expect it to carry out the relevant consultation. As the role of the committee is already – in this context – to operate in a quasi-judicial context, balancing the competing private interests at stake, we agree it makes sense for the committee also to consult the third parties liable to be affected by whichever amendments are proposed. As you note, it is probably unrealistic to expect such consultation to be carried out by an individual MSP.

Clearly, having committees carry out consultation exercises in the circumstances envisaged carries cost implications for the Parliament. However, we believe, partly for the reasons you outline, that this will arise only rarely, and that the overall cost implications are therefore small. Nevertheless, having an agreed process in place is clearly important to ensure that our procedures are robust and fully compliant with ECHR requirements.

If the bill is a private bill, we can see an argument that – even though it is the Parliamentary committee that undertakes the consultation – it should be the promoter that ultimately bears the cost. As noted above, the Parliament generally expects the promoter to pay for the main costs involved in having a parliamentary committee examine its bill, even where that scrutiny involves asking difficult questions or exploring options to which the promoter may be opposed. There is no obvious reason why this principle should not also be carried over to the costs arising from consultation on amendments that the promoter does not support. We note that the SPCB already has the power, under Rule 9A.2.3(d)(vi), to determine which of its costs should be reimbursed by the promoter – and we may therefore wish to consider at a later stage
(should your proposed changes be agreed to) whether the costs of consulting on amendments should be added to the current determination.

If the bill is a hybrid bill, it is much less obvious that the SPCB should seek to recover its consultation costs in such a way (i.e. from the Scottish Government). As noted above, hybrid bills are treated as a special type of public bill, and the presumption is that the costs of scrutinising them are largely borne by the Parliament. This is reflected in the fact that the SPCB has a more limited ability to recover its costs in a hybrid bill, as opposed to a private bill, context. Specifically, it can recover only the costs associated with the appointment of a hybrid bill assessor – by virtue of the undertaking the Scottish Government must make under Rule 9C.3.2(h)(iv).

Since such an assessor may be appointed only in relation to a “works” hybrid bill (i.e. one to which Rule 9C.1.2 applies), it follows that the SPCB has no mechanism for recovering any of its costs from the Scottish Government in the case of a non-works hybrid bill. For the general reason already indicated, that is not a position the SPCB would wish to change.

However, since the Rules already enable the SPCB to recover an assessor’s costs in the case of a works hybrid bill, it may make sense to ensure – as part of any changes your committee recommends – that this is carried through in the context of the consideration of objections to amendments.

At present, the role of an assessor (whether in the hybrid bill or private bill context) is to consider only the objections lodged to the original bill. Your committee will no doubt wish to consider – should you decide to pursue the changes outlined in your letter – whether the scope of the assessor’s duties might be extended to include consideration of objections lodged to amendments. That would, in turn, allow the SPCB to recover the costs involved in having the assessor consider those objections.

Another option may be to extend the assessor’s role further, so that (in the case of a works hybrid bill, or a private bill) any consultation on amendments not supported by the Scottish Government or the promoter could – if the committee wished – be carried out by the assessor (on the hybrid bill committee’s behalf) rather than directly by the committee. In those circumstances, it would become an option for the SPCB to recover the costs of that consultation from the Scottish Government or the promoter, by amending the existing determinations. (To be clear, the SPCB has not yet taken a view on whether it would wish to amend the determinations in such a way. This is something we would consider only once any amended rules were in place. But it is at least worth noting, for present purposes, that it would have that option should the rules be amended as I have outlined in this paragraph.)

In terms of amendments at Stage 3 or Final Stage, I note the suggestion in your letter that it would fall to me as Presiding Officer to identify whether any of the amendments lodged would affect any private interests and, if minded to select them, whether to seek Bureau agreement to defer the Stage 3 or Final Stage proceedings to allow time for consultation on those amendments.
Response from the Scottish Government, December 2013

Thank you for the Committee's letter of 17 October 2013 seeking the views of the Scottish Government on proposed changes to the procedure for dealing with amendments to private and hybrid bills which adversely affect third parties.

I am grateful for the opportunity to provide the Scottish Government's view on this matter. I am content with the Committee's proposal to introduce a merit test and believe this approach will be an improvement on the current rule. I believe it strikes an appropriate balance and will provide a suitable level of discretion to the parliament to determine whether an amendment of this type is reasonable in its wider context.

One point on which I would welcome clarification is whether the Committee's proposal for a merit test rests on (a) whether the amendment affects private interests, or (b) whether it affects private interests and the holder of that interest has not had an opportunity to comment. My assumption is that it is the Committee's intention to cover scenario (b) in order to avoid introducing an additional hurdle for an amendment which raises no private concerns because the person or persons affected have already been consulted at an earlier stage.

I also note the Committee's recommendation that where this category of amendment has been accepted as admissible, and was not lodged by the Scottish Government or promoter of the Bill, that the hybrid/private bill committee should carry out the consultation on behalf of the member. I am content with that approach in general terms for the reasons that the Committee outlines but would note that there may be some scenarios in which it might be appropriate for the Scottish Government or sponsor of the Bill to provide assistance. I would suggest that this could be considered on a case-by-case basis.

Finally, I note the Committee's ongoing consideration of appropriate lodging deadlines at Stage 2 and Stage 3. Should the Committee proceed with its proposed approach I would welcome the opportunity to comment further on this as the Committee's thinking firms up.

I hope that the Committee will find this response helpful and I would be happy to consider any further issues arising from this potential change to Standing Orders

Response from Scottish Government, December 2015

Thank you for your letter dated 4 December 2015 regarding rule changes in relation to amendments to hybrid and private Bills which adversely affect third parties.

I am grateful for the opportunity to provide the Scottish Government's view on this matter and I can confirm that I am content with the Committee's proposals regarding hybrid and private Bills.

I hope this response is helpful and I would be happy to consider any further recommendations of the Committee's.
Annexe C: Standing Order Rule Changes – Hybrid and Private Bills

RIGHTS OF OBJECTORS TO AMENDMENTS

CHAPTER 9A

PRIVATE BILL PROCEDURES

Rule 9A.7 Stages of Private Bills

In Rule 9A.7.3A(a), for “9” substitute “14”.

In Rule 9A.7.3A(b), for “4” substitute “9”.

In Rule 9A.7.3B-

(a) for “4” substitute “9”; and
(b) in paragraph (a), after “further Consideration Stage proceedings” insert “on amendments”.

Rule 9A.8 Preliminary Stage

In Rule 9A.8.2A-

(a) for “(a) and (b)” substitute “(a) to (c)”;
(b) for “sub-paragraph (b)” substitute “sub-paragraphs (b) and (c)”; and
(c) after sub-paragraph (b) insert-

“(c) to undertake any tasks which the assessor is directed by the Private Bill Committee to carry out under Rule 9A.9.7G.”.

Rule 9A.9 Consideration Stage

In Rule 9A.9.7A, for the words from “consideration” to “begin” substitute “the consideration referred to in paragraphs 7B and 7C is to begin”.

After Rule 9A.9.7A insert-

“7B. Following the end of the period for lodging amendments under Rule 9A.12.2, the Private Bill Committee shall consider whether, in its view, any of the amendments lodged adversely affect private interests.

7C. Where the Committee decides that any amendments adversely affect private interests, it shall consider whether, in its view, any of those amendments have sufficient merit that there is a possibility of their being agreed to after further scrutiny.”
7D. Where the Committee decides that an amendment which adversely affects private interests does not have the merit described in paragraph 7C, that amendment may not be moved.

7E. Where the Committee decides that any amendments which adversely affect private interests have the merit described in paragraph 7C, no amendments (whether or not affecting private interests) may be moved unless the tasks listed in paragraph 7H have been completed in relation to each amendment having such merit.

7F. In the case of an amendment that has been or is to be lodged on behalf of the promoter, the promoter shall be responsible for performing the task described in paragraph 7H(a).

7G. Subject to paragraph 7F, the Committee may direct any assessor appointed under Rule 9A.9.1B to perform any or all of the tasks listed in paragraph 7H, or it may perform any or all of these tasks itself. Where any of these tasks is to be carried out by the promoter or an assessor, the Committee may, to the extent that it considers appropriate, specify the manner in which it is to be performed, including by specifying the persons (or classes of person) to be notified under paragraph 7H(a) and the duration of any period for lodging objections.

7H. The tasks are-

(a) notifying the holders of private interests adversely affected by the amendment of its terms and implications and of how they may lodge an objection to it;
(b) where admissible objections are lodged, taking evidence from objectors and from the promoter;
(c) where such evidence is taken, considering that evidence and reaching conclusions (or, in the case of an assessor, reporting to the Committee with recommendations).

7J. Paragraphs 3 to 6, 7A and 8 of Rule 9A.6, and paragraphs 2 to 4B of Rule 9A.9, apply to objections to amendments as they apply to objections to Private Bills, subject to the modifications contained in paragraphs 7K to 7N.

7K. In Rule 9A.6.5-

(a) sub-paragraph (c) is omitted;
(b) in sub-paragraph (d), for “Private Bill” there is substituted “amendment”.

7L. In Rule 9A.6.7A-

(a) “the objection period” means the period for lodging objections to amendments adversely affecting private interests;
(b) before “at Consideration Stage” there is inserted “to consider amendments”.

7M. In Rule 9A.9.2, the final sentence is omitted.
7N. In Rule 9A.9.3(c), for “Private Bill” there is substituted “amendment”.

**Rule 9A.12 Amendments to Private Bills**

In Rule 9A.12.2, omit-

(a) the second sentence; and
(b) the brackets and the words contained within them.

In Rule 9A.12.2A-

(a) in the first sentence, for “3” substitute “8”; and
(b) omit the second sentence.

For the first two sentences of Rule 9A.12.8 substitute-

“Where notice of amendments to a Private Bill has been given, the Clerk shall prepare, for each day of proceedings on the Private Bill at which amendments are to be considered, a marshalled list of the admissible amendments proposed. The list shall set out the amendments so far as not disposed of in the order in which they are to be disposed of as determined by the Clerk. The list shall exclude-

(a) at Consideration Stage or Reconsideration Stage, amendments which may not be moved by virtue of Rule 9A.9.7D;

(b) at Final Stage, amendments not selected by the Presiding Officer; and

(c) at any Stage, manuscript amendments which may not be moved because agreement has been refused under paragraph 6.”.

**CHAPTER 9C**

**HYBRID BILLS PROCEDURES**

**Rule 9C.9 Stages of Hybrid Bills**

In Rule 9C.9.5, for “10” substitute “15”.

In Rule 9C.9.6-

(a) for “4” substitute “9”; and
(b) in paragraph (a), after “Stage 2 proceedings” insert “on amendments”.

**Rule 9C.10 Stage 1**
In Rule 9C.10.3-

(a) for “(a) and (b)” substitute “(a) to (c)”;
(b) for “sub-paragraph (b)” substitute “sub-paragraphs (b) and (c)”; and
(c) after sub-paragraph (b) insert-
“(c) to undertake any tasks which the assessor is directed by the Hybrid Bill Committee to carry out under Rule 9C.11.10G.”.

Rule 9C.11 Stage 2

In Rule 9C.11.10A, for the words from “consideration” to “begin” substitute “the consideration referred to in paragraphs 10B and 10C is to begin”.

After Rule 9C.11.10A insert-

“10B. Following the end of the period for lodging amendments under Rule 9C.14.2, the Hybrid Bill Committee shall consider whether, in its view, any of the amendments lodged adversely affect private interests.

10C. Where the Committee decides that any amendments adversely affect private interests, it shall consider whether, in its view, any of those amendments have sufficient merit that there is a possibility of their being agreed to after further scrutiny.

10D. Where the Committee decides that an amendment which adversely affects private interests does not have the merit described in paragraph 10C, that amendment may not be moved.

10E. Where the Committee decides that any amendments which adversely affect private interests have the merit described in paragraph 10C, no amendments (whether or not affecting private interests) may be moved unless the tasks listed in paragraph 10H have been completed in relation to each amendment having such merit.

10F. In the case of an amendment that has been or is to be lodged by the member in charge, the Scottish Government shall be responsible for performing the task described in paragraph 10H(a).

10G. Subject to paragraph 10F, the Committee may direct any assessor appointed under Rule 9C.11.3 to perform any or all of the tasks listed in paragraph 10H, or it may perform any or all of these tasks itself. Where any of these tasks is to be performed by the Scottish Government or an assessor, the Committee may, to the extent that it considers appropriate, specify the manner in which it is to be performed, including by specifying the persons (or classes of person) to be notified under paragraph 10H(a) and the duration of any period for lodging objections.

10H. The tasks are-

(a) notifying the holders of private interests adversely affected by the amendment of its terms and implications and of how they may lodge an objection to it;
(b) where admissible objections are lodged, taking evidence from objectors and from the member in charge;
(c) where such evidence is taken, considering that evidence and reaching conclusions (or, in the case of an assessor, reporting to the Committee with recommendations).

10J. Paragraphs 3 to 6, 8 and 10 of Rule 9C.7, and paragraphs 4 to 7A of Rule 9C.11, apply to objections to amendments as they apply to objections to Hybrid Bills, subject to the modifications contained in paragraphs 10K to 10N.

10K. In Rule 9C.7.5-
(a) sub-paragraph (c) is omitted;
(b) in sub-paragraph (d), for “Hybrid Bill” there is substituted “amendment”.

10L. In Rule 9C.7.8-
(a) “the objection period” means the period for lodging objections to amendments adversely affecting private interests;
(b) before “at Stage 2” there is inserted “to consider amendments”.

10M. In Rule 9C.11.4, the final sentence is omitted.

10N. In Rule 9C.11.5(c), for “Hybrid Bill” there is substituted “amendment”.

Rule 9C.13 Reconsideration of Hybrid Bills
In Rule 9C.13, omit paragraph 5.

Rule 9C.14 Amendments to Hybrid Bills
In Rule 9C.14.2-
(a) omit the second sentence; and
(b) in the final sentence, for “a” substitute “the”.

In Rule 9C.14.3-
(a) in the first sentence, for “fourth” substitute “ninth”; and
(b) omit the second sentence.

In Rule 9C.14.6-
(a) at the end of paragraph (c), insert “or”;
(b) at the end of paragraph (d), omit “; or” and
(c) omit paragraph (e).

In Rule 9C.14.10, for the third sentence substitute-

“The list shall exclude-

(a) at Stage 2 or Reconsideration Stage, amendments which may not be moved by virtue of Rule 9C.11.10D;

(b) at Stage 3, amendments not selected by the Presiding Officer; and

(c) at any Stage, manuscript amendments which may not be moved because agreement has been refused under paragraph 7.”.

[These rule changes are to protect the rights under Protocol 1 Article 1 of the European Convention on Human Rights of those whose private interests may be adversely affected by amendments to a Private or Hybrid Bill. Protocol 1 Article 1 protects the peaceful enjoyment of property. In assessing whether an interference with this right is compatible with ECHR, account is taken of whether those adversely affected by the interference have been given a reasonable opportunity to put their case and whether the proceedings have given due consideration to relevant factors.

The impact of a Private or Hybrid Bill as introduced on the private interests of third parties is already covered in Standing Orders, with a procedure provided for considering the evidence of objectors before firm conclusions are reached. However, the rules applicable to Private Bills contain no similar provision in relation to amendments lodged for Consideration or Final Stage which adversely affect the private interests of third parties. Chapter 9C on Hybrid Bills does contain some provision, but it is very brief and unlikely to be practically workable. These rule changes amend both the Private and Hybrid Bills rules to provide a specific procedure for considering these issues at Consideration Stage/Stage 2, which is set out in new Rules 9A.9.7B to 7N and 9C.11.10B to 10N.

The process requires the Private or Hybrid Bill Committee to decide at the start of Consideration Stage/Stage 2 whether any amendments lodged adversely affect private interests. Where no amendments have such an effect, the Committee will proceed to debate and vote on amendments in the normal way. Where amendments adversely affect private interests, the Committee will decide whether any of them have sufficient merit that there is a possibility of their being agreed to after further exploration. An amendment which fails this test may not be moved. This avoids the need for further procedure on any amendments which the Committee considers have no chance of being agreed to, regardless of their effect on private interests. Where the Committee decides that any amendments do have sufficient merit, no amendments (whether or not affecting private interests) may be moved unless holders of adversely affected private interests have been notified and given an opportunity to object. Where admissible objections are received, further evidence whether written or oral must be taken and considered. Where an amendment has been lodged on behalf of the promoter/by the member in charge, the promoter/Scottish Government is to notify
holders of adversely affected private interests of the relevant amendments and of how they may object. Subject to this duty on the promoter/Scottish Government, the Committee may either direct any assessor who has been appointed to notify potential objectors and scrutinise their evidence, or may do so itself. Where tasks are to be carried out by the promoter/Scottish Government or the assessor, the Committee may specify the manner in which they are to be performed, including the parties to be notified and the duration of the objection period. This procedure should ensure that those whose private interests are adversely affected are consulted in a way which is sufficient in the context of the interests affected and the Bill as a whole. The Committee will be able to consider advice from clerks and legal advisers prior to making decisions under this procedure.

The adoption of this new procedure requires some additional changes. Notably, it is necessary to have a single lodging deadline prior to the start of Consideration Stage/Stage 2, even where that Stage is to extend over a number of Committee meetings. This will enable the Committee to identify all amendments adversely affecting private interests at the start of the Stage, to ensure that proceedings at the Stage need only be delayed once, if at all. The amendments to Rules 9A.12.2 and 9C.14.2 achieve this. The amendments to Rules 9A.8.2A and 9C.10.3 provide for the terms of an assessor’s appointment to require the carrying out of any tasks which the assessor is directed by the Committee to perform under this new procedure. Amendments to Rules 9A.7.3B and 9C.9.6 relate to the situation where Final Stage/Stage 3 is adjourned to enable further Consideration Stage/Stage 2 proceedings to take place, and increase the minimum interval between the adjournment and the commencement of the further proceedings on amendments in Committee, in order to enable the Committee to carry out its filtering role under the new procedure. There are other minor and consequential amendments.

At Final Stage/Stage 3, it is anticipated that the Presiding Officer will not generally wish to select amendments which would adversely affect private interests. However, where there is a wish to select such amendments, protection of the ECHR rights of third parties will require postponement of Final Stage/Stage 3 to enable a similar consultation to be carried out. This would need to be agreed sufficiently in advance. Therefore there needs to be an increased minimum gap between Consideration Stage/Stage 2 and Final Stage/Stage 3, and a single and earlier deadline for lodging amendments prior to Final Stage/Stage 3. The amendments to Rules 9A.7.3A, 9A.12.2A, 9C.9.5 and 9C.14.3 give effect to this. The minimum gap is increased by 5 sitting days, and the deadline for lodging amendments is brought forward by 5 sitting days.]
Annexe D: Extract from minutes

14th Meeting 2015 (Session 4), Thursday 24 September 2015

Inquiry into procedures for considering legislation (in private): The Committee considered a response from the Scottish Government on its inquiry report.

21st Meeting 2015 (Session 4), Thursday 3 December 2015

Decision on taking business in private: The Committee agreed to take items 5 and 6 in private.

Decision on taking business in private: The Committee agreed that its consideration of its draft Stage 1 report on the Scottish Elections (Dates) Bill and its draft reports on Legislation and Hybrid Bills Standing Order Rule Changes should be taken in private at future meetings.

Hybrid Bills (in private): The Committee considered a note by the Clerk and agreed Standing Order rule changes.

3rd Meeting 2016 (Session 4), Thursday 4 February 2016

Decision on taking business in private: The Committee will decide whether its consideration of issues for, and a draft of, its legacy report, a draft report and Standing Order Rule changes on its legislation inquiry, and papers on lobbying, legislation and the Scotland Bill should be taken in private at future meetings.

5th Meeting 2016 (Session 4), Thursday 25 February 2016

Inquiry into procedures for considering legislation (in private): The Committee agreed a draft report and draft Standing Order Rule Changes.