Delegated Powers and Law Reform Committee

Lobbying (Scotland) Bill at Stage 1
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The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.

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Introduction

1. At its meetings on 17 November and 1 December 2015 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Lobbying (Scotland) Bill at Stage 1 ("the Bill")\(^1\). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government has produced a Delegated Powers Memorandum ("DPM")\(^2\) on the delegated powers provisions in the Bill.
Overview of the Bill

3. This Bill was introduced by the Deputy First Minister and Cabinet Secretary for Finance, Constitution & Economy on 29 October 2015.

4. It makes provision to establish and maintain a lobbying register and to publish a code of conduct in order to fulfil the Scottish Government’s objective of increasing the public transparency of elected representatives’ activity. The aim of the Bill is to introduce a measured and proportionate register of lobbying activity.

5. **Part 1** of the Bill makes provision in relation to the core concepts of the registration regime, including the concept of engaging in regulated lobbying and the related concepts of Government and parliamentary functions.

6. **Part 2** makes provision in relation to the framework for the operation of the lobbying register, including duties to register and submit returns of regulated lobbying activity, the content of the register and the role and functions of the Clerk of the Scottish Parliament (“the Clerk”) in operating the register.

7. **Part 3** makes provision in relation to the oversight and enforcement of the regime, including the role of the Clerk, for example, in monitoring compliance and the role of the Commissioner for Ethical Standards in Public Life in Scotland (“the Commissioner”) in relation to complaints. Provision is also made in relation to offences.

8. **Part 4** makes provision in relation to the publication of parliamentary guidance and a code of conduct for persons lobbying MSPs.

9. **Part 5** makes provision in relation to interpretation, the process for making parliamentary resolutions under the Bill, ancillary provision and commencement as well as offences by bodies corporate etc. and the application of the Bill to trusts.

10. **The schedule** sets out communications which are not lobbying for the purposes of the regime.
Delegated Powers Provisions

11. The Committee considered the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provisions:

- Section 24(7) – Direction to the Commissioner
- Section 27(2) – Direction to the Commissioner
- Section 28(8) – Direction to the Commissioner
- Section 43 – Parliamentary guidance
- Section 49 – Ancillary provision
- Section 50 – Commencement

12. At its meeting on 17 November, the Committee agreed to write to the Scottish Government to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the Annex. As a result of this correspondence the Committee agreed that it did not need to draw the following powers to the attention of the Parliament:

- Section 15 – Power to specify requirements about the register
- Section 20 – Power to make further provision about information notices
- Section 24(5)(a) – Direction to the Commissioner
- Section 31 – Direction to the Commissioner
- Section 41 – Power to make further provision about Parliament’s procedures etc.
Recommendations

13. The Committee’s comments and recommendation on the remaining delegated power in the Bill are detailed below.

Section 44 – Code of Conduct for persons lobbying MSPs

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<th>Power conferred on:</th>
<th>the Scottish Parliament</th>
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<tr>
<td>Power exercisable by:</td>
<td>publication of a code of conduct</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>none</td>
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Provision

14. Section 44(1) provides that the Parliament must publish a code of conduct for persons lobbying members of the Parliament. Section 44(2) provides that the Parliament must, from time to time, review the code of conduct and may, if it considers it appropriate, publish a revised code of conduct.

15. Section 44(3) makes clear that in section 44 “lobbying” means making a communication of any kind to a member of the Parliament in relation to the member’s functions. This is therefore wider than “regulated lobbying” with which the rest of the Bill is concerned. The code of conduct may therefore contain provision relating to any other “lobbying” of MSPs, beyond that of persons engaging in “regulated lobbying” as defined in section 1 of the Bill.

Comment

16. The Committee noted that the provision does not include a requirement for persons to comply with or have regard to the code of conduct, and sought an explanation of this from the Scottish Government. The Committee also asked why the Scottish Government considered it appropriate that the Bill does not contain any sanction or enforcement provision in relation to breach of the code.

17. The Scottish Government referred in its response to the recommendation of the Standards, Procedures and Public Appointments (“SPPA”) Committee in its report on lobbying activity’ that the Parliament should introduce a code of practice for those who lobby, to include advice on expected standards of behaviour. The recommendation was that the code of practice should not be binding. Rather it should mirror provisions to be introduced in the MSPs’ Code of Conduct. In the SPPA Committee’s view: “This could prove useful in providing advance notice of what forms of approach would or would not be deemed appropriate”. The Government indicates in its response that it has sought to reflect the SPPA Committee’s views in framing the power in section 44.

18. The Committee considers it highly unusual for a Bill to enable the creation of a code of conduct without a corresponding obligation on persons to comply with, or

alternatively have regard to, that code. In the Committee’s view, the provision which is contemplated in exercise of the power is not properly characterised as a code of conduct, since there is no intention for it to regulate the activity of any persons. Rather it is intended to act as a guide to the behaviour which MSPs and their staff are likely to expect of persons engaged in lobbying. In the Committee’s view the power would accordingly be more appropriately expressed as a power to issue guidance.

19. The Committee is content in principle with the power in section 44. However in the absence of provision requiring persons to comply with or have regard to any such code, the Committee considers it highly unusual for the power to be expressed as a power to publish a code of conduct. In the Committee’s view, the power would more appropriately be expressed as a power to publish guidance.
Delegated Powers and Law Reform Committee
Lobbying (Scotland) Bill at Stage 1, 74th Report, 2015 (Session 4)

1 Lobbying (Scotland) Bill [as introduced] is available at the following website:
http://www.scottish.parliament.uk/S4_Bills/Lobbying%20(Scotland)%20Bill/SPBill82S042015.pdf
[accessed December 2015]

2 Lobbying (Scotland) Bill Delegated Powers Memorandum is available at the following website:
http://www.scottish.parliament.uk/S4_Bills/Lobbying%20(Scotland)%20Bill/SPBill82DPMS042015.pdf
[accessed December 2015]
Annexe

Correspondence with the Scottish Government

On 17 November 2015, the Committee wrote to the Scottish Government as follows:

1. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 17 November and seeks an explanation of the following matters:

Section 15(1) – Power to specify requirements about the register

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<td>Power exercisable by:</td>
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<td>Parliamentary procedure:</td>
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2. Section 15(1) confers power on the Parliament, by resolution, to make provision about Part 2 of the Bill and sets out a non-exhaustive list of the types of provision which may be made in exercise of the power.

3. Section 15(2) provides that a resolution under subsection (1) may modify sections 4 to 14 of the Bill.

4. The Committee asks the Scottish Government for an explanation of the following:

5. The Delegated Powers Memorandum (“DPM”) explains that the purpose of the power in section 15(1) is to provide flexibility in order to ensure the effective operation of the registration regime. A non-exhaustive list provides an illustration of the circumstances in which the power may be exercised. The power also includes, by virtue of section 15(2), the ability to modify sections 4 to 14 of the Bill. Can the Scottish Government explain further why it is considered appropriate for the Parliament to have a delegated power to modify provisions of the Act as passed?

6. Regarding the choice of procedure, why is it considered appropriate that the power in section 15(1) is exercised by parliamentary resolution notwithstanding that it includes provision to modify primary legislation?

7. What further procedural provision is envisaged to be required in the Parliament’s Standing Orders? Why is it considered appropriate that these matters are subject to provision made in the Standing Orders, rather than set out on the face of the Bill?

8. Section 47(2)(b) confers power on the Parliament to make the full range of ancillary provision in a resolution under the Bill. Why is that considered
appropriate? Can the Scottish Government give an example of the sort of provision it is envisaged might be made under the ancillary powers?

9. Section 47(4) of the Bill provides that Part 1 of the Interpretation and Legislative Reform Act 2010 (“ILRA”) is to apply to a resolution as if it were a Scottish instrument. Can the Scottish Government explain the purpose of this provision?

Section 20(1) – Power to make further provision about information notices

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<td>Parliamentary procedure:</td>
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10. Section 20(1) provides that the Parliament may, by resolution, make further provision about information notices issued by the Clerk under section 17 of the Bill.

11. As regards the choice of procedure, the questions raised in relation to section 15 apply equally here. **Accordingly the Committee asks the Scottish Government for an explanation of the following:**

12. What further procedural provision is envisaged to be required in the Parliament’s Standing Orders? Why is it considered appropriate that these matters are subject to provision made in the Standing Orders, rather than set out on the face of the Bill?

13. Section 47(2)(b) confers power on the Parliament to make the full range of ancillary provision in a resolution under the Bill. Why is that considered appropriate? Can the Scottish Government give an example of the sort of provision it is envisaged might be made under the ancillary powers?

14. Section 47(4) of the Bill provides that Part 1 of ILRA is to apply to a resolution as if it were a Scottish instrument. Can the Scottish Government explain the purpose of this provision?

Section 31 – Directions to the Commissioner

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<tr>
<td>Power exercisable by:</td>
<td>direction by Parliament</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>direction by Parliament</td>
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15. Part 3 of the Bill makes provision for the investigation of complaints and reporting to Parliament by the Commissioner as part of the oversight of the registration
regime. Section 31(1) provides that the Commissioner, in carrying out these functions, must comply with any direction given by the Parliament.

16. Section 24(5)(a) empowers the Parliament to specify in a direction classes of case in relation to which the Commissioner is required to report to Parliament in these circumstances.

17. The Committee asks the Scottish Government for an explanation of the following:

18. In relation to the power in section 31, why is it considered appropriate that provision regarding the handling of complaints is dealt with in directions, rather than set out on the face of the Bill?

19. Further, can you give examples of the sorts of cases under which it is envisaged the Parliament might direct the Commissioner not to carry out an assessment of a complaint, or an investigation into a complaint?

20. In relation to section 24(5)(a), in what sorts of cases where a complaint is inadmissible by virtue of the rules in section 23(3) is it envisaged that the Scottish Parliament would direct the Commissioner to report? Why is it considered appropriate to specify these classes of case in directions, rather than on the face of the Bill?

21. What further procedural provision for directions under the Bill, including as regards publication, is envisaged to be required in the Parliament's Standing Orders? Why is it considered appropriate that these matters are subject to provision made in the Standing Orders, rather than set out on the face of the Bill?

Section 41 – Power to make further provision about the Scottish Parliament’s procedures etc.

Power conferred on: the Scottish Parliament
Power exercisable by: resolution by Parliament
Parliamentary procedure: resolution by Parliament

22. Section 41(1) provides that the Parliament must, by resolution, make provision about procedures to be followed when the Commissioner submits a report to the Parliament under Part 3 of the Bill. Part 3 of the Bill sets out the framework for investigation of complaints and reporting to Parliament by the Commissioner.

23. As regards the choice of procedure the questions raised in relation to section 15 apply equally here. Accordingly the Committee asks the Scottish Government for an explanation of the following:
24. **What further procedural provision is envisaged to be required in the Parliament's Standing Orders? Why is it considered appropriate that these matters are subject to provision made in the Standing Orders, rather than set out on the face of the Bill?**

25. **Section 47(2)(b) confers power on the Parliament to make the full range of ancillary provision in a resolution under the Bill. Why is that considered appropriate? Can the Scottish Government give an example of the sort of provision it is envisaged might be made under the ancillary powers?**

26. **Section 47(4) of the Bill provides that Part 1 of ILRA is to apply to a resolution as if it were a Scottish instrument. Can the Scottish Government explain the purpose of this provision?**

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**Section 44 – Code of Conduct published by the Parliament, for persons lobbying MSPs**

27. **Section 44(1) provides that the Parliament must publish a code of conduct for persons lobbying members of the Parliament.**

28. **The Committee asks the Scottish Government for an explanation as to –**

   (a) why it has been considered appropriate that the section does not include requirements for persons to comply with the Code or have regard to the Code; and

   (b) why it has been considered appropriate that the section does not contain any sanction or enforcement provision in relation to a breach of the Code?

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**On 23 November 2015 the Scottish Government responded as follows:**

You wrote to James Hynd on 17 November setting out a series of questions in respect of the Lobbying (Scotland) Bill. This letter offers the Government’s response to each of those queries. Headings relate to relevant paragraph numbers in your letter.

**Paragraph 5**

The Delegated Powers Memorandum (“DPM”) explains that the purpose of the power in section 15(1) is to provide flexibility in order to ensure the effective operation of the registration regime. A non-exhaustive list provides an illustration of the circumstances in which the power may be exercised. The power also includes, by virtue of section 15(2), the ability to modify sections 4 to 14 of the Bill. Can the Scottish Government explain further why it is considered appropriate for the Parliament to have a delegated power to modify provisions of the Act as passed?
In particular the Government recognises – in the case of a legislative regime regulating a new field such as that provided for in the Bill – that it may be necessary to revisit operational aspects of the register in light of practical experience over time. It is principally for that reason that the power in section 15 to make provision about Part 2 is taken. Section 15(2) makes clear that the power may be exercised so as to modify existing provision in sections 4 to 14. For example, the Parliament may, in light of experience, consider it appropriate that the register contain different information about regulated lobbying activity from that contained in section 6.

As noted in paragraphs 16 to 17 of the DPM, this power for the Parliament to make changes to the Bill was included in particular in light of Recommendation 4 of the Parliament’s Standards, Procedures and Public Appointments Committee’s Inquiry Report – that the Parliament must be able to change the new registration system readily if the registration process inhibits engagement with Parliament. The power to amend the Bill is accordingly included, and covers the registration measures in the Bill, comprising most of Part 2 on the lobbying register.

The Government believes that the power is proportionate and appropriate to the particular nature of this Bill. As noted in the DPM, it is precedent in the Interests of Members of the Scottish Parliament Act 2006 where paragraph 10 of the schedule to that Act similarly confers power for the Parliament by resolution to modify the detail of primary legislation. That provision allows the Parliament, by resolution, to make modifications of that schedule (which sets out what interests constitute registrable financial interests for the purposes of the scheme).

**Paragraph 6**

**Regarding the choice of procedure, why is it considered appropriate that the power in section 15(1) is exercised by parliamentary resolution notwithstanding that it includes provision to modify primary legislation?**

As noted in the DPM and above, the decision to confer subordinate power on the Parliament exercisable by resolution rather than on Ministers in the usual way reflects the Standards Procedures and Public Appointments Committee’s Report on proposals for a register of lobbying activity. It expressed the view that “the Parliament must be assured that the new registration process does not inhibit those seeking to legitimately lobby Parliament and Government. The Parliament must be able to change this new system if it considers this is the case.” The power for the Parliament to amend these aspects of the framework of the Bill is conferred in order to achieve that aim.

The precedent in paragraph 10 of the schedule to the Interests of Members of the Scottish Parliament Act 2006 which similarly confers power for the Parliament by resolution to modify primary legislation is noted above.

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The Government note that a parliamentary resolution requires positive affirmation of the support of the whole Parliament for the measures enacted. This would provide a level of assurance of fuller parliamentary consideration of the measures, in a similar way to the affirmative procedure which is common for subordinate powers to amend primary legislation exercisable by the Scottish Ministers.

Paragraph 7

What further procedural provision is envisaged to be required in the Parliament’s Standing Orders? Why is it considered appropriate that these matters are subject to provision made in the Standing Orders, rather than set out on the face of the Bill?

It will be a matter for the Parliament to decide what form of additional procedural provision is necessary and appropriate in relation to the exercise by Parliament of this and other resolution making powers conferred in the Bill. An example, in relation to the resolution making power under paragraph 10 of the schedule to the Interests of Members of the Scottish Parliament Act 2006, is found in Rule 1.8 of the Standing Orders. In particular, that rule provides that such a resolution may be made on a motion of the Standards, Procedures and Public Appointments Committee, and that the Committee must consult other members about the proposed resolution before lodging such motion. Any new provision to be made in Standing Orders could make similar or different provision. By way of example only it could provide for wider public consultation on a draft of any resolution before it is made.

The Bill leaves any further provision to be made in Standing Orders rather than on the face of the Bill. This is in order to provide for flexibility in the arrangements, but also more generally to respect the general position that it is for Parliament to regulate its own internal procedures.

Paragraph 8

Section 47(2)(b) confers power on the Parliament to make the full range of ancillary provision in a resolution under the Bill. Why is that considered appropriate? Can the Scottish Government give an example of the sort of provision it is envisaged might be made under the ancillary powers?

As with the freestanding ancillary power in section 49 of the Bill for the Scottish Ministers, section 47(2)(b) is in recognition of the fact that any exercise of section 15(1) and the other resolution making powers in the Bill, in particular in light of experience over time, may give rise to the need for incidental, supplementary or consequential provisions. There may also be the need to adjust how changes to the regime in the Bill would apply transitionally. It is considered appropriate that such ancillary provision can be made by Parliament in making resolutions under section 15(1) and the other bespoke resolution making powers in the Bill, rather than there being a need to rely on exercise of the section 49 power by the Scottish Ministers. While the Scottish Government recognises the range of different ways in which this power could be used, use of the power would as usual be tightly constrained.
One example of the use of the section 15 power might be that it would allow the Parliament by resolution to alter section 8 of the Bill (duty to register). Section 8 includes for instance the (30-day) timescale for providing the information required. A significant change to section 8 might, for example, need the adjustment of the operation of provision elsewhere in the Bill which is affected by the duty in this section – e.g. section 22(1)(a) on the Commissioner’s duty to investigate. The ancillary power in section 47(2)(b) might in principle be used in connection with those circumstances.

Paragraph 9

Section 47(4) of the Bill provides that Part 1 of the Interpretation and Legislative Reform Act 2010 (“ILRA”) is to apply to a resolution as if it were a Scottish instrument. Can the Scottish Government explain the purpose of this provision?

Part 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”) contains general default provision about the interpretation and operation of Acts of the Scottish Parliament and in particular Scottish instruments made under such Acts. The rules apply to such legislation in the absence of express provision to the contrary therein.

A “Scottish instrument” is defined in section 1(4) and (5) of ILRA and does not include a resolution of the Parliament. By providing in section 47(4) of the Bill for Part 1 of ILRA to apply to a resolution of the Parliament as it applies to a Scottish instrument, resolutions of the Parliament will benefit from the interpretative and other rules in Part 1 of ILRA in the same way as any Scottish instrument, subject to any contrary provision made in such resolutions.

We note for completeness that paragraph 186 of the Explanatory Notes to the Bill contains a typographical error as it describes section 47(5) of the Bill and not, as indicated, section 47(4) which is not currently expressly addressed in the Explanatory Notes. We will address this when the Notes are revised in due course.

Paragraph 12

What further procedural provision is envisaged to be required in the Parliament’s Standing Orders? Why is it considered appropriate that these matters are subject to provision made in the Standing Orders, rather than set out on the face of the Bill?

As set out in answer above to the point raised at paragraph 7 of your letter, it will be a matter for the Parliament to decide what form of additional procedural provision is necessary in relation to the exercise by Parliament of this and other resolution making powers conferred in the Bill. An example, in relation to the resolution making power under paragraph 10 of the schedule to the Interests of Members of the Scottish Parliament Act 2006, is found in Rule 1.8 of the Standing Orders. In particular, that rule provides that such a resolution may be made on a motion of the Standards, Procedures and Public Appointments Committee, and that the Committee must consult other members about the proposed resolution before lodging such motion. Any new
provision to be made in Standing Orders could make similar or different provision. By way of example only it could provide for wider public consultation on a draft of any resolution before it is made.

The Bill leaves further provision to be made in Standing Orders rather than on the face of the Bill. This is in order, again, to provide for flexibility in the arrangements but also to respect the general position that it is for Parliament to regulate its own internal procedures.

Separately, of course, the provision made at section 47(5) to (7) of the Bill – plugging in to section 41(2) to (5) of the Interpretation and Legislative Reform (Scotland) Act 2010 and the Scottish Statutory Instruments Regulations 2011, subject to modifications – provide for parliamentary resolutions under the Bill to be published by the Queen’s Printer in the same way as Scottish statutory instruments, ensuring that they are published in a recognised format and so as to be easily accessible.

**Paragraph 13**

**Section 47(2)(b) confers power on the Parliament to make the full range of ancillary provision in a resolution under the Bill. Why is that considered appropriate? Can the Scottish Government give an example of the sort of provision it is envisaged might be made under the ancillary powers?**

As set out in answer above to the point raised at paragraph 8 of your letter, as with the freestanding ancillary power in section 49 of the Bill for the Scottish Ministers, section 47(2)(b) is in recognition of the fact that any exercise of section 20(1) in relation to information notices, in particular in light of experience over time, may give rise to the need for incidental, supplementary, consequential or transitional provisions. It is considered appropriate that such ancillary provision can be made by Parliament by resolution under section 20(1) and the other bespoke resolution making powers in the Bill, rather than there being a need to rely on exercise of the section 49 power by the Scottish Ministers. While again the Scottish Government recognises the different uses of these powers, their use would as usual be strictly construed.

The Scottish Government is reluctant to speculate about possible exercise of the power, but one example might be if on the introduction of a change to the rules on the period within which information must be provided, transitional provision were desired about how and when that change had effect in respect of on-going cases.

**Paragraph 14**

**Section 47(4) of the Bill provides that Part 1 of ILRA is to apply to a resolution as if it were a Scottish instrument. Can the Scottish Government explain the purpose of this provision?**

The same principles apply for resolutions under section 20 of the Bill as set out in answer above to the point raised at paragraph 9 of your letter.
Paragraph 18

In relation to the power in section 31, why is it considered appropriate that provision regarding the handling of complaints is dealt with in directions, rather than set out on the face of the Bill?

The procedural and other arrangements for Commissioner investigation and report to Parliament under Part 3 of the Bill are based substantially on the equivalent arrangements for Commissioner investigation and reporting to Parliament under the Scottish Parliamentary Standards Commissioner Act 2002. The 2002 Act provides a framework for a system which has been operating successfully for some time now and for that reason in particular it was considered appropriate to adopt that framework in the Bill.

Similar provision is made in section 4 of the Scottish Parliamentary Standards Commissioner Act 2002, enabling the Parliament to issue directions to the Commissioner in relation to the carrying out of the Commissioner’s investigative functions under that Act. As with the 2002 Act, providing Parliament with power to issue directions to the Commissioner about exercise of his function, rather than making provision on the face of the Bill, respects the fact that the Commissioner is required to report the outcome of investigations to Parliament and provides for appropriate operational flexibility.

As with the 2002 Act there is an important limit on the power. While such directions may in principle be of either a general or specific character section 31(3) of the Bill makes clear that a direction under section 31(1) may not direct the Commissioner as to how a particular investigation is carried out.

Paragraph 19

Further, can you give examples of the sorts of cases under which it is envisaged the Parliament might direct the Commissioner not to carry out an assessment of a complaint, or an investigation into a complaint?

A particular example which has been raised in the Standards, Procedures and Public Appointments Committee’s Stage 1 consideration of the Bill concerns the ability of the Commissioner to refer matters raised in complaints to the Clerk for consideration. The power could, for example, in principle be exercised by the Parliament to direct the Commissioner, where the Commissioner considers it appropriate to do so, to suspend consideration of a complaint received and to refer any matter raised in that complaint to the Clerk to seek to informally resolve the matter with the person to whom it relates in the first instance. This might help to ensure that minor or inadvertent oversights are dealt with through informal action between the Clerk and the person to whom they relate, consistent with the overall intention of the oversight and enforcement arrangements in the Bill, ie to ensure that any questions of compliance can be addressed in an effective and proportionate manner.
Clearly other exercises of the power are possible. The Parliament has exercised its power under section 4 of the 2002 Act in a Direction found in Annex 5 of Volume 4 of the Code of Conduct for Members of the Scottish Parliament. It may be that the Parliament considers that it is appropriate to make similar provision in exercise of the section 31(1) power in the context of the Commissioner’s investigations under the Bill.

**Paragraph 20**

In relation to section 24(5)(a), in what sorts of cases where a complaint is inadmissible by virtue of the rules in section 23(3) is it envisaged that the Scottish Parliament would direct the Commissioner to report? Why is it considered appropriate to specify these classes of case in directions, rather than on the face of the Bill?

Again, the procedural and other arrangements for Commissioner investigation and report to Parliament under Part 3 of the Bill are based substantially on the equivalent arrangements for Commissioner investigation and reporting to Parliament under the Scottish Parliamentary Standards Commissioner Act 2002. The 2002 Act provides a framework for a system which has been operating successfully for some time now and for that reason in particular it was considered appropriate to adopt that framework in the Bill.

Similar provision is made in section 7(6) of the Scottish Parliamentary Standards Commissioner Act 2002. As with the 2002 Act, providing Parliament with power to issue directions to the Commissioner about exercise of his function, rather than making provision on the face of the Bill, respects the fact that the Commissioner is required to report the outcome of investigations to Parliament and provides for appropriate operational flexibility.

Again, the Parliament has exercised its power under section 7(6) of the 2002 Act in a Direction found in Annex 5 of Volume 4 of the Code of Conduct for Members of the Scottish Parliament. It may be that the Parliament considers that it is appropriate to make similar provision in exercise of the section 24(5)(a) power in the context of the Commissioner’s investigations under the Bill.

**Paragraph 21**

What further procedural provision for directions under the Bill, including as regards publication, is envisaged to be required in the Parliament’s Standing Orders? Why is it considered appropriate that these matters are subject to provision made in the Standing Orders, rather than set out on the face of the Bill?

As for Parliamentary resolutions under the Bill (on which see for example the above answer to the point raised at paragraph 7 of your letter), it will be for the Parliament to decide what form of additional procedural provision is appropriate in relation to the exercise by Parliament of powers to issue directions under the Bill. An example of

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procedural provision in relation to the direction making powers under the Scottish Parliamentary Standards Commissioner Act 2002 is found in Rule 3A.2 of the Standing Orders. In particular, that provides that such directions shall be given by the Standards, Procedures and Public Appointments Committee and are so given if signed by the Convener of that Committee. Again, while other provision could be made, the Parliament may wish to make the same or similar provision in relation to directions under the Bill.

On publication, the Parliament could also make provision in Standing Orders as to the means of publication of any direction under the Bill. Standing Orders do not currently make provision for publication of directions under the 2002 Act. Rather, as noted in the above answer to the point raised at paragraph 20 of the clerk’s letter, publication of directions under the 2002 Act is dealt with administratively as part of the Code of Conduct for Members of the Scottish Parliament. Where the Bill relates to the activities of persons outwith the Parliament – rather than its Members – a different means of publication may be considered appropriate, for example alongside any parliamentary guidance about operation of the Bill which may in due course be published by Parliament under section 43 of the Bill. That is ultimately a matter for the Parliament, but clearly Parliament will wish to ensure that provision is made for the publication of directions under the Bill in a clearly accessible manner.

In the context of questions regarding publication it is, the Government considers, important to remember that directions under the Bill are by their nature directions to the Commissioner rather than to the public at large. Accordingly, while those engaging with the Commissioner will wish to be aware of them – the directions are in principle different from resolutions under the Bill. It is in these circumstances that, unlike the provision for parliamentary resolutions under the Bill to secure their publication in the same manner as SSIs, no specific provision is made on the face of the Bill for publication of directions.

As with further procedural provision for resolutions under the Bill (on which see again for example the above answer to the point raised at paragraph 7 of your letter), the Bill leaves further provision to be made in Standing Orders or administratively rather than on the face of the Bill. This is also in order to provide for flexibility in the arrangements and more generally to respect the general position that it is for Parliament to regulate its own internal procedures.

Paragraph 24

What further procedural provision is envisaged to be required in the Parliament’s Standing Orders? Why is it considered appropriate that these matters are subject to provision made in the Standing Orders, rather than set out on the face of the Bill?

As noted, the procedural and other arrangements for Commissioner investigation and report to Parliament under Part 3 of the Bill are based substantially on the equivalent arrangements for Commissioner investigation and reporting to Parliament under the Scottish Parliamentary Standards Commissioner Act 2002. The 2002 Act provides a
framework for a system which has been operating successfully for some time now and for that reason in particular it was considered appropriate to adopt that framework.

However, the 2002 Act stopped short of including – or conferring power to make – provision about the procedures to be followed by the Parliament following the Commissioner submitting a report to the Parliament under that Act. Paragraph 11 of the Explanatory Notes to the 2002 Act explains that the 2002 Act does not deal with this “because it is a matter for the Parliament itself by its own internal rules to set out the procedure that is to apply…it will be necessary for the Parliament to make separate provision in the standing orders and the [Code of Conduct for Members of the Scottish Parliament] for the way the Commissioner will make reports to the Parliament and for the procedure that it will follow once the Commissioner has made a report to it…”5.

While again the Government wished to respect the position that it is for Parliament to regulate its own internal procedures, with the appropriate operational flexibility that brings, it considered that it was appropriate that in the context of this Bill the Parliament should be required to make appropriate procedural provision by resolution. That is, as noted above, in recognition of the fact that investigations and reports to Parliament under the Bill will be in relation to the activities of private parties rather than, as under the 2002 Act, the Parliament’s own Members. Provision for procedures to be followed by the Parliament following the Commissioner submitting a report to the Parliament under the Bill will therefore be of direct relevance to such parties. Taken together with the provision in section 47(5) to (7) of the Bill in relation to publication of resolutions in the same way as SSIs, this will ensure that relevant procedural provision is made by the Parliament by resolution and that any such provision is clearly accessible.

Paragraph 25

Section 47(2)(b) confers power on the Parliament to make the full range of ancillary provision in a resolution under the Bill. Why is that considered appropriate? Can the Scottish Government give an example of the sort of provision it is envisaged might be made under the ancillary powers?

As set out in the above answer to the points raised at paragraphs 8 and 13 of your letter, as with the freestanding ancillary power in section 49 of the Bill for the Scottish Ministers, the provision in section 47(2)(b) is in recognition of the fact that the exercise of section 41 in particular in light of experience over time may give rise to the need for incidental, supplementary, consequential or transitional provisions. It is considered appropriate that such ancillary provision can be made by Parliament in making resolution under section 41, rather than there being a need to rely on exercise of the section 49 power by the Scottish Ministers. While again the Scottish Government recognises the different ways in which this power can be applied, use of the power would be strictly construed. They type of provision which could be made would be of a similar nature to that indicated for the other resolutions.

5 http://www.legislation.gov.uk/asp/2002/16/notes/contents
Paragraph 26

Section 47(4) of the Bill provides that Part 1 of ILRA is to apply to a resolution as if it were a Scottish instrument. Can the Scottish Government explain the purpose of this provision?

The same purpose applies for resolutions under section 20 of the Bill as set out in the above answer to the point raised at paragraph 9 of your letter.

Paragraph 28

The Committee asks the Scottish Government for an explanation as to –

(a) why it has been considered appropriate that the section does not include requirements for persons to comply with the Code or have regard to the Code; and

(b) why it has been considered appropriate that the section does not contain any sanction or enforcement provision in relation to a breach of the Code?

As noted in paragraph 2 of the Policy Memorandum, The Bill takes account of the views of the Parliament’s Standards, Procedures and Public Appointments Committee in its Report on proposals for a register of lobbying activity\(^6\). Those views have informed the Government’s approach to the Bill to a significant extent.

Paragraphs 140 to 148 of the Committee’s Report give consideration to a code of practice for those lobbying MSPs. In particular at paragraphs 143 and 144 the Parliament expressed views as follows:-

143. The Committee considers that there is an argument for providing those who regularly lobby politicians with a non-binding code including guidance that mirrors the rules in the MSP Code of Conduct. This could prove useful in providing advance notice of what forms of approach would or would not be deemed appropriate.

144. This form of code would not be a prescriptive set of rules so there is no justification for making it binding. A non-statutory approach also reflects the fact that it is ultimately the responsibility of the MSP to decide whether to meet with people seeking to lobby them, and to be familiar with the binding rules of their Code in deciding which offers to accept.

The Committee went on to conclude in paragraph 148 that:

148. The Committee recommends that the Parliament should introduce a code of practice for those who lobby that includes advice on expected standards of behaviour. This would mirror the rules on lobbying in the Code of Conduct for MSPs.

Particularly in circumstances where the code of conduct relates to those lobbying Members of the Parliament in their capacity as such, the Government has sought to reflect and respect these views in framing the provision in section 43 of the Bill. It is in these circumstances that the section does not include requirements for persons to comply with the Code or have regard to the Code and that it does not contain any sanction or enforcement provision in relation to a breach of the Code.