



Coverage of the Freedom of Information (Scotland) Act 2002

A Submission by WRVS to the Scottish Government's Discussion

December 2008

Summary of WRVS Position

WRVS is a large volunteer-reliant charity with numerous contractual relationships with public authorities across the UK. As such we believe that

- i. the Scottish Government's discussion paper demonstrates a clear understanding of the salient issues
- ii. the most appropriate way to extend coverage of Freedom of Information legislation in Scotland to parties contracted by public authorities is in the terms of a given contract and not in the form of a blanket extension to all such organisations that would bring them automatically within the scope of the law

About WRVS

WRVS is a charity registered in Scotland (SC 038924) and in England and Wales (1015988). It is also a limited company registered at Companies House (2520413). WRVS operates across the UK.

WRVS wants every older person to have the opportunity and choice to get more out of life. We enable older people to do so by delivering practical support through the power of volunteering and working to publicise and address the issues that affect older people. We also provide in-the-field support to the emergency services.

Our many services are entirely reliant on our 55,000 volunteers, 11,000 of whom are in Scotland. These dedicated Scots, men and women of all ages and backgrounds, deliver hundreds of community-based projects including meals on wheels services, good neighbour befriending schemes and community transport initiatives. We have, in Scotland alone, over 200 emergency services teams involving more than 2300 people and well over 50 established hospital operations supporting visitors, patients and staff.

We are a major service provider and, as such, are a party to hundreds of contracts with public sector bodies at all levels throughout the UK. These bodies include the NHS, local authorities, the emergency services (police, fire, ambulance etc) and UK Government.

It is in this context that we are contributing to the Scottish Government's discussion on the coverage of the Freedom of Information (Scotland) Act 2002. Consequently we make no comment concerning Registered Social Landlords or local authority trusts etc.

We feel it is helpful to note that we found the discussion paper to be very clear and comprehensive in its treatment of the salient issues. We are encouraged by the fact that the Scottish Government has such a mature understanding of this area. We trust that its ultimate approach will be similarly well-informed and hope our contribution goes some way to ensuring it.

The Discussion Paper to which this submission is addressed is attached as an appendix.

Preliminary Remarks

Part 3: Functions of a public nature and a service whose provision is a function of a Scottish public authority

Part 4: Appropriateness of extending coverage

We believe that Parts 3 and 4 of the discussion paper are absolutely correct in their analysis of the pertinent issues and the potential approach outlined there is the right one. In particular, we very strongly agree with the points made in paragraph 18 that:

- "it would be impractical and disproportionate to cover bodies holding short term or low value contracts"
- "the case for extending coverage will be less persuasive where a body is answerable to a regulator and is held to a high degree of accountability or where information about a service being delivered through a contractor can be obtained from the relevant Scottish public authority."
- "For...charitable and not-for-profit bodies... the burdens (of being subject to the Act) may be disproportionate."

Main Submission

Part 5: Extension of coverage to contractors

As it is outwith our area of expertise and experience we do not intend our submission to be taken as setting out a view with respect to PFI/PPP contracts (which are a rather unique case), contracts to operate privately managed prisons or contracts to provide prisoner escort services.

Q1: In principle, do you support extending the coverage of the Act to contractors? Please explain your reasoning e.g. do you consider that you are at present unable to access certain information from contractors as they are not covered by the Act?

We do not support extending the coverage of the Act to contractors in the form of a blanket order applying to all. We believe that coverage is best left to the terms of any given contract.

The points made and the case examples given in paragraphs 40 – 42 suggest that there is not currently an ‘information deficit’ and that the contracting public authority either has *or could require to have* all the details necessary for it to deal with Freedom of Information enquiries about a particular contracted provider’s activities.

Q3: Do you agree that the factors summarised in paragraph 33 are relevant in assessing the appropriateness of extending coverage to contractors? Do you think any additional or alternative factors are relevant? Please explain your reasoning.

If the Government ultimately disagreed with our position as set out in response to Question 1 we suggest that, at the very least, coverage should be subject to any given contractual situation being tested against the eminently sensible factors noted in paragraphs 33 and eloquently elaborated upon in paragraphs 34 -45 i.e.

- they* undertake significant work of a public nature
- they* receive significant public funding
- any relevant contract is not short term or low value
- coverage would enhance transparency and accountability; and
- coverage of the contractor would be measured and proportionate

* i.e. a contracted provider

We believe these factors adequately cover what would need to be covered and we have no additional or alternative factors to suggest.

As a charity reliant on volunteers for the delivery of its mission, we feel especially strongly that the amount of resource (both financial and human) that we are bound to divert from the frontline in order to satisfy the manifold reporting requirements imposed upon us both by statute and by consequent public sector bureaucratic processes (the latter of which have been known to require duplication of our effort) is already too high.

To take up the point made in paragraph 40 and use but one example: meeting the requirements of charity legislation in both Scotland and England/Wales is a resource intensive task which, we would argue, provides a wealth of information about our activities which results in a high degree of transparency.

We therefore feel that the points in paragraph 44 are very well made indeed. They do, of course, echo many of those made by Professor Lorne Crerar in his *Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland (2007)* upon which the Scottish Government has already acted to cut the burden of red tape for all sectors.

Q4: Of the 4 proposed options given in Part 4 (no action/self-regulation/improved statutory guidance/one or a series of section 5 orders), which do you consider the best option? Or would some other option or combination of options be preferable? If supportive of an extension of coverage please also state whether you would support an incremental approach to extension as opposed to a ‘big bang’.

As per our argument above we do not see that there is a pressing need for change at this time.

Self regulation is already in operation, albeit informally, but given the level of formal regulation and reporting required of charities by other means (although dependant on their specific activities, this is rarely confined to complying with charity law) we do not consider that it is necessary to set out further guidance on self regulation or to issue further statutory guidance.

If coverage were to be extended using Section 5 we would wish to see it done so on an incremental 'case-by-case' basis and not in any form of 'big bang'.

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Appendix: Scottish Government Discussion Paper - Coverage of the Freedom of Information (Scotland) Act 2002



DISCUSSION PAPER -

COVERAGE OF THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

A discussion paper produced by the Scottish Government. This paper is also available on our website at <http://www.scotland.gov.uk/About/FOI/Coverage>

November 2008

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Executive summary

Overview of the discussion paper

The Freedom of Information (Scotland) Act 2002 (the Act) came into force on 1 January 2005. The Act encourages the development of a more open culture across the public sector. It does so by providing a statutory right of access to information held by Scottish public authorities (including, for example, the Scottish Ministers, local authorities, health boards, doctors and dental practitioners). It also requires public authorities to have a Publication Scheme which specifies the information that they will routinely publish.

The Act currently applies to approximately 10,000 Scottish public authorities. The Act's coverage can, however, be extended to bodies that carry out functions of a public nature and to contractors who under a contract made with a Scottish public authority provide a service whose provision is a function of that authority. This can be done by making an order under section 5 of the Act (a section 5 order) which designates those bodies as a Scottish public authority in relation to those activities for the purposes of the Act. Given that the Act has now been in operation for almost 4 years it is time to consider whether the coverage of the Act is appropriate.

The purpose of this discussion paper is to seek views on possibly making a section 5 order in relation to -

- Contractors who provide services which are a function of a public authority;
- Registered social landlords; and
- Local authority trusts or bodies set up by local authorities.

Concerns about lack of coverage have most consistently been raised with us about these bodies. In particular, the Scottish Information Commissioner is concerned about the public having lost rights to access information from these bodies under the Act as a result of changes in how public services are now delivered. This discussion paper will explore whether this is the case (e.g. to what extent is there an information deficit) and highlight legal and policy considerations related to any extension of coverage.

We would emphasise, however, that these discussions are exploratory. No bodies will be designated in consequence of them. While some exploratory work has been done, and certain preliminary views may be expressed, no decisions regarding an extension of coverage have been made. We therefore welcome all responses which will inform the development of our policy on the coverage of the Act.

One of our considerations is to weigh up the advantages of improved openness against any potentially negative effects on the bodies proposed to be covered. The Government notes that given the current global economic downturn some sectors of the economy are under particular strain and that the effects of recent events will have a wide-ranging impact on both private and public sector organisations. While

wishing to fulfil its commitment to further discuss the possible extension of the Act, the Government is equally committed to ensuring that regulation is measured and proportionate.

In due course, should the Government be minded to extend coverage, further consultation would occur as required by the Act. This consultation would be with the bodies likely to be affected (or their representatives). In addition, business impact assessments would be carried out.

Structure of the discussion paper

This discussion paper is in 7 parts as follows –

Part 1 – explains the purpose of the paper;

Part 2 – describes the legal powers that may be used to extend the coverage of the Act and, in particular, the requirements of section 5 of the Act;

Part 3 – describes a number of considerations we consider relevant in determining whether a body can lawfully be covered by a section 5 order;

Part 4 – describes a number of considerations we consider relevant in determining whether it is appropriate to extend coverage to a body; and

Parts 5 to 7 – respectively describe relevant considerations around a possible extension of the coverage of the Act to contractors, registered social landlords and local authority trusts and bodies. They also contain various questions upon which we seek your views. Please respond to those parts that you consider to be relevant to you or your organisation. In addition, we would welcome any general comments you may wish to make in respect of extension of coverage and the issues we identify below as being central to this discussion.

When and how to respond

This discussion phase is for a period of 8 weeks. We would therefore ask for responses to the questions raised by **12 January 2009**. Please send responses to -

The Scottish Government FOI Unit
GA(N) Victoria Quay
Edinburgh
EH6 6QQ

or email: foi@scotland.gsi.gov.uk

In your response please identify your organisation(s) (if applicable) and provide a contact name and address. If you have any questions or concerns about the process, please contact Andrew Gunn at the above addresses or by telephone on 0131 244 5061. Further information on this process can be found at <http://www.scotland.gov.uk/About/FOI/Coverage> .

A paper summarising the responses received to this discussion paper will be published on our website in due course. Respondee should also note that information provided in responses, including personal information, may be published or disclosed in accordance with the Act, the Environmental Information (Scotland) Regulations 2004 and the Data Protection Act 1998. If you wish your response to be treated as confidential please make that clear and specify why. Given our legal obligations under the aforementioned legislation we cannot guarantee confidentiality.

Part 1

Purpose of the discussion paper

1. The Freedom of Information (Scotland) Act 2002 (the Act) came into force on 1 January 2005. The Act encourages the development of a more open culture across the public sector. It does so by providing a statutory right of access to information held by Scottish public authorities (including the Scottish Ministers, local authorities, health boards, doctors and dental practitioners). It also requires public authorities to have a Publication Scheme which specifies the information that they will routinely publish.
2. The Scottish Government's '6 Principles' underpin our approach to freedom of information (FOI). They are that the Scottish Government –
 - supports FOI as an essential part of open democratic Government and responsive public services;
 - operates within the Act rather than proposes significant changes to it but adjusts the regime where it is necessary and sensible to do so;
 - publishes information proactively wherever possible;
 - maintains the exemptions set out in the Act and in particular to protect 'private space' for Ministers and others to consider advice and reach decisions;
 - maintains effective relationships with the Scottish Information Commissioner and other key stakeholders; and
 - creates and shares information thoughtfully with regard to the principles above.
3. In our view, the Act has been successfully implemented across Scotland. Public awareness of their statutory right to access information is high and Scottish public authorities are generally responding positively to requests. Moreover, in addition to the significant amounts of public information being made available reactively, an increasing amount of information is published proactively. For example, the release earlier this year of the contract for Prison escort services and the regular publication by the Scottish Government of information about Ministerial gifts and travel. That said, given that the Act has now been in operation for almost 4 years, the Government wishes to consider whether the coverage of the Act is appropriate.
4. The purpose of this discussion paper is to seek views from key stakeholders and interested parties on extending the coverage of the Act to -
 - Contractors who provide services which are a function of a public authority;

- Registered social landlords; and
 - Local authority trusts or bodies set up by local authorities.
5. Concerns about lack of coverage have most consistently been raised with us about these bodies. In particular, the Scottish Information Commissioner is concerned about the public having lost rights to access information under the Act from these bodies as a result of changes in how public services are now delivered. This discussion paper will further explore whether this is the case and highlight legal and policy considerations related to an extension of coverage. At the conclusion of this discussion phase Scottish Ministers will form a view as to whether to proceed to formal consultation having weighed the respective arguments for and against extension. As part of that consideration they will also have due regard to the second Principle of FOI referred to above that the Scottish Government will adjust the regime where it is satisfied that it is necessary and sensible to do so.

Part 2

Coverage of the Act and powers to extend coverage

6. The Act already applies to approximately 10,000 Scottish public authorities. They are listed either by name or description in schedule 1 to the Act. Coverage extends, for example, to Scottish Ministers, local authorities and health boards.
7. Schedule 1 can be amended by an order made under section 4 of the Act. However, the scope of the section 4 order making power is limited. It may only be used to add a reference to a body or the holder of any office which is either part of the Scottish Administration or a Scottish public authority with mixed functions or no reserved functions. It may also be used to remove an entry in Schedule 1. An order was recently made under section 4 to add 9 new bodies to the list of existing Scottish public authorities for the purposes of the Act and to remove entries to 11 bodies which are now defunct¹.
8. In addition to the specification of bodies under schedule 1, the coverage of the Act can also be extended to private bodies by making an order under section 5 of the Act. A section 5 order is used to designate a body as a Scottish public authority for the purposes of the Act. That body would then be subject to all of the requirements of the Act.
9. The section 5 order making power may only be used in respect of a body which -
 - appears to the Scottish Ministers to exercise functions of a public nature; or
 - is providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority.
10. Parts 5 to 7 of this discussion paper explore the extent to which, in our view, contractors, registered social landlords, and local authority trusts or bodies might be said to exercise these functions and/or provide services and could be brought within the scope of a section 5 order. They also explore issues around the appropriateness of extending coverage.
11. Any section 5 order must state the specific function of a public nature being performed or the service under a contract made with a Scottish public authority being provided and in respect of which the body is being designated for the purposes of the Act. The Act will not apply to information held by that body for other purposes. It follows that any designation under section 5 will not necessarily cover all the activities of a particular body.
12. It is possible in some situations for a section 5 order to designate a class of bodies (e.g. all registered social landlords) rather than an individual body.

¹ The Freedom of Information (Scotland) Act 2002 (Scottish Public Authorities) Amendment Order 2008.

This would help to ensure a greater consistency of coverage, if considered appropriate.

Part 3

Functions of a public nature and a service whose provision is a function of a Scottish public authority

13. As already explained, a section 5 order can only be made in relation to bodies that either exercise functions of a public nature or are providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority.

14. There is no definition of what constitutes a function of a public nature for the purposes of the Act, either in formal legal terms or by what is commonly understood. There is also very little relevant case law. As such it is not possible to draw any hard and fast rules as to the kinds of legal considerations that will in all circumstances be relevant. Similar difficulties arise in assessing whether a contractor is providing a service whose provision is a function of a Scottish public authority.

15. By way of useful background, however, and in light of relevant case law, we have specified below the factors that we consider generally relevant in making this assessment. However, this is not exhaustive and you may consider there are alternative or further factors which should be taken into account -

- the extent to which the particular functions are derived from or underpinned by statute or otherwise form part of the functions for which the state has generally assumed responsibilities;
- the extent of public funding of the activity;
- whether the functions are of a nature that would require them to be performed by a public authority if the body did not perform them;
- the degree to which the activities of the body are enmeshed with those of the relevant Scottish public authority;
- whether the body exercises extensive or monopolistic powers which it would not otherwise have; and
- the extent to which the body seeks to achieve some collective benefit for the public and is accepted by the public as being entitled to do so.

16. As already stated, however, these are difficult assessments to make and it is not possible to be definitive about the factors that will be relevant in all cases. In practice, a case by case examination will require to be undertaken as regards the legality of bringing any particular activity within the scope of a section 5 order. Of course, only the courts can determine conclusively whether, and the extent to which, a specified activity can lawfully be brought within the scope of a section 5 order.

Part 4

Appropriateness of extending coverage

17. If we were to be satisfied that contractors, registered social landlords, and local authority trusts or bodies could, as a matter of law, be brought within the scope of a section 5 order, we must then consider whether it would be appropriate to extend the Act to them. The advantages of improved openness must be weighed against any potentially negative impacts on the bodies proposed to be covered.

18. In assessing the appropriateness of extending coverage, we consider the following factors relevant. Again, this is not exhaustive and you may consider there are alternative or further factors which should be taken into account –

- the extent to which the body is providing a ‘core function’ of the state. It is proposed that section 5 be used to bring bodies within the scope of the Act only where they are involved in **significant work of a public nature** e.g. the provision of front line services in respect of education, health, transport etc;
- the extent to which a body receives public funding. It is proposed that coverage be extended only to bodies that receive **a significant amount of public funding** including in the form of grants or fees charged for performing a public function;
- with regard to contractors, the length and value of the contract. As already stated, before making any orders under section 5, the Scottish Ministers must consult with the body (or their representative body) in question. Given the time involved in making an order, including consulting with the bodies and approval by the Scottish Parliament, it would be **impractical and disproportionate to cover bodies holding short term or low value contracts**;
- the extent to which coverage would enhance **transparency and accountability**. We consider that the case for extending coverage will be less persuasive where a body is answerable to a regulator and is held to a high degree of accountability or where information about a service being delivered through a contractor can be obtained from the relevant Scottish public authority.
- whether the public have lost rights to access information under the Act as a result of changes in how public services are now delivered, for example, through the use of particular delivery vehicles. Scottish public authorities are increasingly embracing new ways of delivering their functions. One consequence of this is that maybe the information is no longer in the possession of the authority and therefore not amenable to disclosure under the Act. Whilst we do not think that this is the purpose of such arrangements, we consider there should continue to be **public accountability** as regards the delivery of public authority functions.

- the burden of coverage. Improved openness comes at a cost. Resources would need to be directed, amongst other things, to handling requests, putting in place a Publication Scheme and ensuring that records are appropriately managed. It will be important to assess the likely practical implications of extending coverage, including a body's ability to absorb or pass on the costs of complying with the Act. For small businesses, charitable and not-for-profit bodies, amongst others, the burdens may be disproportionate. Equally, contractors faced with any significant increase in costs due to an extension of coverage may become reluctant to bid for public work, decreasing competition for such contracts and adversely affecting prices and the public interest. Any extension of coverage needs therefore to be **measured and proportionate**.

19. When considering the appropriateness of extending coverage, it is important to assess all possible options. As set out below, these include taking no action; improving openness by adopting measures short of extending coverage such as self-regulation and improved statutory guidance; and making one or a series of section 5 orders. This is not intended to be a fully comprehensive list of possibilities and we would welcome additional suggestions to those highlighted here:

- **take no action:** there is always the option of retaining the status quo. Contractors, registered social landlords and local authority trusts or bodies would remain outwith coverage. Consequently, the public would not be able to access information directly from them by exercising rights under the Act. The exploratory discussions may, for example, indicate that adequate accountability already exists in respect of their provision of public functions (for example, where services are provided under contract, contractual and other information may be held by, and requested from, the relevant Scottish public authority).
- **self-regulation by the relevant bodies:** to the extent that contractors, registered social landlords and local authority trusts or bodies carry out activities that could be covered by a section 5 order, they could be encouraged on a voluntary basis to provide information about those activities. A Code of Practice could be put in place that would, for example, set out 'best practice' on the voluntary disclosure of information, including under a Publication Scheme. This could improve openness and transparency without making the bodies subject to the Act and the burdens that might entail. A difficulty with this approach is the issue of enforcement. That said, although the public would not be able to challenge a body's refusal to comply with a voluntary Code by complaining to the Scottish Information Commissioner, if a body is subject to another regulatory regime it may still be required to make information available and operate in an open and transparent manner.
- **improved statutory guidance:** the Scottish Government is clearly of the view that Scottish public authorities must remain duly accountable for the delivery of any functions that they effectively outsource, whether under

contract or otherwise. The purpose of the statutory Code of Practice issued by Scottish Ministers (under Section 60 of the Act) is to provide guidance to Scottish public authorities on the discharge of their functions under the Act. The Code could perhaps be supplemented to provide improved guidance to authorities on the kinds of steps that could be taken to better ensure public accountability e.g. to include provisions in their contracts ensuring that information is made available to the public authority enabling it to respond to a request. This could strike an appropriate balance between the public's right to know and unnecessarily increasing regulatory burden. The Code could also highlight that publicly owned companies within the meaning of the Act² are automatically subject to the requirements of the Act. As a consequence, if a public authority used such companies to deliver their functions, there would be no risk of the public losing rights under the Act.

- **improving access to information by making one or a series of section 5 orders:** Any extension of coverage needs to be measured and proportionate. The issues associated with any extension are complex. They are often likely to require a case by case analysis which may give rise to unanticipated effects, particularly when extension applies to only certain elements of an organisation's functions or services. As such the Scottish Government is minded to favour an incremental approach to any extension of coverage as opposed to a 'big bang'.

² See sections 3 and 6 of the Act.

Part 5

Extension of coverage to contractors

20. The purpose of this part of the discussion paper is to explore the legal and policy considerations around a possible extension of the coverage of the Act to contractors.
21. Contractors may be brought within the scope of a section 5 order and therefore the Act where they exercise functions of a public nature or are providing, under a contract made with a Scottish public authority, any service whose provision is a function of that authority.
22. At present the Act does not apply to contractors but it does apply to the 10,000 or so bodies that have been designated as a 'Scottish public authority' under and for the purposes of the Act³. Those public authorities enter into many contracts. Although not all of those contracts will involve the outsourcing by a Scottish public authority of a service whose provision is a function of that authority, a significant number may do. In principle, therefore a considerable number of contractors could be brought within the scope of the Act.

Legal considerations

23. Part 3 outlines in fairly general terms a range of the factors that we consider relevant in determining whether a body exercises functions of a public nature or is providing under a contract made with a Scottish public authority any service whose provision is a function of that authority. It is clear that the issues are not straightforward and, in practice, it is likely that a case by case assessment would need to be undertaken. However, given that concerns have been raised with us as regards the lack of coverage, in particular of PFI/PPP contractors and the operators of privately managed prisons, we offer our preliminary views on whether such contractors and operators could be covered by a section 5 order and therefore brought within the scope of the Act.

PFI/PPP contractors

24. Many Scottish public authorities have entered into PFI/PPP contracts for the construction, maintenance and cleaning of particular facilities (for example, schools and hospitals). In the vast majority of those cases, the delivery of what may be considered to be the 'core functions' of the authority (for example, the provision of education and health care services) has remained with the public authority.
25. Our preliminary view is that where contracts are for the provision of construction, maintenance or cleaning etc the contractor may not be performing functions of a public nature or providing under a contract made

³ The Scottish public authorities subject to the Act are specified in Schedule 1 of the Act.

with a Scottish public authority a service whose provision is a function of that authority. To the extent that they are not performing such functions or providing such services we are therefore of the opinion that it may not be possible to designate the contractors (in relation to those activities) as a Scottish public authority for the purposes of the Act under a section 5 order. However, as all arrangements are slightly different, detailed consideration would be required, on a case-by-case basis, of the particular functions being performed under contract.

26. The above analysis is more complex the more it can be said that the contractor is performing a 'core function'. So, for example, if a local authority decided to contract out the whole of nursery education to a private contractor, subject to the supervision and control of the local authority, then that is more likely to be regarded as a function which could be captured by a section 5 order. Similarly, in relation to health care, where contracted out arrangements include the delivery of medical care, including diagnosis and treatment, and the supervision and control of patients, the contractor would appear to be exercising functions of a public nature which could be included in a section 5 order. That said, each case will turn on its own facts and so it is not possible to draw any hard and fast rules.

27. We would add that while concerns have focused on the contracting out of functions and services under PFI/PPP contracts, the vast majority of contracts let by Scottish public authorities do not use this mechanism. However, the above analysis also applies to the more traditional forms of contracting as well as to PFI/PPP contracts.

Privately managed prisons

28. The Scottish Government is responsible for operating prisons in Scotland. It discharges this function through the Scottish Prison Service (SPS) which is an Executive Agency of Government. The Scottish Government and SPS are both subject to the requirements of the Act.

29. The previous administration entered into two contracts with private bodies in relation to respectively Kilmarnock and Addiewell prisons (the latter is due to open in December) (Minute of Agreement between the Secretary of State for Scotland and Kilmarnock Prison Services Ltd and Minute of Agreement between the Scottish Ministers and Addiewell Prison Ltd⁴). Under the respective contracts, the contractors are required to design, construct, manage and finance the prison. As discussed above, our preliminary view is that it may not be possible to bring within the scope of a section 5 order, and therefore the Act, those functions carried out by such contractors, in relation to the design, construction and financing of a prison.

30. However, managing a prison is clearly a function of a public nature which could be covered by a section 5 order. In reaching this view we were influenced by a number of factors. In particular, the operation of prisons is

⁴ Both contracts may be viewed at [SPS.gov.uk/library/keydocs](https://www.sps.gov.uk/library/keydocs).

subject to extensive statutory regulation and is a function for which the state assumes responsibility. The operators perform a valued public service which in their absence would require to be performed by the Government (through SPS) – as is the case with the remainder of the Scottish prison portfolio. Also relevant is the significant public funding of this activity. We would add that under section 5, the operators could be designated either by name or class.

31. Further, in relation to the management function, it is relevant to note that the respective contractors – Kilmarnock Prison Services Ltd and Addiewell Prison Ltd - are special purpose vehicles comprised of a number of interests. Both contractors have in turn sub contracted the appointment of a prison operator who privately manages the prison. There is not a direct contractual relationship between the prison operator and Scottish Ministers. Our opinion is that it would not therefore be possible to cover the contractors under a section 5 order by virtue of a contractual relationship with Scottish Ministers.

32. We also note that the previous administration entered into a contract with the private contractor, Reliance Secure Task Management Ltd in relation to the provision of prisoner escort and court custody services⁵. Again, and for very similar reasons to those given above, we are of the view that the contractor is providing a function/service that could be captured by a section 5 order. As such, the contractor could be designated as a Scottish public authority in relation to this activity (either by name or class). Moreover, with the contractor also being the operator, there is a direct contractual relationship and therefore designation could be made on the basis of either limb of section 5(2) of the Act.

Appropriateness of extending coverage to contractors

33. We have already outlined in Part 4 the factors we consider generally relevant in determining whether it is appropriate to extend coverage. By way of a reminder, and as discussed in greater detail below, we would suggest that contractors should only be considered for inclusion in a section 5 order where:

- they undertake significant work of a public nature
- they receive significant public funding
- any relevant contract is not short term or low value
- coverage would enhance transparency and accountability; and
- coverage of the contractor would be measured and proportionate

Significant work of a public nature

34. We consider that contractors should be considered for coverage under the Act where they perform significant work of a public nature. We regard ‘significant work of a public nature’ as meaning the delivery of some part of the ‘core functions of the state’.

⁵ The contract can be viewed at [SPS.gov.uk/library/keydocs](https://www.sps.gov.uk/library/keydocs).

35. In our view 'significant work of a public nature' would include, for example, front line public services in respect of health, education and transport, law enforcement, the administration of justice and the operation of the prison system. We are strongly of the opinion there must be due transparency and accountability as regards the performance of significant work of a public nature – irrespective of whether the activity is carried out by the public, private or third sector.

Significant public funding

36. As already indicated, if the Government is minded to extend coverage by making a section 5 order, we would propose to do so incrementally in a measured and proportionate manner. This would enable us to monitor and learn from the practical impacts of extension. We believe this approach would also be beneficial to stakeholders and interested parties allowing full opportunity for reflection and consideration of the effects of extension.

37. Given the wide public interest in 'following the public pound', we propose to focus on contractors that receive a significant amount of public funding whether in the form of a grant or fees charged for the performance of a public function. In our view, it must have been the intention of Parliament that section 5 would be used to capture private bodies that receive substantial amounts of taxpayers' money to deliver significant work of a public nature.

Contract value and duration

38. We also propose to focus on relatively high value and long terms contracts. However, we do not propose to set either a minimum duration or value of contract as it is likely that individual contracts will require to be assessed on their own terms. A contract may, for example, initially be for a short period but have an option to extend. Similarly there are numerous ways in which the value of a contract can be calculated.

39. That said, even where a contract is low value and short term, the public may nevertheless have a legitimate interest in receiving information held by the relevant body. We consider that Scottish public authorities must be further encouraged to take cognisance of the increasing public interest in such information and consider how best to meet that demand.

Transparency and accountability

40. We consider that the case for extending coverage will be less persuasive where a body is answerable to a regulator and is held to a high degree of accountability or where information about a service being delivered through a contractor can be obtained from the relevant Scottish public authority. It may prove to be the case that in practice a considerable amount of information is already available from various sources and extension of coverage would not significantly increase access.

41. In terms of existing transparency and accountability we note the following –

- Where a Scottish public authority contracts out the delivery of its public functions, that contract will be held by the authority and will be accessible under the Act. Although it may not be released in full, the Commissioner can set aside any inappropriate reliance on exemptions under the Act. For example, in Decision 190/2007 the Scottish Information Commissioner ordered NHS Lothian to disclose full details of its contract with Consort Healthcare covering the provision of building, maintenance and support services for the new Royal Infirmary of Edinburgh.
- Tender information held by a Scottish public authority may also be accessible. In Decision 104/2008, the Scottish Information Commissioner ordered Glasgow City Council to disclose details of the successful tender for its Street Outreach Service for the homeless. The bid jointly made by two charities was required to be released in full following the Commissioner's refusal to accept that disclosure would damage the commercial interests of the bidder or reveal a trade secret.
- In relation to a request for a copy of the contracts between VisitScotland and VisitScotland.com, the Scottish Information Commissioner held that the confidentiality exemption did not apply (information can be withheld if it has been obtained by the authority from a third party and release would be an actionable breach of confidence). The Commissioner determined that where contracts are the outcome of negotiations between parties, it cannot normally be said that the concluded contract has been obtained by one party from the other. The Commissioner ordered the contract to be released in full (Decision 88/2007).
- The UK Information Commissioner in his response to the Ministry of Justice consultation on the possible designation of additional public authorities⁶, states that "The Commissioner has handled many complaints that concern information held by public authorities about organisations arguably carrying out public functions or providing services under contract. In many scenarios, the Commissioner observes that correct interpretation of section 3(2)(b) of the FOI Act (information is held by another person on behalf of the authority) should lead to information about bodies carrying out public functions or delivering contracted services being caught by the Act...in many cases the Commissioner has found that comprehensive information about the relationship with and performance of the other organisation is held by the public authority. Adding organisations under section 5 in some circumstances may add little value to what can already be accessed via the Act."

42. It follows from the above that concerns raised about the public having lost rights to access information which they previously had under the Act as a result of changes in how public services are now delivered are not necessarily accurate. As can be seen, as a matter of practice, a significant amount of tender and contractual information is already accessible under the Act.

⁶ Freedom of Information Act 2000: Designation of additional public authorities – consultation paper.

Measured and proportionate

43. Any extension of the coverage of the Act to contractors needs to be measured and proportionate and must take account of the current economic climate. In particular, consideration would need to be given to whether coverage should be extended in relation to existing contracts or only in relation to new contracts. On the one hand it could be considered unfair to impose obligations under the Act on a contractor mid way through the term of a contract. On the other, applying the obligations only as regards new contracts would be a slow process and would create anomalies between future contractors who are affected and existing contractors who are not.
44. It will also be important to assess whether the improvements in openness gained by extending coverage outweigh any adverse effects, including for example the costs of complying with the Act. It is difficult to anticipate the level of such costs which will vary on a case by case basis. However it might be anticipated that a contractor would need to train staff on the law, perhaps seek legal advice and recruit additional staff, put in place appropriate processes, including for records management, draft a Publication Scheme and handle requests etc. Moreover, not all of the activity of a particular contractor may be subject to the Act and so it may be necessary to separate information which can and cannot be made available – although of course the public may not understand that distinction and make requests for such information anyway. Also there may be double handling at taxpayers' expense if requests are made both to the relevant Scottish public authority and the contractor where the contractor passes on those costs to the authority. It will also be important to consider the willingness of businesses to contract to deliver public services in the future if they are made subject to the Act.
45. We would also wish to emphasise the Government's commitment to reducing unnecessary burdens (regulatory and financial) on private enterprise and to supporting any organisation engaged in the provision of public services.

Appropriateness of extending coverage to operators of privately managed prisons

46. The Scottish Government has not yet formed a view on the appropriateness of extending the coverage of the Act to the operators of private prisons. However, as it has been suggested to us that such operators should be covered, it is helpful to set out some of the competing arguments.
47. On the face of it, it seems anomalous that prisons operated by SPS are covered by the Act whereas prisons run by private contractors are not. The prisoners, for example, have no choice as regards which prison they are sent to - all prison operators provide similar services and are subject to similar standards. There can be little doubt that the contractors deliver a front line public service which would have to be delivered by SPS in their absence. In

terms of following the public pound, there are also strong arguments in favour of extending coverage to them.

48. That said, the case for extending coverage may be less persuasive where information about a service being delivered through a contractor can be obtained from the relevant Scottish public authority. In this context, relevant information may be obtained from SPS. In particular, both contracts can be viewed on the SPS website and SPS has confirmed that both contractors (Kilmarnock Prison Services Limited and Addiewell Prison Limited) provide full submissions to SPS in response to requests that it receives under the Act.

49. The question therefore arises as to what advantages would be gained by covering the relevant contractors and whether the burdens of coverage would be offset by improved openness, in other words would an extension of coverage be measured and proportionate. Both contracts having been let, is it appropriate to now change the goalposts, would the operators absorb or (perhaps more likely) seek to pass on the costs of compliance – can SPS fund this or would it lead to a reduction in public sector prison budgets? It is also relevant to note the wider Scottish Government policy on the operation of prisons, namely that all future prisons will be operated by the public sector. No new contracts for the operation of prisons will therefore be awarded to private contractors.

50. In respect of the competing arguments for and against extending coverage to the provider of prison escort services we also note that the contractor already makes significant information publicly available with the contract accessible on the SPS website. In addition, the contractor co-operates fully in assisting SPS to respond to relevant FOI requests. Indeed, under the contract, the contractor is required to establish and maintain appropriate communication flows with SPS (from whom information can be requested) and is obliged, as set out in the contract, to provide SPS with such management information as maybe required to enable performance and delivery of the services to be monitored.

Q1: In principle, do you support extending the coverage of the Act to contractors? Please explain your reasoning e.g. do you consider that you are at present unable to access certain information from contractors as they are not covered by the Act?

Q2: If supportive of an extension of the coverage of the Act to contractors, what particular activities would you like to see covered? In particular, do you consider that contractors who operate privately managed prisons or providers of prison escort services should be covered?

Q3: Do you agree that the factors summarised in paragraph 33 are relevant in assessing the appropriateness of extending coverage to contractors? Do you think any additional or alternative factors are relevant? Please explain your reasoning.

Q4: Of the 4 proposed options given in Part 4 (no action/self-regulation/improved statutory guidance/one or a series of section 5 orders), which do you consider the best option? Or would some other option or combination of options be preferable? If supportive of an extension of coverage please also state whether you would support an incremental approach to extension as opposed to a 'big bang'.

Part 6

Extension of Coverage Registered Social Landlords

51. The purpose of this part of the discussion paper is to explore the legal and policy considerations around a possible extension of the Act to registered social landlords (RSLs). We would reiterate, as with the other two categories, that no decisions have been made concerning any extension of coverage. The Scottish Government is open-minded and wishes to canvass views in order that it may reach an informed view on the issue.
52. At the outset it may be helpful to set the context by looking at the functions of social landlords and registered social landlords and describing the RSL landscape more generally.

What is a social landlord?

53. The principal function of a social landlord is to provide 'social housing'. That is, housing for rent that is mainly (but not exclusively) for those on low incomes, at less than market rates. In varying degrees, social landlords also provide a range of other housing related services⁷.
54. There are two classes of social landlord, namely RSLs and local authorities. 26 local authorities provide social housing in their respective areas. 6 local authorities have transferred their housing stock to new RSLs following ballots of their tenants.

What is an RSL?

55. RSLs are independent bodies registered with the Scottish Housing Regulator (SHR). There are currently 247 RSLs registered with the SHR, owning and managing over 260,000 or approximately 10% of all houses across Scotland. In terms of constitution and function the RSL sector is diverse and in terms of size ranges from the management-only local housing organisations owning no properties to Glasgow Housing Association Ltd with 70,000 properties.
56. The Housing (Scotland) Act 2001 (the 2001 Act) sets out the conditions for registration. They are that -
- the body does not trade for profit;
 - that it is either an Industrial and Provident Society or a company limited by guarantee; and
 - that its principal purpose is to provide, construct, improve or manage houses which are to be kept available for letting or, in the case of a housing cooperative, are for occupation by its members (section 58(2) of the 2001 Act).

⁷ Other housing related services include services to homeless people and gypsy travellers. 32 local authorities provide services to the homeless – including those that have divested themselves of their housing stock. Many local authorities and one RSL provide services to gypsies and travellers.

57. The 2001 Act also sets out some permissible or discretionary purposes that RSLs may perform, for example, providing services to owner-occupiers such as care and repair and factoring services (set out in section 58(3) of the 2001 Act). Many RSLs carry out permissible functions.

Legal Considerations

58. A section 5 order may be made to extend the scope of the Act to RSLs if they appear to Scottish Ministers to exercise functions of a public nature. The legal arguments in respect of extending coverage to RSLs are not clear cut. We consider below the factors that could have a bearing on coming to a view one way or another.

59. Part 3 outlines in general terms a range of the factors that we consider relevant in determining whether a body exercises functions of a public nature and could therefore be covered by a section 5 order.

60. In support of the argument that RSLs could be described as exercising functions of a public nature we note that their functions are enshrined in legislation; that, in certain circumstances, they are able to secure a measure of public funding (further described in paragraphs 64-65); and that they are regulated (further described in paragraphs 66-71).

61. On the other hand, however, it cannot be said that RSL's functions are of a nature that would require them to be performed by a public authority if RSLs did not perform them. The housing association sector grew up largely independent of the state and received no public funding before the late 1970s. Indeed the majority of RSLs' funding still comes from private sector sources and the sector currently has facilities to draw down almost £3 billion in private funding. Current Government policy is to make it more reliant on its own and private sector resources. Although they are regulated by a public authority (the Scottish Housing Regulator) RSLs' activities are independent of the state and of local government.

Appropriateness of extending coverage

62. We have outlined in Part 4 the factors we consider generally relevant in determining whether it is appropriate to extend coverage. By way of a reminder, and discussed in greater detail below, we would suggest that RSLs be considered for inclusion in a section 5 order where:

- they undertake significant work of a public nature
- they receive significant public funding
- coverage would enhance transparency and accountability; and
- coverage would be measured and proportionate

Significant work of a public nature

63. It could certainly be argued that the RSL sector undertakes significant work of a public nature (this term is being used in a non-legal sense). In particular, the majority of new social housing in Scotland is built by the RSL sector. However, although RSLs deliver and are widely recognised as delivering a valuable public benefit, that is not to say that *all* RSLs meet this test. The question therefore arises as to how this test could be applied in practice, for example, on a case by case basis, by an appropriate class description, or on the basis of the sector as a whole?

Significant public funding

64. Social rents are affordable for those on low incomes because of the practice of successive Governments over many decades of using public expenditure to subsidise new social housing. Originally this meant subsidising local authorities to build council housing. Over the past few decades the policy has been to subsidise RSLs to build new stock. The present subsidy – Housing Association Grant (HAG) meets an average of 60% of the cost to RSLs of each new house they build. Over the 3 years 2008 – 2011, most of the Government's £1.5 billion expenditure on affordable housing will be spent on HAG subsidies.

65. Government subsidy supplements the significant private funding invested in the RSL sector. It is also important to note that this private borrowing does not count towards the Government's Public Sector Borrowing Requirement (PSBR). The Government is alert to the dangers of the creeping classification of RSLs as 'public bodies' and what this could mean in terms of the private investment possibly being counted towards the PSBR - at a time when increasing the rate of affordable housing supply, through a higher level of private sector funding, is a key Government policy.

Transparency and accountability

66. While RSLs are not subject to the Act, the SHR is. The SHR is an Executive Agency of the Scottish Government and independently exercises the regulatory and enforcement powers of Scottish Ministers set out in the 2001 Act. In particular, the SHR regulates social landlords and local authorities to -

- protect the interests of current and future tenants and other service users;
- ensure the continuing provision of good quality social housing, in terms of decent homes, good services, value for money, and financial viability; and
- maintain the confidence of funders.

67. The SHR expects RSLs to operate in an open and accountable way. These expectations are reflected in the Performance Standards for social landlords and homelessness functions, jointly published by Communities Scotland, COSLA and the Scottish Federation of Housing Associations⁸. The Code of Governance for RSLs, which is statutory guidance published on behalf of

⁸ http://www.communitiesscotland.gov.uk/stellent/groups/public/documents/webpages/CS_016327.pdf

Scottish Ministers, reinforces these expectations⁹. The Code encourages landlords to be proactive in publishing information and in making service users aware of the range of information available to them.

68. The SHR monitors the extent to which RSLs meet these standards through their regulation and inspections activity, including thematic work. The SHR website contains extensive information on the RSL sector, including statistical and financial data, inspection reports and a statutory register of RSLs (which includes the audited annual accounts of each RSL, the allocations policy used to let houses, the rules or memorandum and articles for the RSL, the names of committee members and the senior officer).

69. In addition, the 2001 Act places a duty on every local authority and RSL to develop a 'tenant participation strategy' setting out how they will involve tenants and engage with them to shape the services they provide. Landlords must also consult tenants on changes to key policies, such as annual rent increases.

70. As mentioned earlier, the RSL sector is also subject to regulation by a number of other scrutiny bodies –

- all charitable RSLs are subject to regulation by the Office of the Scottish Charities Regulator (OSCR);
- care or support services provided by an RSL are subject to registration, regulation and inspection by the Scottish Commission for the Regulation of Care;
- as Industrial and Provident Societies and companies limited by guarantee, RSLs are subject to regulation by the Financial Services Authority (FSA); and
- the Scottish Public Sector Ombudsman (SPSO) investigates complaints against RSLs and reports its findings to Parliament.

71. It can be seen from the above that RSLs are subject to a large degree of regulation. The question is whether this has had a positive effect as regards openness and transparency and whether service users can in practice obtain the kinds of information that they are interested in. It may be the case that given the information already available through various bodies, extension of coverage would in reality add little to what is already accessible. A thematic study by Communities Scotland found examples of positive practice (and less good practice) across both the RSL and the local authority sectors¹⁰. The study recommended that all landlords should consult with tenants about the information they wanted to see as well as the most accessible way to present the information. This has led the SHR to conclude that good practice in consulting with tenants may be more important than legislation in determining how open and accountable landlords are.

⁹http://www.scottishhousingregulator.gov.uk/stellent/groups/public/documents/webpages/shr_quickfind.hcsp?srsearch=code+of+governance

¹⁰http://www.communitiesscotland.gov.uk/stellent/groups/public/documents/webpages/shr_openandaccessible_.pdf

Measured and proportionate

72. During the parliamentary consideration of the Freedom of Information (Scotland) Bill, coverage of the RSL sector was considered but rejected by the then Scottish Executive. It argued that the diversity of RSL bodies (in terms of both size and constitution) meant that “blanket coverage would be wholly inappropriate”¹¹. It was recognised that the Act would impose ‘significant legal obligations’ and that not all RSLs, particularly the smaller bodies, were geared up for that and that coverage may deter volunteers from giving up their time and effort¹². It was acknowledged however that these arguments may not hold true for larger RSLs and that consultation should follow on a possible extension of the coverage of the Act to them.
73. Clearly any extension of coverage to RSLs needs to be measured and proportionate. This gives rise to a number of considerations.
74. Firstly, if an extension of coverage to RSLs is considered desirable in policy terms, should all or only some RSLs be covered? If the latter, what should be the determining factors - size, function, only those RSLs created by stock transfer?
75. On the one hand covering all RSLs in respect of their statutory functions under section 58 of the 2001 Act (i.e. both mandatory and permissive) seems straightforward and principled. Is it really the case that the coverage of all RSLs would have a disproportionate effect upon smaller organisations? Individual doctors and dentists are for example subject to the requirements of the Act. That said, dealing with requests and drafting a Publication Scheme etc can be time consuming and will invariably take staff away from their day to day duties. In the case of smaller organisations with limited resources, this may involve staff being diverted from their front line responsibilities. Moreover, it is very likely that any resultant costs arising from an extension of coverage would need to be met from existing sources of income.
76. Another option may be to extend coverage to all RSLs but only in relation to their core functions as set out in section 58(2) of the 2001 Act (see paragraph 56). However, as a matter of practice this may be difficult for the RSLs and the Scottish Information Commissioner to administer and confusing for the public.
77. It has been suggested to us that as a matter of principle, coverage should be extended to the RSLs created to take on the housing stock of local authorities. In particular, the Scottish Information Commissioner has raised concerns about the public having lost rights to access information under the Act in consequence of such stock transfers.

¹¹ Freedom of Information (Scotland) Bill Policy Memorandum.

¹² Jim Wallace, Parliamentary debate on the Bill dated 24 April 2002.

78. Against that, it is relevant to note that 3 of those local authorities (Glasgow, Dumfries and Galloway, and Scottish Borders) transferred their stock to new RSLs before the Act was implemented in January 2005 (affecting 100,000 properties in total). Therefore, while these tenants have not lost any rights under the Act, extension of coverage would enable them to gain the right to access information. However, for those 3 authorities which have transferred their stock to RSLs subsequent to the implementation of the Act, namely Comhairle nan Eilean Siar, Argyll and Bute, and Inverclyde authorities (affecting 17,000 properties in total), extension would enable tenants to regain their rights to access information.
79. In considering the practical implications of extending coverage on this basis it is important to assess whether a tenant's right to access information should be determined with reference to the status of the RSL. RSLs are dynamic bodies and those created as a result of stock transfer may by now have acquired non-transfer stock – would those tenants also benefit from improved rights under the Act?
80. With the exception perhaps of Glasgow Housing Association Limited (GHA), stock transfer associations are no different to other RSLs in terms of their capacity to respond to the challenges of coverage. In terms of sheer size, GHA, which assumed responsibility for the housing stock of Glasgow City Council, is perhaps unique. It is responsible for approximately 70,000 properties although is currently consulting with tenants about the possibility of transferring ownership of over 2,000 properties to the local housing associations that currently manage these on its behalf. It is also envisaged that further second stage transfers to local housing associations will follow. However, we consider that GHA is unique in terms of scale rather than principle.

Q5: In principle, do you support extending the coverage of the Act to RSLs? Please explain your reasoning e.g. do you consider that you are at present unable to access certain information from RSLs as they are not covered by the Act?

Q6: If supportive of an extension of the coverage of the Act to RSLs, on what basis would you wish to see coverage extended (i.e to all RSLs/to all over a certain size/on the basis of provision of specified functions only/GHA only etc)

Q7: Do you agree that the factors summarised in paragraph 62 are relevant in assessing the appropriateness of extending coverage to RSLs? Do you think any additional or alternative factors are relevant? Please explain your reasoning.

Q8: Of the 4 proposed options given in Part 4 (no action/self-regulation/improved statutory guidance/one or a series of section 5 orders), which do you consider the best option? Or would some other option or combination of options be preferable? If supportive of an extension of coverage please also state whether you would support an incremental approach to extension as opposed to a 'big bang'.

Part 7

Extension of coverage to local authority trusts or bodies set up by local authorities

81. Local authorities are subject to the requirements of the Act. As such, any information that they hold may be requested under the Act. Increasingly, however, local authorities are making use of new and innovative ways of delivering their services. For example, using wholly owned subsidiaries of the authority or private companies, perhaps with charitable status. A range of services may be provided by such organisations, for example in economic development, regeneration, sport and leisure.
82. Local authorities, subject to their legal duties, including the duty of best value and public procurement law, take their own procurement decisions. However, an unintended consequence of the outsourcing of the delivery of a service is that the public may lose rights under the Act to access information on that service from the relevant local authority – the authority may simply no longer hold that information. Essentially, if the service provider is not covered by the Act then the public will be unable to access relevant information from them.
83. The Scottish Government therefore wishes to consider whether the coverage of the Act is keeping pace with the various ways in which local authority services are now delivered. In particular, the Scottish Information Commissioner has raised specific concerns with us about the fact that leisure, sports and culture services which were once provided by local authorities are being devolved to arms length trusts and companies.
84. In cases where these trusts and companies are wholly owned by the Scottish Ministers - or by any other Scottish public authority listed in schedule 1 of the Act, they will be covered under the Act by virtue of section 6¹³. However, in other cases they may not. Where these bodies are not subject to the Act this may result in the public losing rights under the Act that they previously enjoyed. We propose to examine whether this is the case. We intend in this discussion to explore the legal and policy considerations around a possible extension of coverage of the Act to such trusts and bodies as well as issues relevant to the appropriateness of extending coverage to such organisations.

Legal considerations

85. The Scottish Government can make an order under section 5 of the Act to extend the coverage of the Act to bodies which appear to Ministers to exercise functions of a public nature or are providing, under contract with a Scottish public authority, any service whose provision is a function of that authority. Depending on the circumstances, local authority trusts and bodies could fall into either or both of these categories.

¹³ See section 6 of the Act for the definition of publicly-owned companies.

86. Local authority trusts and bodies vary greatly in terms of how they are constituted (legal form, charitable status etc) as well as in relation to the functions they deliver. Consequently, a case by case assessment will be required in order to determine whether any particular body or organisation may be covered by a section 5 order. Part 3 of this discussion paper outlines in broad terms a range of factors that we consider relevant in determining the lawfulness of coverage. It is worth noting at the outset that relevant case law is clear in that a private body may carry out public functions¹⁴. It also appears that public subsidy (as opposed to funding) and a lack of commercial motivation will weigh in favour of a determination that a body is performing functions of a public nature, as would a close relationship, perhaps contractual, between a body and local authority. However, a lack of statutory basis or regulation might weigh against the performance of public functions. Ultimately of course the legality of coverage of any particular trust or body is a matter for the courts.

87. We have considered, as an example, how some local authorities currently provide leisure, sports and cultural services through arrangements with trusts and other bodies. These functions are imposed on local authorities by section 14 of the Local Government and Planning Act (Scotland) 1982 which requires them to ensure that there is adequate provision of facilities for the inhabitants of their area for recreational, sporting, cultural and social activities. Section 176 of the Local Government (Scotland) Act 1994 is also relevant since it allows a local authority to provide, or encourage any other person to provide, facilities for leisure etc. However, the fact that the body or trust may be performing these services does not automatically mean that they can be covered by a section 5 order. Much will depend on the particular context, including the nature of the services being provided and the relationship (including legal and financial) with the relevant local authority. Accordingly, careful consideration may have to be given as to whether it may be possible to designate a class of trusts and bodies that are providing leisure, sports and cultural services on behalf of local authorities.

Appropriateness of extending coverage

88. We have outlined in Part 4 the factors we consider generally relevant in determining whether it is appropriate to extend coverage. By way of a reminder we would suggest that local authority trusts and bodies be considered for inclusion in a section 5 order where –

- they undertake significant work of a public nature
- they receive significant public funding
- any relevant contract is not short term or low value
- coverage would enhance transparency and accountability; and
- coverage would be measured and proportionate

¹⁴ YL v Birmingham City Council [2007] UKHL 27

89. A case by case assessment will be required as to the appropriateness of extending coverage to any particular trust or body. As such, it is helpful to set out some of the competing arguments and issues that require to be further explored.
90. In further considering the example of local authorities establishing organisations to deliver their sports, leisure or cultural services, we note that 18 out of 32 local authorities have set up not for profit trusts, a number of which take the form of companies, to deliver their sports services on their behalf under contract¹⁵. Public services in Scotland spend more than £558m a year on sport and local authorities are responsible for approximately 90% of this (£511m). It may be argued that these trusts should be covered by the Act since they are responsible for the delivery of services of significant public benefit and the stewardship of public money and assets.
91. On the other hand a number of issues require further exploration. For example, there is not necessarily a 'one size fits all' definition for these organisations as they are constituted in a number of different ways with different powers and responsibilities, differing relationships with the relevant local authority (contractual or otherwise), and different reporting requirements (for example, companies and charities will be subject to company and charity law reporting requirements). They also have different budget arrangements and approaches to transparency and openness
92. Again with reference to the leisure, culture and sports sector it is relevant to note that some of the relevant organisations were constituted prior to the Act coming into force and so the public have not lost any rights to access information (for example, Perth and Kinross Leisure Limited was established in 1964). However, as with RSLs discussed in Part 6, extension of coverage would enable the public to gain rights of access to information held by such bodies and be consistent with the rights of the public to access information from a local authority where the authority provides the services direct. Conversely, some bodies are established by the local authority as a publicly owned company within the meaning of the Act which means that they are automatically subject to the requirements of the Act. For example, Culture and Sport Glasgow delivers and manages cultural and sport services on behalf of Glasgow City Council. These services were previously delivered by Glasgow City Council's Cultural and Leisure Services. As Culture and Sport Glasgow is a publicly owned public company it is automatically subject to the Act. It is not therefore the case that the public automatically lose rights to access information under the Act in consequence of a local authority delivering services through this type of arrangement. Even if a particular trust or body is not subject to the Act, the public may nevertheless be able to access appropriate information, for example, from the relevant trust or body, a regulator or through the related local authority.
93. As indicated in Part 4, in considering the appropriateness of extending coverage it will be important to assess what measures could be taken to

¹⁵ A performance overview of sport in Scotland – an Audit Scotland report April 2008.

improve transparency and accountability (if necessary) which fall short of a statutory extension of coverage. In particular, the statutory Code of Practice (under Section 60 of the Act) issued by Scottish Ministers to public authorities on the discharge of their functions under the Act could perhaps be supplemented to address these issues.

94. In summary, in considering the applicability of section 5 to local authority trusts and bodies or the appropriateness of extending coverage to such trusts or bodies, a case by case assessment will be required.

Q9: In principle, do you support extending the coverage of the Act to trusts and bodies set up by local authorities? Please explain your reasoning e.g. do you consider that you are at present unable to access certain information from local authority trusts and bodies as they are not covered by the Act?

Q10: Are there any specific local authority trusts or bodies which you would like to see coverage extended to and which meet the criteria for coverage as set out in Part 4?

Q11: Do you agree that the factors summarised in paragraph 88 are relevant in assessing the appropriateness of extending coverage to local authority trusts and bodies? Do you think any additional or alternative factors are relevant? Please explain your reasoning.

Q12: Of the 4 proposed options given in Part 4 (no action/self-regulation/improved statutory guidance/one or a series of section 5 orders), which do you consider the best option? Or would some other option or combination of options be preferable? If supportive of an extension of coverage please also state whether you would support an incremental approach to extension as opposed to a 'big bang'.