The Committee will meet at 10.30am in Committee Room 5.

1. **Inquiry into the regulatory framework in Scotland:** The Committee will take evidence from—

   Jane Ryder, Chief Executive, Office of the Scottish Charity Regulator.

2. **Delegated powers scrutiny:** The Committee will consider the delegated powers provisions in the following Bill—

   Smoking, Health and Social Care (Scotland) Bill at Stage 1.

3. **Executive responses:** The Committee will responses from the Executive to points raised on the following—

   - the Civil Legal Aid (Scotland) Amendment Regulations 2005, *(SSI 2005/112)*
   - the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005, *(SSI 2005/113)*
   - the Community Care (Direct Payments) (Scotland) Amendment Regulations 2005, *(SSI 2005/114)*
   - the Feeding Stuffs (Establishments and Intermediaries) Amendment (Scotland) Regulations 2005, *(SSI 2005/116)*
   - the National Health Service (Service Committees and Tribunal) (Scotland) Amendment Regulations 2005, *(SSI 2005/118)*
   - the NHS Quality Improvement Scotland (Establishment of the Scottish Health Council) Regulations 2005, *(SSI 2005/120)*
   - the National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2005, *(SSI 2005/128)*
the Intensive Support and Monitoring (Scotland) Regulations 2005, *SSI 2005/129*

the Antisocial Behaviour (Fixed Penalty Notice) (Additional Information) (Scotland) Order 2005, *SSI 2005/130*


4. **Instruments subject to annulment:** The Committee will consider the following—

the Home Energy Efficiency Scheme Amendment (Scotland) Regulations 2005, *(SSI 2005/144)*

Act of Sederunt (Fees of Solicitors and Witnesses in the Sheriff Court) (Amendment) 2005, *(SSI 2005/149)*

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2005, *(SSI 2005/150)*

the Pensions Appeal Tribunals (Scotland) (Amendment) Rules 2005, *(SSI 2005/152)*

the Additional Support Needs Tribunals for Scotland (Appointment of President, Conveners and Members and Disqualification) Regulations 2005, *(SSI 2005/155)*

the Sexual Offences Act 2003 (Prescribed Police Stations) (Scotland) Amendment No.2) Regulations 2005, *(SSI 2005/156)*.

5. **Instruments not laid before the Parliament:** The Committee will consider the following—

Act of Sederunt (Rules of the Court of Session Amendment No.2) (Fees of Solicitors) 2005, *(SSI 2005/147)*

Act of Sederunt (Rules of the Court of Session Amendment No.3) (Fees of Shorthand Writers) 2005, *(SSI 2005/148)*

the Gender Recognition (Prescription of Particulars to be Registered) (Scotland) Regulations 2005, *(SSI 2005/151)*

Act of Sederunt (Rules of the Court of Session Amendment No.4) (Prevention of Terrorism Act 2005) 2005, *(SSI 2005/153)*

the Education (Additional Support for Learning) (Scotland) Act 2004 (Commencement No.1) Order 2005, *(SSI 2005/154)*.

Ruth Cooper  
Clerk to the Committee  
Tel: 0131 348 5212
The following papers are relevant to this meeting:

**Agenda Item 1**

Briefing Paper (Private)  
Office of the Scottish Charity Regulator response

**Agenda Items 2-5**

Legal Brief (Private) – to follow

**Agenda Item 2**

Delegated powers memorandum

**Agenda Item 3**

Executive responses

**Agenda Item 4**

Letter in relation to the Home Energy Efficiency Scheme Amendment (Scotland) Regulations 2005, (SSI 2005/144)

**Agenda Items 4-5**

Copies of instruments (circulated to Members only)
OFFICE OF THE SCOTTISH CHARITY REGULATOR RESPONSE TO SUBORDINATE LEGISLATION COMMITTEE INQUIRY INTO THE REGULATORY FRAMEWORK IN SCOTLAND

Introduction

1.1 The Office of the Scottish Charity Regulator (OSCR) is a Scottish Executive Agency and the new regulator of charities in Scotland. The organisation was formally launched on 16 December 2003. The Agency model enables OSCR to work independently of Ministers in our day-to-day tasks, but within Scottish Ministers’ strategy for Scottish Charity Law Reform and Regulation.

1.2 OSCR has a dual role. The first objective is to develop a Regulatory Framework, operating within the existing legislation. We are developing a pro-active Monitoring Programme, which aims to balance the burden of compliance on charities with the need to secure meaningful information. This enables us to take appropriate action in relation to individual charities, but also to provide guidance and work to improve standards overall in the long term.

1.3 The Scottish Executive has published a draft Charities and Trustee Investment Bill for consultation. The draft Bill signals that OSCR’s successor will be established as a Non Ministerial Department. The second and equally important part of OSCR’s remit is therefore managing the transition to OSCR 2. In doing so, we are aiming for a seamless transition, providing continuity of direction and operation. What OSCR puts in place should provide a sound platform for OSCR 2 in terms of strategic direction, principles, working culture and operations. An important aspect has been providing effective input into the pre-legislative consultation consideration to ensure that the proposed new functions, powers and obligations are appropriate and realistic.

1.4 OSCR is therefore in an unusual situation, which has particular relevance to the Committee Enquiry. We have come afresh to existing regulation and have been able to identify within a relatively short time what are the benefits and disadvantages of the current system. Simultaneously, we have had the opportunity to contribute extensively to the proposed new legislation and accompanying regulations. In creating a new organisation and in our contribution to the development of the Bill we have been able to draw on modern approaches to regulation and scrutiny.1

1.5 In particular, we have been able to formulate our values drawing on the principles of regulation developed by the Better Regulation Task Force. We are committed to ensuring that in the performance of our role as Scottish Charity Regulator we will be:

- Independent: we will maintain our operational independence, acting without fear or favour, in the public interest.

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1 For a review of the changing context, including the current regulatory landscape for charities, see our Corporate Plan.
• Proportionate: our actions, procedures and culture will be proportionate to the burden of regulation on charities of different sizes, to the degree of risk involved and to the potential impact.
• Accountable: we will be proactive in accounting to all our stakeholders, which will include involving others on a continuous and appropriate basis.
• Transparent: we will adopt a Freedom of Information culture from the outset.
• Consistent: we will act consistently in our decision making and will also aim to act as an exemplar, observing best practice.
• Fair: we will exercise our powers and discretion in a way which is consistent, impartial and even handed.

Improving Regulatory Quality of New Regulation

2.1 We would support the proposition that a Resource Impact Assessment should be prepared in all cases where regulation is proposed. By definition, effective regulation is designed to have an impact, and we believe careful thought should be given to the full implications of regulation before enactment. This should include establishing the baseline evidence which will be part of the case for the introduction/review of regulation.

2.2 It may well be that the impact assessment is in two stages, as has happened with the Charities Bill. It is perhaps a more realistic and more effective use of time to outline the policy implications at the outset, with more detailed costing to follow. This is particularly appropriate where it is possible to have a draft Bill available for consultation.

2.3 The importance of a full regulatory impact assessment including the additional costs to the regulator as well as the regulated constituency is critical to establishing regulatory quality. One aspect of the recent Penrose report into Equitable Life, and future investigation by the Parliamentary Ombudsman, was the finding that the regulators were not adequately resourced to fulfil their obligations. Although it is inappropriate to offer any comment on the individual case, this does underline the importance of thorough impact assessment for any new regulatory regime.

2.4 Given the Scottish Executive’s commitment to Freedom of Information, as well as the expectations of transparency and accountability as a feature of regulation, we think it axiomatic that there should be a general requirement to consult the public and the regulated constituency on proposals for regulations. It should also be axiomatic that responses be in the public domain, subject to safeguards of appropriate confidentiality.

2.5 We think a consultation period should be a minimum of 12 weeks, and possibly longer. In practice, time required to disseminate information throughout a sector, for those papers to find an effective working forum, responses to be framed, approved and lodged means the practical turn around time within an organisation is often limited to some 4 or 5 weeks.

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2 For further details of how this should be turned into action over the period 2004/06 see our Corporate Plan www.oscr.org.uk
2.6 A feature of new charities regulation has seen publication of a draft Bill for pre-legislative consultation. This has proved very valuable, allowing full consideration of the impact of regulation, and we recommend this route.

2.7 In relation to enforcement, our view is that regulation is a public function whether or not carried out by an Executive Agency such as OSCR, an NDPB or even a private organisation fulfilling a public function. All of these organisations should be committed to the principles of effective regulation, including fairness and consistency of enforcement. They are also bound by the European Convention on Human Rights, which rights extend to organisations as well as individuals, and most will be amenable to the jurisdiction of an ombudsman. This means that there are already procedures of judicial review and complaint to ombudsman available. These rights of review are largely limited to points of law and, being court-focused, there are consequential cost and timing factors. However, we think there is also value in an external appeals mechanism. For OSCR, rather than establish a formal tribunal with substantial overheads for premises and staff, what is proposed is a more accessible and informal panel system and it may be useful to monitor this experience for future reference.

2.8 We support the principle of a general requirement that regulation should be subject to periodic review. It is interesting to note that the previous charity legislation was enacted in 1990: the intervening 15 years have seen a sea change in the external environment and already demonstrated a need for a comprehensive review, not only of law but also of detailed regulation e.g. accounting regulations. The 15 year cycle is likely to be much shorter if legislation and regulation is fully responsive to demand and need. However, there are considerable resource implications for Parliament and the Executive and also for the regulator and regulated constituency. We are unclear how the Executive and Parliament would prioritise statutory commitment to periodic review against competing demands of new legislation. The use of “sunset” review clauses as identified in the Mandelkern Report provides some assistance but the criteria may be so wide as to be comprehensive e.g. it is hard to imagine that technology and market conditions are not liable to change in every sector.

**Improving Regulatory Quality of Existing Regulations**

3.1 We think the arguments in favour of consolidation are even stronger than those with regard to periodic review. Accessibility and transparency are should be a key principles of "better" regulation, and are also two core founding principles of the Scottish Parliament. In an ideal world it should be possible to access all information on the face of a single Bill.

3.2 Whether or not this degree of consolidation is possible, it should be relatively straightforward for any regulator to make available details of regulation, whether contained in primary or subordinate legislation. Modern technology means that website links to the actual texts should be straightforward, routine and inexpensive. We would expect Freedom of Information publication schedules to cover all of this information even before 1 January 2005. Regulators should also be encouraged, as we believe most do, to provide simple and user-friendly explanation and guidance on the meaning and impact of regulation.
Effective Structures for Improving Regulatory Quality

4.1 We are not clear there is a need for an independent advisory body in Scotland, similar to the BRTF, to advise on matters relating to regulatory reform. Given the importance of the European dimension, and of the interface between reserved and devolved powers, it might be more effective to extend and strengthen the UK remit of the BRTF and to include at least one dedicated Scottish representative on this.

4.2 OSCR has encountered some interesting challenges in the interface between devolved and reserved powers. Although this is beyond the scope of the Scottish Executive or Scottish Parliament, it may be there are better mechanisms for Westminster Bills to consider the impact of UK wide impact of legislation, particularly as regards the interface between reserved and devolved areas.

4.3 We support the principle of an annual report being laid before the Scottish Parliament of the level of compliance with the RIA process, both within the Scottish Executive and the wider public sector.

4.4 A feature of the proposed Scottish Charity Bill is that OSCR should have a duty to co-operate with other regulators, with a view to reducing the burden of dual regulation. We strongly support that approach, and would recommend that legislation in both Scotland and England as a matter of routine contain duties of mutual co-operation and the duty and power to share information. It would be particularly useful to find a more systematic approach to the appropriate exchange of information by regulators on a cross border basis.

Office of the Scottish Charity Regulator
20.8.04
SUBORDINATE LEGISLATION COMMITTEE

10th Meeting, 2005 (Session 2)

Tuesday 22nd March, 2005

Memorandum on Delegated Powers

Smoking, Health and Social Care (Scotland) Bill

Purpose

1. This memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of provisions of the Smoking, Health and Social Care (Scotland) Bill conferring power to make subordinate legislation. It describes the purpose of each such provision and explains why the matter is to be left to subordinate legislation.

Outline and Scope of the Bill

2. This Bill will enable the Executive to continue to take action to improve the health of the people of Scotland, to continue its programme of NHS modernisation and to improve health and social care services relevant to the needs of the people of Scotland.

3. A key policy objective for improving health is taking action on the impact of smoking. The Bill’s policy is to introduce a comprehensive ban on smoking in certain wholly enclosed premises.

4. The Bill also makes provision for the introduction of free eye and dental checks for all, and modernises the frameworks for the delivery of certain dental and pharmaceutical services. The Bill introduces a range of measures to update legislation relating to the listing and disciplinary procedures for family health service practitioners.

5. The Bill contains provisions to allow Scottish Ministers to make a scheme authorising payments to be made to certain persons who became infected with the hepatitis C virus after having had NHS treatment involving the receipt of blood, tissue or blood products. There are provisions for amendments to the Regulation of Care (Scotland) Act 2001, provisions in relation to child care agencies and housing support services, and provisions to amend the Adults with Incapacity (Scotland) Act 2000. These will further improve the delivery of health and social care.

6. Included in the Bill are provisions to allow Scottish Ministers to set up or participate in joint venture companies. This will increase the range of options available to Health Boards for the delivery of facilities and services, and enable the Scottish Ministers and NHS bodies to make the most of ideas and intellectual property generated by the NHS. Finally, the Bill makes provision to end the NDPB status of the Scottish Hospital Endowments Research Trust.

7. The subordinate legislation powers contained in the Bill divide between those that are completely new and those that are required to replace existing powers in legislation.
being amended by the Bill. The Bill contains subordinate legislation making powers in the following Parts:

- Prohibition of smoking in certain wholly enclosed places (Part 1);
- Free dental and eye examinations (Part 2);
- Charges for dental appliances and general dental services (Part 2);
- Listing of persons undertaking to provide or approved to assist in the provision of general dental services, general ophthalmic services and performing personal dental services (Part 2);
- Pharmaceutical care services (Part 3);
- Discipline (Part 4);
- Amendment of Regulation of Care (Scotland) Act 2001, and child care agencies and housing support services (Part 5);
- Authorisation of medical treatment (Part 5).

Subordinate Legislation Powers

8. Sections 3 and 4 have subordinate legislation making powers in relation to the prohibition of smoking in certain wholly enclosed places (“the new powers”). The new powers will enable Scottish Ministers to make provision for the display of warning notices and to prescribe premises, parts of premises and classes of premises which are excluded from the definition of “no-smoking premises”. It is considered appropriate that these new powers would be subject to the affirmative resolution procedure of the Parliament.

9. Sections 9 to 23 of the Bill include a number of primary health care provisions containing powers to make subordinate legislation. The modernising of the existing regime, mentioned above, is achieved by amendment of the National Health Service (Scotland) Act 1978 (“the 1978 Act”) and so the new powers will be inserted into the 1978 Act. Therefore, section 105 of the 1978 Act will apply to the new powers. Accordingly, references in the new powers to anything being “prescribed” means prescribed by regulations made by the Scottish Ministers and regulations made under the new powers will be subject to annulment in pursuance of a resolution of the Parliament. It is believed that negative resolution procedure continues to be appropriate in respect of the new powers. The new powers are not simply adding to existing subordinate legislation making powers as some existing powers are being repealed by the Bill.

10. Sections 25 and 28 of the Bill include a number of provisions to make subordinate legislation relating to the Regulation of Care (Scotland) Act 2001 (“the 2001 Act”). The new powers in section 25 enable Scottish Ministers to except certain independent health care services from the requirements of the 2001 Act. It is believed that negative resolution procedure is appropriate in respect of the new powers. Section 28 enables Scottish Ministers to make an order to substitute a day for 1 April 2006 where required to prevent childcare agencies and housing support services from inadvertently committing an offence under the 201 Act.

11. Section 30 of the Bill include a number of provisions to make subordinate legislation relating to the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”). The new powers allow Scottish Ministers to extend the range of health professionals who may sign certificates of incapacity and to prescribe circumstances when the
certificates can extend beyond 1 year. It is believed that negative resolution procedure is appropriate in respect of the new powers.

12. Section 33 of the Bill enables the Scottish Ministers by order to make incidental and other ancillary provision for the purposes of the Bill or in consequence of it.

13. Section 34 provides that any order under section 34 (except where section 34(3) applies) will be subject to annulment by a resolution of the Parliament. Section 34(3) provides for orders to which it applies to be laid in draft for approval by resolution of the Parliament. Affirmative procedure is seen as appropriate given the nature of the orders specified in section 34(3) but otherwise it is considered negative resolution procedure is the most appropriate procedure for the other orders under section 34.

14. Section 37(3) of the Bill confers power on the Scottish Ministers to make the necessary commencement order(s). As this is a commencement provision there is no parliamentary procedure.

**Section 3 - Display of warning notices in and on no-smoking premises**

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<thead>
<tr>
<th>Relevant provision:</th>
<th>Section 3(3).</th>
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<td>Power conferred on:</td>
<td>The Scottish Ministers.</td>
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<tr>
<td>Power exercisable by:</td>
<td>Regulations made by Statutory Instrument.</td>
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15. Section 3(3) of the Bill gives the Scottish Ministers powers to make regulations to make further provision as to the detail of the manner of display, form and content of the no-smoking signs which are required to be conspicuously displayed inside and outside no-smoking premises. The Executive will draft and consult on these regulations, in compliance with section 34(4) of the Bill, to coincide with the Bill’s passage through Parliament. It is considered appropriate to confine this sort of detail to subordinate legislation rather than primary legislation because it may be necessary over time to change the notice display requirements.

16. In deciding whether to adopt negative or affirmative resolution procedure, careful consideration has been given to the degree of parliamentary scrutiny that is felt to be required for the regulations, balancing the need for the appropriate level of scrutiny with the need to avoid using up parliamentary time unnecessarily. Affirmative procedure is used where the order or regulation making powers allow for the modification of any enactment or where there is significant public interest. In view of the public interest in the subject matter, the regulations under this provision will be subject to affirmative resolution procedure.

**Section 4 - Meaning of “smoke” and “no-smoking premises”**

<table>
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<tr>
<th>Relevant provisions:</th>
<th>Subsections 4(2) and 4(7).</th>
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<tr>
<td>Power exercisable by:</td>
<td>Regulations made by Statutory Instrument.</td>
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17. Section 4(2) of the Bill provides for “no-smoking premises” to be prescribed by regulations made by the Scottish Ministers. The kind of premises to be prescribed as “no-smoking premises” are those which are wholly enclosed and, as set out in section 4(4), (a) to which the public or a the section of the public has access, (b) which are being used wholly or mainly as a place of work by persons who are employees, (c) which are being used by and for the purposes of a club or other unincorporated association, or (d) which are being used wholly or mainly for the provision of education or of health or care services. The regulations will set out detailed provisions, including any exemptions which may be prescribed, but the scope of the prohibition is intended to be comprehensive. Again, it is not felt to be appropriate for primary legislation to contain such detail.

18. The regulations to be made under section 4(2) may also define or elaborate the meaning of certain expressions used, namely “premises”, "wholly enclosed", “the public” and “has access”. The regulations may also define or elaborate the meaning of “premises” by reference to the person or class of person who owns or occupies them and so as to include vehicles, vessels, trains and other means of transport (except aircraft). Section 4(8) allows the regulations to provide as to how the no-smoking notice statement is to be expressed in the case of each of the means of transport referred to in the regulations, allowing bespoke no-smoking signs to be created for each means of transport most appropriate to that particular form of transport.

19. Section 4(7) allows the Scottish Ministers to modify section 4(4) so that other kinds of premises may be added, or existing kinds removed. The effect of this would be to add to or remove from the kinds of premises which may be prescribed as “no-smoking premises” under section 4(2).

20. Again it is considered to be more appropriate for detailed provisions to be confined to subordinate legislation as requirements may change over time. Again, the Scottish Ministers intends to draft and consult on regulations as the Bill proceeds through Parliament, and the regulations will be subject to affirmative resolution procedure.

Section 9 - Free oral health assessments and dental examinations

Relevant provision: Amends section 70A(2) and 71 of the 1978 Act and section 20 of the NHS (Primary Care) Act 1997.

Powers conferred on: The Scottish Ministers.

Power exercisable by: Regulations made by Statutory Instrument.


21. This section modifies current regulation making powers and excludes the power to make provision prescribing charges for oral health assessments and dental examinations provided after 1 April 2006. These provisions will allow for such dental checks to be provided free of charge under both general dental services and personal dental services (pilot and permanent arrangements).
Section 11 - Charges for certain dental appliances and general dental services

Relevant provisions: Subsection (2) amends section 70; Subsection (3) amends section 70A(2); Subsection (5) repeals section 71A; and Subsection (6) amends paragraph 2 of Schedule 11.

Power conferred on: The Scottish Ministers.

22. This section amends existing regulation making powers and gives Scottish Ministers the power to make regulations regarding the way in which certain dental charges are made or recovered. Currently the patient charge for dental treatment and appliances is linked to the item of service fee paid to dentists and unless the patient is exempt or remitted from charges he/she pays 80% of that item of service fee. Breaking this link would provide more flexibility and transparency to the charging system. These provisions will allow for such flexible charging in both general dental services and personal dental services (pilot and permanent arrangements). The regulations will provide for a more flexible charging regime.

Section 15 - Lists of person undertaking to provide or assist in the provision of general dental services

Relevant provision: New subsection (2) and (2B) substituted for section 25(2) to (2B) of the 1978 Act.

Power conferred on: The Scottish Ministers.

23. Currently, under section 25(2) of the 1978 Act regulations as to arrangements for the provision of general dental services shall provide for only those individual dentists who have undertaken to provide general dental services in a Health Board area to be included in a list prepared and published by the Health Board. New subsection (2) gives Scottish Ministers the power to make regulations to provide for a list in two parts, to provide for the listing of dental practitioners and dental bodies corporate who undertake to provide general dental services in the first part of the list and the listing of those who are approved to assist in the provision of general dental services in the area of the Health Board in a second part of the list.

24. By subsection (2A) such regulations may provide for matters that may be provided for in the preparation, maintenance and publication of the list including that the first part of the list be further sub-divided to distinguish, for example, those persons who will not undertake to provide the full range of GDS. They may also include provision as to
eligibility and applications for inclusion in a list; the grounds on which an application must be granted or refused or a removal made and the consequences of removal; requirements with which a person included in a list must comply; circumstances in which a listed person may not withdraw from that list; the grounds under which a Health Board may suspend a person from its list; provision as to payments while subject to suspension by a Health Board; and disclosure of information about applications, refusal of applications, or suspensions, removal or references to the Tribunal.

25. New subsection (2B) gives Scottish Ministers the power to make regulations to provide that a person who assists in the provision of general dental services, and does not undertake to provide such services, in a Health Board area, cannot so assist unless he/she is on the second part of the list for that area.

26. There are already regulation-making powers in current section 25(2) and 25(2B), both subject to negative resolution and both providing a degree of flexibility for responding to changes. The provisions which substitute section 25(2) and (2B) similarly also contain regulation-making powers subject to negative resolution and this will also allow flexibility. For example, by subsection (2A)(c), the documents to be supplied on application or the procedure for applications to be made and dealt with may be changed or expanded in light of experience.

Section 16 - Lists of persons performing personal dental services under section 17C arrangements or pilot schemes

27. Section 17F(1) gives Scottish Ministers the power to make regulations providing that a person may not perform personal dental services, whether under permanent arrangements under section 17C of the 1978 Act or through pilot schemes, unless they are included in a list maintained by the Health Board. By section 17F(2), such regulations may also provide for matters that may be included in relation to such lists, including their preparation, maintenance and publication. They may also include provision as to eligibility and applications for inclusion in a list; the grounds on which an application must be granted or refused or a removal made and the consequences of removal; requirements with which a person included in a list must comply; circumstances in which a listed person may not withdraw from that list; the grounds under which a Health Board may suspend a person from its list; provision as to payments while subject to suspension by a Health Board; and disclosure of information about applications, refusal of applications, or suspensions, removal or references to the Tribunal.

28. A regulation-making power subject to negative resolution is seen as the appropriate approach, rather than making provision in the 1978 Act itself, due to the flexibility of such a power to take account of changing circumstances. For example, by subsection (2)(c), the documents to be supplied on application or the procedure for
applications to be made and dealt with may be changed or expanded in light of experience.

Section 17 - Lists of person undertaking to provide or assist in the provision of general ophthalmic services

Relevant provision: New subsections (2) and (2B) substituted for section 26(2) of the 1978 Act.

Power conferred on: The Scottish Ministers.


29. Currently, under section 26(2) regulations as to arrangements for the provision of general ophthalmic services shall provide for only those ophthalmic medical practitioners or opticians who have undertaken to provide general ophthalmic services in a Health Board area to be included in a list prepared and published by the Health Board. New section (2) gives Scottish Ministers the power to make regulations to provide for a list in two parts to provide for the listing of opticians and ophthalmic medical practitioners who undertake to provide general ophthalmic services in the first part of the list and the listing of those who are approved to assist in the provision of general ophthalmic services in the area of the Health Board in a second part of the list.

30. By subsection (2A), such regulations may provide for matters that may be provided for in the preparation, maintenance and publication of the list, including that the first part be further sub-divided to distinguish, for example, those who provide domiciliary visits to nursing homes and similar establishments. They may also include provision as to eligibility and applications for inclusion in a list; the grounds on which an application must be granted or refused or a removal made and the consequences of removal; requirements with which a person included in a list must comply; circumstances in which a listed person may not withdraw from that list; the grounds under which a Health Board may suspend a person from its list; provision as to payments while subject to suspension by a Health Board; and disclosure of information about applications, refusal of applications, or suspensions, removal or references to the Tribunal.

31. New subsection (2B) gives Scottish Ministers the power to make regulations to provide that a person who assists in the provision of general ophthalmic services, and does not undertake to provide such services in a Health Board area, cannot so assist unless he/she is on the second part of the list for that area.

32. New section 26(2)(b) provides a power for Scottish Ministers to make regulations as to arrangements which include provision conferring on any person in accordance with a procedure prescribed by the regulations, a right to choose the medical practitioner or ophthalmic optician by whom his eyes are examined or his sight tested or from whom any prescription for the supply of optical appliances is to be obtained.

33. There are already regulation-making powers in current section 26(2) subject to negative resolution and providing a degree of flexibility for responding to changes. The provisions which substitute section 26(2) similarly also contain regulation-making
powers subject to negative resolution. For example, by subsection (2A)(c), the documents to be supplied on application or the procedure for applications to be made and dealt with may be changed or expanded in light of experience.

**Section 18 - Health Boards’ functions: provision and planning of pharmaceutical care services**

**Relevant provisions:** Inserts new sections 2D and 2E into the 1978 Act.

**Power conferred on:** The Scottish Ministers.

**Power exercisable by:** Regulations made by Statutory Instrument.

**Parliamentary procedure:** Negative Resolution of the Scottish Parliament (section 105(2) of the 1978 Act).

34. This section inserts new sections 2D and 2E into the 1978 Act. These new sections place a duty on Health Boards to provide or secure the provision of pharmaceutical care services for persons in their area, and provide for the way in which Health Boards plan to discharge that duty.

**New section 2D(3)**

35. This allows the Scottish Ministers to prescribe the information that must be published by a Health Board in relation to the pharmaceutical services provided or secured by that Health Board. The purpose of this is to make provision to ensure patients receive detailed information about the pharmaceutical care services available to them.

36. It is not thought appropriate that the Bill should specify the detailed information which requires to be published. It is considered appropriate that the Scottish Ministers should have the flexibility to amend the detail of the information to be provided in light of experience or other changes.

**New section 2D(5)**

37. This allows regulations to be made that set out what are and are not to be regarded as pharmaceutical care services for the purposes of the 1978 Act and which a Health Board has a responsibility to provide.

38. New section 2D(6) sets out examples of the sort of provision regulations under subsection (5) of that section may make. Sub-section (a) of this section allows Scottish Ministers to classify which pharmaceutical care services are to be classified as ‘essential’ and ‘additional’. ‘Essential’ services are those that will be provided in accordance with nationally negotiated contract terms. The kinds of services that it is anticipated that the Regulations will be used for are as follows: for Essential it is expected that they will collectively comprise a chronic medication service; minor ailments service; acute medication service and a public health service. ‘Additional’ services will largely comprises services that are, as now, negotiated locally, e.g. domiciliary oxygen therapy and methadone dispensing services.

39. Regulations under sub-section (b) of new section 2D(6) would detail the manner or circumstances in which the services will be provided. For example, regulations may prescribe that the chronic medication service will be provided to suitable patients who
choose to opt for that service and will include patient medication reviews and
counselling in accordance with agreed clinical protocols.

40. Regulations under sub-section (c) may provide that pharmaceutical care services
may include for example the act of dispensing and that the prescribable and
dispensable medicines and appliances will be specified in a list directed by Scottish
Ministers. In this regard, new section 2D(7) requires Ministers to publish directions
under regulations provided by section 2D(5) in a document to be known as the Drug
Tariff. The Drug Tariff already exists and, inter alia, lists or details the drugs, medicines
and appliances that can be ordered and dispensed as part of the provision of
pharmaceutical care services. It is frequently necessary to amend the detail in the Drug
Tariff and given this requirement it is considered that the most appropriate way of
dealing with such matters is by means of direction.

41. Sub-section (d) of new section 2D(6) will, where the pharmaceutical care service
includes the act of dispensing, detail the persons who can order medicines and
appliances, e.g. a registered medical or dental practitioner, and provide for the
circumstances in which those items may be ordered.

42. The above illustrates the sort of detailed provision that might be made under new
sections 2D(5), (6) and (7), which it is thought demonstrates it is more appropriate for
subordinate legislation.

**New section 2E(1)**

43. This section allows regulations to provide for the way in which Health Boards
should prepare and maintain a plan to discharge their duty at new section 2D(1) to
provide and secure pharmaceutical care services for persons in their area

44. New section 2E(2) sets out examples of the sort of provision regulations under
subsection (1) of that section may make and provides that they cover both substantive
matters, under section 2E(2)(a) with regard to what the plan should identify and contain
and, under subsections (b) to (g), procedural matters, such as the manner in which the
plan should be prepared, kept under review, etc..

45. The need to prepare and maintain a pharmaceutical care services plan is a new
duty for Health Boards and one where the matters to be taken into account and
reviewed will be informed by practice and experience. It is expected that, initially at
least, it will be necessary to amend the detail of such matters in light of experience of
the new regime and, in the circumstances, subordinate legislation will give the required
level of flexibility to respond to developments in an appropriate and timeous way.

46. New section 2E(3) provides that regulations under subsection (2)(a) to that
section may be specified by direction. Subsection 2(a) lists examples of what a Health
Board pharmaceutical service plan should identify. It may be necessary to amend the
detail of such matters in light of experience of operation of the new regime and to clarify
any areas of uncertainty. Given the level of detail and the likely need for flexibility it is
considered that the most appropriate way of dealing with such matters is by means of
direction.
Section 19 - Pharmaceutical care service contracts

Relevant provisions: 
Inserting new section 17R(1); 
Inserting new section 17S(1) and (2); 
Inserting new section 17U(1) and 4(b); and 
Inserting new section 17V(1) and (2) into the 1978 Act.

Power conferred on: The Scottish Ministers.
Power exercisable by: Regulations made by Statutory Instrument.

47. Section 19 inserts new sections 17Q to 17V into the 1978 Act, replacing the existing sections on general pharmaceutical services arrangements. The new sections govern the terms and content of the pharmaceutical care service (PCS) contracts and who may provide or PCS under the contracts. They contain broad regulation making powers, which will be used to set out the detail of the rights and obligations under the new PCS contract. When making regulations under the new sections it is intended to replace the extensive and heavily amended NHS (Pharmaceutical Services) (Scotland) Regulations 1995.

New section 17R(1)
48. This section provides a power to set in regulations those services which must be provided under the contract - the essential services. New subsection (2) allows these services to be described by reference to the manner or circumstances in which they are provided. This power may be used for example to separate out of hours services from those provided during the normal daytime period. Currently section 27 to 28 of the 1978 Act, which are repealed by the Bill, allow for provision to be made in regulations defining the pharmaceutical services to be provided under general pharmaceutical services arrangements.

49. Subordinate legislation is considered more appropriate for this sort of detail than primary legislation. This is especially the case here as it may be necessary to amend the detail of such matters in light of experience of operation of the new PCS contract.

New sections 17S(1) and (2)
50. New section 17S(1) sets out the persons with whom a Health Board may enter into a PCS contract and confers power for the Scottish Ministers to prescribe the conditions that would apply in relation to a Health Board entering into a PCS contract with a contractor. The conditions may relate to the suitability of the contractor to hold a PCS contract: for example, that the persons or firms eligible to provide PCS under the contract should not have been convicted of certain offences, or been disqualified from providing or performing NHS services.

51. New subsection (2) enables regulations to set out what effect a change in membership of a partnership is to have on a PCS contract which is with a partnership. The intention is to allow the membership of the partnership to change without requiring a new contract to be entered into merely because such a change in membership has taken place.
52. The matters in new section 17S(1) and (2) are considered to be more suitable for secondary legislation than primary legislation, given the level of detail required and the fact that there is a need for flexibility as new circumstances arise.

Section 17U(1) and (4)(b)
53. Section 17U(1) confers a broad regulation making power on the Scottish Ministers allowing the imposition of further requirements that must be included in all PCS contracts.

54. Although there may be differences, in many respects it is intended that the regulations made under this section will cover areas that are similar to those currently set out the NHS (Pharmaceutical Services) (Scotland) Regulations 1995.

55. Section 17U(2) sets out examples of the sort of provision regulations under subsection (1) of that section may make, which it is thought demonstrates it is more appropriate for subordinate legislation.

56. Section 17U(3) sets out details of the type of provision that might be made in regulations making the sort of provision suggested in subsection (2)(d) of that section, so that it is clear provision can be made about when a provider under a PCS contract can or must accept a patient and when they can end their responsibility to that patient.

57. Section 17U(4) expands on the sort of provision that might be made in regulations making provision of the sort envisaged in subsection 2(f) including clarification in subsection (4)(b) that such regulations may include provision allowing the suspension or termination of any duty under the contract in relation to services of a prescribed description.

58. Section 17U(5) further expands on the way in which services prescribed under section 17U(4)(b) might be prescribed i.e. by reference to the manner or circumstances in which they are provided.

59. It is clear that regulations made under 17U may contain considerable detail and that it may be necessary to amend the detail of those regulations from time to time. As a result, it is considered that the most appropriate way of dealing with such matters is by means of subordinate legislation.

New section 17V(1) and (2)
60. Section 17V(1) creates a regulation making power to set national procedures for internal dispute resolution of disputes as to the terms of the proposed PCS contracts. The regulations may provide for the proposed terms to be referred to the Scottish Ministers and for the Scottish Ministers, or a person appointed by them, to determine what the terms of the contract should be. Regulations as to disputes as to the terms of an actual contract may be made under new section 17U(1) as explained in 17U(2)(j).

61. Section 17V(2) creates the regulation making power to enable the parties to a PCS contract to opt instead to have the contract treated as an “NHS Contract” entered into under existing section 17A for any purposes of that section.
62. Subsection 17V(4) provides for regulations to set out the application of section 17A in cases where a partnership elects to become a health service body; and where there is a change in the membership of the partnership.

63. It may be necessary to amend the detail of such matters in light of experience of operation of the new PCS contract. Given the level of detail and the likely need for flexibility it is considered that the most appropriate way of dealing with such matters is by means of subordinate legislation.

Section 20 - Persons performing pharmaceutical care services

Relevant provisions: Inserting new section 17W(1) into the 1978 Act.
Power conferred on: The Scottish Ministers.
Power exercisable by: Regulations made by Statutory Instrument.

New section 17W(1)

64. Section 20 inserts new section 17W(1) into the 1978 Act. The new section provides regulation-making powers governing the way in which persons performing pharmaceutical care services (PCS) are listed. The restructuring brought about by the Bill of the way in which PCS are secured or provided for by Health Boards amends the current listing arrangements that list the providers of pharmaceutical services and not those that perform the services. The current regulation making powers relative to listing are contained in existing section 27, all of which is repealed by the Bill.

65. The regulations made under subsection (1) of new section 17W may provide that registered pharmacists may not perform pharmaceutical care services unless their name appears on a list held by the Health Board as respects whose area they will work. For example, where (A) a Health Board employs a salaried pharmacist to perform PCS provided directly by the Board; or (B) where a PCS contract holder undertakes to provide pharmaceutical care services under a PCS contract as respects a Board’s area, the registered pharmacists performing PCS in both (A) and (B) would need to have their name included on the Health Board’s list in order to be permitted to do so.

66. Subsection (2) of the new section 17W sets out the issues that may be included in the regulations, showing the level of detail that will require to be included in the regulations. These include, for example, how the list will be drawn up and maintained; what criteria an individual will have to meet to qualify to be on the list; the process by which decisions on applications will be made and mandatory grounds under which a Health Board would have to reject an application.

67. Subsection (3) of the new section 17W, explains that regulations made under the powers in section 17W(1) as explained in 17W(2)(j), i.e. provision as to disclosure of certain information, may authorise the disclosure of information by a Health Board to the Scottish Ministers, or by the Scottish Ministers to a Health Board.

68. As can be seen from the matters mentioned at new section 17W(2), the arrangements for listing require a considerable level of detail. That and the need to be
able to have flexibility mean that these matters are more appropriate for subordinate than primary legislation.

Section 22 - NHS Tribunal: disqualification by the NHS Tribunal

Relevant provision:
- Section 22(2)(b) amending section 29(4)(b) of the 1978 Act;
- Section 22(3)(c) amending section 29A(5) of the 1978 Act;
- Section 22(6) amending section 32(2) of the 1978 Act; and
- Section 22(7)(a) inserting section 32A(7) into the 1978 Act.

Power conferred on: The Scottish Ministers.
Power exercisable by: Regulations made by Statutory Instrument.

69. Currently under section 29(4)(b) of the 1978 Act regulations may provide, in the case of certain representations to the NHS Tribunal, the time limits within which they must be made. The representations this applies to are ones in respect of a practitioner that the second condition for disqualification by the Tribunal is met, which is that of fraud. The amendment allows regulations to prescribe the time limit within which any representations that a condition for disqualification is met must be made.

70. By virtue of section 29A(5) of the 1978 Act, regulations may make provision securing that a practitioner who is subject to an inquiry by the Tribunal in a fraud case may not be added to any list of practitioners held by an Health Board until the proceedings have been concluded. The amendment is to the effect that, in the future, those subject to an inquiry in any case may be prevented by the terms of regulations from being added to any list.

71. Regulations under section 32(1)(a) may set out the procedures of the NHS Tribunal. By virtue of section 32(2) of the 1978 Act, they may provide that in a case where representations are made to the Tribunal against the same person on grounds of efficiency and fraud, it may inquire into one case before another and may adjourn the other, if they think it appropriate, indefinitely. The Tribunal would otherwise be required under the Act to inquire into all representations by Health Boards. The power may be exercised to allow the Tribunal flexibility in inquiring into representations. The Bill adds a third condition for the disqualification of practitioners - that of unsuitability – and the amendment ensures that the regulations may take account of it.

72. Section 17P(1) of the 1978 Act provides that regulations may make provision as to suspension from a list of health care professionals who perform primary medical services. Amendments made to the 1978 Act in the Bill provide that regulations under section 25(2), section 26(2), new section 17F(1), and 17W(1) may make provision as to suspension from a list of those providing and approved to assist in the provision of general dental services, providing and approved to assist in the provision of general ophthalmic services, performing personal dental services and performing pharmaceutical care services respectively.
73. The new subsection allows regulations to provide that where a Health Board has suspended a person in accordance with regulations made under those provisions and makes representations to an applies for interim suspension by the Tribunal, that suspension may continue until the Tribunal determine whether or not to direct interim suspension. Other regulations which make provision as to lists and suspension and the Tribunal are subject to negative resolution and that degree of scrutiny is also considered appropriate here.

Section 23 - NHS Tribunal: corresponding provision in England or Wales or Northern Ireland.

Relevant provision: Section 23 inserting new section 32D of the 1978 Act.
Power conferred on: The Scottish Ministers.
Power exercisable by: Regulations made by Statutory Instrument.

74. This section inserts new section 32D into the 1978 Act. Historically, certain decisions of the NHS Tribunals in England and Wales and in Northern Ireland under provisions in force there which correspond to provisions in force in Scotland have applied in Scotland also. At present section 31 deals with decisions outwith Scotland for the disqualification of practitioners while the present section 32D applies to decisions for their suspension. Section 31 is to be repealed and the new section 32D now provides that regulations may provide for the effect of decisions in other parts of the UK which correspond (whether or not exactly) to disqualifications and suspensions by the Tribunal in Scotland.

75. The provisions in force in England and Wales and Northern Ireland do not correspond exactly with the Scottish regime. The Tribunal in England and Wales has been abolished. The Family Health Services Appeal Authority now has the power to direct the national disqualification of practitioners but other decisions, including those dealing with conditional disqualification, can be taken by local health authorities. There are other differences, for example, the sanction of local disqualification whereby a practitioner is disqualified from only the list or lists where his or her name is entered for the time being and not from all similar lists will in future not apply in Scotland. Accordingly the power allows the Scottish Ministers to provide in regulations for the effect to be given to a corresponding decision, which may include providing for the effect of decisions which correspond (whether or not exactly) with a decision on conditional disqualification to be determined in a manner prescribed in regulations by the Scottish Ministers.

76. A regulation making power is seen as the appropriate approach rather than making provision in the 1978 Act itself. For England and Wales many of the corresponding provisions are themselves in subordinate legislation and regulations will provide a degree of flexibility to be able to respond to changes in the future. Other regulations which make provision as to lists and the procedures of the Tribunal are subject to negative resolution and that degree of scrutiny is also considered appropriate here.
Section 25 - Independent health care services

Relevant provisions: Section 25 amends section 2(5) of the 2001 Act.
Power conferred on: The Scottish Ministers.
Power exercisable by: Regulations made by Statutory Instrument.

77. This section amends Section 2 (5) of the Regulation of Care (Scotland) Act 2001. It provides Scottish Ministers with a power to make regulations which except services from the definition of an ‘independent healthcare service’ in the 2001 Act.

78. This power already exists for other care services defined in the 2001 Act where appropriate – see for example section 2(6) concerning “nurse agencies”. The current definition in the 2001 Act goes wider than the policy intention which was to regulate wholly private services. The power to except could be used, for example, to except from the definition services provided by a General Practitioner on behalf of a third party such as examinations for insurance companies.

79. It is thought that it is appropriate to except services by subordinate legislation as this allows flexibility to take account of changing circumstances. As noted above there is precedent in the 2001 Act for such a power and for regulations made in exercise of such a power to be subject to negative procedure.

Section 28 – Registration of child care agencies and housing support services

Relevant provisions: Subsection (4)(e).
Power conferred on: The Scottish Ministers.

80. Subsection (4)(e) gives Scottish Ministers the power to make an Order to substitute a later day for 1 April 2006.

81. The purpose of the power is to give Scottish Ministers the flexibility to extend the period of deemed registration of Housing Support services and Childcare Agency services should that prove to be necessary.

Section 30 – Amendment of Adults with Incapacity Act 2000: authorisation of medical treatment

Relevant provisions: Section 30(2)(b) and 30(2)(e)(ii).
Power conferred on: The Scottish Ministers.
Power exercisable by: Regulations made by Statutory Instrument.

82. These two provisions enable Scottish Ministers (a) to extend, if appropriate, the range of health professionals who may sign certificates of incapacity under the Act and (b) to prescribe the circumstances in which certificates of incapacity can extend beyond 1 year. This follows concerns that the current provisions were unduly restrictive and
reflects the views obtained in a consultation exercise and discussion with key stakeholders.

83. It is considered that subordinate legislation is the most appropriate approach due to the flexibility of such a power to take account of changing circumstances. Similarly, the circumstances where a certificate of incapacity can be extended beyond 1 year may also require revision at a later date after experience has been gained in applying the approach. Regulations will be by negative resolution in accordance with section 86 of the 2000 Act, which should allow the appropriate degree of Parliamentary scrutiny.

Section 33 - Ancillary provisions

Relevant provisions: Section 33.
Power conferred on: The Scottish Ministers.

84. Section 33 provides for Scottish Ministers to make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary for the purposes, or in consequence, of the Act.

Section 37: Short title and commencement

Relevant provision: Section 37(3)
Power conferred on: The Scottish Ministers.
Parliamentary procedure: No parliamentary procedure.

85. Section 37 provides for the short title and commencement arrangements for the Bill.

86. Section 37(3) gives the Scottish Ministers power to appoint by order a day when the provisions of the Bill shall come into force. Section 37(4) explains that different days can be appointed for different purposes.

87. It is standard procedure for such commencement provisions to be dealt with by subordinate legislation. Whilst the order, in common with the usual practice for such orders, is not subject to any parliamentary procedure as such, the Subordinate Legislation Committee will have the opportunity to consider the instrument in terms of its remit.

Schedule 1 – Fixed penalty for offences under sections 1, 2 and 3

Relevant provisions: Paragraph 2;
Paragraph 4(1);
Paragraph 5(2);
Paragraph 12; and
Paragraph 13 (a) and (c).

Power conferred on: The Scottish Ministers.
Power exercisable by: Regulations made by Statutory Instrument.

88. Schedule 1 sets out the details of how the fixed penalty system, introduced by section 5, will work for offences committed under sections 1, 2 and 3 of the Bill.

89. Paragraph 2 gives the Scottish Ministers the power to set via regulations a time limit relating to the offence after which a fixed penalty notice may not be given. Paragraph 4(1) allows the Scottish Ministers to prescribe by means of regulations the amount of the fixed penalty for an offence under section 1, 2 or 3.

90. Paragraph 5(2) allows the Scottish Ministers to prescribe by means of regulations the discounted amount for a fixed penalty offence. A lesser amount is payable by offenders, in terms of paragraph 6(1) where earlier payment is made.

91. Paragraph 12 allows the Scottish Ministers to make regulations about the application by councils of fixed penalties, also about keeping accounts and the preparation and publication of statements of account, relating to fixed penalties.

92. Paragraph 13 empowers the Scottish Ministers to make regulations prescribing the circumstances in which fixed penalty notices may not be given and the methods for payment of penalties. Paragraph 13 also allows the Scottish Ministers to modify paragraphs 4(2) and 5(1) of the Schedule so as to modify the period for payment of the fixed penalty and the period for when payment of the discounted amount is to be made to qualify for the discount respectively.

93. Once again, the detail of the provisions are such that it is more appropriate for secondary rather than primary legislation. Regulations made under the relevant provisions of Schedule 1 will again be subject to affirmative resolution by the Scottish Parliament.

Schedule 2: Minor and consequential amendments.

**Relevant provision:**
- Paragraph 1(7) amending section 32(1)(a) of the 1978 Act.
- Paragraph 1(9) amending section 32E(1) of the 1978 Act

**Power conferred on:** The Scottish Ministers

**Power exercisable by:** Regulations made by Statutory Instrument.

**Parliamentary procedure:** Negative resolution of the Scottish Parliament (section 105(2) of the 1978 Act).

94. Currently under section 32(1) regulations provide for the procedures to be followed by the Tribunal when it inquires into cases under sections 29 to 31 of the 1978 Act. Section 31 is repealed. The effect of the amendment is that the regulations will in future provide for inquiries under sections 29 to 30 to be held in accordance with such procedures as may be prescribed by or determined under regulations.

95. Currently under section 32E(1) regulations may provide for payments to be made to practitioners who are suspended in terms of section 32A(3) or 32D(2) dealing with
suspension by the Tribunal in Scotland or under provisions in force in England and Wales or Northern Ireland respectively. The present section 32D(2) is substituted by the regulation-making power in new section 32D(3).
Executive Responses

- The Civil Legal Aid (Scotland) Amendment Regulations 2005, (SSI 2005/112)
- The Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005, (SSI 2005/113)
- The Community Care (Direct Payments) (Scotland) Amendment Regulations 2005, (SSI 2005/114)
- The Feeding Stuffs (Establishments and Intermediaries) Amendment (Scotland) Regulations 2005, (SSI 2005/116)
- The National Health Service (Service Committees and Tribunal) (Scotland) Amendment Regulations 2005, (SSI 2005/118)
- The National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2005, (SSI 2005/128)
- The Intensive Support and Monitoring (Scotland) Regulations 2005, (SSI 2005/129)
- The Antisocial Behaviour (Fixed Penalty Notice) (Additional Information) (Scotland) Order 2005, (SSI 2005/130)
On 15th March the Committee asked the Executive for an explanation of the following matter-

‘The Committee asks the Executive to confirm that section 26 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 will be brought into force on 4 April 2005’.

The Scottish Executive responds as follows-

The Executive confirms that section 26 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 will be brought into force on 4th April 2005.
THE CRIMINAL LEGAL AID (SCOTLAND) (FEES) AMENDMENT REGULATIONS 2005, (SSI 2005/113)

On 15th March 2005 the Committee asked the Executive for an explanation of the following matter –
‘The Committee asks the Executive what, if any progress has been made towards consolidation of these Regulations.’

The Scottish Executive responds as follows-

The Executive is aware that these Regulations have now been amended several times. Reforms have been necessary as a result of modernising and efficiency initiatives together with a number of changes to legislative reform.

It had been intended the principal Regulations should be consolidated before now. However the Strategic Review of the delivery of Legal Aid, Advice and Information is about to start its consultation stage. This may give rise to substantial re-structuring of the legal aid system, including further regulatory changes over the next year or so.

It has therefore been considered prudent to await the outcome of this review before consideration is given to embarking on what would amount to a substantial programme of consolidation.
THE COMMUNITY CARE (DIRECT PAYMENTS) (SCOTLAND) AMENDMENT REGULATIONS 2005, (SSI 2005/114)

1. on 15th March the Committee asked the Executive for an explanation of the following matters-

“The preamble cites as an enabling power section 90(3) of the 1968 Act. However this power confers a power to revoke or amend Orders. It does not seem to the Committee therefore to be relevant to Regulations. The Executive is asked for an explanation as to the reason for its inclusion.

Conversely it would seem that subsection (6) of section 12B of the 1968 Act is a relevant enabling power yet has not been cited in the preamble. The Committee asks the Executive for an explanation of the omission. “

2. The Scottish Executive responds as follows:

3. The Executive thanks the Committee for its comments in relation to section 90(3) and agrees that section 90(3) confers a power to amend Orders as opposed to Regulations. The power to amend the Community Care (Direct Payment) (Scotland) Regulations 2003 would be implied in the power to make the Regulations by virtue of section 14 of the Interpretation Act 1978. The Interpretation Act 1978 is an interpretative tool and therefore is not required to be mentioned in the preamble. The Executive therefore agrees that it was not appropriate to refer to section 90(3) in the preamble to the Regulations. The Executive does not, however, think that the reference to the otiose power affects the validity of the instrument and therefore does not propose to take any corrective action.

The Regulations amend the Community Care (Direct Payment) (Scotland) Regulations 2003 to specify that people who are in need of care and attention arising out of infirmity or age who are aged 65 or over are not ineligible to receive direct payments. The power to specify those who are ineligible to receive direct payments is contained in section 12B(1)(b). The power to amend the 2003 Regulations is contained in the power conferred by section 12B(1)(b) as interpreted in accordance with section 14 of the Interpretation Act 1978, as above. Section 12B(6) confers the power to make different provision for different cases and to include in the Regulations any supplementary, incidental, consequential and transitional provisions and savings as the Scottish Ministers think fit. The Executive does not think that the section 12B(6) power is being used in these Regulations and therefore there is no need to specifically mention section 12B(6) in the preamble to the Regulations. However, if the section 12B(6) power were being exercised in the Regulations, then there would be no need to correct the instrument because section 12B(6) would be one of the provisions covered by the phrase “and of all other powers enabling them in that behalf”. The Executive therefore thanks the Committee for its second comment but does not propose to take any corrective action.
In its letter to Catherine Hodgson of 15 March the Committee commented as follows:

“The Committee ask the Executive why it has chosen to use the powers conferred by section 2(2) of the ECA as the enabling power for this instrument rather than section 56 of the Finance Act 1973 “

The Food Standards Agency responds as follows:

The Feeding Stuffs (Establishments and Intermediaries) Regulations 1999, which SSI 2005/116 amends, were made under the powers contained in section 2(2) of the European Communities Act 1972.

In making amendments to those Regulations under SSI 2005/116, it was considered appropriate to make use only of the powers under section 2(2) of the European Communities Act 1972 for the sake of consistency. It was not considered necessary or appropriate to draw down, in addition or in substitution, powers contained in the Finance Act 1973.

The Committee will be aware that section 56(3) of the Finance Act 1973 declares that the power to make regulations under section 56(1) is “without prejudice to any powers exercisable apart from this section to require payment of fees or other charges”. Section 2(2) of the European Communities Act 1972 is such a power.
THE COMMUNITY CARE (DIRECT PAYMENTS) (SCOTLAND) 
AMENDMENT REGULATIONS 2005, (SSI 2005/114)

1. On 15 March 2005 the Committee requested an explanation of the 
   following matter which is answered below.

   The Scottish Executive responds as follows:

2. “The principal Regulations which date from 1992 have now been 
   substantially amended more than 10 times and the Committee considered 
   them now to be very difficult to understand. The committee therefore asks the 
   Executive what progress if any it is making towards consolidation of these 
   Regulations”

   The Executive explains that it is aware of the desirability of consolidating 
   regulations when an instrument has been amended on a number of 
   occasions. However the time and resources required to consolidate an 
   instrument have to be balanced against other demands being made on the 
   Executive. Bearing those demands in mind, it was decided not to consolidate 
   the principal Regulations on this occasion. However it is the Executive’s 
   intention to review the operation of the principal Regulations during the course 
   of this year with a view to bringing forward a consolidation. The Executive 
   explains though that it may, having regard to the time and resources required 
   for consolidation, amend the principal Regulations further prior to 
   consolidation if necessary consequential upon other regulatory changes in the 
   NHS.
On the 15th March 2005 the Committee asked in relation to the above instrument:

“The Committee asks the Executive whether the reference to “paragraph” 2(b) in regulation 3 should in fact be to “regulation” 2(b).”

The Scottish Executive Health Department responds as follows –

The Executive thanks the Committee for their comments. The reference is an error and should have been to regulation 2(b). However, given that there is only one “2(b)” in the instrument, the Executive considers that the cross reference clearly means to refer to regulation 2(b) and that there is no ambiguity as to what is being referred to. The Executive therefore does not consider there is an urgent need to correct the error in the instrument. However, the Executive will amend the relevant cross-reference when the instrument is next amended.
On the 15th March 2005 the Committee asked in relation to the above instrument:

“The Committee asks the Executive whether the reference to “paragraph” 2(b) in regulation 3 should in fact be to “regulation” 2(b).”

The Scottish Executive Health Department responds as follows –

The Executive thanks the Committee for their comments. The reference is an error and should have been to regulation 2(b). However, given that there is only one “2(b)” in the instrument, the Executive considers that the cross reference clearly means to refer to regulation 2(b) and that there is no ambiguity as to what is being referred to. The Executive therefore does not consider there is an urgent need to correct the error in the instrument. However, the Executive will amend the relevant cross-reference when the instrument is next amended.
On 15 March 2005 the Committee requested an explanation of the following matter which is answered below.

2. “The Committee asks the Executive what if any progress has been made towards consolidation of these Regulations.”

The Scottish Executive Health Department responds as follows:

The Executive explains that, as set out in the Executive Note accompanying these Regulations, the Executive is aware of the desirability of consolidating regulations when an instrument has been amended on a number of occasions but that bearing other demands being made on the Executive in mind, it had been decided not to consolidate these Regulations nor are there immediate plans to do so.

The Executive additionally explains that in reaching that decision the Executive has had regard to provisions in Part 2 of the Smoking, Health and Social Care (Scotland) Bill currently before Parliament which would make significant changes to general ophthalmic services and arrangements for them. It is the Executive’s plan to consider consolidation together with the changes envisaged in those provisions.
On 15 March the Committee asked the Executive for an explanation of the following matters –

The Committee is concerned that in its current form there are serious doubts as to how far regulation 4 is *intra vires*. The Committee asks the Executive what power authorises regulation 4 to the extent that it prohibits a children’s hearing from imposing a movement restriction condition unless it is satisfied as to certain matters. It appears to the Committee that the only relevant power would be section 70(13), however this would confine the regulation making powers to making provision as to the arrangements for monitoring compliance with the movement restriction specified in the supervision requirement, that is, after the imposition of the restriction rather than as a pre-condition for the imposition.

The Committee also has concerns with regard to the *vires* of regulation 6(e). Regulation 6 purports to prescribe the conditions that may be imposed on a child in a supervision requirement with a movement restriction condition. It is not clear to the Committee how a child could comply with paragraph (e), most of which appears to be relevant to the duty on the person designated by virtue of regulation 5. The Committee also finds paragraph (f) unclear, in particular the final part of that paragraph which seems directed at the person designated rather than the child. The Executive is asked for comment.

Paragraph (1)(c) of regulation 5 authorises a children’s hearing to designate certain persons “in relation to monitoring compliance with regulation 7”. It appears to the Committee that regulation 7 simply prescribes the methods of monitoring compliance that may be used. It does not seem in itself to impose any requirements as to compliance with the obligations that are the subject of monitoring. The Committee asks the Executive for clarification.

4. Regulation 5(1) states that the children’s hearing “shall” designate one or more of the persons described whereas the enabling power uses the word “may”. The Committee asks the Executive for comment.

5. Regulation 2 defines a number of terms all of which are defined in the Act. It is not clear to the Committee why the Executive considered this necessary. The Executive is asked for comment.

6. The definitions of “crisis response service” and “movement restriction care plan” seem to the Committee to contain material that goes beyond a definition and impose substantive requirements in respect of the service and the plan respectively. The Committee asks the Executive why it has chosen to draft the definitions in this way in this instance.
7. The Committee asks the Executive why the Explanatory Note narrates the enabling power.

The Scottish Executive responds as follows:

**First question**

1. The Executive has given very full consideration to the Committee’s concerns over the extent to which regulation 4 in its current form is *intra vires*. In responding to this question the Executive does acknowledge that the particular form in which regulation 4 has been drafted might have been approached differently, but considers that the regulation within the overall structure of the legislative framework in which it stands is nonetheless *intra vires*.

As noted by the Committee section 70(13) of the Children (Scotland) Act 1995 is relevant here. It allows Scottish Ministers by regulations to make provision as to the arrangements for monitoring compliance with a movement restriction condition specified in a supervision requirement. While it is acknowledged that the considerations which are set out within regulation 4 might, to some extent, have an appearance of being in the manner of pre-conditions for the imposition of a movement restriction condition, we would respectfully submit that they can properly be regarded as representing an integral part of the overall arrangements and structure for monitoring compliance, for which section 70(13) provides authority. The particular considerations which are referred to within regulation 4(2)(a) to (d) are all directly concerned with safeguarding and promoting the welfare of a child for whom the hearing considers a movement restriction condition is the appropriate means of supervision within the meaning of section 70(1). They are concerned with ensuring compliance and this in the Executive’s view is within the powers of section 70(13).

The Executive is satisfied, therefore, that regulation 4 is *intra vires*. However, we do believe that, presentationally, regulation 4 could have been improved by means of its heading being adjusted, and making direct reference to the movement restriction care plan. In addition, the Executive would intend bringing forward amending regulations, at an early date, to extend the new regime to remaining local authority areas not covered by this initial phase. This will give the Executive an early opportunity to take account of local authorities’ experience of the new regulatory framework following an initial period of operation. In doing so the Executive would take careful account of the points which have been made by the Committee, both in regard to regulation 4, and on the other matters raised in the Committee’s letter.

**Second Question**

2. Again the Executive notes that the Committee has concerns with regard to the vires of regulation 6(e). Regulation 6 has been made under the provisions in section 70(12) which provide that the hearing, when imposing a
movement restriction condition within a supervision requirement, shall also impose such of the conditions prescribed by the Scottish Ministers as they consider necessary in the child’s case. Regulation 6(e) is concerned with an integral aspect of the process, namely review dates for a movement restriction condition. It is considered that, as framed, the provision is properly directed towards the child, who will require to know review dates to which he or she is subject, and which will be a condition of the supervision requirement with a movement restriction condition. The child will thus be able to ensure that he or she co-operates with and prepares for such review. Turning to regulation 6(f), on which the Committee seeks comment, it is concerned with conditions which a child will require to comply with relative to the particular arrangements applying to the specific supervision requirement for that child, and includes for completeness, reference to the person designated in terms of regulation 5(1). This for example could include a requirement to attend at the offices of the person designated in accordance with regulation 5(1)(a) or(b) at a particular time for the purpose of contributing to the review of progress. A further example would be an arrangement requiring the child to be available in the house at a specified time and frequency to facilitate the technical checking of the equipment.

It is therefore considered by the Executive, under reference to section 70(12), that regulation 6(e) is indeed intra vires. While the Executive acknowledges the Committee’s observation concerning the clarity of paragraph 6(f) we trust that the comment provided in explanation is sufficient for the Committee.

Third Question

3. The Committee has sought clarification from the Executive in regard to the reference which regulation 5(1)(c) makes to regulation 7. Regulation 7, as noted by the Committee, prescribes the methods of monitoring compliance with a movement restriction condition which can be specified in a supervision requirement. These are concerned with the “technical” aspects of monitoring, and detail radio and electronic monitoring processes. The person designated in terms of regulation 5(1)(c) will have responsibility for monitoring compliance with the technical requirements associated with regulation 7. The relevant regulation making powers in this regard are contained within section 70(14)(a) and (c), which are intrinsically linked. Regulation 5(1)(c) reflects that link, being concerned with monitoring compliance in regard to the child’s co-operation with the effective use of devices.

Fourth Question

4. The Executive acknowledges that regulation 5(1) states that the Childrens Hearing “shall” designate one or more of the persons described, albeit that the enabling power uses the word “may”. It is accepted that the word “may” could have been used here. However, where a hearing has reached a position of imposing a movement restriction condition that will be as a result of it having satisfied itself as to matters such as the care plan, the monitoring of which will necessarily involve the designation of the persons referred to in regulation 5(1)(a) and (b). Similarly in order to monitor
compliance with regulation 7 a designation under regulation 5(1)(c) will be an essential element of the process. We consider this is a proper exercise of the powers under section 70(14)(c).

Fifth Question

5. It is acknowledged that a number of the terms which are set out in regulation 2 are defined in the 1995 Act. While it was not essential to have done so it is explained that the terms concerned have been detailed within that regulation, with reference to their definitions in the 1995 Act, simply for ease of reference.

Sixth Question

6. So far as the definitions of “crisis response service” and “movement restriction care plan” are concerned these are areas which are integral elements of the subject matter of the regulations. It was not possible to define them with reference to provisions contained in other legislation, and it was considered necessary that they should be detailed as comprehensively as possible within regulation 2, given the role which they have in the overall operation of the regulations. The detail of what is to be included in relation to the service and plan is intended therefore to clarify the elements which they are to embrace, and it is not considered that they impose substantial requirements. They represent part of the monitoring arrangements with which these regulations are concerned.

Seventh Question

7. It is acknowledged that while the Explanatory Note need not have narrated the enabling power this was inserted simply for ease of reference.
On 15 March the Committee asked the Executive for an explanation of the following matters:

“The Committee noted that under the enabling power the order must specify the required information. The Committee questioned whether paragraph (e) of article 2 is sufficiently specific for this purpose and asks the Executive for its views.”

The Committee also requests explanation of the use of the definition in article 1(2) given that the term in question is defined for the purpose of the regulations in section 134 of the Act.

The Scottish Executive responds as follows:

First question

1. The enabling power at section 130(3)(f) relates to “such other information as may be prescribed”. The Executive considers that the reference to “information connected with the administration of the notice” is sufficiently specific because it is clear that this relates to and must be linked to the sort of information that is required to enable proper processing of the form and operation of the scheme. The information under this category will cover the processing and reference numbers, information that a record of the notice will be kept by the police for future reference and information for the recipient as to the status of fixed penalty notices in respect of criminal records.

2. In this connection the Executive note mistakenly indicated that the information covered by article 2(e) would also include details about the gender, race and occupation of a person who receives a fixed penalty notice. This is not correct. The fixed penalty notice will not include that information. However, the police will separately take a note of such information amongst other matters in case it should prove necessary to identify the recipient in any future court proceedings. We attach a revised Executive note which makes this clear and apologise for any unnecessary misunderstanding.

Second question

3. The term “fixed penalty notice” is defined at section 129(2) of the Act. Article 1(2) links it to that definition. A definition is not usually required in an SSI where the definition in an Act applies to the Act as a whole (as per paragraph 8 of Schedule 1 to the Interpretation Order (1999/1379)). However the definition of fixed penalty notice at section
129(2) is for the purpose of section 129(1) and not of the Act as a whole. The Executive therefore considered it necessary to include the definition in the Order.
On 15 March 2005 the Committee asked:

The Subordinate Legislation Committee today considered the above instrument and seeks an explanation of the following matters.

4. Regulation 2(1) contains a definition of “farmer” and paragraph (3) of that regulation also contains a definition but in different terms. The Committee therefore asks for clarification.

5. The Committee asks for explanation as to why it was considered necessary for regulation 2 to include a generic provision relating to the interpretation of Community instruments at paragraph (5), in addition to the definition of various Community instruments at paragraph (1), also containing detailed citations of amendments to those instruments.

The Scottish Executive Rural Affairs Department responds as follows:

The first question

1. The Executive thank the Committee for drawing this error to their attention. The inclusion of a definition of “farmer” in regulation 2(1) was an oversight which will be remedied at the earliest opportunity. SEERAD are considering further amendments in relation to recently agreed Commission Regulations which are due for publication, which should provide a convenient opportunity.

2. Although the word “Article” has also been omitted from regulation 2(1), the intention was for the definition of “farmer” throughout the Regulations with the exception only of regulation 27 to be as stated in regulation 2(3). Although the inclusion of the definition of “farmer” in regulation 2(1) duplicates and may draw the attention of the reader from the accurate drafting in regulation 2(3), the Executive considers that the Regulations read together with Council Regulation 1782/2003 as referred to in both regulation 2(1) and (3) would have to be interpreted as intended to refer to the definition of “farmer” which appears in Article 2(a) of that Council Regulation.

3. If the provision in regulation 2(1) casts doubt on the operative reference to “farmer” in regulation 27(4), where the definition in regulation 27(6) should have been clearly attracted, it is submitted that there is no doubt in practice. Regulation 27(4) saves the effect of regulation 12 of the 1996 Regulations on delivery notification for non-food raw materials, for declarations made or information provided under that provision after 18th April 2005, in light of the revocation of the Arable Area Payment Regulations 1996 (SSI 1996/3142, as
amended) by this instrument. The definition of “farmer” in regulation 27 refers to that in the 1996 Regulations which in turn refers to the definition in Council Regulation (EC) 3508/92 (O.J. No. L 355, 5.12.1992, p. 1) on the subsidy Integrated Administration and Control System which has been replaced by the definition in Article 2(a) of Council Regulation (EC) 1782/2003 (O.J. No. L 270, 21.10.2003, p. 1) as referred to in regulation 2(3) of this instrument. The new definition of “farmer” is wider in scope, as instead of referring to an agricultural producer it refers to a person exercising an “agricultural activity” as broadly defined in Regulation 1782/2003. There will however be no difference here in who is caught, as the saving provision will apply to producers under the 1996 Regulations, and the new wider definition of “farmer” means there would be no adverse impact on producers or farmers who should be able to rely on regulation 27(4).

The second question

1. Many of the provisions of the EC Regulations relevant to the subsidy schemes to which this instrument relates are directly applicable in domestic law as a matter of EC law. In addition, there were a number of amendments to Commission Regulations 795/2004 (O.J. No. L 141, 30.4.2004, p. 1) and 796/2004 (O.J. No. L 141, 30.4.2004, p. 18) agreed by the Commission but not yet published, the intention was to provide for the implementation of these EC rules as fully as possible. For instance, Commission Regulation (EC) No. 394/2005 amending Regulation 795/2004 was published in the Official Journal of the European Union on 10 March 2005 (O.J. L 63, p.17), coming into force the day after the Regulations were made. That Regulation will not on that basis be covered by the effect of this instrument under regulation 2(5), but the intention would have been to relate the provisions of these Regulations to such instruments if they had effect when the Regulations were made.

2. Care was however taken to list all the amendments which had effect in EC law as appropriate in the body of the instrument, and other relevant amending EC instruments will be added by amendment as appropriate.
HOME ENERGY EFFICIENCY SCHEME AMENDMENT (SCOTLAND) REGULATIONS 2005

We are writing to you in advance of making and laying the above regulations which are currently in draft and which we wish to bring into force on 21st April after the recess. The regulations will amend the eligibility provisions for grants for insulation and improved energy efficiency in line with the increases to working tax credit and child tax credit which take effect from 6 April 2005. As the Committee has expressed concern about the need for a consolidation of the existing provisions in the past, we thought it best to indicate our reasons for making a further amendment without consolidation in advance of the new instrument being made and laid.

The last amendment to the principal regulations, the Home Energy Efficiency Scheme Regulations 1997 (S.I. 1997/790), was by the Home Energy Efficiency Scheme Amendment (Scotland) Regulations 2004 (S.S.I. 2004/188). In considering these regulations and in view of the considerable amendments to the regulations since 1997, the Committee asked what progress had been made towards consolidation. The Executive indicated its intention to bring forward a consolidation in due course but did not give a specific proposed timescale.

Since then, it has been determined that the current central heating programme and warm deal will end on 31 March 2006. After that date, the existing arrangements will be replaced by a new programme. The details of that programme are not yet finalised but it may be that the eligibility criteria will change. It is therefore likely that considerable further amendments to the regulations will be required. Against that background it is our view that the most appropriate time to produce a consolidation would be in connection with the introduction of the new programme.

We appreciate that the Committee have been expecting a consolidation to take place on any further amendment. However, as you will understand, any consolidation produced at this stage would require to be considerably further amended in less than a year’s time. In the meantime, it is necessary to make a small change to the current programme to ensure that grant applicants in receipt of tax credits in Scotland are no worse off in relation to the receipt of funding than similar applicants in England and Wales. We hope therefore that the Committee will understand and support our approach.

ANN MILOVIĆ