The Committee will meet at 10.30am in Committee Room 4.

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

   Sarah Boyack MSP, Convener, Environment and Rural Development Committee;
   Roseanna Cunningham MSP, Convener, Health Committee;
   Miss Annabel Goldie MSP, Convener, Justice 2 Committee; and
   Iain Smith MSP, Convener, Education Committee.

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

   Licensing (Scotland) Bill as amended at Stage 2.

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

   Joint Inspection of Children’s Services and Inspection of Social Work Services (Scotland) Bill at Stage 1.

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

   the Victim Statements (Prescribed Courts) (Scotland) Revocation Order 2005, *(SSI 2005/draft)*


   the Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005, *(SSI 2005/515)*

the Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Amendment Regulations 2005, (SSI 2005/518)

the National Assistance (Assessment of Resources) Amendment (No.2) (Scotland) Regulations 2005, (SSI 2005/522)


5. **Draft instruments subject to approval:** The Committee will consider the following—


6. **Instruments subject to approval:** The Committee will consider the following—


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

   the Avian Influenza (Preventive Measures) (Scotland) Regulations 2005, (SSI 2005/530)

   the Avian Influenza (Preventive Measures in Zoos) (Scotland) Regulations 2005, (SSI 2005/531)

   the Food Labelling Amendment (No. 3) (Scotland) Regulations 2005, (SSI 2005/542).

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

**Agenda Item 1**

Briefing paper (Private) SL/S2/05/30/1
Environment and Rural Development Committee Submission SL/S2/05/30/2
Health Committee Submission SL/S2/05/30/3
Justice 2 Committee Submission SL/S2/05/30/4
Finance Committee Submission SL/S2/05/30/5
Local Government and Transport Committee Submission SL/S2/05/30/6

**Agenda Items 2 – 7**

Legal brief (Private) – to follow SL/S2/05/30/7

**Agenda Item 2**

Delegated powers memorandum SL/S2/05/30/8
Bill as amended at Stage 2 (circulated to Members only)

**Agenda Item 3**

Delegated powers memorandum SL/S2/05/30/9
Draft Regulations and draft protocol to be issued under Part 1 SL/S2/05/30/9a
Bill and accompanying documents (circulated to Members only)

**Agenda Item 4**

Executive responses SL/S2/05/30/10

**Agenda Items 5 – 7**

Copies of instruments (circulated to Members only)
Subordinate Legislation Committee Inquiry into the Regulatory Framework in Scotland – Phase 2

Thank you for your letter dated 31 August, inviting the Committee to submit its views on the parliamentary scrutiny of subordinate legislation and its own role in the process. The Committee very much welcomes this opportunity to comment, and the opportunity for me, as Convener, to give oral evidence to your inquiry in November.

The Committee has a relatively heavy subordinate legislation responsibility, and has so far considered 141 instruments under the negative procedure and 20 under the affirmative procedure this Session. The Committee has highlighted a number of issues of principle during the course of its scrutiny. The Committee was also able to consider your consultation paper in some detail at its meeting on 21 September, which provided a useful opportunity to draw together members’ experiences. The Committee’s comments are below, referring where possible to the specific headings and questions in your consultation paper.

1. Nature of supervision by the Parliament

You asked for views on the current negative and affirmative procedures and whether they should continue to exist for the parliamentary consideration of subordinate legislation. The Committee acknowledges that it is correct that the parliamentary procedure applying to an instrument should be determined in the context of scrutinising the parent act.

The Committee offers no direct comment on whether the current negative and affirmative procedures should continue. However, the Committee notes that the procedure applicable to a particular instrument can, at times, bear no relation to the degree of controversy associated with it. The Committee has dealt with affirmative instruments on which there has been little policy comment or disagreement and the additional level of parliamentary scrutiny allowed for the instrument has appeared unwarranted. Equally, at times the Committee has had very little time to deal with instruments under the negative procedure which have involved quite controversial issues. Lodging a motion to annul a negative instrument is a tool to raise the debate in these cases, but is regarded as a rather drastic option. A more flexible tool may be desirable.

In particular, the Committee notes that a very significant number of the instruments the Committee considers are implementing EU obligations. The European Communities Act 1972 allows transposition of EU obligations to be done by an instrument subject to negative procedure (although the procedure prescribed by another appropriate parent act may be used where possible). This results in some very substantial policy measures (eg. such as the rules governing the Less Favoured Area Support Scheme – which amounts to £60m expenditure per annum) being subject to the lower level of scrutiny that a negative procedure entails.

You also asked about the role of the Subordinate Legislation Committee (SLC) and the subject committees in examining subordinate legislation. On occasion the Committee has found it difficult to interpret reports from the SLC. While the Committee recognises and acknowledges that Standing Orders give the SLC a specific technical role in the scrutiny process separate from that of subject committees, the Committee has
suggested in the past that it would be helpful if the SLC could provide a clearer indication of how serious its concerns on the drafting of a particular instrument were. If technical concerns about an instrument are such that there is very serious doubt about whether it can be properly implemented, there may be a place for a mechanism for the SLC to consider a motion to reject the instrument. Where the concerns are of a policy nature, the issue should clearly be for the subject committee to consider.

A related point is confusion over what the practical effect would be of annulling an instrument which implemented an EU obligation (as is very common in this Committee’s remit). On occasion, the Committee has had very serious reservations about such an instrument, but has been unclear as to the legal implications of recommending that it be annulled. The SLC might perhaps consider providing clearer advice to subject committees in those circumstances.

2. Amendment

You asked whether the Scottish Parliament should be given powers to amend instruments or drafts, or to recommend such amendments, and whether the Parliament should be given the power to recommend certain changes being made to an instrument, before the instrument gains parliamentary approval.

On balance, the Committee considers that, having delegated the power to the Scottish Ministers to make detailed subordinate legislation, attempting to take back that power to the Parliament in some form would be a huge and unmanageable responsibility. The Committee does not, therefore, believe that the Parliament should have a generalised right to amend subordinate legislation.

The Committee has, however, often noted that, where the SLC has pointed out (sometimes relatively minor) flaws in an instrument, current processes do not give the SLC any route to insist on the flaw being rectified in the original instrument. A subject committee would often not wish to recommend annulment unless the instrument was regarded as so flawed as to be unworkable. The process usually means that the Executive has to commit to correcting minor flaws with a further instrument ‘at the next legislative opportunity’. This can mean that the Committee has to scrutinise two instruments to give effect to the same policy intention, which could be seen as unnecessarily confusing for the public and causing unnecessary double-handling for committees.

The Committee does not believe that an instrument needs to undergo parliamentary scrutiny if its purpose is simply to resolve a matter such as a typo or an erroneous cross-reference. It would seem appropriate to develop a way of taking on board such minor amendments, whether that were to happen through the instruments not being laid until the SLC has had a chance to look at them or through some other mechanism whereby the amendments could be approved the first time round, instead of requiring a further scrutiny of a second instrument. Where the SLC raises an issue and the subject committee agrees, and concerns are formally recorded so that interested parties know exactly what changes are being suggested, the Committee considers that the option to recommend formally that an instrument is amended by the Executive – without further parliamentary scrutiny - would appear to be sensible.
3. Consultation

You asked whether a general requirement to consult the Parliament on draft instruments should be imposed. The Committee has stated in the past that it may be helpful at times to see instruments when they are in draft, but without the burden of that ‘double handling’ of every instrument. The Committee believes that requiring the Executive to give a certain amount of formal advance warning to the Parliament of the likely content and timing of instruments before they are formally laid may allow the Committee to select instruments it feels require more detailed examination. Any such system should be accompanied by a formal method within the Parliament for referring these notifications to the relevant subject committee.

Aside from the general case for such a system, there is a particular case when late transposition from European Union law is involved and the Executive is running slightly behind schedule. By the time the statutory instruments come to subject committees some of them are already in force. As mentioned above, that puts subject committees in an extremely difficult position where rejecting an instrument could put the Executive in breach of EU requirements.

The issue, however, is not simply about timing. Some improvement in the quality of the information provided by the Executive with instruments would also help subject committees to plan their scrutiny effectively. The Committee has made a number of comments in the past about the quality and consistency of information accompanying statutory instruments (particularly the Executive Note). For example, the Note sometimes does not provide a sufficient level of explanation of the practical implications of a measure, and the quality of this information is very variable. Similarly, the Note usually refers to any consultation which has taken place but rarely gives any information on what the response was to the consultation (in terms of numbers and content of responses). Improvements in this information would allow for an earlier and more informed judgement of the degree of debate required when the instrument reaches the subject committee.

4. Definition of SSIs

You asked whether all instruments of a legislative character, for example, guidelines and codes of conduct, should require to be SSIs. On occasion the Committee has found it confusing that a set of statutory instruments addressing similar policy areas are subject to different, or no, parliamentary procedures. For example, some measures relating to regulation of scallop fishing were considered by the Committee as a negative instrument while other measures which were part of the same package were to come forward in an instrument that was not subject to any parliamentary procedure. This is due to the provisions of the relevant parent act, but can confuse scrutiny and the public understanding of the process.

The Committee does not consider that there is a need for all instruments to be SSIs. However, the Committee does believe that there is a need to develop a mechanism that allows subject committees to be aware of all instruments of a regulatory or legislative character, so it can decide to examine any it wishes. The Committee recognises that it already has the option to seek evidence on any such instrument, but considers that a formal notification method would be helpful.
5. Existing Parliamentary procedures

You asked about the timing of negative and affirmative consideration and whether the time allowed for the Parliament to consider SSIs should be increased. The Committee has noted that there can be a very concentrated volume of subordinate legislation coming forward at certain times, which makes effective scrutiny more difficult. This is particularly an issue prior to a recess period when the Executive may seek to bring forward all subordinate legislation which it wishes to come into force over the recess. For example, in June 2005 the Committee had five negative instruments to consider at the second last meeting and nine at the last one before the recess. The Committee considers that this volume (which came on top of an already very busy agenda those weeks) meant that it could not reasonably scrutinise the instruments properly and had absolutely no reasonable chance of discussing them in more depth or considering whether further evidence was needed.

More generally, the limited time available for subject committees to scrutinise an instrument means that the options for giving more detailed consideration (perhaps by taking written or oral evidence) to a particularly complex or controversial instrument are very limited. The Committee usually has the option of only one (or, at most, two) meetings on which it can consider an instrument once the SLC has reported on it. This does not usually allow enough time to decide to take evidence and then arrange an evidence session.

Due to the problems caused by the volume of subordinate legislation and limited time for scrutiny, the Committee supports the idea of increasing the time allowed for scrutiny beyond the usual 40 days, on the basis that any such extension of the time limit should not cause undue delay. This would inevitably improve scrutiny, particularly if combined with other improved management measures such as increasing formal notification of forthcoming SSIs (see section 3 above).

You also asked whether the 21 days given for a negative instrument to come into force should be extended to something that would allow the Parliament to consider all negative instruments before they came into force. The operation of the 21-day rule can cause significant problems. As the first 20 days of the parliamentary process are usually taken up by the SLC’s scrutiny of an instrument, the 21-day rule means that the instrument is very often in force by the time the subject committee considers it. This is confusing for the public, but can also hamper scrutiny. In some cases (eg. where an instrument sets out a grant scheme or introduces an offence, or in the case of late transposition of EU legislation as noted above), very significant problems and confusion could be created if the Parliament exercised its right to annul an instrument after substantial action (such as application for, or payment of, grants or arrest on suspicion of an offence) had already been taken on the authority of the instrument. This leaves the Committee in an invidious position.

The 21-day rule also has the potential to hamper scrutiny and transparency particularly in the case of instruments laid in the run up to a recess. This is further exacerbated by the fact that the clock stops on the 40 days allowed for parliamentary scrutiny over recesses, while the 21-days between an instrument being laid and coming into force are a simple three-week calendar period.
Taking the example of June 2005 again, the Committee decided that it wanted to raise points with the Minister on three of the instruments considered at the last meeting in June. Members' concerns were such that the Committee delayed final decision on the instruments until the next meeting (i.e. September), by which time all the instruments had been in force for over two months. At its first meeting in September the Committee dealt with the three negative instruments held over from June and another five which had not been ready in time to go on the agenda for the last meeting in June, but which were all already in force by the time the Committee saw them in September. The instruments dealt with a number of significant policy issues and this situation therefore causes the Committee some concern.

The Committee considers that better advance warning of pending instruments might also address this issue. However, the Committee also believes that a practical solution to the specific difficulties caused by the 21-day rule is required, without causing undue delay.

I hope this information is helpful.

Yours sincerely

Sarah Boyack MSP
Convener
Introduction

1. At its meeting on 27 September the Health Committee discussed issues that it would like to see raised with the Subordinate Legislation Committee as part of that Committee’s inquiry into the handling of subordinate legislation by the Parliament. This paper sets out the issues that Members raised, and details of the way that the Welsh Assembly handles subordinate legislation. The contents of this paper were formally agreed by the Committee at its meeting on 25 October.

Volume

2. The Health Committee handles more subordinate legislation than any other Committee in the Parliament. Within the last year we have handled over 100 pieces, and this comprises about a third of all subordinate legislation allocated to committees. It is very difficult for the committee to give proper scrutiny to this volume of legislation, particularly under the current arrangements.

Notice

3. The Parliament does not receive adequate notice from the Executive of items of subordinate legislation. This does not allow any proper sort of pre-planning, and reduces the ability of the Committee to scrutinise effectively.

Timing

4. The current periods that statutory instruments lie before the Parliament – 28 days and 40 days – do not leave enough time for adequate scrutiny.

5. It is frequently the case that the Health Committee has only 1 or at most 2 meetings when it may take a particular instrument, given the other constraints, e.g. the need for the Subordinate Legislation Committee to have reported first. This removes the possibility for the Committee to initially examine an instrument and then receive evidence from Scottish Executive officials if this is felt necessary. A longer time period would promote more effective scrutiny.

6. It would appear that many of these instruments could be submitted earlier, and there is no apparent urgency for many of them, which raises the question of why they have to be dealt with so quickly.
7. At the same time some instruments are submitted which come into force before the end of Parliamentary consideration. This is not an acceptable state of affairs.

Ability to Amend

8. **MSPs should have the ability to amend subordinate legislation.**

9. At present the arrangements whereby Committees must either agree items of subordinate legislation or reject them totally leaves members and committees little choice but to approve, even if there are significant reservations about elements of the legislation. An example would be the regulations stemming from the Smoking, Health and Social Care (Scotland) Act, which specify all those areas exempt from the smoking ban. MSPs should have the right to submit amendments to the most significant items of subordinate legislation.

Quality of Information from Executive Officials

10. **The quality of information currently received from Scottish Executive officials is poor.**

11. The Explanatory Notes that accompany the instruments do not explain the legislation but frequently repeat what is in the instrument without in any way explaining it or why the Executive is introducing it. They are sometimes models of obfuscation. These Notes, as currently presented, do little to help members identify which instruments are most significant and most worthy of scrutiny.

12. In addition the Health Department does not provide any sort of forward chart of subordinate legislation that is being developed. It must be possible for the Department to produce this, and indeed we would have thought that it would be good management practice for it do so, if only for its own benefit. If there were any sort of overview of forthcoming subordinate legislation, this might also permit the Department to avoid submitting large numbers of instruments simultaneously, resulting in the Committee having to deal with, for instance, 12 instruments at a single meeting.

The Welsh Experience

13. It is frustrating to discover that the Welsh Assembly operates a more effective subordinate legislation scrutiny regime, and in particular that Welsh Assembly Committees receive considerably better quality information from the Welsh Assembly Government, than do we. The Welsh Assembly Health and Social Services Committee receives regularly updated tables of subordinate legislation that is expected over the forthcoming 6-9 months, with short summaries of what the legislation does, when it is expected etc. An example is attached.
14. That Committee also receives Explanatory Notes drafted by Welsh Assembly Government officials which are greatly superior to those that we currently receive, and set out in very clear terms what the legislation does and why. An example is attached.

15. If the Health Committee were to receive information of a similar quality to that received by its counterpart in Cardiff, it would be able to be intelligently selective in undertaking its detailed scrutiny and carry out much more effective subordinate legislation scrutiny overall.

16. We also note that subordinate legislation within the Welsh Assembly may be amended by Assembly Members.

Roseanna Cunningham
Convener
Health and Social Services Committee

HSS(2)-10-05(p.5)

Date: Wednesday 5 October 2005
Venue: Committee Rooms 3&4, National Assembly for Wales
Title: Schedule of Proposed Secondary Legislation

Purpose

1. This paper invites the Committee to identify forthcoming secondary legislation for scrutiny.

Forward look

2. The list is in two parts:

HSS(2)-10-05(p.5a) - Health and Social Care Secondary Legislation

HSS(2)-10-05(p.5b) - Food Standards Agency Secondary Legislation

Action

3. The Committee is invited to identify draft legislation for further scrutiny from the 'new additions' schedules only. Please note that any changes or additions since the last scrutiny by the Committee have been highlighted using shading.

Committee Service

September 2005
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<th>NAME/WORKING TITLE</th>
<th>PURPOSE</th>
<th>PROJECTED MONTH LEGISLATION TO BE MADE</th>
<th>1. STANDING ORDER</th>
<th>2. PROCEDURE – STANDARD OR EXECUTIVE</th>
<th>3. WALES / UK OR EUROPE</th>
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<tr>
<td>Carmarthenshire, Ceredigion and Mid Wales and North Glamorgan NHS Trusts Amendment Orders (Identified for scrutiny 16/07/03)</td>
<td>To increase the number of Non-Executive Directors for these NHS Trusts by one additional member to bring the Establishment Orders into line with the number of Non-Executive Directors on the Trust Boards</td>
<td>Not known this has been deferred in order to consider the position with the remaining Establishment Orders</td>
<td>1. SO 24</td>
<td>2. Standard</td>
<td>3. Wales</td>
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<tr>
<td>The Children (Performances) (Amendments) (Wales) Regulations 2004</td>
<td>To remove current limits on the number of performances a child may undertake each year in film, TV or theatre; and to make some other aspects of regulation of such performances less restrictive.</td>
<td>(deferred to allow prior consideration of Clywch Report recommendations)</td>
<td>1. SO 24</td>
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<td>3. Wales</td>
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<tr>
<td>Independent Medical Agencies National Minimum Standards</td>
<td>Lays down the National Minimum Standards for Independent Medical Agencies</td>
<td>follows on from the above</td>
<td>1. SO 29</td>
<td></td>
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<tr>
<td>The National Health Service (Pharmaceutical Services) (Wales) Regulations 2005</td>
<td>Changes regarding control of entry rules around controlled areas. The First Minister agreed (29th June 2004) to consult stakeholders on proposals to make regulatory changes to streamline the “Control of Entry” process (i.e. consideration of applications from pharmacies and the related appeals system) and to inform stakeholders that criteria will be developed to help determine that applications meet the requires “Essential Services” to be specified under the new pharmacy contractual framework which is currently being negotiated. The rurality</td>
<td>Waiting for legislation timetable Anticipated Dec 2005</td>
<td>1. SO24/SO22</td>
<td>2. Standard/Executive</td>
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2. Standard/Executive  
3. Wales |
|---|---|---|---|---|
| HSS 44 (03) | Health Professions Order Consequential Amendments | Amendments required to NHS (Professions Supplementary to Medicine) Reg 1974 and NHS (Speech Therapists) Reg 1974. | Not Known awaiting advice | 1. SO24  
2. Standard  
4. UK |
| HSS 46 (03) | Independent Review of Determinations (Adoptions) (Wales) Regulations 2005 (Considered by Committee on 23/06/04) | To establish a mechanism for the independent review of determinations by adoption panels on assessment of adopters. | December 2005 | 1. SO24  
2. Standard  
3. Wales |
| HSS 48 (03) | The Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005 Identified for scrutiny | Regulation to specify the range of foods covered by the Healthy Start Scheme in Wales. | Spring 2006 | 1. Unknown  
2. Standard  
3. Wales |
| HSS 07 (04) | The Adoption Information and Intermediary Services (Pre Commencement Adoptions) (Wales) Regulations 2005 | Regulations covering access and disclosure of information about adoption made before commencement of these regulations (30 December 2005) | September 2005 | 1. S024  
2. Standard  
3. Wales |
|---|---|---|---|---|
| HSS 11 (04) | Adoption and Children Act Register Order in Council | Order in Council made by the Secretary of State for Education and Skills, to establish the Adoption and Children Act Register. If the Order applies to Wales a draft must be laid before and approved by resolution of the Assembly | No action until 2006 at the earliest | 1. S026  
2. Standard  
3. England and Wales |
| HSS 13 (04) | The Local Authorities (Prescribed Fees) (Adoptions with a Foreign Element) (Wales) Regulations 2005 | Regulations giving local authorities discretion to (continue to ) charge fees to prospective intercountry adopters | October 2005 | 1. S024  
2. Standard  
3. Wales |
| HSS 14 (04) | Independent Review of Determinations (Phase 2 ) (Wales) Regulations 2005 | Regulations establishing independent reviews of adoption panel determinations in respect of the disclosure of protected information | On hold | 1. SO24  
2. Standard  
3. Wales |
| HSS27 (04) | The Social Services Complaints Procedures (Wales) Regulations 2005 | To provide a statutory framework for local authority social services complaints, using the Assembly’s new powers in the Health and Social Care (Community Health and Standards) Act 2003 | Target date for Plenary 6 Dec 2005 | 1. SO24  
2. Standard  
3. Wales |
<p>| HSS 37 (04) | The Water Fluoridation (Wales Consultation) Regulations 2005 Identified for Scrutiny | To introduce regulations governing consultation arrangements for any water fluoridation scheme(s) that might be introduced in Wales | Not known Not planned for this year | 1. SO 24 2. Anticipated Standard (with debate) 3. Wales |
| HSS 38 (04) | The National Health Service Travelling expenses and remission of charges Wales Regulations | To change the calculation of the requirements for someone over 60 in line with changes that were made in England and make other relevant changes to bring regs in to line with England and Scotland | Came into force on 15th July 2005 | 1. SO24 2. Accelerated 3. Wales |
| HSS 40 (04) | The National Health Service (Travelling Expenses and | To update the income allowances (required as part of the non-devolved tax credit system) for people | Came into force on 15th July 2005 | 1. SO 24 2. Standard |</p>
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<thead>
<tr>
<th>HSS 45 (04)</th>
<th>Proposed Primary care (charges to overseas visitors) Regulations 2005</th>
<th>To change and clarify the rules of eligibility of overseas visitor to receive free primary medical services</th>
<th>Not known – no timetable as yet- Consultation completed. Ministerial decision To put on hold until further notice</th>
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<td>HSS 52 (04)</td>
<td>The National Health Service (Primary Medical Services) (Miscellaneous Amendments) (Wales) Regulations 2005</td>
<td>Amendments to the GMS Contract Regulations</td>
<td>December 2005</td>
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<td>Adoption (Non Agency Cases) Regulations 2005</td>
<td>Regulations to cover adoption cases not within the remit of the Adoption Agency (Wales) Regulations 2005</td>
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<td>HSS 55 (04)</td>
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<td>Regulations to update the Local Authority Adoption Services (Wales) Regulations 2003</td>
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<td>1. SO 2 2. Standard</td>
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<td>HSS 58 (04)</td>
<td>The National Health Service (Performers Lists) (Pharmacists) (Wales) 2005</td>
<td>To create a Performers list for Pharmacists</td>
<td>October 2005</td>
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<td>HSS 70 (04)</td>
<td>Shipman Inquiry Regulations 2005</td>
<td>Changes to existing regulations as a result of recommendations made in Shipman IV and Shipman V</td>
<td>Autumn/Winter 05 at the earliest</td>
<td></td>
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<td>HSS 71 (04)</td>
<td>Independent Prescribers Regulations 2005</td>
<td>Introduce Independent Prescribing in Wales</td>
<td>September 2005 Consultation process has only just started</td>
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<td>HSS 72 (04)</td>
<td>GMS Transitional and Consequential Provisions (Wales)(Amendment)Order 2005</td>
<td>Amendment necessary as it cross-refers to the proposed amendments to the Primary Medical Services Regulations 2005.</td>
<td>December 2005</td>
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<td>HSS 73 (04)</td>
<td>The Local Safeguarding Children Boards (Wales)</td>
<td>To establish Local Safeguarding Children Boards in Wales under section 31 of the Children Act 2004</td>
<td>November 2005</td>
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<td>Regulations 2005</td>
<td>3. Wales</td>
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<tr>
<td>Adoption and Children Act 2002 (Commencement No 10) (Wales) Order 2005</td>
<td>November 2005</td>
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| To bring into force those parts of the Act not yet commenced relating to Wales that must be commenced by Wales alone | 1. SO 24
2. Standard
3. Wales |
Health and Social Services Committee

HSS(2)-10-05(p.6)

Date: Wednesday 5 October 2005
Venue: Committee Rooms 3&4, National Assembly for Wales
Title: The Social Services Complaints Procedures (Wales) Regulations 2005

Purpose

1. This paper provides the Committee with the opportunity it requested to consider the draft regulations on complaints procedures in local authority social services for adults, before they are taken forward for consideration in accordance with standing order 24.

Summary

2. The Committee selected these Regulations for scrutiny at its meeting on 3 March 2004. They form part of a wider reform of complaints procedures in local authority social services and the matching regulations on services for children (The Representations Procedure (Children) (Wales) Regulations 2005) appear as the next item on the agenda. Subject to approval in Plenary – scheduled for 29 November 2005 – it is hoped to bring the new arrangements into force on 1 April 2006.

Background

3. In 2001, the Assembly consulted widely on complaints and representations procedures in social services under the title “Listening to People”. Since then, the Adoption and Children Act 2002 and the Health and Social Care (Community Health and Standards) Act 2003 have given the Assembly new powers and the opportunity to overhaul the arrangements last revised in 1991.

4. The new arrangements have been developed with the help of a Complaints and Representations Advisory and Implementation Group (CRAIG). This brought together a range of key interests to consider the main policy options, the drafting instructions for the regulations and the associated guidance. A formal 12 week consultation finished in August. Some amendments have been proposed and the draft regulations, explanatory memorandum and regulatory appraisal are ready for consideration by the Committee.

Consideration

5. Compared with current arrangements - established on an England and Wales basis nearly 15 years ago - the main changes are as follows:
• Overall, the separate children’s and community care procedures have been brought more closely together into a common framework. There are – for legal reasons – two sets of regulations, but there is now one body of guidance. Unnecessary differences between to two sets of regulations have been eliminated wherever possible, although of course the differences required by the primary legislation have been maintained.

• The new regulations extend the duties on local authorities to safeguard and promote the welfare of the service user in the way they handle complaints. There are new duties to ascertain and take into account the user’s wishes and feelings.

• Both procedures now have the same three-stage procedure – local resolution, formal consideration and panel hearing. (This has been achieved by introducing into the children’s procedure a time limited first stage giving a chance for local resolution.)

• The regulations put all the time-scales for handling complaints on a statutory footing and require authorities to keep complainants informed about progress with their complaint.

• The regulations provide arrangements for managing complex situations where there are concurrent investigations by for instance the police, the Care Standards Inspectorate for Wales (CSIW) or the Care Councils.

• The regulations safeguard the existing right of complainants to go to a panel hearing wherever the local authority’s handling of their complaint has failed to secure resolution of the matter. However, in perhaps the biggest single change, this will in future involve a panel with both the panel membership and the administrative arrangements wholly independent of the complained against authority.

6. It has been the Assembly Government’s intention since the passage of the 2003 Act to build clearer links between the social services and NHS procedures. But, following the recommendations of the Fifth Report of the Shipman Inquiry, work on the new NHS regulations has been suspended. However, the new social services guidance sets out the new arrangements for links between the two procedures – arrangements which it is proposed will be given the force of regulation when the new NHS regulations are made.

7. Through the guidance, the same principles have been extended to cover links with the other complaints procedures of local authorities. Together, these changes will represent a major step towards a seamless complaints service for users of public services in Wales.

8. The formal consultation on the draft regulations, draft regulatory appraisal and draft guidance was held between 16 May and 5 August 2005. 52 responses were received from relevant organisations, including bodies representing services users, local authorities and local health boards, and the Public Services Ombudsman and the Care Council for Wales. There was
overwhelming endorsement for most of the Assembly Government’s proposals.

9. Alongside the more formal consultation, we worked with All Wales People First to provide representatives of people with learning disabilities with a face to face opportunity to discuss the proposals. And, working with Age Alliance Wales, a separate exercise was conducted to seek the views of individual older people and their local organisations, from which 96 responses were received. There was overwhelming support from both of these exercises for the Assembly Government’s plans for the regulations.

10. In the light of the consultations, a number of small amendments have been made to the draft of the Regulations. These amendments:

- adjust some of the time-scales for individual stages of the procedure,
- strengthen the requirements on authorities to keep complainants informed about their rights under the procedures,
- strengthen the requirements on authorities to keep complainants informed about the progress of their complaint, and
- make provision for cases where the Care Councils in either Wales or England may also be investigating the matter raised in a complaint

**Timetable for implementation**

11. Following the Committee’s consideration of the regulations, I intend submitting them to Business Committee later in October, with the aim of tabling a final draft at plenary on 29 November 2005. Subject to the National Assembly’s approval, the Regulations will be commenced on 1 April 2006 to allow local authorities to prepare for implementation.

**Action**

12. The Committee is invited to:

i) consider this paper, the draft regulations, the draft Explanatory Memorandum and the draft Regulatory Appraisal;

ii) note the intention to proceed with the draft regulations in accordance with standing order 24. On current plans, the intention is to seek the Assembly’s agreement to making the regulations in plenary on 29 November 2005.

**Brian Gibbons AM**  
**Minister for Health and Social Services**

Contact: Colin Vyvyan, Older People and Long Term Care Policy Division (ext.: 3259)
These Regulations make provision for complaints to local authorities about the exercise of their social services functions, with the exception of functions capable of being considered as representations under sections 24D and 26 and schedule 7, paragraph 6 of the Children Act 1989. They replace the Complaints Procedure Directions 1990. Provision is also made for representations made under the Representations Procedure (Children) (Wales) 2005 to be further considered under these Regulations.

Regulations 3 and 4 require the local authority to establish a complaints procedure and set out the principles to be followed in operating it. Under regulation 5 the local authority must designate a senior officer with responsibilities in relation to complaints and regulation 6 requires the local authority to appoint a complaints officer.

Regulation 7 sets out requirements in relation to publicity of the complaints procedure and regulation 8 sets out requirements for the training of staff.

Part III sets out who may complain (regulation 9) and about what matters (regulations 10 and 11). Regulation 12 establishes a procedure for consideration of how complaints shall be dealt with where there is a concurrent consideration by another person or body. This allows for the local authority to suspend consideration temporarily where to continue would compromise or prejudice the other consideration.

Part IV establishes procedures for working with other local authorities (regulation 13) or persons registered under the Care Standards Act or the National Assembly (regulation 14).

Regulation 18 requires the local authority to attempt local resolution of a complaint and regulation 19 establishes the procedure for formal consideration of the complaint where local resolution has not been achieved.

Regulation 20 sets out requirements in relation to the response to be sent by the local authority including as to the complainant’s right to request an independent panel hearing in accordance with Part VI of the Regulations.

Part VI sets out the arrangements for independent consideration of both complaints made under these Regulations and representations made under the Representations Procedure (Children) (Wales) Regulations 2005.

Part VII sets out how local authorities are to monitor and report on the arrangements they have made with a view to ensuring that they comply with the Regulations.
2005 No. (W. )

SOCIAL CARE, WALES

[NB - this needs to be re-drafted on completion]

The Social Services Complaints Procedure (Wales) Regulations 2005
Made 2005
Coming into force 1 April 2006

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PART VIII
TRANSITIONAL PROVISION
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The National Assembly for Wales, in exercise of the powers conferred by sections 114(3), (4) and (5) and 115(1), (2), (4), (5) and (6) of the Health and Social Care (Community Health and
Standards) Act 2003(1) and sections 26A and 26ZB of the Children Act 1989(2) hereby makes the following Regulations:-

PART I
GENERAL

Title, commencement and application
—1. The title of these Regulations is the Social Services Complaints Procedure (Wales) Regulations 2005 and they come into force on 1 April 2006. These Regulations apply in relation to Wales.

Interpretation
In these Regulations —
“the Act” means the Health and Social Care (Community Health and Standards) Act 2003(3);
“appropriate office” (“swyddfa briodol”) means in relation to an establishment or agency —
if an office has been specified under regulation 14(3) for the area in which the establishment or agency is situated, that office;
in any other case, any other office of the National Assembly.
“child” means a person under the age of 18;
“complaints officer” means the person appointed under regulation 6;
“complaints procedure” means the arrangements made under regulation 4;
“disciplinary proceedings” means any procedure for disciplining employees adopted by a local authority;
“former complaints procedure” means the complaints procedure under section 7B of the Local Authority Social Services Act 1970(4);
“local authority” means a county council or county borough council;
“National Assembly” (“Cynulliad Cenedlaethol”) means the National Assembly for Wales;
“partnership agreement” means an agreement between a local authority and an NHS body made under the provisions of section 31 of the Health Act 1999(5) and the National Health Service Bodies and Local Authorities Partnership Arrangements (Wales) Regulations 2000(6);
“service user” means any person who may make a complaint under regulation 9(1);
“social services functions” means the list of functions set out in Schedule 1 to the Local Authority Social Services Act 1970;
“staff” means any person who is employed by or engaged to provide services to a local authority; and
“working day” means a day except Saturday, Sunday, Christmas Day, Boxing Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971(7).

(1) 2003 c.43.
(2) 1989 c.41. Section 26ZB of the Children Act 1989 was inserted by section 116 of the Act. The functions of the Secretary of State under the Children Act 1989 were transferred to the Assembly by the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672).
(3) 2003 c.43.
(4) 1970 c.42. Section 7B was inserted by section 50 of the National Health Services and Community Care Act 1990 and amended by section 67(1) and Schedule 5 Part 2 paragraphs 15(1) and (2) of the Health and Social Care Act 2001.
(5) 1999 c.52.
(7) 1971 c.80.
General principles in handling complaints

—2. Any complaints procedure set up under these regulations must be operated in accordance with the principle that the welfare of the service user should be safeguarded and promoted. Account should be taken of the ascertainable wishes and feelings of the service user.

PART II

SETTING UP THE COMPLAINTS PROCEDURE

Duty to establish a complaints procedure

Each local authority must make arrangements in accordance with these regulations for the handling and consideration of complaints and the arrangements must be in writing.

Senior Officer responsible for complaints

Each local authority must designate a senior officer to be responsible for seeking to ensure compliance with the arrangements made by the local authority under these Regulations.

Complaints officer

—3. Each local authority must appoint a person, in these Regulations referred to as a complaints officer, to manage the procedures for handling and considering complaints and in particular —

to perform the functions of the complaints officer under these Regulations;

to perform such other functions in relation to complaints as the local authority may require; and

to co-operate with such other persons or bodies as may be necessary in order to investigate or resolve complaints.

The functions of the complaints officer may be performed by any person authorised by the local authority to act on behalf of the complaints officer.

A complaints officer may be —
a person who is not an employee of the local authority; and

appointed as complaints officer for more than one body.

Publicity

—4. Each local authority must ensure that there is effective publicity of its complaints arrangements.

Each local authority must take all reasonable steps to ensure that service users and their carers, if any, are informed of its arrangements, the name of its complaints officer and the address at which the complaints officer can be contacted.

A copy of the arrangements made under Regulation 3 must be given, free of charge, to any person who makes a request for one.

Each local authority must take all reasonable steps to provide a copy of its arrangements in any form requested by the service user or other person making a complaint on the service user’s behalf.

Information and training for staff

Each local authority must ensure that their staff are informed about and appropriately trained in the operation of the complaints procedure.
PART III
NATURE AND SCOPE OF THE COMPLAINTS PROCEDURE

Persons who may make complaints
—5. A complaint may be made by any person to whom the local authority has a power or duty to provide, or secure the provision of, a service which, if provided, would be provided as a social service function and whose need, or possible need for such a service has (by whatever means) come to the attention of the local authority.

A complaint may be made by a person (a “representative”) acting on behalf of a person mentioned in paragraph (1) in any case where that person —

is a child; or

has requested the representative to act on his or her behalf; or

is not capable of making the complaint personally.

A complaint may be made by a person (a “representative”) in respect of a person who has died.

Any representative making a complaint under paragraph (2)(a) or (c) or under paragraph (3) must, in the opinion of the local authority have, or have had, an interest in the person’s welfare and be a suitable person to act as representative.

If in any case the local authority is of the opinion that any person making a complaint under paragraphs (2)(a) or (c) or (3) does not have sufficient interest in the person’s welfare or is not a suitable person to act as a representative, the authority must notify the person in writing immediately, stating the reasons for that opinion.

Where notification is given under paragraph (5) and the person referred to in paragraph (1) in respect of whom the complaint has been made is alive the local authority must, if it considers it appropriate to do so having regard to the understanding of the person referred to in paragraph (1), provide that person with a copy of the notification.

In these Regulations any reference to a complainant includes a reference to his or her representative.

Matters about which complaints may be made
—6. Subject to paragraph (2) a complaint to a local authority may be about the exercise of its social services functions including —

the discharge by a local authority of any of its social services functions;

the provision of services by another person pursuant to arrangements made by such an authority in the discharge of those functions;

the provision of services by such an authority or any other person in pursuance of arrangements made by the authority under section 31 of the Health Act 1999(8) in relation to the functions of an NHS body (within the meaning of that section).

A complaint may not be made under these regulations about the exercise of functions under sections 31, 33, 34, 35, 43, 44 and 47 of the Children Act 1989.

Matters excluded from consideration
These Regulations do not require arrangements to be made for the investigation of any complaint which has been investigated —

under these Regulations,

under any former complaints provisions, or

by a Commissioner for Local Administration.

(8) 1999 c.8.
Complaints subject to concurrent consideration

—7. Where a complaint relates to any matter —
about which the complainant has stated in writing that he or she intends to take proceedings in any
court or tribunal, or
about which the local authority are taking or are proposing to take disciplinary proceedings, or
about which the local authority have been notified that an investigation is being conducted by any
person or body in contemplation of criminal proceedings, or
about which a meeting involving other bodies including the police has been convened to discuss
issues relating to the protection of children or vulnerable adults, or
about which the local authority have been notified that there are current proceedings under
section 59 of the Care Standards Act 2000,

the local authority must consider, in consultation with the complainant and any other person or
body which the authority consider appropriate to consult, how the complaint should be handled.
Such a complaint shall be referred to for the purposes of this Regulation as a “complaint subject to
concurrent consideration”.

The consideration of a complaint subject to concurrent consideration under this Part of the
Regulations may be discontinued if at any time it appears to the local authority that to continue
would compromise or prejudice the other consideration.

Where the local authority decide to discontinue the consideration of a complaint under paragraph
(2) the authority must give notice of that decision to the complainant.

Where the local authority discontinue the consideration of any complaint under paragraph (2),
they may at any time resume their consideration.

Where consideration of a complaint has been discontinued under paragraph (2) the local authority
must ascertain the progress of the concurrent consideration and notify the complainant when it has
been concluded.

The local authority must resume consideration of any complaint where the concurrent
consideration is discontinued or completed and the complainant requests that the complaint be
considered under these Regulations.

PART IV
WORKING WITH OTHER AGENCIES

Complaints involving more than one body

—8. In any case where it appears to the complaints officer that a complaint is or may be a
complaint which relates to the exercise of functions by more than one local authority (a complaint
involving more than one body) the complaints officer must, as soon as reasonably practicable —
notify the other body or bodies involved and consider with the complaints officer of each of them
which body should take the lead in handling the complaint; and
notify the complainant of their decision.

The complaints officer of a local authority which is the lead body must —
ensure that any part of the complaint relating to the actions of the local authority is considered
under this part of the regulations;
ensure that the complainant is kept informed about the progress of the investigation;
ensure that the response required under regulation 20 so far as practicable includes a response on
any matter which was within the responsibility or control of any other body mentioned in
paragraph (1).

The complaints officer of a local authority which is not the lead body must —
ensure that any part of the complaint relating to the actions of the local authority is considered under these regulations; and
advise the complaints officer of the lead body of any resolution of the complaint under regulation 18, or the outcome of any investigation under regulation 19.

**Handling of care standards complaints**

—1. Except where paragraph (2) applies, in any case where a complaint relates wholly or partly to services provided by an establishment or agency in respect of which a person is registered by the National Assembly under the Care Standards Act 2000(9), the local authority receiving such a complaint must, within 2 working days of receipt —

send details of the whole complaint or that part of the complaint which relates to the registered service to the person registered to provide that service; and

inform the complainant that details have been sent under sub-paragraph (a).

This paragraph applies where -

a complaint has already been considered by the registered person; or

the local authority are of the opinion that to proceed under paragraph (1) would be likely to compromise or prejudice the investigation of the complaint under Part V of the Regulations or might compromise or prejudice an investigation by the National Assembly.

In any case where a complaint relates wholly or partly to services provided by an establishment or agency in respect of which a person is registered by the National Assembly, the local authority must notify the appropriate office of the National Assembly if it has not been possible to resolve the complaint under regulation 18.

**PART V**

**HANDLING AND CONSIDERATION OF COMPLAINTS BY LOCAL AUTHORITIES**

**Making a complaint**

—2. Where a person wishes to make a complaint under these Regulations, he or she may make the complaint to any member of the staff of the local authority employed or engaged in relation to the social service functions of the authority.

A complaint under paragraph (1) may be made orally or in writing (including electronically).

**Advice about the availability of advocacy services**

The local authority must inform the complainant of the availability of any advocacy services which the complaints officer believes may be of assistance to the complainant.

**Withdrawal of complaints**

—3. A complaint may be withdrawn orally or in writing at any time by the complainant.

The local authority must as soon as possible write to the complainant to confirm the oral withdrawal of a complaint.

**Local resolution**

—4. The local authority must take all reasonable steps to resolve the complaint as soon as is reasonably practicable and subject to paragraph (2), within 10 working days beginning on the date the complaint was made.

(9) 2000 c.14.
The period referred to in paragraph (1) may be extended upon request by the complainant or with the complainant’s agreement by up to a further 10 working days.

For the purposes of paragraph (1), the local authority may in any case where it would be appropriate to do so, and with the agreement of the complainant, make arrangements for conciliation, mediation or other assistance for the purposes of resolving the complaint.

Where the complaint is resolved under paragraph (1), the local authority must confirm in writing to the complainant the agreed resolution.

Where the complaint has not been resolved within 20 working days, the local authority must, as soon as practicable, notify the complainant in writing of:

- the complainant’s right to request that the complaint be formally considered;
- the procedure for requesting such further consideration; and
- the date by which such a request must be made having regard to the provisions of paragraph (6).

The complainant may request orally or in writing that the complaint be formally considered under regulation 19 at any time within 30 working days of the date on which the complaint was first made.

**Formal consideration**

—5. Where the complainant has requested formal consideration of the complaint, subject to regulations 12, 13 and 14 the local authority must investigate the complaint to the extent necessary and in the manner which appears to the authority most appropriate to resolve it speedily and efficiently.

The local authority must compile a formal written record of the complaint as soon as is reasonably practicable, and send it to the complainant with an invitation to the complainant to comment on its accuracy.

The local authority must consider any comments made by the complainant under paragraph (2) and in the light of those comments make any amendments to the record which are necessary to ensure it is, in the opinion of the authority, an accurate record of the complaint.

Except where arrangements have been made under regulation 18(2) the local authority may in any case where it would be appropriate to do so, and with the agreement of the complainant, make arrangements for conciliation, mediation or other assistance for the purposes of resolving the complaint.

The local authority must —

- explain to the complainant how the complaint will be investigated; and
- send a copy of the complaint to any person who is the subject of the complaint unless —
  - this has already been done; or
  - notification at that time would prejudice the consideration of the complaint.

The local authority may —

- invite the complainant and any other person whom the authority considers may be able to assist with the resolution of the complaint to be interviewed; and
- take such advice as appears to the complaints officer to be required.

Where any person is interviewed in accordance with paragraph 6(a) the local authority must —

- send a copy of the draft record of the interview to the person interviewed;
- invite that person to comment on the accuracy of the draft record;
- consider any comments made by the person; and
- in the light of those comments make any amendments to the record which, in the opinion of the authority, are necessary to ensure that the record is accurate.

The local authority must take all reasonable steps to keep the complainant informed about the progress of its formal consideration of the complaint.
**Response**

—6. The local authority must prepare a written response to the complaint which —
summarises the nature and substance of the complaint;
describes the investigation under regulation 19 and summarises the conclusions;
explains what action will be taken to resolve the complaint;
where appropriate, contains an apology to the complainant; and
identifies what other action, if any, will be taken in the light of the complaint.

Subject to paragraph (3), the response must be sent to the complainant within 25 working days beginning on the date on which the local authority received the request from the complainant for formal consideration.

If, in the case of —
any complaint where there has been difficulty in the determination of its nature or substance;
a complaint involving more than one body;
a complaint which has been treated as subject to concurrent consideration under regulation 12; or
any other complaint where the complainant has agreed to a later response,
it is not possible for the response to be sent within 25 working days the local authority must notify the complainant of the reason for the delay, the date by which it expects to send the response and must send that response as soon as reasonably practicable.

The response must include information about —
the complainant’s right to request an independent panel hearing in accordance with regulation 22;
the procedure for requesting such a hearing; and
the time within which such a request must be made.

Copies of the response prepared in accordance with paragraph (1) must be sent —
to any person who was the subject of the complaint;
where the complaint involves more than one body to the complaints or officer of each body;
where the complaint relates to a service described in regulation 10(1)(c) to the NHS body with whom the arrangement was made;
where the complaint is a care standards complaint mentioned in regulation 14, to the person registered under the Care Standards Act 2000 as the provider in respect of the establishment or agency.

**PART VI**

**THE INDEPENDENT PANEL HEARING**

**The Independent Panel**

—7. The Assembly must take such steps as it considers reasonable, including as to administrative and financial arrangements, to establish a panel to further consider complaints under this Part.

In particular the Assembly must prepare and keep up to date two lists of persons who in its opinion are suitable to further consider complaints under this Part.

The persons appointed to one of the lists established under paragraph (2) must have experience in the provision of services which must or may be provided by local authorities under the Local Authority Social Services Act 1970(10) or which are similar to such services (“the list of persons with social services experience”). The persons appointed to the other list (“the list of lay persons”) should not have such experience.

(10) 1970 c.42.
A person is not to be regarded as suitable for appointment under paragraph (2) if he or she is employed by, or an elected member of, a local authority in Wales.

**Request for an independent panel hearing**

—8. A complainant may request that a complaint is further considered by an independent panel in accordance with this Part in any case where —

- a local authority has decided that it will not consider a complaint under regulation 9(5);
- for any reason formal consideration under regulation 19 has not been completed within 6 months of the date on which the complaint was made;
- the complainant is dissatisfied with the result of formal consideration by the local authority under regulation 19;
- for any reason formal consideration under the Representations Procedure (Children) (Wales) Regulations 2005(11) has not been completed within 6 months of the date on which the representation was made; or
- the complainant is dissatisfied with the local authority’s formal consideration of representations made under the Representations Procedure (Children) (Wales) Regulations 2005.

Subject to paragraph (3) a request under paragraph (1) must be made to the Assembly within 20 working days of the day on which the written response to the complaint was sent to the complainant under regulation 20(2) or notification sent under regulation 9(5) or the written response sent to the complainant under regulation 18(2) of the Representations Procedure (Children)(Wales) Regulations 2005.

Where a request is made under paragraph (1)(b) or (d) it must be made within 20 working days of the complainant becoming aware that the local authority has not sent a written response to the complaint or representation within 6 months of the date on which it was made.

Where a complainant notifies the local authority complained against that he or she requests further consideration of the complaint by an independent panel under paragraph (1) the local authority shall, as soon as practicable, inform the Assembly of the request and the request shall be treated as having been made to the Assembly on the date that it was received by the local authority.

**Duty on local authorities to co-operate with the Assembly**

—1. Where a request for an independent panel hearing is made under regulation 22(1) the local authority which is the subject of the complaint must provide such assistance as may reasonably be required to enable the Assembly to discharge its functions under this Part.

The assistance that may be required under paragraph (1) includes the production of information or documents relevant to a complaint notwithstanding any rule of common law that would otherwise prohibit or restrict such production.

**Initial handling of request**

—2. When the Assembly receives a request for a panel hearing it must —

- acknowledge receipt of the request in writing within 2 working days;
- ask the complainant to provide within 20 working days if one has not already been provided, a written statement setting out the basis of the complaint and why the complainant is dissatisfied with the local authority’s response;
- inform, in writing, the local authority complained against and send it a copy of the complainant’s letter requesting a panel hearing and, when available, a copy of the complainant’s statement requested under sub-paragraph (b);
- request from the local authority the complaints file and any information and documents relevant to the complaint.

(11) S.I. 2005/
The Assembly must convene a panel to further consider the complaint within 20 working days of receipt of the complainant’s written statement of the complaint.

The panel must consist of 3 members, one drawn from the list of persons with social services experience and two drawn from the list of lay persons.

One of the panel members drawn from the list of lay persons must be appointed by the Assembly to chair the panel.

**Procedure of the panel hearing**

—3. In further considering the complaint the panel may adopt such procedures as it determines are most appropriate for dealing with the complaint.

Before the panel determines to adopt a procedure for dealing with a complaint it must consult the complainant and any person who is the subject of the complaint.

In the event of any disagreement as to the procedure that is to be adopted for dealing with the complaint the decision of the chair of the panel is final.

The panel may make such enquiries and take such advice as it determines are appropriate.

The panel must ensure that the complainant and any person who is the subject of the complaint are given the opportunity to present their case orally or, if they so wish, in writing.

The panel or a member of the panel may interview any person who is not the complainant or a subject of the complaint if the panel considers that they may be able to provide information relevant to the complaint.

If any interview under paragraph (6) is conducted otherwise than in the presence of the complainant and every person who is the subject of the complaint, any information gathered in the interview, which the panel may take into account, must be summarised in writing and copies provided to the complainant and any person subject to the complaint at least 2 working days before the panel hearing.

At any interview or meeting with a panel member the complainant and any person who is the subject of the complaint may be accompanied by a relative or friend and by any person chosen by him or her to act as an adviser.

A person accompanying a complainant or person who is the subject of a complaint may, with the consent of the chair of the panel, speak to the panel.

Any meeting of the panel or of any member of the panel with another or with the complainant or any person who is the subject of the complaint shall be in private.

**Report of the panel**

—4. The chair of the panel must prepare a written report which —

summarises the findings of fact made by the panel relevant to the complaint;

summarises the conclusions of the panel;

recommends what action, if any, should be taken to resolve the complaint;

recommends what other action, if any, should be taken as a result of the complaint; and

sets out the reasons for the findings, conclusions and recommendations of the panel.

The report may include suggestions which the panel consider would improve the services of the local authority or which would otherwise be effective for the purpose of resolving the complaint.

The report must be delivered to the Assembly within 5 working days of the conclusion of the panel hearing.

Subject to paragraph (5) the Assembly must send copies of the report of the panel to —

the complainant;

any independent person appointed under regulation 17 of the Representations Procedure (Children) (Wales) Regulations 2005;
any person on whose behalf a complaint has been made by a representative; the panel members; and the Chief Executive and Director of Social Services for the authority which is complained against. The panel chair may withhold any part of the panel’s report where, in his or her opinion, this is necessary in the interests of protecting the confidentiality of any third party. If the panel chair is unable to make the report available to the Assembly within the time set out in paragraph (3) the Assembly must write to the persons who are entitled to a copy of the report explaining the reason for the delay and when the report will be available.

Response of the local authority

The Local authority must, within 15 working days of receipt of the report of the panel — decide what action the authority will take in the light of the recommendations of the panel; and notify that decision to the complainant and any person on whose behalf a complaint has been made by a representative.

Complaint to the Ombudsman

The notice sent under regulation 27(b) must explain the complainant’s right to complain to the Public Services Ombudsman for Wales (Ombwdsmon Gwasanaethau Cyhoeddus).

PART VII
LEARNING FROM COMPLAINTS

Monitoring the operation of the complaints procedure

Each local authority must monitor the arrangements that they have made with a view to ensuring that they comply with the Regulations by keeping a record of each complaint received, the outcome of each complaint, and whether there was compliance within the time limits specified in regulations 18 and 20.

Annual Report

—5. Each local authority must prepare an annual report on their performance in handling and consideration of complaints for the purposes of — monitoring compliance with these Regulations, and improving the handling and consideration of complaints. The first report referred to in paragraph (1) must be compiled within 12 months of the date of the coming into force of these Regulations.

PART VIII
TRANSITIONAL PROVISION

Transitional Provision

—6. Subject to paragraph (2) where a complaint has been made in accordance with any former complaints procedure before 1 January 2006, it must be considered in accordance with that procedure. Where, in accordance with a former complaints procedure, a complainant — has made a request to a local authority for review by a panel, or would have been entitled to make such a request after 1 January 2006,
the local authority must treat any such request (if made) as a request for the complaint to be considered under Part VI of these Regulations.

Signed on behalf of the National Assembly for Wales under section 66(1) of the Government of Wales Act 1998(12)

Date

The Presiding Officer of the National Assembly
EXPLANATORY MEMORANDUM

THE SOCIAL SERVICES COMPLAINTS PROCEDURE (WALES) REGULATIONS 2005

Summary

These Regulations, together with the matching set on services for children (The Representations Procedure (Children) (Wales) Regulations 2005) and the associated guidance, will have the effect of putting into place a new framework for handling complaints in local authority social services.

1. This Memorandum is submitted to the Assembly’s Business Committee in relation to The Social Services Complaints Procedure (Wales) Regulations 2005, in accordance with Standing Order 24.6.

2. A copy of the draft instrument is submitted with this Memorandum.

Enabling Powers

3. The powers to make these Regulations are contained in section 114 of the Health and Social Care (Community Care and Standards) Act 2003. This power has been conferred on the National Assembly for Wales and in turn, have been delegated to my portfolio as Minister for Health and Social Services.

Background

4. The immediate background to the development of these Regulations was the Health and Social Care (Community Health and Standards) Act 2003, which received Royal Assent on 20 November 2003. Part 2 provides for a range of measures designed to raise standards in health and social care. Chapter 9 of this Part gave the Assembly new powers to reform complaints procedures in the NHS and in local authority social services.

Effect

5. These Regulations will, with the matching set on services for children (The Representations Procedure (Children) (Wales) Regulations 2005) and the associated guidance, have the effect of putting into place a new framework for handling complaints in local authority social services.
6. In summary, the key changes introduced through the two sets of Regulations are:

- Overall, the separate children’s and community care procedures have been brought more closely together into a common framework. There is a single volume of guidance covering all complaints about social services. In the Regulations, unnecessary differences have been eliminated wherever possible, although of course the differences required by the two pieces of primary legislation have been retained;

- The new Regulations extend the duties on local authorities to safeguard and promote the welfare of the service user in the way they handle complaints. There are new duties to ascertain and take into account the user’s wishes and feelings;

- Both procedures now have the same three-stage process. (This has been achieved by introducing into the children’s procedure a clear, time limited first stage giving a chance for informal local resolution);

- The Regulations put all of the time-scales for handling complaints on a statutory footing and they require authorities to keep complainants informed about progress with their complaint;

- The Regulations provide arrangements for managing complex situations where there are concurrent investigations by for instance the police, the Care Standards Inspectorate for Wales (CSIW) or the Care Council; and

- The automatic right to take an unresolved complaint to a Panel hearing has been retained and, in perhaps the biggest single change, an independent panel has been introduced. Both the membership of the Panel and the administrative arrangements will be wholly separate from the authority against which the complaint has been made.

7. The Regulations and guidance set out new arrangements for links between local authorities and the CSIW and, through the guidance, the same principles have been extended to cover links with other complaints procedures in the NHS and in local government. Together, these changes will represent a major step towards a seamless complaints service for users of public services in Wales.

**Target Implementation**

8. It is intended that the proposed Regulations be made on 29 November 2005 and come into force on 1 April 2006. The equivalent Regulations in England are due to come into force on the same day. Therefore, any delay in making would give local authorities less time to prepare for a successful implementation. Further delay in the coming into force date would mean that the additional opportunities and safeguards enshrined in the Regulations would be unavailable to users of social services in Wales.
Financial Implications

9. It is not anticipated that local authorities will need additional resources to meet their duties under these Regulations. The overall intention is to secure improvements in practice within existing resources. Local authorities have had duties to establish and operate complaints procedures since the early 1990s. They have had duties to publicise the procedures among service users and the public and they have had duties to train their own staff to use the procedures.

10. Under the new arrangements, authorities will no longer be responsible for operating the third or panel stage of the procedure. Local authorities will be able to re-deploy any modest savings they make to developing the quality of their practice in the two earlier stages.

11. This change creates limited financial implications for the Assembly. The existing Independent Review Secretariat for the NHS will undertake this role on behalf of the Assembly – albeit with a much simpler procedure than the NHS one. This will have a recurrent cost from 2006-07 of £100k for the children’s and adults procedures combined. This will pay for the administrative cost of running the panel, as well as 'day fees' for the panel members. This funding will be found from existing budgets and savings made within the Health and Social Care Main Expenditure Group.

Regulatory Appraisal

12. A Regulatory Appraisal has been carried out in relation to this Instrument and is attached.

Consultation

With Stakeholders

13. The draft Regulations – together with the guidance - would implement most of the main proposals to come out of the Assembly’s wide-ranging consultation on complaints in 2001. The main findings of which were:

- There was “particular support” for the proposal to bring the separate children’s and community care procedures into a common three-stage framework;
- There was support for elements of the procedure to be more independent of the authority complained against;
- Respondents generally supported a greater emphasis on local resolution;
- Those who responded wanted stronger guidance on the need to defer or freeze decisions while complaints about them are considered;
- Those who responded wanted better follow-up of the undertakings given by authorities in response to complaints; and
Respondents wanted to see clearer links between social services procedures and other processes in, for example, health, education and housing.

14. The present draft Regulations and the associated guidance were developed with the help of a Complaints and Representations Advisory and Implementation Group (CRAIG). This brought together a range of key interests to consider the policy options, the drafting instructions for the Regulations and the draft guidance.

15. There has been extensive consultation over the last 18 months with service users, local authority complaint officers and advocacy providers on how we can improve the arrangements for handling complaints and move towards a more seamless response across different services. This work informed the development of the draft regulations and guidance.

16. In addition, a public consultation was carried out on the draft Regulations, draft Regulatory Appraisal and draft guidance between 16 May 2005 and 5 August 2005. (A list of consultees is attached at Annex 1 to the Regulatory Appraisal.) 52 responses were received from relevant organisations, including bodies representing services users, local authorities and local health boards and Public Services Ombudsman, the Children’s Commissioner and the Care Council. There was overwhelming endorsement for almost all of the Assembly Government’s proposals for the Regulations and a number of helpful suggestions were made, especially for the guidance. Just one proposal was rejected - a suggestion that the regulations should be amended to require all complaints officers to have a social work qualification. Respondents felt that, in selecting the best people to be complaints officers, a local authority should be able to draw on a wider pool than social workers.

17. Alongside the more formal consultation, the Welsh Assembly Government worked with All Wales People First to provide representatives of people with learning disabilities with a face to face opportunity to discuss the proposals. Working with Age Alliance Wales, a separate exercise was conducted to seek the views of individual older people and their local organisations, from which 96 responses were received. There was overwhelming support from both of these exercises for the proposed Regulations.

18. In the light of the consultations, a number of amendments were made to the drafts of both sets of Regulations. These amendments will:

- adjust some of the time-scales for individual stages of the procedure;
- strengthen the requirements on authorities to keep complainants informed about their rights under the procedures;
- strengthen the requirements on authorities to keep complainants informed about the progress of their complaint; and
- make provision for cases where the Care Council may also be investigating the matter raised in a complaint.
19. The draft Regulations were notified to the Health and Social Services Committee via the list of forthcoming legislation on 3 March 2004 (HSS(2)-04-04 Paper 4a) and were identified for detailed scrutiny. This took place on 5 October 2005.

20. (to be completed after 5 October)

Recommended Procedure

21. Subject to the views of the Business Committee, I recommend that these Regulations proceed to Plenary under the Accelerated procedure.

Compliance

22. The proposed legislation will (as far as is applicable):

- have due regard to the principle of equality of opportunity for all people (Government of Wales Act 1998 section 120);
- be compatible with the Assembly’s scheme for sustainable development (section 121);
- be compatible with Community law (section 106);
- be compatible with the Assembly’s human rights obligations (section 107);
- be compatible with any international obligations binding the UK Government and the Assembly (section 108).

23. This Memorandum has been cleared by the Directorate of Legal Services and by the Assembly Compliance Officer.

24. Drafting lawyer: Joy Seculer (ext. 5895)

25. Head of Directorate: Mike Shanahan (ext. 3060)

26. Policy Lead: Colin Vyvyan (ext. 3259)
REGULATORY APPRAISAL

THE SOCIAL SERVICES COMPLAINTS PROCEDURE (WALES) REGULATIONS 2005

Background

1. There are currently two separate procedures for handling local authority social services complaints:

- **Children Act representations and complaints procedure**: There is one procedure for representations, including complaints, about social services actions under Part III of the Children Act 1989. This is set out in the Representations Procedure (Children) Regulations 1991 and guidance.

- **The Local Authority Social Services Act (LASS Act) complaints procedure**: The NHS and Community Care Act 1990 introduced a second complaints procedure. This covers all complaints about social services for adults and children’s services apart from those under Part III of the Children Act 1989. The requirements are set out in the Complaints Procedure Directions 1990 and guidance.

2. In 2001, the Assembly consulted widely on complaints and representations procedures under the title “Listening to People”. This proposed that the community care and children’s services complaints procedures should be brought together to form a single complaints and representations procedure for social services. The respondents to the consultation gave “particular support” to this proposal - but the Assembly has had to wait on primary legislation for powers to regulate across social services complaints procedures as a whole.

3. The Health and Social Care (Community Health and Standards) Act 2003 received Royal Assent on 20 November 2003. Chapter 9 to Part 2 of the Act deals with complaints procedures in social services for adults and - for the first time – this gives the Assembly powers to make Regulations in these areas.

Purpose and intended effect of the measure

4. These draft Regulations use the Assembly’s new powers in the 2003 Act to reform the complaints arrangements set out in 1990. The main changes are:

- Overall, the two sets of Regulations bring the separate children’s and community care procedures more closely together into a common framework. There is now one body of guidance, although on legal advice, there are still separate sets of regulations for children and adults. The two sets of regulations mirror each other as closely as is possible, while retaining differences required by the primary legislation;
• The new Regulations extend the duties on local authorities to safeguard and promote the welfare of the service user in the way they handle complaints. There are new duties to ascertain and take into account the user’s wishes and feelings;

• Both procedures now have the same three-stage process. (This has been achieved by introducing into the children’s procedure a clear, time limited first stage giving a chance for informal local resolution);

• The Regulations put all of the time-scales for handling complaints on a statutory footing and require authorities to keep complainants informed about progress with their complaint;

• The Regulations provide arrangements for managing complex situations where there are concurrent investigations by for instance the police, the Care Standards Inspectorate for Wales (CSIW) or the Care Councils; and

• In perhaps the biggest single change, the regulations introduce an independent stage where local consideration has failed to secure resolution of the matter. Under the old arrangements, the local authority convened a panel hearing with, typically, one of the three members being independent. Under the new arrangements, complainants will still have the same right to a panel hearing – but both the membership and the convening arrangements will be wholly separate from the complained against authority.

5. It has been the intention since the passage of the 2003 Act to build clearer links between the social services and NHS procedures. Following the recommendations of the Fifth Report of the Shipman Inquiry, work on the new NHS Regulations has been suspended. However, the social services guidance sets out new arrangements for links between the two procedures – arrangements which it is proposed will be given the force of regulation when the new NHS Regulations are made.

6. The Regulations and guidance set out new arrangements for links between local authorities and the CSIW and, through the guidance, the same principles have been extended to cover links with other complaints procedures in local government. Together, these changes will represent a major step towards a seamless complaints service for users of public services in Wales.

Risk Assessment
7. Recent research commissioned by the Assembly, the response to the 2001 consultation and representations from service users have suggested a number of problems with the present regime:

• People who use services see the arrangements as too complicated;
• Authorities have not always dealt with complaints promptly and sympathetically;
• Authorities have not always met the requirements on time-scales;
Authorities have not always kept complainants informed about the handling of their complaint; The separate arrangements for children and adults have created confusion; There has been no framework for handling complaints that involve both social services and the NHS; The lack of any independent stage to the procedure has undermined confidence among some service users; and And a small – but growing – number of people have felt the need to take their concerns to the Public Services Ombudsman for Wales.

Options
8. There are three options:
   • Option 1: Do Nothing;
   • Option 2: Wait for the planned NHS Regulations currently on hold; and
   • Option 3: Make the Legislation.

Option 1: Do Nothing
9. This would mean that the present arrangements would continue – with all of the risks and shortcomings outlined in the paragraph 7. In particular, the vulnerable people who rely on social services would still have no access to an independent panel hearing when the local authority’s handling of the complaint has failed to resolve the issue.

Option 2: Wait for the planned NHS Regulations currently on hold
10. This would mean that the health and social services drafts could be considered together. However, the issues for the two services are rather different. While the Assembly overhauled the NHS complaints arrangements in April 2003, the social services arrangements are still in the form in which they were first introduced for England and Wales in 1990 and 1991. The Assembly held its own major consultation on social services complaints in 2001 and has waited on Westminster legislation in 2002 and 2003 for the powers to make the changes proposed then. The Shipman recommendations – which have delayed the NHS regulations - do not have a direct bearing on the social services arrangements. And it will still be possible to build more of a seamless service across the NHS and local authorities by outlining the changes in guidance now and amending the social services regulations when the NHS regulations are finalised. There is little justification for delay on these grounds.

Option 3: Make the Legislation
11. The Assembly has an opportunity through recently acquired powers to reform complaints arrangements in social services. Making the legislation now means that the reforms in Wales can come into force at the same time as the matching reforms in England.

Benefits
12. The main beneficiaries of the new framework will be the vulnerable men and women who use social services. It will also benefit the family
members and advocates who might need to pursue complaints on their behalf.

- The Regulations create unified and more coherent arrangements;
- The Regulations create duties on authorities to place the well being of the person using the service at the heart of their work on handling complaints;
- The Regulations put the time-scales for handling complaints on a statutory footing and place duties on authorities to keep complainants informed about the handling of their complaint;
- They provide arrangements for managing those complex situations where for instance the police, the CSIW or the Care Council are also investigating the matters raised in the complaint;
- Most importantly, the Regulations give people who use service the opportunity to have an independent review of their concerns when the local authority’s handling of the complaint has failed to resolve the issue; and
- If implemented successfully, the new framework should mean that fewer people with concerns about social services would feel the need to take their concerns to the Public Service Ombudsman for Wales.

13. The Regulations and guidance will also be of benefit to local authorities and their staff. It will give them a single, comprehensive framework of Regulations and guidance on complaints for the first time.

Costs
14. It is not anticipated that local authorities will need additional resources to meet their duties under these new Regulations. The overall intention is to secure improvements in practice within existing resources. Local authorities have had statutory duties to establish and operate complaints procedures since 1990. They have had duties since then to publicise the procedures among service users and the public - and they have had duties to train their own staff to use the procedures properly.

15. Under the new arrangements, authorities will no longer be responsible for operating the third or panel stage of the procedure. Local authorities will be able to re-deploy any modest savings they make at this stage to developing the quality of their practice in the two earlier stages.

16. This change creates limited financial implications for the Assembly, which will have responsibility under the Regulations for running the new independent panel stage. The Assembly has concluded an agreement with the NHS Business Services Centre that the role will be performed on its behalf by the existing Independent Review Secretariat for the NHS – albeit with a radically simpler procedure than the NHS one. This will have a recurrent cost from 2006-07 of £100k for the children’s and adults procedures combined. This will pay for the administrative costs of running the panel, as well as ‘day fees’ for the panel members. These sums will be found within the Assembly’s social care baselines.
Consultation

With Stakeholders

17. The draft Regulations – together with the guidance - would implement most of the main proposals to come out of the Assembly’s wide-ranging consultation on complaints in 2001. The main findings of which were:

- There was “particular support” for the proposal to bring the two separate procedures into a common three-stage framework;
- There was support for at least part of the procedure to be independent of the authority complained against;
- Respondents generally supported a greater emphasis on local resolution;
- Those who responded wanted stronger guidance on the need to defer or freeze decisions while complaints about them are considered;
- Those who responded wanted better follow-up of the undertakings given by authorities in response to complaints; and
- Respondents wanted to see clearer links between social services procedures and other processes in, for example, health, education and housing.

18. The present draft Regulations and the associated guidance were developed with the help of a Complaints and Representations Advisory and Implementation Group (CRAIG). This brought together a range of key interests to consider the main policy options, the drafting instructions for the Regulations and the draft guidance.

19. There has been extensive consultation with service users, local authority complaints officers and advocacy providers on how we can improve the arrangements for handling complaints and move towards a more seamless response across different services. This work informed the development of the draft Regulations and guidance.

20. In addition, a public consultation was carried out on the draft Regulations, draft Regulatory Appraisal and draft guidance between 16 May 2005 and 5 August 2005. (A list of respondents is attached at Annex 1.) 52 responses were received from relevant organisations, including bodies representing services users, local authorities and local health boards, and the Public Services Ombudsman, the Children’s Commissioner and the Care Council. While a number of helpful suggestions were made, there was overwhelming endorsement for most of the Assembly Government’s proposals. Just one proposal was rejected - a suggestion that the Regulations should be amended to require all complaints officers to have a social work qualification. Respondents felt that in selecting the best people to be complaints officers, local authority should be able to draw on a wider pool than social workers.

21. Alongside the more formal consultation, the Assembly Government worked with All Wales People First to provide representatives of people with learning disabilities with a face to face opportunity to discuss the proposals. Working with Age Alliance Wales, a separate exercise was conducted to seek
the views of individual older people and their local organisations, from which 96 responses were received. There was overwhelming support from both of these exercises for the proposed Regulations.

22. In the light of the consultations, a number of amendments were made to the drafts of the two sets of Regulations. These amendments will:

- adjust some of the time-scales for individual stages of the procedure;
- strengthen the requirements on authorities to keep complainants informed about their rights under the procedures;
- strengthen the requirements on authorities to keep complainants informed about the progress of their complaint; and
- make provision for cases where the Care Council may also be investigating the matter raised in a complaint.

With Subject Committee
23. The draft Regulations were notified to the Health and Social Services Committee via the list of forthcoming legislation on 3 March 2004 (HSS(2)-04-04 Paper 4a) and were identified for detailed scrutiny. This took place on 5 October 2005.

Review
24. The impact of the Regulations will be monitored systematically. The Regulations require each authority to produce an annual report on its work with complaints. The guidance associated with the Regulations specifies the scope of the report and it should include - at minimum - data on:

- the numbers of complaints resolved at each stage - local resolution, formal consideration and independent review panel;
- adherence to time-scales;
- who made the complaints;
- what they were about;
- how they were resolved; and
- confirmation that promises made as part of the resolution have been kept.

25. The 22 annual reports should provide a good basis for compiling a clear picture of performance across Wales.

26. The independent panel hearings will create new opportunities to look at how well the local arrangements are working.

27. The SSIW will be including new indicators of the handling of complaints within the developing framework for Performance Management. Beyond this, it would open to the Assembly to ask SSIW to inspect the handling of complaints. This could be done either as one of its regular thematic inspections - or as a one-off investigation if there was a local cause for concern.
Summary
28. Recent legislation has given the Assembly an important opportunity to overhaul the arrangements for handling complaints about social services. The present procedures have been in place since the early 1990’s.

29. The proposed Regulations will benefit vulnerable adults who use social services in Wales. They will bring together the separate arrangements for services to children and adults into a single framework. Most importantly, they will give people who use services the chance to take their concerns to an independent panel hearing where the local authority’s handling of the complaint has failed to resolve the issue. The costs involved will be very modest.

30. The Department of Health currently plans to bring in broadly similar regulations on complaints procedures for adults on 1 April 2006 as their response to the changes in the 2003 Act.

Health and Social Care Department
September 2005
Response from Convener of Justice 2 Committee to Convener of SLC (endorsed by the Justice 1 Committee)

Inquiry into the Regulatory Framework in Scotland

1. The Justice 2 Committee welcomed the invitation from your committee to contribute to the second stage of your inquiry. Having discussed the consultation paper in committee, we have the following comments.

Nature of supervision by the Parliament
2. The Committee is content that the existing negative and affirmative procedures are generally helpful and appropriate in distinguishing the relative importance of instruments and aiding committee scrutiny. We are also content with the distinct roles of the subordinate legislation committee and subject committees.

3. We considered carefully the proposal that Parliament might have the power to recommend amendment of SSIs. While we could see why this might appear attractive on the face of it, our view is that the absence of any amending power imposes an essential discipline on draftsmen. If it was known that there was the possibility of amendment, the quality of instruments might well be affected. Within the timescale for subordinate legislation, we consider that it would be difficult to give amendments appropriate time and balanced scrutiny, to ensure that they were workable. Our strong view is therefore that the power to annul instruments is an adequate safeguard and that amendment of subordinate legislation by Parliament would not be appropriate.

Consultation
4. On the question of consultation of Parliament, our view is that there is no requirement for greater consultation on draft SSIs. We are aware that the “super affirmative” procedure has been written in to bills on a small number of occasions. Our view is that that procedure should continue to be used sparingly, if at all, and that the existing affirmative procedure will generally be adequate for scrutiny purposes.

Definition of SSIs
5. We were concerned at the suggestion that certain instruments made under delegated powers, but not exercisable by a statutory instrument, should be regarded as “of a legislative character”. Our view is that a clear distinction should maintained between instruments that are clearly legislative (such as rules and regulations) and others which should not be made as SSIs. There are other ways for committees to carry out scrutiny of guidelines and codes of conduct, without requiring them to be SSIs.

Timing of negative and affirmative procedures
6. Our view is the current timescales for both negative and affirmative instruments are generally adequate. We consider it essential that the Executive should be able to act under delegated powers within a reasonable timescale, always subject to the power of Parliament to review and annul if
necessary. We are not therefore concerned that on occasion, because of the operation of the 21 day rule, instruments being considered by subject committees may already be in force. While this may complicate consideration of annulling motions, it does not prevent Parliament annulling an instrument where there is a clear case to do so.

7. While the committee has always managed to consider instruments within the timescales prescribed, we note that occasionally this has been right at the end of the time allowed. We therefore wonder if the Executive might be encouraged to pay greater attention to the committee’s working cycle when lodging instruments, to ensure that adequate scrutiny will be possible; this may be particularly relevant, for example, when instruments are being lodged close to a recess.

Conclusion
8. Our only other general comment is that it would be helpful for officials drafting explanatory notes to be conscious that they are drafting for subject committees, as well as for the SLC. Their audience may not therefore be expert in all the technicalities of subordinate legislation. This may be particularly relevant where the instrument is amending previous SSIs and its effect may not therefore be immediately obvious to a reader who does not have legal training.

ANNABEL GOLDIE
SUBMISSION FROM THE FINANCE COMMITTEE

Subordinate Legislation Committee - Inquiry into the Regulatory Framework in Scotland: Phase 2

Thank you for your invitation to the Finance Committee to contribute to the second phase of your inquiry into the regulatory framework in Scotland. The Finance Committee has some concerns about the ability of the Parliament properly to scrutinise the financial impact of subordinate legislation, which are set out below.

1. As the volume of ‘enabling’ Acts increases so too does the extent to which the costs associated with these Acts are dependent on subordinate legislation. We are concerned that Financial Memoranda for primary legislation can devolve scrutiny of costs onto subordinate legislation. As an example, the Management of Offenders (Scotland) Bill proposes the creation of a number of ‘Community Justice Authorities.’ Each is estimated to cost £200,000; however the total number of authorities was unknown at the time of the Finance Committee’s scrutiny. The CJAs will be established by subordinate legislation, at which time the total costs will become apparent. However there is no procedure by which the Finance Committee can return to subordinate legislation to check whether the costs as set out are consistent with the estimates given in Financial Memoranda for primary legislation. We feel this is a significant deficiency.

2. There has been one recent instance – the Education (Additional Support for Learning) (Scotland) Act – where the main costs were dependent on a piece of guidance which was not subject to Parliamentary procedure at all in the Bill as introduced. The Committee expressed serious concerns about this state of affairs and the final Act did include provision for Parliamentary scrutiny of a Code of Practice. The Code of Practice was not subordinate legislation, however, and so there was no requirement for the Executive to provide costing information. When the Education Committee looked at the Code of Practice, no mention was made of costs.

3. As you are aware the Parliament has introduced a mechanism to address the situation where amendments at Stage 2 of a Bill significantly affect the costs of a Bill. A revised Financial Memorandum must be submitted. However where amendments are introduced to Bills after Stage 1 which rely on subordinate legislation for implementation, no mechanism exists for financial scrutiny of costs, which may be significant.

I hope this response can contribute usefully to your inquiry. Please don’t hesitate to contact me should you require further information.

Des McNulty
Convener

2 Education (Additional Support for Learning) (Scotland) Act, 2005, s.27
3 Education Committee, 8th Report 2005 (Session 2), Additional Support for Learning Code of Practice (SP Paper 383)
SUBORDINATE LEGISLATION COMMITTEE INQUIRY INTO THE REGULATORY FRAMEWORK IN SCOTLAND

Thank you for your letter of 31 August seeking the Local Government and Transport Committee’s views on this inquiry.

You will recall that the Committee discussed its response to the Subordinate Legislation Committee’s consultation paper at its meeting on 3 October. I thought it would be helpful to provide a brief summary of the views expressed by the Committee at the meeting. I also attach a copy of the Official Report of the meeting which provides a full account of the discussion which took place.

The Committee agreed the following comments in response to the consultation paper.

1. The Committee agreed, in principle, that there should be a power to amend instruments. However, the Committee considered that the Subordinate Legislation Committee could examine further the practical implications of such a change. In particular, the Committee noted that whilst a new power to amend instruments could lead to improved scrutiny of SSIs, there might be some disadvantages, such as an increased workload for the Parliament and potential delays in the process of scrutinising SSIs.

2. The Committee noted that many statutory instruments have been subject to consultation by the Scottish Executive before being laid before Parliament. The Committee considered, however, there were variations in the standard of consultation undertaken by the Executive. The Committee therefore suggested that, as part of its inquiry, the Subordinate Legislation Committee could look at the question of the overall standard of consultation on statutory instruments with a view to ensuring that an appropriate level of consultation is carried out for each instrument.

3. There were mixed views from Committee members on the use of the negative procedure. Some members were opposed to the use of negative instruments and argued that it was undesirable that the procedure could lead to a situation where members had to annul an instrument which had already come into force. Other members of the Committee were of the view that the negative procedure should continue to exist for the Parliamentary consideration of subordinate legislation, and that the procedure could be appropriate where an instrument conferred minor or technical powers on which there was unlikely to be much political debate. There was a general view that where significant powers were being conferred by an instrument, it would normally be more appropriate for the affirmative procedure to be used. Members also noted that it would be the role of Parliament, when scrutinising primary legislation, to consider the delegated powers contained in Bills, and to take a view on the balance between the use of the affirmative and negative procedure.

I shall await with interest the outcome of your committee’s inquiry.

Bristow Muldoon
Convener - Local Government and Transport Committee
SUBORDINATE LEGISLATION COMMITTEE

30th Meeting, 2005 (Session 2)

Tuesday 8th November, 2005

Delegated Powers Memorandum

Licensing (Scotland) Bill as amended at Stage 2

Provisions Conferring Power to Make Subordinate Legislation
1. This memorandum has been prepared by the Scottish Executives for the Subordinate Legislation Committee to update the Subordinate Legislation Committee on the changes made to the Licensing (Scotland) Bill at stage 2.

Delegated powers

Choice of procedure
2. Regulations and orders under the powers described below are generally subject to negative resolution procedure in the Scottish Parliament. The Executive has chosen this procedure as the matters that they deal with are overwhelmingly of a technical or procedural nature and do not engage important or substantive provisions of the Bill. We do not believe affirmative resolution procedure will be necessary for this as it is not sufficiently important to merit a debate in the Scottish Parliament. However, the paragraph below notes those occasions where the Executive has amended regulations during stage 2 of the Bill to affirmative procedure.

Section 136(4) and (5) – Orders and regulations
3. The Subordinate Legislation Committee report at Stage 1 (paragraphs 5, paragraphs 18 to 20 and paragraphs 21 to 23) noted that certain of the powers taken would allow subordinate legislation to be used to amend primary legislation, and therefore considered that the affirmative procedure would be more appropriate to such provisions. In response the Executive agreed with the Committee’s findings and brought forward amendments to section 136 to make the following provisions subject to an affirmative procedure:
   - Section 25(2) Conditions of a premises licence;
   - Section 115(5) Excluded Premises;
   - Section 130(3) Remote sale of alcohol.

PART 2: LICENSING BODIES & OFFICERS
Section 15A(1) – Training of Licensing Standards Officers
Power conferred on: The Scottish Ministers
Powers exercised by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

4. This power allows Ministers to prescribe training requirements with which Licensing Standards Officers must comply. In particular, Ministers will have the power to accredit both course content and course providers.
Reasons for taking this power
5. Section 13(4) of the Bill already enabled Scottish Ministers to prescribe the qualifications a Licensing Standards Officer would need, but did not allow Scottish Ministers to prescribe the training a Licensing Standards Officer should undertake. The National Licensing Forum agreed, when giving consideration to Licensing Standards Officers, that any training regarded as mandatory should be prescribed in order to ensure consistency across the country. Such training is considered likely to change as the Licensing Standards Officer’s role develops and was therefore considered to be best suited to being set out in regulations. As these regulations will be mainly procedural and technical and will not change the application of Bill policy it was felt the use of negative procedure was the most appropriate.

PART 3: PREMISES LICENCES

Section 48A(4) – Notification of determination
Power conferred on: The Scottish Ministers
Powers exercised by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

6. This provision confers on Scottish Ministers the power to set out the form, manner and timescales in which a Licensing Board must notify the relevant people of the reasons for the grant or refusal of a premises licence.

Reasons for taking this power
7. This power enables Scottish Ministers to ensure the notification process is consistent across the country. It is considered appropriate for this level of detail to be contained in regulations rather than on the face of the Bill. As these regulations will be of a procedural, technical nature and will not change the application of Bill policy it was felt the use of negative procedure was the most appropriate.

PART 4: OCCASIONAL LICENCES

Section 57A(4) – Notification of determination
Power conferred on: The Scottish Ministers
Powers exercised by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

8. This provision confers on Scottish Ministers the power to set out the form, manner and timescales in which a Licensing Board must notify the relevant people of the reasons for the grant or refusal of an occasional licence.

Reasons for taking this power
9. This power enables Scottish Ministers to ensure the notification process is consistent across the country. It is considered appropriate for this level of detail to be contained in regulations rather than on the face of the Bill. As these regulations will be of a procedural, technical nature and will not change the application of Bill policy it was felt the use of negative procedure was the most appropriate.
PART 6: PERSONAL LICENCES

Section 70(2C) – Notification of determination
Power conferred on: The Scottish Ministers
Powers exercised by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

10. This provision confers on Scottish Ministers the power to set out the form, manner and timescales in which a Licensing Board must notify the relevant people of the reasons for the grant or refusal of a personal licence.

 Reasons for taking this power
11. This power enables the Scottish Ministers to ensure the notification process is consistent across the country. It is considered appropriate for this level of detail to be contained in regulations rather than on the face of the Bill. As these regulations will be of a procedural, technical nature and will not change the application of Bill policy it was felt the use of negative procedure was the most appropriate.

PART 8: OFFENCES

Section 99(4C)(c) – Delivery of alcohol by or to a child or young person
Power conferred on: The Scottish Ministers
Powers exercised by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

12. This provision mirrors section 93(4) and confers on the Scottish Ministers a power by regulation to specify what documents, in addition to a passport and a European Union photocard driving licence, would be acceptable in establishing a child or young person’s age with regard to the delivery of alcohol.

 Reasons for taking this power
13. There is already a plethora of different schemes and a continuing problem of fake ID and such a power would ensure that those delivering alcohol have a measure of reassurance of what is acceptable proof. However, it is considered likely to be too detailed for the Bill to set out a complete list of the types of documents that are acceptable. As these regulations will not change the application of Bill policy and again are primarily technical and specific, it was felt the use of negative procedure was the most appropriate.

PART 9: MISCELLANEOUS AND GENERAL

Section 118(10) – Vessels, vehicles and moveable structures
Power conferred on: The Scottish Ministers
Powers exercised by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

14. This provision confers the power on Scottish Ministers to modify as they consider necessary the application of the Bill to vessels, vehicles and moveable structures.
**Reasons for taking this power**

15. There are several provisions within the Bill that are primarily designed to apply to buildings (e.g. fire certificates, layout plans, neighbour notification). To provide alternative provisions for vehicles and other structures in the Bill would lead to over-complicated provisions. In addition the regulation-making power would enable a more flexible response to new innovations in this area of the market. Although this power would have the effect of amending primary legislation and would therefore usually be by affirmative procedure, it is considered that these regulations would be of a highly technical and highly delimited nature, designed only to ensure that necessary adaptations can be made to the provisions of the Bill in the case of vessels, vehicles and other moveable structures. As these regulations will not change the application of Bill policy - and in fact will ensure that that policy is successfully applied to vessels, vehicles and other moveable structures, it was felt the use of negative procedure was more appropriate than requiring a debate of the Scottish Parliament.

**Section 120(2A) – Relevant offences and foreign offences**

- **Power conferred on:** The Scottish Ministers
- **Powers exercised by:** Regulations made by statutory instrument
- **Parliamentary procedure:** Negative resolution of the Scottish Parliament

16. This amendment enables Scottish Ministers, in addition to specifying “relevant offences” as under section 120(1) (which trigger a review of the licence), to specify offences which would amount to ‘relevant offences’ only if they were committed on a number of occasions.

**Reasons for taking this power**
Since a licence review procedure could have a serious consequence for the licence holder, it would be disproportionate if certain offences where to trigger such a review on a single conviction. However a number of such convictions would demonstrate an unwillingness to tackle a problem or a disregard for the law which we believe should enable the licensing Board to consider whether further action is needed against the licence holder. It is expected that this would be the case with some offences under Part 1 of the Smoking, Health and Social Care (Scotland) Act 2005. It is considered that setting out the offences in regulations rather than on the face of the Bill is both neater and will provide the flexibility required to respond to any changes in what types of offence or repeated offences are considered in the context of alcohol licensing. As these regulations will not change the application of Bill policy it was felt the use of negative procedure was the most appropriate. Furthermore, as the relevant offences are to be set out in regulations (see section 120(1)), it is considered that those offences which must be committed on a number of occasions to amount to a ‘relevant offence’ should also be contained in regulations.

Section 127(1)(c) – Fees
Power conferred on: The Scottish Ministers
Powers exercised by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

17. Section 127(1)(c) confers on the Scottish Ministers the power to make regulations which allow the recovery of increased costs of public services, including Police costs associated with a licensed premises to be made through the fee system.

Reasons for taking this power
18. Scottish Ministers had previously taken a power to make regulations setting out what fees are to be applied under the provisions of the Bill. This was amended by a non Executive amendment which would enable the recovery of extra public service costs carried by the community from the relevant licensed premises. It is considered that further guidance would be required through regulations. As the fee regime in its entirety is to be contained in the regulations, it is necessary for this aspect of the fees regime also to be contained in regulations. It is therefore considered appropriate for the level of detail required to be contained in regulations rather than on the face of the Bill. In addition, secondary legislation provides the flexibility to change the level and structure of the recovered charges regularly. As these regulations will be of a technical and procedural nature and will not change the application of Bill policy it was felt the use of negative procedure was the most appropriate.

SCHEDULE 2: LOCAL LICENSING FORUMS

Schedule 2, paragraph 2 (1A) – Membership
Power conferred on: The Scottish Ministers
Powers exercised by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

19. This provision confers the power on Scottish Ministers to change the minimum or maximum number of members of the Local Licensing Forum.
Reasons for taking this power
20. The Bill states members should be not fewer than 5 and not more than 10. This power allows Scottish Ministers to change these numbers if necessary following the experience of Local Licensing Forums in operation. Although this power in effect allows subordinate legislation to be used to amend primary legislation, it is considered that the modification possible here is highly delimited and specific and is not sufficiently important to merit a debate in the Scottish Parliament. As these regulations will not change the application of Bill policy it was felt the use of negative procedure was the most appropriate.
Joint Inspection of Children’s Services and Inspection of Social Work Services (Scotland) Bill

Purpose

1. This Memorandum has been prepared by the Scottish Executive to assist the Subordinate Legislation Committee in its consideration, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of the Joint Inspection of Children’s Services and Inspection of Social Work Services (Scotland) Bill. It describes the purpose of those provisions conferring power to make subordinate legislation. The Memorandum explains why the matter is to be left to subordinate legislation and gives the reason for seeking the powers proposed.

Background to the Bill

Joint inspection of children’s services

2. The Scottish Executive set out in its Partnership Agreement of 2003 that it intends “to protect our most vulnerable children through a tough new inspection system for child protection services”. In March 2004 Ministers announced there would be a new multi-disciplinary children’s services inspection team led by Her Majesty’s Inspectorate of Education (HMIE). Its first tasks would be to undertake inspections of child protection services in all 32 local authority areas and to put in place integrated inspections for all services for children, both by 2008. The inspectorates and agencies involved are HMIE, Social Work Inspection Agency (SWIA), the Scottish Commission for the Regulation of Care (Care Commission), Her Majesty’s Inspector of Constabulary (HMIC), the NHS Quality Improvement Scotland; (NHS QIS) and, to a lesser extent, Her Majesty’s Chief Inspector of Prisons for Scotland (HMIP).

3. There are three levels of inspection: strategic, operational, and individual (at the level of the service user). At this latter level, information that can be drawn from records held on the individual will be a key source of evidence in the evaluation of the effectiveness of children’s services. The Executive considers that it is essential therefore for the success of the planned programme of child protection inspections that the joint inspection team can access individual records from appropriate agencies (including health records) and that the holders of individual records are empowered to release them. Primary legislation is required to allow inspectorates to obtain and share all information about individuals which may be relevant to the particular inspection in question.

Inspection of social work services

4. The Social Work (Scotland) Act 1968 gives SWIA extensive powers in relation to inspection of certain types of residential setting for looked after children, and a
power of inquiry into the functions of a local authority. However, SWIA does not have an express power to inspect social work services generally. It is proposed that this Bill gives SWIA specific powers of inspection for all social work services.

**Policy objectives**
5. Our objectives in giving inspectorates the powers to work together jointly and to access and share information, for the purpose of inspecting children’s services, are to support the improvement of children’s services; to enable a joint inspection team to focus on the outcomes achieved for children and to respect the confidentiality of individual children and their families. Our objective in relation to SWIA is to give the inspection agency the full range of powers to inspect social work services provided by or on behalf of local authorities.

**Summary of legislative provisions**
6. Part 1 of the Bill makes provision to enable the inspection of children’s services jointly by any two or more of the persons or bodies which are either listed in section 1(6) of the Bill or directed to participate under section 2(1).

7. Part 1 provides in particular for:
   - The inspection to be of all children’s services or such children’s services as are specified; the inspection to cover services in the whole of Scotland or in whatever part of Scotland is specified; and for it to be in respect of the provision of those services generally or of how those services were provided to an individual child or group of children.
   - The purpose of the inspection which is to review and evaluate the effectiveness of the provision of the services being inspected.
   - A regulation making power to give powers for the purpose of the inspection.

8. Part 2 of the Bill makes provision in relation to persons to be appointed by the Scottish Ministers as social work inspectors to carry out inspections of social work services.

9. Part 2 provides in particular for:
   - A power to Scottish Ministers to appoint social work inspectors.
   - Giving such inspectors the functions of conducting inspections of and investigations into the provision of social work services and encouraging improvements in those services.
   - A regulation making power to make further provision concerning the exercise of the inspection functions.

10. Part 3 of the Bill makes provision in relation to regulations to be made under the Bill, amendment and repeals of certain enactments consequent on the provisions of Part 2 of the Bill, interpretation and commencement.

**Provisions conferring power to make subordinate legislation**

**Part 1 – Children’s services**  
Section 1(6) (g) – power to specify a person or body as one to which section 1 of the Bill applies  
Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument  
Parliamentary procedure: negative resolution of the Scottish Parliament

11. This provision allows the Scottish Ministers to specify in an order persons or bodies other than those listed in section 1(6)(a) to (f) as persons or bodies to which section 1 of the Bill applies. The effect of being so specified is that the person or body can then be required by the Scottish Ministers to conduct an inspection, jointly with another such person or body, relating to the provision of children’s services.

Reason for taking power

12. The Bill lists what are considered at present to be the appropriate persons and bodies to conduct the child protection inspections. This list may, however, need to be changed both to take account of changes in the constitution of the persons and bodies presently listed and as a result of developments in the way that possible joint inspections of children’s services may be delivered in future. The power to add to the list is also included in case it becomes apparent that we have omitted to include a body or person which should have been included.

13. The power to amend the list by order will allow the list to be updated as required without having to have recourse to primary legislation. We consider that this is a matter more appropriately dealt with by subordinate legislation.

Reason for choice of procedure

14. The power is subject to the negative resolution procedure. The addition of a particular person or body to the list in section 1(6) has only the reasonably limited effect of enabling Ministers to require that person or body to take part in conducting a joint inspection. The basic nature of joint inspections, or of the powers available to any joint inspection team, will not change in consequence and the negative resolution procedure is accordingly considered by the Executive to be appropriate.

Section 3(1) – power to make regulations for the purpose of a joint inspection  
Power conferred on: the Scottish Ministers  
Power exercisable by: regulations made by statutory instrument  
Parliamentary procedure: draft regulations to be laid and approved by affirmative resolution of the Scottish Parliament

15. Section 3 provides that regulations can be made for the following matters:
   • Requiring or facilitating the sharing or production of information (including medical records) for the purpose of an inspection under section 1 of the Bill. The term “medical records” is defined in section 7 of the Bill to mean “records relating to the physical or mental health of an individual”. The inclusion of the reference to “medical records” is intended to be an indication of the intention to use this regulation making power to allow access to this type of information. It is considered necessary to avoid criticism of such use being an unexpected use of the power.
   • Requiring any person to provide an authorised person with an explanation of information produced to the authorised person. This is intended to enable provision which will require persons with information to meet and discuss it with those conducting the joint inspection.
- Requiring information produced to an authorised person to be held in compliance with prescribed conditions and further disclosures to be made in compliance with such conditions. It is anticipated that provision will be made here in particular in relation to medical records. What is set down in regulations will have to be consistent with the terms of the Data Protection Act 1998. Such conditions as might be prescribed under this power will be relevant to this.
- Empowering an authorised person to enter any premises for the purposes of an inspection under section 1 of the Bill.
- Empowering an authorised person to disclose to a person prescribed any information of a prescribed nature which the authorised person holds in consequence of a joint inspection. It is anticipated that this will be used to enable information gathered in the joint inspection to be passed on to a relevant agency for further action if the joint inspection team uncovers (e.g.) evidence of abuse or misconduct in relation to which it considers that further action is required.
- Creating offences for enforcing any provision of the regulations.

**Reason for taking power**

16. This power is required to allow Scottish Ministers to provide those conducting the inspections with sufficient powers to enable them to do so. We have given further explanation of the individual provisions at paragraph 15 above. In addition the Executive will provide during the Parliamentary stages of the Bill a draft of the regulations which it is proposed to make under this power.

17. It is considered that these powers should be set out in subordinate legislation rather than being set out in the Bill. The reason for this is that while we can set out in general terms the kinds of powers which we anticipate will be required, we consider that the exact detail of the powers is best left to subordinate legislation. The Bill introduces a new type of inspection in terms both of the joint working and the range of services being inspected. In view of this, we consider that the conduct of such inspections will inform the detail of the powers required. While the methodology for the joint inspection of child protection services has been consulted on, a further round of consultation is planned over 2006 for the joint inspection of children’s services which is due to begin in 2008. Accordingly, we consider that the powers may have to be refined as the inspections proceed and it would be preferable to have the capacity to do this without having to have recourse to primary legislation.

**Reason for choice of procedure**

18. Regulations under section 3(1) may contain provisions concerning the obtaining and handling of sensitive information about individuals. The Executive therefore considers it appropriate that affirmative resolution procedure should apply to these regulations.

**Part 2 – Social work services**

**Section 5(3) – power to make regulations for the exercise of functions under section 5(1) of the Bill**

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Section 5(3) provides that regulations can be made for the following matters:

- As to the types of inspection or investigation which may be conducted.
- Requiring or facilitating the production by a social work service provider to an inspector of information (other than "relevant medical records"). The provision in paragraph (b) is limited to information held by a social work service provider and cannot enable production of "relevant medical records" which are defined in section 7 to mean medical records which have been prepared by a registered medical practitioner (within the meaning of section 2 of the Medical Act 1983) who is or has been, responsible for the clinical care of the individual to whom the records relate. Provision can only be made (under paragraph (c)) requiring or facilitating the production of such "relevant medical records" to a medically qualified inspector.
- Requiring an explanation of information to be provided to an inspector. Our comments in relation to the similar provision in section 3 are relevant here.
- Empowering an inspector to enter any premises.
- Empowering an inspector to disclose to a person prescribed for the purposes of this paragraph any information of a prescribed nature which the inspector holds in consequence of conducting an inspection or investigation under section 5(1). Again our comments in relation to the similar provision under section 3 are relevant.
- Creating offences for enforcing any provision of the regulations.

Reason for taking power

20. This power is required to allow Scottish Ministers to provide those carrying out the functions under section 5(1) with sufficient powers to enable them to do so. We have given further explanation of the individual provisions at paragraph 19 above. In addition the Executive will provide during the Parliamentary stages of the Bill a draft of the regulations which it is proposed to make under this power.

21. As is the case with joint inspections, we consider that the powers in connection with the functions of social work inspectors under Part 2 of the Bill may have to be refined from time to time. Again, it would be preferable to have the capacity to do this without having to have recourse to primary legislation. We therefore consider that subordinate legislation is also appropriate here. Subordinate legislation under Part 2 will also be subject to affirmative resolution procedure.

Reason for choice of procedure

22. As with regulations under section 3(1), section 5 regulations may contain provisions concerning the obtaining and handling of sensitive information about individuals. Once again, the Executive therefore considers affirmative resolution procedure to be appropriate.

Part 3 – General

Section 7 (definition of “social work services functions”) – power to make regulations defining which local authority functions are to constitute “social work services functions”

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: draft regulations to be laid and approved by affirmative resolution of the Scottish Parliament

23. The definition of “social work services functions” in section 7 contains within it power to prescribe in regulations which local authority functions are to be constitute social work services functions. Part 2 of the Bill is concerned with inspections of, and investigations into, the provision of social work services. A service is a social work service if provided by a local authority in the exercise of any of their social work services functions or provided by another person in terms of arrangements made by an authority in exercise of those functions.

Reason for taking power
24. Leaving the definition of what is to constitute a social work service function to be set out in regulations allows suitable flexibility so that, as the exact nature of, and the statutory basis for, relevant local authority functions develops in future, the regulations can be amended and the appropriate definition readily kept in line with changes. This will ensure that the coverage of Part 2 inspections can be readily kept in line with developments in the social work services field.

Reason for choice of procedure
25. This power is subject to the affirmative resolution procedure. This is considered appropriate since the definition of what functions are to be social work services functions is central to determining the scope of inspections and investigations under Part 2 of the Bill and the consequent scope of any compulsory powers provided by way of regulations under section 5(3).
SUBORDINATE LEGISLATION COMMITTEE

30th Meeting, 2005 (Session 2)

Tuesday 8th November, 2005

Executive Responses

The Victim Statements (Prescribed Courts) (Scotland) Revocation Order 2005, (SSI 2005/draft); and
The Victim Statements (Prescribed Offences) (Scotland) Revocation Order 2005, (SSI 2005/526)

On 1 November 2005 the Committee asked for an explanation of the following matter:-

“The Explanatory Note does not fulfil the requirements of the Guidance on the drafting of statutory instruments as the effect of the Orders is not made clear. The Committee acknowledges that the Executive Note explains the effect but is concerned that this Note is available only to readers with access to the internet.”

The Scottish Executive responds as follows:-

“The Executive considers that the purpose of the Explanatory Note is to give a reader of the instrument a short, clear statement of the substance and purpose of the instrument. The Executive considers that the Explanatory Notes attached to the above instruments achieve that objective. Both Notes identify the instruments being revoked and also, in brief terms, state the effect of the instruments. Any reader of the instrument can refer to the instruments being revoked if they require further detail of their terms.

The Executive considers that it is a matter of judgement how much information should be contained in the Explanatory Notes. It accepts that it would be feasible to provide a detailed explanation in the Explanatory Note as to effect of the instruments being revoked, although that would inevitably lengthen the Explanatory Notes without necessarily increasing their utility to the reader. However it notes that the Committee accepts that the Executive Notes in this case provide further information. The Executive considers that it is perfectly proper for the Executive Notes to contain rather more detailed information than is contained in the Explanatory Note. Indeed, were the Explanatory Note to contain as much information as the Executive Note there would be no purpose in preparing the latter.

On 1 November 2005 the Committee asked the Executive for an explanation of the following matters:

The Committee asks the Executive for explanation of the *vires* of the following provisions:

- Rules 24(4) and 33(3) – it appears to the Committee that provision for the payment of expenses of persons other than Tribunal members or staff is already provided for in a substantive provision of the Act, namely paragraph 17 of schedule 1;
- Rule 28(5) – the Committee seeks further clarification of the *vires* of this rule, given that paragraph 14 of schedule 1 makes specific provision with regard to decisions of the Tribunal;
- Rule 37(1) - the Committee seeks further clarification of the *vires* of this rule given the provisions of paragraph 14 of schedule 1, as read with paragraph 4 of that schedule makes specific provision with regard to decisions of the Tribunal;
- Rule 37(2) – paragraph 14(1)(b) of schedule 1 to the Act seems to rule out the words from “save as” to the end and appears to allow no exceptions; and
- Rules 39(2)(b) and (5) in the light of paragraph 10 of schedule 1 to the Act which states that it is the Scottish Ministers who are to pay any expenses reasonably incurred by the President in the exercise of his or the Tribunal’s functions.

Finally, the Committee seeks explanation of why, in paragraph 37(3)(a), a requirement to send out a copy of the decision was thought necessary, given that such a requirement is already to be found in paragraph 14 of schedule 1 to the Act.

**The Scottish Executive responds as follows:**

**First question – bullet point 1 (Rules 24(4) and 33(3))**

1. Rule 24 makes provision enabling the Tribunal to appoint an expert to enquire into and report on any matter. Rule 24(4) provides that the Secretary shall pay such reasonable fees, expenses or allowances as the President may determine to any person so appointed. Rule 33(2) enables the Tribunal to appoint a person with appropriate skills or experience in facilitating the giving of evidence by children. Rule 33(3) provides that the Secretary shall pay such reasonable fees, expenses or allowances as the President may determine to any person so appointed.

2. Paragraph 17 of Schedule 1 provides that a Tribunal may pay (a) such allowances or expenses as the President may determine in connection with any person’s attendance at hearings of the Tribunal and (b) such amounts as the President may determine in connection with any report prepared in pursuance of rules made under paragraph 11(2)(q). Paragraph 11(2)(q) provides that the rules may include provision “enabling a Tribunal to commission medical and other reports in specified circumstances”.
3. In relation to both rules, Executive’s position, under reference to section 34(2)(a) (Orders, regulations and rules), is that it is making an “incidental” or “supplemental” provision considered to be expedient and necessary to specify as a matter of practice and procedure that the administrative responsibility for actually making payment is that of the Secretary on behalf of the Tribunal.

4. In relation to Rule 33(3) the further point is made that it is likely that a person appointed under that Rule is likely to have responsibilities other than merely being in attendance at a hearing. For example such a person would be likely to meet with the child witness beforehand and might be involved in assisting the child with written evidence or with the giving of evidence in terms of Rule 23 (Evidence by telephone, video link or other means). It is also the case that a person appointed under Rule 33 is unlikely to prepare a report and so will not come within the ambit of 11(2)(q).

5. The Executive considers that there is vires for these rules in terms of section 34(2)(a) and in terms of the general rule making power under para 11(1).

First question – bullet point 2 (Rule 28(5))
1. Rule 28 (5) makes provision for the eventuality of a member of a Tribunal, other than the convener, being or becoming absent. It provides that, with the consent of the parties, the hearing may continue before the convener and the remaining member, that a Tribunal so constituted is deemed to be validly constituted and that the decision of the Tribunal shall be taken by the convener and the remaining member.

2. Paragraph 14(1)(a) of Schedule 1 provides for decisions of Tribunals to be made by a majority. In other words it provides that the decision need not be unanimous. It does not relate to the constitution of Tribunals and does not appear to the Executive to preclude the possibility of proceedings before a Tribunal from which a member other than the convener is absent.

3. The vires for rule 28(5) lies in paragraph 11(2)(j) of Schedule 1 in terms of which rules may include provision enabling Tribunal proceedings to be conducted in the absence of any member of a Tribunal other than the convener. It is considered “proceedings” falls to be interpreted as a reference to the whole proceedings of the Tribunal from the making of the reference to the final decision and includes not only the conduct of a hearing but also the deliberations leading to a decision.

First question – bullet point 3 (Rule 37(1))
1. Rule 37(1) provides that where a Tribunal is constituted by a convener and one member in terms of Rule 28(5) the convener shall have a second or casting vote. Paragraph 14(1)(a) of schedule 1 provides that decisions of Tribunals may be reached by a majority. Paragraph 4(2) of schedule 1 provides that Tribunals constituted by the President under para 4(1) must comprise the President or a convener plus two members.

2. Paragraph 11(2)(j) of Schedule 1 provides the vires to make rules providing for proceedings to be conducted by a Tribunal in the absence of one member other than the convener. This is consistent with the view that, while a Tribunal initially constituted by the President must comprise a convener plus two members, the
supervening unavailability of one of the two members should not preclude further procedure.

3. To avoid the possibility of a Tribunal becoming deadlocked in the absence of a member, it is considered under reference to section 34(2)(a) that Rule 37(1) is “incidental” or “supplemental” provision considered to be expedient and that there is accordingly vires for it.

First question – bullet point 4 (Rule 37(2))
First question – bullet point 5 (Rules 39(2)(b) and(5))
1. The Executive is most grateful to the Committee for drawing these points to its attention. It considers that the Committee’s observations in relation to these rules are well founded and undertakes to bring forward amending rules to address the points raised.

Second Question
1. The Committee seeks an explanation as to why in Rule 37(3)(a), a requirement to send out a copy of the decision was thought necessary, given that such a requirement is already to be found in paragraph 14 of schedule 1 to the Act. The intention of the Executive was to clarify that, as a matter of practice the administrative responsibility for doing so rests with the Secretary.
The Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005, (SSI 2005/515)

On 1 November 2005 the Committee asked the Executive for an explanation of the following matter:

“Regulation 4 states that if the prescribed conditions apply, an appeal committee will be deemed “for the purposes of paragraph 6(6)(b)” of schedule 2 to have confirmed a decision of an education authority on a placing request. As paragraph 6(6)(b) is simply a regulation-making provision, following the wording of the enabling power itself, should the phrase in question not read “for the purposes of this Act”?”

The Scottish Executive responds as follows:

1. The Executive has considered the matter raised by the Committee and accepts that the phrase might have been as set out in the Committee’s letter.

2. It is explained that in drafting regulation 4 it had been thought helpful to make specific reference to that paragraph in the schedule. The validity of the instrument is not affected by this stance.
On 1 November 2005 the Committee asked the Executive for an explanation of the following matter:

“The Executive is asked for an explanation of article 3(2) and in particular the words “and that” at the end of the 4th line.”

The Scottish Executive responds as follows:

Article 3 of these regulations saves the effect of sections 60 to 65G of the Education (Scotland) Act 1980 for certain references to appeal committees. Article 3(2) of this order specifies the references to which this article applies.

Article 3(2) also sets a final cut-off of 60 days from the appointed day for the lodging of any such reference under the 1980 Act.

The Executive accepts that the words “and that” are not essential. Those words were intended only to be of assistance in the reading of, what we acknowledge is, a lengthy sentence. We are however satisfied that this does not affect the validity of the instrument.

Minor and printing points

We note the concern raised by the Committee regarding the number of minor and printing points. The Executive regrets the additional work which this has entailed for the Committee.

On 1 November 2005 the Committee asked the Executive for an explanation of the following matters:

1. “The Committee asks why the title of the regulations does not follow the usual form for instruments of this nature. Given that the original regulations are replaced completely by these regulations, the Committee is concerned that this instrument should have (No.2) in the title rather than “amendment”.

2. The Committee also seeks confirmation that the instrument was made available free of charge to all known recipients of the original Regulations and if so why the regulations do not bear an italic headnote to that effect.

The Scottish Executive responds as follows:

1. The intention in using “amendment” in the title of the Regulations was to signal that the regulations contained amended provision from that in the earlier and now revoked regulations. In the light of the Committee’s comments the Executive accepts that this was misplaced but is satisfied that this does not affect the validity of the instrument.

2. The Executive regrets the oversight of the need for an italic headnote to the effect that this replacement instrument will be made available free of charge to all known recipients of the original Regulations. We are making enquiries of TSO as to how best to address this oversight and put in place arrangements for such distribution.
On 1st November 2005, the Committee asked the Executive for an explanation of the following matter-

“The Subordinate Legislation Committee today considered the above instrument and agreed to ask for further information in relation to the reason for the breach of the 21 day rule in this instance. The Committee noted that the Age-Related Payments Regulations 2005 to which the instrument relates were laid at Westminster and came into force on 21 September and seeks clarification of the reasons for the delay in Scotland.”

**The Scottish Executive responds as follows:**

The letter of 20th October to the Presiding Officer, highlighted the breach. As explained, it became clear shortly before the October recess that payments to be made by the UK Government to older care home residents from 7 November under the Age Related Payments Act 2004 would be lost in charges unless the current rules were changed. As the Committee has noted, the Age-Related Payments Regulations 2005 to which the instrument relates were laid at Westminster and came into force on 21 September. Steps are being taken to ensure such a discrepancy in timings between Westminster and the Scottish Parliament does not happen again.