EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

AGENDA

15th Meeting, 2009 (Session 3)

Wednesday 20 May 2009

The Committee will meet at 10.00 am in Committee Room 1.

1. **Schools (Consultation) (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1, in a round-table discussion, from—

   Bruce Robertson, Director of Education, Learning and Leisure, Aberdeenshire Council;

   Lindsay Glasgow, Asset Planning Manager, City of Edinburgh Council;

   Councillor Angus Campbell, Council Leader, Comhairle nan Eilean Siar;

   Margaret Doran, Executive Director of Children and Families, Glasgow City Council;

   Moira Niven, Chair of the School Estates Sub-Committee of the Resources Committee, Association of Directors of Education in Scotland.

2. **Subordinate legislation:** The Committee will consider the following negative instruments—

   the Adoption Support Services and Allowances (Scotland) Regulations 2009 (SSI 2009/152);

   the Adoption Agencies (Scotland) Regulations 2009 (SSI 2009/154);

   the Adoption and Children (Scotland) Act 2007 (Supervision Requirement Reports in Applications for Permanence Orders) Regulations 2009 (SSI 2009/169); and

   the Applications to the Court of Session to Annul Convention Adoptions or Overseas Adoptions (Scotland) Regulations 2009 (SSI 2009/170).
The papers for this meeting are as follows—

**Agenda item 1**

Paper by the Clerk

**Agenda item 2**

Paper by the Clerk

SPICE briefing
Introduction

1. This paper introduces the third oral evidence session as part of the Committee’s Stage 1 consideration of the Schools (Consultation) (Scotland) Bill.

2. The first oral evidence session was held at the Committee’s 13th meeting 2009 on Wednesday 6 May 2009. Further information on the evidence sessions is available in paper ELLC/S3/09/13/1.

Oral evidence

3. The third oral evidence session will take the form of a round-table discussion with:

   - Aberdeenshire Council: Bruce Robertson, Director of Education, Learning and Leisure;
   - City of Edinburgh Council: Lindsay Glasgow, Asset Planning Manager;
   - Comhairle nan Eilean Siar: Councillor Angus Campbell, Council Leader;
   - Glasgow City Council: Margaret Doran, Executive Director of Children and Families; and
   - Association of Directors of Education in Scotland (ADES): Moira Niven, Chair of the School Estates Sub-Committee of the Resources Committee.

4. All the witnesses have provided written evidence to the Committee and these are attached at Annexe A.

Emma Berry
Assistant Clerk
Education, Lifelong Learning and Culture Committee

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1. Aberdeenshire Council welcomes the opportunity to respond to this Bill and wishes its views to be formally recorded as part of the written evidence for the Education, Lifelong Learning and Culture Committee.

2. Aberdeenshire Council supports the general principles surrounding the Schools (Consultation) (Scotland) Bill

3. These principles are built upon good practice and recognise the need for transparent processes in respect of changes to education provision locally.

4. We are pleased that the Bill addresses requirements for all education authorities in respect of changes to provision in the case of all schools, urban or rural.

5. We are pleased that the previous intimation of a narrow focus of a ‘Rural Schools’ Bill has been broadened and recognise and welcome the willingness of the Cabinet Secretary to, thus far, listen to the views of councils in the crafting of the draft legislation.

6. We support in particular:
   - The introduction of an education benefits statement.
   - The preparation of a proposal paper by the education authority.
   - The publication and circulation of the said proposal paper.
   - The mechanisms to check for any alleged inaccuracies in the said proposal paper.
   - The minimum six week consultation period, including the ’30 school days’.
   - The holding of a public meeting.
   - The principle of the involvement of an independent body, HMIE (please see below).
   - The preparation of a consultation report and associated proposals.

7. In the case of rural schools we support in particular:
   - The recognition of the wider impact on rural communities of changes to local educational provision.
• The impact of different travelling arrangements for pupils.

• The principle of designating rural schools (Please see below).

Our concerns

8. We believe that locally elected representatives are best placed to make decisions on local educational provision. Provided the council observes all the steps outlined in Sections 3-14 of the Bill, we see no reason for Scottish Ministers to have a ‘call-in’ notice for proposals.

9. The definitions of reasons for Scottish Ministers issuing a ‘call-in’ notice are far too vague, in fact lack any substance of clarity. ‘Relevant representations made to them (by any person)’ is far too general a criterion. Precise criteria for ‘call-in’ need to be included in the final Act. Such general statements as included in 15(4) and 17(2) of the Bill could lead to subjective interpretations by ministers and could lead to lack of consistency across Scotland.

10. The potential timescales for the alteration of educational provision outlined in the Bill could lead to significant educational concerns for the pupils involved. If, for example, a school roll drops to a point where there are significant educational concerns, and the Minister triggers section 17 of the Bill, then the best interests of the pupils could be put at risk.

11. While the involvement of HMIE is welcomed and the role of HMIE is clarified in sections 8 and 9, we have concern over how well placed HMIE currently is to ensure consistency of approach in evaluating these matters. Some enhanced capacity in the organisation would be needed.

The rural schools dimension

12. We are concerned and surprised that section 14 does not define the detail of how or why a school would be included on ‘the list of rural schools maintained by the Scottish Ministers’. We do not accept the statement in section 14(3) as it allows Scottish Ministers any criteria ‘they consider as appropriate’ for inclusion. Prior to the publication of the Bill, 3 definitions and criteria were used, and these we feel should be included in the final Act. For ease of reference these were:

• Accessible rural
• Remote rural
• Very remote rural

13. While we are pleased that there is no presumption against the closure of rural schools, we are concerned that Scottish Ministers could apply the ‘call-in’ clauses and refuse consent (Section 16(2)). Such actions may not be in the educational interests of the pupils concerned and could also have a disproportionate impact on the finances of the education authority (please refer to section of this report on the Financial Memorandum). The
demographics of some rural communities are such that closure proposals are inevitable and the recent decision of a Scottish Minister to refuse the closure of a rural school with two pupils, both siblings, is very concerning.

14. The Bill does not provide any appeal mechanisms for the education authority if there is disagreement against the Scottish Ministers’ decision. We feel that such an appeal mechanism should be established through a committee of the Scottish Parliament.

Policy Memorandum

15. Notwithstanding the areas where we feel the Bill needs strengthened, the associated policy memorandum, as it stands, is helpful.

Financial Memorandum

16. The Scottish Government estimates that they may have four “call-ins” per year and that they will require 10 days of staff time to deal with these. It also estimates that there will be 20 cases per year when two days of Scottish Government staff time per case will be needed to deal with representations made to ministers to “call-in”.

17. Aberdeenshire Council contends that such assumptions cannot be guaranteed, that the procedures surrounding “call-ins” lack detail and that it remains to be seen whether there will be fewer “call-ins” than current referrals (16 per year).

18. The Financial Memorandum estimates that there will be £61,000 of costs annually to local authorities. Local authorities will be expected to absorb these costs, which will come mainly from publishing the consultation report and advertising this fact. The Financial Memorandum itself suggests that future expenditure estimates has been a difficult process (para 122).

19. We contend that it is inevitable that there would be additional expense in an authority such as Aberdeenshire which has a high number of rural schools, some with falling rolls.

20. The Financial Memorandum states (para 124) that local authorities may argue that failing to close a rural school reduces its scope to make financial savings. It also contends that potential savings are offset for example by increased travel costs and increased “social support” or “regeneration” costs to the “school-less” community.

21. The Financial Memorandum does not define what these notional costs are. It does not make clear exactly how keeping a school open provides the range of “investment” in a community that the school “represented.”

22. In paragraph 126 the Financial Memorandum appears to refute the idea that a school closure would, in fact, provide savings – “Expenditure does not rise; it merely does not fall.” The Financial Memorandum therefore
appears to avoid the issue around the potential savings accrued by education services through a school closure and attributes an undefined social investment to such a school. The Financial Memorandum does not recognise that the disproportionately high costs of maintaining very small schools open, where there are near by schools able to absorb the pupils, can cause difficulties from other parents and staff in council areas.

**Conclusion**

23. Aberdeenshire Council is one of the largest rural education authorities in Scotland, and the majority of our schools would be affected by the specific aspects of the legislation that pertain to rural communities. As such we feel that we have a significant contribution to make to the consultation process. We hope that our written evidence is helpful and would be willing to expand upon this in oral evidence if the committee is so minded.

Bruce Robertson, OBE and  
Director of Education, Learning and Leisure

Councillor Richard C Stroud  
Chair of Education, Learning and Leisure

3 April 2009
SUBMISSION FROM THE CITY OF EDINBURGH COUNCIL

Schools (Consultation) (Scotland) Bill

1. I refer to the call for evidence with regard to the above noted Bill.

2. The opportunity presented by the Bill to consolidate the practices governing consultation is welcomed. The Bill will provide greater clarity for all affected parties regarding the statutory consultation process that will apply to any Council proposals. This clarity will also assist with the credibility of the consultation process. The greater emphasis on local decision making that the Bill should introduce is also welcomed, subject to how the call-in processes work in practice.

3. Many of the processes proposed by the Bill are practices already conducted by the Council in its statutory consultation exercises as best practice.

4. The removal of the automatic approval requirement from Scottish Ministers for any school operating at over 80% occupancy is welcomed. This removes an arbitrary cut off point for the approval process. The spirit of only requiring call-in where authorities have not followed the process set out in the Bill is welcomed – authorities that follow the process should therefore be able to take more decision making at local level. The restriction of call-in to school closures matters is also welcomed; this means that for local matters such as catchment review local authorities are empowered to make decisions at the local level.

5. However, section 16 provides no guidance on the time period that ministers would expect to revert to authorities with their determination of the case. It is suggested that guidance on this matter would be beneficial, not just for authorities, but also the affected stakeholders who will effectively be in limbo until a decision is made.

6. Transitional arrangements under schedule 3 indicate that if a council has undertaken statutory consultation on a proposal but not yet made a decision at the time the Bill is enacted, then the Bill would apply retrospectively. At worst this would mean the authority would have to re-conduct the entire consultation process, at best it would introduce a delay into the decision making process leaving affected parties in limbo. It is estimated that the requirement to provide HMIE with the details of the proposal and consultation, assess their response, and publish the final consultation report three weeks in advance of a council meeting will add about two months to the current timescales. The HMIE consultation requirement is not covered by current legislation so would have to await enactment of the Bill to apply, even if an authority were to follow the rest of the processes set out in the Bill in anticipation of its enactment.

7. Given the amount of time that is already invested in carrying out statutory consultation exercises, it is requested that the provisions of the Bill only apply
to consultation exercises that are yet to be conducted at the point of enactment, rather than retrospective application.

8. Alongside the above comments regarding the principles of the Bill, there are a number of queries regarding some individual elements of the Bill, which are highlighted below.

9. It is noted that individuals will have the opportunity to write to three parties on the proposals, the council, HMIE and the Scottish Ministers. Given that the council is required to give copies of responses to HMIE as part of the process, it is queried whether there needs to be a clause at section 8 (4) (c) which makes provision for individuals to write direct to HMIE.

10. It is understood under section 12 (5) why the effect of travelling should be assessed for pupils, however, it queried why the effect on staff should be evaluated. As council employees, their terms and conditions will govern their requirements to work in particular locations as with any other council employee.

11. The requirement at section 15 (2) (a) for notification to Scottish Ministers within one working day is very fast and may, for a number of reasons, be unachievable. If a council fails to meet this very rapid turnaround does this make the whole process challengeable?

12. Given that it is proposed that HMIE have a formal involvement at the end of the public consultation process, it is suggested that they are added to the list of consultees in schedule 2 so they have early sight of the proposals.

13. In summary, it is recognised that the Bill represents a culmination of working with many affected stakeholders, including COSLA, and the general principles of the Bill are welcomed.

Gillian Tee  
Director of Children and Families  
09 April 2009
SUBMISSION FROM GLASGOW CITY COUNCIL

Schools (Consultation) (Scotland) Bill

1. Glasgow City Council (GCC) generally welcomes the review of the framework for the management of changes to the provision of schools, including school closures, catchment area changes and the grounds for the referral of proposals to the Scottish Ministers.

Summary

2. The main concern of GCC relates to the role of HMIE in the process. HMIE are accountable to Scottish Ministers. Her Majesty’s Senior Chief Inspector is the senior professional adviser on all aspects of education to Scottish Ministers.

3. For HMIE to be commenting on local authority decision making before there is any cause to refer to ministers has the potential to undermine local democratic processes.

4. Involvement of HMIE during the process of the development and shaping of proposals which are out for local and public consultation, before council decision is taken to close a school, is inappropriate.

5. Whilst we would have no objection to providing information as requested in 8 (1) i.e. notifying HMIE of the proposals, we do object to HMIE being the equivalent of a consultee and their report being considered as part of the decision making process by elected members. We would object to section 8 (with the exception of (1) a. on practical grounds). During the current consultation exercise on school mergers in Glasgow, we have 8,000 responses and it is taking a team of approximately 30 people to collate, analyse and form recommendations from this consultation exercise. Consideration is also being given to thousands of emails; website references; telephone calls; 41 public meetings and additional meetings with local elected members; groups of parents; children’s councils and community groups.

6. The detailed information requested for HMIE and the inclusion of comment from HMIE in the proposals to council members goes beyond their capacity, function and area of expertise.

7. It is for local authorities to make decisions relating to the provision of education within their local areas, as local authorities are democratically accountable to their local communities for these decisions.

8. Consulting with HMIE, as advisers to Scottish Ministers, and asking HMIE to make judgements on the educational case as part of the consultation and then also commenting during call-in, has the potential for confusion of role and function.
9. However, we agree that HMIE have a role in advising ministers in any call–in procedures.

10. Additionally, we would appreciate clarification regarding the status of early years’ provision within the Bill i.e. regarding the status of the closure of an early years’ provision vis-a-vis closure of a school, bearing in mind the following regulations:

11. (Schedule 2 as amended, Education (Publication and consultation etc.) (Scotland) Regulations, 1981):

   When proposing to make changes in education matters, the authority, in carrying out the necessary consultation, may be required to submit the proposal to Scottish Ministers for their consent. In this case the proposal cannot be implemented unless consent is given.

12. The proposals to which this condition applies are:

   (a) Proposals to discontinue any school OTHER THAN A NURSERY SCHOOL, or any stage of education in a school, OTHER THAN A NURSERY CLASS IN A SCHOOL, where the change would result in any child at that school:

      (i) having to attend a different primary school 5 miles or more away from the original school, measured by the nearest available route

      (ii) having to attend a different secondary school ten miles or more away from the original school, measured by the nearest available route.

   (b) Proposals to change the site of a school, other than a nursery school, which would result, in the case of a primary school, in the new site being more than 5 miles away from the previous site; and in the case of a secondary school, in the new site being more than 10 miles away from the previous site, measured by the nearest available route.

   (c) Proposals to discontinue any school or any stage of school education in any school or to change the site of any school or to vary the catchment area of any school, where the number of pupils in attendance is greater than 80% of that school’s capacity. In calculating the pupil capacity, regard must be had to:

      (i) the assessment of capacity on which the authority have based their proposal

      (ii) the maximum number of pupils in attendance at the school in any one year in the period of 10 years preceding the proposal;
(iii) the curriculum of the school

13. In many instances, the education authority will need to carry out formal consultation as laid down and, in addition, to obtain the consent of Scottish Ministers.”

14. We believe clarity in the Bill is critical in relation to our ambition to extend and enhance our early years’ provision across the city which would be in line with the Government’s Early Years’ Framework and the commitment in the Single Outcome Agreement to addressing poverty i.e. supporting parents into training and employment. If section 9(c) does not apply in the same way as sections 9(a) and (b), then every time a local authority changes their early years provision in line with the Government’s early years framework, then, potentially, there will require to be referral of all proposed nursery closures in Scotland. Nurseries are not described in capacities but in full time equivalences.

15. GCC fully supports the principle that the responsibility for school provision remains with local authorities and that local authorities are in the best position to take decisions and have a duty in relation to the provision of efficient and effective education taking account of the local and wider community circumstances.

Specific comments

Overview of key requirements

16. In our recent consultation on proposed school closures (2 Feb 2009 to 18 March 2009), GCC believe that we went beyond current statutory requirements and addressed subsections 1 to 5 with the exception of 3(e).

17. This exception relates to GCC’s concern that HMIE has the potential to be seen as:

- a consultee / adviser to the local authority consultation process;
- an assessor of the proposals at the consultation with stakeholders stage, before Council decisions are taken, and
- adviser to Scottish Ministers during the consultation process and as part of the call in process.

18. GCC wish to stress that they see no role for HMIE in any local authority consultation process.

19. We see the role of HMIE solely as adviser to Scottish Ministers and accept that they should comment on the educational case only under grounds for call–in.

Relevant proposals and consultees

20. No comments on this section.
Educational benefit statement

21. In our recent consultation on proposed school closures, GCC believe that we went beyond current statutory requirements and addressed subsections 1 to 3 with the exceptions of 1(a) (iv) and 1(c).

22. We would have no concern including these subsections in subsequent consultations.

Proposal paper

23. In our recent consultation on proposed school closures, GCC believe that we went beyond current statutory requirements and addressed subsections 1, 3, 4 and 5. Section 2 was not relevant at the time of consultation.

Correction of the paper

24. In our recent consultation on proposed school closures, GCC believe that we went beyond current statutory requirements and addressed subsections 1 to 3 with the exception of section 3(a)(iii) and involving HMIE in section 3(b).

Notice and consultation period

25. In our recent consultation on proposed school closures, GCC believe that we went beyond current statutory requirements and addressed subsections 1 to 5.

Public meeting

26. In our recent consultation on proposed school closures, GCC believe that we went beyond current statutory requirements and addressed subsections 1 to 4 with the exceptions of 2(b).

Involvement of HMIE

27. In our recent consultation on proposed school closures, GCC did not engage with HMIE as detailed in section 8 as we believe it is for local authorities to make the necessary decisions in relation to the provision of education within their areas. HMIE were kept informed of the Council decision to go out to consultation.

Consultation report

28. In our recent consultation on proposed school closures, GCC believe that we went beyond current statutory requirements and addressed subsections 1 to 5 with the exceptions of 1(b).
Content of report

29. In our recent consultation on proposed school closures, GCC believe that we went beyond current statutory requirements and addressed subsections 1 to 4 with the exceptions of 2(c)(i) ‘oral representations’ 2(c)(ii) and 2(d).

Time for further consideration

30. No comment on this section

Factors for rural closure proposals

31. No comment on this section.

Explanation of approach

32. No comment on this section.

Designation of rural schools

33. No comment on this section.

Call-in of proposals

34. GCC have no concern if advised of outcome within 6 weeks.

Determination of case

35. GCC seek clarity around what form of conditions may be applicable in section 2(b)(i).

Grounds for call-in etc.

36. No comment on this section.

18 to 22 General

37. No comments on these sections.

Schedule 1

38. No comment.

Schedule 2

39. In our recent consultation on proposed school closures, GCC believe that we went beyond current statutory requirements and addressed subsections 1(a) to 1(i).
Schedule 3

No comment.

Margaret Doran
Executive Director of Children and Families
1 April 2009
SUBMISSION FROM COMHAIRLE NAN EILEAN SIAR

Schools (Consultation) (Scotland) Bill

1. Comhairle nan Eilean Siar welcomes the opportunity to submit comments on the Bill, and looks forward to contributing to further consultation on its terms.

2. The comhairle generally welcomes any proposal to clarify and, if possible, simplify, current procedures for proposals to close schools, or discontinue stages of education in schools, and would submit that the Bill generally reflects the practice followed by most local authorities who are considering such proposals in any case.

3. The proposals to prepare educational benefits statements and proposals papers are generally welcomed.

4. The comhairle particularly welcomes the early involvement of HMIE, and would prefer that the Bill include an obligation on HMIE, at the time of compiling the proposal paper, to assist the authority in the assessment of, *inter alia*, educational benefits.

Rural schools

5. The comhairle, most of whose schools would qualify as “rural schools”, notes with some concern the proposal within the Bill to apply different factors for rural school closure proposals, in effect, moving away from an assessment of educational benefits, to the effect on the local community. While the comhairle, in common with other local authorities, would always examine these factors in any case when considering a proposal for closure or discontinuation of education in a rural area, there is an important point of principle in stating that educational benefit to pupils is, in the case of rural schools, only one factor, and not actually a factor to be given particular weight, in assessing whether a school should be closed. Circumstances could be envisaged where, for example, the number of pupils in a school was very small, with significant detriment to educational standards, and where closure of that school would, inevitably, have a negative effect on the local community, simply in terms of loss of a long established, and probably much loved, public service in the community. A council is therefore faced with a choice of educational benefit to pupils, on whose interest, it is submitted, a council’s attention should be focussed, weighed against negative effect on the community. In practice, this could mean that pupils be retained in an educationally detrimental situation, because of factors not relevant to their education.

Call in of proposals

6. The comhairle adheres to the general principle of subsidiarity in relation to services provided by local authorities, and would submit that all decisions in relation to school provision should be taken locally, in accordance
with established and agreed, and fair and transparent, procedures. The comhairle recognises, however, the long tradition within Scottish education legislation of government having a role in school closure decisions, including the power to over-rule councils’ decisions.

7. Against this background, the comhairle welcomes an end to the automatic referral of school closure decisions to the Scottish Government, and welcomes all attempts to clarify grounds for the Scottish Government to call in a council’s decision. It is essential that all parties are clear as to the criteria for call-in, and that these are applied consistently, based on sustained grounds of objection, rather than perceptions.

8. It should be noted, however, that consultees and others are not without other remedies where a council has failed to comply with statutory requirements, or has failed to take proper account of relevant considerations; these matters can be addressed through judicial remedies such as Interdict and Judicial Review. There is undoubtedly a risk of spurious procedural objections, submitted merely as a delaying tactic to the implementation of properly taken decisions on school closures.

General observations

9. The comhairle would also urge that account be taken of local authorities’ obligations to consider other relevant factors, in assessing school provision throughout their areas. Audit Scotland has frequently commented on councils’ need to address under occupancy, or the issue of poorly maintained buildings, and these issues can only be effectively addressed through objective assessment of the entire school estate. It is also likely, in the foreseeable future, that there will be increased pressures on Scottish Government, and local government funding, and therefore local authorities will require to scrutinise school provision with the same rigour as will have to be applied to other local government services.

Further comments

10. The comhairle would be happy to assist the Education, Lifelong Learning and Culture Committee further in its deliberations on the Bill, whether by way of further written evidence, or by oral representations, and trust these comments have been of assistance.

Malcolm Burr
Chief Executive
8 April 2009
SUPPLEMENTARY SUBMISSION FROM COMHAIRLE NAN EILEAN SIAR

Schools (Consultation) (Scotland) Bill

1. Further to my e-mail of 8 April 2009 enclosing Comhairle nan Eilean Siar's submission on the terms of the above Bill, I have received a late submission from the Comhairle's SNP Group, in the following terms –

Rural schools

2. The SNP Group considers that the local community in which any pupil is brought up has a considerable influence on their education, and merits greater weight than is suggested in the Comhairle's response.

General observations

3. The Group suggests that the Comhairle's submission indicates that a poorly maintained school could count as a criterion for closure and, since responsibility for maintenance rests with the local authority, it would be unreasonable to include this as a consideration.

4. Thank you for taking account of this late submission.

Malcolm Burr
Chief Executive
28 April 2009
SUBMISSION FROM ASSOCIATION OF DIRECTORS OF EDUCATION IN SCOTLAND (ADES)

Schools (Consultation) (Scotland) Bill

1. Thank you for the invitation to submit evidence on the principles of the above Bill. We hope that the following ADES (Association of Directors of Education in Scotland) comments are helpful to your deliberations.

2. It is worth noting that Scottish Government officials consulted closely with ADES representatives in liaison with COSLA (Convention of Scottish Local Authorities) officers in the development of the Bill. Many of the points raised in that process are reflected in the Bill.

3. It is unfortunate that the launch of the Bill gave the impression that its main focus was the protection of rural schools. This detracted from the implications of the Bill for all schools consultation procedures; and potentially makes council decisions on closures in the drive to secure more efficient and effective schools estates provision, more difficult.

4. ADES maintains its position that decisions on school provision should be taken locally by local authorities within the parameters of national guidelines and that government interventions in individual decisions is not necessary. However, it is acknowledged that views on this issue are polarised. In that context, ADES accepts the approach taken in the Bill that Scottish Government involvement be restricted to closure decisions on a ‘call-in’ basis only.

5. ADES supports the operational procedures for the management of consultations proposed in the Bill. In general, they reflect best practice already established in many councils.

6. However, it is worth noting some specific points relating to the consultation procedures. Firstly, the requirements will substantially extend the period between the initial proposal and decision implementation. Good forward planning of changes to school provision will be required and it will be helpful if any call-ins are decided promptly. Secondly, clarification of the purpose of HMIE involvement would be helpful, particularly if there are differences in the position adopted by HMIE and local educational officials on a proposal. Thirdly, the specific criteria to be applied in making a call-in decision on a closure proposal have not yet been clarified.

7. In relation to the existing referral system for proposed changes to denominational provision the ADES position is that it is no longer required. However, the Bill does not change the existing arrangements. In addition, it is worth noting the differential consultation requirements between denominational and non-denominational school communities in relation to the removal of transport and a change to the denominational status of a school.
Murdo MacIver
North Lanarkshire Council
Association of Directors of Education in Scotland
9 April 2009
Introduction

1. This paper seeks to inform members’ consideration of four instruments relating to the Adoption and Children (Scotland) Act 2007.

Background

2. The Minister for Children and Early Years, Adam Ingram MSP, wrote to the Committee on 21 April 2009 to update members on the Scottish Government’s progress in implementing the Adoption and Children (Scotland) Act 2007 and the Looked After Children regulations. This correspondence is attached at Annexe A. The Minister stated that 11 SSIs would be laid, with the intention that the legislation would commence on 28 September 2009.

3. Copies of each SSI, explanatory notes and Executive Notes are attached in hard copy with the papers. A SPICe briefing on the SSIs is also included.

4. All the instruments are subject to negative procedure. A procedural note on this is attached at Annexe B.

Adoption Support Services and Allowances (Scotland) Regulations 2009 (SSI 2009/152)¹

5. Paragraph 4 of the Executive Note to the Regulations states the purpose of the parent act (in relation to adoption support services and allowances) as:

“to ensure that all those affected by adoption have the right to access support. The 2007 Act defines what should be considered as support and makes it a requirement that a person identified in the 2007 Act who applies for support be assessed and that a plan is put in place to provide that support where it is needed. The 2007 Act also places a requirement on local authorities to prepare an Adoption Allowances Scheme.”

6. The Executive Note also states (at paragraph 2) that the purpose of the instrument is to prescribe:

- “the manner in which an agency makes an assessment/reassessment of adoption support services,

• the matters which are considered in making that assessment/reassessment,

• the procedure to be followed when considering the payment of adoption allowances and,

• the factors that should be taken into account when considering allowances and the review, variation and termination of that allowance.”

7. More detailed commentary on the provisions of each regulation is set out in the Explanatory Note on page 10 of the SSI and in the SPICe briefing.

8. Paragraphs 8 (Adoption Support Services) and 10 (Adoption Allowances) of the Executive Note do not anticipate any increased costs as a result of this regulation as they relate to changes to existing services rather than new obligations.

9. The Education, Lifelong Learning and Culture Committee is the designated lead committee and should report to the Parliament by 25 May 2009.

10. The Subordinate Legislation Committee (SLC) considered the instrument at its meeting on 12 May 2009. The SLC sought clarification on Regulation 11, which makes provision for an adoption allowance to include an element of remuneration. A copy of the SLC report, and Scottish Government’s clarification, is attached at Annexe C. In its report, the SLC considers “the position has been satisfactorily explained and justified within the Government’s response, such that the Committee on this occasion notes the response as being satisfactory, and reports accordingly to the lead Committee and Parliament” (paragraph 8).

The Adoption Agencies (Scotland) Regulations 2009 (SSI 2009/154)

11. Paragraph 2 of the Executive Note to the regulations sets out the purpose of the instrument to:

“govern how adoption agencies (local authorities and registered adoption services) exercise their functions in relation to adoption under the 2007 Act. The Regulations provide an essential framework within which adoption agencies are required to take certain steps before making fundamental decisions about individual adoption cases. The regulatory framework is designed to safeguard the welfare of each child and protect the rights of their parents and adopters by providing for a rigorous decision making process.”

12. More detailed commentary on the provisions of each regulation is set out in the Explanatory Note on page 35 of the SSI and in the SPICe briefing.

13. Paragraph 7 of the Executive Note states that the instrument should have no financial effect as the regulations largely restate the existing provisions.

14. The Education, Lifelong Learning and Culture Committee is the designated lead committee and should report to the Parliament by 25 May 2009.

15. The Subordinate Legislation Committee considered the instrument at its meeting on 12 May 2009. The SLC raised a number of issues relating to the scheduling and drafting of this amendment. The Committee wrote to the Scottish Government for clarification and a copy of the SLC report, and Scottish Government’s response, is attached at Annexe D. In relation to the scheduling issue, the SLC reports the instrument to the lead committee and Parliament. The SLC was content with the Scottish Government’s clarification regarding the issue the Committee had with the drafting of the instrument.

**The Adoption and Children (Scotland) Act 2007 (Supervision Requirement Reports in Applications for Permanence Orders) Regulations 2009 (SSI 2009/169)**

16. Paragraph 3 of the Executive Note to the regulations refers to section 95 of the parent act, which requires a Children’s Hearing to prepare a report for a court if the Hearing wishes to make or vary a supervision requirement with respect to a child who is subject to court procedures for a Permanence Order, or a variation of such an order. Section 95(2) requires that this report must contain such information as the Scottish Ministers may prescribe by regulation. These regulations set out this prescribed information.

17. Paragraph 4 of the Executive Note provides more detail on the prescribed information as being:

- “the terms of the proposed supervision requirement and the reasons for making it;
- the terms of any current supervision requirement already in force in respect of the child;
- the terms of any proposed modification of any current supervision requirement and the reasons for making that modification; and
- the report of the proceedings of the Children’s Hearing, prepared by the Principal Reporter, in accordance with rule 31 of the Children’s Hearing (Scotland) Rules 1996 (S.I. No. 3261).”

18. Further information on the regulation is provided in the SPICe briefing.

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19. Paragraph 6 of the Executive Note states that the instrument should have no financial effect as information is already required to be supplied to a court in these circumstances.

20. The Education, Lifelong Learning and Culture Committee is the designated lead committee and should report to the Parliament by 1 June 2009.

21. The Subordinate Legislation Committee considered the instrument at its meeting on 12 May 2009 and determined that it did not need to draw the attention of the Parliament to the instrument on any of the grounds set out within Rule 10.3.1.

The Applications to the Court of Session to Annul Convention Adoptions or Overseas Adoptions (Scotland) Regulations 2009 (SSI 2009/170) 4

22. Paragraph 2 of the Executive Note to the regulations states that the Adoption and Children (Scotland) Act 2007 “replaces the Adoption (Scotland) Act 1978 and modernises entirely the existing legal framework for domestic and intercountry adoption. The effect of the Regulations will be to restate the existing Rules of the Court of Session because the statutory authority (the 1978 Act) for the existing Rules is overtaken by the regulation making power in section 69 of the 2007 Act.”

23. Paragraph 9 of the Executive Note states that the instrument should have no financial effect.

24. The Education, Lifelong Learning and Culture Committee is the designated lead committee and should report to the Parliament by 1 June 2009.

25. The Subordinate Legislation Committee considered the instrument at its meeting on 12 May 2009 and determined that it did not need to draw the attention of the Parliament to the instrument on any of the grounds set out within Rule 10.3.1.

Recommendation

26. The Committee is invited to consider whether it wishes to make any recommendation in relation to these instruments.

Emma Berry
Assistant Clerk
Education, Lifelong Learning and Culture Committee

4 OPSI. Available at: http://www.opsi.gov.uk/legislation/scotland/ssi2009/ssi_20090170_en_1
[Accessed on 14 May 2009]
CORRESPONDENCE FROM THE MINISTER FOR CHILDREN AND EARLY YEARS, ADAM INGRAM MSP, DATED 22 APRIL 2009

I wrote to the Committee in October to provide an update on our progress in implementing the Adoption and Children (Scotland) Act 2007 and the Looked After Children Regulations. I thought it would be helpful to provide a final update as we are now starting to lay the Regulations.

The Adoption and Children (Scotland) Act (Commencement Number 3) Order 2009 came into force on 20 April. I intend to lay the following SSls, starting this week:

- The Adoption Agencies (Scotland) Regulations 2009
- The Adoption Support Services and Allowances (Scotland) Regulations 2009
- The Period to Prepare an Adoption Allowances Scheme (Scotland) Order 2009
- The Adoptions with a Foreign Element (Scotland) Regulations 2009
- The Applications to the Court of Session to Annul Convention Adoptions or Overseas Adoptions (Scotland) Regulations 2009
- The Adoption (Disclosure of Information and Medical Information) (Scotland) Regulations 2009
- The Adoption Supervision Requirement Report (Scotland) Regulations 2009
- The Adoption and Children (Scotland) Act (Commencement Number 4 Transitional and Savings Provisions) Order 2009
- The Adoption and Children (Scotland) Act 2007 (Modification of Enactments) Order 2009
- The Adoption and Children (Scotland) Act 2007 (Modification of Subordinate Legislation) Order 2009
- The Looked After Children (Scotland) Regulations 2009

I intend to commence the legislation on 28 September 2009. Our intention had been to set a commencement date in late June, as soon as possible after the Regulations were approved by Parliament. However, a number of local authorities represented on AD SW's Fostering and Adoption Sub-Group have raised concerns about their capacity to rewrite local policies and procedures in light of the new Regulations and guidance and to deliver training to all those staff involved in time for commencement at the end of June. Likewise, the Chair of the Sheriff Court Rules Adoption Working Group was concerned that there would not be sufficient time to deliver training on the new Sheriff Court Rules to Sheriffs and court staff.

I know that our partners in local government and the voluntary sector are keen to see the legislation implemented as soon as possible so we can start to see the improvements that will have a positive impact on looked after children's lives such as the increased flexibility that the permanence order will provide. I know too that there are same-sex couples who are waiting for the new legislation to be implemented so they can be assessed as foster carers or prospective adopters. I want to see these changes as soon as possible, but I...
want to ensure that all the agencies involved, local authorities, voluntary and independent fostering and adoption agencies, the courts, solicitors, the Children's Panel and others, have sufficient time to prepare for implementation of the legislation which is why I decided to commence the legislation in September.

I hope that this information is helpful.
Procedural Note

Standing Orders

1. The procedures for dealing with Scottish Statutory Instruments (SSIs) are covered by Chapter 10 of Standing Orders. SSIs are laid by being lodged with the chamber clerks and are published in the Business Bulletin. They are referred to the Subordinate Legislation Committee, the appropriate subject committee (the ‘lead committee’) and, where relevant, any other committee.

SSIs subject to annulment: ‘negative instruments’

2. Where an SSI is subject to annulment, it comes into force on a specified date and then remains in force unless it is annulled by the Parliament. Any MSP may by motion propose to the lead committee that the committee recommends that nothing further is to be done under the instrument. Such motions are lodged with the chamber clerks.

3. The lead committee debates such a motion for no more than 90 minutes.

4. The lead committee reports to the Parliament, setting out its recommendations. If it recommends annulment, the Bureau will propose to the Parliament a motion that nothing further is to be done under the instrument.

5. All the above must take place within 40 days of the instrument being laid, excluding recesses of more than 4 days.

6. To date, no motion to annul these instruments have been lodged with the chamber clerks.
1. These Regulations make provision in relation to access to support services for those affected by adoption. The 2007 Act defines what should be considered as ‘support’ and makes it a requirement that a person identified in the 2007 Act, who applies for support, is to be assessed and that a plan is put in place to provide that support where required. The Regulations also place a requirement on local authorities to prepare an ‘adoption allowance scheme’.

2. Part 3 of this instrument is concerned with allowances. It sets out, at regulations 10 to 17, provision relating to an ‘adoption allowance scheme’. The terminology used throughout Part 3 (and indeed within the relevant provisions in the 2007 Act under which these Regulations are made) is that of ‘allowances’. The one exception is regulation 11 which is concerned with ‘remuneration’. It provides that, in particular circumstances, an adoption allowance can include an element of remuneration, for foster carers and kinship carers.

3. The relevant sections of the 2007 Act, under which the provisions in this instrument are made, refer to power to make provision as to ‘allowances’ but make no reference to ‘remuneration’. Regulation 11 makes provision for an adoption allowance to include an element of remuneration. Clarification was therefore sought as to the basis for making provision concerning remuneration.

4. Correspondence between the legal advisers and the Scottish Government is reproduced at Appendix 1.

5. The Government has provided a full reply on this point. The Committee accepts that regulation 11 is narrow in its application, and that the remuneration element of allowances applies in very specific circumstances and for a limited period. It notes that there is no question of an allowance consisting wholly of remuneration, the wording of regulation 11(1) being to the effect that an allowance ‘may include an element of remuneration’.

6. The further explanation of the policy intention of regulation 11 which is set out in the first paragraph of the Government’s response is helpful in understanding the context in which provision for an element of remuneration to be included has been made.

7. The Committee considers that while on initial consideration, regulation 11 appears to be an unusual or unexpected use of the powers conferred by section 71, the position has been satisfactorily explained and justified within the Government’s response, such that the Committee on this occasion notes the response as being satisfactory, and reports accordingly to the lead Committee and Parliament.
The Adoption Support Services and Allowances (Scotland) Regulations 2009 (SSI 2009/152)

On 1st May the Scottish Government was asked:

given that the ordinary meaning of “allowance” in this context may be said to be “a definite portion, sum, or amount, allotted or granted to meet any expenses or requirements” (Oxford English Dictionary) to explain why regulation 11 is thought to be within the scope of powers of section 71(3) as read with the meaning of allowance scheme in section 71(2) insofar as provision is made for an adoption allowance to include an element of remuneration, being a reward rather than an amount to meet expenses.

The Scottish Government responds as follows:

Regulation 11, which includes the remuneration reference, is very narrow in application. It provides that an adoption allowance may include “an element of remuneration” where the adoptive parent has been a foster carer or kinship carer for the adoptive child and where that person, as a foster parent or kinship carer, was previously receiving remuneration from the adoption agency. Any such remuneration will usually end within 2 years of the adoption order being made under regulation 11(2). The policy intention of regulation 11 is to ensure that a foster parent / kinship carer is not financially disadvantaged by adopting the child they were already caring for. It would be unfortunate if arriving at a beneficial, permanent solution to the child’s situation (i.e. the child being adopted by those already caring for him) triggered financial disadvantage on the part of the adoptive parent. Regulation 11 guards against that possibility.

Given the narrow circumstances in which remuneration can be made under regulation 11, we are of the view that it does fit within an ordinary meaning of “allowance”. It is to be noted that regulation 11(1) provides that an allowance “may include an element of remuneration” so there is no question of an allowance consisting entirely, or even substantially, of remuneration – rather remuneration can be no more than one element, amongst several, within an allowance.

Ordinary meanings of allowance can encompass remuneration. Remuneration means “money paid for work or a service” (the New Oxford Dictionary of English 1998). The same dictionary gives the following meaning of allowance: “a sum of money paid regularly to a person to meet specified needs or expenses” while the Compact Oxford English Dictionary refers to “an amount of money that can be earned”. Therefore allowance can incorporate notions of pay and earning that are more obviously associated with remuneration.

We also note that section 117(2) is referred to as an enabling power for the Regulations. If it is not accepted that allowance encompasses “an element of remuneration” within its ordinary meaning, as we contend, then it is submitted
that including an element of remuneration, within the narrow parameters prescribed in regulation 11, is incidental or supplemental to the payment of an adoption allowance following adoption allowances schemes made under section 71 and these Regulations.
The Adoption Agencies (Scotland) Regulations 2009 (SSI 2009/154) (Education, Lifelong Learning and Culture Committee)

17. The purpose of this instrument is to set out how ‘adoption agencies’ (i.e. local authorities or registered adoption services) are to exercise their functions in relation to adoption under the 2007 Act.

18. Correspondence between the Committee’s legal advisers and the Scottish Government is reproduced at Appendix 3.

Issues 1 and 2

19. Legal advisers queried whether the references in regulation 28 to the Adoption (Disclosure of Information about Natural Parents) (Scotland) Regulations 2009 (‘the Disclosure Regulations’), which had not been made nor laid in draft before the Scottish Parliament at the point at which this instrument was made could have any meaning or effect as the date this instrument was made, and also why it was considered appropriate to make and submit the Regulations for parliamentary scrutiny in advance of the Disclosure Regulations having been made.

20. The reply notes that although this instrument has already been made, it does not come into force until 28th September 2009, and that until then the provision made at regulation 28 has no legal effect.

21. However, the instrument which is before the Committee today is subject to negative procedure, while the Disclosure Regulations are subject to affirmative procedure. The Disclosure Regulations remain to be finalised. It is conceivable that circumstances might arise where Parliament is deprived of the opportunity of taking any action in relation to this instrument; in particular should it ultimately transpire that issues arise which cause concern so far as the content of the Disclosure Regulations are concerned in regard to the reference which is made to them in regulation 28 of this instrument. The issue is one which might therefore be regarded as being of some note having regard to the interests of ensuring effective Parliamentary scrutiny of instruments.

22. The drafting approach which has been taken here, in respect of provisions in regulation 28 being stated to be subject to another set of Regulations which are still to be made raises both technical and potential practical difficulties. The Committee takes the view that the drafting approach which has been taken here raises significant issues and that as a matter of good drafting practice it is one which should be avoided so far as it is possible to do so.

23. The Committee recognises that a considerable number of instruments have been laid in relation to implementation of the 2007 Act. While this might have caused the Government some difficult scheduling issues, the Committee
takes the view that fuller account should be had to such issues, in relation to
the drafting and scheduling of related instruments, so as to avoid where
possible reference in one instrument to provision still to be made, as a matter
of good drafting practice.

Issue 3

24. This is a lesser point in relation to which the response usefully clarifies
the position in relation to commencement, and the reason for footnoting the
amendments concerned in the footnotes of this instrument. The position has
been reasonably explained, such that the Committee is satisfied in relation to
this point.

25. In relation to issues 1 and 2 the Committee reports the instrument
to the lead Committee and to the Parliament on the ground that it
considers that, having regard to ensuring effective Parliamentary
scrutiny, due account should be had to scheduling issues concerning
related instruments to which reference is being made, so as to avoid
reference to provisions contained in a still to be made instrument, where
it is possible to do so, as a matter of good drafting practice.

26. In relation to issue 3, the Committee notes that it is content with
the response received from the Government.
CORRESPONDENCE FROM THE SCOTTISH GOVERNMENT TO THE SUBORDINATE LEGISLATION COMMITTEE

The Adoption Agencies (Scotland) Regulations 2009 (SSI 2009/154)

On 1st May 2009 the Scottish Government was asked:

(a) whether the references in regulation 28 to the Adoption (Disclosure of Information and Medical Information about Natural Parents) (Scotland) Regulations 2009 ("the Disclosure Regulations") which were not made nor laid in draft before the Scottish Parliament when the Regulations were made can have any meaning or effect as at the date the Regulations were made;

(b) why it is considered appropriate to make and submit the Regulations for parliamentary scrutiny in advance of the Disclosure Regulations having been made;

(c) in relation to regulations 13(6) and 23(4) in so far as these refer, by way of footnotes, to amendments to provisions which are not yet in force, to clarify the Scottish Government's position in regard to commencement of the provisions concerned.

The Scottish Government responds as follows:

(a) The Regulations and the Disclosure Regulations form part of a series of statutory instruments required to implement the Adoption and Children (Scotland) Act 2007 ("the 2007 Act"). They each require different parliamentary procedures. The Regulations are subject to negative resolution procedure whilst the Disclosure Regulations are subject to the affirmative procedure. The coming into force date for both instruments is 28th September 2009. Whilst it is a matter for the Scottish Parliament whether or not to annul the Regulations (subject to negative procedure) or to approve the Disclosure Regulations (subject to affirmative procedure) should both instruments come into force on 28th September 2009 then the reference in regulation 28 of the Regulations to the Disclosure Regulations will have legal effect. Although the Regulations have already been made, until that date the provision has no legal effect.

(b) As noted in the preceding paragraph both instruments are intended to come into force on the same date but both are subject to different forms of parliamentary procedure. They both form part of a suite of instruments required to give effect to the 2007 Act. The Regulations have been laid at this stage to allow sufficient time for parliamentary scrutiny and so that local authorities may have time to revise their procedures for adoption in time for 28th September. In order to manage the process of consultation and following discussion with partners the instruments were consulted on in discrete blocks. Consultation on the Regulations ended on 29th August 2008 whilst consultation on the Disclosure Regulations was carried out in 2 stages ending on 8th October 2008 for disclosure of information and
28th January 2009 for disclosure of medical information about natural parents. It has therefore not been possible to have the Disclosure Regulations finalised, laid in Parliament and made in advance of the making of the Regulations. If Parliament approves the Disclosure Regulations and does not annul the Regulations the date regulation 28 has legal effect will be synchronous with the Disclosure Regulations.

(c) The intention of the Scottish Government is to commence those provisions of the 2007 Act which are not already in force (and these include the amendments in schedule 1 to the Act referred to in the footnotes in regulations 13(6) and 23(4)) on 28th September. It is therefore considered appropriate to narrate these amendments in the footnotes of this instrument.
Adoption Regulations

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Introduction

This briefing gives a general overview of the regulations which have been or are due to be laid following the Adoption and Children (Scotland) Act 2007. To date, not including commencement orders, five of eleven sets of regulations have been laid (one of which on foreign adoptions is already in force). Where regulations are not yet laid, reference is made to the consultation draft. There are also regulations due to be laid on looked after children which include provision for foster care and kinship care. (There will be a separate SPICe Briefing on these). The adoption regulations deal with:

- The process of adoption, largely restating existing law and taking account of the new permanence order.
- Support services and allowances. The 2007 Act extended provision in both these areas.
- Interaction with the Children’s Hearings system. There is a short set of regulations about reports from a children’s panel when a court is dealing with a permanence order.
- Disclosure of information, covering access to adoption records and access to medical information about the natural parents.
- Adoptions with a foreign element. Regulations here largely restate the existing law.

The regulations are due to be introduced during May and will be dealt with by the Committee on different dates. This briefing gives a short overview of all the adoption regulations, although at time of writing some were only available as consultation drafts. The following table gives the regulations laid to date (not including commencement orders) and those due to be laid shortly.
| **The Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) (Scotland) Regulations 2008** | **SSI number** | **Date Laid** |
| | SSI 2008/303 | 11 September 2008 |
| **The Adoption Agencies (Scotland) Regulations 2009** | SSI 2009/154 | 22 April 2009 |
| **The Adoption Support Services and Allowances (Scotland) Regulations 2009** | SSI 2009/152 | 22 April 2009 |
| **The period to prepare an adoption allowances scheme (Scotland) Order 2009** | SSI 2009/168 | 30 April 2009 |
| **The Adoptions with a foreign element (Scotland) Regulations 2009** | tba | tba |
| **Applications to the Court of Session to annul Convention Adoptions or Overseas Adoptions (Scotland) Regulations 2009** | SSI 2009/170 | 30 April 2009 |
| **The Adoption (Disclosure of Information and Medical Information) (Scotland) Regulations 2009** | tba | tba |
| **Adoption and Children (Scotland) Act 2007 (Supervision Requirement Reports in Applications for Permanence Orders) Regulations 2009** | SSI 2009/169 | 30 April 2009 |
| **The Adoption and Children (Scotland) Act (Commencement Number 4 Transitional and Savings Provisions)Order 2009** | tba | tba |
| **The Adoption and Children (Scotland) Act 2007 (Modification of Enactments) Order 2009** | tba | tba |
| **The Adoption and Children (Scotland) Act 2007 (Modification of Subordinate Legislation) Order 2009** | tba | tba |

**Consultation**

The Scottish Government has issued seven consultations on the adoption regulations. These are:

- **Adoptions – support services and allowances** June 09 2008
- **Adoptions – adoption agencies** July 07 2008
- **Adoptions with a foreign element – special restrictions** August 12 2008
- **Adoption – supervision requirement report** August 12 2008
- **Adoptions – disclosure of information** August 12 2008
- **Adoptions with a foreign element** October 09 2008
- **Adoptions – disclosure of medical information** November 19 2008

**The Adoption Policy Review Group**

Much of this legislation is based on the work of the Adoption Policy Review Group which reported in two phases. The review started in 2001. Phase 1 concerned practice issues and reported in 2003. Phase II considered the need for legislative change and reported in June 2005. The work was needed because of the changing nature of adoption. In particular, children tend to be older when adopted and come into the system after having been taken away from their birth parents. The group’s proposals aimed to provide long term security for children who cannot live with their birth families and provide additional support to adopters, foster carers and birth families.

**The Adoption and Children (Scotland) Act 2007 (the 2007 Act)**

This Act replaces the Adoption (Scotland) Act 1978 and the regulations are all being laid under the 2007 Act (although the Adoptions with a Foreign Element Regulations also use powers under the Adoption (Intercountry Aspects) Act 1999). Many of the provisions re-stated existing law. New provisions in the 2007 Act include:

- replacing existing freeing orders and parental responsibilities orders with a single court order called a permanence order. The aim of this order is to increase stability for children who cannot live with their original families but be flexible enough to cater for the needs of individual children. A permanence order can be sought with or without a measure granting authority for the child to be adopted, dependent on the needs of a particular child. It is similar to long term fostering.
• providing for joint adoption by unmarried couples (including same-sex couples). Currently, one person in an unmarried couple can adopt, while their partner may apply separately for an order under section 11 of the Children (Scotland) Act 1995 to gain parental responsibilities and parental rights.

• extending the adoption support services framework for people affected by adoption. The detail of this is in SSI 2009/152.

In general, during parliamentary scrutiny of the Bill in 2006 there was support for the intention of modernising and strengthening the legal framework for adoption. Issues which arose with regard to regulations concerned foster care and disclosure of information. There was concern in evidence to the then Education Committee that fostering issues considered by the Adoption Policy Review Group were to be placed in regulations rather than on the face of the Bill. The Scottish Government has consulted on the Looked After Children Regulations which include provision for fostering. (These will be considered in detail in a future SPICe briefing). There was also concern by, for example, the BMA about provision for disclosure of medical information about the natural parents to prospective adopters or someone who has been adopted.

The following gives a very brief overview of the regulations, focusing on how they change the existing law.

**Adoption Agencies Regulations SSI 2009/154**

These replace the current Adoption Agencies (Scotland) Regulations 1996 and largely re-state existing law. New provisions relate to taking views of the child and child’s relatives into account and reviewing suitability for adoption. The new provisions in the regulations:

- Require agencies to have regard to the views of children when considering adoption and of other relatives when an agency is placing a child for adoption
- Enable prospective adopters to seek a review of an agency’s decision that they were unsuitable to adopt
- Enable a review, if after two years, no child is placed with prospective adopters
- Provide for applications for Permanence Orders

**Adoption Support Services and Allowances SSI 2009/152 and 2009/168**

In summary, the provisions:

- Extend entitlement to adoption services to certain categories of people outside the local authority area. If an adopted child moves local authority then the original local authority remains responsible for support services for three years or until the child turns 18.
- State the factors to be considered in assessments and re-assessments for adoption support services and give timescales
- State what is to be included in a notice proposing support
- Makes explicit the range of circumstances that allowances can be made
- Enables allowances to Include an element of remuneration for those were previously kinship carers or foster carers of the child they have adopted
- SSI 2009/168 requires that local authorities prepare an adoption allowance scheme within three months of the coming into force of s.71 which provides for such schemes

**Support Services**

The Adoption Policy Review Group (APRG) phase 2 report (2005) included a chapter on support services. The following table lists the recommendations and how they are reflected in the Act and regulations.
<table>
<thead>
<tr>
<th>APRG Recommendation</th>
<th>Act or Regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>There should be adoption support services that are based on a sound legal framework, and that have the commitment of central government, local authorities and other providers (6.9).</td>
<td>The Act and Regulations between them provide a more detailed legal framework for support services than was the case under the 1978 Act.</td>
</tr>
<tr>
<td>Adoption support services should be: counselling, advice, information and financial support and others prescribed by regulation (6.12)</td>
<td>Services are defined at s.5 of the Act as provision of counselling, guidance or ‘any other assistance in relation to the adoption process’ that a local authority considers appropriate.</td>
</tr>
<tr>
<td>The current restriction on adoptive families receiving cash instead of services from adoption agencies should be removed (6.14).</td>
<td>s.12 of the 2007 Act allows local authorities to provide a payment instead of a service</td>
</tr>
<tr>
<td>The adoption service provided by every local authority should unequivocally include adoption support services. (6.15)</td>
<td>s.10 of the 2007 Act requires local authorities to provide services to certain people and gives them a power to provide services to others.</td>
</tr>
<tr>
<td>Each local authority should have an adoption support officer within the senior management team for social services who will have lead responsibility for service provision (6.16)</td>
<td></td>
</tr>
<tr>
<td>There should be a Code of Practice for the provision of adoption support services (6.17)</td>
<td></td>
</tr>
<tr>
<td>Legislation should provide for voluntary, specialist adoption support agencies to be established (6.18)</td>
<td></td>
</tr>
<tr>
<td>In general, local authority placing a child for adoption should retain responsibility for providing adoption support services to the child and the adoptive family for three years after the adoption order, after which point, if the adopted person is under 18 years of age, the responsibility would become the responsibility of the local authority where the adopted person and the family lives. (6.19)</td>
<td>Regulation 4 of 2009/152 provides for this, but allows for services to end sooner if the person to whom they are being provided agrees.</td>
</tr>
<tr>
<td>Services should be available to all parties involved in adoption (6.21).</td>
<td>s.1 of the 2007 Act lists those entitled to services</td>
</tr>
<tr>
<td>Each party to an adoption should be entitled to an assessment of their need for adoption services. The local authority should then plan how any assessed needs are to be met.(6.22)</td>
<td>s.9 of the 2007 Act states who is entitled to assessments.</td>
</tr>
<tr>
<td>Where services are being provided for a child and the adopters following assessment and a plan, there should be a contract between the local authority adoption agency, the adopters and any adopted child aged 12 or over, detailing the services that the agency will provide. (6.23)</td>
<td>Regulation 8 of 2009/152 requires the local authority to set out what services are proposed and allows representations</td>
</tr>
</tbody>
</table>

A concern in consultation was how support services would be funded (BAAF personal communication 23 April 2009). The issue is also raised by Elaine Sutherland in her book ‘Child and Family Law’ (Green’s 2008)

“given the question of resources, it may be optimistic to think that the system envisaged by the Review Group will become reality.” (para 5-082).

The Executive note to the regulations states that increases in applications for support services will be funded from within local authorities’ existing resources.

**Allowances**

The Adoption Policy Review Group recommended that adoption allowances should be paid under a national scheme provided for in regulations (6.13). This was not supported by the Scottish
Executive. The 2007 Act s.71 requires local authority adoption agencies and enables registered adoption agencies to prepare allowances schemes. SSI 2009/168 requires this to be done within three months of s.71 of the 2007 Act coming into force.

Current regulations allow an allowance to be paid if the adoption is not practicable otherwise. The new regulations allow an allowance to be paid in particular circumstances, such as to enable the placing of siblings together. In addition, the new regulations provide for an element of remuneration to be included for adopters, but only where they were formerly foster or kinship carers of that child. This remuneration can be paid for up to two years, or longer in exceptional circumstances.

While there is no prescribed rate (as this will be set by local authorities), the regulations do require the person’s financial situation to be taken into account. Allowances are payable until the child leaves home, turns 18, leaves full time education/training or becomes eligible for income support or job seekers allowance.

In the consultation on the regulations the Government stated that: “it is not the intention of the Scottish Government to legislate for a national minimum adoption allowance. Guidance will be issued.” One issue raised in consultation was whether there ought to be a prescribed national rate (BAAF, personal communication, 23 April 2009).

**Supervision Requirement and Permanence Orders SSI 2009/169**

The 2007 Act introduced the ‘Permanence Order’, following the recommendation of the Adoption Policy Review Group. It is designed to provide for children in long term fostering and for children waiting for adoption. It can make a number of provisions, including where the child is to live and can give authority for adoption. Under this order a child is considered as ‘looked after’ in terms of the Children (Scotland) Act 1995.

One issue is how a Permanence Order interacts with other orders which can control residence – such as a supervision order from a Children’s Hearing. Where a Permanence Order is being made by a court and a Children’s Hearing is considering making or changing a supervision requirement then the Children’s Hearing must make a report to the court which is considering the Permanence Order.

This SSI sets out the requirements for that report.

**Disclosure of Information Draft Regulations**

The following is based on draft regulations issued for consultation in 2008. There were three sets of regulations consulted on. However, the first, concerning the information to be kept about adoptions has been incorporated into SSI 2009/154 Part VIII. The second part of the consultation covered disclosure of information about adoptions and the third covered disclosure of medical information. (In addition to what is proposed in these regulations a person has a right to see their birth certificate when they turn 16).

**Disclosure of Information**

The Adoption Policy Review Group’s Phase II report included a chapter on access to information. Its recommendations in this area were:

- Only adopted people aged 16 or over should have an automatic right to information about their adoption (12.9)
- Adopted people under 16 should have clear though limited rights to have access to appropriate information from their adoption agency records (12.10)
- There should be further guidance to agencies to ensure that all relevant information about children is passed on to prospective adopters, in written form as well as orally (12.30)
Section 38 of the 2007 Act provides for regulations to be made about the information which can be disclosed to an adopted person or any other persons specified. Draft regulations on disclosure of information proposed that when an adopted person applies for support services the adoption agency may disclose any information held by them, unless it could identify the birth parents or relatives. If the information is sought by someone under 16 (or 18 if in England and Wales), then it can only be disclosed if the adoption agency thinks it is appropriate to do so.

When an adopted person seeks information, that information may also be disclosed to relevant public bodies, such as the local authority which is providing adoption support services.

In addition, case records may be accessed for research and must be made available for certain kinds of inquiries such as an inquiry under the Social Work (Scotland) Act 1968 or an inquiry by the Scottish Public Services Ombudsman.

Access to Medical Information About Natural Parents

Section 74 of the Act gives Scottish Ministers powers to make regulations regarding the disclosure of information about the medical history of an adopted child’s birth family. Under other proposed regulations (SSI 2009/154) the prospective adopter must already be provided with information about the child’s health.

These draft regulations propose that, prior to an adoption going ahead and where other attempts to get the information have failed, the adoption agency should have a right to medical information about any genetically transmissible diseases and this information should be put in the case record.

The Adoption Policy Review Group had recommended that:

- There should be primary legislation to allow the release of medical information, with or without consent, where this is necessary to plan properly for child who cannot live with their birth families (12.17)
- The Group recommends that professionals should consider carefully the needs to disclose medical information about wider birth families to adopted people and adopters taking into account all the circumstances (12.21)

In its stage 1 report the then Education Committee recommended that, in view of the sensitive issues involved, regulations should be subject to affirmative procedure.

The Committee believes that there is a justification for adopted children to be able to gain access to information relating to their birth parents’ medical history where they may be relevant to health care decisions that require to be made. However, it supports the British Medical Association’s argument that regulations controlling the disclosure of medical information should be subject to the Parliament’s affirmative procedure.

While the adoption Bill was going through Parliament, the British Medical Association had argued that: “Any information that can be accessed and passed to children or their adoptive parents should be restricted to that which can be shown to be relevant and for which there are consent or public interest justifications. Any difficulties that are perceived to exist at present, where access is denied, could be resolved, in part, by the development and dissemination of guidance for medical and other clinical professionals”

Adoptions with a Foreign Element

Adoptions with a foreign element are provided for in Chapter 6 of the 2007 Act. Such adoptions have different procedures dependent on whether the country involved has ratified the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption ("the Hague convention") This Convention aims to protect the best interests of the child and to prevent
the abduction, sale or traffic of children. To date, 52 states have ratified or acceded to the Convention.

Convention adoptions are regulated by the Adoption (Intercountry Aspects) Act 1999 and associated 2003 regulations. Following a Sewell motion, there were also changes made by the Adoption and Children Act 2002 (the 2002 Act). However, as the intercountry adoption provisions in the then Westminster Children and Adoption Bill (now the Children and Adoption Act 2006 (the 2006 Act)), although limited to England and Wales, were relevant to Scotland, the previous administration agreed that the intercountry adoption provisions contained in the 2002 Act should not be commenced but should, instead, be replicated in the Bill which became the 2007 Act.

The 2007 Act and the proposed regulations mainly consolidate the existing law but incorporated the provisions in the 2002 Act which were never commenced. These relate to parents and relatives being exempted from certain restrictions and the recognition of adoptions made overseas.

**Exemptions for Parents and Relatives Draft Regulations**

The 2007 Act removes two kinds of exemptions from parents, guardians and relatives. These are:

- Restrictions on bringing children into the UK
- Restrictions on removing children from the UK with a view to adoption in another country

The Scottish Government consultation asked whether the exemptions should be re-instated. All of the consultation responses agreed that the current exemption of parents, guardians and relatives from the restrictions should cease. The Scottish Government therefore do not propose to make regulations to re-instate the exemptions.

**Special Restrictions for Certain Countries SSI 2008/303**

The 2007 Act replicates provisions contained in the 2006 Act which enable Scottish Ministers to declare that special restrictions are to apply to any relevant overseas country. Orders restricting adoptions from Cambodia and Guatemala were made on 10 September 2008 and came into force on 7 October 2008 (SSIs 2008/304 and 2008/305). SSI 2008/303 sets out (a) the procedure to be followed by the Scottish Ministers when a request from a prospective adopter to be treated as an exception from the restrictions is being considered and (b) the ‘matters’ to be taken into account in determining whether a case merits an exception. This was considered by the Committee on 01 October 2008 and also came into force on 07 October.

**Court Order to Annul a Convention Adoption SSI 2009/170**

The other set of regulations on foreign adoptions is the Application to the Court of Session to Annul Convention Adoptions or Overseas Adoptions SSI 2009/170. This provides that an application to annul must be made by petition within two years of the adoption. This relates to the power of the Court of Session to determine that an adoption made in another country does not have effect in Great Britain. This restates existing law.

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14 May 2009