EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

AGENDA

26th Meeting, 2009 (Session 3)

Wednesday 30 September 2009

The Committee will meet at 10.00 am in Committee Room 5.

1. **Schools (Consultation) (Scotland) Bill**: The Committee will consider the Bill at Stage 2.

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

   - the Children’s Hearings (Scotland) Amendment Rules 2009 (SSI 2009/307)
   - the Education (Fees, Awards and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2009 (SSI 2009/309).

3. **Public Services Reform (Scotland) Bill (in private)**: The Committee will consider a draft Stage 1 report.

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The papers for this meeting are as follows—

**Agenda item 1**

Documents relevant to the Schools (Consultation) (Scotland) Bill (to be published 28 September)

**Agenda item 2**

Paper by the Clerk

**Agenda item 3**

Draft report
Introduction

1. This paper seeks to inform members’ consideration of the following statutory instruments:

- the Children’s Hearings (Scotland) Amendment Rules 2009 (SSI 2009/307); and
- the Education (Fees, Awards and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2009 (SSI 2009/309).

2. Copies of the SSIs, explanatory notes and Executive Notes are provided to members in hard copy only.¹

3. The instruments are both subject to the negative procedure. A procedural note on this is attached at Annexe A.

The Children’s Hearings (Scotland) Amendment Rules 2009 (SSI 2009/307)

Background

4. These amendment regulations were laid on 4 September 2009 and the lead committee must report by 12 October 2009. The Education, Lifelong Learning and Culture Committee has been designated the lead committee.

5. This instrument is made in exercise of powers conferred in the Children (Scotland) Act 1995.

Policy objectives

6. Paragraph 1 of the Executive Note states that the purpose of the rules is to make a purely consequential amendment to the Children’s Hearings (Scotland) Rules 1996 (the 1996 rules).


8. The 1996 regulations were repealed by the Looked After Children (Scotland) Regulations 2009 and, consequently, rule 20 of the 1996 rules refers to repealed regulations. This instrument amends the 1996 rules to

¹ Electronic copies of statutory instruments can be found on the Office of Public Sector Information website:
correct this so that the 1996 rules will refer to the Looked After Children (Scotland) Regulations 2009.

Issues the Committee may wish to consider
9. The Executive Note states that the instrument will have no financial effect.

10. The Subordinate Legislation Committee (SLC) dealt with the instrument at its meeting on 22 September 2009, when members considered correspondence with the Scottish Government relating to a drafting point. The relevant section of the SLC report is attached in Annexe B. The SLC concludes that the instrument could have been more clearly drafted but states in Paragraph 9 of Annexe B that “the Committee notes that the revised provision is principally of concern to local authorities and considers that it is likely that they will understand the intended effect of the amendment, so that the lack of clarity is unlikely to be such as to affect the operation of the instrument”.

11. No motion to annul this instrument has been lodged.

The Education (Fees, Awards and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2009 (SSI 2009/309)

Background
12. These regulations were laid on 8 September 2009 and the lead committee must report by 26 October 2009. The Education, Lifelong Learning and Culture Committee has been designated the lead committee.

13. This instrument is made in exercise of powers conferred in the Education (Scotland) Act 1980 and the Education (Fees and Awards) Act 1983.

Policy objectives
14. The Executive Note to the instrument states that it has two principal policy objectives. Further information is provided in the Executive Note.

15. First, the instrument extends the Locally Engaged Staff Assistance Scheme (LESAS) to allow relevant staff who were employed after 8 August 2007, and who successfully apply for re-settlement in the UK, to be granted entitlement to support for education without the requirement of having resided in the UK for three years.

16. Second, the instrument clarifies the residence requirements for students from the Channel Islands and Isle of Man for the purpose of charging tuition fees.

Issues the Committee may wish to consider
17. The Executive Note states that the instrument will have a negligible financial effect.

18. The Subordinate Legislation Committee (SLC) dealt with the instrument at its meeting on 22 September 2009, when members considered correspondence with the Scottish Government relating to a drafting point. The
relevant section of the SLC report is attached in *Annexe C*. The SLC sought to clarify the legal basis of the LESAS on the basis that it would have been helpful for this to have been set out in the instrument for information. In conclusion, the SLC stated that it was content with the information provided by the Scottish Government in this respect.

19. No motion to annul this instrument has been lodged.

**Action**

20. The Committee is invited to consider whether it has anything to report to the Parliament on either of these instruments.

Emma Berry  
Assistant Clerk  
Education, Lifelong Learning and Culture Committee
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.
The purpose of this instrument is to make a consequential amendment to the Children’s Hearings (Scotland) Rules 1996. The provision in the 1996 Rules which is being amended regulates the conduct of a children’s hearing when it considers a case on referral or the review of a supervision requirement.

Correspondence with the Scottish Government is reproduced at Appendix 2.

The content of rule 20(6)(b) of the 1996 Rules, as amended by rule 2 of this instrument, provides that a local authority are to have confirmed to the children’s hearing that in compiling their report under rule 20 they have complied with the requirements of regulation 7 of the Looked After Children (Scotland) Regulations 2009.

By way of background, before the hearing disposes of a case by making a supervision requirement requiring the child to reside at a specified place, it must have received and considered a background report from the local authority, also containing recommendations on other specified matters. The local authority must also have provided confirmation that they have complied with the requirements of regulation 7.

Regulation 7 applies where a local authority submits a report on a child to a hearing, under other provisions of the 1995 Act. The regulation states that where the local authority is of the view that it would be in the best interests of the child, it may recommend that the child be cared for or placed in terms of a range of options set out in regulation 7(2), (paragraphs (a) to (e)). Regulation 7 sets out a range of possible recommendations rather than requiring anything to be done. Given that regulation 7 is of an ‘enabling’ nature, and sets out a range of possible recommendations, rather than actually requiring anything to be done, it was not clear therefore how compliance with the requirements of regulation 7 was to be understood or demonstrated.

The response submits that regulation 7 does set out certain requirements on a local authority when it prepares a report. The response states that it describes the effect of the amended provision as regulating the recommendations as to the placement of a child, and that the local authority can only recommend placement with those persons specified in paragraph (2)(a) to (d) or placement in a residential establishment (per(e)).

In response to how compliance with rule 20(6)(b) is to be demonstrated, the reply states that this will be done within the report itself. Any recommendation with regard to placement, for example, with a foster carer, contained in a report would require to comply with three requirements; namely
that the local authority would need to be of the view that placement is in the best interests of the child; the foster carer would need to be formally approved in accordance with the Regulations; and the foster carer would need to have entered into a written agreement in accordance with the Regulations.

8. The Committee remains of the view that the terms of regulation 7 do not impose ‘requirements’ upon local authorities. They indicate the range of recommendations which local authorities may make with regard to the care or placement of a child. The Committee considers that the representation of them as ‘requirements’ in terms of the amendment stated is not therefore wholly apt, but acknowledges that the provision might be seen to some extent to ‘regulate’ the recommendations as to placement/care which can be made. That ‘regulation’ of recommendations might be viewed, to some extent at least, as being akin to setting out ‘requirements’.

9. This is a consequential amendment concerned with ensuring that the range of places at which a supervision requirement can require a child to reside is maintained. The Committee considers that the substituted text which provides for the local authority having ‘complied with the requirements’ of regulation 7 of the Looked After Children (Scotland) Regulations 2009 could have been more clearly drafted. However, the Committee notes that the revised provision is principally of concern to local authorities and considers that it is likely that they will understand the intended effect of the amendment, so that the lack of clarity is unlikely to be such as to affect the operation of the instrument.

10. The Committee reports this instrument to the lead Committee and to the Parliament on the ground that the meaning of the amendment which rule 2 of the instrument makes, in respect of rule 20(6)(b) of the Children’s Hearings (Scotland) Rules 1996, could have been more clearly stated with respect to the text which it substitutes, referring to the local authority having ‘complied with the requirements of regulation 7 of the Looked After Children (Scotland) Regulations 2009.
Appendix 2 - Correspondence between the Subordinate Legislation Committee and Scottish Government

On 11th September 2009 the Scottish Government was asked:

(1) to explain what is meant by the reference within the text which is substituted in rule 20(6)(b) of the Children's Hearings (Scotland) Rules 1996 which refers to the local authority "having complied with the requirements of regulation 7 of the Looked After Children (Scotland) Regulations 2009" on the basis that regulation 7 itself does not impose requirements; and

(2) to indicate how compliance with rule 20(6)(b), as amended, is to be demonstrated.

The Scottish Government responds as follows:

(1) It is submitted that regulation 7 of the Looked After Children (Scotland) Regulations ("the Regulations") does indeed set out certain requirements on a local authority when it prepares a report for a children's hearing. The effect of this provision is to regulate the recommendations as to the placement of a child which may be made where the duty to submit a report on a child to a children's hearing under section 56(7) of the Children (Scotland) Act 1995 ("the 1995 Act") is triggered. The Principal Reporter must arrange a children's hearing where it appears that compulsory measures of supervision are necessary in respect of the child. When the hearing is arranged the Reporter must request a report on the child and on such circumstances as appear to the Reporter to be relevant. The Reporter may also request from the local authority such information, supplementary or additional to the report. In terms of section 56(7) of the 1995 Act the local authority is under a duty to supply that report.

The effect of regulation 7 of the Regulations is that the local authority may only recommend placement with those persons specified in paragraph (2)(a) to (d) or placement in a residential establishment. The first requirement of regulation 7 is that the recommendation may only be made if it is in the child's best interests (paragraph (2)). The local authority may recommend that the child be cared for by their parents or any person with parental responsibilities and parental rights but under an arrangement made in accordance with regulation 8 of the Regulations (paragraph (2)(a)). The report may recommend placement with a kinship carer but that must be a kinship carer who has entered into an agreement under regulation 12 of the Regulations (paragraph (2)(b)). "Kinship carer" is defined in the Regulations as a person who has been approved as such in accordance with a decision made under regulation 10 of those Regulations. A parallel requirement is made in respect of a recommendation for placement with a foster carer. The carer must have entered into an agreement under regulation 24 of the Regulations (paragraph (2)(c)) and they must be formally approved as a foster carer (by virtue of the definition of "foster carer" in regulation 2). The report may also contain a recommendation that the child be placed with any other person who is not a relevant person (in terms of section 93 of the 1995 Act that is a person who...
does not have parental rights and responsibilities in respect of the child or who does not ordinarily have charge of or control over the child) but only where the requirements of regulation 36 of the Regulations have been met.

(2) Rule 20(6) requires that the local authority must have confirmed that it has complied with the requirements of regulation 7 in compiling their report. Compliance with the requirements of that provision will be demonstrated in the report itself. For example, a recommendation in that report that the child be placed with a foster carer must comply with 3 requirements - the local authority must be of the view that placement is in the best interests of the child; the foster carer must be formally approved in accordance with the Regulations; and the foster carer must have entered into a written agreement under regulation 24.
11. These Regulations amend various sets of 2006 and 2007 Regulations dealing with several types of student support. Most of the amendments have the effect of providing that an Iraqi national who has been granted indefinite leave to enter the UK under the “Locally Engaged Staff Assistance Scheme (Direct Entry)” operated by the Home Department, and such a person’s spouse, civil partner and children who meet the relevant residence requirements, shall be eligible for various types of student support.

12. The Regulations also amend the Education (Fees and Awards) (Scotland) Regulations 2007, to make it clear that students who move from the Channel Islands and the Isle of Man to the UK to undertake a course will be regarded for the purposes of those Regulations as being ordinary resident in the Islands.

13. Correspondence with the Scottish Government is reproduced at Appendix 3.

14. Neither the instrument, the Explanatory Note nor the Executive Note refer to how the Locally Engaged Staff Assistance Scheme is constituted. Accordingly the Committee queried whether the Scheme is established under legislative provisions or by any particular documents. If that were to be the case, it would be normal practice to refer to those provisions or documents in the instrument, so that persons could establish the provisions of the Scheme from time to time. If the Scheme was established by legislation, there might have been a need also to refer to the provisions, to cater for the effect of any further legislative changes to the Scheme.

15. The response confirms that there are no such relevant legislative provisions or documents. The Scheme is an ex gratia one operated by the Home Department, using its common law powers to do so.

16. While satisfied with this response the Committee considered that it would have been useful to readers of the instrument to have further explained in the Explanatory Note or the Executive Note that the scheme is operated under the common law powers of the Home Department, and the contact point to obtain further information on the Scheme. Alternatively, this could have been footnoted.

17. The Committee reports to the lead committee and to the Parliament that an explanation has been sought and provided by the Scottish Government in relation to the references to “the Locally Engaged Staff Assistance Scheme (Direct Entry) operated by the Home Department”, in regulations 2, 4, 7, 12, 13, 15, 17 and 18, with which the Committee is satisfied.
Appendix 3 - Correspondence between the Subordinate Legislation Committee and Scottish Government

On 11 September the Scottish Government was asked:

The Scottish Government are asked on this instrument, in relation to the various references to “the Locally Engaged Staff Assistance Scheme (Direct Entry) operated by the Home Department”, in regulations 2, 4, 7, 12, 13, 15, 17 and 18, for an explanation-

(1) whether this Scheme is made under any legislative provision/s or is established by any particular documents?

(2) how are persons to establish what the “LESAS” Scheme consists of, and that they may be entitled under it? Would the effect of the provisions be made clearer if the relevant provisions or documents were referred to in the instrument, in relation to any possibility that the Scheme provisions could be amended after the coming into force of the Regulations?

The Scottish Government responds as follows:

(1) The Locally Engaged Staff Assistance Scheme (Direct Entry) is a scheme operated by the Home Department on an *ex gratia* basis utilising its common law powers. The scheme is not constituted by a legislative instrument or by a formal document.

(2) In line with our response to the first question, the Scottish Government are unable to refer to any legislative instrument or formal document. The question of whether a person has been granted indefinite leave to enter the United Kingdom under the Locally Engaged Staff Assistance Scheme (Direct Entry) operated by the Home Department is a question of fact. The persons admitted under the scheme are issued with a letter by the UK Border Agency advising them of their entitlement to support for education and so are aware of their eligibility for such support.

The Scottish Government would like to add that it has sought to make these amendments to the principal Regulations in a consistent manner as is used for the eligibility criteria pertaining to persons who have applied for refugee status and have been granted leave to enter or remain in the United Kingdom pending the outcome of their application for refugee status (see paragraph 6(a)(i) of Schedule 1 to each set of the principal Regulations).