EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

AGENDA

31st Meeting, 2009 (Session 3)

Wednesday 25 November 2009

The Committee will meet at 10.00 am in Committee Room 6.

1. Autism in education: The Committee will take evidence, in a round-table discussion, from—

   Bryan Kirkaldy, and Gordon Ford, Association of Directors of Education in Scotland;

   Irene Matier, President, Association of Head Teachers and Deputes in Scotland;

   Carolyn Brown, Association of Scottish Principal Educational Psychologists;

   Professor Pamela Munn, University of Edinburgh;

   Shona Pinkerton, National Autistic Society Scotland;

   Brian Cooklin, School Leaders Scotland;

   Jim Taylor, Scottish Society for Autism;

   Margaret Penketh, President, Scottish Support for Learning Association.

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

   the Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) (No. 2) Amendment Regulations 2009 (SSI 2009/349)

   the Regulation of Care (Social Service Workers) (Scotland) Amendment Order 2009 (SSI 2009/350)

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The papers for this meeting are as follows—

**Agenda item 1**

Paper by the clerk

**Agenda item 2**

Paper by the Clerk
Education, Lifelong Learning and Culture Committee

31st Meeting, 2009 (Session 3), Wednesday, 25 November 2009

Autism in education

Introduction

1. This paper introduces members to the Committee’s first evidence session on the issue of autism in education.¹

Background

2. At its meeting on 16 September 2009, the Committee considered correspondence from the Minister for Children and Early Years in relation to petition PE1213.

3. After discussion, members agreed to hold a number of evidence sessions on general issues relating to autism in education. The format for the evidence sessions was agreed on 4 November 2009. Those giving evidence are—

25 November Association of Directors of Education in Scotland; Association of Head teachers and Deputes in Scotland; Association of Scottish Principal Educational Psychologists; Professor Pamela Munn, University of Edinburgh; National Autistic Society Scotland; School Leaders Scotland; Scottish Society for Autism; and Scottish Support for Learning Association.

2 December Adam Ingram MSP, Minister for Children and Early Years.

4. Further information relating to the Committee’s consideration of petition PE1213 can be found on the Committee’s web pages.²

Autism in education

5. A number of specific issues relating to autism in education have been identified for discussion at this evidence session. These are—

- Process by which children/young people with ASD have their condition assessed and diagnosed;
- Support for families with children/young people with ASD in finding the best form of education and support through the education system;

¹ Autism in education evidence sessions, Education, Lifelong Learning and Culture Committee web pages—
http://www.scottish.parliament.uk/s3/committees/ellc/inquiries/AutismInEducation/AutismInEducation.htm

² Petitions, Education, Lifelong Learning and Culture Committee web pages—
http://www.scottish.parliament.uk/s3/committees/ellc/PetitionsHomepage.htm
• Support for children/young people with ASD at school;
• Teaching methods which best support children/young people with ASD;
• Support available for teachers/head teachers of pupils with ASD;
• Impact that pupils with ASD have on classroom dynamics;
• Approaches to dealing with behaviour of children/young people with ASD in the classroom;
• Mechanism for resolving disputes and appealing school exclusion.

6. The Committee invited written comments to assist its consideration of this issue and submissions received are attached at Annexe A. It is expected that the Committee will receive further submissions in advance of the Minister’s evidence.

Action

7. The Committee is invited to consider the submissions included in Annexe A and take evidence from the witness panel.

Emma Berry
Assistant Clerk
Education, Lifelong Learning and Culture Committee
WRITTEN SUBMISSION FROM INVERCLYDE COUNCIL

Please find below some information based on the points suggested in your letter of 13 November 2009:

1. **Process relating to assessment and diagnosis**
   Please see attached document taken from our Psychological Service’s Guidelines on Autism.

2. **Support for families**
   We use the Annual Review system for this purpose. This is a multi-agency meeting which focuses on the child’s needs, identifies strategies and support. Progress is monitored. Discussion regarding appropriate provision takes place at this meeting.

3. **Support at school**
   - Teacher CPD including university modules
   - Early Bird and Early Bird Plus programme
   - TRIAD team – support particularly in early years
   - Specialist teachers: bases and on outreach basis
   - Adult supports
   - IEPs for attainment and/or behaviour
   - Review meetings
   - Primary and Secondary Communication and Language Bases.

4. **Teaching methods**
   These vary depending on the individual child. They can include PECS and TEACHH in some cases.

5. **Support for teachers and headteachers**
   - Advice from specialist teachers
   - Outreach provision from 2 bases
   - Early Bird and Early Bird Plus
   - Working group auditing practice based on the Autism Toolkit
   - Working group supporting school implementation of the Toolkit.

6. **Classroom dynamics**
   This varies across individual cases. Disruption to peers can be significant. We have used phased-in timetables, relatives as taxi escorts, inclusion zones and small groups to good effect.

7. **Approaches to dealing with behaviour**
   - Staff training
   - Sharing of information
   - Adult support e.g. auxiliary
   - Setting of firm boundaries
   - Structured day
   - Ensuring next step/part of lesson is clear
   - Targets in IEPs.
8. Resolving disputes and exclusion
   - Most disputes resolved at school level
   - Information on mediation, dispute resolution issued in the authority
   - Support from decreasing number of local authority officers
   - Readmission meetings.
INTRODUCTION

The key to providing effective services to meet the varying needs of autistic children and young people depends on joined up working within councils, between professionals, and in partnership with parents and families.

The council’s strategic goals in relation to how it has interpreted statute, particularly in terms of inclusion and recognition of diversity, are critical to the systems and structures developed to deliver effective services.

At a national level, since the publication of the PHIS Report 2001, many of its recommendations have been addressed and considerable progress made across Scotland. The developments over the last decade need to be evaluated with a view to establishing a National Autism Action Plan for the next five to ten years. A National Autism Action Plan should include the following elements:

1. Effective multi agency assessment and diagnosis processes

There are examples in some parts of Scotland where education and health professionals have been involved in working together to develop ASD joint care pathways. Community based multi-agency assessment, diagnosis and intervention models have the advantage of sharing information between professionals and parents and can demonstrate reduced waiting times for diagnosis. These models also tend to promote better working relationships and skills development between professionals.

2. Planning and support for children and young people with ASD in school

There is evidence that it is helpful for councils to establish an autism strategy working group with a membership which draws from a range of parents and professionals. A helpful focus for the working group is the production of a strategic development plan for the council. Exemplar tasks/themes for the plan include:

- identification year on year of pupils with ASD across the whole school population
- extension of quality assurance frameworks to support schools build capacity across the council
- development and quality assurance of a specialist outreach support service
- development and/or revision of education ASD guidelines
- ASD specific CPD frameworks provided across the authority
- development of joint pathways alongside health colleagues for diagnosis, assessment and intervention
- ongoing parental involvement and participation in planning
- ensuring a continuum of appropriate provision to meet the diversity of needs of the pupils with autism.
- examination of methods of pupil consultation
3. Teaching strategies, planning and involving individual children
There are numerous examples where schools demonstrate that they are making the learning experiences of pupils with autism dynamic and positive. ASD specific outreach services and psychological services work with school staff to increase their knowledge base and develop support programmes for pupils.

The *Autism Toolbox*, commissioned by the Scottish Government and developed by the National Centre for Autism Studies, is an exemplary resource. It provides information to schools about current research and effective teaching strategies. It is important that there is a further follow-up with councils about how this resource can be used to best effect. There is a good case for a reprint of this resource to be made available to more education staff and other agencies.

4. Training/staff development
It is self-evident that teacher skills are critical to building schools’ capacity to address ASD issues. CPD framework within councils can support training for staff across education resources so that the full range of pupils with ASD across the authority can be supported.

5. Support for Parents
Parents are a rich source of information and support not only for their own children but also in planning for all children and young people. Parents should be actively and positively involved in council strategy groups and other council autism working groups and steering groups. Parents should be invited to participate in developing/revising council autism guidelines. Parents should be invited to be involved in training alongside other professionals, and supported to link to educational professionals via local parent groups and national groups.

6. Approaches to behaviour of children and young people with autism
The development of effective skills for school staff is essential to supporting autistic pupils. This issue relates directly to the culture of staff support created at the level of the classroom, the school and the council management structure. The schools and staff who manage autistic pupils’ challenging behaviour successfully have the following processes in place and subject to review and evaluation:

- staff welfare processes
- a recognised de-escalation system to manage challenging behaviour
- positive management approaches practiced by staff on a regular basis
- classroom and school audits which assess the school environment for ‘autism friendliness’
- clear council guidance regarding behaviour management procedures
- clear behaviour and discipline procedures at council and school level
- a continuum of school provision to match the range of needs of children and young people with autism.
WRITTEN SUBMISSION FROM SOUTH AYRSHIRE COUNCIL

1. **Process by which children/ young people with Autism Spectrum Disorder (ASD) have their condition assessed and diagnosed**

ASD assessment and diagnosis, using the Autism Diagnostic Observation Schedule, is currently made by a Clinical Psychologist or Consultant Psychiatrist from NHS Ayrshire and Arran’s Child and Adolescent Mental Health Service. We are currently working with colleagues from North Ayrshire Council, East Ayrshire Council and NHS Ayrshire and Arran to develop a pan-Ayrshire Locality Autism Assessment Team (based on the West Dunbartonshire model). Referral, assessment and diagnosis will be made by the appropriate multi-agency locality autism assessment team locality. Piloting of this model begins on a pan-Ayrshire basis in December 2009.

2. **Support for families with children/ young people with ASD in finding the best form of education and support through the education system**

Identification of the child’s additional support needs is managed through South Ayrshire Council’s Additional Support Needs (ASN) early years forum and staged intervention system. The multi-agency group working with the child and family assess the child’s additional support needs and identify the most appropriate way of meeting these. Support for the child and family during this process is led by the Educational Psychology Service.

3. **Support for children/ young people with ASD at school**

An individualised educational programme is in place for all children and young people with ASD. This programme outlines the strategies that will be used to meet the child or young person’s identified additional support needs, roles and responsibilities of education staff and partner agencies and includes specific measurable targets. The individualised educational programme is reviewed with the child, family and partner agencies on a regular basis. A number of children and young people with ASD have a Coordinated Support Plan in accordance with local and national guidelines...

4. **Teaching methods which best support children/ young people with ASD**

A wide variety of teaching approaches are used to give the child an appropriate breadth of experience taking into account the individual’s learning style. When identifying appropriate teaching methods consideration is given to the:

- Individuals learning style and profile of abilities;
- Physical environment;
- Curriculum, particularly in relation to communication, social understanding and social skills;
- Learning environment and visual structure;
- Structure of the day;
- Development of learning skills and work strategies;
- Skills of staff and teaching approaches;
- Involvement of parents/carers;
• Liaison with partner agencies; and,
• Effective management of change.

5. **Support available for teachers/ head teachers of pupils with ASD**
Support is provided for all staff by educational psychologists, senior educational psychologist with ASD specialist remit, speech and language therapists, clinical psychologists, early years home visiting teachers, ASN special schools staff, ASD supported learning centre staff, ASD specialist outreach team, national autistic society. Other support is provided through the South Ayrshire Psychological Service ASD information pack, awareness raising and specific training provision.

6. **Impact that pupils with ASD have on classroom dynamics**
Levels of support provision and the types of approaches used take account of the additional demands for staff time in meeting individual pupil’s needs and managing classroom dynamics.

7. **Approaches to dealing with behaviour of children/ young people with ASD in the classroom**
Pupils with ASD have problems understanding the motives and intentions of others and find coping with other people quite stressful. This can result in unusual or inappropriate behaviours which prevent challenges for staff in schools. Individualised educational programmes identify strategies for managing behaviour that are appropriate for the pupil’s individual needs.

8. **Mechanism for resolving disputes and appealing school exclusions**
A tiered approach to resolving disputes related to Additional Support Needs is in place. This ranges from internal school action to the provision of independent mediation services. South Ayrshire schools are supported to develop alternative ways of managing challenging behaviour of pupils with ASD that do not resort to exclusion.
Introduction

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

   - the Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) (No. 2) Amendment Regulations 2009 (SSI 2009/349)
   - the Regulation of Care (Social Service Workers) (Scotland) Amendment Order 2009 (SSI 2009/350)

2. Copies of the SSI, explanatory notes and Executive Note are provided to members in hard copy only.

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

Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) (No. 2) Amendment Regulations 2009 (SSI 2009/349)

Background

4. These Amendment Regulations were laid on 9 October 2009 and the lead committee must report by 30 November 2009. The Education, Lifelong Learning and Culture Committee was designated the lead committee.

5. This instrument is made in exercise of powers conferred in the Regulation of Care (Scotland) Act 2001.

Policy objectives

6. The Regulation of Care (Scotland) Act 2001 established the Scottish Social Services Council (SSSC). The Executive Note which accompanies the instrument states that one of the Council’s main objectives is to set up and maintain registers of social workers and other social service workers.

7. A phased approach to registration was adopted, with social workers and other groups of social service workers registering at seven staggered intervals. The descriptions of the types of social service workers which fall

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within these groups is set out in the Regulation of Care (Social Service Workers) (Scotland) Order 2005 (SSI 2005/318).

8. The Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) Regulations 2009 (SSI 2009/91) came into force on 31 March 2009. The Regulations set out the provisions, for specific groups of social care workers, relating to the timescales for existing and new social workers’ registration.

9. The SSSC is due to commence registration of a new group of social care workers, those employed in school care accommodation services. The Executive Note does not state when registration will commence. The instrument extends the Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) Regulations 2009 (SSI 2009/91) to cover these workers. This will ensure that the timescales for registration will apply to existing and new social care workers who are employed in school care accommodation services.

Issues the Committee may wish to consider

10. Members will note that the instrument came into force on 16 November 2009.

11. The Executive Note states that no significant increases in administrative costs to the SSSC are anticipated.

12. The Subordinate Legislation Committee (SLC) considered the instrument at its meeting on 10 November 2009. The Committee highlighted two issues to draw to the attention of the Parliament. The first was that the term ‘worker in a residential school care accommodation service’ did not share the same definition with the Regulation of Care (Social Service Workers) (Scotland) Amendment Order 2009 (SSI 2009/350) (this instrument is related to SSI 2009/349 and is considered below). The second issue related to a drafting point. The relevant section of the SLC’s report, including correspondence on these two issues with the Scottish Government, is attached at Annexe B.

Regulation of Care (Social Service Workers) (Scotland) Amendment Order 2009 (SSI 2009/350)

Background

13. The Amendment Order was laid on 9 October 2009 and the lead committee must report by 30 November 2009. The Education, Lifelong Learning and Culture Committee was designated the lead committee.

14. This instrument is made in exercise of powers conferred in the Regulation of Care (Scotland) Act 2001.

Policy objectives

15. Members are referred to paragraphs 6 and 7.

16. This instrument amends the Regulation of Care (Social Service Workers) (Scotland) Order 2005 (SSI 2005/318) to include social care workers who are
employed in school care accommodation services. This has enabled the SSSC to maintain a register of this group of workers from 16 November 2009.

**Issues the Committee may wish to consider**

17. Members will note that the instrument came into force on 16 November 2009.

18. The Executive Note states that no significant increases in administrative costs to the SSSC are anticipated.

19. The Subordinate Legislation Committee considered the instrument at its meeting on 10 November 2009 and determined that it did not need to draw it to the attention of the Parliament.


**Background**

20. The Order was laid on 29 October 2009 and the lead committee must report by 30 November 2009. The Education, Lifelong Learning and Culture Committee was designated the lead committee.

21. This instrument is made in exercise of powers conferred in the Protection of Vulnerable Groups (Scotland) Act 2007.

**Policy objectives**

22. The Protection of Vulnerable Groups (Scotland) Act 2007 provides that the Scottish Ministers may make provision consequential to provisions made in the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 (NI Order). The Act and NI Order make up part of the legislation that the constituent parts of the UK have enacted to implement corresponding lists of individuals who are disqualified from working with children or vulnerable groups.

23. A number of instruments made under the NI Order came into force on 12 October 2009 and the Committee has considered a number of consequential instruments at recent meetings. The Executive Note confirms that the making of these NI Orders has enabled Scottish Ministers to make corresponding provision.

24. This instrument improves arrangements for enhanced disclosure under the Police Act 1997 for an individual included in a list made under the NI Order.

**Issues the Committee may wish to consider**

25. Members will note that the instrument came into force on 20 November 2009.

26. The Executive Note states that the instrument has no financial implications.
27. The Subordinate Legislation Committee considered the instrument at its meeting on 17 November 2009. The Committee raised a concern that the proposed modification to the Police Act 1997 constituted a textual amendment and, therefore, that the affirmative procedure should have been used instead. The Committee concluded that “where the question of whether an instrument makes a textual amendment is determinative of the Parliamentary procedure which applies, the form of modification adopted should be absolutely clear”. The relevant section of the SLC’s report, including correspondence on these two issues with the Scottish Government, is attached at Annex C.

Action

28. The Committee is invited to consider whether it has anything to report to the Parliament.

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.
EXTRACT FROM THE SUBORDINATE LEGISLATION COMMITTEE’S 46TH REPORT 2009

The Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) (No. 2) Amendment Regulations 2009 (SSI 2009/349) (Education, Lifelong Learning and Culture Committee)

2. The purpose of this instrument is to add to the categories of persons listed in the Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) Regulations 2009 (SSI 2009/91) (‘the principal instrument’) three new categories of persons who are not fit to be employed in care services unless registered with the Scottish Social Services Council. The three new categories are: manager of a residential school care accommodation service, supervisor of a residential school care accommodation service and worker in a residential school care accommodation service.

3. Correspondence between the Committee and the Scottish Government is reproduced in the Appendix.

Question 1

4. SSI 2009/349 and the Regulation of Care (Social Service Workers) (Scotland) Amendment Order 2009 (SSI 2009/350) are related. The Scottish Government acknowledge that it would have been preferable for the definition of "worker in a residential school care accommodation service" in SSI 2009/349 and 2009/350 to be the same in each instrument but does not consider that the omission of the word ‘support’ in SSI 2009/349 makes the definitions inconsistent or will have any legal or practical effect. The Committee shares this view. However, the Committee considers that consistency with SSI 2009/350 would have been preferable.

Question 2

5. The Committee considers that the attempted application of regulation 6 of SSI 2009/118 to the three new definitions of social service worker listed in the instrument and the manner in which the new regulation 6A has been expressed could have been clearer. Regulation 6 is currently clearly limited by reference to a category of persons to whom it applies. The Committee considers that a clearer drafting device is required to convey any expansion of the application of regulation 6. The lack of clarity of the effect of 6A has been compounded by the use of the word ‘should’. The Committee considers that the intention would have been clearer had some other, less equivocal, word been adopted.

6. The Committee draws to the attention of the Parliament and the lead committee that the Scottish Government intend that the definition of 'worker in a residential school care accommodation service' in SSI 2009/349 and in the related SSI 2009/350 is the same, despite the fact that the word 'support' precedes the word 'worker' in the definition in SSI 2009/350 but not in the definition in SSI 2009/349. The Committee is of the opinion that the omission of the word ‘support’ in the definition in SSI 2009/249 will not have any legal or practical effect but recommends that it is good drafting practice to promote consistency of terminology in closely related instruments.
8. The Committee reports this instrument to the Parliament and to the lead committee on the grounds that, in the opinion of the Committee, the application of regulation 6 of SSI 2009/118 to the three new types of social service worker listed in the instrument could be clearer.
APPENDIX

The Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) (No. 2) Amendment Regulations 2009 (SSI 2009/349) and The Regulation of Care (Social Service Workers) (Scotland) Amendment Order 2009 (SSI 2009/350)

On 29 October 2009 the Scottish Government was asked:
1. In the definition of 'worker in a residential school care accommodation service' in article 2(2)(d) in SSI 2009/350 the word 'support' precedes the word 'worker'. However, the word 'support' does not appear in the definition of the same phrase in the related SSI 2009/349 at regulation 2(2)(d). Is it intended that the definition should be the same in both instruments? If so, what does the Scottish Government intend that the definition should be in both instruments and what does the Scottish Government consider is the effect of the presence of the word 'support' in one of the definitions but not in the other?

The Scottish Government responds as follows:
We think that it would assist to explain the intended effect of the two instruments. Both relate to the scheme of registration of social care workers with the Scottish Social Services Council under section 44 of the Regulation of Care (Scotland) Act 2001. SSI 2009/350 amends the list of prescribed social service workers to enable certain persons involved in providing residential school care accommodation services to be registered. SSI 2009/349 amends existing regulations (SSI 2009/118) which specify that certain employees involved in the provision of care services are not fit unless they are registered by the Scottish Social Services Council. Whilst the Scottish Government recognise that it would have been preferable for the definition of "worker in a residential school care accommodation service" in SSI 2009/349 and 2009/350 to be the same, it is not considered that the minor difference alters the legal effect. The preferred definition is as in SSI 2009/350 (including the word 'support'). The definition in 2009/350 relates to prescribing such workers as "social service workers" under the Regulation of Care (Scotland) Act 2001. The Scottish Government does not consider that the omission of the word 'support' in the definition of "worker in a residential school care accommodation service" in SSI 2009/349, which provides such workers are only fit if registered, de-aligns the definitions to any significant effect. Only those who are prescribed as social service workers can be registered in the first instance, which limits the requirement to the definition as in SSI 2009/350. The inclusion of the word 'support' was in terms of descriptive reference to aid the Scottish Social Services Council in opening their register to certain categories of worker. In context we do no think that the omission of the word 'support' will have any legal or practical effect.

On 29 October 2009 the Scottish Government was asked:
2. Regulation 2(4) of SSI 2009/349 inserts a new regulation 6A into 2009/118. The last line of the new regulation 6A(1) states that 'regulation 3, as read with regulation 6 (our emphasis) should apply to that person'.

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Given that regulation 6 of 2009/118 applies to a residential child care worker, a manager of an adult day care service or a manager of a care home service for adults, what is to be taken to be read by the words 'as read with regulation 6' in the new regulation 6A, given that the new regulation 6A applies to different categories of persons to regulation 6?

What is intended by the use of the word 'should' in the last line of new regulation 6A(1)?

Given that the regulations are complicated, in particular the regulations with respect to the time frame for 'new employment', does the Scottish Government consider that the effect of new regulation 6A could have been clearer?

The Scottish Government responds as follows:

The heading and internal cross references in regulation 6 of 2009/118 should not be construed as limiting the meaning of that regulation in context. The regulations and amendments to them must be read as whole and not in isolation to understand the meaning of the regulations as amended, therefore new regulation 6A has the effect of applying regulation 3 and regulation 6 to the new categories of worker as they apply to existing categories of worker. The categories of worker to which regulation 6 applies will also now extend to “manager in a residential school care accommodation service”, “supervisor of a residential school care accommodation service” and a “worker in a residential school care accommodation service” by virtue of new regulation 6A.

The word “should” in regulation 6A(1) is intended to convey the conditionality of the application of regulation 6, being that all conditions stated in regulation 6 must be met for that regulation to apply. Whilst it is appreciated that a different drafting approach could have been taken, it is considered that the current drafting communicates the intended meaning accurately.

The scheme of designating “social service workers” and their registration by the Scottish Social Services Council has been incremental and Scottish Government has worked closely with the Scottish Social Services Council on the approach taken. Regulation 6A of 2009/349 follows the existing scheme in the earlier regulations 2009/118. As SSI 2009/349 makes amendments to 2009/118 it was considered appropriate to adopt the style and framework in those earlier regulations. It was not considered that adopting a new approach would add to the clarity of the scheme which is acknowledged to be complex.


28. Correspondence between the Committee and the Scottish Government is reproduced in Appendix 6.

29. The questions raised are largely concerned with the same issue, and relate to the nature of the “modifications” which the Order makes to other primary legislation. They were probed, along with other points, in relation to SSI 2009/337 (reported on 3 November 2009), that instrument having been reported to the lead committee and to the Parliament on the grounds that the form or meaning of particular provisions could have been clearer, and that where the question of whether an instrument makes a textual amendment is determinative of the Parliamentary procedure which applies it was considered that the form of modification adopted should be absolutely clear.

30. This Order has been made on the basis that it is subject to negative procedure. In considering the use of that procedure, the Committee noted that under section 100(4) of the 2007 Act an order under section 87(2) must be laid before the Scottish Parliament in draft. That is the position “only if the order contains provisions which add to, replace or omit any part of the text of this or any other Act”. This Order is made under provisions in the 2007 Act, including section 87(2).

31. The Committee was concerned that article 3, which is headed “Modification of the Police Act 1997” might be regarded as making textual amendments to that Act, and wished to probe the issue of whether this instrument should therefore, in accordance with section 100(4), have been subject to affirmative procedure. The provisions might appear to be adding to the text of the Act concerned. This raised the issue of whether the instrument might be considered ultra vires as a result of procedural impropriety.

32. The Government’s reply on this point is similar to that provided when the Committee raised the same issue concerning SSI 2009/337 and rehearses the Government’s case why textual amendments are not, in fact, being made here. It draws on the manner in which article 3 has been drafted, with it being stated that the provision is made (only) “for the purpose of this Order”, and that the legislation has effect “as if it had been modified”.

33. As in relation to SSI 2009/337, the Committee remains unconvinced that the use of such language enables the view to be taken that textual amendments are not being made, although it might to an extent point towards
that being the position. The reply asserts that the provision concerned has not been drafted so as to “add to, replace or omit any part of the text of an Act”. It is stated that what it does falls short of textual amendment and that the approach adopted is one that has involved ‘glossing’ the meaning of the affected Act specifically for the purpose of the Order.

34. The reply goes on to state that the Order does not deliver a permanent change to the legal effect of section 113C(3) and 113D(3) of the Police Act 1997, and that because of the transitory nature of the provision the Government considered that it was neither necessary or appropriate to effect an actual textual amendment.

35. The Government’s response does set out stateable arguments that what is being done here is not such as to amount to textual amendment. However, the Committee is not wholly convinced by the drafting devices used, and would consider for example that the phrase “for the purposes of this Order” seems to be somewhat circular and therefore meaningless.

36. The Committee draws this instrument to the attention of the lead committee and the Parliament on the basis that the form or meaning of article 3, which provides for modification of the Police Act 1997, could have been made clearer. The Committee considers that where the question of whether an instrument makes a textual amendment is determinative of the Parliamentary procedure which applies, the form of modification adopted should be absolutely clear.
APPENDIX 6


On 5 November 2009 the Scottish Government was asked:
1. On what basis it considers that article 3 does not, actually, make textual amendments in relation to the Police Act 1997 (such that this instrument should not therefore be subject to affirmative procedure in terms of section 100(4) of the 2007 Act).

2. (a) Insofar as the drafting of article 3 of this instrument follows the approach taken in SSI 2009/337, in respect of which various points were recently raised, and it being anticipated that the response to question 1 might therefore be in similar terms, whether it would nonetheless accept that in drafting article 3, and indeed the instrument as a whole, a different approach might have been adopted, in the interests of improving clarity and transparency.

(b) In particular, in circumstances where the matter of whether an instrument makes textual amendment is determinative of the Parliamentary procedure which applies, whether it agrees that it is of paramount importance that the form of modification adopted be absolutely plain, and that it is not desirable and should not be necessary for reliance to have to be made on placing a 'gloss' on affected provisions, or otherwise to depend on drafting devices which include the use of phrases such as 'for the purpose of this Order' and 'as if it had been modified', and that, to that end, the drafting of article 3 could have been clearer.

The Scottish Government responds as follows:
1. The Government considers that article 3 does not make textual amendments in relation to the Police Act 1997. The drafting makes it clear that the provision is made only for the purpose of this Order and that the legislation has effect as if it had been modified. The drafting is therefore clearly not intended to make actual textual amendments to the Police Act 1997. Section 100(4) of the Protection of Vulnerable Groups Act 2007 ("the PVG Act") provides that the draft affirmative procedure is the appropriate parliamentary procedure where the instrument adds to, replaces or omits any part of the text of an Act. The approach adopted in the drafting of this Order does not do any of the above, but glosses the meaning of the affected Acts specifically for the purposes of the Order.

The Government has been referred to the approach it took in relation to SSI 2009/337. The Government notes that the approach taken in article 5 of that Order, where a textual amendment is made to the affected Regulations, may be contrasted with the approach taken in this Order.

The Government considers that "For the purpose of this Order" means that the gloss applied to the affected provisions of the Police Act 1997 and of the Protection of Children (Scotland) Act 2003 is only for the purpose of this
Order. Section 87(1) of the PVG Act provides that Ministers may make such provision as they consider appropriate in consequence of, or for giving full effect to, any provision made by virtue of the Safeguarding Vulnerable Groups Act 2006 ("the SVG Act").

The Order does not deliver a permanent change to the legal effect of sections 113C(3) and 113(D)(3) of the Police Act 1997. The provisions introduced are transitory as they will have effect only until provisions in the PVG Act come into force. It is due to the transitory nature of the provision that the Government considers that it was neither necessary nor appropriate to effect an actual textual amendment.

2 (a) As to whether a different approach might have been adopted to drafting the instrument in the interests of improving clarity and transparency, that is difficult to assess in the abstract. The achievement of clarity and transparency in the drafting of legislation is a goal which the Government continually strives to achieve and one to which the Government is committed. The Government is of the view that clarity and transparency have been achieved, both in the instrument itself, and in the Executive Note which accompanied it.

(b) The Government also agrees that, where the matter of whether an instrument makes textual amendment is determinative of the Parliamentary procedures which apply, it is of paramount importance that the form of modification adopted be absolutely plain. In the present instance (and as also explained in the Government's response of 13 October 2009 in connection with SSI 2009/337) the Government's view is that the instrument does make it plain that the provision is made only for the purpose of this Order and that the legislation has effect as if it had been modified. The drafting is clearly not intended to make actual textual amendments to the Police Act 1997, otherwise the conventional drafting forms normally employed to bring about a textual amendment would have been used for reasons of clarity and transparency. A clear distinction can be drawn between the provisions of article 3, where no textual amendment is made, and article 4 where textual amendment is made to the Police Act 1997 (Criminal Records) (Scotland) Regulations 2006. That those drafting forms were not used reflects the position of the Government that textual amendments were not being made to the 1997 Act.