The Committee will meet at 2.15 pm in Committee Room 6.

1. **Decision on taking business in private:** The Committee will decide whether to take item 8 in private.

2. **Health Boards (Membership and Elections) (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

3. **Sexual Offences (Scotland) Bill:** The Committee will consider the Scottish Government's response to Committee's stage 1 report.

4. **Apprenticeships, Skills, Learning and Children Bill (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Apprenticeships, Skills, Learning and Children Bill (UK Parliament legislation).

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

   - the Housing Support Grant (Scotland) Order 2009 (SSI 2009/draft);
   - the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2009 (SSI 2009/draft);
   - the Bankruptcy and Diligence etc. (Scotland) Act 2007 (Inhibition) Order 2009 (SSI 2009/draft);
   - the Renewables Obligation (Scotland) Order 2009 (SSI 2009/draft).

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

   - the Victim Statements (Prescribed Offences) (Scotland) Order 2009 (SSI 2009/31);
   - the Victim Statements (Prescribed Offences) (No.2) (Scotland) Order 2009 (SSI 2009/71);
the Regulation of Care (Miscellaneous Amendments) (Scotland) Regulations 2009 (SSI 2009/32);
the Absent Voting at Scottish Local Government Elections (Provision of Personal Identifiers) Regulations 2009 (SSI 2009/35);
the National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2009 (SSI 2009/37);
the Non-Domestic Rates (Levying) (Scotland) Regulations 2009 (SSI 2009/42);
the Housing Revenue Account General Fund Contribution Limits (Scotland) Order 2009 (SSI 2009/43);
the Home Energy Assistance Scheme (Scotland) Regulations 2009 (SSI 2009/48);
the Advice and Assistance and Civil Legal Aid (Priority of Debts) (Scotland) Regulations 2009 (SSI 2009/49);
the Registration of Births, Deaths and Marriages (Fees) (Scotland) Order 2009 (SSI 2009/65);
the Arrestment Jurisdiction (Scotland) Order 2009 (SSI 2009/66);
the Diligence (Scotland) Regulations 2009 (SSI 2009/68).

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

- the Specified Animal Pathogens (Scotland) Order 2009 (SSI 2009/45);
- the Education (Listed Bodies) (Scotland) Amendment Order 2009 (SSI 2009/60);
- the Education (Recognised Bodies) (Scotland) Amendment Order 2009 (SSI 2009/61);
- the Act of Sederunt (Rules of the Court of Session Amendment) (Miscellaneous) 2009 (SSI 2009/63).

8. **Working Practices Pilot:** The Committee will consider a paper from the clerk on the pilot process for liaison with the Scottish Government on Scottish Statutory Instruments.

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Clerk to the Subordinate Legislation Committee  
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The papers for this meeting are as follows—

**Agenda Items 2-8**

Legal Brief SL/S3/09/8/1 (P)

Summary of Recommendations SL/S3/09/8/2

**Agenda Item 2**

*Health Boards (Membership and Elections) (Scotland) Bill as Amended at Stage 2*

Supplementary Delegated Powers Memorandum

**Agenda Item 3**

Sexual Offences - Paper from the Clerk SL/S3/09/8/3

Government response to SLC Stage 1 Report SL/S3/09/8/4

Committee Stage 1 Report SL/S3/09/8/5

**Agenda Item 4**

Apprenticeships, Skills, Learning and Children Bill LCM SL/S3/09/8/6

*Apprenticeships, Skills, Learning and Children Bill*

**Agenda Item 6**

Government Responses SL/S3/09/8/7

**Agenda Item 8**

The Committee will be invited to consider the following recommendations under consideration at today’s meeting. Decisions are a matter for the Committee.

**Agenda Item 2 Health Boards (Membership and Elections) (Scotland) Bill**

**Section 1(5) & 1(6) – Power to specify further circumstances in which elected, appointed or councillor members must vacate office**

The Committee will wish to consider whether the delegated powers contained in section 1(5) and (6) of the Bill (as amended) are acceptable in principle, and that they may be subject to negative procedure.

**Section 2: (inserting schedule 1A to the 1978 Act – election regulations)**

The Committee will wish to consider whether section 2(1A) of the Bill, inserting section 105(2A) of the 1978 Act to provide that election regulations shall be subject to affirmative procedure, is acceptable.

**Section 2(2): (so far as inserting paragraph 3(2) of schedule 1A to the 1978 Act – election regulations)**

The Committee will wish to consider whether the additional provision in section 2(2), so far as inserting paragraph 3(2) of schedule 1A to the 1978 Act in relation to election regulations, is acceptable. This is that, if regulations specify a division of a Health Board area into more than one ward, the regulations must also specify the number of elected members to be elected in each electoral ward.
Section 2(2): (so far as inserting paragraph 4(1) of schedule 1A to the 1978 Act – election regulations)

The Committee will wish to consider if the amended provision in section 2(2), so far as inserting paragraph 4(1) of schedule 1A to the 1978 Act in relation to election regulations, is acceptable. This is that election regulations must appoint an individual as the returning officer for each ward in which a Board election is to be held.

Section 2(2): (so far as inserting paragraph 7 and 8(1) of schedule 1A to the 1978 Act – election regulations)

The Committee will wish to consider if the amended provisions in section 2(2), so far as inserting paragraph 7 and 8(1) of schedule 1A to the 1978 Act in relation to election regulations, are acceptable. The Committee might consider that the amendments only clarify the drafting.

Section 2(2): (so far as inserting paragraph 8(4) of schedule 1A to the 1978 Act – election regulations)

The Committee will wish to consider if the additional provision in section 2(2), so far as inserting paragraph 8(4) of schedule 1A to the 1978 Act in relation to election regulations is acceptable. This is an additional provision that, if the regulations provide for votes in a Health Board election to be cast only by post, the regulations must also provide for a system of personal identifiers to be used. If a traditional ballot is used (e.g. a mixture of ballot box and post ballot) then personal identifiers are not required.

Section 2(2): (so far as inserting paragraph 9(2) of schedule 1A to the 1978 Act – election regulations)

The Committee will wish to consider if the additional provision in section 2(2), so far as inserting paragraph 9(2) of schedule 1A to the 1978 Act in relation to election regulations is acceptable. This provides that election regulations may disqualify from being a candidate, an individual holding a post set out in a list of restricted posts maintained by the Health Board concerned for that purpose.
Section 4 (elected members: pilot scheme) – Powers to make the “pilot order”

The Committee will wish to consider if the amendments in section 4(4) of the Bill, amending the procedures applying in connection with a pilot order, may be acceptable.

The Committee might also consider if it could welcome that the Government have amended section 4 of the Bill in response to comments and recommendations made by the Committee in its Report at Stage 1.

Section 6 (termination of pilot scheme)

The Committee may consider whether in relation to section 6, it should draw to the attention of the lead committee and to the Scottish Government for consideration at Stage 3, that—

(a) section 6(2) of the Bill provides for the automatic repeal of sections 1 to 7 and paragraph 2 of the schedule, if the pilot order is revoked, or on the day after the Parliament fails to resolve to approve a draft roll-out order, but section 6 does not provide for the revocation of the pilot order in the event that the Parliament fails to approve a draft roll-out order (although it appears that must be the effect of the repeal of those sections); and

(b) were Parliament to fail to approve a draft roll-out order, the Bill does not appear to provide or make clear whether, on the automatic repeal of sections 1 to 7, the Scottish Ministers are permitted any delegated powers to make any further or consequential provisions that might be needed in regard to the pilot area arrangements. This is given that such arrangements for elections, or the re-organisation of the membership of Health Boards, may have been implemented up to the date of any rejection of a roll-out order, by virtue of the pilot order. (This assumes that those powers are sought or may require to be taken by the Scottish Ministers in those circumstances, which is a matter to be considered by the Government).

Section 7(1) – Powers to make a “roll-out order”

The Committee may wish to consider whether it is acceptable that a roll-out order in terms of section 7 of the Bill shall be subject to the prescribed form of “super-affirmative” procedure.

The Committee may also wish to consider if it should ask the Government to explain (urgently in this week of 2 March, by sufficient time in advance of the deadline for Stage 3 amendments), in relation to section 7(3A)(c), why the period of 60 (calendar) days specified for Parliament and committee consideration of a proposed draft roll-
out order does not exclude any days during which the Parliament is dissolved or in recess, so far as the effect of this may be that there is an insufficient period for Parliament consideration of a proposed draft roll-out order after it is laid.

The Committee may wish to consider pressing the Government (again urgently) for a commitment that it will bring forward an amendment at Stage 3 to the effect that the period of 60 days specified as above shall not include any days when the Parliament is dissolved or in recess, or alternatively that the stated period (not including dissolution or recess days) should be another sufficient and stated period of days, to enable any Parliament resolution and any committee consideration and report on a proposed order, in terms of section 7(3A)(c) of the Bill.

Failing such commitment being made by the Government by response during next week, given that 3 March is the last Committee date before the deadline for Stage 3 amendments on 6 March, the Committee may wish to consider whether it should authorise the Convener on its behalf to lodge an amendment to this effect, to be considered at the Stage 3 debate due to take place on 12 March 2009.

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**Agenda Item 3**  
**Sexual Offences (Scotland) Bill**

The Committee may wish to note the Scottish Government's response.

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**Agenda Item 4**  
**Apprentices, Skills, Learning and Children Bill**  
(UK Parliament legislation)

Clause 65(provision of services)(YPLA) and clause 103 (provision of services)(SFA)

The Committee may wish to consider that the delegation of powers here, under reference to clauses 65 and 103, and the order making provision under clause 248, to be acceptable. The Committee may also wish to consider that negative procedure provides the appropriate level of scrutiny.
Agenda Item 5  Draft instruments subject to approval

The Housing Support Grant (Scotland) Order 2009 (SSI 2009/draft)

The Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2009 (SSI 2009/draft)

The Bankruptcy and Diligence etc. (Scotland) Act 2007 (Inhibition) Order 2009 (SSI 2009/draft)

The Renewables Obligation (Scotland) Order 2009 (SSI 2009/draft)

The Committee may wish to consider if it is content with these instruments.

Agenda Item 6  Instruments subject to annulment

The Victim Statements (Prescribed Offences) (Scotland) Order 2009 (SSI 2009/31)

The Committee may wish to report this instrument to the lead committee and the Parliament as defectively drafted. The Committee may wish to note that this Order will be revoked by Order SSI 2009/71 but not until 1 April 2009.

The Victim Statements (Prescribed Offences) (No. 2) (Scotland) Order 2009 (SSI 2009/71)

The Committee may wish to consider if it is content with this instrument, which revokes SSI 2009/31.

The Regulation of Care (Miscellaneous Amendments) (Scotland) Regulations 2009 (SSI 2009/32)

The Committee may wish to report to the lead committee and to Parliament that it welcomes the Government's offer to consider clarifying the terms of the Explanatory Note given the differences between SSI 2003/150 and SSI 2002/114 and SSI 2002/115.
The Absent Voting at Scottish Local Government Elections (Provision of Personal Identifiers) Regulations 2009 (SSI 2009/35)

The Committee may wish to consider reporting the instrument to the lead committee and the Parliament on the grounds that it considers that due account should be had to the scheduling of related instruments to avoid reference to matters which are conditional on future events where possible and as a matter of good drafting practice.

The Committee may wish to consider reporting the instrument to the lead committee and the Parliament on the grounds that there is a sufficient doubt as to whether the power in section 23(2)(c) can be supplemented by the power in section 61(2) so as to permit Ministers to specify disclosure by the returning officer, and therefore that there is a doubt as to whether regulation 18A(2) to the Representation of the People (Absent Voting at Local Government Elections) (Scotland) Regulations 2007 to be inserted by regulation 10 of these regulations is within vires.

The Committee may wish to consider reporting the instrument to the lead committee and the Parliament on the grounds that the use of unnecessary definitions is a failure to follow normal drafting practice.

The National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2009 (SSI 2009/37)

The Committee may wish to draw this instrument to the attention of the lead Committee and to the Parliament on the ground that there has been a failure to follow proper drafting practice, in respect that the citation of section 27(1) of the National Health Service (Scotland) Act 1978 within the preamble appears inappropriate.

The Non-Domestic Rates (Levying) (Scotland) Regulations 2009 (SSI 2009/42)

The Housing Revenue Account General Fund Contribution Limits (Scotland) Order 2009 (SSI 2009/43)

The Home Energy Assistance Scheme (Scotland) Regulations 2009 (SSI 2009/48)

The Advice and Assistance and Civil Legal Aid (Priority of Debts) (Scotland) Regulations 2009 (SSI 2009/49)

The Registration of Births, Deaths and Marriages (Fees) (Scotland) Order 2009 (SSI 2009/65)

The Arrestment Jurisdiction (Scotland) Order 2009 (SSI 2009/66)
The Diligence (Scotland) Regulations 2009 (SSI 2009/68)

The Committee may wish to consider if it is content with these instruments.

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Agenda Item 7  Instruments not laid before Parliament

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The Specified Animal Pathogens (Scotland) Order 2009 (SSI 2009/45)

The Education (Listed Bodies) (Scotland) Amendment Order 2009 (SSI 2009/60)

The Education (Recognised Bodies) (Scotland) Amendment Order 2009 (SSI 2009/61)

The Act of Sederunt (Rules of the Court of Session Amendment) (Miscellaneous) 2009 (SSI 2009/63)

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The Committee may wish to consider if it is content with these instruments.
SEXUAL OFFENCES (SCOTLAND) BILL – RESPONSE TO SLC STAGE 1 REPORT

Background

1. Under Rule 9.6.2 of Standing Orders the Committee submitted its report on the delegated powers provisions in the Sexual Offences (Scotland) Bill to the Justice Committee, as lead committee for the Bill, on 21 November 2008.

2. On 16 February 2009, the Cabinet Secretary for Justice, Kenny McAskill MSP wrote to the Convener responding to the Subordinate Legislation Committee’s (SLC) report

Scottish Government Response

3. The response indicates that the Scottish Government (SG) intend to seek to amend the Bill in line with the Committee’s views on the delegated power in section 29: Power to specify “relevant offences” for the purpose of Section 29(2).

4. In its Stage 1 report the Committee also made recommendations in relation to section 32: Power to amend the definition of what constitutes a “position of trust” in respect of the offence of sexual abuse of trust at section 31. The Committee found the use of a delegated power acceptable in principle, however members queried whether the power could be framed more narrowly. The Committee also recommended that the power should be subject to affirmative procedure.

5. The response confirms that the Scottish Government do intend to seek to amend the Bill so that the power is subject to affirmative procedure. However, Ministers do not intend to seek amendment to the Bill such that the power is framed more narrowly, to reflect only changes in the arrangements for the care and education of young people in Scotland. The response refers to evidence considered by the Justice Committee at Stage 1, particularly evidence from ACPOS which proposed a wider definition of a “position of trust”. The response contends that this indicates that the question of how a position of trust should be best be defined remains open to debate.
6. The response goes on to state that an amendment will be sought so that an order can vary or delete conditions which constitute a position of trust as well as extending them.

Progress of the Bill

7. The Bill passed Stage 1 on 12 February 2009.

Recommendation

Members are invited to note and comment on the Scottish Government’s response to the Committee’s report on the delegated powers provisions in the Sexual Offences (Scotland) Bill at Stage 1.

Shelagh McKinlay
Clerk to the Committee
SEXUAL OFFENCES (SCOTLAND) BILL – REPORT OF THE SUBORDINATE LEGISLATION COMMITTEE

I am grateful to you and your Committee for your consideration of the delegated powers contained in the Sexual Offences (Scotland Bill. I am writing to you to respond to the points made your report on the Bill.

Section 29: Power to specify “relevant offences” for the purpose of Section 29(2)

The Committee considers that the use of subordinate legislation to specify “relevant offences” for the purpose of s29(2) is appropriate in order to provide flexibility to address future changes in the law.

However, the Committee recommends that the Government consider further whether the Bill can be amended to restrict the scope of the power to a power to specify offences or circumstances involving conduct of a sexual nature involving children as “relevant offences”.

The Committee recommends that the specification of “relevant offences” should be subject to affirmative procedure.

In view of the recommendation made in paragraph 301 of the Justice Committee’s Stage 1 Report, the Government now proposes to amend the Bill at Stage 2 so as to specify “relevant offences” for the purpose of section 29(2) on the face of the Bill. However, we propose to retain the secondary power to enable the amendment of the definition of “relevant offences” if it is required to react to changes in circumstances or developments in the law.

The Government is content to accept the Committee’s recommendation that this order-

February 2009
making power should be subject to affirmative procedure and that it should enable only the
designation of offences with a sexual element as "relevant offences". We will bring forward
appropriate amendments at Stage 2.

Section 32: Power to amend the definition of what constitutes a "position of trust" in
respect of the offence of sexual abuse of trust at section 31

The Committee finds the use of a delegated power acceptable in principle. However,
members wish to ask the Scottish Government to consider further whether the power
could be framed more narrowly in such a way that would allow for flexibility in
responding quickly to any changes in the arrangements for the care and education of
young people in Scotland

Given the potential impact of the exercise of this power to widen the scope of the
offence of sexual abuse of trust the Committee recommends that affirmative
procedure is the appropriate level of parliamentary scrutiny

The Scottish Government accepts the Committee's recommendation that the order-making
power at section 32 should be subject to affirmative procedure and will bring forward
amendments at Stage 2.

You will be aware that the Justice Committee's Report on the Bill considered and sought the
Government's views on ACPOS' proposal for a much wider definition of a "position of trust"
than that contained in the Bill. The Government has rejected the approach ACPOS
proposed but we consider that this indicates that the question of how a "position of trust"
should best be defined remains open to legitimate debate. The Government have therefore
concluded that a power to amend the scope of the definition (which is wider than a purely
procedural power to update the definition in light of changes to arrangements for the care
and education of young people in Scotland and is subject to affirmative procedure) is
appropriate.

However, it is intended that the ordering making power should be amended so that an order
can vary or delete the conditions in s32 which constitutes a "position of trust" as well as
extending them. The power will be restricted to ensure that the offence of sexual abuse of
trust will not apply to sexual activity between adults (aged 18 and over). No amendment will
be made to section 31(1) of the Bill.

The Government take the view that such restriction will be sufficient, in light of the fact that it
will be made subject to affirmative procedure. This will provide the Parliament with the
opportunity to carefully scrutinise any additional conditions which are contained in an order
made under s32.

I hope this reply is helpful.

KENNY MACASKILL

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Introduction

1. At its meetings on 9 September\(^1\), 7 October\(^2\), 28 October\(^3\) and 4 November\(^4\) 2008 the Subordinate Legislation Committee considered the delegated powers provisions in the Sexual Offences (Scotland) Bill at Stage 1. The Committee submits this report to the Justice Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill.

3. The Committee’s correspondence with the Scottish Government is reproduced in the Annexe.

Delegated Powers Provisions

4. This Bill provides a statutory framework for sexual offences in Scots law. The Bill contains 9 delegated powers to make subordinate legislation, the majority of which are subject to negative resolution procedure.

5. The Committee considered each of the delegated powers provisions in the Bill.

6. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following sections: 30, 38, 42, 43, 46 and 49.
Section 29: Power to specify “relevant offences” for the purpose of Section 29(2)

Background
7. Section 29(1) provides that it shall be a defence for an accused person who is charged with an offence under sections 21 to 27 (sexual activity involving or directed towards a child aged 13-15) that he or she reasonably believed that the child, with whom he or she engaged in sexual activity, had attained the age of 16 years at the time the conduct took place. Section 29(2) provides that such a defence is not available to an accused if that accused has previously been charged by the police with a “relevant offence”.

8. Subsection (5) of section 29 confers a power on the Scottish Ministers to specify by order, subject to negative procedure, which offences will constitute a “relevant offence” for the purpose of section 29(2). (Those offences can be specified individually or can be identified by describing the type of offences which are “relevant offences”.)

9. The Committee wrote to the Scottish Government raising concerns about the scope of this power as well as the parliamentary procedure attached to it. The Committee also subsequently took oral evidence from officials on this issue.

10. In particular, the Committee wished to examine whether “relevant offences” for this purpose should be specified “on the face” of the Bill. The Committee believed that the scope of the power merited careful consideration given that the exercise of the power determines whether a defence of mistaken belief as to age is available. The Committee notes that there is no limitation on Ministers in specifying offences for this purpose – Ministers are not restricted to specifying offences in relation to sexual behaviour for example. The Committee also wished to explore whether the exercise of such a power should be subject to affirmative rather than negative procedure.

Evidence
11. In evidence to the Committee Gery McLaughlin of the Scottish Government Criminal Justice Directorate stated that it was felt to be more appropriate for the list of “relevant offences” to be provided in a single order rather than in a mix of primary and secondary legislation. In addition, while the absence of such a power had caused no difficulties in the past, listing the “relevant offences” in an order gave Ministers flexibility to respond quickly to any changes in the law both in Scotland and in other parts of the UK. (Col 393)

12. The Committee also asked for further explanation as to why negative procedure was considered to be an appropriate level of scrutiny. The Government explained that the use of negative procedure reflects the approach taken by the Scottish Law Commission in relation to order making powers in general its Report on Rape and Other Sexual Offences. Mr McLaughlin stated that, in his interpretation, the Scottish Law Commission had adopted an approach which favoured the use of affirmative procedure only where there is to be a substantial change in the law. (Col 397)
Conclusions and Recommendations

13. The Committee acknowledges that the argument that a complete list of “relevant offences” should be kept in one place is valid in that it is important that the criminal law should be clear and easily accessible. The Committee notes that it would be possible to achieve this objective through a list of “relevant offences” in the Bill itself. The Committee also recognises that the requirement to ensure flexibility to respond to new and changing legislation north and south of the Border is a legitimate aim and that there is a strong public interest in keeping the law up to date.

14. The Committee considers therefore that, on balance, there are arguments which support the use of subordinate legislation in these circumstances.

15. However concerns remain about the breadth of this power. The Committee must have regard to the fact that without any limitation on what may be specified, Ministers under this, or any future administration, could greatly expand the number or types of offences specified and therefore the availability of the defence.

16. The Committee did not consider that it had received a full explanation as to why the power to specify “relevant offences” cannot be framed more narrowly, to reflect the stated policy intention that “relevant offences” would be offences committed against children which had a sexual element.

17. The Committee therefore considers that the use of subordinate legislation to specify “relevant offences” for the purpose of Section 29(2) is appropriate in order to provide flexibility to address future changes in the law.

18. However, the Committee recommends that the Government consider further whether the Bill can be amended to restrict the scope of the power to a power to specify offences or circumstances involving conduct of a sexual nature involving children as “relevant offences”.

19. The Committee also continues to have concerns about the use of negative procedure for this power. While there is a need for flexibility to respond to changes in the law, it was not suggested by officials that there was a need to respond so quickly to developments that the use of affirmative procedure would be ruled out. The need to exercise this power will be preceded by legislative change and this can be anticipated in sufficient time to timetable an affirmative order. As this power was not contained in the draft bill annexed to the Scottish Law Commission’s report, the Committee considers that it does not have the benefit of the Commission’s view on which procedure it would have proposed to attach to such a power. As Ministerial involvement in specifying when the defence is available would be a change to the current law, the Committee is not persuaded that it can be assumed the Commission would have proposed negative procedure.

20. Given the significance of the effect of the exercise of the proposed power in determining when a defence of mistaken belief as to age is available to an accused, the Committee considers that specification of “relevant offences” should be subject to Parliament’s approval through affirmative procedure.
21. The Committee therefore recommends that the specification of “relevant offences” should be subject to affirmative procedure. The Committee draws the attention of the lead committee to these concerns.

Section 32: Power to amend the definition of what constitutes a “position of trust” in respect of the offence of sexual abuse of trust at section 31

Background
22. Section 31 creates an offence of sexual abuse of trust. It provides that a person commits an offence of sexual abuse of trust if they are aged 18 years or older and intentionally engage in a sexual activity with, or directed at, a person who is under 18 and in respect of whom the perpetrator is in a position of trust. Section 32 defines “position of trust” for the purpose of the offence in section 31 by setting out conditions which, if fulfilled, denote a person being in a “position of trust”.

23. Five situations which are “positions of trust” are set out in the Bill. In addition section 32(1) confers a power on Ministers to make an order, subject to negative procedure, specifying what other conditions, in addition to those already set out in section 32, will constitute a “position of trust”.

24. Members noted that Ministers can specify any condition by which a position of trust would be established for the purpose of the offence. There are no apparent restrictions on this and the section does not provide for any qualitative test to be applied by the Scottish Ministers in exercising this power so as to narrow its scope. The power is also one which will have the effect of amending primary legislation, albeit not by textual amendment - this has the potential to broaden the scope of the offence.

Evidence
25. The Committee wished to explore whether Ministers’ unlimited discretion to define new situations of trust to which the criminal offence would apply could be restricted in some way. The Committee also wished to probe further the Scottish Government’s reasons for proposing negative procedure.

26. Therefore, following its meeting on 9 September the Committee wrote to the Scottish Government with a number of questions about the scope of this power and the fact that the Bill proposes that it be subject to negative procedure and the Committee also considered oral evidence on this issue at its meeting on 28 October.

27. The response received by the Committee stated that framing the power at section 32 more narrowly would risk losing the flexibility to respond quickly to changes in the arrangements for the care and education of young people in Scotland, without the need for primary legislation. In oral evidence Mr McLaughlin stated that it was difficult to speculate at this stage what future changes may involve. (Col 398)

Conclusions and Recommendations
28. The Committee agrees that it is appropriate to have the flexibility to amend the law to reflect change in care arrangements and that these are likely to alter
over time. However, the power available to Ministers is much broader than one which permits them to update references to reflect changes in care arrangements. It permits them to specify any conditions which are new positions of trust and which concern a relationship between persons one of which is over 18 and the other is under 18. The Committee notes that the law does not interfere with sexual relationships between consenting persons over the age of 16 without good cause. In its view the exercise of this power is therefore of significance.

29. Accordingly, the Committee finds the use of a delegated power acceptable in principle. However, members wish to ask the Scottish Government to consider further whether the power could be framed more narrowly in such a way that would allow for flexibility in responding quickly to any changes in the arrangements for the care and education of young people in Scotland.

30. In evidence to the Committee Mr McLaughlin stated that the choice of negative procedure was consistent with the Scottish Law Commissions’ approach. (Col 398) However, the Committee disagrees with this view. In the Scottish Law Commission’s report and draft Bill this power is subject to affirmative procedure (see s 31(7) of the draft Bill annexed to the Scottish Law Commission Report)—this is consistent with the existing law as set out in section 4(1) of the Sexual Offences (Amendment) Act 2000.

31. Given the potential impact of the exercise of this power to widen the scope of the offence of the sexual abuse of trust the Committee recommends that affirmative procedure is the appropriate level of parliamentary scrutiny.

Section 35: Power to specify circumstances which are to be regarded as constituting the provision of care services for the purpose of the offence of sexual abuse of trust of a mentally disordered person

Background

32. Section 35 creates the offence of sexual abuse of trust of a mentally disordered person. Subsection (1) provides that a person commits an offence under this section if they fall within the class of persons specified in subsection (2) and intentionally engage in sexual activity with, or directed at, a mentally disordered person. Subsection (2) sets out the classes of person who are subject to the offence provisions in subsection (1). It provides that they are those who provide a care service to a mentally disordered person and those who are employed in, or contracted to provide services in, or who manage, a hospital in which a mentally disordered person is receiving treatment.

33. Subsection (4) lists what constitutes the “provision of care services”. In addition it confers a power on the Scottish Ministers to make an order, subject to negative procedure, specifying other circumstances which constitute the provision of care services.
Evidence
34. At its meeting on 9 September the Committee agreed to write to the Scottish Government to seek an assurance that this power is framed more narrowly than that in section 32(1).

35. The Scottish Government’s response confirmed that the power at Section 35 of the Bill is framed in such a way that it is only the manner of provision of care services as defined that can be amended and that this can be done only by addition rather than deletion of any part of Section 35(4).

36. In light of the assurance provided the Committee considers that this power is acceptable.

Section 45: Ancillary provision

Background
37. Section 45 of the Bill confers on the Scottish Ministers a power to make by order such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, or in order to give full effect to, the Bill. Subsection (2) provides that the power extends to the modification of any enactment, instrument or document.

38. Section 46(3) provides that any order under this section which contains provisions that add to, replace or omit any part of the text of an Act will be subject to affirmative procedure. Otherwise, it will be subject to negative procedure.

39. The Committee noted that this is a wide power which could be used to amend or repeal primary legislation, (including the Bill once enacted). Such powers are commonly sought as the full range of amendments to the statute book necessary to give effect to a Bill cannot always be identified, or may change, in the course of the passage of the Bill. However, the Committee considers that justification is required for any power to amend or modify the effect of primary legislation which is not subject to affirmative procedure.

40. The Committee therefore agreed to ask the Scottish Government—

- whether it would be prepared to agree that any modification of primary legislation however effected should be subject to affirmative procedure; and

- if not, whether it would give an undertaking that any significant or permanent modifications made to enactments using this power would be effected through textual amendment and so subject to affirmative procedure.

41. In its response, the Government stated that it did not consider that it would be appropriate to give an undertaking, in abstract, as to the way in which any modifications using this power will be effected, however, it stated that in the particular circumstances of this Bill, it would be willing to bring forward amendments to ensure that any direct modification of primary legislation, whether textual or otherwise, will attract affirmative procedure.
42. The Committee welcomes this response and will consider the proposed amendments at Stage 2.
Response from Scottish Government

Sexual Offences (Scotland) Bill at stage 1

At its meeting on 9 September 2008 the Committee asked for explanation of the Scottish Government’s thinking on a number of matters relating to the powers to make subordinate legislation contained in the Bill.

Section 29: Power to specify “relevant offences” for the purpose of Section 29(2)

The Committee asks the Scottish Government—

- what type of offences it intends to specify as “relevant offences”;
- to explain why it is considered appropriate that the availability of the defence under section 29(1) should be dependent on whether or not a person has previously been charged with a relevant offence rather than convicted of such an offence, given that a person charged may subsequently not be convicted;
- why relevant offences could be not be listed in the Bill at this stage in combination with a restricted power to amend that list to reflect changes in the law on sexual offences within the UK;
- alternatively whether the Bill could be amended to clarify the nature of offences that could be specified using this power; and
- given the significance of the effect of the exercise of the proposed power, in that it determines the availability of a statutory defence to a serious criminal offence, why specification of relevant offences should not be subject to Parliament’s approval through affirmative procedure.

Section 32: Power to amend the definition of what constitutes a “position of trust” in respect of the offence of sexual abuse of trust at section 31

The Committee asks the Scottish Government—

- whether the open discretion to Ministers to provide for additional conditions constituting positions of trust could be framed more narrowly; and
- if not, whether it would agree that given the potential impact of the exercise of this power to widen the scope of the offence of sexual abuse of trust affirmative procedure would be the appropriate level of parliamentary scrutiny.
Section 35: Power to specify circumstances which are to be regarded as
constituting the provision of care services for the purpose of the offence of
sexual abuse of trust of a mentally disordered person

The Committee asks for an assurance from the Government that the power in
section 35 is framed more narrowly than section 32(1), in that it is only the manner
of provision of care services as defined that can be amended and that only by
addition rather than deletion of any part of section 35(4).

Section 45: Ancillary provision

The Committee asks the Scottish Government—

- whether it would be prepared to agree that any modification of primary
  legislation however effected should be subject to affirmative procedure; and

- if not, whether it would give an undertaking that any significant or
  permanent modifications made to enactments using this power would be
  effected through textual amendment and so subject to affirmative
  procedure.

The Scottish Government responds as follows—

Section 29: Power to specify “relevant offences” for the purpose of Section
29(2)

Section 29(1) provides that it is a defence to an offence concerning sexual activity
with an ‘older child’, that is a child aged between 13-15, that the accused
reasonably believed that the child had attained the age of 16 years. Section 29(2)
places a restriction on the availability of this defence by providing that the accused
may not use the defence if he or she had previously been charged with a ‘relevant
offence’. Section 29(5) gives Scottish Ministers power to prescribe by order the
definition of a ‘relevant offence’.

The policy intention is that ‘relevant offences’ would be offences committed
against children which had a sexual element. These will be likely to include the
offences contained at sections 14 to 26 of the Bill, in addition to a number of
existing provisions, such as those contained at sections 6 and 7 of the Criminal
Law (Consolidation) (Scotland) Act 1995. The Government did not include these
on the face of the Bill as it considered that it would be more appropriate that these
be listed in a single Order, rather than being contained only on the face of the Bill
or in a mix of primary and secondary legislation. It did not consider it either
necessary or desirable to specify on the face of the Bill the nature of the offences
that might constitute a “relevant offence”.

Committee members have asked why this defence should be restricted to those
not previously charged with a relevant offence, as opposed to being restricted only
to those not previously convicted of a relevant offence. If the test was that the
accused had previously been convicted of a relevant offence it would not be
possible to convict, as the accused would be able to rely, on each occasion, on the
fact that he or she had not previously been convicted. The fact that an accused

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person has been previously *charged* means that he, or she, is on notice that in the future more caution has to be exercised. Furthermore, it should be noted that section 5(5) of the Criminal Law (Consolidation) (Scotland) Act 1995, which criminalises intercourse with a girl aged 12-15 and is replaced by the provisions of this Bill also restricts the use of the defence of mistaken belief as to the girl’s age to those not previously *charged* with a like offence. This is not therefore a new approach.

It is the Government’s view that the negative resolution procedure will provide the appropriate level of scrutiny for an order specifying the offences to be included in the definition of ‘relevant offences’ for the purpose of the offences in Part 4 of the Bill. In the event that any Member had significant concerns about the terms of any such Order, or the offences included within the definition of ‘relevant offence’, it would be open to that Member to pray against the Order in Committee.

**Section 32: Power to amend the definition of what constitutes a “position of trust” in respect of the offence of sexual abuse of trust at section 31**

The Committee asks whether the power to amend the definition of what constitutes a “position of trust” in respect of the offence at section 31 of the Bill could be framed more narrowly. As outlined in the Delegated Powers Memorandum, the power is intended to allow sufficient flexibility to respond to changes in the arrangements for the care and education of young people in Scotland without the need for primary legislation. In the Government’s view, framing the power at section 32 more narrowly would risk losing the flexibility to respond quickly to such changes. As with the power at section 29, the Government’s view is that the negative resolution procedure provides the appropriate level of scrutiny for such an Order.

**Section 35: Power to specify circumstances which are to be regarded as constituting the provision of care services for the purpose of the offence of sexual abuse of trust of a mentally disordered person.**

The Committee asks for an assurance that the power at section 35 is framed in such a way that it is only the manner of provision of care services as defined that can be amended, and that this can be done only by addition rather than deletion of any part of section 35(4). The Government confirms that this is the case.

**Section 45: Ancillary provision**

The Committee asks whether the Scottish Government would be prepared to agree that any modification of primary legislation should be subject to affirmative procedure or, alternatively, to give an undertaking that any significant or permanent modifications made to enactments using this power would be effected through textual amendment and so subject to affirmative procedure.

The Scottish Government does not consider that it would be appropriate to give an undertaking, in abstract, as to the way in which any modifications using this power will be effected. The Bill provides for textual modification of primary legislation to attract affirmative procedure. Normally, non textual modification is confined to modifying particular pieces of text for certain limited circumstances, application or
adaptation - thus negative procedure would usually be appropriate in relation to such modifications. However, in the particular circumstances of this Bill, the Government is willing to bring forward amendments to ensure that any direct modification of primary legislation, whether textual or otherwise, will attract affirmative procedure.
LEGISLATIVE CONSENT MEMORANDUM

APPRENTICESHIPS, SKILLS, CHILDREN, AND LEARNING BILL

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Education and Lifelong Learning, is:

“That the Parliament agrees that the relevant provisions of the Apprenticeships, Skills, Children and Learning Bill, introduced in the House of Commons on 4 February 2008, relating to the management of Career Development Loans and the Managing Information Across Partners programme, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Fiona Hyslop, Cabinet Secretary for Education and Lifelong Learning, under Rule 9.B.3.1(a) of the Parliament’s standing orders. The Apprenticeships, Skills, Children and Learning Bill (“the Bill”) was introduced in the House of Commons on 4 February 2009. The Bill can be found at:

http://services.parliament.uk/bills/2008-09/apprenticeshipsskillschildrenandlearning.html

Content of the Bill

3. The Bill makes provisions relating to education and training and primarily impacts on England. The Bill will introduce a number of measures aimed at improving schools’ performance; introduce the right to request time off to train (this provision will extend to Scotland); establish a statutory right to apprenticeships for young people; and establish a number of new bodies in relation to qualifications and funding.

Provisions that relate to Scotland

4. Amongst the new bodies to be established by the Bill are the Young People’s Learning Agency and the Skills Funding Agency. These agencies will take over many of the functions currently carried out by the Learning and Skills Council (LSC), which will be abolished. Two of the LSC’s functions were the subject of a Legislative Consent Memorandum (LCM) under the Further Education and Training Act 2007 and relate to the management of Career Development Loans and the services developed under the Managing Information Across Partners programme (MIAP).

5. Clause 14 in the Bill will transfer powers, previously held by the LSC, to the Young People’s Learning Agency and the Skills Funding Agency. An LCM is required to allow the Young People’s Learning Agency and the Skills Funding Agency to exercise functions in Scotland in relation to education and training – matters which are within the legislative competence of the Scottish Parliament.

6. The UK bill will also confer functions directly on the Scottish Ministers and will therefore alter executive competence. As a result, Scottish Ministers will be able: to
enter into arrangements with the Skills Funding Agency (about Career Development Loans); to consent to arrangements between the Skills Funding Agency and bodies in Scotland exercising training and education functions in relation to Career Development Loans; and to request services from the Young People’s Learning Agency and the Skills Funding Agency that have been developed through MIAP to extend to Scotland.

7. Career Development Loans allow individuals in Great Britain to participate in learning. They are aimed at supporting increasing levels of participation in vocational learning, encouraging more individuals to take responsibility for their own learning, and encouraging financial institutions to view learning as an investment worthy of a loan.

8. The UK Government has announced that Career Development Loans will be re-branded in September 2009 as Professional and Career Development Loans with a number of changes. The key changes envisaged by the UK Government are to increase the volume of loans available (from 15,000 to 45,000 in 2010-11), to increase the rate and amount of loan funding available (100% funding rather than 80% and loan ceiling raised to £10,000) and to negotiate reduced interest rates with the banks.

9. The aim of the MIAP programme is to enable learner and learning data to be shared across the education sector within the UK. A Learner Registration Service (to allocate a Unique Learner Number) has been developed through the MIAP programme and work is underway to develop a Learner Record (a qualifications and skills summary).

Reasons for seeking a Legislative Consent Motion

10. The LCM is required because the executive competence of Scottish Ministers is being expanded in relation to the functions noted above. This develops the arrangements previously established as a result of the Session 2 LCM relating to the Further Education and Training Act 2007. This will ensure that Scottish Ministers have the powers to instruct the new Skills Funding Agency to amend the criteria for Career Development Loans for Scottish learners and to ensure that, in future, Scottish learners will be able to benefit from the developments in the MIAP programme.

Consultation

11. The Scottish Government has not consulted on the issues relating to the LCM. However, for the previous LCM in 2007, the Scottish MIAP Group was consulted. The Group commissioned a report into various aspects of the work and concluded that there was a desire to work alongside developments in England to ensure a joined up approach, particularly for individual learners.

Financial implications

12. There are no financial implications for this LCM.

Conclusion

13. The Scottish Government believes that it is in the best interests of the Scottish people that a) the Young People’s Learning Agency and the Skills Funding Agency be able to exercise certain functions in Scotland, in consequence of the Apprenticeships, Skills, Children and Learning Bill, and that b) Scottish Ministers should exercise certain
executive functions in relation to Scotland, thereby building on the situation originally established by the Further Education and Training Act 2007. In particular, this will ensure that Scottish Ministers have the powers to amend the criteria for Career Development Loans to reflect the needs of Scottish learners and to maintain the option of extending to Scotland some of the services developed under the MIAP programme in the future. The Scottish Government therefore recommends that, so far as these matters fall within the legislative competence of the Scottish Parliament, or alter the executive competence of the Scottish Ministers, they should be considered by the UK Parliament.

Scottish Government
February 2009
The Victim Statements (Prescribed Offences) (Scotland) Order 2009 (SSI 2009/31)

On 18 February 2009 the Scottish Government was asked:

"Despite the provision in Article 1(2), the cross heading to that article and the italicised headings of The Victim Statements (Prescribed Offences) (Scotland) Order 2009, Article 1 of the Order appears to make no provision for commencement. While Article 1(2) of the Order makes provision for the application of the Order to particular offences after a certain date, it does not indicate when the Order will come into force. We understand that paragraph 2 of Schedule 1 to The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379) as applied to SSIs by article 7(1) of that Order indicates that the Order comes into force on the date when it is made. Article 10(1) and (2) of the Scotland Act (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SI 1999/1096) has therefore not been complied with in this case. There may also be a question over the time when the Order came into force on 3rd February and whether or not it has retrospective effect. The Scottish Government is invited to comment and indicate what corrective action, if any, it intends to take."

The Scottish Government responds as follows:

The Scottish Government would like to thank the Subordinate Legislation Committee for highlighting that article 1 of the Order appears to make no provision for commencement. The lack of a commencement provision is an error. We apologise for this oversight. The Scottish Government intends to revoke the Order and lay a new Order. It is expected that the new Order will be made before 10 March 2009 and that the new Order will come into force on 1 April 2009.
On 17th February the Scottish Government was asked:

to comment on the accuracy of the statement in the Explanatory Note that "Regulations 9 to 13 amend SSI 2003/150 to ensure consistency with SSI 2002/114 and 2002/115 as amended by these Regulations" given that

(a) the discretion as regards managers who have relevant convictions rests with the care provider in relation to care services but in relation to limited care services the discretion rests with the Commission given that reg 4(2)(b) on providers (as it is intended it will be amended by the draft affirmative instrument before Parliament) is applied to managers by reg 5 of 2003/150; and

(b) as regards employees of providers of limited care services the tests relating to integrity and character and previous convictions set out in regulation 9(d) and (e) of SSI 2002/114 are not applied.

The Scottish Government responds as follows:

The reference to consistency in the Explanatory Note refers to bringing the language used in SSI 2003/150 in line with the language used in the other instruments referred to in the Note, as was recommended by a previous member of the legal advisory team to the Subordinate Legislation Committee.

The Explanatory Note is not part of the instrument however and this should not affect the instrument in any way. We are however happy to consider clarification of the Note at time of printing and can discuss this with the SI clerks.
The Absent Voting at Scottish Local Government Elections (Provision of Personal Identifiers) Regulations 2009 (SSI 2009/35)

On 19th February the Scottish Government was asked:

Given that—
The Regulations are subject to negative procedure and were made on 5th February 2009,

Regulation 10 amends the Representation of the People (Absent Voting at Local Government Elections) (Scotland) Regulations 2007 so as to permit Returning Officers to disclose certain information to candidates or agents in accordance with Regulation 24B of the Representation of the People (Postal Votes for Local Government Elections) (Scotland) Regulations 2007,

At the date of making the Regulations there is no regulation 24B in existence (it being only proposed that a regulation 24B is to be inserted by the Representation of the People (Postal Voting for Local Government Elections) (Scotland) Amendment Regulations 2009, assuming that a draft of the last-mentioned Regulations is approved by the Scottish Parliament),

whether the reference in the provision inserted by regulation 10 to Regulation 24B, a provision which does not yet exist as a matter of law, and that may never have effect, can itself have any meaning or effect and therefore whether Ministers have properly exercised the enabling power in Section 23(2)(c) of the Local Electoral Administration Services (Scotland) Act 2006.

In this connection the Scottish Government may wish to note that the relevant footnote to this instrument states that regulation 24B is inserted by regulation 6 of the draft Regulations whereas it would in fact be inserted by regulation 7.

ANSWER
The Scottish Government notes both points.

As the question identifies, the two sets of Regulations, which between them are intended to achieve a single policy outcome concerning absent voting at elections, are being made under powers which require different Parliamentary procedures. It is a matter for the Parliament whether or not it approves the making of the Regulations that require affirmative procedure or annuls the Regulations being made by negative procedure. Depending on the views of the Parliament, it is hoped that both sets of Regulations can come into force on 31st March 2009. At that date if the Parliament has approved the making of the affirmative Regulations then the cross-reference highlighted in the question would have effect in law.

If the Parliament declines to approve the draft of the affirmative procedure Regulations, or the Parliament resolves to annul the negative procedure Regulations, then the cross-reference will have no meaning and the provision at regulation 10 will not have effect in law.
The Scottish Government does not consider this an improper use of the power at section 23(2)(c) of the 2006 Act, particularly as amplified by section 61(2)(b).

2. Given that -
Section 23(2)(c) of the Local Electoral Administration and Registration Services (Scotland) Act 2006 confers power on the Scottish Ministers to make regulations specifying persons to whom, and purposes for which, a Registration Officer may disclose information contained in the personal identifiers record,

Regulation 10 appears to have been made in reliance on the power conferred by Section 23(2)(c),

Regulation 18(2) of the Representation of the People (Absent Voting at Local Government Elections) (Scotland) Regulations 2007 (inserted by Regulation 10 of this instrument) permits the Returning Officer to disclose information held in the personal identifiers record to specified persons,

whether the Scottish Ministers have the power under section 23(2)(c) to make the provision introduced by Regulation 10 which purports to specify the persons to whom, and purposes for which, a person other than the Registration Officer may disclose information.

ANSWER
The Scottish Government is relying on the power in section 61(2) of the 2006 Act in making this provision. Section 23 provides that a Registration Officer shall provide the personal identifiers record to a returning officer for use in an election. Regulation 10 is intended to ensure that candidates and agents attending absent vote proceedings during an election can be provided with access to personal identifier information to confirm that absent votes are being properly checked. As those proceedings are controlled by the Returning Officer, not the Registration Officer, the ability to disclose the information has to be given to the Returning Officer. The Scottish Government considers that this is a reasonable use of the power in section 61(2) to make provision that is supplemental and consequential on the supply of the information to the Returning Officer by the Registration Officer.

3. Whether the inclusion of definitions of the following terms—
"the 2007 Regulations" in Regulation 2,
"universal postal service provider" in the provisions inserted by regulation 6, and
"universal postal service provider" in regulation 11

is consistent with normal drafting practice given that in each instance the term defined is only subsequently referred to once in the operative part of the relevant instrument.

ANSWER
Regarding "the 2007 Regulations", although only used once in the operative part of the regulations, this phrase is also used in headings where it has some utility. However, it is accepted that a different approach could have been taken.
Regarding "universal postal service provider", in regulation 6, this approach avoids a cumbersome presentation of the provision at regulation 15B(1)(a), inserted by regulation 9. The definition appears in the equivalent Westminster Parliament absent voting regulations (SI 2001/497, Part 5, at Reg 64,) and the concept is used at several points in the equivalent Scottish Parliament absent voting provisions, but does not currently exist in the relevant 2007 local government absent voting regulations. It is accepted that a different approach could have been taken, however the legal effect is clear.

Regarding "universal postal service provider", in regulation 11, this approach simplifies the presentation of the provision at regulation 12(4). It is accepted that a different approach could have been taken, however the legal effect is clear.

The National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2009

On 18 February 2009 the Scottish Government was asked:

To explain why the several powers which are cited in the preamble, all contained within the National Health Service (Scotland) Act 1978, include sections 27(1) and (2) of that Act, given that subsection (1) is concerned with Health Board duties relating to arrangements for the provision of proper and sufficient drugs and medicines, and that subsection (2) is about making provision to ensure that persons for whom drugs are ordered receive them, whereas this instrument is essentially concerned with making provision for revised charges (in respect of which other relevant sections of the 1978 Act are cited).

The Scottish Government responds as follows:

We accept that section 27 of the National Health Service (Scotland) Act 1978 (“the Act”) mainly relates to making arrangements for the provision of pharmaceutical services rather than for charging for those services which is provided for under section 69 of the Act. The Scottish Government accepts that it is arguable that the citation of section 27(1) is not appropriate. However we considered it prudent to cite section 27(1) in the preamble to the Regulations given that the Scottish Ministers are making provisions in relation to exemption certificates issued in England, Wales and Northern Ireland, as section 27(1) expressly refers to these sorts of arrangements for provision under the health service outside of Scotland.

We consider that the citation of section 27(2) is appropriate. Section 27(2) provides that regulations shall provide for securing that arrangements made by a Health Board under subsection (1) will enable persons to receive drugs, medicines or appliances which have been ordered for them from persons with whom the arrangements have been made. This is to ensure that the arrangements which the Health Board has made fulfil the delivery of the pharmaceutical services to the persons which require them. Under regulation 3(4) of the principal Regulations a chemist shall be under no obligation to provide pharmaceutical services in respect of an order on a Scottish prescription form or equivalent prescription form unless the patient has paid the chemist any charge or one of the exemptions applies (the exemptions are those listed in regulation 7). Under
regulation 4(4) of the principal Regulations a doctor shall be under no obligation to supply drugs or appliances unless the patient has paid any charge or an exemption applies. As the provisions of regulations 3(4) and 4(4) of the principal Regulations relate to obligations to provide drugs and appliances we consider that they fall within the terms of section 27(2) and in amending the exemptions accepted section 27(2) is relied upon.

Section 27(1) and (2) were variously cited in the previous Regulations which amend the charges for drugs and appliances provided under the NHS in Scotland; SSI 2008/27, SSI 2008/105, SSI 2007/139 (paragraph (2) only), SSI 2007/317 (paragraph (2) only), 2006/246 (paragraph (2) only), SSI 2006/149 (paragraph (2) only). Whilst it is noted that these instruments performed a variety of different functions in relation to charges for drugs and appliances, it is considered they are consistent with our use of the cited powers in this instrument.

Even if the citation of these powers was surplus to the powers required, it is not considered that this would affect the validity or legality of this instrument. Relying on an excess of powers would not have any substantive legal effect on the instrument.