SUBORDINATE LEGISLATION COMMITTEE

AGENDA

19th Meeting, 2009 (Session 3)

Tuesday 2 June 2009

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

1. **Sexual Offences (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.

2. **Tobacco and Primary Medical Services (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

3. **Equality Bill (UK Parliament legislation):** The Committee will consider the powers to make subordinate legislation conferred on Scottish Ministers in the Equalities Bill (UK Parliament legislation).

4. **Draft instruments subject to approval:** The Committee will consider the following—
   - the Licensing (Mandatory Conditions) (Scotland) Regulations 2009 (SSI 2009/draft);
   - the Environmental Liability (Scotland) Regulations 2009 (SSI 2009/draft).

5. **Instruments subject to annulment:** The Committee will consider the following—
   - the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009 (SSI 2009/183);
   - the Police Pensions Amendment (Increased Pension Entitlement) (Scotland) Regulations 2009 (SSI 2009/185);
   - the Local Government (Discretionary Payments and Injury Benefits) (Scotland) Amendment Regulations 2009 (SSI 2009/187);
   - the University of the West of Scotland Order of Council 2009 (SSI 2009/194);
   - the Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment (No. 2) Order 2009 (SSI 2009/196).
6. **Instruments not laid before the Parliament:** The Committee will consider the following—

- the Judiciary and Courts (Scotland) Act 2008 (Commencement No.2) Order 2009 (SSI 2009/192);

7. **Annual report:** The Committee will consider a draft annual report for the Parliament year from 9 May 2008 to 8 May 2009.

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The papers for this meeting are as follows—

**Agenda Items 1-7**

Legal Brief  
Summary of Recommendations

**Agenda Item 1**

Sexual Offences Bill Supplementary Delegated Powers Memorandum

Letter from Minister for Justice

**Agenda Item 3**

Equality Bill LCM

**Equality Bill**

**Agenda Items 4-6**

Government Responses

**Agenda Item 7**

Annual Report
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 1**  
**Sexual Offences (Scotland) Bill as amended at Stage 2**

**Section 29(5A) – power to specify “relevant sexual offences” for the purposes of section 29(2)**

The Committee is invited to find the power in section 29(5A) to modify the list of relevant sexual offences set out in schedule 1Z acceptable given its restriction in scope and that it is subject to affirmative procedure.

**Section 32(8) – 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 is invited to find the power in section 32(8) to amend the definition of what constitutes a position of trust acceptable in principle and that it is appropriate that it should be subject to affirmative procedure.

**Section 45 – ancillary provision**

The Committee is invited to find the proposed amendments to ancillary powers set out in the Cabinet Secretary’s letter of 27 May acceptable.
Agenda Item 2  Tobacco and Primary Medical Services (Scotland) Bill

Paragraph 3 of Schedule 1 – power to prescribe the time after which a fixed penalty notice may not be given

The Committee may wish to report to the lead committee and the Parliament that, given that the power to set the time after which a fixed penalty may not be given is of importance in the context of the operation of the scheme and enforcement more generally, and that the power is not subject to any fixed limits within which it may be exercised, the power should be subject to affirmative procedure.

Paragraph 4 of Schedule 1 – power to prescribe the amount of fixed penalty and the discounted amount

The Committee may wish to report to the lead committee and the Parliament that, it considers the prescribing of maximum penalties which can be imposed for contravention of the law is a significant and important matter, whether it arises in the context of a civil or criminal enforcement regime. Accordingly it recommends that the exercise of the power to set maximum penalties should be subject to affirmative procedure.

Paragraph 11(2) – power to modify paragraph 5(1) and (4) of schedule 1 to substitute different deadlines for payment

The Committee may wish to report to the lead committee and the Parliament that, given the potential impact of the exercise of this power on individuals and that no clear justification has been given as to why it is necessary for the power to be exercisable without any limits as to what may be prescribed being set, it is appropriate that the exercise of the power be subject to affirmative procedure.
Agenda Item 3   Equality Bill (UK Parliament Legislation)

Clause 91(10): Qualifications bodies (Part 6)

The Committee may wish to report to the lead committee that it is content with this delegated power in principle, and that it is subject to negative resolution procedure.

The Committee may consider drawing to the attention of the lead committee that while the power in clause 91(10)(c) enables the Scottish Ministers to prescribe any “appropriate regulator” in Scotland for the purposes of clause 91, the Government’s Legislative Consent Memorandum, at paragraphs 20 to 25, indicates that the current appropriate regulator for Scotland is the Scottish Qualifications Authority alone.

Clause 92(3): Interpretation (relevant qualification)

Clause 145(3): Power to specify public authorities (Part 11)

The Committee may consider these powers to be acceptable in principle and that they should be subject to negative procedure.

Clause 147: Power to impose specific duties

Clause 148: Power to impose specific duties: cross-border authorities

The Committee may consider these powers to be acceptable in principle and that they should be subject to affirmative procedure.

Clause 149(5): Power to impose specific duties: supplementary

The Committee may consider this power (in clause 149(5)) to be acceptable in principle, and that it should be subject to affirmative procedure where the regulations would amend an Act, and otherwise negative procedure.
Clause 155(3): Designated transport facilities (Part 12)

Schedule 11, Part 1, paragraph 4: Single-sex schools turning co-educational

Schedule 14, paragraph 2: educational endowments

Schedule 17, paragraph 10: Disabled Pupils: Enforcement: Tribunals in Scotland

The Committee may consider these powers to be acceptable in principle, and that they should be subject to negative resolution procedure

Agenda Item 4 Draft instruments subject to approval

The Licensing (Mandatory Conditions) (Scotland) Regulations 2009 (SSI 2009/draft)

The Committee may wish to report this instrument to the lead committee and to the Parliament on the ground that there appears to be a doubt whether it is *intra vires*, and specifically whether regulation 2 which restricts the application of an existing mandatory licence condition set out in paragraph 13 of schedule 3 to the 2005 Act is within the scope of the enabling power cited, or the implied power within paragraph 11 of schedule 1 to the Interpretation Order.

The Environmental Liability (Scotland) Regulations 2009 (SSI 2009/draft)

The Committee may consider drawing regulation 18(1) and (2) (on allocation of costs) to the attention of the lead committee in relation to its consideration of the Regulations.

The Committee may consider that those paragraphs appear to be within the enabling powers contained in the European Communities Act 1972 to make the instrument, but that it should be drawn to the attention of the lead committee that regulation 18(1) requires a competent authority to determine the operators’ responsibility for the costs of environmental damage under the Regulations (where there is more than one operator). Regulation 18(2)(d) sub-delegates to the authority the ability to determine any other basis for the allocation of liability for such costs, beyond the options set out in regulation 18(2)(a) to (c).
Agenda Item 5  Instruments subject to annulment

The National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009 (SSI 2009/183)

The Committee may wish to report to the lead committee and the Parliament that this instrument contains a number of drafting errors set out in the correspondence with the Government but to note and welcome the Scottish Government’s commitment to bring forward a corrective instrument to address these errors prior to these regulations coming into force.

The Police Pensions Amendment (Increased Pension Entitlement) (Scotland) Regulations 2009 (SSI 2009/185)

The Committee may wish to draw this instrument to the attention of the Parliament on the grounds that a mistake has been made in a reference to a related statutory instrument. The Committee may wish to acknowledge that this mistake is unlikely to have any effect on the operation of this instrument. The Committee may wish to acknowledge and welcome the Scottish Government’s commitment to bring forward an amendment to correct the error.

The Local Government (Discretionary Payments and Injury Benefits) (Scotland) Amendment Regulations 2009 (SSI 2009/187)

The Committee may wish to report this instrument to the lead Committee and the Parliament on the following ground—

- In relation to the definition of “the Benefits Regulations” which is inserted by regulation 3(a)(ii) of these Regulations into the Local Government (Discretionary Payments and Injury Benefits) (Scotland) Regulations 1998, there are drafting errors in respect that the amendments in regulations 3(b), 3(c)(i), 12, and 25 refer to “the Benefit Regulations”. It is considered that these errors do not affect the validity of the instrument and are not thought likely to affect the operation of the instrument.

The Committee may wish to welcome that the Scottish Government have undertaken to correct the drafting errors in due course.
The University of the West of Scotland Order of Council 2009 (SSI 2009/194)

The Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment (No. 2) Order 2009 (SSI 2009/196)

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

Agenda Item 6  Instruments not laid before Parliament

The Judiciary and Courts (Scotland) Act 2008 (Commencement No.2) Order 2009 (SSI 2009/192)

The Custodial Sentences and Weapons (Scotland) Act 2007 (Commencement No. 2 and Transitional Provisions) Order 2009 (SSI 2009/197)

The Committee may wish to consider if it is content with these instruments.
SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Sexual Offences (Scotland) Bill. This Memorandum explains changes to the powers to make subordinate legislation under the Sexual Offences (Scotland) Bill resulting from amendments at Stage 2. This supplementary memorandum should be reading in conjunction with the original Delegated Powers Memorandum for the Bill.

AMENDMENTS TO DELEGATED POWERS

2. During Stage 2 proceedings, Scottish Ministers modified some of the delegated powers that were introduced by the Bill. These changes are designed to give Parliament a greater role in scrutinising subordinate legislation made under the Bill and respond to comments made by both the Subordinate Legislation Committee and the Justice Committee on these powers.

3. There follows a description of the delegated powers which have been amended at Stage 2.

Section 29(5A) – Power to specify “relevant sexual offences” for the purpose of section 29(2)

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution procedure

Provision

4. 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 (which are concerned with sexual activity involving or directed towards children 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 sexual offence’. Section 29(5) of the Bill, as introduced, provided Scottish Ministers with an order making power to specify what offences would be “relevant offences” for the purpose of section 29. This order making power was subject to negative resolution procedure.
5. Section 29(5) of the Bill, as amended at Stage 2, now provides that a “relevant offence” means an offence listed in schedule 1Z to the Bill (amendments will be made at Stage 3 so that section 29(5)(a) refers to “relevant sexual offences” to ensure consistency with the rest of section 29). Schedule 1Z provides a list of “relevant offences”. These are offences concerning sexual activity with children under the age of consent in Scotland, England & Wales and Northern Ireland. This schedule was introduced at Stage 2 in response to comments from the Justice Committee that “relevant offences” were not defined on the face of the Bill.

6. Section 29(5A) of the Bill contains an order making power which enables Scottish Ministers to modify the list of relevant offences contained in schedule 1Z. In line with the recommendation contained in the Subordinate Legislation Committee’s Stage 1 Report, the power to amend the Schedule to add new offences had been restricted to sexual offences involving children.

Reason for taking power

7. Although “relevant offences” are listed in a schedule to the Bill, it is considered appropriate to retain a power to add or delete offences from the list of “relevant offences” to ensure that there is flexibility to respond to changing legislation in all parts of the United Kingdom. It may be that primary legislation is brought forward in other parts of the United Kingdom which create new sexual offences in those jurisdictions or revoke the offences which are listed in schedule 1Z. The list of “relevant offences” will need to be updated in consequence of that legislation. Using this order making power provides the flexibility to take account of these changes, given that it may not be competent for the legislation brought forward in other parts of the UK to amend the schedule of “relevant offences”. Furthermore, as section 29(2) prevents a person from using a defence if he or she is charged with a “relevant offence”, it is also important that such changes are brought forward as soon as possible. An order making power provides the best mechanism to do this, as opposed to bringing forward primary legislation in Scotland which will be subject to longer timescales.

Choice of procedure

8. The Subordinate Legislation Committee’s Stage 1 Report recommended that, given the significance of the exercise of the proposed power in determining when a defence of mistaken belief as to age is available to an accused, any power to specify a “relevant offence” should be subject to affirmative resolution procedure. In light of the Committee’s recommendation, amendments were brought forward at Stage 2 which provide that the exercise of the power at section 29(5A) to amend the schedule of offences shall be subject to affirmative resolution procedure.
Section 32(8) – 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

Power conferred on: Scottish Ministers  
Power exercisable by: Order made by statutory instrument  
Parliamentary procedure: Affirmative resolution procedure

Provision

9. Section 31 creates an offence of sexual abuse of trust. It provides that a person commits an offence of sexual abuse of trust if he or she is aged 18 years or older and intentionally engages in a sexual activity with, or directed at, a person who is under 18 and in respect of whom he or she is in a position of trust. Section 32 defines “position of trust” for the purpose of the offence of sexual abuse of trust at section 31. Section 33 interprets terms used in section 32 of the Bill.

10. Section 32(8) provides the Scottish Ministers with an order making power to modify section 32 and 33, (other than section 32(8)) so as to add, delete or amend a condition constituting a position of trust. This order-making power was introduced at Stage 2 and replaces the order-making power at section 32(1) of the Bill, as introduced, which provided only an order making power to add new conditions which constitute a position of trust (and not to delete or amend existing conditions).

Reason for taking this power

11. The reason for widening the original power in section 32(1) of the Bill is to allow for sufficient flexibility to amend the definition of a ‘position of trust’ to reflect any future changes to the arrangements relating to the education or care of young people in Scotland. These changes may result in needing to amend or remove the conditions in section 32 (and modify section 33 to add, remove or modify the definition of any terms in section 33) as well as needing to create additional conditions. Ensuring that children are protected from harm by those in positions of trust or responsibility over them has been an area of policy subject to recent developments and it is possible that further developments in the future may necessitate changes to the definition of a ‘position of trust’. Without a power to modify and remove conditions (as well as add conditions) by statutory instrument, primary legislation will be required to ensure that this definition continues to accurately reflect the changes in circumstances in which positions of trust arise, which would be subject to longer timescales and inhibit Government’s ability to respond quickly to changes in the arrangements for the care and education of young people. Given these changes will impact on whether a person has committed a criminal offence, there is a need for the Government to give effect to such changes quickly.

Choice of procedure

12. The Bill as introduced provided that the order making power in section 32(1) was subject to negative resolution procedure. The Subordinate Legislation Committee’s Stage 1 Report recommended that, given the potential impact of the exercise of this power to widen the scope of the offence of sexual abuse of trust, affirmative resolution procedure is the appropriate level of Parliamentary scrutiny. In light of the Committee’s recommendation, amendments were brought forward at Stage 2 which provide that the exercise of the power at section 32(8) shall be subject to affirmative resolution procedure.
SEXUAL OFFENCES (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM
I am writing to you concerning the Scottish Government's proposed approach to amending the provision at section 45 of the Sexual Offences Bill, which 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.

The Subordinate Legislation Committee, in its Stage 1 Report, recommended that the order-making power should be amended so as to provide that any modification of primary legislation, however effected, should be subject to affirmative procedure. In our response to the Committee's Report, the Government undertook that, 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.

As I explained to the Justice Committee during Stage 2 consideration of the Bill on 31 March, we did not lodge amendments to section 45 at Stage 2 owing to general discussions of the matter which have taken place with parliamentary officials, as a similar issue has arisen with other legislation. We committed to lodge any amendments that are required at Stage 3.

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INVESTOR IN PEOPLE
Following consideration of the matter we now propose to amend the Bill at Stage 3 so as to require:

- Affirmative procedure for any ancillary order making consequential, incidental or supplemental provision, and
- Negative procedure for any ancillary order making transitional, transitory or saving provision.

We recognise that, as this Bill is replacing the common law and deals with a sensitive area, special circumstances apply in respect of this Bill. The first part of our proposed amendment therefore goes further than the undertaking given in our response to the Committee’s Stage 1 Report. It would mean that an order containing supplemental, consequential or incidental provisions would attract affirmative procedure regardless of whether it modified an enactment. For example, if an order made such provision adjusting the existing common law on criminal offences, it would be subject to the higher level of scrutiny provided for by affirmative procedure even though no enactment is modified. Our proposed amendment also avoids possible uncertainty that an amendment based on any provision modifying an Act could create with respect to exactly when a provision modifies primary legislation and when it does not.

The second part of our proposed amendment recognises that orders making transitional, transitory and savings provision deal with different issues. The Bill already contains significant transitional provision on the continuity of the law on sexual offences, and this has been subject to Parliamentary scrutiny. Retaining any aspect of the common law for a period of time, and when exactly the common law should be repealed is a matter for the timing of commencement orders as opposed to a savings provision. Transitory provision is concerned only with short term provision. We therefore consider that it is appropriate for orders containing such provision to attract negative procedure in the circumstances of this Bill.

I hope this information is helpful in explaining our proposed approach to amending the ancillary order-making power at section 45 at Stage 3.

KENNY MACASKILL
Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Health and Wellbeing, is:

“That the Parliament agrees that the relevant provisions of the Equality Bill, introduced in the House of Commons on 24 April 2009, to make provision within the legislative competence of the Parliament and to alter the executive competence of Scottish Ministers in respect of the public sector duty to promote equality, the hearing of disability discrimination school education cases by the Additional Support Needs Tribunals for Scotland, the arrangements for educational endowments, the power to prescribe qualification authorities in relation to equality, and transitional arrangements for single sex educational establishments, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Nicola Sturgeon MSP, Cabinet Secretary for Health and Wellbeing, under Rule 9.B.3.1(a) of the Parliament’s standing orders. The Equality Bill was introduced in the House of Commons on 24 April 2009. The Bill can be found at:

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

Content of the Equality Bill

3. The overarching aim of the Bill is to consolidate, simplify and, where appropriate, harmonise the different pieces of equality legislation that have been produced over the last forty years. The Bill will also create a new single equality duty on public bodies to tackle discrimination, promote equality of opportunity and encourage good community relations. The duty will cover race, disability and gender and also include age, sexual orientation, gender reassignment and religion or belief, replacing the three existing duties with a single framework.

4. There are 5 areas where the Bill currently triggers the need for legislative consent – the public sector duty to promote equality; the hearing of disability discrimination school education cases by the Additional Support Needs Tribunals for Scotland; the arrangements for educational endowments; qualification authorities; and transitional arrangements for single sex educational establishments to become co-educational. These are described below in more detail.

Public Sector Equality Duty

Background

5. The UK Government is proposing that the new single public sector duty will work along similar lines to the existing duties (race, disability and gender) and take a three “armed” approach to:
• Eliminate unlawful discrimination
• Promote equality of opportunity
• Promote good relations between different people.

6. These three arms will extend across equality strands – race, disability, gender, pregnancy and maternity, sexual orientation, gender reassignment, religion or belief and age.

7. In line with the existing duties the new single duty will take the form of a general duty set out in the Bill, to which (almost) all public bodies will be subject; and specific duties set out in Regulations which will apply only to larger key public bodies. The purpose of the specific duties is to enable better performance of the general duty.

Legislative Consent

8. In line with the existing duties, the Bill (clause 147) gives Scottish Ministers a Regulation making power for the specific duties. Scottish Ministers will have a power to make Regulations to impose specific duties on Scottish public authorities and the devolved Scottish functions of cross-border public authorities. The Bill includes a provision that Regulations for the specific duty may impose duties on a public authority that is a contracting authority within the meaning of the Public Sector Directive in connection with its public procurement functions. Before making Regulations to impose the specific duties, Scottish Ministers will be required to consult the Equality and Human Rights Commission.

9. Bodies subject to the general duty will be listed at a Schedule to the Equality Bill. Scottish Ministers will have a power to make Regulations to specify public authorities for the purposes of the general duty. Before making such Regulations, Scottish Ministers will require the consent of a Minister of the Crown.

10. These proposals to confer on Scottish Ministers a power to make Regulations to impose the specific duties, and to amend the relevant Schedule, alter the executive competence of the Scottish Ministers, thereby engaging the need for a Legislative Consent Motion.

Disability Discrimination Act (DDA) Cases In School Education – Proposed transfer to the Additional Support Needs Tribunals for Scotland (ASNTS)

Background

11. Currently all disability discrimination cases in school education in Scotland are heard by the Sheriff Court. The proposal in the Equality Bill is to extend the powers of the Additional Support Needs Tribunals for Scotland (ASNTS) to hear disability discrimination cases as in England and Wales. The intention is that all disability discrimination cases on the provision of education and associated services in all Scottish schools as well as cases around admissions and exclusions, will be heard by the ASNTS.

12. Some of the advantages of this change would be: the merits to parents of an expert body to hear appeals; a less confrontational system; more workable remedies; and, quicker more accessible hearings.
13. This issue of extending the jurisdiction of the ASNTS to hear claims of unlawful discrimination in relation to school education was first raised by the Disability Rights Commission (DRC, now EHCR) in 2005. The DRC wanted the new ASNTS to follow the same jurisdiction as in the equivalent Tribunals in England and Wales.

14. The Scottish Parliament was advised in October 2006 (PQ S2W 29191) that the Scottish Government intended to make such representations to Her Majesty’s Government. These representations were subsequently made with the result that this specific proposal was contained in the UK Government’s Discrimination Law Review. (Part 2 of the Green Paper – More Effective Law (Chapter 7, Page 115, paragraphs 7.5c and 7.27.)

15. We undertook wide consultation in Scotland with key stakeholders, including the DRC, from June to August 2007 on this specific Scottish Proposal.

Legislative Consent

16. The proposals in the Equality Bill (paragraph 10 of schedule 17) give Scottish Ministers a power to make rules as to the proceedings on a claim to the ASNTS, and the making of a claim, thereby engaging the need for a Legislative Consent Motion as Ministers’ executive competence is being altered.

Educational Endowments

Background

17. Benefactors of, or charities connected to, educational institutions often provide benefits to pupils in the form of scholarships, grants or endowments. If the school is single sex when the arrangement is set up – and some of these endowments date back to the 19th century – the endowment may well restrict the benefits to members of one sex. If the school becomes co-educational a modification is needed in order to enable the benefits to be offered to pupils of either sex. Although we know of only one order that has been made under section 79 – The Sex Discrimination (Geoffrey Simpson Bequest Modification) Order 1996 – no matter how infrequently used, we consider that the power so to modify such endowments should be retained.

18. At present, section 79 of the Sex Discrimination Act 1975 provides that power, whereby the Secretary of State may make such an order on the request of the trustees etc of the charity, in order to remove restrictions which discriminate on grounds of sex. Section 78 of the Act provides the equivalent power in relation to England and Wales. Whilst the English power too is used infrequently, Whitehall colleagues also wish an equivalent of section 79 to be retained in the Equality Bill.

Legislative consent

19. The proposals in the Bill (paragraph 2 of schedule 14) give Scottish Ministers a power to make an order modifying an educational endowment in Scotland which discriminates by restricting the beneficiaries to persons of one sex. The conferral of this power upon Scottish Ministers to prescribe is, in effect, an alteration of their executive competence, thereby triggering the requirement for a Legislative Consent Motion.
Qualification Authorities

Background

20. The Education (Scotland) Act 1996 sets out the Scottish Qualifications Authority’s functions. These include developing, awarding and accrediting qualifications and providing quality assurance.

21. The proposal in the Bill (clauses 92-94) is intended to clarify the respective duties of the regulator and awarding bodies in ensuring non-discrimination in relation to access to qualifications.

22. In England, there are a number of different awarding bodies operating in competition with each other, and a separate regulator. However, in Scotland, there is not a competitive market for general qualifications as there is in the rest of the UK. There is only one awarding body in Scotland, the Scottish Qualifications Authority (SQA), and it is a non-departmental public body, established under the Education (Scotland) Act 1996 and governed by a Board of members appointed by Ministers. It is accountable to Ministers and the Scottish Parliament for its functions which include a responsibility to develop qualifications and maintain standards. The SQA’s dual role of qualifications development and quality assurance is achieved by having in place robust and identifiable qualifications and quality systems which are strongly governed through the Board’s Qualifications Committee whose membership comprises independent stakeholders. Stakeholder views are also obtained through an Advisory Council which is made up of members appointed by Ministers from SQA’s key stakeholder sectors. The SQA’s dual awarding and regulatory roles have posed no problems in Scotland where standards have been consistently maintained.

23. It should therefore be stressed that the SQA has long-established and rigorous processes in place to ensure non-discrimination and has, to the Scottish Government’s knowledge, received no complaints to date that its procedures or conduct have given rise to discrimination.

Legislative Consent

24. Provisions in the Equality Bill (clauses 91-92) give Scottish Ministers the power to prescribe the regulator in Scotland in relation to obligations under the Equality Bill. Those provisions also confer a power on Scottish Ministers to prescribe relevant qualifications. Qualifications bodies are defined in the Bill as bodies that can confer a relevant qualification. In line with the Education (Scotland) Act 1996, in Scotland the regulator and qualification body will be the SQA.

25. The conferral of this power upon Scottish Ministers to prescribe is, in effect, an alteration of their executive competence, thereby triggering the requirement for a LCM.

Single-Sex Educational Establishments

Background

26. Under the Sex Discrimination Act 1975, the responsible body for a single-sex education authority school or grant aided school in Scotland, where it determines to alter its admissions arrangements so that the establishment will cease to be a single-
sex establishment, may apply to the Secretary of State for an order (a “transitional exemption order”) authorising discriminatory admissions during the transitional period specified in the order. Independent schools apply to the Equality and Human Rights Commission for such an Order.

Legislative Consent

27. The Bill (paragraph 4 of schedule 11) proposes to replicate this regime but conferring the power to make Orders in relation to an education authority school or a grant aided school in Scotland, upon Scottish Ministers. The conferral of this power to make Orders upon Scottish Ministers is, in effect, an alteration of their executive competence, thereby triggering the requirement for a LCM.

Consultation


29. In relation to the ASNTS provisions, the Scottish Government undertook wide consultation in Scotland with key stakeholders including the Disability Rights Commission from June to August 2007 on this specific Scottish proposal. There is general support from stakeholders for this move.

Financial Implications

Public Sector Duty

31. The public sector is already pursuing policies which are designed to promote equality of opportunity in relation to race, disability and gender. The legislative requirements for each are slightly different, although the need to consult communities and publish schemes and reports on progress are common. A move to a single consolidated equality duty, albeit one which covers more equality groups, may offer an opportunity for savings, since the requirements will now be uniform and there will no longer be a need for separate documentation.

32. Given existing requirements to promote race, gender and disability equality additional financial consequences arising specifically from the extension of the public sector duty are unlikely to be significant.

Additional Support Needs Tribunals for Scotland (ASNTS)

33. The financial significance of the extension of the jurisdiction of the ASNTS to hear school disability discrimination appeals is minimal and may result in minor savings to education authorities. The Financial Memorandum relating to the Education (Additional Support for Learning) (Scotland) Bill was brought before the Scottish Parliament on 6 October 2008 and notes that an indicative average cost for an education authority case going to the ASNTS is £5,000 and for a case going to a Sheriff
Court is around £9,000. Therefore, the move of cases from the Sheriff Court to ASNTS may offer an opportunity for savings, potentially £4,000 per case. From information received, numbers of school disability discrimination appeals are small eg 9 cases from April 2004-April 2009, around 2 cases per year. Therefore potential savings to authorities may be around £8,000 per year. In addition, the President of the ASNTS advises that the ASNTS has the capacity to take on additional cases.

**Educational endowments**

34. There are no financial implications consequent upon the change in respect of educational endowments. The provisions in the Bill simply replicate, for the Scottish Ministers, existing powers contained in the Sex Discrimination Act 1975.

**Qualification authorities**

35. There are no financial implications associated with the qualification authorities provisions.

**Transitional arrangements for single sex educational establishments to become co-educational**

36. There are no financial implications consequent upon the change in respect of these transitional arrangements. The provisions in the Bill again simply replicate, for the Scottish Ministers, existing powers contained in the Sex Discrimination Act 1975.

**SCOTTISH GOVERNMENT**

May 2009
The Environmental Liability (Scotland) Regulations 2009 (SSI 2009/draft)

On 21st May 2009 the Scottish Government was asked:

…but in relation to this instrument to explain the grounds on which it is considered that regulation 18(1) and (2) are within the enabling powers in section 2(2) and Schedule 2 of the European Communities Act 1972?

This is given that it appears these provisions sub-delegate to competent authorities powers to determine the responsibility of the operators for the costs of environmental damage (in the case of activities of more than one operator) and the basis on which responsibility between operators is allocated, and legislative sub-delegation is not generally permitted by virtue of paragraph 1 of Schedule 2 to the 1972 Act.

The Scottish Government responds as follows:

Regulation 18 (1) and (2) simply provide for the competent authority in question to carry out an administrative act rather than sub – delegating a legislative power. Regulation 18(1) and (2) clearly contain no power to legislate by any of the means referred to in paragraph 1(1)(c ) of Schedule 2 to the European Communities Act 1972. The provisions are considered to be within the enabling powers of section 2(2) of the 1972 Act, specifically section 2(2)(b) of that Act as being provisions for the purpose of dealing with matters arising out of the implementing of the Directive.

The Licensing (Mandatory Conditions) (Scotland) Regulations 2009 (SSI 2009/draft)

On 20th May 2009 the Scottish Government was asked:

…to explain the vires for regulation 2 which modifies schedule 3 of the Licensing(Scotland)Act 2005 so as to restrict the operation of an existing condition set out in paragraph 13 of that schedule given that:

(a) the enabling power cited by the Scottish Government (section 27(2) of the 2005 Act) is restricted to adding further conditions to the list in schedule 3 or extending the application of an existing condition; and

(b) paragraph 11 of Schedule 1 to SI 1999/1379 (the Interpretation Order) appears to have no application to the present exercise of the power to amend the 2005 Act given that:

(i) paragraph 11 clearly states that it only implies that the enabling power, in section 27(2), may be used to revoke, amend or re-enact any instrument made under the power,
The Scottish Government responds as follows:

The amendments being proposed in the Licensing (Mandatory Conditions)(Scotland) Regulations 2009 are intended to relax the conditions (specifically paragraph 13) added to schedule 3 of the Licensing (Scotland) Act 2005 by the Licensing (Mandatory Conditions)(Scotland) Regulations 2007.

The Government acknowledge that the enabling power in section 27(2) of the 2005 Act may not give Ministers the power to revoke or restrict the conditions contained in schedule 3 as originally enacted. Accordingly, Ministers propose to make use of the implied powers contained in paragraph 11 of Schedule 1 to SI 1999/1379 (the Interpretation Order) to revoke the 2007 Regulations in their entirety and re-enact them subject to the modifications currently being proposed.

To address the questions posed by SLC:

(a) The enabling power in section 27(2) allows additions to be made to the conditions contained in schedule 3 but does not allow any revocation or amendment of the conditions originally enacted. The Government’s view is that there is nothing in the enabling power to restrict Ministers’ power to revoke or amend any additional conditions added by Regulations made under that power.

(b)(i) The Government are of the view that any amendment to the 2005 Act is indirect. The proposed Regulations seek to revoke the 2007 Regulations and this is within the implied powers detailed in paragraph 11.

(b)(ii) The Government’s view is that there is an implied power to revoke the 2007 Regulations by virtue of paragraph 11 and there is nothing in section 27(2) to indicate that this is not the case. If the contrary view is accepted then any mandatory conditions added to schedule 3 through the operation of section 27(2) would require to remain in force until the 2005 Act itself is amended either by the alteration of the enabling power or by direct alteration of schedule 3.

The NHS (Pharmaceutical Services) (Scotland) Regulations 2009 (SSI 2009/183)

On 20 May 2009 the Scottish Government was asked:

1. to explain whether regulation 8 can have application to the alternative Form A for use by persons who are not pharmacists and, if so, how the references in regulation 8(2)(a) and (4) to paragraph 2(b) are to have effect given that paragraph 2(b) of the alternative form covers matters which are different to Form A for use by pharmacists and Form A (MR).
The Scottish Government responds as follows:

It is accepted that regulation 8 can have application to the alternative Form A for use by persons who are not pharmacists. It is also accepted that references in regulation 8(2)(a) and (4) to paragraph 2(b) of Form A cannot have proper effect in respect of the said alternative Form A given that different matters are covered in paragraph 2(b) therein. The appropriate corresponding paragraph in the alternative Form A is paragraph 3.

As these Regulations are a consolidating instrument the wording of regulation 8 has not been changed from that which was used in the National Health Service (Pharmaceutical Services) (Scotland) Regulations 1995 (S.S.I. 1995/414) (“the 1995 Regulations”). The forms in Schedule 2 are also the same as those in the 1995 Regulations.

Whilst in practice no problem has been identified in relation to this inaccuracy we consider that it would be appropriate to clarify regulation 8 and we will bring forward an amending instrument to do so that will come into force on the same day as these Regulations.

2. The Scottish Government was also asked whether the following are errors, and if so, what the effect of any error is considered to be:

(a) the reference to paragraph (3) instead of paragraph (4) in regulation 9(1);

(b) the reference to paragraph (3) instead of paragraph (1) in regulation 11(5);

(c) the reference to determinations of the Board by virtue of regulation 13(2) where the Scottish Ministers appear to have such a function under that provision;

(d) whether “Schedules 4 and 5” should read “Schedules 4 or 5” in paragraph 4(10) of Schedule 1;

(e) whether the last sentence of note 1 to Form A for use by persons other than pharmacists should omit “persons other than”;

(f) whether paragraph 1(2) of Schedule 5 should refer to regulation 12 of the 2009 Regulations and substitute reference to the Scottish Ministers for reference to the Secretary of State;

(g) whether paragraph 2(2) of Schedule 5 should have amended the reference from regulation 9 of the 1995 regulations to regulation 12 of the 2009 Regulations.

The Scottish Government responds as follows:

The Scottish Government accepts that these are errors which we will correct, subject to our comments below, when bringing forward the amending instrument as detailed above.

The Scottish Government also explains that:
in relation to question (c) we understand this to mean the reference to regulation 13(2) in regulation 15(1)(e) (publication of particulars). This should refer to a determination made by the Board by virtue of regulation 12(2) and we will draft the amendment accordingly; and

in relation to questions (f) and (g) we understand the relevant schedule to be Schedule 6.

The Police Pensions Amendment (Increased Pension Entitlement) (Scotland) Regulations 2009 (SSI 2009/185)

On 21 May, the Scottish Government was asked:

Regulation 3(b) inserts paragraph (2B) in regulation E8 of the Police Pensions Regulations 1987 (SI 1987/257). The inserted paragraph (2B)(a) refers to 'an additional benefit within the meaning of paragraph 4 of Part V of Schedule B (of 1987/257). Is it intended that the reference should be to paragraph 4 of Part V of Schedule B of 1987/257 given that Part V of Schedule B appears to have been revoked by schedule 2 Part 3 para. 1 of SSI 2007/68?

The Scottish Government responds as follows:

Part V of Schedule B to the Police Pensions Regulations 1987 ("Part V") was revoked by paragraph 1 of Part 3 of Schedule 2 to the Police (Injury Benefits) (S) Regulations 2007 (SSI 2007/68). The reference in the new paragraph (2B) of regulation E8 of the Police Pensions Regulations 1987 should not have been to paragraph 4 of Part V, but to paragraph 7 of Schedule 3 to SSI 2007/68 which replaced Part V. The Scottish Government is grateful to the Subordinate Legislation Committee for bringing this error to its attention.

As to the effect of the error, it is considered that whilst reference should have been made to paragraph 7 of Schedule 3 to SSI 2007/68, the incorrect reference is unlikely to give rise to difficulties in practice as those responsible for administering the regulations are aware that Part V was replaced by Schedule 3 to SSI 2007/68 (which makes similar provision) and the error in the instant regulations can be drawn to their attention by means of a circular. In addition, it is considered that it is possible to rely on section 17(2)(a) of the Interpretation Act 1978 which provides that where an act repeals and re-enacts, with or without modification, a previous enactment, then any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted.

The Scottish Government expects to further amend the Police Pensions Regulations 1987 before the end of the year, and intends to bring forward an amendment to cure the error in these regulations at that time.
On 21st May 2009 the Scottish Government was asked:

“In relation to the definition of “the Benefits Regulations” which is inserted by regulation 3(a)(ii) of these Regulations into the Local Government (Discretionary Payments and Injury Benefits) (Scotland) Regulations 1998, while there are various references to that term in these Regulations, the amendments in regulations 3(b), 3(c)(i), 12, and 25 refer to “the Benefit Regulations”.

What is the effect of this apparent error considered to be?”

The Scottish Government responds as follows:

The Scottish Government thanks the Committee for pointing out the references to “the Benefit Regulations” in regulations 3(b), 3(c)(i), 12, and 25, which should read “the Benefits Regulations”. It is considered that these references are unlikely to be interpreted to mean anything other than “the Benefits Regulations” as defined in regulation 3(a)(ii) however in order to improve clarity for the reader the Government will bring forward amendments at the next available opportunity.
Subordinate Legislation Committee

Draft Report on Annual Report

The Committee reports to the Parliament as follows—

Introduction

1. This Report covers the work of the Subordinate Legislation Committee during the parliamentary year from 9 May 2008 to 8 May 2009. The Committee has scrutinised a number of bills and instruments again this year, reporting to subject Committees and the Parliament on issues such as the scope of delegated powers, and whether delegated powers are within vires as well as on detailed drafting issues.

Inquiry into the Regulatory Framework in Scotland

2. The Committee completed its inquiry into the regulatory framework in Scotland, and published its report on 18 March 2008. Following this report, the Committee has been in constructive dialogue with the Scottish Government on its recommendations to improve the scrutiny of secondary legislation and which will be implemented in large part by the forthcoming Legislative Reform (Scotland) Bill, which is expected to be introduced before the summer recess. This will form a major part of the Committee’s workload during 2009-10.

Bills

3. The Committee considers delegated powers provisions in Government, Members’, Committee and Private bills. Over the reporting period, the Committee has considered and reported on 14 bills at Stage 1 and 3 bills as amended at Stage 2. As with previous years, the recommendations of the Committee on bills have led to a number of changes by the Government to relevant provisions, and through its scrutiny process the Committee continues to ensure that the correct balance between primary and secondary legislation is maintained.

4. The Committee has considered more legislative consent memorandums (7) than in any previous year. These are Westminster Bills which seek to change the law or alter Scottish Ministers’ or the Scottish Parliament’s powers in relation to devolved matters.
Subordinate Legislation

5. The Committee has continued to work to tight timescales in its consideration of subordinate legislation, producing 60 reports over the reporting year. During the parliamentary year, the Committee published 36 statutory instrument reports, reporting on 341 Scottish Statutory Instruments in total.

6. Of the instruments considered, 62 were subject to affirmative procedure, 212 to negative procedure, and 67 which were either not laid or not subject to Parliamentary procedure.

Equalities

7. The Committee considers equalities issues which can arise under the European Convention on Human Rights and under Community law. It is part of the Committee’s remit to draw the attention of lead committees and the Parliament to any instrument that in its opinion fails to comply with any such requirement.

8. It is also within the Committee’s remit to report any instrument on the grounds of an unusual or unexpected use of a power which raises equalities issues.

9. The Committee also scrutinises drafting practice and so points out, for example, failure to use gender neutral language in instruments.

Meetings

10. During the parliamentary year, the Committee met 35 times. Of these meetings, none were entirely in private and 12 were partly in private.

11. All the meetings have been held in Edinburgh.