The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

25th Meeting, 2009 (Session 3)

Tuesday 22 September 2009

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 6 in private.

2. **Public Services Reform (Scotland) Bill:** The Committee will take evidence on the delegated powers provisions in the Bill at Stage 1 from—

   Colin Miller, Head of Public Bodies Policy Team, Kirsty McGrath, Branch Head, Solicitors Health and Community Care Division, SGLD, and John St Clair, Divisional Solicitor, Constitutional and Civil Law Division, SGLD, Scottish Government.

3. **Interpretation and Legislative Reform (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

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

   the Teaching Council (Scotland) Act 1965 Modification Order 2009 (SSI 2009/draft);
   the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2009 (SSI 2009/draft).

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

   the Children’s Hearings (Scotland) Amendment Rules 2009 (SSI 2009/307);
   the Education (Fees, Awards and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2009 (SSI 2009/309);
   the Legal Aid (Supreme Court) (Scotland) Regulations 2009 (SSI 2009/312).
6. **Public Services Reform (Scotland) Bill:** The Committee will consider the evidence from Scottish Government officials.

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The papers for this meeting are as follows—

**Agenda Items 2-6**

- Legal Brief  
  SL/S3/09/25/1 (P)
- Summary of Recommendations  
  SL/S3/09/25/2

**Agenda Item 2**

- Public Services Reform (Scotland) Bill - Government response  
  SL/S3/09/25/3
- Paper by the Clerk  
  SL/S3/09/25/4 (P)

**Agenda Items 4 and 5**

- Government responses  
  SL/S3/09/25/5
The Committee will be invited to consider the following recommendations under consideration at the meeting. Decisions are a matter for the Committee.

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## Agenda Item 3
**Interpretation and Legislative Reform (Scotland) Bill**

### Section 1(7) – Application of Part 1 – Definition of “Scottish instrument”

The Committee may wish to ask the Scottish Government—

(a) to explain why it has elected to adopt a more restricted and closed definition of Scottish instrument together with a power to amend the definition which is a change in approach to that taken by the Interpretation Order and the draft Bill it consulted upon.

(b) to explain why it is considered necessary or appropriate to take a power to remove categories of Scottish instrument, as well as to add further types?

(c) to explain the effect of the exercise of the power in section 1(7) to remove any of the types of instrument listed in section 1(4) (in relation to the interpretation and construction of such types of instruments made on or after the day when Part 1 of the Bill comes into force but before the change to the list), that would be affected by the change, and to comment on whether any such effects are considered to be desirable?

(d) to explain whether it is intended that Orders of Council, Acts of Sederunt and Acts of Adjournal should be included within the current scope of the list in section 1(4) of the Bill as “Scottish instruments”, and whether this could be made clearer?

### Section 25(2) – Definitions in schedule 1

The Committee may wish to ask the Government to explain—
(a) Given it is not explained in the DPM, why is it intended to include words and expressions in Schedule 1 based on a "frequent use" test, rather than other reasons for inclusion that might be used?

(b) Has the Government considered whether any of the definitions as listed in Schedule 1 should be exempt from the power to modify definitions; for example, because they are of fundamental constitutional importance?

(c) Can the Government explain why a power to modify is considered necessary rather than a power to add new definitions?

(d) Has it been considered whether the exercise of the proposed general power to modify the definitions in Schedule 1 might alter the effect of existing Acts or instruments if terms are redefined in future?

(e) Could the Bill make clearer that any future changes to the defined terms in Schedule 1 would only affect Acts or instruments made after the coming into force of the change?

Section 34(2) – Power to change procedure to which subordinate legislation is subject

The Committee may wish to ask the Scottish Government to explain why it has considered that, following a resolution of the Parliament in terms of section 34(1), the Scottish Ministers should have the discretion, rather than the requirement, to make an order making the necessary modification of any enactment to give effect to the resolution?

Section 42(1) – Publication, numbering and citation: regulations

The Committee may wish to ask the Government to explain—

(a) how it envisages the power in section 42(2)(a) to prescribe the form of SSIs could be used? Has the Government considered if some ways of prescribing the form (as hypothetical examples, the length of instruments or formal requirements for the title) could affect the actual contents, and whether it is desirable to make clear in the power that the contents cannot be so prescribed?; and

(b) in relation to section 42(2)(g), can the Government clarify the present arrangements by which charges for copy instruments, lists and annual editions are set? Would the Government agree that paragraph (g) could enable charging for access to copy instruments on the OPSI or OQPS websites, and is it intended that any such (hypothetical) proposal could fall within the enabling powers in section 42?
Section 57(3) – Commencement

The Committee may wish to consider the commencement power in section 57(3) of the Bill to be acceptable and may wish to be content that it is not subject to procedure.

Agenda Item 4 Draft Instruments subject to approval

The Teaching Council (Scotland) Act 1965 Modification Order 2009 (SSI 2009/draft)

The Committee may wish to report that it considers it good practice for amendments to primary legislation to remove any resulting redundant provisions. The Committee may therefore wish to welcome the Government’s commitment to do so in the context of the forthcoming changes to the status of the General Teaching Council.

The Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2009 (SSI 2009/draft)

The Committee may wish to consider if it is content with this instrument.

Agenda Item 5 Instruments subject to annulment

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

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

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

The Committee may wish to report that an explanation has been sought and provided by the Scottish Government in relation to the references to “the Locally
Engaged Staff Assistance Scheme (Direct Entry) operated by the Home Department”, in regulations 2, 4, 7, 12, 13, 15, 17 and 18, with which the Committee is satisfied.

The Legal Aid (Supreme Court) (Scotland) Regulations 2009 (SSI 2009/312)

The Committee may wish to report to the lead committee and the Parliament that it requested further information from the Scottish Government with which it is satisfied.
On 9 September the Scottish Government was asked:

Schedule 2, paragraph 2 - Power for the Court of Session (1) to regulate the conduct of officers of court in exercising their extra-judicial functions and (2) to prescribe the procedure in relation to appeals under section 82 of the Debtors (Scotland) Act 1987

The Committee asks the Scottish Government to explain why it has been considered appropriate that any provisions which shall exercise the power in Schedule 2, paragraph 2(a)(i) of the Bill of the Court of Session to regulate the conduct of officers of court in exercising their extra-official functions shall not be laid in Parliament (because an Act of Sederunt would not require to be laid), whereas any code of practice for persons undertaking “informal debt collection” that would have been issued by the Scottish Civil Enforcement Commission under section 56(2) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (as repealed by this Bill) would have been laid before the Parliament for consideration?

The Scottish Government responds as follows:

The power to regulate the extra-official functions of officers of court by rules of court, which is added to the existing powers of the Court of Session by schedule 2, paragraph 2(a)(i) of the Bill, replaces the power in section 61(4) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 for the Scottish Civil Enforcement Commission to make rules regulating judicial officers. The 2007 Act does not require those rules, which the Bill would replace by the widened rules of court power, to be laid in Parliament.

The repeal of the provisions establishing the Commission by the Bill would render unnecessary the Commission’s specific power in section 56(2) of the 2007 Act to publish information and other material to promote good practice and inform the public about informal debt collection. The rationale for removing this power is that this information and material can instead be published - without the need for any specific statutory power - by the professional association to be designated under section 63 of the 2007 Act. The Scottish Ministers also have the power by negative regulations to add to the functions of the professional association. In line with the other arrangements in the Bill for regulating officers of court, the Bill otherwise relies on the existing supervisory structures of the Court of Session.
Section 46(4) - Power to make further provision about the preparation, content and effect of reports

The Committee asks the Scottish Government—

- what is meant by ‘further provision about the effect of reports’ under section 46? Given that this is a matter of substance rather than an administrative or procedural matter what is the rationale behind and justification for this element of the power?

- in particular, is it intended that the power could be exercised to make substantive provision as to duties to implement the findings of reports or other sanctions?

- if so, why is a power required as opposed to making specific provision as to effect in the Bill and why would negative procedure be considered appropriate?

The Scottish Government responds as follows:

In inspecting social services SCSWIS can carry out various types of inspection; an inspection of ‘care services’, an inspection of ‘social work services’, a combination of both or an inspection of the co-ordination and organisation of any social service or services. Dependent upon the type of inspection carried out, the report generated will have differing effects. In the most straightforward of cases such as an investigation into a care service the effects of the report will be straightforward in that they may result in action being taken by SCSWIS in terms of chapter 3 or 4 of Part 4.

However SCSWIS will be able to carry out an integrated and varied inspection programme combining (within the one inspection), inspections of social work services and care services, and/or inspections relating to an individual’s care journey and a more strategic overview of an organisation’s delivery of services. This flexibility of inspection is to be allied with a flexibility on the effect of the outcome of these inspections: the reports.

Subordinate legislation under this provision will set out the effect of the report, be that to prescribe that a certain type of report is to be sent to the Scottish Ministers, (based on content or just by virtue of its remit) or elsewhere.

It is not thought appropriate to set out in primary legislation detailed rules on the effect of the reports on various combinations of inspection types that SCSWIS can carry out. Further as SCSWIS innovates new methods in simplifying and streamlining its inspection programme by combining various inspection types it is important that the reports produced by them are able to be used in ways which suit those new methods, and accordingly delegated legislation will provide such flexibility.

This matter is administrative as it will be parasitic upon the range of inspections which SCSWIS is empowered to carry out on the face of the Bill. The Scottish Government does not think that it would be a competent use of the power to make substantive provision as to duties to implement the findings of reports or other sanctions, through use of regulations under this subsection. Any regulations made have to be read within the context of Part 4 of the Bill which clearly sets out the specific duties and sanctions available to SCSWIS and Scottish Ministers. The general powers in section 46(4) could not be competently framed to provide rights or duties in addition to, or contrary to them.
Section 47 - Power to make further provision for conducting inspections

The justification for the power (in para. 39 of the DPM) is restricted to the provision of matters of “technical and administrative detail” and to the need for amendment of provisions from time to time. The Committee, therefore, asks the Scottish Government——

- whether the powers in respect of interview, mental and physical examination and disclosure in sections 47(2)(f) and (h) are properly to be considered as only administrative detail;

- to explain why the proposals for these powers cannot be put before the Parliament for consideration in the Bill; and

- how and for what purposes it is intended that the powers in section 47(2)(f) and (h) will be exercised?

The Scottish Government responds as follows:

The regulation making powers in section 47(2)(f) and (h) provide that regulations may be made setting out the practical implementation of the substantive provisions; that interviews and physical and mental examinations may be carried out and that information may be disclosed, in consequence of an inspection under Part 4. They will include who may carry out interviews, the circumstances surrounding same, the types of person to whom information with regard to the inspections may be disclosed, and the types of information that will be subject to such provisions. These powers are flexible given the new inspection regime will bring together different types of inspection (as explained in the government’s response to the Committee’s questions on section 46(4)), and will provide for the different permutations and combinations of inspections that will be carried out by SCSWIS. The Government recognises that these issues are significant however and has set out in the Bill that regulations under section 47 are to be subject to affirmative procedure. The Government will also provide draft regulations for the committee’s consideration prior to the commencement of stage 2 scrutiny in Parliament.

Section 53(1)(c) – Power to prescribe grounds on which SCSWIS may propose to cancel the registration of a care service

Given the potential effect of a proposal to cancel a registration, the Scottish Government is asked to give further consideration to the choice of negative procedure which can allow a change in the criteria for cancellation to be brought into force within 21 days. In light of the significance for service providers and those who receive services, would affirmative procedure not be more appropriate?

The Scottish Government responds as follows:

The Government notes the Committee’s concern on this matter, however would point out that this power represents a re-enactment of the provisions of section 12(1)(c) of the Regulation of Care (Scotland) Act 2001. Regulations under section 12(1)(c) were subject to negative resolution procedure, an approach which met with the approval of the Parliament at the time, and there has been no comment in the past eight years that this
procedure was the wrong one. We therefore see no need to change the procedure in this re-enactment.

Section 62(1) - Power to make regulations relating to the registration of care services

The Scottish Government is asked to clarify what is intended by the reference in section 62(1)(b)(iii) to ‘categories of applicant who cannot competently make applications’ and how it is envisaged that this element of the power may be exercised. Is it intended that this power could set out criteria for eligibility to provide services and, if so, the Scottish Government is asked to explain why this is considered administrative and not a matter of substance which would be better suited to primary legislation? If subordinate legislation is required why would negative procedure be appropriate?

The Scottish Government responds as follows:

The intent of this provision is to permit regulations to set out categories of applicant who cannot competently make an application. It will work in unison with the provisions under section 53(1)(c) in order to ensure that those who are subject to the prescribed grounds for cancellation in section 53 are also not permitted to apply to provide care services. This is a re-enactment of section 28(1)(c)(iii) of the Regulation of Care (Scotland) Act 2001. Regulations under section 28(1)(c)(iii) were subject to negative resolution procedure, an approach which met with the approval of the Parliament at the time, and, as with section 53(1)(c) above there has been no comment in the past eight years to indicate that this was the wrong procedure. We therefore see no need to change the procedure in this re-enactment. It is not intended that this power could be used to set out criteria for eligibility to provide services in the wider sense, the government believes that this would require regulations to be made under section 63 of the Bill.

Section 76(5)(c) - Power to prescribe an Act and thereby add the requirements or conditions contained in that Act to the list of relevant requirements

The Committee asks the Scottish Government—

• to explain why this power is considered administrative rather than substantive given its effect is to extend the reporting system with the enforcement mechanisms that apply to other matters;

• whether it has reviewed other enactments at this point with a view to considering what should be added to the reporting system; and

• why it would be necessary to take this power in relation to new legislative provisions since at the time they are made consideration could be given to including them within this section?

The Scottish Government responds as follows:

The Government notes the Committee’s views on this matter, however would point out that this power applies in relation to care services referred to in section 68(1) in the same way as the power in section 53(1)(c) applies to other care services. Instead of
cancellation of services based on a prescription under section 53(1)(c) the Bill provides for reporting to the Scottish Ministers based on a prescription under section 76(5)(c). It further represents a re-enactment of the provisions of section 41(4)(b)(iii) of the Regulation of Care (Scotland) Act 2001. The Scottish Government prefers to retain the flexibility of adding or revoking prescribed Acts which contain conditions or requirements through the use of subordinate legislation, avoiding the possibility of repeated changes to this primary legislation that could occur if named ‘other Acts’ were to be amended or repealed and subsequently become unsuitable for prescription. Accordingly the Scottish Government’s review of the other enactments will lead instead to subordinate legislation though use of this power.

The Scottish Government accepts that at the time of the making of new legislation amendment could be made imposing any requirements or condition that they contain upon the authorities concerned, however matters may not be considered relevant at the time of the new legislation passing, and may subsequently become so, it is therefore sensible to adopt this approach.

Section 76(6) - Power to prescribe matters in relation to a care service registered under Chapter 4 of Part 4, upon which SCSWIS must report and provide information to the Scottish Ministers

Given that section 76(6) refers to ‘such other matters in relation to a care service’, the Scottish Government is asked if it is intended that the exercise of the power will be of general application (i.e. applying to all care services) or specific application (to individual care services)?

The Scottish Government responds as follows:

The power in section 76(6) is limited in its application only to services registered under chapter 4 and accordingly is of specific application to only those services which fall within the provisions of section 68(1) but could apply to both individual care services falling within the provisions of section 68(1), or all such care services, when read with section 87(1)(b).

National Health Service (Scotland) Act 1978
Section 10D(1) - Power to delegate functions

The Committee asks the Scottish Government—

- Given the restricted nature of HIS as a body concerned with the improvement of health care services why it is necessary to have a power to delegate to it any of the Scottish Ministers functions in relation to the health service?

- Given that legal liability for the exercise of the delegated functions is transferred from the Scottish Ministers to HIS, to explain why affirmative procedure would not be merited?
The Scottish Government responds as follows:

HIS is to be a Non Departmental Public Body (NDPB) set up under the National Health Service (Scotland) Act 1978 (the “principal Act”). It is to be established in a similar way to the Common Services Agency established under section 10 of that Act. Section 10(3) of the principal Act provides for the delegation of Scottish Ministers’ functions to the NDPB by order. Further HIS (with regard to its role of ensuring quality of service provision within the NHS) takes over the functions currently exercised by NHS Quality Improvement Scotland, a special health board; section 2(1)(b) of the principal Act provides for the delegation of Scottish Ministers’ functions to a special health board by order subject to negative resolution procedure. Accordingly it is the government’s view that this function is appropriately drafted and subject to the appropriate procedure in keeping with the approach laid out in the principal Act.

National Health Service (Scotland) Act 1978 Section 10M(4) - Power to make regulations to make further provision about the preparation, content and effect of reports

The Committee asks the Scottish Government—

- what is meant by ‘further provision about the effect of reports’ under section 10M(4)? Given that this is a matter of substance rather than an administrative or procedural matter what is the rationale behind and justification for this element of the power?

- In particular, is it intended that the power could be exercised to make substantive provision as to duties to implement the findings of reports or other sanctions; and

- if so, why is a power required as opposed to making specific provision as to effect in the Bill and why is negative procedure appropriate?

The Scottish Government responds as follows:

The provisions relating to HIS inspections and reports mirror to a large degree the provisions which have been drafted with regard to SCSWIS inspections and reports under section 46(4); accordingly the Government provides a similar explanation. In inspecting services provided under the health service and independent health care services HIS can carry out various types of inspection; an inspection of services provided under the health service under Section 10I, an inspection of independent health care services under section 10J or, at the request of the Scottish Ministers, an inspection of both under section 10L(1)(d). This flexibility of inspection is to be allied with a flexibility on the effect of the outcome of these inspections: the reports. Dependant upon the type of inspection carried out the report generated will have differing effects.

Subordinate legislation under this provision will set out the effect of the report, be that to prescribe that a certain type of report is to be sent to the Scottish Ministers, (based on content or just by virtue of its remit) or elsewhere.

It is not thought appropriate to set out in primary legislation detailed rules on the effect of the reports on various combinations of inspection types that HIS can carry out. Further
as HIS innovates new methods in simplifying and streamlining its inspection programme by combining various inspection types or methods it is important that the reports produced by them are able to be used in ways which suit those new methods, and accordingly delegated legislation will provide such flexibility.

This matter is administrative as it will be parasitic upon the range of inspections which HIS is empowered to carry out on the face of the Bill. The Scottish Government does not think that it would be a competent use of the power to make substantive provision as to duties to implement the findings of reports or other sanctions, through use of regulations under this subsection. Any regulations made have to be read within the context of the National Health Service (Scotland) Act 1978 as amended by Part 5 of the Bill which clearly sets out the specific duties and sanctions available to HIS and Scottish Ministers. The general powers in section 10M(4) could not be competently framed to provide rights or duties in addition to, or contrary to them.

National Health Service (Scotland) Act 1978
Section 10N(1) - Power to make regulations to make further provisions for conducting inspections

The power to make regulations on inspections under section 10N(1) is very wide but the justification for the power (in para. 89 of the DPM) is restricted to the provision of matters of technical and administrative detail and to the need for amendment of provisions from time to time. The Committee questions whether the powers in respect of interview, mental and physical examination and disclosure in sections 10N(3)f) and (h) are properly to be considered only as administrative detail. The Scottish Government is asked to explain why the proposals for these powers cannot be put before the Parliament for consideration in the Bill. The Scottish Government is also asked how and for what purposes it is intended that the powers in section 10N(3)(f) and (h) will be exercised.

The Scottish Government responds as follows:

The provisions relating to HIS inspections and reports mirror to a large degree the provisions which have been drafted with regard to SCSWIS inspections and reports under section 47, accordingly the Government provides a similar explanation. The regulation making powers in section 10N(1)(f) and (h) provide that regulations may be made setting out the practical implementation of the substantive provisions; that interviews and physical and mental examinations may be carried out and that information may be disclosed, in consequence of an inspection under section 10I, 10J or 10L. They will include who may carry out interviews, the circumstances surrounding same, the types of person to whom information with regard to the inspections may be disclosed, and the types of information that will be subject to such provisions. These powers are flexible given the inspection regime will bring together different types of inspection (as explained in the government’s response to the Committee’s questions on section 10M(4)), and will provide for the different permutations and combinations of inspections that will be carried out by HIS. The Government recognises that these issues are important however and has set out in the Bill that regulations under this section are to be subject to affirmative procedure. The Government will also provide draft regulations for the committee’s consideration prior to the commencement of stage 2 scrutiny in Parliament.
National Health Service (Scotland) Act 1978
Section 10R(1)(c) - Power to prescribe grounds upon which HIS may cancel the registration of an independent health care service

Given the effect of a proposal to cancel a registration, the Scottish Government is asked to give further consideration to the choice of negative procedure which can allow a change in the criteria for cancellation to be brought into force within 21 days. In light of the significance for service providers and those who receive services, would affirmative procedure not be more appropriate?

The Scottish Government responds as follows:

These provisions are identical in nature to those referred to in the Committee’s question with regard to section 53(1)(c), accordingly the Government provides a similar explanation. The regulation making powers in section 10R(1)(c) represent a re-enactment of the provisions of section 12(1)(c) of the Regulation of Care (Scotland) Act 2001, which section previously applied to the cancellation of the registration of independent health care services. Regulations under section 12(1)(c) were subject to negative resolution procedure, an approach which met with the approval of the Parliament at the time, we therefore see no need to change the procedure in this re-enactment.

National Health Service (Scotland) Act 1978
Section 10Z1 - Power to make regulations about registers and registration

The Committee asks the Scottish Government to clarify what is intended by the reference in section 10Z1(1)(b)(iii) to ‘categories of applicant who cannot competently make applications’ and how it is envisaged that this element of the power may be exercised. Is it intended that this power could set out criteria for eligibility to provide services and, if so, the Government is asked to explain why this is considered an administrative matter and not a matter of substance which would be better suited to primary legislation? If subordinate legislation is required why would negative procedure be appropriate?

The Scottish Government responds as follows:

These provisions are identical in nature to those referred to in the Committee’s question with regard to section 62(1), accordingly the Government provides a similar explanation. The intent of this provision is to permit regulations to set out categories of applicant who cannot competently make an application. It will work in unison with the provisions under section 10R(1)(c) in order to ensure that those who are subject to the prescribed grounds for cancellation section 10R are also not permitted to apply to provide care services. This is a re-enactment of section 28(1)(c)(iii) of the Regulation of Care (Scotland) Act 2001 which section previously applied to an application to register independent health care services. Regulations under section 28(1)(c)(iii) were subject to negative resolution, an approach which met with the approval of the Parliament at the time, we therefore see no need to change the procedure in this re-enactment. It is not intended that this power could be used to set out criteria for eligibility to provide services.
in the wider sense, the government believes that this would require regulations to be made under section 10Z2.

**Section 96(1) - Power to direct a person or body to participate in a joint inspection**

*How will the participation in a joint inspection of a body not listed in section 95(6) be apparent and how it can be demonstrated what powers that body does or does not have, in particular in the context of a criminal offence relating to the obstruction of an investigation? Given that involvement in joint inspection and the acquisition of investigatory powers has legal effect which can impact on individuals why is it not considered appropriate for this power to be exercised by subordinate legislation?*

The Scottish Government responds as follows:

Scottish Ministers will include the name of the body, the context in which they are being directed and the extent of the powers which they will exercise in the Directions issued under this power. Section 96 represents a re-enactment of the provisions of section 2 of the Joint Inspection of Children’s Services and Inspection of Social Work Services (Scotland) Act 2006, an approach which met with the approval of the Parliament at the time, we therefore see no need to provide for this power to be exercised by subordinate legislation in this re-enactment.

**Section 97(1) - Power to make regulations relating to joint inspections**

*The Committee asks the Scottish Government—*

- whether the powers in respect of interview, mental and physical examination and disclosure in sections 97(2)(d) and (f) are properly to be considered as only administrative detail;

- to explain why the proposals for these powers cannot be put before the Parliament for consideration in the Bill; and

- how and for what purposes it is intended that the powers in section 97(2)(d) and (f) will be exercised?

The Scottish Government responds as follows:

These provisions are almost identical in nature to those referred to in the Committee’s question with regard to section 47 and section 10N1, accordingly the Government provides a similar explanation. The regulation making powers in section 97(2)(d) and (f) provide that regulations may be made setting out the practical implementation of the substantive provisions; that interviews and physical and mental examinations may be carried out and that information may be disclosed, in consequence of a joint inspection. They will include who may carry out interviews, the circumstances surrounding same, the types of person to whom information with regard to the inspections may be disclosed, and the types of information that will be subject to such provisions. These powers are flexible given the inspection regime will bring together different types of inspection and practices, and will provide for the different permutations and combinations of inspections that will be carried out by the persons and bodies under the...
joint inspection provisions. As in examples above the Government recognises that these issues are significant and has set out in the Bill that regulations under this section are to be subject to affirmative procedure. This approach reflects that used under the Joint Inspection of Childrens Services and Inspection of Social Work Services(Scotland) Act 2006 which has worked well over the past three years with no adverse comment regarding parliamentary scrutiny. The Government will also provide draft regulations for the committee’s consideration prior to the commencement of stage 2 scrutiny in Parliament.

Schedule 7, paragraph 2(2) – Power to vary the number of members of SCSWIS
Schedule 11, paragraph 2(2) - Power to vary the number of members of HIS

Given that the powers as drafted permit the substitution of any minimum or maximum number of members of SCSWIS and HIS, the Committee asks whether or not it would be appropriate for a minimum and/or maximum number of members within which the powers may be exercised to be specified on the face of the Bill?

The Scottish Government responds as follows:

The existing draft proposes a maximum and minimum limit of members of SCSWIS and HIS based on our knowledge of the circumstances at this time and what seems reasonable. We cannot know what the future circumstances are which might require Ministers to alter those limits, so do not wish to impose an arbitrary limit on the numbers at this point. However any change to Schedule 7 paragraph2(2) or Schedule 11, paragraph 2(2) would require a statutory instrument which would be subject to due parliamentary process and to a reasonableness test at that point. We feel that the current draft gives the required flexibility with sufficient protection built in.
The Teaching Council (Scotland) Act 1965 Modification Order 2009 (SSI 2009/draft)

The Scottish Government responds as follows:

The Scottish Government agrees that sections 45(3), 47(1) and 54 of and paragraph 1(2) of schedule 2 to the Standards in Scotland's Schools etc. Act 2000 are rendered redundant by the repeal of sections 4A, 5(1)(b) and 6A of Schedule 1 to the Teaching Council (Scotland) Act 1965 in the draft Order. That said, it is not considered that having those redundant provisions on the statute book has any detrimental legal effect on the draft Order.

As the General Teaching Council for Scotland is becoming an independent body, it is the intention to undertake a major reform of the Council in the near future which will include significantly amending the Teaching Council (Scotland) Act 1965. There may also be a need to amend the Standards in Scotland's Schools etc. Act 2000 as part of this exercise, including repeal of redundant sections. At that time any other redundant provisions, such as those in question will be picked up.

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

On 11th September 2009 the Scottish Government was asked:

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

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

The Scottish Government responds as follows:

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

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

(2) Rule 20(6) requires that the local authority must have confirmed that it has complied with the requirements of regulation 7 in compiling their report. Compliance with the requirements of that provision will be demonstrated in the report itself. For example, a recommendation in that report that the child be placed with a foster carer must comply with 3 requirements - the local authority must be of the view that placement is in the best interests of the child; the foster carer must be formally approved in accordance with the Regulations; and the foster carer must have entered into a written agreement under regulation 24.

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

On 11 September the Scottish Government was asked:

The Scottish Government are asked on this instrument, in relation to the various references to “the Locally Engaged Staff Assistance Scheme (Direct Entry) operated by the Home Department”, in regulations 2, 4, 7, 12, 13, 15, 17 and 18, for an explanation-
(1) whether this Scheme is made under any legislative provision/s or is established by any particular documents?

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

The Scottish Government responds as follows:

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

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

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

The Legal Aid (Supreme Court) (Scotland) Regulations 2009 (SSI 2009/312)

On 11th September the Scottish Government was asked—

“The Criminal Legal Aid (Scotland) Regulations 1996/2555 currently recognise proceedings in the JCPC under reference from the High Court under paragraph 11 of Schedule 6 to the Scotland Act 1998 as distinct proceedings – regulation 4(1)(k). Regulation 6(3) of these Regulations removes this category of proceedings from the 1996 regulations. Can the Government explain the effect of and reason for this change? If this is a substantive change why is this not referred to in the Executive Note or Explanatory Note to the Instrument?”

The Scottish Government responds as follows—

Regulation 4(1)(k) of the Criminal Legal Aid (Scotland) Regulations 1996 (“the 1996 Regulations”) currently refers to “proceedings in the Judicial Committee of the Privy Council [“the JCPC”] on appeal from the High Court of Justiciary under paragraph 11 and 13(a) of Schedule 6 to the Scotland Act 1998 [“the Scotland Act”]. Regulation 6(3) of the Legal Aid (Supreme Court) (Scotland) Regulations 2009 (“the 2009 Regulations”) will substitute regulation 4(1)(k) of the 1996 Regulations. The substitute regulation
4(1)(k) will refer only to an appeal under paragraph 13 of Schedule 6 to the Scotland Act. It therefore departs from its predecessor in omitting reference to paragraph 11 of Schedule 6 to the Scotland Act.

Reference to paragraph 11 of Schedule 6 to the Scotland Act is omitted from the substitute regulation 4(1)(k) on the basis that it should not have been included in the first place. Whereas paragraph 13 of Schedule 6 to the Scotland Act provides for an "appeal" to the JCPC, paragraph 11 provides for a "reference" to be made to the JCPC. As no "appeal" properly so-called can be taken under paragraph 11 of Schedule 6 to the Scotland, the reference to it which currently appears in regulation 4(1)(k) of the 1996 Regulations is otiose. Thus regulation 6(3) of the 2009 Regulations will not remove a category of proceedings from the 1996 Regulations, but rather will correct (by omission) an inaccurate statutory cross-reference. As regulation 6(3) does not make any substantive change no reference in the Executive or Explanatory Note to the 2009 Regulations is required.

For completeness it is observed that the approach taken in relation to regulation 6(3) is consistent with the approach taken to paragraphs (4) and (5) of regulation 8 of the 2009 Regulations. Those paragraphs amend regulation 4(1) of the Civil Legal Aid (Scotland) Regulations 2002 ("the 2002 Regulations"). Regulation 4(1) of the 2002 Regulations is the civil legal aid counterpart to regulation 4(1) of the 1996 Regulations, which relates to criminal legal aid. Currently, regulation 4(1)(j) of the 2002 Regulations defines, as distinct proceedings for the purposes of civil legal aid, proceedings in the JCPC "on appeal from the Court of Session under paragraph 10, 12 or 13(b) of Schedule 6 to the Scotland Act". Like paragraph 11, paragraph 10 of Schedule 6 to the Scotland Act provides for a "reference", not an "appeal". Regulation 8(4) of the 2009 Regulations will provide for any appeal to the Supreme Court to be treated as distinct proceedings for the purposes of civil legal aid but, as in the criminal legal aid context, references to the Supreme Court will not be treated as distinct proceedings for the purposes of civil legal aid.