The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

8th Meeting, 2013 (Session 4)

Tuesday 5 March 2013

The Committee will meet at 10.30 am in Committee Room 3.

1. **Draft instruments not subject to any parliamentary procedure:** The Committee will consider the following—

   Public Services Reform (Functions of the Common Services Agency for the Scottish Health Service) (Scotland) Order 2013 [draft] (SG 2013/12).

2. **Instruments subject to affirmative procedure:** The Committee will consider the following—

   Renewables Obligation (Scotland) Amendment Order 2013 [draft];
   Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013 [draft];
   Police and Fire Reform (Scotland) Act 2012 (Consequential Modifications and Savings) Order 2013 [draft];
   Local Government Finance (Scotland) Amendment Order 2013 [draft].

3. **Instruments subject to negative procedure:** The Committee will consider the following—

   Police Service of Scotland (Police Cadets) Regulations 2013 (SSI 2013/42);
   National Health Service (Scotland) (Injury Benefits) Amendment Regulations 2013 (SSI 2013/52);
   Electricity (Applications for Consent) Amendment (Scotland) Regulations 2013 (SSI 2013/58);
   Fees in the Registers of Scotland (Consequential Provisions) Amendment Order 2013 (SSI 2013/59);
   Police Service of Scotland (Conduct) Regulations 2013 (SSI 2013/60);
   Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013 (SSI 2013/62);

Education (School Lunches) (Scotland) Amendment Regulations 2013 (SSI 2013/64).

4. **Scottish Law Commission reports:** The Committee will consider correspondence from the Convener of the Standards, Procedures and Public Appointments Committee.

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The papers for this meeting are as follows—

Agenda Items 1, 2 and 3

Legal Brief (private)	SL/S4/13/8/1 (P)

Agenda Items 1, 2 and 3

Instrument Responses	SL/S4/13/8/2

Agenda Item 4

Briefing Paper	SL/S4/13/8/3

SUBORDINATE LEGISLATION COMMITTEE

8th Meeting, 2013 (Session 4)

Tuesday 5 March 2013

Instrument Responses

DRAFT INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Public Services Reform (Functions of the Common Services Agency for the Scottish Health Service) (Scotland) Order 2013 (SG2013/12) [consultation draft]

On 15 February 2013, the Scottish Government was asked:

The Scottish Government is asked to provide further information as to why the Government considers that the instrument meets the following vires tests set out in section 18 of the Public Services Reform (Scotland) Act 2010:

18(2)(b) – the effect of the provision is proportionate to the policy objective
The Explanatory Document explains the policy objective as improving the Agency's ability to better leverage its services to support the public sector and removing obstacles to its ability to diversify the provision of its services across the public sector. The Explanatory Document appears to consider that because the measure is merely empowering and not mandatory this addresses the question of whether the objective has been achieved in a proportionate manner.

We consider that providing the Agency with a wide discretion in such matters is not of itself sufficient to demonstrate proportionality. The effect of the proposal on the current legislative objective is also relevant. In this context a proportionate approach is one which achieves the proposed aim with the minimum risk to or interference with the core purpose of the Agency. We consider that in this case the continued effective, efficient provision of high quality support services to the National Health Service in Scotland is the Agency's core purpose. In short diversification cannot be allowed to harm the Health Service or that will be disproportionate. The Explanatory Document does not explain how the existing services will continue to be maintained. There is no provision in the order which identifies the question of potential conflict between the core NHS duties and the diversified duties to the public sector as a whole or how the Agency is to deal with them. We therefore consider that neither the order nor the Explanatory Document demonstrate that considerations of proportionality have been properly addressed.

Section 18(2)(c) – the provision as a whole strikes a fair balance between the public interest and the interests of any person affected by it
This issue is related to the issue of proportionality above since users of the health service are presumably persons with interests affected by this order. The Explanatory Document indicates that provided the current core services are maintained at an equivalent level of quality this criterion is satisfied by a public interest argument based on cost. Again we note that nothing in the order specifies that the diversification of services is to be limited by reference to absence of

detrimental effect on core functions or the functioning of the NHS as a whole. Accordingly it is not clear that the order itself demonstrates a fair balance.

Section 18(2)(d) – does not remove any necessary protection
The current legislative arrangement provides protection by restricting the functions of the Agency in terms of the goods it may provide or the persons to whom it may provide services or with whom it may share accommodation and facilities. These appear to be us to be intended to protect the provision of health services which it is the Agency's core function to support. The health of persons is specifically identified as a protection for the purposes of section 18(2)(d). As noted above the order does not provide any specific restriction on the manner in which the Agency may pursue its diversification functions so as to secure the continued provision of an effective and quality health service which its core functions support. For example the order would permit the sharing of Agency premises currently occupied for a health service purpose with any public body discharging public functions. While the Ministers may determine which public bodies may share premises there is no control over that arrangement provided for by the order and also a lack of transparency as to the basis on which decisions would be made. The Government is therefore asked to explain why it is not considered necessary to address this issue specifically within the order in order to maintain a necessary protection of the core health service functions.

The Scottish Government is also asked whether new section 15(2B) of the 1978 Act should refer to subsection (2A)(c) rather than (2A)(b) as drafted.

The Scottish Government responded as follows:

(1) Section 18(2)(b) – the effect of the provision is proportionate to the policy objective

The Subordinate Legislation Committee's legal advisers state—

"The Explanatory Document explains the policy objective as improving the Agency's ability to better leverage its services to support the public sector and removing obstacles to its ability to diversify the provision of its services across the public sector. The Explanatory Document appears to consider that because the measure is merely empowering and not mandatory this addresses the question of whether the objective has been achieved in a proportionate manner.

We consider that providing the Agency with a wide discretion in such matters is not of itself sufficient to demonstrate proportionality. The effect of the proposal on the current legislative objective is also relevant. In this context a proportionate approach is one which achieves the proposed aim with the minimum risk to or interference with the core purpose of the Agency. We consider that in this case the continued effective, efficient provision of high quality support services to the National Health Service in Scotland is the Agency's core purpose. In short diversification cannot be allowed to harm the Health Service or that will be disproportionate. The Explanatory Document does not explain how the existing services will continue to be maintained. There is no provision in the order which identifies the question of potential conflict between the core NHS duties and the diversified duties to the public sector as a whole or how the Agency is to deal with them. We therefore consider that neither the

order nor the Explanatory Document demonstrate that considerations of proportionality have been properly addressed."

The Scottish Government considers that, in context, a provision is proportionate to the policy objective if they confer no more power than is necessary to achieve the policy objective pursued. The policy objective pursued is to enable the Common Services Agency to provide a wider range of goods and services to a wider range of bodies than is currently the case. That policy objective could potentially be achieved by enabling the Common Services Agency to provide any service to any person – but such a provision would – in the government's view – not be proportionate to the objective pursued as it would provide Common Services Agency with the ability to provide services to persons well beyond those envisaged by the policy objective. The Scottish Government agrees that the Common Services Agency should not allow the quality or extent of its services to the Scottish Health Service to be diluted, but considers that this is a task of management of the Common Services Agency, rather than an issue impacting on the proportionality of the Order.

(2) Section 18(2)(c) – the provision as a whole strikes a fair balance between the public interest and the interests of any person adversely affected by it

The Subordinate Legislation Committee's legal advisers state—

"This issue is related to the issue of proportionality above since users of the health service are presumably persons with interests affected by this order. The Explanatory Document indicates that provided the current core services are maintained at an equivalent level of quality this criterion is satisfied by a public interest argument based on cost. Again we note that nothing in the order specifies that the diversification of services is to be limited by reference to absence of detrimental effect on core functions or the functioning of the NHS as a whole. Accordingly it is not clear that the order itself demonstrates a fair balance."

The Scottish Government notes that section 18(2)(c) is concerned with ensuring that a fair balance is struck in the competition between "the public interest", on the one hand, and "any person adversely affected" by the Order, on the other. In the instant case, the public and potential users of the Scottish Health Service are essentially the same group, and have the same interest. This is, as the Explanatory Document relates, that public services (including the health service) should be of high quality and should be provided in such a way as to maximise efficiency and reduce costs without affecting quality.

(3) Section 18(2)(d) – the provision does not remove any necessary protection

The Subordinate Legislation Committee's legal advisers state—

"The current legislative arrangement provides protection by restricting the functions of the Agency in terms of the goods it may provide or the persons to whom it may provide services or with whom it may share accommodation and facilities. These appear to be us to be intended to protect the provision of health services which it is the Agency's core function to support. The health of persons is specifically identified as a protection for the purposes of section 18(2)(d). As noted above the order does not provide any specific restriction on the manner in which the Agency may pursue

its diversification functions so as to secure the continued provision of an effective and quality health service which its core functions support. For example the order would permit the sharing of Agency premises currently occupied for a health service purpose with any public body discharging public functions. While the Ministers may determine which public bodies may share premises there is no control over that arrangement provided for by the order and also a lack of transparency as to the basis on which decisions would be made. The Government is therefore asked to explain why it is not considered necessary to address this issue specifically within the order in order to maintain a necessary protection of the core health service functions."

The Scottish Government notes that the current legislative arrangement sets out a range of goods and services which the Common Services Agency may provide, and a range of bodies to whom these may be provided. It is submitted that that arrangement enables the Common Services Agency to provide goods and services to a range of public bodies. It does not afford protection to users of the Scottish Health Service from poor quality healthcare. Ensuring that, within their statutory remit, the Common Services Agency provides a high quality of services to Health Boards and public bodies outside the health service is the responsibility of management. The quality of, for example, IT services is not determined by the range of public bodies to whom that service is provided, but by the quality of the management supporting the delivery of those services. Services provided to a narrow range of health service bodies could be provided at a poor quality, and vice versa.

Separately, the Scottish Government notes that it is the "health and safety of persons" that is specifically identified as an example of a protection in section 18(3). The Scottish Government considers that "health and safety" relates to measures for the prevention of accidents, injury and disease (typically at work or in the context of specific activities (e.g. operating a railway)) as distinct from "health" which relates to the provision of services to promote health and wellbeing.

(4) The Subordinate Legislation Committee's legal advisers state—

"The Scottish Government is also asked whether new section 15(2B) of the 1978 Act should refer to subsection (2A)(c) rather than (2A)(b) as drafted."

The Scottish Government is grateful to the Committee's legal advisers for drawing this erroneous cross reference to its attention and will rectify this error prior to laying the draft Order following consultation.

INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE

Renewables Obligation (Scotland) Amendment Order 2013 [draft]

On 22 February 2013, the Scottish Government was asked:

1. In relation to the new article 22C of the principal 2009 Order, as inserted by article 7:

(a) Please clarify whether the provisions in subparagraphs (2)(a) and (b) must both apply as conditions, before no "SROCs" are to be issued by a generating station to which the article applies, or whether these conditions are alternatives. Would this be made clearer by adding "and" or "or" as the case may be at the end of subparagraph (a)?

(b) Is there an error in paragraph (2) as the defined term in the 2009 Order is a "qualifying combined heat and power generating station", but "generating" is omitted in 2 places?

(c) Article 3 substitutes a definition of "energy crops" for "energy crop" in the principal Order (which definition is used elsewhere in this instrument), but paragraph (3) of article 22C retains the reference to " energy crop". Was it intended that the definition in article 3 would be kept in the singular, because that definition lists alternative types of crop, and that would accord with 22C(3)?

(d) If you would propose to amend any of these points, then by what means?

2. Article 3(a)(ix) provides for ambulatory references to Annex 5 to the "Renewables Directive" 2009/28/EC, in article 54A and Schedule A1 to the principal 2009 Order. However the second paragraph of the preamble narrates the intention to make the ambulatory reference in article 54A alone. Further, while article 23 amends that article 54A in implement of Commission Decision 2011/13/EU and so for a purpose mentioned in section 2(2) of the 1972 Act, Schedule A1 to the principal Order contains various existing references to Annex 5 which are otherwise not affected by this Order.

(a) Please clarify whether it is intended (as article 3(a)(ix) provides) to make an ambulatory reference in respect of all of the references to Annex 5 contained in *Schedule A1* to the principal Order?

(b) If so, please clarify how those ambulatory references are made within the powers in paragraph 1A of schedule 2 to the European Communities Act 1972, and how provision is made for a purpose mentioned in section 2(2) in that respect.

(c) If it is intended to make those references in relation to Schedule A1, is there an omission in paragraph 2 of the preamble?

The Scottish Government responded as follows:

1. In relation to the new article 22C of the principal 2009 Order, as inserted by article 7:

(a) It is not the case that the provisions in sub-paragraphs (2)(a) and (b) must both apply as conditions. The Government considers that the provision is clear. The effect of paragraph 2(a) is that no "SROCs" are to be issued in respect of electricity generated by a generating station to which the article applies unless the generating station is a qualifying combined heat and power generating station. The effect of paragraph (2)(b) is that no SROCs are to be issued in respect of electricity generated by such a generating station if the generating station has not been a qualifying combined heat and power generating station during the whole or part of 5 or more obligation periods.

(b) The Scottish Government acknowledge that the word "generating" does not appear in paragraph (2)(a) or (b) of new article 22C and are grateful to the Committee for drawing this to their attention. The Scottish Government, however, do not consider that in the context any doubt arises from the omission of the word. It is clear that both paragraphs (a) and (b) are referring to generating stations and that the reference to a "qualifying combined heat and power station" is a reference to a qualifying combined heat and power generating station falling within the definition of article 2(1) of the principal 2009 Order. The Scottish Government will seek to insert the word "generating" at the next available opportunity.

(c) Article 22C(3) defines "relevant biomass" as biomass which is composed wholly or partly from wood which is not an energy crop. This clearly refers to wood which is not one of the energy crops listed in article 3. The Scottish Government do not think there is any ambiguity in the provision.

2. The Scottish Government is grateful to the Committee for raising this matter.

(a) The intention is to make an ambulatory reference in respect of all the references to Annex 5 contained in Schedule A1 to the principal 2009 Order.

(b) The amendments made by article 23 to article 54A of the principal 2009 Order implement Commission Decision 2011/13/EU on certain types of biofuels and bioliquids to be submitted by economic operators to Member States. The Commission Decision was made under the third paragraph of article 18(3) of Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources ("the Renewables Directive"). Article 23 accordingly makes provision for a purpose mentioned in section 2(2) of the European Communities Act 1972. As amended by article 23, article 54A(8) of the principal 2009 Order will include references to Annex 5 of the Renewables Directive. Article 54A(8) will also include definitions of "actual value method" and "mixed value method" which rely on definitions set out in Schedule 1A to the principal 2009 Order. Schedule A1 defines those terms by reference to Annex 5 of the Renewables Directive. Article 3(a)(ix) of the draft Order accordingly is made within the powers in paragraph 1A of Schedule 2 to the European Communities Act 1972.

(c) The Scottish Government agrees that there is an omission in paragraph 2 of the preamble. It regrets this but considers that it has no legal effect in the circumstances. The enabling power, paragraph 1A of Schedule 2 to the European Communities Act 1972 is cited in the preamble and as necessary, the ambulatory reference is made expressly in the instrument itself in article 3.

Police Investigations and Review Commissioner (Investigations Procedure, Serious Incidents and Specified Weapons) Regulations 2013 [draft]

On 22 February 2013, the Scottish Government was asked:

The Scottish Government is asked to explain why the word "(Scotland)" has been omitted from the title of this instrument and in the citation provision in regulation 1, given the usual drafting practice that it should be included unless "Scotland" appears elsewhere in the title, or the title is considered to be sufficiently Scottish without express reference. Should the Scottish Government consider the title to be sufficiently Scottish without expressly mentioning the word "Scotland", it is asked to explain the basis for that view.

The Scottish Government responded as follows:

The Scottish Government considers the title of this instrument to be sufficiently Scottish without express reference to the word "(Scotland)" in the title or in the citation provision. The "Police Investigations and Review Commissioner" is not a generic phrase, but the title of a particular statutory office holder. No other office or body of the same name exists elsewhere in the United Kingdom. That office is established by an asp (the Police, Public Order and Criminal Justice (Scotland) Act 2006 (the 2006 Act), as amended by the Police and Fire Reform (Scotland) Act 2012) which of course extends only to Scotland. The office is therefore a Scottish one. Functions are to be conferred on the Commissioner both by the 2006 Act and by provisions of the Police and Fire Reform (Scotland) Act (Consequential Provisions and Modifications) Order 2013 with extent only to Scotland. Further functions are to be conferred by Scottish Statutory Instruments. All of these functions are exercisable only in and as regards Scotland.

Accordingly, the "Police Investigations and Review Commissioner" refers to a uniquely Scottish public office holder, operating in Scotland only, and so reference to the word "(Scotland)" is unnecessary for the purpose of making a specific connection to Scotland. This is not dissimilar to, for example, The Number of Inner Houses Judges (Variation) Order 2010 (SSI 2010/449) or the Sheriff Court Fees Amendment Order 2012 (SSI 2012/293), each of which refer to peculiarly Scottish entities without reference to the word "(Scotland)".

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Police Service of Scotland (Police Cadets) Regulations 2013 (SSI 2013/42)

On 22 February 2013, the Scottish Government was asked:

1. The effect of this instrument appears to be to revoke and then save the Police Cadets (Scotland) Regulations 1968 ("the 1968 Regulations"). In addition to that instrument, this entails the revocation and saving of 12 separate amending instruments, as well as the revocation of a further 13 amending instruments which we understand to be spent. In addition to this, the 1968 Regulations as so revoked and saved are further textually amended by the provisions of regulation 2(3). We observe that the 1968 Regulations are not available in consolidated form, to the best of our knowledge, either publicly or through commercial resources available to us. It is also difficult to obtain a copy of the original 1968 Regulations. Given these points, and given that the 1968 Regulations as revoked and saved will continue to constitute the terms and conditions of service for police cadets in Scotland, the Scottish Government is asked to explain

a. why they did not consider it appropriate to consolidate the 1968 Regulations, rather than preserving them in this fashion;

b. why it considers that the effect of this instrument (which, in effect, preserves the 1968 Regulations rather than making substantive provision) is sufficiently clear, particularly to those whose terms and conditions are regulated in this way; and

c. whether it proposes to take any steps so as to make the terms and conditions of service more easily available to police cadets.

2. Regulation 2(2) provides that "…the Regulations mentioned in Part 2 and, so far as provided there, in Part 3 of the Schedule continue to have effect on and after 1 April 2013…". The heading to Part 3 of the Schedule reads "Instrument revoked with partial saving", and paragraph 1 of that Part states "The Police (Minimum Age for Appointment) Regulations 2006 so far as they amend the Police Cadets (Scotland) Regulations 1968". Should that reference in paragraph 1 of Part 3 properly be to the Police (Minimum Age for Appointment) (Scotland) Regulations 2006 ("the 2006 Regulations")? If so, how does the Scottish Government propose to correct this?

3. The Scottish Government is further asked to explain what the effect of Part 3 of the Schedule, as read with regulation 2(2), is supposed to be. Standing the revocation of regulation 2 of the 2006 Regulations by paragraph 20 of Schedule 3 to the Police Service of Scotland Regulations 2013 on 1 April 2013, the only substantive provision of the 2006 Regulations which will remain is regulation 3 (which amends the 1968 Regulations). If the intended effect of this provision is to save regulation 3 of the 2006 Regulations as it applies to the 1968 Regulations, why is it considered that regulation 2(2) and Part 3 of the Schedule achieve this effect? If they are considered to achieve that effect, does the Scottish Government consider that this is sufficiently clear, and why?

The Scottish Government responded as follows:

1a, b and c. The position with regards to police cadets is unique and the Scottish Government has therefore had to adopt a unique approach. The police cadets regime has previously been an access route to becoming a constable of a police force. To qualify for appointment as a cadet a chief constable has to be satisfied that the individual is likely, on attaining the age of 18 years, to be able to satisfy the qualification requirements for appointment to a police force. That test is an onerous one for an individual of 16 or 17 years of age to satisfy. In recent years the police cadet access route has fallen into general disuse and most constables are nowadays recruited via other access routes. We understand there are currently only 19 police cadets in Scotland, employed by Grampian Joint Police Board; other police authorities have stopped recruiting police cadets. The Police Service of Scotland and ACPOS have indicated that they do not currently intend recruiting new police cadets once the current cadets' contracts come to an end. Those contracts are expressly stated to be subject to the 1968 Regulations.

The Scottish Government then faced the issue of whether to draft fresh police cadet regulations, re-state the current ones or save the current ones with modifications to reflect the Police and Fire Reform (Scotland) Act 2012. Drafting fresh police cadet regulations or re-stating them was not considered appropriate because the new Police Service does not presently wish to recruit any police cadets after 1 April 2013 and the Scottish Government would have effectively been imposing a set of regulations on stakeholders which they had neither asked for nor wanted and which would give the misleading impression that new police cadets were likely to be appointed after 1 April 2013.

Instead, consistent with the policy context of finite ongoing existence of a very small number of police cadets, the Scottish Government chose to retain the current regulations with limited modifications so that those few individuals who are currently employed as police cadets may continue on the terms and conditions with which they have been appointed – and are therefore familiar – until the natural end of their appointment. Thereafter there will be nobody subject to the 1968 Regulations and in due course they will be swept away.

It is worth noting that the terms of the Regulations are part of the personal terms and conditions of employment and as such are of interest primarily to the individual employees themselves rather than being legislation of general effect bearing on the populace at large. As those individual employees are already subject to the 1968 Regulations in their unconsolidated form we do not think there is any prejudice caused by saving them with minor modifications that ensure they can continue to be employed by the Scottish Police Authority consistent with their written terms and conditions of employment as issued by their current employer. In light of the Committee's concerns we will ask the Scottish Police Authority to provide a consolidated form of the 1968 Regulations to each of the police cadets transferred by the 2012 Act.

2. The Scottish Government thanks the Committee for identifying the typographical error in paragraph 1 of Part 3 of the Schedule to the Regulations. As the footnote makes clear, the reference to the Police (Minimum Age for Appointment) Regulations 2006 should be to the Police (Minimum Age for Appointment) (Scotland)

Regulations 2006. The footnote refers to SSI 2006/552 which is so titled. While the error is regrettable we do not think a court would have much difficulty ascertaining the correct intention here because: (a) the footnote directs the reader to the more fully named instrument; and (b) the instrument bearing that name is S.I. 2006/2278 and applies to England and Wales only so it would be out-with competence for the Scottish Parliament to revoke it. We will endeavour to have the instrument corrected by correction note, which failing we will correct the title in the next available instrument.

3. Regulation 2(1) of the Regulations provides that Regulations mentioned in the Schedule are revoked, so far as not already revoked. The Police (Minimum Age for Appointment) (Scotland) Regulations 2006 are mentioned in Part 3 of the Schedule. They are therefore revoked (to the extent not already done so by the Police Service of Scotland Regulations 2013). Regulation 2(2) then says that the Regulations mentioned in Part 3, so far as provided in that Part, continue to have effect. Part 3 provides so far as they amend the Police Cadets (Scotland) Regulations 1968. Taken together, the effect is that the 2006 Regulations are saved to the extent that they amend the 1968 Regulations. The drafting may be concise but we consider the effect clear when one takes the verbs and applies them to the provisions of the Schedule in turn: for regulation 2(1), what is mentioned in the Schedule? In Part 3 it is the 2006 Regulations. For regulation 2(2), what is mentioned is the 2006 Regulations; what is "so far as" provided, is the "so far as they amend the Police Cadets (Scotland) Regulations 1968". There is no other thing provided in Part 3. The heading to Part 3 of the Schedule dispels any doubt as to what is intended: the instrument is revoked subject to the saving provided.

National Health Service (Scotland) (Injury Benefits) Amendment Regulations 2013 (SSI 2013/52)

On 19 February 2013, the Scottish Government was asked:

1. In new regulation 4(11) of the National Health Service (Scotland) (Injury Benefits) Regulations 1998 "the NHS Terms and Conditions of Service Handbook" is referred to for the purposes of the meaning of "injury allowance" without further specification of that document and no indication as to where copies of that document may be obtained. This Handbook requires to be consulted in order to calculate a person's entitlement to benefits under the 1998 Regulations by virtue of regulation 4(6).

The Scottish Government is asked to explain:
- which edition of the Handbook is being referred to;
- the meaning of "injury allowance" and how that is calculated (the current Handbook of this name available online does not appear to make reference to injury allowance);
- whether it is intended that this reference to the Handbook is to be ambulatory and if so whether it achieves this effect;
- where a copy of the Handbook can be obtained; and
- whether the provision made in new regulation 4(11) concerning the Handbook is sufficiently clear without this information.

2. In new regulation 18B(1) of the 1998 regulations a claim for benefit must be made in such form and within such period as the Scottish Ministers may specify. In what manner will these requirements be specified and how will this be notified to persons entitled to benefits under the 1998 regulations? If this function is not to be exercised by subordinate legislation why is it considered appropriate to confer this function on Ministers to exercise by other means since the power in section 10 of the Superannuation Act 1972 anticipates that the requirements that must be fulfilled by persons for them to be entitled to payment under the regulations will be prescribed in the regulations themselves?

3. In new regulation 18B(3) to whom does the expression "that person" refer given that no person other than the Scottish Ministers has been referred to in the regulation. If it is intended only to refer to the applicant is this sufficiently clear? This would appear to be material to identifying the scope of medical information which the Scottish Ministers can require to be produced.

4. In new regulation 21A(1)(b) in what form is the information requested by the Scottish Ministers to be provided? Sub-paragraphs (a) and (c) refer to information being provided in writing whereas sub-paragraph (b) does not. As entitlement to benefits may be lost if the information is not provided within the time limit specified, is it considered to be sufficiently clear how persons are to comply with this requirement?

The Scottish Government responded as follows:

1. (a) "The NHS Terms and Conditions Handbook" refers to NHS terms and conditions of service handbook at:

http://www.msg.scot.nhs.uk/index.php/pay/agenda-for-change as amended from time to time.

(b) "Injury allowance" refers to the allowance by that name to be set out in a new section of the NHS terms and conditions handbook with effect from 31 March 2013. The UK NHS Injury Review Group is updating the handbook to incorporate this. The new section (along with guidance) will set out the terms and conditions relating to the allowance (including how it is to be calculated). The new section is to be ratified by the NHS Staff Council on 26 February 2013 and published on the above website by 31 March 2013.

(c) The reference to "injury allowance" in the handbook is ambulatory. Regulation 4(10) refers to "an injury allowance payable on or after 31 March 2013 in accordance with the terms and conditions of the person's employment". Those terms, particularly in relation to a person entering NHS employment after that date, may change. It is considered sufficiently clear that "injury allowance" must refer to that allowance in the NHS handbook which is payable in accordance with the terms as amended from time to time.

(d) An updated handbook (incorporating the new section) is due to be published on or before 31 March 2013 at: http://www.msg.scot.nhs.uk/index.php/pay/agenda-for-change. Information about the new injury allowance will also be notified to relevant staff.

(e) Since the updated handbook is to be published on or before 31 March 2013, the reference in regulation 4(11) to the injury allowance is considered to be sufficiently clear.

2. Regulation 18B(1) requires that a claim must be made in such form, and within such period, as the Scottish Ministers may specify. Information on how to make a claim, including the form to be used and the period for making claims, will be set out in guidance published by the Scottish Government. The NHS handbook will signpost where staff can obtain this information. Section 10(2) of, and paragraph 11 of Schedule 3 to, the Superannuation Act 1972 provide that the regulations may confer such functions as they consider necessary or expedient. It is considered expedient to enable the Scottish Ministers to specify the form and period because these are administrative matters which may be subject to regular revision. However, any material change to the form or the period for making claims will be published in advance and notified to NHS staff.

3. "That person" is intended to refer to the person making a claim for benefit to the Scottish Ministers under regulation 18B(1). Regulation 18B(3) should have referred to "the person making the claim". Since subsection (3) applies only in the case of a claim under subsection (1), it is considered sufficiently clear that "that person" must refer to the person making a claim under that subsection and cannot reasonably refer to any other person. However, this reference will be corrected when the Regulations are next amended.

4. Any request by the Scottish Ministers for information relating to any change referred to new regulation 21A(1)(b) will set out what is required and how it is to be provided. Guidance will also be provided as to the form in which information should

be provided. It is therefore considered that it will be sufficiently clear as to how persons are to comply.

SUBORDINATE LEGISLATION COMMITTEE

8th Meeting, 2013 (Session 4)

Tuesday 6 March 2013

Briefing Paper on proposals for implementation of Scottish Law Commission Reports

1. As Members will be aware, the Standards, Procedures and Public Appointments (SPPA) Committee is considering proposals for the implementation of Scottish Law Commission reports.

2. To inform this consideration, the Convener of this Committee, along with the Convener of the Justice Committee, gave evidence to the SPPA Committee at its meeting on 17 January 2013.

3. Informed by this evidence, the SPPA Committee considered the matter further at its meeting on 31 January and agreed to consider a draft report and draft standing order changes at a future meeting. However, prior to any further consideration, the SPPA Committee agreed to consult on the draft standing order changes.

4. Correspondence seeking the views of this Committee on the draft standing orders is attached as an annex to this paper. In addition to setting out the draft standing order changes, the SPPA Committee invites this Committee's views on two specific points.

5. Firstly, the SPPA Committee considered whether the rules need to make provision for the Subordinate Legislation Committee to seek policy input from subject committees on Scottish Law Commission bills. The SPPA Committee noted that there is nothing in the current rules to prevent the Subordinate Legislation Committee from seeking such input. However, it wondered if it would be helpful for the rules to specify a timescale for such input, or allow the Subordinate Legislation Committee to do so. It accordingly invited the views of this Committee on the matter.

6. And secondly, the SPPA Committee noted a suggestion from the Welfare Reform Committee that the name of this Committee might need to be updated to reflect its new role. As you will note from the correspondence, the SPPA Committee again invites this Committee's views on that matter.

Recommendation

7. **Members are invited to consider the correspondence from the SPPA Committee. In particular, members are invited to consider:**

    - **the draft standing orders;**

- **whether it would be helpful to specify a timescale in which subject committees should respond to the Committee on policy matters with regard to Scottish Law Commission bills; and**

- **whether there would be merit in changing the name of the Committee to reflect its proposed new remit.**

SL/S4/13/8/3

The Scottish Parliament
Pàrlamaid na h-Alba

Standards, Procedures and Public Appointments Committee

Nigel Don MSP
Convener of the Subordinate
Legislation Committee

Room TG.01

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22 February 2013

Dear Nigel

Thank you for your recent evidence to the Standards, Procedures and Public Appointments Committee in relation to Scottish Law Commission Bills.

The Committee discussed the issues further at its meeting on 31 January. The Official Report of our discussion is attached for your information. We agreed that, before the Committee considers this again, I would give you an opportunity to comment on the draft rules.

I am therefore enclosing the draft rules and would welcome any comments you have by Wednesday 6 March. The Committee will then consider the draft rules at its meeting on 14 March.

The draft rules are designed to allow the Bureau to refer certain bills to the Subordinate Legislation Committee. This is achieved first by amending the Subordinate Legislation Committee remit and second by adding a new definition of Scottish Law Commission bills.

Referrals by the Bureau would be made in the same way as for other bills. One consequence of this is that there would be no automatic requirement to consult the relevant subject committee before referring a Scottish Law Commission bill. It was clear from your evidence, and from the written evidence from other committees, that opinion on this issue is evenly divided. The Committee decided to recommend option 1 from the working group report – referral by the Bureau - since this would avoid introducing an additional step in cases where that was unnecessary. The Committee noted that this would not preclude the Bureau from seeking the views of subject committees in case where this would be helpful.

The draft rules do not specify the criteria which would be used to decide if a bill was suitable for referral to the Subordinate Legislation Committee. Instead, they require the Presiding Officer to determine the criteria which we envisage would reflect the proposals in the working group report. An advantage of this approach is that if the criteria proved too broad (or indeed too restrictive) they could more easily be amended than if they were set out in the Standing Orders.

The Committee considered whether the rules need to make provision for the Subordinate Legislation Committee to seek policy input from subject committees on Scottish Law Commission bills. The Committee noted that there is nothing in the current rules to prevent SLC from seeking such input. However, we wondered if it would be helpful for the rules to specify a timescale for such input, or allow the SLC to do so. I would welcome your thoughts on this point.

We also noted a suggestion from the Welfare Reform Committee that the name of your committee might need to be updated to reflect this new role. Again, I would welcome your thoughts on this.

Yours sincerely

Dave Thompson MSP
Convener
Standards, Procedures and Public Appointments Committee

SCOTTISH LAW COMMISSION BILLS

CHAPTER 6

COMMITTEES

Rule 6.11 Subordinate Legislation Committee

In Rule 6.11.1(e), omit "and".

After Rule 6.11.1(f) insert

"(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.".

CHAPTER 9

PUBLIC BILL PROCEDURES

Rule 9.1 General Rules and Special Rules

In Rule 9.1.1, for "Rules 9.18 to 9.21" substitute "Rules 9.17A to 9.21" and after "Budget Bills," insert "Scottish Law Commission Bills,".

After Rule 9.17 insert-

"**Rule 9.17A Scottish Law Commission Bills**

1. A "Scottish Law Commission Bill" is a Bill which-

   (a) implements all or part of a report of the Scottish Law Commission

   (including a joint report with the Law Commission);

   (b) complies with such criteria as shall be determined by the Presiding Officer; and

   (c) is not a Consolidation Bill, Codification Bill, Statute Law Repeals Bill or Statute Law Revision Bill.

2. The Clerk shall arrange for the determinations of the Presiding Officer under paragraph 1(b) to be notified to the Parliament.

3. Where the Subordinate Legislation Committee has commenced consideration of, but has not yet reported on, the general principles of a Scottish Law Commission Bill under Rule 6.11.1(g) and that Committee considers that on the basis of the

evidence gathered by it the Bill does not comply with the criteria determined by the Presiding Officer under paragraph 1(b), that Committee shall inform the Parliamentary Bureau. The Parliament may, on a motion of the Parliamentary Bureau, designate another committee as the new lead committee. The new lead committee shall consider the general principles of the Bill afresh, but may take into account any evidence gathered and views submitted to it by the Subordinate Legislation Committee.

4. Where a Scottish Law Commission Bill which has been referred to the Subordinate Legislation Committee at Stage 2 has been amended at that Stage so as to insert or substantially alter provisions conferring powers to make subordinate legislation, Rule 9.7.9 does not apply, but a revised or supplementary memorandum shall be lodged and published as if Rule 9.7.10 applied.".

DRAFT STANDING ORDER RULE CHANGES

Official report of Standards, Procedures and Public Appointments Committee meeting, 31 January 2013

Scottish Law Commission Bills

The Convener: Agenda item 4 is Scottish Law Commission bills. We need to take a view on a number of issues in the clerk's paper, which is paper 1. At our previous meeting, we heard evidence from the conveners of the Subordinate Legislation Committee and the Justice Committee on the working group report on implementing Scottish Law Commission bills. Although the conveners broadly agreed with the report, some issues were raised on which we might wish to take a view before considering the draft standing orders.

The first issue is the mechanism for referring bills, which is covered in paragraphs 2 to 5 on page 1 of the paper. What do members feel about options 1 and 2, on which the two conveners had slightly different views?

Fiona McLeod (Strathkelvin and Bearsden) (SNP): It is interesting that among not just the two conveners but all the committees that submitted written evidence, opinion is absolutely evenly split. To go back to first principles, I certainly prefer option 1. We should not introduce a level at which the Parliamentary Bureau has the criteria that we suggest, but a subject committee almost gets to make the bureau's decision for it because the matter is referred to it first. Bills go through three stages. Under option 1, the bureau will reflect on the criteria and, if appropriate, send the bill to the Subordinate Legislation Committee. As with any bill, at stage 1, a subject committee could make its views known. If we said that the bill should go to the subject committee first, we would just be introducing an unnecessary extra step.

The Convener: Do other members have views?

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I agree with Fiona McLeod.

Richard Lyle (Central Scotland) (SNP): I also tend to agree with Fiona.

The Convener: I am getting the sense that members are content to go with option 1. Is that the case?

Members *indicated agreement.*

The Convener: The second point is on the criteria for referral, which are dealt with in paragraphs 6 and 7 of the paper. Do members have any comments?

When Nigel Don was before us, he made the point that standing orders would not prevent the Subordinate Legislation Committee from seeking a view, although there is no obligation to respond—[*Interruption*.] Sorry, I have just jumped on to another issue. My apologies.

We are looking at the criteria for referral, which are covered in paragraphs 6 and 7. Do we wish to bear the issue in mind in considering the draft standing orders? Basically, are we happy with the criteria for referral or do we want to adjust them in any way? Shall we just bear the issue in mind?

Members *indicated agreement.*

The Convener: The next item concerns input from subject committees. As I said, Nigel Don felt that the standing orders would not prevent the Subordinate Legislation Committee from seeking a view, although there would be no obligation on subject committees to respond. It strikes me as a bit pointless to leave it hanging out there. Some deadline could be set, and if the subject committee did not respond that deadline, the Subordinate Legislation Committee would take it that that committee was content. What do members feel about that?

Margaret McCulloch (Central Scotland) (Lab): I agree—there should be a timescale.

The Convener: If we set a timescale, how long would be appropriate in order to give a subject committee time to respond to the Subordinate Legislation Committee? Would a month be reasonable?

Richard Lyle: It depends on when the subject committee meets and on any recesses. A month may be too short.

The Convener: So perhaps the deadline should be a month, excluding any recesses. I do not think that it would be right for us to demand that the subject committee responds, but if there were a deadline, the presumption would be that if the subject committee did not reply within that deadline, it accepted what the Subordinate Legislation Committee was saying.

Richard Lyle: I would agree with a month, excluding recesses.

The Convener: Okay, thank you for that.

That takes us to support issues, which are dealt with in paragraphs 11 and 12. What do members feel about the ability of the non-Government bills unit to support members in relation to the bills that come forward?

Richard Lyle: If the Scottish Government introduces a bill, it will support that bill. If a committee introduces a bill, it will be resourced somehow. If a member brings forward a bill, I am sure that the member will be able to do that on their own if required. However, I do not agree that these bills will not be resourced; I think that they will. I cannot specify from where at this moment in time but I think that they will be resourced.

Fiona McLeod: On paragraph 12, being the pedant that I am, I absolutely agree. It is not for standing orders to discuss resourcing. There is already a procedure. As Richard Lyle said, if a bill is introduced, it is resourced as per the way in which it is introduced. It is not something for us to write up in standing orders.

The Convener: You are probably right. The practicalities will exercise control anyway. If there is no resource for a bill, it will not be introduced, and if there is, it will. I think that the issue will take care of itself. We do not really want to come down hard and fast on this. I presume that the committee does not want to seek the Government's view on this. If members feel that it is not an issue and that it should not be dealt with by standing orders, there is no point in looking for further information on it. We will just leave it as it is.

Members *indicated agreement.*

The Convener: We now move on to the impact of the proposed procedures, which is covered in paragraphs 13 to 16. Are there any comments? Do you feel that we need to review the system at some stage in the future? Does Fiona have a comment?

Fiona McLeod: You know me—I go through every line.

Anything new that is brought in should have a review process. I was just worried about the wording "later in the session". Should we agree to a timescale for a review but also to review the system after X number of bills have gone through? If we get to later in the session and nothing has gone through, will there be anything to review? When I thought about it, I realised that we must ask whether, if nothing has gone through, that is because the criteria are too strict. There must be a timescale, perhaps with an option of having a review after X number of bills, so that we see how things have worked through.

I throw this in: I have written "after X bills", but perhaps it should be that we review after three bills or 18 months—

The Convener: —whichever comes first.

Fiona McLeod: Does that make sense?
The Convener: What do members feel about that suggestion? Would we be happy to suggest a review after three bills or 18 months?

Members *indicated agreement.*

The Convener: That allows us to deal with the situation in which no bills come through, in which case, obviously, the system that we have set up is not working. The whole purpose is to allow some bills to come through. Eighteen months would be a reasonable timescale—if nothing has happened in that time, we would need to re-examine the criteria and so on. That is fine—we will do that.
Let us presume that one or two bills come through over the next 12 months or so. There will still be a lot of other Law Commission bills sitting there. Should the review pick up in due course on the question of what should be done about the bills that the system is not picking up? Should we consider that to see whether there is anything else that we can suggest that would help more bills to come through in some other way? Do members want to consider that for the work programme in due course? Are we happy with that?

Members *indicated agreement.*

The Convener: Okay—we will do that as well.
That brings us on to the "Next steps" in the paper. We are asked to look at how we should consult on the draft standing orders. Do members want to look at the draft standing orders first before we consult others? Alternatively, are members content for the draft standing orders to be put together by the clerks, with me having a look at them, and then put out for consultation? We could then consider the responses at the next meeting at the end of February.

There are pros and cons with both approaches. If we put the draft standing orders out for consultation now, we get the benefit of other people's thoughts. On the other hand, if we look at them first, we can tailor them and deal with any points that we are not keen on before putting them out to consultation, but that would mean a delay of about a month before we could look at them ourselves. What would members prefer: putting them out and getting responses, or having a look at them first?

John Lamont: The most efficient use of our time would be to get the draft standing orders out to the conveners. We can then reflect on the drafts and the views that are expressed. We could proceed from there, rather than adding the extra stage of our looking at them first.

The Convener: Are you happy with that, Margaret?

Margaret McCulloch: That is fine.

The Convener: Fiona McLeod is also happy. Okay—that is how we will do it. That is fine.
We are also asked to agree to consider the draft report and the draft rule changes in private at a future meeting. Do members agree to consider the next stage in private?

Members *indicated agreement.*

Fiona McLeod: I want to ask about something that has suddenly dawned on me. Somewhere in the paper, the question of whether the Subordinate Legislation Committee should have its name changed is raised.

The Convener: That was among the responses from other committees. We can probably pick up that point at a future meeting. There is some merit in considering that, and we will do so at a future meeting.