

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 16 September 2003
(Morning)

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

6th Meeting 2003, Session 2

CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Mr Stewart Maxwell (West of Scotland) (SNP)

*Christine May (Central Fife) (Lab)

*Mike Pringle (Edinburgh South) (LD)

Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Bruce Crawford (Mid Scotland and Fife) (SNP)

Alex Johnstone (North East Scotland) (Con)

Maureen Macmillan (Highlands and Islands) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Isla McLeod (Scottish Executive Legal and Parliamentary Services)

Martin Reid (Food Standards Agency Scotland)

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERKS

Joanne Clinton

Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 16 September 2003

(Morning)

[THE CONVENER *opened the meeting at 10:32*]

Food Standards Agency Scotland (Statutory Instrument Process)

The Convener (Dr Sylvia Jackson): I bring the Subordinate Legislation Committee meeting to order. We have apologies from Murray Tosh, who has had to go to another meeting.

Agenda item 1 is on the Food Standards Agency Scotland's statutory instrument process. We have the pleasure of welcoming Martin Reid, who is assistant director of FSA Scotland, and Isla McLeod, who is from the office of the solicitor to the Scottish Executive. The committee has raised a number of issues with FSA Scotland over the past few weeks and Martin Reid has kindly agreed to talk about them. Martin will make a brief statement first.

Martin Reid (Food Standards Agency Scotland): I thank the committee for inviting the agency to today's meeting. The Food Standards Agency is a United Kingdom department, but we are conscious of the need to ensure that the requirements of devolution are fully adhered to. Therefore, I welcome the opportunity to reassure committee members that we take our responsibilities seriously and make every effort to meet the standards that the Parliament and its committees are entitled to expect.

It is regrettable to the agency—and to me personally—that the committee felt the need to express dissatisfaction with its dealings with the agency. I hope that we will be able to move matters forward constructively today.

The Convener: Thank you. I will ask the first question before opening questioning up to members. How have you tried to resolve your difficulties with following a UK timetable as well as following our devolved timetable in Scotland?

Martin Reid: The agency has specifically recognised that point, not only in the context of the Scottish Parliament, but with regard to the National Assembly for Wales, the Northern Ireland Assembly and Westminster. We are going through a regulatory review process in which we are

setting out a critical path of timetables with which the whole agency needs to comply, to ensure that the various Parliaments' and Assemblies' timetables are adhered to. That is a work in progress.

We in FSA Scotland obviously make every effort to ensure that our colleagues—particularly those in Westminster and Whitehall, who lead on most of the issues with which we deal—are aware of our timetable. That has required an education process: we are aware of devolution impacts and we have tried to ensure that our colleagues elsewhere are educated on those. A series of seminars was held around the FSA that set out the timetables and emphasised the importance of adhering to them and of taking account of the different demands and processes of the different Administrations.

I feel that that message is getting through. I hope that the regulatory review process will conclude the work of the past three years and result in a standard operating procedure that will apply throughout the UK.

The Convener: Does Isla McLeod want to comment just now?

Isla McLeod (Scottish Executive Legal and Parliamentary Services): No, not at this stage.

The Convener: Please feel free to comment at any point. I open the meeting to members' questions.

Christine May (Central Fife) (Lab): I welcome both witnesses. I am sorry if some of our original comments to FSA Scotland were sharp. However, we were grateful for the subsequent tone of many of your responses.

When you said that your Scottish staff are well aware of the need to adhere to timetables, were you suggesting that others in the UK-wide division might not have been as aware or cared as much?

Martin Reid: It is not a question of whether other staff care as much, because they certainly do. Awareness is the issue and we are trying to raise awareness around the entire agency. We are different from many other agencies in that we are UK-wide. We have conducted various education exercises to raise awareness about the need to stick to timetables and processes.

The issue is not about whether people care about what is happening in Scotland. We in FSA Scotland are viewed sometimes as a bit of a pain within the agency for constantly making points to our colleagues in the south.

One example of our success in doing that is that we have ensured that Scottish ministers are always properly included when UK lines are being presented for negotiation in Europe. Early

experiences indicated that that process was often not well followed. We had to chase up matters to ensure that letters were going out and so on. It became clear that there was insufficient awareness around the agency of the need to do such things. However, that issue has been addressed and letters come up on a regular basis.

We also tend to see draft documents now before they are issued. In all departments there is always the question of ensuring that documents are seen timeously. We see documents timeously now, but it remains an issue. We keep an eye on that situation and ensure that everybody keeps it at the forefront of their minds.

Christine May: I think that the committee would sympathise with the business of seeing documents.

The Convener: Absolutely. I think that we are becoming aware, through what Martin Reid said, of his agency's complex and wide remit. An increasing amount of legislation must be coming through in your area, Martin. Is that the case?

Martin Reid: Yes. The European Commission issued a white paper on food safety in 1999 or 2000. We expect a raft of legislation to come out of that white paper. A clear example is the continuing work on the consolidation of the hygiene directives, which will take 17 different directives on food and simplify them into three new regulations. We expect those to be adopted at the end of this year. Subsequently, we will have to review an awful lot of existing legislation and replace it with new legislation. Some of the new legislation will be similar to existing legislation, but some will require changes. Certainly, the legislation's presentation will be different from that of current legislation. Therefore, the committee can look forward to receiving much more legislation from the Food Standards Agency over the next year or two.

Mr Stewart Maxwell (West of Scotland) (SNP): I accept what you have said about this being a complex area in which there is a lot of European legislation and that the difficulty is not only the bulk, but the complexity of each regulation. However, you mentioned an education process. I presume that you were referring to your trying to educate Westminster about, for instance, the deadlines that must be met in the Scottish Parliament. Devolution and the Scottish Parliament have been in place for four and a half years. How long do you think that it will take those at Westminster to learn about the deadlines?

Martin Reid: We are pretty well at the end of the road for the regulatory review process. Once it is in place it should result in a document for people to be aware of. Staff turnover has been a bit of an issue for us in Scotland, but that has not affected

the way in which we have dealt with legislation. Neither should that be used by the agency as an excuse for any issues that have arisen in relation to any legislation that has come before the committee.

It is a continuing process. I do not foresee our taking our foot off the gas. In terms of ensuring that the education process continues, we will need to top it up regularly. Our staff have participated in seminars around the agency to ensure that our messages are getting across. Specific workshops are being set up at Westminster at which FSA Scotland staff will give presentations explaining specific Scottish parliamentary processes and some of the—I hesitate to use the word difficulties—intricacies of our working within FSA UK and having a UK board, but also having to be aware of our responsibilities to the Scottish Executive and the Scottish Parliament. We must continually press those kinds of points. The people whom we educated three or four years ago may well have gone by now; therefore, we need to continue the process and ensure that the new staff are equally aware of those issues.

Mr Maxwell: I accept that it is a continuing process and that those who are working at Westminster will not be particularly au fait with the principles of the Scottish Parliament, which would not be top of their agenda. Nonetheless, that education must take place. Can you tell us how many times, on average, the deadlines at Westminster are missed and how that compares with the number of times that they are missed here? I ask that because, at our previous five meetings, almost without exception, the FSA's deadlines for the Scottish Parliament have been missed. That was one of the most obvious issues to arise in the first five meetings, which is why we invited you along today. Are deadlines missed to the same extent at Westminster, or is there a clear difference between the meeting of deadlines there and here?

Martin Reid: I cannot answer that off the top of my head, but I am happy to make some inquiries and to find out the ratio of the number of times that the deadlines have been missed at Westminster to the number of times that they have been missed in Scotland over the past few months. Because of the limited resources that are available to FSA Scotland, we are quite dependent on our colleagues at headquarters for the production of the initial drafts of legislation. We suffer a little in the timing of our receiving documentation. However, as I have said, we have tried to address that and we are having some success. I hope that, in future, the number of times that the agency has to request authorisation to breach the 21-day rule will be reduced. I also hope that, when we request that authorisation in future, we will be able to provide clear justification. I fully accept that the

fact that we have received drafts late is not a good enough excuse to give the committee. We will try to ensure that that does not happen in the future.

Mr Maxwell: I agree that saying that you received the drafts late is not a good enough reason and I hope that that will be addressed. You say that part of the problem is a lack of resources in Scotland to deal with the legislation, most of which comes from Westminster. If the resources were available in Scotland, would you no longer have the problem?

10:45

Martin Reid: Any office would benefit from having more resources, provided that those resources were used as efficiently as possible. We deal with a significant amount of legislation for the size of our office—as the committee will be aware through the amount of legislation that comes before it. It is possible that, if more resources were available to us, we would be able to react better to requests for legislation and things might be a little different.

We probably have sufficient resources to deal with the raft of legislation that is currently proposed; however, we must think ahead. We know that consolidation will be required and that various other regulations are emanating from Europe. We will have to examine closely the resources that are available to us and our legal colleagues to ensure that we are adequately resourced to deal with the demands that are placed on us. We have taken a preliminary look at that through our business planning process and we have consulted the office of the solicitor to the Scottish Executive. Our assessment is that we are adequately resourced to deal with our work load; nevertheless, it will require hard work to keep up with future legislation.

Mr Maxwell: You seem to be contradicting yourself. Are you now saying that you are adequately resourced? In your previous answer, you seemed to be saying that the fact that you were not adequately resourced was part of the problem.

Martin Reid: As I said, there may be an issue over resources. However, our current assessment is that, looking ahead, we have adequate resources to deal with future demands. The committee will be able to measure whether that assessment is reasonable and we will make every effort to ensure that those kinds of issues are not excuses that we bring to the committee for any failing on our part. I cannot prejudge what will happen further down the road, but that is the conclusion that we draw from what we have done so far in anticipating the weight of legislation that will come our way in the next year or two.

The Convener: Stewart Maxwell mentioned staff training. In examining the regulations that have come from the agency, we have noted certain on-going drafting issues relating to errors that are appearing fairly constantly, such as appear in the regulations that are before us today on importing various kinds of nuts and the obligations on importers or member states. Will you address that sort of issue as well as others that we are going to mention, which are to do with the explanatory notes and transposition notes? Do you use those issues in the training of your staff, or—as Stewart Maxwell is suggesting—are you not quite at that level yet because you need more resources to incorporate all that?

Martin Reid: Some of the issues that the committee has raised have surprised us a little. I am not saying that the committee's conclusions are not correct—we are grateful to the committee for drawing such issues to our attention—however, the difficulty that you are talking about did not appear prevalent a year or so ago and the staff in the agency who deal with the legislation have not changed. I am, therefore, at a loss as to why we would suddenly encounter a problem to do with the preparation of the legislation. Perhaps we can address that later, along with the other points that the committee wants to raise. Isla McLeod might want to talk about some of those.

I am a little puzzled as to why we would encounter problems to do with the quality of the legislation. The staffing situation has not particularly changed: the people who are responsible for preparing the legislation are essentially the same people who were responsible for doing it a year or so ago. If the committee will allow, I will really have to pass on that point. Perhaps I could promise to look into the matter back at the agency and try to identify whether there is an underlying reason why problems might be occurring. Nothing immediately comes to mind, however.

The Convener: Before we go into further detail, could you answer the question that I asked earlier: if there are recurring issues, do you use them for staff training exercises?

Martin Reid: I would say that we would do. We do not have anything factored in to deal with the specific points that the committee has discussed, but the staff have complete accessibility to Scottish Executive training, and we encourage them to take it up. Most of our staff have been through the relevant training. If there is a need to refresh people, we will look into that.

The points that have been raised over the past few months highlight one or two issues that we need to consider. We need to establish whether there is a need to go back and refresh a few people. Some training will have taken place three

or four years ago now, and I would have hoped that, in the intervening period, the amount of legislation that we have been dealing with has meant that people have become more familiar with how things should be done. There should be no question of standards slipping because of that increased amount of legislation, but I can consider whether we could build in any specific training points, as you described. First, however, it is a matter of identifying whether there is an underlying reason for what has been occurring.

The Convener: We will discuss some of the issues further later, but I invite Christine May to raise a point about transposition and explanatory notes.

Christine May: I wish to focus on the matter of transposition notes in particular. I think that we have commented on the absence of transposition notes in most of our committee meetings this session. We understand that it is common practice to issue them in England and Wales. First, if that is the standard practice elsewhere in the UK, why do you not always provide them? Secondly, why, when the committee has consistently expressed its view that transposition notes should be there for consistency if nothing else, do you not just give us them to keep us quiet?

Isla McLeod: It is the Executive's policy not to do transposition notes for all instruments routinely. I understand that there is a continuing dialogue between the Executive and the committee about transposition notes, so I do not think that it is for me to give the committee a definitive answer today.

On a personal level, I would say that the prospect of doing transposition notes fills me with horror. In some cases, a piece of legislation can look quite simple. Some directives look quite simple on the face of it. Transposing them, however, can become quite a complex matter. I realise that that probably emphasises Christine May's point that transposition notes are needed, but if they were always required that would have implications for our work load and level of production. There is a legal requirement to produce transposition notes in England, but we have no such requirement here. That is the difference.

Christine May: Ah, I see. Could I follow up on the matter of explanatory notes—or do you wish to cover that, convener?

The Convener: You can do so, Christine, but first I would ask Isla McLeod to speak up a little.

Isla McLeod: I will try to do so.

Christine May: We have also focused on explanatory notes, which we feel are extremely helpful to those who are using a given instrument.

Would it perhaps be a good idea to provide them as a matter of course, even if some of them were simply to say that the Executive did not believe that any further explanation was required?

Isla McLeod: I am aware of the statutory instruments to which Christine May is alluding. We set out, in the explanatory notes that we do produce for instruments, what the new regulations require of the manufacturers concerned. There is a tension between our guidance, which says that explanatory notes should be brief, and the need to provide enough information for the people using the regulations. We have to be careful about that, because we do not want explanatory notes to become intimidating addenda to instruments.

We have taken on board the committee's previous comments. For subsequent instruments, which we will be making over the next few months, we will be incorporating an explanation setting out, as briefly as possible, what the changes from the previous regulations are—although that is not always the easiest thing to do.

Christine May: To return to something that Martin Reid said earlier about liaison with colleagues down south and consultation on timetables, do you have direct liaison with the European Commission, and do you get opportunities to emphasise specifically Scottish elements?

Martin Reid: As the committee will be aware, the lead on European issues resides with Whitehall. We have a good working arrangement in the agency. If there are particular Scottish issues pertaining to what has emanated from Brussels, we have the opportunity to lead on them. There have been only a limited number of examples of that, but we certainly have every opportunity to feed in Scottish views. If there are particular Scottish points, then there is the opportunity for officials from the FSAS to attend meetings so as to ensure that they are raised. There are mechanisms in place to ensure that Scottish issues are taken into account, either in developing UK lines or at the early stages of negotiations on working documents, and I am quite satisfied that what is currently in place is working.

Christine May: That is the formal mechanism but, in my experience of working with the European Commission, a lot of preparatory work is done through informal networks. Do you make use of such of those as are available to you?

Martin Reid: Yes. We have good contacts with individuals in the Commission in those areas that particularly affect Scotland. I know that it is not everybody's favourite way of communicating, but direct e-mails work quite effectively at an informal level.

Christine May: That is good. Thank you.

The Convener: For clarification, could I ask Isla McLeod to summarise the position in relation to transposition notes and explanatory notes? I am sorry—I did not pick up everything that you were saying earlier.

Isla McLeod: My apologies—I will move my microphone nearer to me.

There is a continuing dialogue between the Executive and the committee in relation to transposition notes. There is a common policy across the Executive, which is not to provide them routinely. I cannot give you a definitive answer on that point today; it is for the Executive to decide on that.

Explanatory notes are particular to the individual instrument that they accompany. We have taken on board the committee's comments that—in relation to the particular instruments that I have in mind—there should perhaps be a little more explanation of the changes from the old to the new regulations. We have provided that in instruments that we have been preparing subsequently.

It is quite difficult, however. There is a tension between providing an informative appendix to an instrument for the person using it and providing too much information. On the instruments that the committee is alluding to, the directives that we are transposing seem to be small and straightforward, with fairly straightforward sets of regulations but, if we try to think of a concise way to set out for the user what those changes are, we find that they are in fact very many and very small. A detailed explanation of the changes between the old and new instruments would end up being quite substantial.

We have taken on board the committee's comments, and we are now including an additional paragraph, setting out the changes between the old and new regulations. However, of necessity, such an explanation has to be limited in what it can actually say.

11:00

The Convener: If an explanatory note has been developed for particular regulations—perhaps the first set of regulations—and there does not necessarily need to be another explanatory note for subsequent sets of regulations, is it possible that at least something from that explanatory note might be included with later regulations? I am trying to think about how we could get a little more help. We can find it difficult to put matters in context and get behind them, particularly when we must consider a large number of instruments in a week. Explanatory notes are very useful.

Isla McLeod: I hope that we have managed to achieve what we are trying to do in the

instruments that will come through over the next few months.

The Convener: Okay—we shall see.

Isla McLeod: We shall.

The Convener: I would like to return to something that Martin Reid said. Martin, you said that you were searching to find out where there might be difficulties—I think that you used words with that meaning—and that you could not understand why we were bringing up issues that were not brought up a year ago.

Martin Reid: It is not that I do not understand or accept the issues that the committee has raised with the agency—it is perfectly valid for the committee to raise such issues—but there seems to be have been something of a blip in the agency's record over the past two or three years. We have not picked up particular problems with how the agency has prepared legislation for the committee and I would like to investigate whether there is an underlying reason for such problems occurring now and to identify whether there is a training issue or some other reason behind those problems occurring.

The agency wants to maintain high standards in the quality of legislation that proceeds to the committee and—with respect—I do not want to spend too much time explaining the agency's problems to the committee. I would like to take a little time to investigate whether there is an underlying reason why such things occur and identify whether there is a training need. If there is such a need, we will certainly look to put training in place either through formal training mechanisms via the Scottish Executive or perhaps a specific exercise that we can carry out within the agency.

The Convener: Will you write back to the committee about what has happened when you have done your investigation?

Martin Reid: Of course.

The Convener: Thank you.

As there are no other questions, I thank Isla McLeod and Martin Reid for coming to the meeting.

Delegated Powers Scrutiny

Vulnerable Witnesses (Scotland) Bill: Stage 1

11:04

The Convener: Agenda item 2 is delegated powers scrutiny. Members will remember that we sent several questions to the Scottish Executive about the Vulnerable Witnesses (Scotland) Bill at stage 1. We will go through the answers point by point and discuss how we want to proceed.

Our first question referred to proposed new section 271N(1) of the Criminal Procedure (Scotland) Act 1995, on the application of proposed new sections 271 to 271M of the act to proceedings in the district court. Members have the Executive's response to the question in front of them. The committee should decide whether it thinks that the Executive's response is sufficient in respect of the on-going McInnes inquiry. The response deals with why district courts have not been included at this point in the legislation, but have been left to subordinate legislation.

Christine May: Given the Executive's response, we have reached the end of the committee's remit and powers in querying how the Executive wants to proceed with the matter. Perhaps we ought to refer the matter—and particularly the proposal to phase in implementation—to the lead committee and the Parliament to consider whether the method that the Executive has proposed is the most appropriate method and what alternative methods might be available. We should draw the matters that we queried to their attention.

Mike Pringle (Edinburgh South) (LD): I agree. I am a member of the Justice 2 Committee, which is dealing with the Vulnerable Witnesses (Scotland) Bill. District courts have already been discussed in that committee and it is right that the Subordinate Legislation Committee should also discuss the matter.

I think that the district courts in their own way are just as important as the High Court and the sheriff courts. I understand the Executive's problems with the bill, but it is important to highlight the matter with the Justice 2 Committee and bring the issues that the Subordinate Legislation Committee has discussed forcibly to its attention so that it thoroughly discusses the way forward.

I understand the issue surrounding resources. A huge amount of money has just been spent in Edinburgh on refurbishing district courts and there might not be a desire to spend a lot more money immediately. However, the real issue relates to justice. If there is going to be justice, the bill

should be enacted as quickly as possible. Perhaps somebody, somewhere must address the problem of how all the district courts are going to come online at once. Somebody said earlier that it is not good enough for the courts in Dundee to come online before the courts in Argyll and Bute or in Edinburgh and that everything should happen at once. Resources are one of the big issues involved.

Mr Maxwell: I agree with what has been said and with Christine May's point about whether a commencement order is the right way to proceed—it is up to the committee to discuss that. I also agree with what Mike Pringle said about phased implementation.

We should at least mention to the Justice 2 Committee the possible European convention on human rights implications. I am not sure whether there are such implications, but I have slight concerns about phased implementation. As Mike Pringle said, it does not seem reasonable that provisions should be extended for the protection of vulnerable witnesses in Dundee, but not in Argyll—at the very least, we should mention that to the lead committee.

Gordon Jackson (Glasgow Govan) (Lab): I do not have a problem with the matter. I understand what has been said about justice in Dundee and Argyll, but district courts are sometimes literally a back room above a shop. There can be huge physical problems in certain places. On the other hand, would one want places to wait where provisions could apply now?

There are two ways of looking at phasing in. Is nobody to get the procedures because one place cannot have them? I am not persuaded. The Executive's answer is good, but I agree with Christine May. The matter is not for the Subordinate Legislation Committee—the Justice 2 Committee can think about the politics of the matter up hill and down dale, but we cannot take the matter any further than simply referring what we have noted.

The Convener: In our note to the lead committee, do you agree that we should make it clear what the minister's powers will be?

Gordon Jackson: We should. I am sure that the Executive knows anyway, but we have a duty to highlight the matter.

The Convener: We should make things clear. What things mean is not always clear when one is on a lead committee and outwith the legal process. We could highlight points that have been made about the commencement order. Do members want to include further points on the commencement order?

Christine May: What we have said should cover it.

Primary Medical Services (Scotland) Bill: Stage 1

The Convener: We move on to delegated powers scrutiny of the Primary Medical Services (Scotland) Bill at stage 1. We received the briefing papers only recently, so we might have additional questions that we might want to bring up at next week's meeting. It has been suggested that, with respect to our going through the bill and our legal adviser's questions on it, we might want to invite witnesses to next week's meeting to get a full answer to some of the questions. Does the committee agree that the clerk should invite bill team officials to next week's meeting to answer questions?

Christine May: I would welcome that arrangement for next week because I have had little time to study the legal brief. The suggested arrangement would give us the time to have a first pass at the bill this morning and let the Executive know what questions we might want to raise. Presumably, depending on what the answers are, we will have supplementary questions. Therefore, it would be welcome to have the proposed witnesses next week.

The Convener: Is it agreed that we do that?

Members indicated agreement.

The Convener: We will highlight the legal brief's key points. I remind the committee that the bill is part of a package of measures that will implement changes to the organisation of the national health service in Scotland. The bill's purpose is to introduce the new general medical services contract and the consequential restructuring of the provision of personal and general medical services by health boards. That is the overview.

The first section of the legal brief deals with the bill's subordinate legislation powers. Our legal advisers tend to agree with the Executive that the negative resolution procedure seems appropriate in respect of the new powers. Does the committee agree with that view, or are we violently against it?

Christine May: We agree.

The Convener: So the negative resolution procedure is acceptable for the bulk of the provisions.

The legal brief welcomes the Executive's intention to produce sample regulations under the new powers during the bill's passage through the parliament. Does any member want to comment on that?

Christine May: I hope that we get the sample regulations earlier in the process rather than later;

that would be helpful. It is good that the Executive will do that exercise as the bill progresses, because that will allow for the possibility of making amendments before the regulations have been tried out on patients.

The Convener: Exactly.

Mr Maxwell: I was about to say what Christine said. I think that what the Executive proposes is a good idea and that it will be helpful. We should commend the Executive for that.

The Convener: Okay.

Section 1(2) of the bill inserts into the National Health Service (Scotland) Act 1978 new section 2C(3), which allows Scottish ministers to prescribe the information that must be published by a health board in relation to the primary medical services provided or secured by that health board. Our legal advice suggests that that is sensible. Do any members have a contrary view?

Mr Maxwell: No.

The Convener: Okay.

Proposed new section 2C(5) allows regulations to be made that set out what are and are not to be regarded as primary medical services for the purposes of the 1978 act. Our legal brief indicates that

"the provision is consistent with the approach of existing provisions in the 1978 Act",

but that there may be a difficulty about

"what may constitute a 'primary medical service' under section 17C."

Do you want to comment on that, Gordon?

Gordon Jackson: No. I suspect that I am like everyone else in that I have not considered the issue as much as I would have liked.

The Convener: Exactly. That is why we want to have witnesses next week and look at the issue in much more depth.

Mr Maxwell: On what constitutes primary medical services, it might have been helpful if the bill had provided an illustrative list. The difficulty with lists is that they can tend to box one in, but some sort of a list would have been helpful. Like everybody else, I have not had much time to read the legal brief, so perhaps we can ask next week's witnesses detailed questions about that point.

11:15

Mike Pringle: I agree with that. The problem with having a list of primary medical services is that if something is left out of the list, somebody will claim later that what was left out is not a primary medical service. Therefore, such a list

should be an illustrative one rather than a definitive one.

The Convener: Exactly.

Christine May: Proposed new section 2C(5) of the 1978 act will allow health boards to prescribe what primary medical services are. I would like to hear from the Executive that this is intended to be a facilitating mechanism to allow services to be provided where, for example, the nine-to-five service providers do not want to offer out-of-hours services, rather than restricting patients' access to services even further. I think of NHS dental services, which are under huge pressure at the moment. Perhaps we can press the Executive on how the regulations will be drafted to ensure that their primary effect is to expand patients' access to services.

The Convener: Okay.

Mike Pringle: Paragraph 47 of the legal brief states:

"On the other hand with respect to new sub-section (6), given the stated intention relating to GPs hours is there a case for the relevant provision to be included in primary legislation where it can be debated?"

I suggest that including the relevant provision in primary legislation is the way forward. It would be good to ask questions on that next week because that is a huge issue.

The Convener: That is a good point because we are being told that one of the issues that the committee should consider is the balance between what is in the bill and what is in regulations.

Section 2 of the bill is entitled:

"Provision of primary medical services: section 17C arrangements".

In addition to those arrangements, there are also minor amendments that are purely consequential, mainly repealing existing provisions that are no longer relevant. That seems not to be a big issue for the committee.

On proposed new section 17D(3) of the 1978 act, the legal brief argues that

"In relation to new subsection (3) some type of transitional period will clearly be needed. The only question is whether the transitional period should be specified in primary legislation or whether",

for flexibility, it should be in regulations. That was exactly Mike Pringle's point. Perhaps we can bring those points in together.

If members have comments as we go through the legal brief, please stop me.

We move on to consideration of proposed new sections 17E(3)(ca), (cb) and (cc) and 17E(3A) and (3C) of the 1978 act.

It is partly a matter of clarifying what may be included in regulations relating to the patient's choice of medical practitioner. Proposed new section 17E(3A) of the 1978 act authorises the Scottish Ministers to make regulations that require payments to be made under section 17C arrangements. It does not appear to be clear what payments the proposed legislation has in mind or who it is envisaged will be required by the regulations to make them.

At the moment, section 17E(3)(k) of the 1978 act permits regulations made under that section to authorise, but not require, health boards to make payments of financial assistance for certain purposes. It may be that it is to those or similar payments that proposed new section 17E(3A) is directed, but we need clarity on that.

Christine May: I note that, under the proposed directions, retrospective payments could be made. Has anything been specified in relation to the retrospective recovery of any payments made erroneously?

The Convener: That is not clear, so we could ask the Executive about that.

The proposed new sections of the 1978 act that section 4 of the bill introduces govern the terms and content of the general medical services contract and specify who may provide or perform primary medical services under the contracts.

Our legal advice is that the Executive's case for consigning provisions in that area to subordinate legislation seems unanswerable. We might wish to consider whether, given that the services that are to be provided are those that the Executive considers to be essential in the new GMS contract, the bill ought at least to contain an illustrative list of the types of service that are envisaged. We might wish to consider whether annulment provides the right level of scrutiny for that. At the same time, it is pointed out that that is the procedure that applies to exercises of the present powers that are to be repealed by the bill.

Proposed new section 17L of the 1978 act—we are particularly concerned with proposed new sections 17L(1), 17L(4) and 17L(6)—sets out the persons with whom a health board may enter into a GMS contract. There is a question around whether the procedure that has been selected is appropriate, and we might want to follow that matter through.

Christine May: I would like us to follow up what our legal briefing says about proposed new section 17L(4), which enables regulations to be made on the effect of a change in the membership of a partnership. I hope that this is a case where we will see the regulations concerned fairly quickly. I think that, under the new legislation, there will be cases where those who have

previously held contracts may be deemed to be unsuitable. It would be good to see the regulations sooner rather than later.

The Convener: The clerk indicates that we could ask for a timetable, if there is one.

Christine May: That would be good.

The Convener: Still on proposed new section 17L(4), it could be questioned whether, given that the circumstances do not seem likely to change and thus to require the flexibility of subordinate legislation, this provision could not have been made in the bill itself. It is the same argument about what is on the face of the bill and what comes under subordinate legislation.

Christine May: It is probably worth testing the point with the Executive. There may be a good reason for its decision. If so, can we be told what it is?

The Convener: That is basically what we are asking. We want to know why provisions are in subordinate legislation rather than in the many sections of the bill. The same applies to proposed new section 17L(6). If those points are put together, that would be helpful to us next week.

Section 17M is on payments by health boards under general medical services contracts. The section provides for the giving of directions by the Scottish ministers as to payments to be made under general medical services contracts. There is no provision for such matters to be dealt with by subordinate legislation. The matter seems to be an administrative matter relating to pay. Our legal advice says that, in principle, therefore, there would seem to be no need for the power to be exercised by any means more formal than direction.

Christine May: I return to the point that I made about getting money back if it is subsequently discovered that that money should not have been received in the first place.

The Convener: Exactly.

Section 17N(1) confers a broad regulation-making power on the Scottish ministers that allows the imposition of further requirements that must be included in all GMS contracts. It is suggested that the Executive's view on the need for delegated powers in this instance seems to be acceptable. Again, the only point to be made might be whether annulment provides the right level of parliamentary scrutiny. We could ask that question.

Mr Maxwell: With previous bills, particularly when there has been a lot of subordinate legislation and delegated powers, we have discussed the possibility, at least, of regulations being subject to the affirmative procedure at first. Subsequently, the regulations could be subject to

less strict procedure. In the first instance, there might be a case here for considering matters in a more detailed fashion, perhaps under the affirmative procedure. When we are sure about things, we can move on to less detailed scrutiny. For all the provisions to go through as subject to annulment does not necessarily seem to be the best way to proceed. We have discussed the matter before and it may not be inappropriate to proceed in such a fashion.

The Convener: Alasdair Rankin might want to highlight for next week's meeting what delegated powers are suggested as being subject to the negative procedure. That would be helpful.

Alasdair Rankin (Clerk): We can do that.

The Convener: We will proceed to proposed new sections 17O(1) and 17O(2). The Executive's memorandum describes the detail of the delegated powers conferred by proposed new section 17O(1), which makes provision for the establishment, by regulations, of national procedures for the resolution of disputes as to the terms of the proposed GMS contracts. On the surface, things seem to be okay. Our legal advice is that it is not thought that any procedure more onerous than annulment is necessary.

Section 5 is on persons performing primary medical services. The section inserts into the 1978 act proposed new section 17P, which confers powers on the Scottish ministers to make regulations governing the ways in which persons carrying out primary medical services are listed. New section 17P(1) appears to be generally justified.

Christine May: The legal briefing again raises the question whether something of potentially considerable importance should be in the bill or left to regulations. I would like to hear reasons, as I suspect that either way of doing things is equally valid.

The Convener: We can add that one to the list.

Christine May: I would hate to think that the question of an individual GP's eligibility might be debated in the Parliament. That would obviously be inappropriate.

The Convener: That is suggested in our legal advice.

Proposed new section 29(8)(a) of the 1978 act seems okay.

Members indicated agreement.

11:30

The Convener: There is quite a big comment in our legal advice on section 7(1), on ancillary provisions.

Christine May: There must be transitional arrangements. Is it valid for the affirmative procedure to be used merely because an instrument amends primary legislation? From the committee's point of view, is it right that all the matters in the catch-all provisions are there? Should any of them be anywhere else? Should they be the subject of a separate paragraph on their own? I would want to test that.

Gordon Jackson: I am not sure that I understand. What do you mean by "should be on their own"?

Christine May: I refer to what are described as ancillary provisions. I suppose that it might be regarded as a matter of opinion whether something is of sufficiently low importance to be an ancillary provision or whether it could be more important than the Executive is saying. Ancillary provisions are ones in which amendments can be made that have quite significant effects sometimes but that, because they are brushed in at the end, do not receive the detailed scrutiny that they might.

Gordon Jackson: I was just not sure how that could be done. A provision is defined as incidental, supplemental or consequential. Either those words could be taken out—which would be difficult—or they could be left in, in which case it would be a matter of opinion later on whether the provision was consequential or serious. Unless it could be known in advance what the issue was going to be, it would be hard to know which word to take out. I do not, therefore, know how the wording could be amended.

The Convener: Are you bringing the issue of vires into this?

Gordon Jackson: No, not at all.

Christine May: I am happy to raise the matter and have Gordon Jackson express an opposing point of view.

Gordon Jackson: It is not an opposing point of view. I just do not know how a word could be taken out in advance, as it could not be known in advance whether the provision was consequential or serious.

The Convener: Let us have that debate. We will put that on the list.

Section 9 deals with the commencement and short title. No issues arise on section 9.

Members indicated agreement.

Executive Responses

11:33

The Convener: Item 4 is consideration of Executive responses. We asked various questions about regulations last week, and we have received replies.

Form of Improvement Order (Scotland) Regulations 2003 (SSI 2003/336)

The Convener: I have read through the answer that we received and the legal advice that we have been given. It is suggested that we may wish to consider reporting the regulations on the grounds that there are doubts as to whether they are intra vires in one respect. We might also draw attention to all the further information that we have received from the Scottish Executive. Are members happy with that suggestion?

Members indicated agreement.

Housing Grants (Form of Cessation or Partial Cessation of Conditions Notice) (Scotland) Regulations 2003 (SSI 2003/337)

The Convener: Christine May was quite interested in these regulations.

Christine May: I felt that the parent act—the Housing (Scotland) Act 1987—gave no scope for amendment of the conditions: either they were all complied with or none of them was complied with. I do not think that we are going to get a different answer from the Executive so I recommend that we do as we have done previously, which is to report our comments and the response to the lead committee and the Parliament to see what action—if any—they wish to take.

The Convener: Yes. Our legal advice suggests that there is doubt as to whether, in part, the regulations are technically intra vires.

National Health Service (Compensation for Premature Retirement) (Scotland) Regulations 2003 (SSI 2003/344)

The Convener: We previously raised four points on the regulations. On point 1, in relying for a definition on superseded legislation the instrument fails to comply with proper legislative practice. Point 2 dealt with the issue of same-sex relationships, and further clarification has been supplied by the Executive. On points 3 and 4, there is a feeling that the instrument fails to follow proper legislative practice.

Are there further points that members think we should make to the lead committee or to Parliament?

Mr Maxwell: I do not think so. I am still not convinced by the Executive's answer on point 2; however, I do not think that there is anywhere else that we can go with it. The matter should just be drawn to the attention of the lead committee.

The Convener: Yes. We asked the question and got back the answer. It is now over to the lead committee.

**Food (Hot Chilli and Hot Chilli Products)
(Emergency Control) (Scotland)
Regulations 2003 (SSI 2003/382)**

The Convener: The committee took the view that the inclusion of article 3 as a provision that must be complied with by an importer must constitute defective drafting. That is not a condition that an importer can fulfil, as the duty to comply falls solely on the member state. The answer that we received was encouraging, as the Executive hopes to produce amending regulations shortly.

Christine May: We should just report the answer to the lead committee.

The Convener: Yes. We should report the Executive's undertaking following our drawing its attention to that matter.

**Food (Brazil Nuts) (Emergency Control)
(Scotland) Regulations 2003 (SSI 2003/396)**

The Convener: In response to the second question that we relayed to the Food Standards Agency last week, the FSA confirms that it is intended that compliance with article 5 should be a requirement of regulation 3(1)(a). We are advised that the FSA will make the necessary amendment in the amending regulations. That is good news. In relation to the first and third questions that we raised, the FSA has acknowledged that there was defective drafting. I suggest that we report those issues, along with the answers that we have received, to the Parliament and the lead committee.

Members indicated agreement.

**Draft Instrument Subject
to Approval**

**Title Conditions (Scotland) Act 2003
(Consequential Provisions) Order 2003
(draft)**

11:38

The Convener: There is only one recommendation in our legal brief, which is to ask the Executive

"why, as the Regulations amend the parent Act itself, section 168(5) has not been cited in the preamble as an enabling power."

Is that agreed?

Members indicated agreement.

Instruments Subject to Approval

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning)
(West Coast) (No 9) (Scotland) Order 2003
(SSI 2003/409)**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning) (West
Coast) (No 10) (Scotland) Order 2003
(SSI 2003/410)**

11:39

The Convener: No points have been identified in relation to the orders.

Members indicated agreement.

Instruments Subject to Annulment

Police Pensions (Scotland) Amendment Regulations 2003 (SSI 2003/406)

11:40

The Convener: We come to item 7, under which we have several instruments to consider. The first is the Police Pensions (Scotland) Amendment Regulations 2003 (SSI 2003/406).

Christine May: On paragraph 7 of schedule 1, which amends regulation H1 of the Police Pensions Regulations 1987 (SI 1987/257), there is some doubt as to whether the provision that matters may be referred

“to a board of duly qualified medical practitioners”

complies with the Police Pensions Act 1976, in which the wording is “to a medical practitioner”. Although I managed to convince myself that the word “tribunal” could perhaps be used to refer to that medical practitioner, others poured scorn on that idea. Perhaps we should ask about it.

The Convener: We will seek an explanation.

There is a question over possible proposals to consolidate the relevant regulations in the form of a Scottish statutory instrument. We also have a number of points of form, which we could convey to the Executive by way of an informal note. Is that agreed?

Members indicated agreement.

Animal By-Products (Scotland) Regulations 2003 (SSI 2003/411)

The Convener: These regulations were very interesting, and we have a number of points to raise for the purposes of clarification. The first is to do with regulation 32, which does not include a specific sanction for breach of its requirements. We could ask the Executive to clarify how that regulation is to be enforced.

Christine May: Could the Executive also clarify what is to happen to records that are to be made but not kept? People might make a record of something but, if nobody cares about it, could it just be destroyed immediately?

The Convener: There is quite a bit of confusion over certain regulations on the making and keeping of records.

We might also ask the Executive whether it intends obstruction offences under regulation 47 to be triable either way—summarily or on indictment—as it is more usual for such offences to be triable only summarily and to be subject to a

maximum penalty of level 3 on the standard scale. There was an issue over whether sentences involved six or three months of imprisonment.

Christine May: There is no transposition note.

The Convener: Again, we raise that point.

Christine May: Yes—it is my favourite. I heard what the witnesses said earlier in the meeting, but I still think that one should be included.

The Convener: Are those points agreed?

Members indicated agreement.

Food (Figs, Hazelnuts and Pistachios from Turkey) (Emergency Control) (Scotland) Amendment Regulations 2003 (SSI 2003/413)

The Convener: We turn now to figs, hazelnuts and pistachios from Turkey, which I might have had this summer. No points of substance arise.

Food (Pistachios from Iran) (Emergency Control) (Scotland) Regulations 2003 (SSI 2003/414)

The Convener: We have quite a few points to raise under these regulations, and it is suggested that we ask the Executive a number of questions on them. We could ask the Executive to explain the purpose and effect of regulation 3(1)(b). Is that agreed?

Members indicated agreement.

The Convener: Under regulation 3(1), it seems that people can import pistachios only if they undertake to sample them. Of course, the product would have to be imported before any sampling could be done anyway. I was trying to make that point to the Food Standards Agency witnesses earlier, because the same requirement appears elsewhere. Various other points are made in the legal brief about the same area, and we should put those to the Executive as well.

The second main point is that, although it is accepted that express revocation is not necessary in law, why does regulation 7 not also revoke SI 1997/3046, the sole purpose of which was to amend SI 1997/2238, which is revoked by these regulations? Just a tidying up is needed.

Members indicated agreement.

Road Works (Inspection Fees) (Scotland) Regulations 2003 (SSI 2003/415)

The Convener: There do not appear to be any points of substance to raise in relation to the regulations, but there is a minor error that we might note, which is to do with the word “and”. We can mention that by informal letter. Is that agreed?

Members indicated agreement.

Road Works (Recovery of Costs) (Scotland) Regulations 2003 (SSI 2003/416)

11:45

The Convener: It is suggested that we ask the Executive why section 163(3) of the parent act—the New Roads and Street Works Act 1991—which seems to be an important enabling power relevant to the sub-delegation provided for in the definition of

“cost in that period of capital”,

has not been so cited in the preamble to the instrument.

Members indicated agreement.

The Convener: Before he had to leave our pre-meeting for another meeting, Murray Tosh raised an issue about style that might be conveyed by informal letter. Is that agreed?

Members indicated agreement.

Road Works (Reinstatement) (Scotland) Amendment Regulations 2003 (SSI 2003/417)

Christine May: The question is whether the regulations refer to 125 million standard axels per annum or over the lifetime of the road, and whether they are intended to operate on every cattle track up a mountain or only on roads that carry 125 million standard axels per annum, which would make sense.

Gordon Jackson: I know that the frequency has been missed out before, but it must be per something—per week, per annum or per millennium—otherwise, the figure has no meaning.

The Convener: Indeed. There has to be a time frame. We will ask for an explanation. We will also ask why section 163(3), which appears to be relevant, has not been cited in the preamble as an enabling power.

Christine May: The regulations are very topical. There has been a lot in the newspapers over the past week or so about local authorities, in particular, complaining about reinstatement, the utilities and so forth. They will want to use the regulations and they will want them to be right.

The Convener: Absolutely—especially in Stirling.

Christine May: And in Fife. I cannot see the utilities' being willing to lie down and not argue the case on the regulations.

The Convener: I cannot see that at all. We must be very careful that everything is exact.

Food (Peanuts from Egypt) (Emergency Control) (Scotland) Regulations 2003 (SSI 2003/418)

The Convener: The next regulations are on peanuts from Egypt.

Gordon Jackson: It is like a song. [*Laughter.*]

Mike Pringle: We are all going to burst into song.

The Convener: It is recommended that we raise with the Executive the same points that we will raise in relation to SSI 2003/414.

Christine May: Was that on pistachios from Iran?

The Convener: Yes.

Christine May: I like pecans, myself.

Food (Peanuts from China) (Emergency Control) (Scotland) Amendment Regulations 2003 (SSI 2003/419)

The Convener: The next regulations are on peanuts from China.

Gordon Jackson: I am starting to wonder whether these regulations have just been made up to pull our legs. Is this a spoof?

Mike Pringle: I never realised that I was going to deal with so many nuts—

Gordon Jackson:—from the Scottish Executive. [*Laughter.*]

Christine May: You must have known when you stood for election.

The Convener: Order. Members will be glad to know that no points of substance arise in relation to the regulations.

Housing Grants (Application Forms) (Scotland) Regulations 2003 (SSI 2003/420)

The Convener: No points arise in relation to the regulations.

Advice and Assistance (Scotland) Amendment (No 2) Regulations 2003 (SSI 2003/421)

The Convener: We will ask the Executive when it intends to consolidate the principal regulations, as they have been amended seven times.

Members indicated agreement.

National Health Service (General Dental Services) (Scotland) Amendment (No 2) Regulations 2003 (SSI 2003/422)

The Convener: The issue is consolidation, again.

Gordon Jackson: We were once told that the Executive had a policy on how many times it would amend regulations before consolidating them. I cannot remember how many times it said it would do so; however, seven times seems too many. Was it four times?

The Convener: Yes—it would amend regulations four times, with consolidation on the fifth substantive amendment. Perhaps we can make that point in our letter.

Gordon Jackson: Yes, and remind the Executive what it told us.

Members indicated agreement.

Teachers' Superannuation (Scotland) Amendment Regulations 2003 (SSI 2003/423)

The Convener: The regulations are going to be consolidated and that work is well under way. There is no further comment in our legal advice.

Children's Hearings (Provision of Information by Principal Reporter) (Prescribed Persons) (Scotland) Order 2003 (SSI 2003/424)

The Convener: No points of substance arise, just minor points. Is that agreed?

Members indicated agreement.

The Convener: Members will be pleased to hear that that is the end of the agenda. We will meet again next week. I hope that we will not have quite so many papers before us then, but we will see. Thank you very much.

Meeting closed at 11:51.

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