



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 6 March 2012

Session 4

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CONTENTS

	Col.
INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE	295
Patient Rights (Treatment Time Guarantee) (Scotland) Regulations 2012 [Draft].....	295
Local Government Finance (Scotland) Amendment Order 2012 [Draft]	296
INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE	297
Patient Rights (Complaints Procedure and Consequential Provisions) (Scotland) Regulations 2012 (SSI 2012/36).....	297
Non-Domestic Rates (Enterprise Areas) (Scotland) Regulations 2012 (SSI 2012/48)	299
Children's Hearings (Scotland) Act 2011 (Safeguarders Panel) Regulations 2012 (SSI 2012/54)	299

SUBORDINATE LEGISLATION COMMITTEE

6th Meeting 2012, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*James Dornan (Glasgow Cathcart) (SNP)

COMMITTEE MEMBERS

*Chic Brodie (South Scotland) (SNP)

*Mike MacKenzie (Highlands and Islands) (SNP)

*Michael McMahon (Uddingston and Bellshill) (Lab)

*John Pentland (Motherwell and Wishaw) (Lab)

*John Scott (Ayr) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Colin Gilchrist (Legal Adviser)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 5

Scottish Parliament

Subordinate Legislation Committee

Tuesday 6 March 2012

[The Convener opened the meeting at 14:30]

Instruments Subject to Affirmative Procedure

Patient Rights (Treatment Time Guarantee) (Scotland) Regulations 2012 [Draft]

The Convener (Nigel Don): I welcome members to the sixth meeting in 2012 of the Subordinate Legislation Committee and ask them to turn off their mobile phones.

Under agenda item 1, we begin with the draft treatment time guarantee regulations. Regulations 5 and 6 set out the circumstances in which a health board may reset the calculation of waiting time to zero. The regulations do not make clear the Scottish Government's intention that that should not have any effect where the health board is already in breach of the treatment time guarantee. Does the committee therefore agree to draw the regulations to the Parliament's attention under reporting ground (h), because they could be clearer?

Members *indicated agreement.*

The Convener: In regulation 1(2), reference should have been made to the definition of "ophthalmic medical practitioner" in the National Health Service (General Ophthalmic Services) (Scotland) Regulations 2006 (SSI 2006/135). Instead, reference is made to the definition of "medical practitioner" in those regulations, but there is no such definition. Does the committee therefore agree to draw the regulations to the Parliament's attention under the general reporting ground, because they contain a drafting error in the definition of "ophthalmic medical practitioner"?

Members *indicated agreement.*

John Scott (Ayr) (Con): I see that the Government has undertaken to correct that error at the next appropriate opportunity. Since the error is not what the Government intended and has the potential to lead to confusion—I am not saying that it will—I suggest that it be corrected sooner rather than later, instead of at the next opportunity.

The Convener: Thank you. Your point is noted, John, and is on the record. I am sure that we all agree that such things are best corrected sooner rather than later, if they are to be corrected at all.

Local Government Finance (Scotland) Amendment Order 2012 [Draft]

The committee agreed that no points arose on the instrument.

Instruments Subject to Negative Procedure

Patient Rights (Complaints Procedure and Consequential Provisions) (Scotland) Regulations 2012 (SSI 2012/36)

14:32

The Convener: Under agenda item 2 we begin with SSI 2012/36. I believe that Chic Brodie wants to comment.

Chic Brodie (South Scotland) (SNP): Yes. I should declare an interest, in that I acted as an unpaid adviser to an information technology company that dealt with compliance in the health service, particularly on customer records and customer complaints.

The Convener: Thank you.

Two matters in the regulations could have been more clearly expressed. First, the regulations could have made clearer the limitations on the investigation and reporting duties imposed on responsible bodies by regulation 6. Those limitations are necessary to ensure compliance with article 8 of the European convention on human rights and the Data Protection Act 1998, and to maintain patient confidentiality.

Secondly, the specification in regulation 4 of the additional persons who may make complaints or give feedback includes persons already covered by section 15 of the Patient Rights (Scotland) Act 2011. Those are the issues.

John Scott: Again, I have concerns about the regulations on the ground of lack of clarity. Of course we want greater openness and transparency in health board structures. There is a case in Ayrshire at the moment involving a lack of transparency that has caused a great deal of upset and embarrassment to NHS Ayrshire and Arran. I think that there must therefore be a duty for the Parliament and for us to insist on absolute clarity. I am concerned about the lack of it in the regulations.

On the one hand, we want as much openness and transparency as possible; on the other hand, people's human rights, under article 8 of the European convention on human rights, must not be infringed. The duty of care must be that the regulations are clear, because past problems with NHS Ayrshire and Arran have been caused, in part, by a lack of both clarity in and understanding of the regulations. Let us not make the same mistake again.

The Convener: Your point is understood. My understanding of the particular regulation is that it

is very wide, the presumption being that the ECHR would restrict it and we are clear that that is the overriding legislative provision. Will Colin Gilchrist confirm that?

Colin Gilchrist (Legal Adviser): Yes, the Government's response clarifies that the responsible bodies acting under regulation 6 would require to do so in accordance with article 8 of the convention.

The Convener: The only thing that we might be able to do, therefore, is ask the Government to redraft the regulations so that they say as much explicitly.

John Scott: The problem is that there is inadequate definition in the first place, so how you define people's rights under the ECHR becomes open to interpretation. That is where the problem lies. Different bodies have different interpretations. If the regulation was clear in the first place we would not have that danger.

James Dornan (Glasgow Cathcart) (SNP): I am by no means a legal expert, but is not the whole purpose of the regulations to make the process as transparent as possible? At a certain stage, the confidentiality aspect of the ECHR will come into play and act as a buffer against leaks of confidential information. On the one hand, we are trying to get transparency, which is what the regulations are attempting to do; the safeguards should be—

John Scott: I agree, but it is the overenthusiastic interpretation of confidentiality that has led to problems in Ayrshire, which is why I am arguing that there should have been a clear definition in the first place. I accept the point about being reasonable, but what if it became unreasonable? We need to avoid unreasonableness, however good the intentions, by making things clear at the outset. It is like dancing on the head of a pin.

The Convener: I do not think that you are dancing on the head of a pin, but we have to remember where we are with the legislation. I suggest that we draw it to the attention of both the policy committee, which is the lead committee, and the Parliament.

Does the committee agree that we should draw the regulations to the Parliament's attention, in accordance with reporting ground (h), because they could have been more clearly expressed?

Members indicated agreement.

The Convener: Do we also recognise that it would be a good idea if our narrative was made available to the policy committee for its consideration?

Members indicated agreement.

The Convener: The regulations make supplemental provision in addition to consequential provision, but the powers relied on to do so have not been expressly cited in the preamble, nor do the regulations refer to the provisions made being supplemental. In addition, information as to where copies of the 2005 directions can be obtained was not provided in the instrument or the explanatory note, contrary to normal drafting practice.

On that basis, does the committee agree to draw the regulations to the Parliament's attention, in accordance with the general reporting ground, because there has been a failure to follow normal drafting practice?

Members *indicated agreement.*

Non-Domestic Rates (Enterprise Areas) (Scotland) Regulations 2012 (SSI 2012/48)

Children's Hearings (Scotland) Act 2011 (Safeguarders Panel) Regulations 2012 (SSI 2012/54)

The committee agreed that no points arose on the instruments.

The Convener: Although the legal advisers raised no points on the instruments, there is one comment in relation to SSI 2012/48. It is noted that, in relation to the effect of the listing of activities in the schedule, it would have been useful to the committee's scrutiny of the provisions if, where a line lists more than one activity, the Executive note had given an explanation of the policy objective underlying the listing. An explanation has been provided in the Scottish Government's response to the committee.

Chic Brodie: Just for clarity, the legal brief talks about four enterprise areas, but there are more than that. I do not know why it says that. The original draft designates four enterprise zones.

Could someone clarify paragraph 1(a), under the heading,

"Issues raised with the Scottish Government"?

The Convener: We will just take a moment to reflect on that.

On your first question, about there being more than four areas, the regulation refers to four classes of area, so there are four areas, in the context of classes of area. There could be more than one area in each class.

Chic Brodie: The first statement mentioned four enterprise zones. They have been distilled into—I think—19 enterprise areas. I do not know whether that is a moot point.

The Convener: That is not inconsistent with the fact that the regulation talks about four classes of area. There can be multiple copies of each area in different places.

Chic Brodie: Okay.

The Convener: We do not believe that we have a problem, but thank you for drawing it to our attention.

Chic Brodie: What about the question in paragraph 1(a)? I cannot find the answer to that question. I am sure that it is there, though.

The Convener: I am sorry; you will have to run that past me again.

Chic Brodie: The legal brief says:

"the legal adviser asked the Scottish Government for an explanation on the following matters".

One of those questions is:

"For those lines which list two or more such operations (for example on the last page, manufacture of aircraft and spacecraft and related machinery), is it intended, as such listing indicates, that the required activity is all of those operations, or is it intended to be any one of them?"

I cannot find any answer to that.

Colin Gilchrist: The Government response clarified that regulation 3 of SSI 2012/48 refers to a person occupying the lands and heritages in the particular enterprise area for the sole or main purpose of

"carrying on an activity listed in that part of the Schedule".

Chic Brodie: I see that the Scottish Government response says:

"For example, a person engaged in the manufacture of machinery related to aircraft may be eligible for relief even if that person does not manufacture aircraft, spacecraft or machinery related to spacecraft."

That is fine.

The Convener: Are you happy?

Chic Brodie: Now that I have found that, yes.

The Convener: Excellent. I think, with that foray into the detail of the regulation, for which I am grateful, I am in a position to bring this meeting to a close.

Meeting closed at 14:43.

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