The Scottish Parliament
Pàrlamaid na h-Alba

SUBORDINATE LEGISLATION COMMITTEE

AGENDA

6th Meeting, 2012 (Session 4)

Tuesday 6 March 2012

The Committee will meet at 2.30 pm in Committee Room 5.

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

   Patient Rights (Treatment Time Guarantee) (Scotland) Regulations 2012 [draft];
   Local Government Finance (Scotland) Amendment Order 2012 [draft].

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

   Patient Rights (Complaints Procedure and Consequential Provisions) (Scotland) Regulations 2012 (SSI 2012/36);
   Non-Domestic Rates (Enterprise Areas) (Scotland) Regulations 2012 (SSI 2012/48);
   Children's Hearings (Scotland) Act 2011 (Safeguarders Panel) Regulations 2012 (SSI 2012/54) .

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The papers for this meeting are as follows—

Agenda Items 1 and 2

Legal Brief (private)	SL/S4/12/6/1 (P)
Instrument Responses	SL/S4/12/6/2

SUBORDINATE LEGISLATION COMMITTEE

6th Meeting, 2012 (Session 4)

Tuesday 6 March 2012

Instrument Responses

INSTRUMENTS SUBJECT TO THE AFFIRMATIVE PROCEDURE

The draft Patient Rights (Treatment Time Guarantee) (Scotland) Regulations 2012

On 15 February 2012, the Scottish Government was asked:

1. To explain why the provision made by regulation 8(3) in relation to liability for costs is within *vires* since section 9(3) of the 2011 Act specifies distinct matters which can be specified by regulations and which do not concern responsibility for patient costs. If the ancillary powers in section 25(1) are being relied upon can the Scottish Government explain why such provision is considered necessary or expedient directly as a result of specifying matters under section 9(3)?

2. Does the Scottish Government consider the meaning of "ophthalmic medical practitioner" in regulation 1(2) is clear since the definition provided adopts the meaning of "a medical practitioner within the meaning of regulation 2 of [SSI 2006/135]" and there is no definition of "medical practitioner" in that regulation? Is it intended that the definition of "ophthalmic medical practitioner" in the 2006 regulations is to be adopted for the purposes of these regulations?

3. Regulation 5 and regulation 6(2) permit a Health Board to reset the calculation of waiting time to zero in certain circumstances. Is the date on which that action takes effect sufficiently clear so as to ensure accurate calculation of the waiting time which applies? What effect does the resetting of the calculation of the waiting time have if the statutory maximum waiting time has already been exceeded?

4. Calculation of waiting time will be affected by action by patients or a failure to take certain action – for example the circumstances specified in regulation 6(1)(a) to (c). Where a patient does not have the capacity to act, will action on the patient's behalf by a competent person (e.g. a parent of a child) suffice? If so do the regulations provide for this clearly?

The Scottish Government responded as follows:

1. The Scottish Government considers that the provision made by regulation 8(3) is within vires. The ancillary powers in section 25(1)(c) are being relied upon and the Scottish Government considers that this provision is expedient as a result of specifying matters under section 9(3)(b). Section 9(3)(b) provides that the Scottish Ministers may by regulations specify action that a Health Board is to take to ensure that it complies with a treatment time guarantee. The Scottish Government considers

it is expedient to make use of the ancillary powers in section 25(1) to specify the responsibility for costs as per regulation 8(3) where a patient is treated outside the area of the responsible Health Board (as part of a step which a Health Board may take to comply with the treatment time guarantee).

2. The Scottish Government can confirm that the intention is that the definition of "ophthalmic medical practitioner" in SSI 2006/135 is to be adopted for the purposes of these regulations, and thanks the committee for drawing this error to their attention. The Scottish Government considers, however, that, whilst the meaning of "ophthalmic medical practitioner" in regulation 1(2) could be clearer, given there is no definition of "a medical practitioner" in the 2006 Regulations but only of "ophthalmic medical practitioner", a court would be likely to arrive at the correct interpretation of the Regulations. Further, as an ophthalmic medical practitioner is always a "medical practitioner", such persons are in any case included in the references to "medical practitioner" in the regulations, and accordingly the omission of "ophthalmic" does not affect the legal effect of the regulations. The Scottish Government will amend the definition of "ophthalmic medical practitioner" for clarification purposes at the next appropriate opportunity.

3. The Scottish Government considers that the date on which the action takes effect is sufficiently clear so as to ensure accurate calculation of the waiting time which applies. Section 11(2) of the 2011 Act enables the Scottish Ministers to direct a Health Board to take specified action in relation to its compliance with the treatment time guarantee (including, in particular, the steps it must take). The Scottish Government intends to issue Directions to Health Boards in accordance with this power to specify the steps which a Health Board must take for the purposes of monitoring each treatment time guarantee. These Directions will ensure that Health Boards keep a record of the date on which the action referred to in regulations 5 and 6(2) takes effect.

In circumstances where the statutory maximum waiting time has been exceeded, the Health Board will be in breach of the treatment time guarantee and section 10 of the 2011 Act will apply. The Health Board must therefore take steps in accordance with that section. Any resetting of the calculation of the waiting time will effectively be irrelevant as the Health Board will already be in breach.

4. In circumstances where a patient does not have the capacity to act, for example, in circumstances specified in regulation 6(1)(a) to (c), the general law in Scotland in terms of adults with incapacity will apply. Where action is taken on the patient's behalf by a competent person, that action will suffice for the purposes of, for example, regulations 5 and 6. The Scottish Government does not consider it is necessary for the regulations to provide for this point specifically. For example, where a person is legitimately acting on a patient's behalf, (e.g. a parent for a child), and refuses two or more offers of an appointment for the agreed treatment on behalf of that child, in so far as the person is legally entitled to act on behalf of that child, it is clear that that action will suffice for the purposes of regulation 6(1). In such circumstances, Health Boards will have to consider on a case by case basis whether it is reasonable and clinically appropriate to refer the patient back to that patient's referring clinician.

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

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

On 15 February 2012, the Scottish Government was asked:

1. To explain why the Scottish Government considers the scheme for handling complaints which includes the requirement for a report of investigations to be issued to **any complainant** is compatible with Article 8 of ECHR, given that there is no requirement that the patient who received the health care to which the complaint relates has consented to the complaint being made or otherwise restricting those persons who may act as a complainant on the patient's behalf or in relation to health care provided to another person (for example a parent of a child), in contrast to the existing complaint schemes which these regulations replace – see for example paragraph 83 of SSI 2004/115.

2. Whether regulation 4 is considered to be competent given that it prescribes "**any person** who is, or is likely to be affected by an act or omission of a responsible body" for the purposes of section 15(3)(a)(ii) of the 2011 Act. Regulation 4 would appear to include persons who could make a complaint by or on behalf of a patient by virtue of section 15(3)(a)(i) but it is clear from the terms of section 15(3)(a)(ii) that such persons cannot be specified using the power in section 15(4)(a).

3. In relation to the consequential amendments made by the Schedule, is it intended that the arrangements specified must operate in accordance with any regulations or directions made under **any section** of the 2011 Act rather than those made under section 15? Regulations and directions made under other parts of the Act do not directly relate to the arrangements for complaints procedures. If this wider requirement is intended can the Scottish Government explain the *vires* for making such provision? In particular, if the ancillary power in section 25(1) is relied upon, can the Scottish Government explain why such provision is considered necessary or expedient in consequence of the exercise of the power under section 15(4)?

4. Is the omission of reference to regulations and directions made under section 15 (or the 2011 Act) from the amendment made by paragraph 3(5) of the Schedule intentional?

5. Why is the reference to the 2005 Directions is considered sufficiently precise to identify them and where copies of the 2005 Directions can be obtained?

The Scottish Government responded as follows:

Question 1

The general policy intention behind the regulations is not to restrict those who may make a complaint in relation to services provided under the health service. If a

complaint is made on behalf of another person, for example, where the patient is a child, or where the patient does not consent to the investigation of the complaint, the responsible body would have to take that into account when handling and responding to a complaint. In such circumstances, the responsible body may well be constrained as to what it can do in terms of investigating any such complaint, or in terms of the information which can be included in the report of such an investigation.

Regulation 6(1)(c) provides that the responsible body must send the complainant a report of the investigation into the complaint. In handling a complaint, and in issuing the report, the responsible body must be satisfied that it is acting in accordance with its obligations under Article 8 of the ECHR, and indeed any other obligations it has under the ECHR, or any other law such as the Data Protection Act 1998. These obligations will be highlighted in the revised good practice guidance which is being prepared for issue to the NHS to help support the implementation of the requirements within the legislation.

Question 2

The Scottish Government considers that regulation 4 is competent. The Government accepts that regulation 4 could have been more clearly expressed to clarify that, in specifying such other persons for the purposes of section 15(3)(a)(ii), the intention was not to include persons who could make a complaint by or on behalf of a patient, given that such persons are already specifically referred to in section 15(3)(a)(i) of the Act. However, given that the function of complaining is conferred on certain persons by section 15(3)(a)(i), the Scottish Government considers that it would not be possible to confer that function upon those persons again by means of regulation 4. As such, it is considered that regulation 4 falls to be interpreted as specifying persons only to the extent that they are ‘other persons’ than those referred to in section 15(3)(a)(i).

Question 3

In relation to the consequential amendments made by the Schedule it is intended that, where specified, the arrangements must operate in accordance with any regulations or directions made under any section of the 2011 Act rather than only those made under section 15. The Scottish Government consider that the vires for making such provision can be found in the ancillary powers under section 25(1)(c).

Section 25(1)(c) provides that any power conferred by the Act on the Scottish Ministers to make regulations includes power to make such consequential, supplemental, incidental, transitional, transitory or saving provision as appears to the Scottish Ministers to be necessary or expedient. The Scottish Government is relying on section 25(1)(c) to make supplemental provisions. If we take SSI 2004/115 as an example, the Scottish Government intends that contractors must establish a complaints system which operates pursuant to section 15, and any regulations or directions made under section 15 of that Act. In addition to that, however, the Scottish Government considers it is expedient to make clear that to the extent that any other regulations or directions made under the Act are relevant to contractors as providers of services under the Health Service, they must act in accordance with such provisions.

Paragraph 94 of SSI 2004/115 is also amended to make clear that the Health Board may vary the contract without the contractor's consent where it is reasonably satisfied that it is necessary to vary the contract so as to comply with the Patient Rights (Scotland) Act 2011, any regulations made pursuant to that Act, or any direction given by the Scottish Ministers pursuant to that Act. The Scottish Government considers that in addition to enabling a Health Board to vary a contract so as to comply with section 15 of the Patient Rights (Scotland) Act 2011, it is expedient to use the supplemental power to ensure that a Health Board is able to vary a contract with a contractor under a general medical services contract in order to comply with the 2011 Act generally. This reasoning carries across to other equivalent amendments made in the Schedule.

To the extent that the Subordinate Legislation Committee does not agree with the Scottish Government's analysis of the scope of section 25(1), the Scottish Government is still satisfied that the provisions in the Schedule are within vires as a consequence of the general enabling powers cited (i.e. "and all other powers enabling them to do so"). The Court of Appeal's conclusions in the Vibixa case[1] confirm that general enabling powers in the preamble to a statutory instrument may be interpreted as referring to an enabling power, not expressly invoked in situations such as where, in order for the SI to have effect, the maker of the instrument must necessarily have invoked the power. Whilst Vibixa is an English case, the Scottish courts are likely to find it persuasive. The Scottish Government is therefore able to rely on powers under the National Health Service (Scotland) Act 1978 in taking forward the amendments in the Schedule (namely sections 17E, 17N, 25, 26, 27, 105(7) and 108(1) of the 1978 Act) by virtue of the general enabling powers cited.

Question 4

The omission of reference to regulations and directions made under section 15 of the 2011 Act is intentional in the amendment made by paragraph 3(5) of the Schedule. The same is true of the amendments made by paragraphs 5(4) and 6(4) of the Schedule. These paragraphs relate to amendments made to provisions about the co-operation with investigations of a complaint by a Health Board. If we take the amendments to SSI 2006/135 as an example, the Scottish Government considers that the wording "shall cooperate with any investigation of a complaint by the Board in accordance with the procedures which it operates in accordance with section 15 of the Patient Rights (Scotland) Act 2011" is sufficient to capture any regulations or directions made under section 15 of the 2011 Act. In this instance the Scottish Government does not intend to capture regulations and directions made under *any* section of the 2011 Act, only those under section 15.

Question 5

The Scottish Government considers that the reference to the 2005 Directions is sufficiently precise to identify the Directions. Regulation 1(2) specifies the title of the Directions, the date when the Directions were made and the date when the Directions were brought into force. There are no other Directions given to Health Boards, Special Health Boards and the Agency on Complaints Procedure which

[1] Vibixa Ltd v Komori UK Ltd & Ors [2006] EWCA Civ 536, see paragraphs 13 and 21.

were made and brought into force on these dates. Copies of the 2005 Directions are available at: http://www.sehd.scot.nhs.uk/mels/HDL2005_15.pdf and are also included as Part 5 of the 2005 “Can I Help You?” guidance available at: http://www.show.scot.nhs.uk/App_Download/pdf/1guidance010405.pdf. Copies of the 2005 Directions can be obtained from the Scottish Government Health Directorate.

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

On 24 February 2012 the Scottish Government was asked:

(1) By regulation 3, rating relief operates where a person occupies lands and heritages for the sole or main purpose of carrying on an activity listed in the parts of the Schedule. In those parts, activities are listed in separate lines containing business operations.

(a) For those lines which list 2 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?

(b) If any one of those operations is intended, could this have been made clearer, or to give effect to the intended policy, by making provision to that effect?

(2) Regulation 3 and 5(1) apply to provide a person with rates relief in the circumstances set out in regulation 4. The circumstance in regulation (a)(i) is that a new entry in respect of the lands and heritages is made in the valuation roll after 1 April 2012. The circumstance in regulation 4(b) is that an application for relief is made in accordance with regulation 6.

(a) By what date do these circumstances require to be implemented for the rates relief to apply, in the absence of such provision in regulation 4 and 6 (and what is the basis of that assessment)?

(b) Could the meaning and effect have been made clearer in that respect, by providing for the intended date by when these circumstances require to be implemented, or to give effect to the intended policy?

The Scottish Government responded as follows:

With regard to the first question, the Scottish Government confirms that the policy position is that where a number of activities are listed in an entry in the Schedule business rates relief is available to a person engaged in all, some or only one of those activities. 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. The Scottish Government does not consider that the reference in regulation 3 to an activity is a reference to a whole entry in the Schedule; it is a reference to any activity mentioned in any of the entries. It considers that regulation 3 has that effect without the need for specific provision, and that it is sufficiently clear.

With regard to the second question, the time limits within which the circumstances in regulation 4(a)(i) and (ii) must have taken place are contained in the provisions themselves and there is no time limit within which an application is made under regulation 4(b). The relief will apply from the date on which the application for relief

is made in accordance with regulation 6 because that will be the latest date on which one of the circumstances occurs. The Scottish Government considers that the provisions as drafted are clear and effective and it does not consider that any other dates are required.