HEALTH AND SPORT COMMITTEE

AGENDA

4th Meeting, 2010 (Session 3)

Wednesday 3 February 2010

The Committee will meet at 9.30 am in Committee Room 1.

1. **Subordinate legislation:** The Committee will consider the following negative instruments—

   The Official Feed and Food Controls (Scotland) Regulations 2009 (SSI 2009/446).

2. **Subordinate legislation:** The Committee will take evidence on the National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2010 (SSI 2010/1) from—

   Shona Robison MSP, Minister for Public Health and Sport, Tom Wallace, Policy Manager, Community Pharmacy and Primary Care Infrastructure, Deirdre Watt, Team Leader, Community Pharmacy and Primary Care Infrastructure, and Dr Catriona Hayes, Statistician, Health Analytical Services, Scottish Government.

3. **Subordinate legislation:** Mary Scanlon MSP to move S3M-5461—

   That the Health and Sport Committee recommends that nothing further be done under the National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2010 (SSI 2010/1).

4. **Subordinate legislation:** The Committee will take evidence on the draft Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2010 from—

   Nicola Sturgeon MSP, Cabinet Secretary for Health and Wellbeing, John Swift, Head of Health Public Appointments Unit, and Gillian Russell, Divisional Solicitor, Health and Community Care, Scottish Government.

5. **Subordinate legislation:** Cabinet Secretary for Health and Wellbeing, Nicola Sturgeon MSP, to move S3M-05465—
That the Health and Sport Committee recommends that the draft Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2010 be approved.

6. **Subordinate legislation:** The Committee will take evidence on the draft Health Board Elections (Scotland) Amendment Regulations 2010 from—

Nicola Sturgeon MSP, Cabinet Secretary for Health and Wellbeing, Mr Robert Kirkwood, Business Planning Executive, and Gillian Russell, Divisional Solicitor, Health and Community Care, Scottish Government.

7. **Subordinate legislation:** Cabinet Secretary for Health and Wellbeing, Nicola Sturgeon MSP, to move S3M-05467—

That the Health and Sport Committee recommends that the draft Health Board Elections (Scotland) Amendment Regulations 2010 be approved.

8. **Inquiry into out-of-hours healthcare provision in rural areas:** The Committee will take evidence from—

Nicola Sturgeon MSP, Cabinet Secretary for Health and Wellbeing, Frank Strang, Deputy Director, Primary Care, Jill Vickerman, Head of Healthcare Planning, and Ian Williamson, Performance Manager of Scottish Ambulance Service and NHS 24, Scottish Government.

Douglas Thornton
Clerk to the Health and Sport Committee
Room T3.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5247
Email: douglas.thornton@scottish.parliament.uk
The papers for this meeting are as follows—

**Agenda Item 1**

Note by the clerk  
SSI 2009/446

**Agenda Items 2 and 3**

Note by the clerk  
SSI 2010/001

**Agenda Items 4 and 5**

Note by the clerk  
Draft Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2010

**Agenda Items 6 and 7**

Note by the clerk  
Draft Health Board Elections (Scotland) Amendment Regulations 2010

**Agenda Item 8**

Note by the clerk
Health and Sport Committee

4th Meeting, 2010 (Session 3), Wednesday, 3 February 2010

Subordinate Legislation Briefing

Negative instrument

<table>
<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>The Official Feed and Food Controls (Scotland) Regulations 2009 (SSI 2009/446)</td>
<td>8 Feb</td>
<td>No</td>
<td>These Regulations revoke and re-enact with changes the Official Feed and Food Controls (Scotland) Regulations 2007 and apply in relation to Scotland only.</td>
<td>The SLC reports that regulations 30(1) and (2), 38(10) and 46(2)(a) are defectively drafted. The SLC welcomes the Government’s commitment to correct these errors before the Regulations come into force.</td>
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</table>

Where instruments have been drawn to the Committee’s attention, the relevant extract from the SLC report is given as an annex to this paper. If members have any queries or points of clarification on the instrument which they wish to have raised with the Scottish Government in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible.
Health and Sport Committee

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<tr>
<td>The National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2010 (SSI/2010/1)</td>
<td>8 Feb</td>
<td>Yes</td>
<td>These Regulations come into force on 1st April 2010 and amends the National Health Service (Charges for Drugs and Appliances) (Scotland) Regulations 2008(2). The SLC raised a point of clarification with the Scottish Government and reported that the Government’s response had been helpful in clarifying the intended effect of regulation 3(a) as permitting payment of the reduced price if applications are received on or after 1 April regardless of whether they were made before that date.</td>
<td>Yes</td>
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<tr>
<td>The Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2010 (SSI 2010/draft)</td>
<td>8 Feb</td>
<td>Yes</td>
<td>This Order amends schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003 which lists the specified authorities to which the code of practice published by the Commissioner for Public Appointments in Scotland applies.</td>
<td>The SLC has no points to raise on this instrument.</td>
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<td>The Standards, Procedures and Public Appointments Committee also considered the substance of the instrument on such appointments to health boards in relation to this scrutiny of the annual report of the Commissioner for Public Appointments in Scotland. The Committee did not have any comments to make on this subject.</td>
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Health and Sport Committee
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<td>The Health Board Elections (Scotland) Amendment Regulations 2010</td>
<td>8 Feb</td>
<td>Yes</td>
<td>These Regulations amend the Health Board Elections (Scotland) Regulations 2009 (“the principal Regulations”) which set out the arrangements for pilot Health Board elections.</td>
<td>The Subordinate Legislation Committee has drawn two points to the attention of the Committee in relation to circumstances where a person could be entitled to vote in both Fife and Dumfries and Galloway Health Board elections and whether offences created by subordinate legislation are intra vires given that there is a strong presumption against this. The extract from the relevant SLC report is attached in the annex to this paper.</td>
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Where instruments have been drawn to the Committee’s attention, the relevant extract from the SLC report is given as an annex to this paper. If members have any queries or points of clarification on the instrument which they wish to have raised with the Scottish Government in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible.
The Health Board Elections (Scotland) Amendment Regulations 2010 (SSI2010/draft) (Health and Sport Committee)

2. This amending instrument seeks to address matters on which this Committee, and the Health and Sport Committee, reported in connection with the Health Board Elections (Scotland) Regulations 2009 (SSI 2009/352). The Health and Sport Committee shared the Committee’s concerns on those Regulations that it was not clear what was to happen where a person was eligible to vote in more than one Health Board area or ward. Primary legislation provides that a person may not vote twice but there was no provision as to how that rule was to be followed in cases of dual entitlement to vote.

3. In addition, the Health and Sport Committee requested that the Government consider introducing an offence where an individual sought to vote more than once or in more than one Health Board area. At present, these rules relate to the piloting of Health Board elections in the Fife and Dumfries and Galloway areas, under the 2009 Regulations, but unless amended they would also apply to future elections if the scheme is rolled out to the rest of Scotland.

4. Regulation 2(2) inserts a new regulation 5A into the principal Regulations. This will apply some modified offences provisions of the Representation of the People Act 1983 to the Health Board elections. These concern section 60 (presentation/personation), section 61 (voting more than once), and section 65 (offences relating to nomination and ballot papers).

5. The offences provisions relate to matters which are either corrupt or illegal practices, and there are serious criminal penalties for the offences. (Corrupt practices are punishable generally on indictment with a maximum prison term of two years, or a maximum unlimited fine. By summary proceedings, they are punishable with a maximum prison term of six months, or a maximum fine at the statutory maximum level.)

6. Regulation 2(4) amends rule 5 of the Schedule to the principal Regulations, which provides that an individual may not vote in more than one Health Board area, and may not vote more than once in the same Board area. This repeats, in the Regulations, the prohibition which is in the new Schedule 1A to the National Health Service (Scotland) Act 1978 (“the 1978 Act”) introduced by the Health Boards (Membership and Elections) (Scotland) Act 2009 (“the 2009 Act”).

7. Correspondence between the Committee and the Scottish Government is reproduced at Appendix 1.

8. Regulation 2(4)(b) provides in the Regulations for the prohibition set out in paragraph 9(4) of Schedule 1A to the 1978 Act. An individual may not vote more than once in the same Health Board area, nor in more than one area.
9. In its response to the Committee to questions raised on the principal Regulations, the Scottish Government stated that: “we do not consider there would be vires to deal with this issue [the prohibition of voting more than once] given the terms of the Act.” It could therefore be considered surprising, in light of that reply, that the Government has chosen to deal with the issue by re-stating the prohibition in regulation 2(4)(b). However, the Committee accepts that Regulation 2(4)(b) is seeking to clarify to some degree the eligibility of a voter, in circumstances where they are otherwise entitled to vote in more than one area.

10. On the effect of regulation 2(4)(b), however, there is a difference of view given, between the Government’s reply on the principal Regulations, and on these Regulations. For the former, the Government stated that “It will then be for the returning officers in the health board areas to consider how to ensure these provisions are given effect to in practice”. The latter states “If s/he is properly registered in two areas, the voter will have to decide which area to vote in”.

11. It appears to the Committee that the changes to the principal Regulations infer that it is the voter, who would be entitled to vote in more than one Health Board area, who must select in which area he or she will vote. The Regulations do not specify any other basis on which the matter is determined - they do not specify that the returning officer can select which area applies. If this is indeed the intended policy, the Committee considers that it could have been more clearly expressed.

Question (2)

12. The Executive Note explains that the Health and Sport Committee, in its report on the principal elections Regulations (SSI 2009/352), requested that the Government consider introducing an offence, where an individual sought to vote more than once or in more than one pilot area.

13. Regulation 2(2) applies, with modifications, certain offence provisions in the Representation of the People Act 1983 (“the 1983 Act”). The 1983 Act sets out the principal franchise arrangements for the Parliamentary and local government elections. The Committee asked for an explanation as to which enabling powers cited in the preamble to the instrument permit Ministers to make provision for such criminal offences.

14. The Committee notes that the power under paragraph 12(3) of Schedule 1A to the 1978 Act which is being relied on, can be used to apply enactments (with or without modifications) but does not expressly authorise the specification of offences. There is a strong legal presumption against the creation of offences by subordinate legislation, which is rebuttable only by express provision, or by clear inference in the enabling legislation. That strong presumption is summarised in Craies on “Legislation” as referred to in the correspondence, which is an authoritative work on legislation and statutory interpretation. (The presumption is repeated in the 9th edition, at page 42). The Committee understands that this view is also shared by the Joint Committee on Statutory Instruments at Westminster.

15. The Government argues that paragraph 12(3) of Schedule 1A to the National Health Service (Scotland) Act 1978 (inserted by the 2009 Act) provides that an enactment may be applied (with or without modifications) to health board elections. The Government
considered that this provides an express power to apply the provisions of the 1983 Act, including the application of the offences, with modifications.

16. The Committee considers however, that the strong legal presumption applies, and there must be an express authorisation of the offences provisions in the enabling Act, or at least by clear inference. The power in paragraph 12(3) is in the nature of a supplemental power. (It is drafted as a particular aspect of the supplemental power in paragraph 12(2)).

17. Further, Schedule 1A of the 1978 Act (as inserted by the 2009 Act) lists in some detail various matters which the elections regulations (by affirmative procedure) either must or may include. This includes significant matters such as entitlement to vote, but also relatively minor administrative matters, such as provisions for the returning officers fees and expenses. The specific listing of what regulations either may or must include does not appear to include any express (or clearly implicit) reference to provisions for criminal offences or penalties.

18. The Committee is satisfied that a doubt is raised as to the vires of the offences provisions in the Regulations, which may be outwith the powers permitted in the enabling primary legislation.

19. The Subordinate Legislation Committee reports to the lead committee and the Parliament that—

(1) the effect of regulation 2(4) (amending rule 5 of the Schedule to the principal Regulations) is not to specify how the eligibility of voters is to be established in circumstances where a person could be entitled by the criteria set out in rule 5 to vote in both Fife and Dumfries and Galloway Health Board elections;

The Committee considers that the implied effect of that paragraph is that a voter may select in which one area they may vote. If this is the intended policy, the Committee considers that it could have been more clearly expressed;

(2) there appears to be a doubt whether the offences provisions in the new regulation 5A(2), (3) and (4) of the 2009 Regulations, as inserted by regulation 2, are intra vires given that there is a strong presumption against the creation of offences by subordinate legislation, rebuttable only by express provision or clear inference, neither of which appear to the Committee to have been satisfied in this case.

APPENDIX 1

The Health Board Elections (Scotland) Amendment Regulations 2010 (SSI2010/draft)

On 7 January 2010 the Scottish Government was asked:

(1) In regard to the meaning and effect of regulation 2(4)(b), is an effect of that provision considered to be that a voter who may otherwise be entitled to vote in more than one
area may select for which area their vote shall count? Or does there require to be provision to determine in which area the vote shall count? Could the provisions be made clearer in this respect?

(2) Regulation 2(2) applies with modifications certain offences provisions in the Representation of the People Act 1983. Can it be explained and justified on what grounds the enabling powers as cited in the preamble to the instrument are being relied on to specify such criminal offences? This is given that those powers do not expressly authorise the specification of offences, and there is generally a strong presumption against the creation of offences by subordinate legislation, which is rebuttable only by express provision or by clear inference in the enabling legislation. (See Craies on Legislation, 8th edition, at page 37.)

The Scottish Government responds as follows:

(1) The effect of regulation 2(4)(b) is to clarify, on the face of the Regulations and as provided for in the enabling Act, that where, in terms of the Regulations, a voter is entitled to vote in more than one Health Board area, or more than once in the same Health Board area (which conceivably could happen if wards were created in Health Board areas in the future), that person may only vote in one of those areas. We think the effect of the provision is clear. This wording was offered to, and accepted by, the Health and Sport Committee during the passing of the Health Board Elections (Scotland) Regulations 2009. If s/he is properly registered in two areas the voter will have to decide which area to vote in. If Parliament approves these Regulations it will also be an offence for a voter to vote twice and guidance to voters will reflect this.

It is possible in other elections to be registered in more than one area, most commonly in the case of students, but we are not aware of any other elections where further clarification is provided to an individual to determine which area they may vote in; it will simply be their decision.

(2) Paragraph 12(3) of Schedule 1A to the National Health Service (Scotland) Act 1978 provides that an enactment may be applied (with or without modifications) to health board elections. It is our opinion that this provides an express power to apply the provisions of the Representation of the People Act 1983 without limitation. As a result, as with the other provisions of that Act applied by the principal Regulations, this power allows the application of the offences, with modifications, provided for in these Regulations.
Health and Sport Committee

4th Meeting, 2010 (Session 3), Wednesday, 3 February 2010

Inquiry into out-of-hours healthcare provision in rural areas

Background

Previous consideration by the Committee

1. This is the Committee’s third meeting of oral evidence on its inquiry into out-of-hours healthcare provision in rural areas.

2. At its meeting on 20 January, the Committee held two evidence taking sessions. The first was a scene-setting panel of witnesses providing an overview of the current standard of out-of-hours healthcare across Scotland, and the different challenges faced in different areas. The Committee heard from Barbara Hurst (Audit Scotland); Dr Frances Elliott (NHS Quality Improvement Scotland); David Heaney (Centre for Rural Health); Professor Allyson Pollock (Centre for International Public Health Policy) and Dr Andrew Buist (British Medical Association Scotland).

3. In the second evidence session on 20 January, the Committee heard from a panel of professionals and practitioners who gave a service provider’s perspective on the challenges faced in delivering out-of-hours healthcare in rural and remote areas. The Committee heard from Dr Susan Taylor (Royal College of General Practitioners Scotland); Linda Harper (Royal College of Nursing Scotland); David Forbes (UNISON); Dr Paul Kettle (Remote Practitioners Association of Scotland) and Dr Ewen Mcleod (British Association for Immediate Care Scotland).

4. On Monday 25 January, the Committee held two further evidence sessions in Kinloch Rannoch, an area which is the subject of a public petition on out-of-hours healthcare provision. The panel for the third session was made up of representatives from rural and remote communities and patient groups, including the local area of Kinloch Rannoch. The Committee heard from Dick Barbor-Might (SOS Rannoch); Randolph Murray (Petitioner on out-of-hours healthcare in Kinloch Rannoch); Keith Cameron (Scottish Ambulance Service); Linda Entwistle (First Responder); and Tom Forrest and Roy Macpherson (Wester Ross Medical Practices Community Representatives Out-of-hours Group).

5. In the inquiry’s fourth evidence session, on 25 January, the Committee heard from a panel of Chief Executives and Directors of key delivery groups. These were Dr Michael Hall (NHS Highland); Gerry Marr (NHS Tayside); Dr Sheena MacDonald (NHS Borders); Pauline Howie (Scottish Ambulance Service) and John Turner (NHS 24).
Issues arising from previous weeks’ evidence

6. Some of the issues raised during the previous two weeks’ evidence sessions include:–

- **Fragmented approach to out-of-hours healthcare:**

  - In each session, the issue of **responsibility for providing out-of-hours healthcare** since the introduction of the new GP contracts in 2004 was discussed.

  - Service user representatives highlighted a confusion over who should be contacted during out-of-hours, as well as concerns about a perceived diminished quality of service provided by NHS 24, the Scottish Ambulance Service and community first responders compared with seeing the local GP. Specifically, concerns were raised over response times and the ability of the various service providers to make sound diagnoses.

  - The public’s confusion in this respect was reiterated by the Scottish Ambulance Service through its own survey, and it has reported a marked increase in demand since the introduction of the new GP contracts.

  - Service providers generally agreed that it would be **unrealistic to return to the situation prior to 2004 for all of Scotland**, although several of the practising GPs who gave evidence stated they chose to provide out-of-hours healthcare in their own rural or remote community as there were, in their opinion, no viable alternatives.

  - Dr Hall of NHS Highland stated that the solution for many areas of Scotland could be to **offer a modified GP contract that included out-of-hours responsibility** and a corresponding financial inducement.

  - Gerry Marr of NHS Tayside stated that they **already have salaried GPs in out-of-hours service** but that an area such as Kinloch Rannoch could not justify this arrangement.

  - Dr MacDonald stated that NHS Borders has tried to make the job more attractive to doctors generally, developing a cohort that is separate from the daytime independent contractor group to provide the out-of-hours service. This cohort of salaried GPs is deployed, for example, in A and E and to support sickness absence in daytime practices, which gives them daytime work, as well as out-of-hours work, to make it a more attractive option for them. NHS Borders’ aim is to build up a portfolio of hours called **an unscheduled care service** that covers some in and out-of-hours responsibility. She described this **combination of independent contractors and salaried GPs** for out-of-hours services as, in effect, a Borders-wide co-operative.
The need for local consultation and local solutions:

- Witnesses unanimously agreed that no single solution would work for all rural and remote areas of Scotland.
- David Heaney of the Centre for Rural Health stated that he has felt for a long time that it is very difficult to monitor the outcomes in the delivery and quality of service in rural and remote areas.
- Dr Buist of the British Medical Association expressed an opinion that health boards need to have local groups made up of the various service providers where an integrated and efficient system for the delivery of out-of-hours healthcare for that particular area can be discussed and implemented. This opinion was echoed by several other witnesses.
- The witnesses from the Wester Ross Community Representatives Out-of-hours Group stated that they had found solutions through local consultation and cooperation, and felt that in areas where there was a perceived lack of out-of-hours provision, this was not the case.

Combination of solutions to tackle out-of-hours healthcare provision:

- The witnesses from the Wester Ross Community Representatives Out-of-hours Group stated that part of the solution to many problems faced in rural and remote areas would be the development of telehealth nationwide. However, it was conceded that not all rural and remote areas of Scotland have internet coverage.
- The witnesses representing community first responders and the Scottish Ambulance Service also stated that the situation in many areas would improve with better communications technology such as smart phones and new radio networks.
- Many of the witnesses, both service users and service providers, expressed sympathy and respect for Scottish Ambulance Service staff, and pointed to a perceived lack of ambulances in rural and remote areas for many of the problems with response times.
- The Chief Executive of the Scottish Ambulance Service argued that the issue of rural and remote areas is taken very seriously, and that, in fact, response times are the fastest-ever. Furthermore, they are working to identify under-utilised out-of-hours GPs who could support them as part of an integrated service.

Oral evidence
7. Today’s evidence is from the Scottish Government. The panel consists of Nicola Sturgeon MSP, Cabinet Secretary for Health and Wellbeing, Frank Strang,
Deputy Director of Primary Care, Jill Vickerman, Head of Healthcare Planning, and Ian Williamson, Performance Manager of Scottish Ambulance Service and NHS 24.

Andrew Howlett
Committee Assistant