The Committee will meet at 2.15 pm in Committee Room 4.

1. **Decision on taking business in private:** The Committee will decide whether to take item 6 in private.

2. **Instruments subject to annulment:** The Committee will consider the following—
   - the Plant Health (Import Inspection Fees) (Scotland) Amendment Regulations 2010 (SSI 2010/405);
   - the Sale of Tobacco (Prescribed Document) Regulations 2010 (SSI 2010/406);
   - the Sale of Tobacco (Register of Tobacco Retailers) Regulations 2010 (SSI 2010/407).

3. **Instruments not laid before the Parliament:** The Committee will consider the following—
   - the Flood Risk Management (Scotland) Act 2009 (Commencement No. 2 and Savings Provisions) Order 2010 (SSI 2010/401 (C. 27));
   - the Fees in the Registers of Scotland Amendment Order 2010 (SSI 2010/404).

4. **Double Jeopardy (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

5. **Patient Rights (Scotland) Bill:** The Committee will consider the Scottish Government’s response to points raised on the delegated powers provisions in this Bill at Stage 1.

6. **Local Electoral Administration (Scotland) Bill:** The Committee will consider the contents of a draft report.
The papers for this meeting are as follows—

Legal Brief (private)  SL/S3/10/33/1
Summary of Recommendations  SL/S3/10/33/2

**Agenda Item 4**

Double Jeopardy (Scotland) Bill (as introduced)
Delegated Powers Memorandum
Briefing Paper (private)  SL/S3/10/33/3

**Agenda Item 5**

Patient Rights (Scotland) Bill (as introduced)
Delegated Powers Memorandum
Briefing Paper  SL/S3/10/33/4
Correspondence from the Scottish Government  SL/S3/10/33/5

**Agenda Item 6**

Draft Report (private)  SL/S3/10/33/6
Correspondence from the Scottish Government  SL/S3/10/33/7
SUBORDINATE LEGISLATION COMMITTEE

33rd Meeting, 2010 (Session 3)

Tuesday 30 November 2010

Summary of Recommendations

The Committee will be invited to consider the following recommendations at the meeting. Decisions are a matter for the Committee.

Agenda Item 2  Instruments subject to annulment

The Plant Health (Import Inspection Fees) (Scotland) Amendment Regulations 2010 (SSI 2010/405)

The Sale of Tobacco (Prescribed Document) Regulations 2010 (SSI 2010/406)

TheSale of Tobacco (Register of Tobacco Retailers) Regulations 2010 (SSI 2010/407)

The Committee may wish to consider if it is content with these Regulations.

Agenda Item 3  Instruments not laid before the Parliament

The Flood Risk Management (Scotland) Act 2009 (Commencement No. 2 and Savings Provisions) Order 2010 (SSI 2010/401) (C. 27)

The Fees in the Registers of Scotland Amendment Order 2010 (SSI 2010/404)

The Committee may wish to consider if it is content with these Orders.

Agenda Item 4  Double Jeopardy (Scotland) Bill

Section 4(7) – Power to make an order varying the offences to be covered by the new evidence exception to double jeopardy

The Committee might wish to ask the Scottish Government whether exercise of the power under section 4(7) to modify schedule 1 so as to add or remove offences should not be subject to a consultation requirement.
It is acknowledged that exercise of that power is subject to affirmative procedure but, given that the power to add further offences is a significant one, would there not be merit in making provision within the Bill to the effect that a comprehensive consultation exercise must first be undertaken with a suitable range of interested parties?

Indeed, given the importance of this power, would that not be an essential element in ensuring that the implications of any proposed changes are fully scrutinised and evaluated before being finalised (in the same way as the DPM emphasises the value of Parliamentary debate in the shaping of schedule 1 within the Bill itself)?

Section 16(3) – Short title, interpretation and commencement

The Committee may wish to be satisfied with the commencement power set out at section 16(3) of the Bill and that it is subject to no procedure.
Patient Rights (Scotland) Bill – Response to SLC Stage 1 Report

Background

1. Under Rule 9.6.2 of Standing Orders, the Subordinate Legislation Committee submitted its report on the delegated powers provisions in the Patient Rights (Scotland) Bill to the Health and Sport Committee, as lead committee for the Bill, on 11 May 2010.

2. On 24 November 2010, Lauren Murdoch, Patient Rights Bill Team Leader, wrote to the Clerk to the Subordinate Legislation Committee responding to the Committee’s Stage 1 report.

Scottish Government Response

3. The response indicates that the Scottish Government intends to seek to amend the Bill in line with the Subordinate Legislation Committee’s recommendations on the delegated powers contained in sections 7(1), 7(3), 7(4) and 21(1)(c).

4. In its stage 1 report, the Committee recommended that the power under section 9(3) should be expressed as a power to make subordinate legislation. The Government has noted this but contends that it may not be appropriate for all circumstances.

5. The Government believes that directions are an appropriate measure to respond speedily to unforeseen exceptional circumstances and does not intend to bring forward an amendment to this section.

Progress of the Bill

6. The Bill passed Stage 1 on 17 November 2010. Stage 2 will start on Tuesday 7 December.

7. The Subordinate Legislation Committee will give further consideration to the delegated powers contained in the Bill after Stage 2.

Recommendation

8. Members are invited to note the Scottish Government’s response to the Subordinate Legislation Committee’s report on the Patient Rights (Scotland) Bill at Stage 1.

Irene Fleming
Clerk to the Committee
Correspondence from the Scottish Government dated 24 November 2010

PATIENT RIGHTS (SCOTLAND) BILL at Stage 1: Subordinate Legislation Committee Report

In your letter of 11 May 2010 to the Scottish Government’s Elspeth MacDonald, Head of Constitution and Parliamentary Secretariat, you attached a copy of the Subordinate Legislation Committee’s report on the Bill and asked for a response prior to the commencement of Stage 2 proceedings.

Thank you for your consideration of the Bill and its delegated powers. We note that the Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in sections: 1(4), 4(2), 11(4)(a), 14(2), 15(6), 20(1) and 22(3), and that it considered that it did not need to draw the attention of the Parliament to the powers of direction in sections: 5(3), 9(2), 11(4)(b), 12(5) and 14(2).

I will deal with the other issues raised in sequence, and the Scottish Government response.

Section 5(1) – Guidance in relation to the practical application of the health care principles

Power conferred on: Scottish Ministers
Power exercisable by: guidance
Parliamentary procedure: none

The Committee sought further information from the Government on the function of the guidance. The Committee was satisfied that this delegated power is appropriate to be exercised in the form of guidance.

Scottish Government: the Government notes the Committee’s response.

Section 7(1) – (Treatment time guarantee: further provision) - Duty to make provision about the treatment time guarantee

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

The Committee drew to the attention of the lead committee its view that the power to exclude patients from eligibility for the treatment time guarantee is significant. In its view, a power to amend the description of patients who are eligible for the guarantee does not preclude the specification, in the Bill, of initial descriptions of patients who
are to be eligible which could be amended or of criteria on the basis of which such descriptions are to be determined.

**Scottish Government**: the Government believes that eligibility criteria are most appropriately expressed in secondary legislation, for the reasons stated in previous correspondence.

The Committee recommended that the power in section 7(1) be subject to affirmative rather than negative procedure because of the significance of the guarantee and the significance and effect on the operation of that guarantee of designation of eligible patients and the method of calculating the waiting time.

**Scottish Government**: the Government anticipates that the bulk of the provisions in these regulations will relate to the detailed operation of the guarantee, together with administrative and procedural matters which will be technical in nature; this would suggest that negative procedure would be appropriate but the Government has considered the Committee’s comments further and the Health and Sport Committee’s endorsement of the comments and intends to bring forward an amendment to apply draft affirmative procedure to these regulations.

**Section 7(3) - (Treatment time guarantee: further provision) - Further provisions about the treatment time guarantee**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** regulations made by statutory instrument  
**Parliamentary procedure:** negative resolution of the Scottish Parliament

The Committee recommended that this power be subject to affirmative, rather than negative procedure because of the significance, through the exercise of the power, of the exclusion of specified treatments and services from the guarantee.

**Scottish Government**: the Government noted that this is largely an issue of a medical and technical nature but has considered the comments in the report that the exclusion of specified treatments and services from the guarantee is an important issue of significance to patients and to the public generally (as potential patients), and the Health and Sport Committee’s endorsement of the comments and intends to bring forward an amendment to apply draft affirmative procedure to these regulations.

**Section 7(4) - (Treatment time guarantee: further provision) - Power to amend the maximum waiting time**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** negative resolution of the Scottish Parliament

The Committee recommended that the power should be made subject to affirmative procedure given the significant impact the exercise of the power may have on the nature of the guarantee and on the extent of the right afforded by sections 1(1) and 6(1). The Committee noted the Scottish Government’s commitment to consider
further whether an amendment should be brought forward to apply draft affirmative procedure.

**Scottish Government**: the Government intends to bring forward an amendment to apply draft affirmative procedure to this section of the Bill.

**Section 9(1) – Guidance in relation to the treatment time guarantee**

- **Power conferred on:** Scottish Ministers
- **Power exercisable by:** guidance
- **Parliamentary procedure:** none

The Committee was satisfied that this delegated power is appropriate to be exercised in the form of guidance.

**Scottish Government**: the Government notes the Committee’s response.

**Section 21(1)(c) – Power when making orders or regulations to make consequential, supplementary, incidental, transitional, transitory or saving provision within those orders or regulations.**

- **Power conferred on:** Scottish Ministers
- **Power exercisable by:** Order
- **Parliamentary procedure:** Affirmative / Negative / None

The Committee is satisfied with the Scottish Government’s justification for the power in section 21(1)(c) in addition to that under section 20(1). The Committee does not consider it is appropriate to provide for substantive provision to be made in commencement orders subject to no procedure. It therefore recommends that section 21(1)(c) should be amended to this effect and notes the Scottish Government’s undertaking to do so.

**Scottish Government**: the Committee’s response is noted. The Government will bring forward an amendment to section 21(1)(c) so that it does not apply to commencement orders.

**Other proposed delegated powers**

**Section 9(3) – suspension of the treatment time guarantee**

- **Power conferred on:** Scottish Ministers
- **Power exercisable by:** directions

The Committee was satisfied that the position as to when powers of direction may be used is made clear in the Bill. However, the Committee was not satisfied that directions are appropriate for the purpose of suspending the treatment time guarantee in exceptional circumstances given the significance of the guarantee and given that directions do not allow any degree of parliamentary scrutiny. The Committee recommended that the power under section 9(3) should be expressed as a power to make subordinate legislation. If it is necessary for policy reasons to be
able to bring that legislation into force immediately subject to subsequent endorsement by Parliament for it to continue in force, then it is possible to provide for such procedure.

Scottish Government: The Government notes the Committee’s point of view and the lead Committee’s endorsement of that. It would be possible to do as the Subordinate Legislation Committee suggests, however this may not be appropriate for all circumstances. For example, if the suspension was for a few days for one Health Board area, then directions are an appropriate measure: making subordinate legislation might not in that instance be an appropriate use of Parliament’s time. If the exceptional circumstances were to have a much broader impact then it is possible that subordinate legislation would be more appropriate. The Government believes that, on balance, directions are an appropriate measure to respond speedily to unforeseen exceptional circumstances and thus does not intend to bring forward an amendment to this section.
Correspondence from Scottish Government dated 22 November 2010

Local Electoral Administration (Scotland) Bill at Stage 1

Thank you for your letter of 16 November to Elspeth MacDonald regarding Section 5(1) of the Local Electoral Administration (Scotland) Bill.

The Committee sought examples of how the power of direction in section 5(1) could be used and how it would relate to the existing functions of returning officers for local government elections (including any existing power of direction).

There is no existing power of direction to returning officers at local government elections. The proposed power of direction in the Local Electoral Administration (Scotland) Bill is based on that available to Regional Returning Officers in elections to the European Parliament.

As the Committee will be aware, returning officers are appointed under the terms of the Representation of the People Act 1983. Returning officers are generally responsible for the conduct of elections in their area. They do not have a role in the preparation and maintenance of the electoral register, which is the role of electoral registration officers. Returning officers will continue to carry out the functions set out within the 1983 Act.

The proposed power of direction would be used by the Convener of the Electoral Management Board to support returning officers in the administration of these functions and ensure consistency, where necessary, in their delivery across Scotland. For example, directions setting out requirements on returning officers to conduct a final postal vote sweep for ballot papers in sorting offices on the day of the poll or arrangements for the opening of postal votes were issued for the 2007 European elections. We anticipate that the directional power within the legislation would be used by the Convener on similar types of issues.

We have proposed a power of direction rather than powers to make subordinate legislation for a number of reasons. As the examples given above demonstrate, the directions envisaged will be on administrative and operational issues which will not require the scrutiny of parliament, particularly because the conduct of elections should be independent of the political process. Also, directions may be required at short notice and the time needed to follow a Parliamentary process for subordinate legislation could result in the requirements not being issued in advance of an election.

I hope this response is helpful to the Committee in its consideration of the Bill.