



HEALTH AND SPORT COMMITTEE

AGENDA

11th Meeting, 2012 (Session 4)

Tuesday 20 March 2012

The Committee will meet at 10.00 am in Committee Room 1.

1. **Decision on taking business in private:** The Committee will decide whether to take item 7 in private and whether its consideration of a draft report on its inquiry into integration of health and social care should be taken in private at future meetings.
2. **Subordinate legislation:** The Committee will take evidence on the Patient Rights (Treatment Time Guarantee) (Scotland) Regulations 2012 [draft] from—

Nicola Sturgeon, Cabinet Secretary for Health, Wellbeing and Cities Strategy, Margaret Duncan, Head of Branch, Ministerial Support and NWTC Sponsorship, and Francesca Rennie, Solicitor, Scottish Government.
3. **Subordinate legislation:** Nicola Sturgeon to move—

S4M-02363—That the Health and Sport Committee recommends that the Patient Rights (Treatment Time Guarantee) (Scotland) Regulations 2012 [draft] be approved.
4. **Subordinate legislation:** The Committee will take evidence on the Community Care (Personal Care and Nursing Care) (Scotland) Amendment Regulations 2012 [draft] from—

Nicola Sturgeon, Cabinet Secretary for Health, Wellbeing and Cities Strategy, and Gillian Barclay, Head of Older People's Care Unit, Scottish Government.
5. **Subordinate legislation:** Nicola Sturgeon to move—

S4M-02364—That the Health and Sport Committee recommends that the Community Care (Personal Care and Nursing Care) (Scotland)

Amendment Regulations 2012 [draft] be approved.

6. **Inquiry into integration of health and social care:** The Committee will take evidence from—

Nicola Sturgeon, Cabinet Secretary for Health, Wellbeing and Cities Strategy, Angiolina Foster, Director of Health & Social Care Integration, Kathleen Bessos, Deputy Director, Health and Social Care Integration, and Alison Taylor, Team Leader, Integration and Service Development, Scottish Government.

7. **Inquiry into integration of health and social care:** The Committee will consider the main themes arising from evidence received during the inquiry.

Douglas Wands
Clerk to the Health and Sport Committee
Room T3.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5210
Email: douglas.wands@scottish.parliament.uk

The papers for this meeting are as follows—

Agenda Items 2, 3, 4 and 5

Note by the clerk

HS/S4/12/11/1

[The Patient Rights \(Treatment Time Guarantee\) \(Scotland\) Regulations 2012](#)

HS/S4/12/11/2

[The Community Care \(Personal Care and Nursing Care\) \(Scotland\) Amendment Regulations 2012](#)

HS/S4/12/11/3

Agenda Items 6 and 7

PRIVATE PAPER

HS/S4/12/11/4 (P)

Paper 1, Agenda Items 2, 3, 4 and 5

Health and Sport Committee

11th Meeting, Tuesday 20 March 2012

Subordinate Legislation Briefing

Overview of instrument

1. There are two affirmative instruments for consideration.
2. A brief explanation of the instruments along with the comments of the Subordinate Legislation Committee is set out below. If members have any queries or points of clarification on the instruments 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.

Details on the instruments

3. Patient Rights (Treatment Time Guarantee) (Scotland) Regulations 2012 (SSI 2012/draft). These Regulations make further provision about the treatment time guarantee established by virtue of section 8 of the Patient Rights (Scotland) Act 2011 and set out how that guarantee is to operate in practice.
4. The Subordinate Legislation Committee has drawn the instrument to the Parliament's attention on the basis that certain matters could have been more clearly expressed and that there has been a failure to follow normal drafting practice. The SLC Committee's report is at Annexe A.
5. Members will recall that at last week's Committee meeting it considered the Patient Rights (Complaints Procedure and Consequential Provisions) (Scotland) Regulations 2012 (SSI/2012/36). The Subordinate Legislation Committee drew the instrument to the Parliament's attention under similar reporting grounds as the affirmative instrument being considered today. The Convener has written to the Scottish Government to raise the Committee's concerns over the drafting of SSI/2012/36.
6. The Community Care (Personal Care and Nursing Care) (Scotland) Amendment Regulations 2012 (SSI 2012/draft). The purpose of the instrument is to update the free personal and nursing care flat rate payments in care homes in line with inflation, from 1st April 2012.
7. The Subordinate Legislation Committee has not made any comments on this instrument.

Dougie Wands

Clerk to the Committee

Annexe A

Patient Rights (Treatment Time Guarantee) (Scotland) Regulations 2012 [draft] (*Health and Sport Committee*)

3. The treatment time guarantee (TTG) set out in section 8 of the Patient Rights (Scotland) Act 2011 provides that an eligible patient is to start to receive an agreed treatment within the maximum waiting time. Section 10 sets out the steps which Health Boards must take where the TTG is not complied with.

4. This instrument sets out various matters relating to the operation of the TTG. In particular, the instrument sets out: which patients are eligible for the TTG; how waiting time is to be calculated; in what circumstances a patient can be referred back to the referring clinician; the treatments and services to which the TTG does not apply; the steps which must be taken by a health board where it is unable to meet the TTG; and what information about the TTG must be provided to patients.

5. The instrument is subject to the affirmative procedure. If approved, it will come into force on 1 October 2012.

6. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in [Appendix 1](#). Where no further comment is made on a question, the Committee is content with the Government's response.

7. In relation to regulations 5 and 6(2), which permit a health board to reset the calculation of waiting time to zero in certain circumstances, the Scottish Government was asked what effect such a resetting has if the statutory maximum time has already been exceeded.

8. The Scottish Government responded that, in such a situation, any resetting of the calculation of the waiting time would “effectively be irrelevant as the Health Board would already be in breach” and that section 10 of the 2011 Act would apply.

9. The Committee notes that the Regulations make no provision that prevents a Health Board from resetting the waiting time to zero in such circumstances. It considers that the resulting conflict between regulations 5 and 6(2) and section 10 of the 2011 Act raises an undesirable lack of clarity in relation to what is intended to be a new right.

10. In relation to regulation 1(2), the Scottish Government was asked whether the definition of “ophthalmic medical practitioner” is clear as it seeks to adopt the definition of “a medical practitioner within the meaning of [SSI 2006/135]”. There is no definition of “medical practitioner” in that regulation, which provides a definition of “ophthalmic medical practitioner”.

11. In its response, the Scottish Government confirmed that the intention is that the definition of “ophthalmic medical practitioner” in SSI 2006/135 is to be adopted for these Regulations. It stated its belief that, although the meaning could be clearer, a court would be likely to arrive at the correct interpretation.

12. The Committee agrees that a court would be likely to arrive at the intended interpretation of the Regulations, but it considers that there is a drafting error.

13. The Committee notes that the Scottish Government does not propose to withdraw and relay the draft Regulations to correct this mistake, but that it has undertaken to correct the error at the next appropriate opportunity.

14. The Committee therefore draws the instrument to the Parliament’s attention under reporting ground (h) because the instrument could be clearer in the following respect. 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 this should not have any effect where the Health Board is already in breach of the treatment time guarantee.

15. The Committee also draws the instrument to the Parliament’s attention under the general reporting ground because it contains a drafting error in the definition of “ophthalmic medical practitioner”. Reference should have been made to the definition of “ophthalmic medical practitioner” in the National Health Service (General Ophthalmic Services) (Scotland) Regulations 2006. Instead, reference was made to the definition of “medical practitioner” in those Regulations when there is no such definition. The Committee notes that the Scottish Government has undertaken to correct this error at the next appropriate opportunity.

APPENDIX 1

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

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.