



## Health and Community Care Committee

22nd Meeting, 2001

Wednesday 3 October 2001

The Committee will meet at 9.30 am in Committee Room 2

1. **Item in private:** The Committee will consider whether to take item 5 in private.
2. **Time limit on debates:** The Committee will be asked to agree to limit debate on emergency affirmative SSIs to 15 minutes.
3. **Subordinate Legislation:** The Committee will consider the following affirmative instruments—

The Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No. 6) (Scotland) Order 2001 (SSI 2001/316)

The Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (East Coast) (Scotland) Order 2001 (SSI 2001/317)

The Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No. 7) (Scotland) Order 2001 (SSI 2001/322)

and the following negative instruments--

The National Health Service Trusts (Membership and Procedure) (Scotland) Regulations 2001 (SSI 2001/301)

The Health Boards (Membership and Procedure) (Scotland) Regulations 2001 (SSI 2001/302)

The Scottish Social Services Council (Appointments Procedure and Access to the Register) Regulations 2001 (2001/303)

4. **Community Care and Health (Scotland) Bill (Stage 1):** The Committee will take evidence from—

Lord Sutherland of Houndwood

Professor Alison Petch

Professor David Bell

5. **The Scottish Budget 2002/3:** The Committee will consider a paper prepared by the adviser.

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The Following papers are attached for this meeting:

Agenda Item 3

Abridged 33rd Report 2001 of the Subordinate Legislation Committee      **HC/01/22/1**

Agenda Item 5

Paper on the Scottish Budget 2002/3 by adviser (**Private paper**)      **HC/02/21/2**

**Agenda item 3**

Health & Community Care  
Committee  
3 October 2001

HC/01/22/1



**Subordinate Legislation Committee**

**33<sup>rd</sup> Report, 2001**

**(Abridged)**

**Subordinate Legislation**

The Committee reports to the Parliament as follows—

1. The Committee met on 25<sup>th</sup> September 2001 and determined that the attention of the Parliament need not be drawn to the instruments listed at Annexe A. The Committee draws the attention of the Parliament to instruments listed at Annexe B and to the response provided by the Executive to questions from the Committee on the instrument listed at Annexe C.
2. The report is also addressed to the following committees as the lead committees for the instruments specified:

Health and Community Care	SSI 2001/301
	SSI 2001/302
	SSI 2001/303
	SSI 2001/316
	SSI 2001/317

## Instruments subject to approval

**The Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.6) (Scotland) Order 2001, (SSI 2001/316)**

**The Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (East Coast) (Scotland) Order 2001, (SSI 2001/317)**

## Instruments not subject to Parliamentary control

**The Food Protection (Emergency Prohibitions) (Radioactivity in Sheep) Partial Revocation (Scotland) Order 2001, (SSI 2001/313)**

**The Food Protection (Emergency Prohibitions) (Paralytic Shellfish Poisoning) (West Coast) (Scotland) Revocation Order 2001, (SSI 2001/314)**

**The National Health Service Trusts (Membership and Procedure) (Scotland) Regulations 2001, (SSI 2001/301)**

1. The Committee requested comment on two aspects of the Regulations.
2. Firstly, The Committee considered that part of paragraph (5) of regulation 12 might already be included in paragraph (1) of that regulation. The Committee therefore asked for explanation of what paragraph (5) adds to paragraph (1) of regulation 12. The Committee also wished to know whether the application of regulation 12 to members of the committees, provided for in paragraph (5), is intended to extend to associates of members. Similar points arose in relation to SSI 2001/302 below.
3. The Executive's reply, reproduced at Appendix B, stated that regulation 12(1) makes provision in relation to the director of a Trust at meetings of the management team and any committee of the Trust. Regulation 12(5) applies the same provision to all members of such committees. The formulation of the paragraph is intended to avoid doubt as to the application and to make clear that the provision applies to meetings other than those attended by a director of the Trust.
4. Regulation 12(5) intends to apply the provisions of the regulation as a whole to the members of committees including members whose associates may have an interest. This reflects the position in current codes of conduct, accountability and practice applicable to such members.
5. The Committee refers to its comments on SSI 2001/302 below. Regulation 12(1) partially repeats the provisions of regulation 12(5) and as such, in the Committee's view, is defectively drafted. In addition, as with SSI 2001/302, it leaves the position of associates of committee members open to doubt and, accordingly, is defectively drafted in this respect also.

6. **The Committee therefore draws this provision to the attention of the Parliament and lead committee on the grounds that it is defectively drafted in the same way as regulation 11 of SSI 2001/302 below.**

7. Secondly, the Committee noted that the Explanatory Note does not highlight the amendments made to the Regulations consolidated. Nor does it indicate the regulations where the detail of the provisions may be found. The Committee asked for an explanation.

8. In its reply, the Executive regretted that the main amendments to the Regulations as consolidated were not set out in the Explanatory Note and repeats its response to a similar point raised in relation to SSI 2001/302 below.

9. **The Committee therefore draws the attention of the Parliament and lead committee to the instrument on the grounds of defective drafting of the Explanatory Note as with SSI 2001/302.**

#### **The Health Boards (Membership and Procedure) (Scotland) Regulations 2001, (SSI 2001/302)**

10. The Committee raised four points on the instrument.

11. As in connection with SSI 2001/301, the Committee asked why the changes to the existing regulations are not highlighted in the Explanatory Note.

12. In its response, reproduced at Appendix C, the Executive regretted that the main amendments to the previous regulations consolidated here were not highlighted in the Explanatory Note. These were, however, foreshadowed in the Executive Note accompanying the instrument and were the subject of extensive consultation, prior to the making of the regulations, on "*Our National Health - A plan for change*" and "*Rebuilding our National Health Service*".

13. The Committee observes that, in general, whilst current readers of Regulations may be aware of the effect of changes this may not be the case in the future. The Executive Note and consultation papers may not be readily available to readers of the instrument, unlike the Explanatory Note, which is reproduced, with the instrument in the Annual Volume.

14. The Executive further outlines in its reply the main changes, which relate largely to consistency between these Regulations and SSI 2001/301.

15. The Committee considers that in this particular instance, as only those now affected by the changes are likely to have a practical interest in them, the other steps taken by the Executive to highlight the changes are probably sufficient in practice to overcome any deficiencies in the Explanatory Note.

16. **The Committee therefore draws the instrument to the attention of the Parliament and lead committee on the grounds that the Explanatory Note is**

**defectively drafted. It fails to highlight the changes of substance from the previous Regulations revoked by this instrument.** The Committee nevertheless notes that no prejudice is likely to be suffered in the short term by those affected by the instrument in the light of the extensive publicity given to the changes by the Executive.

17. Secondly, as similarly raised with regard to regulation 12 of SSI 2001/301 considered above, in the Committee's view, paragraph (5) of regulation 11 may already be included in paragraph (1) of that regulation. The Committee therefore asked for explanation of what paragraph (5) adds to paragraph (1) of regulation 11.

18. The Executive responded that, as in the case of regulation 12 of SSI 2001/301, regulation 11(1) intends to apply provisions to members who attend meetings of the Board or of a committee of the Board. Regulation 11(5) intends to extend those provisions to members of committees who are not Board members. The formulation of the paragraph is intended to avoid doubt as to the application and to make clear that the provision applies to meetings other than those attended by a member of the Board.

19. In the Committee's view, so far from avoiding doubt the reference to committees in regulation 11(1) appears to confuse the issue. The drafting of regulation 11(1) is so complex that it is quite unnecessarily difficult to follow. In so far as regulation 11(1) refers to committees, the provision repeats part of regulation 11(5) and is thus defectively drafted in this respect. The Committee contrasts Regulation 11 with regulation 10 of SSI 2001/303 below which contains no such unnecessary repetition.

20. The Committee also notes that the drafting of the provision leaves it open to doubt whether associates of those committee members who are not committee members are covered. However, it is clear from the Executive's response to SSI 2001/301 that this is the intention. This is a defect shared by SSI 2001/303 although to a lesser extent.

**21. The Committee therefore draws the instrument to the attention of the Parliament and lead committee on the grounds that regulation 11(1) is defectively drafted in that it contains a reference to committees that is duplicated in regulation 11(5). It is also defectively drafted in failing to make clear the intention that associates of those committee members who are not committee members are covered by the requirements as well as members.**

22. Thirdly, the Committee asked for explanation of the relevance of the reference to paragraph 6 of Schedule 1 to the parent Act.

23. The Executive accepts that no provision is made by the regulations affecting the terms of service and remuneration of officers and servants of Boards directly. However, the position of persons who are officers of Boards is dealt with in regulation 4. Those officers are not to be remunerated in relation to their membership of the Board. It was considered appropriate from the point of view of certainty to include the power contained in paragraph 6 of Schedule 1 when including reference to those officers in that paragraph.

24. The Committee doubts whether the mere mentioning of the officers in question in regulation 4 is sufficient to require the citation of paragraph 6 of schedule 1. However, it considers that the point is debatable and that the Executive is right to err on the side of caution.

**25. The Committee therefore draws the point to the attention of the Parliament and lead committee on the grounds that it required further explanation supplied by the Executive.**

26. Fourthly, the Committee asked why regulation 2(1) states that members of Boards are to be appointed by the Scottish Ministers when paragraph 2 of Schedule 1 to the parent Act contains the same provision.

27. The Executive responded that regulation 2(1) was inserted to facilitate the reading of the remainder of the provisions of the regulation. The Executive accepts that it is otiose given that the provision of paragraph 2 of Schedule 1 to the 1978 Act rules on the matter. However, it was felt helpful to express the point in this way to allow the reader fully to understand the paragraphs that immediately follow.

28. The Committee refers to its comments on similar provisions in SSI 2001/303 below. It is doubtful whether repeating a substantive provision of an enabling Act as a substantive provision in subordinate legislation is technically *intra vires*. The Committee does not question the motives of the Executive in including the provision. However, as indicated in the guidance on statutory instruments, the place for such supplementary information is in the Explanatory Note, as introductory words to the substantive provision, or in a provision defining the scope or purpose of the instrument, according to circumstances. Accordingly, in making provision in the form of substantive law, the regulation is defectively drafted.

**29. The Committee therefore drawing the attention of the Parliament and lead committee to this provision on the grounds that it unnecessarily repeated provisions of the enabling Act. There is doubt, therefore, as to whether it is technically *intra vires*. It is also defectively drafted in this respect as indicated above.**

**The Scottish Social Services Council (Appointments, Procedure and Access to the Register) Regulations 2001, (SSI 2001/303)**

30. The Committee referred four points to the Executive.

31. Firstly, the Executive was asked to explain why the preamble makes no reference to the fulfilment of the statutory obligation on the Scottish Ministers contained in section 56(2) of the Regulation of Care Act and schedule 2, paragraph 7 to consult prior to making the Regulations.

32. In its reply, reproduced at Appendix D, the Executive has accepted that the recital should, as a matter of general practice, have contained a reference to the statutory obligation to consult, and apologises for the oversight. The omission of

such a reference does not, however, affect the validity of the regulations, and details of the consultation were set out in the Executive Note that accompanied them.

33. The Committee accepts that omission from the preamble of a reference to the statutory obligation to consult does not affect the validity of an instrument. The essential point is that consultation was carried out and details were indeed set out in the Executive Note that accompanied the instrument. The Committee has therefore been able to satisfy itself that the necessary requirements had been fulfilled.

34. However, as the Executive acknowledges, it is good drafting practice, and in accordance with the guidance on drafting of SSIs, that any essential statutory precondition to the making of an instrument should be summarised in the preamble. Moreover, the Executive Note is for the use of the Parliament and is not reproduced in the Annual Volume. It is not therefore readily available to the general public. **Failure to refer in the preamble to the need for consultation constitutes defective drafting and the Committee therefore draws the attention of the Parliament and lead committee to the instrument on this ground.**

35. Secondly, the Committee asked why regulation 2(1) partly repeats the provisions of paragraph 1 of schedule 2 to the parent Act. The Committee also noted that the effect of paragraph 4 of schedule 2 to the parent Act is to prescribe a minimum number of members of the Council. The Committee therefore asked the Executive to explain the *vires* of regulation 2, in so far as it empowers the Scottish Ministers to appoint “such number of members” as they “think fit”.

36. The Executive accepts that regulation 2(1) partly repeats the wording of paragraph 2 of schedule 2 to the parent Act. The Executive considers that it was desirable to do so as a first step in setting out clearly the scheme of appointment that is envisaged by the Regulations.

37. The effect of paragraph 4 of schedule 2 is to prescribe a minimum number of appointees of two particular types, but not otherwise to make provision as to the number of members of the Council. Paragraph 7(b) of schedule 2 to the parent Act empowers the Scottish Ministers by regulations to make provision as to the number of persons who may be appointed, subject to paragraph 4 of that schedule. The Executive takes the view that regulation 2(1) makes such provision by providing in part that there is no upper limit to the number of appointees. It was considered unnecessary to repeat in the regulations the provisions as to minimum numbers of appointees that are imposed upon the Scottish Ministers by paragraph 4.

38. The Committee observes that this response is inconsistent. On the one hand, the Executive states that it is repeating a provision of the Act for the sake of clarity. On the other hand, it says it did not refer to a restriction on the use of a power because the restriction was contained in the Act. It appears to the Committee that the answers on these points are in fact the wrong way round.

39. The Committee refers to its comments on SSI 2001/302 above. As a matter of law, it appears to the Committee that the Executive can only make regulations within the terms of the delegation allowed to it by the enabling Act. In this case, the Act itself provides that the Council is to consist of a convener and members to be



appointed by the Scottish Ministers. The Ministers' powers are to make regulations making provision amongst other things as to how they are to exercise the powers of appointment conferred by the Act. In so far as the Regulations purport to do more than this, i.e. conferring power on the Scottish Ministers to appoint the Council, they appear to be of doubtful *vires*.

40. The drafting intention to set out the scheme of appointment of the Council is nevertheless a worthy one and could have been achieved, as the Committee has suggested above, by an alternative form of wording, for example by prefacing the substantive provisions relating to appointments by introductory wording. **The Committee therefore draws the attention of the Parliament and lead committee to the instrument on the grounds that the provisions are defectively drafted in that they do not correctly reflect the stated drafting intention. As drafted, it is also doubtful whether the provisions are *intra vires*.**

41. On the second point, the conferring of power on the Scottish Ministers the right to appoint such members "as they think fit" without qualification, appears to the Committee to go beyond the terms of the enabling power and thus to be of doubtful *vires*. Any attempt to subvert, in practice, the restriction in the Act would appear challengeable, whatever the Regulations said. Nevertheless, this is one case when it is good practice to repeat the words of the enabling power, including any restrictions, to avoid any suggestions that the maker of the instrument is acting *ultra vires*.

42. **The Committee therefore draws the attention of the Parliament and lead committee to the instrument on the grounds that it is doubtful that it is *intra vires* and that, in any event, it is defectively drafted as described above.**

43. Thirdly, the Executive was asked to explain which provision of the parent Act justifies the sub-delegation to the Council contained in regulation 13(3).

44. The Executive replied that regulation 13(3) is made under the powers conferred by section 56(1)(b) of the parent Act. That provision empowers the Scottish Ministers to make regulations requiring the Council to secure that access to the register shall be afforded to any person on such conditions and in such circumstances as may be specified in the regulations. The Executive considers that regulation 13(3) does specify conditions and circumstances in which access to the register is to be afforded and, therefore, that there is no sub-delegation since the Council has only to ascertain whether persons wishing to have access to the register meet the specified criteria.

45. The Committee considers that the difficulty is that the words "to the satisfaction of the Council" in the definition of "relevant employer" introduce a subjective test of compliance. Use of the word "specified" normally implies an objective test. Nevertheless, **the Committee acknowledges that there is room to argue the point either way in this case and therefore simply draws the Executive's response to attention of the lead committee and the Parliament.**

46. Fourthly, given that section 56(1)(b) provides for fees to be “specified” in the Regulations, the Committee asked which power justifies the sub-delegation of fees to the Council contained in regulation 13(5).

47. The Executive replied that section 56(1)(b) empowers the Scottish Ministers to make regulations requiring the Council to secure that access to the register shall be afforded to any person on the payment of “such fees as may be specified in the regulations”. The Executive has replied that the fee has been specified and that the only question remaining to the Council is whether or not to collect it or to collect it in full. It is not thought that this amounts to sub-delegation.

48. The Committee considers that, again, the provision as drafted raises doubts about its *vires* on the grounds that it may represent unauthorised sub-delegation. The purpose of the enabling provision appears to be not to confer power on the Council to allow access to the register but to require it to do so on the payment of a specified fee, (not a specified maximum fee). If the Council wishes to make the registers available other than on payment of the prescribed fee, that is a matter for the Council. The enabling Act does not confer any powers on the Scottish Ministers to authorise them so to do nor does the Council’s power depend on such authorisation. The wording of the enabling Act would seem to preclude the setting of a maximum fee and the degree of sub-delegation contained in the Regulations.

**81. The Committee therefore draws regulation 13(5) to the attention of the Parliament and lead committee on the grounds that it is doubtful whether it is *intra vires* in specifying a maximum fee rather than a fee and that it exceeds the powers conferred by the enabling Act in that it purports to delegate the setting of the fee to the Council.**

## **THE NATIONAL HEALTH SERVICE TRUSTS (MEMBERSHIP AND PROCEDURE) (SCOTLAND) REGULATIONS 2001 (SSI 2001/301)**

**In its letter of 18 September the Committee made the following comments on this instrument.**

"1. The Committee considers that part of paragraph (5) of regulation 12 may already be included in paragraph (1) of that regulation. The Committee therefore asks for explanation of what paragraph (5) adds to paragraph (1) of regulation 12. The Committee also wishes to know whether the application of regulation 12 to members of the committees, provided for in paragraph (5), is intended to extend to associates of members.

2. The Committee notes that the Explanatory Note does not highlight the amendments made to the Regulations consolidated nor does it indicate the regulations where the detail of the provisions may be found. The Committee asks for explanation."

### **The Scottish Executive responds as follows:**

1. Regulation 12(1) makes provision in relation to the director of a Trust at meetings of the management team and any committee of the Trust. Regulation 12(5) applies the same provision to all members of such committees. The formulation of the paragraph is intended to avoid doubt as to the application and to make clear that the provision applies to meetings other than those attended by a director of the Trust.

Regulation 12(5) intends to apply the provisions of the regulation as a whole to the members of committees including members whose associates may have an interest. This reflects the position in current codes of conduct, accountability and practice applicable to such members.

2. The Executive regrets that the main amendments to the regulations as consolidated were not set out in the explanatory note. Those changes were however signalled in the Executive Note which accompanied the instrument. The changes to the regulations reflect the consultations on "Our National Health - A plan for action, a plan for change" - the Scottish Health Plan and "Rebuilding our National Health Service" to improve and streamline the governance and accountability of the NHS in Scotland.

The main changes related to consistency between these regulations and SSI 2001/302. This was achieved by reordering provisions to align them in each case and by reviewing and revising the conditions for disqualification and appointments of members and directors again to achieve general consistency. The regulations also clarified the rules on co-optation of members (regulation 11(2) and (3).

For Scottish Executive Health Department  
20 September 2001

**THE NATIONAL HEALTH SERVICE HEALTH BOARDS (MEMBERSHIP AND PROCEDURE) (SCOTLAND) REGULATIONS 2001 (SSI2001/302) AND**

**THE NATIONAL HEALTH SERVICE TRUSTS (MEMBERSHIP AND PROCEDURE) (SCOTLAND) REGULATIONS 2001 (SSI2001/301)**

1. The above Regulations are made under sections 2(10), 12A(5), 105(7) and 108(1) of, and of paragraphs 2A, 4, 6 and 11 of Schedule 1 to, the National Health Service (Scotland) Act 1978.

Policy objectives

2. The Regulations will implement the health policy objectives announced in the Scottish Health Plan to achieve greater integration in the NHS in Scotland by creating 15 new unified NHS Boards in the existing 15 Health Board areas. It is also in line with wider Scottish Executive policy on reviewing the number, and operation, of public bodies.
3. The Regulations will enable the streamlining of decision-making within local NHS systems and the involvement of key stakeholders such as Local Authorities. They will allow a wider spectrum of people to be involved in the NHS by allowing them to participate in committees within the system, without having to be a member of the board. They will provide a more consistent basis for the appointment of members and the transaction of business across the organisations which comprise each local NHS system

**Financial effects**

4. There will be a saving of approximately £410,000 on remuneration payable to non-executive members and trustees. be completed

Scottish Executive Health Department  
September 2001

## **THE HEALTH BOARDS (MEMBERSHIP AND PROCEDURE) (SCOTLAND) REGULATIONS 2001 (SSI 2001/302)**

### **In its letter of 18 September the Committee made the following comments:**

"1. As raised in connection with SSI 2001/301, the Committee asks why the changes to the existing regulations are not highlighted in the explanatory note?

2. As similarly raised with regard to regulation 12 of SSI 2001/301, the Committee considers that part of paragraph (5) of regulation 11 may already be included in paragraph (1) of that regulation. The Committee therefore asks for explanation of what paragraph (5) adds to paragraph (1) of regulation 11.

3. The Committee asks for explanation of the relevance of the reference to paragraph 6 of Schedule 1 to the parent Act.

4. The Committee asks why regulation 2(1) states that members of Boards are to be appointed by the Scottish Ministers when paragraph 2 of Schedule 1 to the parent Act contains the same provision."

### **The Scottish Executive responds as follows:**

1. The Executive regrets that the main amendments to the previous regulations consolidated here were not highlighted in the explanatory note. These were however foreshadowed in the Executive Note which accompanied the instrument and were the subject of extensive consultation, prior to the making of the regulations, on "Our National Health - A plan for change" and Rebuilding our National Health Service".

The main changes related to consistency between these regulations and SSI 2001/301. This was achieved by reordering provisions to align them in each case and by reviewing and revising the conditions for disqualification and appointment of members and directors in each case, again to achieve general consistency. The Regulations also clarified the rules on co-option of members (regulation 10(2) and (3)).

2. As in the case of regulation 12 of SSI 2001/301, regulation 11(1) intends to apply provisions to members who attend meetings of the Board or of a committee of the Board. Regulation 11(5) intends to extend those provisions to members of committees who are not Board members. The formulation of the paragraph is intended to avoid doubt as to the application and to make clear that the provision applies to meetings other than those attended by a member of the Board.

3. It is accepted that no provision is made by the regulations affecting the terms of service and remuneration of officers and servants of Boards directly. However, the Committee will note that the position of persons who are officers of Boards is dealt with in regulation 4. Those officers are not to be remunerated in relation to their membership of the Board. It was considered appropriate from the point of

view of certainty to include the power contained in paragraph 6 of Schedule 1 when including reference to those officers in that paragraph.

4. Regulation 2(1) was inserted to facilitate the reading of the remainder of the provisions of the regulation. It is accepted that it is otiose given that the provision of paragraph 2 of Schedule 1 to the 1978 Act rules on the matter. However, it was felt helpful to express the point in this way to allow the reader to fully understand the paragraphs which immediately follow.

For: Scottish Executive Health Department

Date: 20 September 2001

**THE SCOTTISH SOCIAL SERVICES COUNCIL (APPOINTMENTS, PROCEDURE AND ACCESS TO THE REGISTER) REGULATIONS 2001 (SSI 2001/303)**

1. In its letter of 18 September 2001 the Committee raised the following matters.
  - (a) The Executive is asked to explain why the preamble makes no reference to the fulfilment of the statutory obligation on the Scottish Ministers contained in section 56(2) of the Regulation of Care Act and schedule 2, paragraph 7 to consult prior to making the Regulations.
  - (b) The Committee asks why regulation 2(1) partly repeats the provisions of paragraph 1 of schedule 2 to the parent Act. It is also noted that the effect of paragraph 4 of schedule 2 to the parent Act is to prescribe a minimum number of members of the Council. The Executive is therefore asked to explain the vires of regulation 2(1) in so far as it empowers the Scottish Ministers to appoint “such number of members” as they “think fit”.
  - (c) The Executive is asked to explain which provision of the parent Act justifies the sub-delegation to the Council contained in regulation 13(3).
  - (d) Given that section 56(1)(b) provides for fees to be “specified” in the Regulations, the Committee asks which power justifies the sub-delegation of fees to the Council contained in regulation 13(5).
2. The Department of Health and Community Care responds as follows.
  - (a) The Executive accepts that the recital should as a matter of general practice have contained a reference to the statutory obligation to consult, and apologises for this oversight. The Executive observes that the omission of such a reference does not however affect the validity of the regulations, and notes that details of the consultation were set out in the Executive Note which accompanied them.
  - (b) The Executive accepts that regulation 2(1) partly repeats the wording of paragraph 2 of schedule 2 to the parent Act. The Executive considers that it was desirable to do so as a first step in setting out clearly the scheme of appointment which is envisaged by the regulations. The Executive observes that the effect of paragraph 4 of schedule 2 is to prescribe a minimum number of appointees of two particular types, but not otherwise to make provision as to the number of members of the Council. Paragraph 7(b) of schedule 2 to the parent Act empowers the Scottish Ministers by regulations to make provision as to the number of persons who may be appointed, subject to paragraph 4 of that schedule. The Executive takes the view that regulation 2(1) makes such provision by providing in part that there is no upper limit to the number of appointees. It was considered unnecessary to repeat in the regulations the provisions as to minimum numbers of appointees which are imposed upon the Scottish Ministers by paragraph 4.

- (c) Regulation 13(3) is made under the powers conferred by section 56(1)(b) of the parent Act. That provision empowers the Scottish Ministers to make regulations requiring the Council to secure that access to the register shall be afforded to any person on such conditions and in such circumstances as may be specified in the regulations. It is considered that regulation 13(3) does specify conditions on and circumstances in which access to the register is to be afforded and therefore that there is no sub-delegation since the Council has only to ascertain whether persons wishing to have access to the register meet the specified criteria.
- (d) Section 56(1)(b) empowers the Scottish Ministers to make regulations requiring the Council to secure that access to the register shall be afforded to any person on the payment of “such fees as may be specified in the regulations”. It is considered that the fee has been specified and that the only question remaining to the Council is whether or not to collect it or to collect it in full. It is not thought that this amounts to sub-delegation.

for: Department of Health and Community Care

19 September 2001



# Key Costing Issues in the CDG Report on Care for the Elderly

Professor David Bell

scotecon

University of Stirling

2<sup>nd</sup> October 2000

## 1. Demography

What changes will occur in the age structure of the Scottish population that will impact on the demand for and supply of long-term care in Scotland over the next 20 years?

There will be a substantial increase in the 85+ population, due to pre-existing population trends, improved health status and health care. The changes in other age groups will be less dramatic, but together these contribute to the “aging” of the Scottish population.

Table 1: Changes in the Composition of the Scottish Population by Age Group 1998-2021

Age Band	Change 1998-2021
0-44	-18%
45-59	4%
60-74	37%
75-84	42%
85+	67%
Total	-2%

## 2. Health Expectancy

Based on research from Aberdeen University, we included a 0.25 per cent per year reduction in the proportion of the elderly population requiring care services to reflect increasing health expectancy.

## 3. Changes in the Unit Costs of Care

A key assumption in the overall costing, this was set at 2 per cent per annum in real terms, to reflect changes in both the quality and the cost of providing care.

## 4. The Substitution Between Informal and Formal Care

The international evidence of the substitution between informal and formal care is limited. Our estimate is based on research carried out in the USA and suggests a 12 per cent switch from the informal to the formal sector, implying an additional annual cost of £25m.

## 5. Unmet Need

Work from Aberdeen University resulted in an estimate of unmet need for personal care services in the community in the range between £15 to £25 million

The take-up of unmet need and the substitution from informal care to formal care will take some time to build up. In the interim, the CDG has suggested that resources be invested to build up the capacity in the community to meet this additional demand.

## 6. Calculating the Cost of the Policy

### (a) In Care Homes

Table 2: The Breakdown of Costs for Individuals in Care Homes

<b>Composition of Average Costs.</b>	<b>Private Residential Homes</b>	<b>Nursing Home care Per Week</b>
<b>Average Cost per Week</b>	<b>£285</b>	<b>£346</b>
<b>Estimated Living &amp; Housing Costs.</b>	<b>£139</b>	<b>£139</b>
<b>Personal Care Costs.</b>	<b>£145</b>	<b>£145</b>
<b>Nursing Care Costs</b>	<b>£0</b>	<b>£61</b>

### (b) Adding the Costs of Care in the Community

	No. of Self-funding Residents	Average Personal & Nursing Costs per Week	Estimated Cost £m
<b>Residential Care Homes</b>			
Personal Care - Residents	2974	£90	14
<b>Nursing Homes</b>			
Personal Care - Residents	4599	£90	22
Nursing Care - Residents	4599	£65	16
Estimate of Charges collected from Local Authorities for Personal Care			10
Estimated of Private Expenditure on Personal Care from Private Providers (UKHCA)			10
<b>Estimate of Existing Private Expenditure on Nursing &amp; Personal Care</b>			<b>£71</b>
<b>Anticipated Reaction to Policy based On Three Year Phasing:</b>			<b>Year 1 £m</b>
Estimated Cost of Switchover from Informal to Formal Care:			£8
Estimated Cost of Meeting Existing Unmet Need for Personal Care			£8
<b>Non Recurring Investment in Community Care Services</b>			<b>£37</b>
<b>Year 1 Estimate of the Cost of Introducing Free Personal and Nursing Care</b>			<b>£125</b>

#### Other issues:

1. The impact of changes in the balance of care

What will be the cost implications of changes in the balance of care towards more care in the community?

2. Equity issues associated with the policy

The conflict between “diagnostic equity” and the more traditional understanding of equity

3. Recruiting and retaining a skilled workforce able to deliver the policy

Will there be a sufficient supply of appropriately skilled workers to meet the increase in demand for care in the community? Will smart technology reduce the requirement for such labour?