



Health and Community Care Committee

32nd Meeting, 2001

Wednesday 19 December 2001

The Committee will meet at 9.30 am in Committee Room 2, Committee Chambers, George IV Bridge, Edinburgh

1. **Item in private:** The Committee will consider whether to take item 4 in private.
2. **Subordinate Legislation:** The Committee will consider the following negative instruments—

The National Health Service (Charges for Drugs and Appliances) (Scotland) Regulations 2001 (SSI 2001/430)

The National Health Service (Superannuation Scheme, Injury Benefits and Compensation for Premature Retirement) (Scotland) Amendment Regulations 2001 (SSI 2001/437)

The Community Care (Direct Payments) (Scotland) Amendment Regulations 2001 (SSI 2001/447)

The Miscellaneous Food Additives (Amendment) (No.2) (Scotland) Regulations 2001 (SSI 2001/450)

3. **Community Care and Health (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 2).
4. **Report on Hepatitis C:** The Committee will consider a draft response to the Scottish Executive proposals.

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Room 2.5

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The Following papers are attached for this meeting:

Agenda Item 5

Paper from the clerks on Hepatitis C (Private – to follow)

HC/01/32/1



The Scottish Parliament

Subordinate Legislation Committee

43rd Report, 2001 (Abridged)

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. The Committee met on 27th November and 4th December 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 the instruments and the code of conduct at Annexe B.
2. The report is also addressed to the following committees as the lead committees for the instruments and codes of conduct specified:

Health and Community Care	SSI 2001/425
	SSI 2001/430

Instruments subject to approval

The Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.13) (Scotland) Order 2001, (SSI 2001/425)

The National Health Service (Charges for Drugs and Appliances) (Scotland) Regulations 2001, (SSI 2001/430)

40. The Committee raised four main points with the Executive, to which it received a courteous and helpful response. Firstly, the Executive was asked to explain why regulation 3(3) was not drafted in gender-neutral terms.

41. In its reply, reproduced at Appendix D, the Health Department states that this is a consolidating instrument. The Department accepts that gender-neutral terminology should be used in Scottish Statutory Instruments and has sought to use it in this instrument. The Department notes that in Regulation 3(3) the terminology of the consolidated instruments has been used rather than gender-neutral terminology and apologises for this particular oversight.

42. The Committee notes the Department's acknowledgement of the fault, which appears to have been an oversight. **The Committee therefore draws the instrument to the attention of the lead committee and the Parliament on grounds of failure to follow proper drafting practice, acknowledged by the Department.**

43. Secondly, the Committee asked for an explanation of the reference in regulation 8 to both "sum prescribed" and "prescribed sum" despite the fact that the Explanatory Note on page 13 states that all references have been changed to "sum prescribed".

44. The Department accepts that it has not corrected all of the references for consistency. This was an oversight. In the Department's view, the terminology is such that it will not confuse readers and does not affect the application of the provisions. The Department undertakes to address the matter when the instrument is next amended.

45. The Committee notes that the Department acknowledges its mistake and undertakes to put matters right at the next opportunity. The Committee agrees that this is probably sufficient, as the Department is probably correct in thinking that the terminology will not in practice cause difficulties for the user. Nevertheless, the Committee considers that such inconsistency in terminology falls within the definition of defective drafting rather than failure to comply with proper drafting practice.

46. **The Committee therefore draws the instrument to the attention of the lead Committee and the Parliament on the ground of defective drafting, acknowledged by the Executive.**

47. Thirdly, the Committee asked for explanation of the purpose and effect of regulation 8 regarding the following points—

(i) Paragraphs 14 (b) and (c) of regulation 8 refer to when pre-payment certificates "ceased to be valid". The provisions in SSI 2001/67 from which these paragraphs appear to be derived refer to the date when pre payment certificates "became valid". There is no reference in the Explanatory Note to this change.

(ii) It is not clear whether an application for repayment can be made before the date on which the certificate ceases to apply as the references in the various subparagraphs are to holding a valid prepayment certificate.

(iii) Regulation 8 as a whole contains a number of discrete provisions and the drafting approach of combining all the provisions in one regulation is unclear.

48. In response to points (i) and (ii), the Department stated that the reference to the period of time is a reference back to when the application for repayment in respect of a pre-payment certificate shall be made. In the case of regulation 14(b), for example, a person has until four months from the date on which the certificate ceased to be valid within which to apply for repayment. This change affords a reasonable period of time within which an application may be made. An application for repayment can be made from the date on which the certificate becomes valid. The Department accepts that a reference to this change should have been included in the Explanatory Note.

49. On point (iii), the Department states that, whilst regulation 8 is lengthy, its provisions relate only to pre-payment certificates and cover the process for making applications and obtaining repayments or refunds in respect of such certificates. This provision is, like the rest of the instrument, a simple consolidation save for some minor amendments. As it had operated without problem in the past, the style of the equivalent provision in the 1989 Regulations has been followed.

50. The Committee is satisfied with the Department's explanation of points (i) and (ii), which it draws to the attention of the lead committee and the Parliament. The Executive acknowledges that the Explanatory Note is incomplete in that it fails to highlight the change as required by the Guidance. The Committee therefore draws attention to the instrument on the grounds of defective drafting on that respect.

51. On point (iii), the Committee notes that, although there was a provision equivalent to regulation 8 in the 1989 Regulations, it was far more limited in scope and was therefore easier to follow and considerably shorter. The amendments made to regulation 8 in these Regulations were, on the other hand, far from minor as the provisions from which it derived were fundamentally flawed. As this is a consolidation, in the Committee's view the opportunity could have been taken to split the regulation into more manageable pieces without changing its substance.

52. As the Committee has remarked on previous occasions, it is important that an instrument such as this, applying directly to members of the public, should be readily comprehensible. Regulation 8 clearly fails this test. **The Committee therefore draws the attention of the lead committee and the Parliament to regulation 8 on the grounds of failure to comply with proper drafting practice.**

53. Fourthly, the Committee suspected that the reference in Schedule 4 to SI 1993/552 ought to read 1993/522 and asked the Executive to confirm.

54. The Department confirms that the reference should be to SI 1993/522 and has undertaken to contact HMSO to correct it. The Committee welcomes the undertaking, considering that the error constitutes defective drafting. **The Committee therefore draws the attention of the lead committee and the Parliament to the instrument on the ground of defective drafting in this respect.**

THE NATIONAL HEALTH SERVICE (CHARGES FOR DRUGS AND APPLIANCES) (SCOTLAND) REGULATIONS 2001, (SSI 2001/430)

On the 27th November 2001 the Committee asked:

1. The Executive is asked to explain why regulation 3(3) has not been drafted in gender-neutral terms.
2. The Committee notes that regulation 8 still contains references to both “sum prescribed” and “prescribed sum” despite the fact that the Explanatory Note on page 13 states that all references have been changed to “sum prescribed”. The Executive is asked to explain;
3. The Executive is asked to explain the purpose and effect of regulation 8 regarding these points—
 - (i) Paragraphs 14 (b) and (c) of regulation 8 refer to when pre- payment certificates “ceased to be valid”. The provisions in SSI 2001/67 from which these paragraphs appear to be derived refer to the date when pre payment certificates “became valid”. There is no reference in the Explanatory Note to this change.
 - (ii) It is not clear whether an application for repayment can be made before the date on which the certificate ceases to apply as the references in the various sub-paragraphs are to holding a valid prepayment certificate.
 - (iii) Regulation 8 as a whole contains a number of discrete provisions and the drafting approach of combining all the provisions in one regulation is unclear.
4. The Committee believes that the reference in Schedule 4 to SI 1993/552 ought to read 1993/522. The Executive is asked to confirm.

The Scottish Executive Health Department responds as follows:

Point 1

In response to point 1 above the Department comments that this instrument is a consolidating instrument. The Department accepts that gender neutral terminology should be used in Scottish Statutory Instruments and has sought to do so in this instrument. The Department notes that in Regulation 3(3) the terminology of the consolidated instruments has been used rather than gender neutral terminology and apologises for this particular oversight.

Point 2

In response to point 2 above the Department notes the point raised by the Committee and that it has not corrected all of the references for consistency. This was an oversight and the Department thanks the Committee for raising this. The Department is of the view that the terminology is such that it will not confuse readers and does not affect the application of the provisions. The Department will address the matter when the instrument is next amended.

Point 3

In response to point 3(i) and (ii) the Department comments that the reference to the period of time is a reference back to when the application for repayment in respect of a pre-payment certificate shall be made. In the case of regulation 14(b) for example, a person has until four months from the date on which the certificate ceased to be valid within which to apply for repayment. This change affords a reasonable period of time within which an application may be made. An application for repayment can be made from the date on which the certificate becomes valid. A reference to this change should have been included in the Explanatory Note.

In response to point 3(iii) the Department comments that whilst regulation 8 is lengthy, its provisions relate only to pre-payment certificates and cover the process for making applications and obtaining repayments or refunds in respect of such certificates. This provision is, like the rest of the instrument, a simple consolidation save for some minor amendments. As it had operated without problem in the past the style of the equivalent provision in the 1989 Regulations have been followed

Point 4

In response to point 4, the Department notes the point raised by the Committee and confirms that the reference should be to SI 1993/522. HMSO will be contacted in this respect.

Derek Mackintosh
For: the Scottish Executive Health Department

29th November 2001



The Scottish Parliament

Subordinate Legislation Committee

44th Report, 2001 (Abridged)

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. The Committee met on 11th December 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 the instruments at Annexe B.
2. The report is also addressed to the following committees as the lead committees for the instruments specified:

Health and Community Care	SSI 2001/437
	SSI 2001/447
	SSI 2001/450
	SSI 2001/451

Instruments subject to approval

The Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No.14) (Scotland) Order 2001, (SSI 2001/451)

Instruments subject to annulment

The Miscellaneous Food Additives (Amendment) (No.2) (Scotland) Regulations 2001, (SSI 2001/450)

Instruments subject to annulment

The National Health Service (Superannuation Scheme, Injury Benefits and Compensation for Premature Retirement) (Scotland) Amendment Regulations 2001, (SSI 2001/437)

14. The Committee raised six points on the Regulations. The Executive's response, reproduced at Appendix B, seems hardly satisfactory.

First question

15. The Committee noted that the Regulations amend three separate sets of Regulations and asked the Executive to explain this drafting approach when there are no provisions common to each set and the amendments appear to be substantial.

16. The Executive replied that the SSI amends three SIs. These SIs deal with various employment benefits open to employees of the National Health Service in Scotland. The Executive took the view that it was obvious good sense and user-friendly to the public to bring together these amendments into one portmanteau set of amending regulations. Not only do the instruments deal with the same subject matter - i.e. employment benefits - but also the same employer.

17. Also, the benefits are part of the employees' remuneration package and therefore are in a sense an inter-related unity. Thirdly, it is not unusual for these benefits to be rolled into one set of regulations, as they are in other public sector schemes.

18. In the Committee's view, a decision on whether to include amendments to a number of principal instruments in one single instrument rather than in separate instruments is a matter of judgement and, to some extent, personal taste. As the Committee has remarked on previous occasions, where the amendments are identical across a range of instruments, as in the case of the recent Health Service Trusts amendments or with a single underlying purpose there is considerable merit in preparing only one instrument.

19. On the other hand, it seems to the Committee that where different and substantial amendments are made to different instruments the argument for combining the amendments in one instrument is less convincing. In this case, it is

not clear that there is any connection between the amendments made to the various principal instruments other than timing. Moreover, although the Executive claims that the principal Regulations deal with the same subject matter, the Committee notes that it was not considered appropriate at the time when those instruments were made to make one composite set of Regulations but three separate sets. The Committee considers that it would have been more appropriate in this instance, and more user-friendly, to have produced three separate amending instruments.

20. The Committee therefore draws the instrument to the attention of the Parliament and lead committee on the ground that it fails to comply with good drafting practice in that respect.

Second question

21. The Committee asked why the references to the three sets of Regulations contained in regulations 2 to 4 are divorced from the relevant amending regulations.

22. The Executive responded that as these regulations amend three sets of regulations, it seemed was user-friendly to set out the scheme and order of the SSI at the beginning of the instrument. The user can immediately go to the relevant amending regulations if only interested in them.

23. In the Committee's view, the response simply highlights the difficulties inherent in combining more than one set of amendments in the one instrument. In fact, it seems to contradict what is said in response to the first point. Regulations 2 to 4 seem quite unnecessary as separate regulations and indeed serve only to add to the length and complexity of regulations that are already very complex. While introductory provisions like regulations 2 to 4 are usual and necessary as pegs on which to hang Schedules, the Committee observes that it is very unusual indeed to find them used to introduce other substantive regulations. Although the meaning of the Regulations is not affected, it seems odd to claim that the drafting approach makes the Regulations more user-friendly.

24. The Committee therefore draws the attention of the lead committee and the Parliament to the Regulations on the grounds that they fail to comply with proper drafting practice on this ground also.

Third question

25. The Committee asked what purpose is served by the definitions in regulation 1(2) when each set of Regulations is referred to only once.

26. The Executive acknowledges that where regulations are referred to only once in an instrument, there is no need to define those regulations. In this instrument, however, definitions are included as it considered that this is user-friendly and makes the flow of the text easily accessible. The definitions are using the shorthand for the regulations as used by those familiar with the regulations.

27. The Committee considers that the definitions are quite unnecessary and irrelevant and serve only to confuse further what is already a very confusing document. If anything, the point again emphasises the wisdom of preparing separate instruments in cases such as this.

28. The Committee therefore draws the attention of the lead committee and the Parliament to this provision on the grounds, again, of failure to follow proper drafting practice.

Fourth question

29. The Committee asked why the headings to regulations 2 to 4 are not consistent with the texts of the respective regulations (and appear to ignore the effect of regulation 1(2)).

30. The Executive responded that headings do not form part of the text proper of the SSI, where the shorthand definitions are used. Again, the decision was taken to spell out the full title in the heading so that a user missing the definitions in regulation 1(2) could easily pick it up going through the text quickly.

31. The Committee recognises that the headings may not form part of an instrument in the sense that printing errors in headings may be amended in a way that may not be possible with more substantive parts of an instrument. They are nevertheless part of an instrument.¹ If an instrument contains headings, those headings should be properly drafted and consistent.

32. The Committee considers that, in this instrument, not only are the headings to regulations 2 to 4 inconsistent with the text of those regulations and the definitions in regulation 1(2) but also with the headings to regulations 19 and 20 to 23.

33. The internal inconsistencies in the titles of the instrument may not affect its interpretation but they are still undesirable. In addition, the response serves only to underline the pointlessness of the definitions in regulation 1(2).

34. The Committee, therefore, draws the attention of the lead committee and the Parliament to the failure to comply with proper drafting practice in the above respect.

Fifth question

35. A heading referring to “Amendment of Superannuation Scheme Regulations” appears to have been omitted between regulation 4 and 5 and, similarly, a heading seems to be missing from regulation 19. The Committee asked for an explanation.

36. The Executive accepts that, stylistically, a heading could have been included again above regulation 5 but it was thought desirable to have the reference to “Interpretation” to take the user to the Interpretation regulation of the NHS Superannuation regulations, which are very long. The heading to regulation 2 is so close to regulation 5, and it spells out what regulation 5 does clearly, so that it was not thought that there could be any confusion.

¹ See Bennion, *Statutory Interpretation*, 3rd Edition section 64 at page 194) and may be used for purposes of interpretation of an instrument.

37. On the Committee's last point about there being no heading to regulation 19, the Executive wondered whether the question was included by mistake as there is a heading to regulation 19.

38. The Committee is puzzled by the response. The omission of a heading for the part of the Regulations relating to the Superannuation Regulations seems to have been an oversight. The Regulations contain general headings to identify the parts of the Regulations that apply to the each set of principal Regulations amended by these Regulations. The omission of a similar heading in relation to the Superannuation Regulations might lead the reader to think at least initially that regulations 5 to 18 applied generally to all the sets of Regulations amended. The Regulations ought to be consistent.

39. The reference to regulation 19 was not an oversight. Again, there is an inconsistency in the use of headings. Regulation 19 is the converse of regulations 5 to 19. In the case of regulation 19, the set of Regulations amended is given as a heading but not, as a subheading, the content of the particular regulation amended. Again, this is inconsistent with the rest of the Regulations.

40. While the various inconsistencies in the use of headings is probably not material to the interpretation of the instrument it is undesirable and undoubtedly constitutes careless drafting. **The Committee therefore draws the attention of the lead committee and the Parliament to the instrument on the grounds that it fails to comply with proper drafting practice through inconsistency in the use of headings.**

Sixth question

41. Finally, the Committee asked why, contrary to good drafting practice, regulation 15 makes a formal textual amendment to punctuation.

42. The Executive responded that the view was taken that when a list was being rearranged as by regulation 15, it was helpful to edit the punctuation carefully.

43. The Committee observes that it is not proper drafting practice to make specific textual amendments to punctuation. Strictly speaking, the interpretation of a statutory provision should not depend on punctuation. If, exceptionally, an amendment to punctuation is required, the Committee reminds the Executive that the correct practice is to replace as much as is appropriate of the relevant passage in which the punctuation occurs.

44. **The Committee therefore draws the attention of the lead committee and the Parliament to the failure of the instrument to comply with proper drafting practice by reason of the textual amendment of punctuation as mentioned above.**

The Community Care (Direct Payments) (Scotland) Amendment Regulations 2001, (SSI 2001/447)

53. The Committee raised one point on the instrument. The Executive was asked to explain why the Explanatory Note to this instrument does not comply with the guidance on drafting of Statutory Instruments. It appears merely to repeat the wording of the Regulations themselves rather than to give the reader a summary of the instrument's effects that would be intelligible to persons who are unfamiliar with the relevant area of law or administration.

54. The Health Department's reply, reproduced at Appendix D, states that the purpose of the amendment was to add to the list of persons excluded from entitlement to receipt of direct payments those who are specified in new regulation 2(2)(aa) of the principal Regulations.

55. The Department hoped that the words in parenthesis in the second and third lines of the Explanatory Note would adequately indicate that the purpose of the amendment was to exclude those classes of persons specified from entitlement to receipt of direct payments. It was not considered appropriate to rehearse at length the nature of direct payments for the circumstances in which they might otherwise be payable. The Department, however, notes all that the Committee says and will bear this in mind in future.

66. In the Committee's view, an Explanatory Note that simply repeats the words of the instrument cannot generally be considered acceptable and, in this instance, certainly fails to comply with the guidance. The Executive Note, by contrast, is very helpful and it would surely have been possible to strike a happy medium between the detail of the Executive Note and the brevity of the Explanatory Note that would have satisfied the requirements of the guidance.

67. The Committee therefore draws the attention of the lead committee and the Parliament to the instrument on the grounds of defective drafting on the ground that the Explanatory Note is insufficiently informative.

THE NATIONAL HEALTH SERVICE (SUPERANNUATION SCHEME, INJURY BENEFITS AND COMPENSATION FOR PREMATURE RETIREMENT) (SCOTLAND) AMENDMENT REGULATIONS 2001, (SSI 2001/437)

1. We refer to your letter of 4th December 2001 in which the following questions are asked:

(a) It is noted that the Regulations amend three separate sets of Regulations. The Committee asks why amendments to three sets of Regulations were incorporated in this instrument when there are no provisions common to each set and the amendments appear to be substantial;

(b) The Committee enquires why the references to the three sets of Regulations contained in regulations 2 to 4 are divorced from the relevant amending regulations.

(c) The Committee asks what purpose is served by the definitions in regulation 1(2) when each set of Regulations is referred to only once.

(d) The Committee asks why the headings to regulations 2 to 4 are not consistent with the texts of the respective regulations (and appear to ignore the effect of regulation 1(2)).

(e) A heading referring to "Amendment of Superannuation Scheme Regulations" appears to have been omitted between regulation 4 and 5 and similarly, a heading seems to be missing from regulation 19. The Committee requests explanations on these points.

(f) The Committee asks why, contrary to good drafting practice, regulation 15 makes a formal textual amendment to punctuation.

2. We would answer your questions as follows:

(a) The S.S.I. amends 3 S.I.s. These S.I.s deal with various employment benefits open to employees of the National Health Service in Scotland. The Executive took the view that it was obvious good sense and user friendly to the public to bring together these amendments into one portmanteau set of amending regulations. Not only do the instruments deal with the same subject matter - i.e. employment benefits - but also the same employer. Also the benefits are part of the employees' remuneration package and therefore are in a sense an inter-related unity. Thirdly it is not unusual for these benefits to be rolled into one set of regulations, as they are in other public sector schemes.

(b) Because these regulations amend 3 sets of regulations, The Executive took the view that it was user friendly to set out the scheme and order of the S.S.I. at the beginning of the S.S.I.. The user can immediately go to the relevant amending regulations, if only interested in them.

(c) The Executive acknowledges that where regulations are referred to only once in an instrument, there is no need to define those regulations. In this instrument, however, definitions are included as it considered that this is user friendly and makes the flow of the text easily accessible. The definitions are using the shorthand for the regulations as used by those familiar with the regulations.

(d) The headings do not form part of the text proper of the S.S.I., where the shorthand definitions are used. Again the decision was taken to spell out the full title in the heading so that a user missing the definitions in regulation 1(2) could easily pick it up going through the text quickly.

(e) It is accepted that stylistically a heading could have been included again above regulation 5, but it was thought desirable to have the reference to "Interpretation" to take the user to the Interpretation regulation of the NHS Superannuation regulations, which are very long. The heading to regulation 2 is so close to regulation 5, and it spells out what regulation 5 does clearly, so that it was not thought that there could be any confusion. As to the Committee's last point about there being no heading to regulation 19, we wonder whether this question has been included by mistake as there is a heading to regulation 19.

(f) The view was taken that when a list was being rearranged as by regulation 15, it was helpful to edit the punctuation carefully.

For: Scottish Executive Education Department
Scottish Public Pensions Agency

6 December 2001

THE COMMUNITY CARE (DIRECT PAYMENTS) (SCOTLAND) AMENDMENT REGULATIONS 2001 (SSI 2001/447)

In its letter of 4 December 2001 to Colin Miller the Committee commented as follows—

“The Executive is asked to explain why the Explanatory Note to this instrument does not comply with the guidance on drafting of Statutory Instruments. It appears merely to repeat the wording of the Regulations themselves rather than to give the reader a summary of the instrument’s effects that would be intelligible to persons who are unfamiliar with the relevant area of law or administration.”

The Scottish Executive responds as follows—

The Executive notes the Committee’s comments. The purpose of the amendment as the Committee will be aware was to add to the list of persons excluded from entitlement to receipt of direct payments those who are specified in new Regulation 2(2)(aa) of the principal Regulations.

It was hoped that the words in parenthesis in the second and third lines of the Explanatory Note would adequately indicate that the purpose of the amendment was to exclude those classes of persons specified from entitlement to receipt of direct payments. It was not considered appropriate to rehearse at length the nature of direct payments for the circumstances in which they might otherwise be payable.

The Executive, however, notes all that the Committee says and will bear this in mind in future.

For: Scottish Executive Health Department

6 December 2001