



The Scottish Parliament
Pàrlamaid na h-Alba

Published 6 March 2018
SP Paper 286
10th Report, 2018 (Session 5)

Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate legislation considered by the Delegated Powers and Law Reform Committee on 6 March 2018



Published in Scotland by the Scottish Parliamentary Corporate Body.

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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 6 March 2018, the Committee agreed to draw to the attention of the Parliament the following instruments—

National Health Service (General Medical Services Contracts) (Scotland) Regulations (SSI 2018/66)

National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2018 (SSI 2018/67)

2. The Committee's recommendations and conclusions in relation to these instruments are set out in the following sections of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out by the relevant lead committee at the end of this report.


Points raised: instruments subject to negative procedure

National Health Service (General Medical Services Contracts) (Scotland) Regulations 2018 (SSI 2018/66) (Health and Sport)

Background and Purpose

4. These Regulations consolidate previous amendments to the Regulations of 2004, aim to modernise the language and drafting, make required technical updates (such as the removal of outdated statutory references) and make consequential amendments and revocations.
5. In addition, the Regulations introduce a number of new contractual terms and changes. There are many key changes which are outlined in paragraph 10 of the Policy Note with the instrument.
6. The Regulations are subject to the negative procedure. With the exception of one provision in schedule 6, they come into force on 1 April 2018. The exception comes into force on 25 May 2018.

Discussion

7. The Policy Note accompanying the instrument explains that the proposed changes to the general medical services contract were detailed in a contract offer which was put to a poll of the GP profession in Scotland in December 2017. The contract offer, supported by associated wider contractual changes, proposes a refocusing of the GP role as expert medical generalists.
8. The Scottish Government has acknowledged that several drafting errors have been made in the Regulations. It explains that the Regulations are designed to implement an agreement between the Scottish Government and the British Medical Association as to the contractual terms for GPs. The Government states:
 Whilst both parties worked hard to ensure that all matters were settled in advance of the Regulations being finalised, inevitably a number of changes required to be made late in the drafting process. This has caused a higher than usual number of cross referencing errors.
9. The Scottish Government has undertaken to lay amending Regulations in early course to correct the errors. The correspondence from the Government is set out at Annex A. The Government acknowledges within the correspondence that some errors are sufficiently serious that amending Regulations are required.

Recommendations

10. To draw the Regulations to the attention of the Parliament on the following reporting grounds:

On ground (i), as some provisions appear to be defectively drafted as follows.

- 1. There is an error in paragraph 33(3)(e) of schedule 6, which provides for a modification of the "NHS dispute resolution procedure". The first occurrence of sub-paragraph (e) should be head (c) of the list in preceding sub-paragraph (19). The second occurrence of sub-paragraph (e) should be on a separate line, and is intended to be the paragraph 33(3)(e).**
- 2. The duties of the person nominated to work with the data protection officer in terms of paragraph 70(2) of schedule 6 should refer to matters "set out under paragraph 67(b) and (c)" rather than paragraph 67(b) only.**
- 3. Paragraph 89(3)(a) and (b) of schedule 6 are intended to obligate the parties to attempt informal resolution, and to bar them from beginning the more formal NHS dispute resolution procedure until the less formal local dispute resolution process is attempted. As the Health Board which is a party to the contract is defined as "the Second Health Board", the references in paragraph 89(3)(a) and (b) should be to "the Second Health Board" rather than "the first Health Board" .**
- 4. Paragraph 109(1) of Schedule 6, which relates to the imposition of contract sanctions, ought to refer to all heads of paragraph 109(2).**
- 5. There are missing paragraph references at the end of paragraph 110(5) of schedule 6 (termination of contract by the Health Board) which should refer to paragraphs 101 to 107.**

11. On the general ground, as there are other drafting errors in the instrument, as follows.

- 1. Regulation 3(1) includes a definition of "independent prescriber". This includes (d) "a podiatrist or chiropodist prescriber". There is an error as the term defined also in regulation 3(1) is a "podiatrist or chiropodist independent prescriber".**
- 2. Regulation 11(8) places certain requirements on the "contactor", but the term which is defined in regulation 3(1) is the "contractor". A similar error occurs in the two references to "contactor" in regulation 33(6).**
- 3. There is an error in the condition specified in paragraph 39(6)(b) of schedule 6. A comma is omitted after "for a purpose", and the insertion of the comma changes the meaning of the provision.**

4. In paragraph 62(5)(a)(ii) of schedule 6, reference is made to "the Board". This should refer to "the Health Board", to capture the definition in regulation 3(1).
5. The reference in paragraph 65(2)(a) of schedule 6 to "paragraphs 65 and 66" ought to be "paragraphs 66 and 67".
6. In paragraph 77(8) of schedule 6, the reference to sub-paragraph (2) should be to sub-paragraph (6), given that the latter relates to an annual review, whereas the former relates to an annual return.
7. In paragraph 81(2)(a)(i) of schedule 6, the reference to regulation 11(9) should be to regulation 11(8).
8. In paragraph 89(9) of schedule 6, the reference to "sub-paragraph (4)" should be to "sub-paragraph (6)", as the local resolution panel is referred to in that latter paragraph but not the former.
9. In paragraph 94(4)(c) of schedule 6, the Act referred to should be correctly cited as the "Patient Rights (Scotland) Act 2011" rather than 2016.
10. In paragraphs 109(2)(b) and 110(4)(b) of schedule 6 (contract sanctions and the dispute resolution procedure) the references to "paragraph 91 and 92" should be to "paragraphs 90 and 91".
11. In the first and fifth entries of schedule 9 (revocations), the references to paragraph 2 of schedule 6 of these Regulations are incorrect.
12. The Committee welcomes the Scottish Government's commitment to lay amending Regulations in early course.
13. The Committee considers that the Scottish Government's quality control procedures ought to have avoided the high number of errors which appear in the instrument, by the time it was made and laid before the Parliament.

National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2018 (SSI 2018/67) (Health and Sport)

14. These Regulations consolidate the National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004 and aim to modernise the language and drafting, make required technical updates, such as the removal of outdated statutory references, and consequential amendments and revocations.

15. In addition the Regulations introduce a number of new contractual terms and changes. There are many key changes which are outlined in paragraph 10 of the Policy Note with the instrument.
16. The Regulations are subject to the negative procedure. With the exception of one provision in schedule 1, they come into force on 1 April 2018. The exception comes into force on 25 May 2018.
17. The Policy Note explains that proposed changes to the general medical services contract were detailed in a contract offer which was put to a poll of the GP profession in Scotland in December 2017. The contract offer, supported by associated wider contractual changes, proposes a refocusing of the GP role as expert medical generalists.
18. The Scottish Government has acknowledged that several drafting errors have been made in the Regulations. As noted above, the Regulations are designed to implement an agreement between the Scottish Government and the British Medical Association as to the contractual terms for GPs and the errors occurred when changes were required late in the drafting process.
19. The Scottish Government has undertaken to lay amending Regulations in early course to correct the errors. The correspondence from the Government is set out at Annex B.

Recommendations

20. **To draw the Regulations to the attention of the Parliament on the following reporting grounds:**

On ground (i), as the provision in schedule 2, paragraph 26(3)(a) appears to be defectively drafted. A cross-reference to "paragraph 28(1) of schedule 2" is included but the reference should be to "paragraph 26(1) or (2)".
21. **On the general ground, as there are other drafting errors in the instrument, as follows:**
 1. **Regulation 2(a) refers to the "National Health (Primary Medical Services Section 17C Agreements [sic.] (Scotland) Regulations 2004". This should be a reference to "the National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004".**
 2. **Regulation 3(1) includes definitions of "care home service" and "licensing authority" but these terms are not referred to in the Regulations.**
 3. **Regulation 3(1) defines a "limited liability partnership" as a limited liability partnership incorporated in accordance with section 2 of the Limited Partnerships Act 2000. This should be a reference to the Limited Liability Partnerships Act 2000.**

4. **Regulation 3(1) includes a definition of the "Regional and Social Care Board". This should be a definition of the Regional Health and Social Care Board.**
5. **Regulation 3(1) includes a definition of "relevant register". Part (c) of that definition refers to the Health Professions Council. This should be a reference to the Health and Care Professions Council.**
6. **In schedule 1, paragraph 44(7) there is a reference to a review referred to in sub-paragraph (2). This should refer to sub-paragraph (5).**
7. **In schedule 1, paragraph 56(9), the reference to "sub-paragraph (4)" should be to "sub-paragraph (6)".**
8. **Schedule 1, paragraph 57(1) refers to "an NHS agreement" when it should refer to an "NHS contract".**
9. **The heading for schedule 1, paragraph 73 does not correspond to the provision. The heading refers to agreements with one or more companies limited by shares yet the provision refers to parties to the agreement being companies, partnerships or limited liability partnerships.**
10. **In schedule 2, paragraph 26(3)(d), where it inserts new sub-paragraph (19) into paragraph 58 of schedule 1, head (d) does not follow head (c) of new sub-paragraph (19). The second sub-paragraph (3)(d) in paragraph 26 should be sub-paragraph (3)(e) and should be aligned with sub-paragraph (3)(d).**
11. **Schedule 4, paragraph 13 refers to paragraph 85 of schedule 1. This should be a reference to paragraph 83 of schedule 1.**
22. **The Committee welcomes the Scottish Government's commitment to lay amending Regulations in early course.**
23. **The Committee considers that the Scottish Government's quality control procedures ought to have avoided the high number of errors which appear in the instrument, by the time it was made and laid before the Parliament.**

No points raised

Finance and Constitution

Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2018 (SSI 2018/87)

Justice

United Nations (International Residual Mechanism for Criminal Tribunals) Order 2018 (SI 2018/187)

Local Government and Communities

Non-Domestic Rates (Levying) (Scotland) Regulations 2018 (SSI 2018/74)

Non-Domestic Rates (New and Improved Properties) (Scotland) Regulations 2018 (SSI 2018/75)

Non-Domestic Rates (Transitional Relief) Amendment (Scotland) Regulations 2018 (SSI 2018/76)

Non-Domestic Rating (Unoccupied Property) (Scotland) Regulations 2018 (SSI 2018/77)

Standards, Procedures and Public Appointments

Lobbying (Scotland) Act 2016 (Commencement No. 2) Regulations 2018 (SSI 2018/73 (C.7))

Annex A

National Health Service (General Medical Services Contracts) (Scotland) Regulations 2018 (SSI 2018/66)

On 26 February 2018, the Scottish Government was asked:

1. Regulation 3(1) includes a definition of "independent prescriber" for the purposes of the Regulations. This includes (d) "a podiatrist or chiropodist prescriber". Is there an error as the term which is defined also in regulation 3(1) is a "podiatrist or chiropodist independent prescriber"?

2. Regulation 3(1) includes a definition of "supplementary prescriber" which at the end of the definition refers to an annotation in the relevant register as a "nurse independent" / supplementary prescriber. Is there an error as the term which is defined in regulation 3(1) is an "independent nurse prescriber"?

3. (a) There is an error in regulation 11(8) which places certain requirements on the "contactor", but the term which is defined in regulation 3(1) is the "contractor"?

(b) A similar error occurs in the two references to "contactor" in regulation 33(6)?

4. Regulation 13(7) provides that section 17A of the National Health Service (Scotland) Act 1978 ("the 1978 Act") has effect subject to various modifications, if pursuant to paragraph (1) or (4) of regulation 13, a "contractor" is to be regarded as a health service body.

(a) Please explain why this provision is within the enabling powers cited in the preamble or other enabling powers, given that section 17O(4) of the 1978 Act provides that the regulations may include provision as to the application of section 17A in cases where a partnership [only] is to be regarded as a health service body, and there is a change in the membership of the partnership?

(b) If any other enabling powers are relied on, does this have any effect on the procedure which the Regulations are subject to?

5. Paragraph (1) of regulation 33 makes provision where, on 31 March 2018, a GMS contract includes a requirement to provide out of hours (OOH) services. The contract must continue to provide such services, and certain provisions of the 2004 Regulations continue to have effect on and after 1 April 2018, until one of the 'end dates' specified in paragraph (3).

Given that that requirement and those provisions have effect until one of the "end dates" as specified, why in respect of regulation 33(3)(a)(i) is no provision required (to provide for an end date) where a contractor has served an OOH notice in the period before 12 November 2017?

6. (a) Paragraph 5(3) of schedule 6 makes provision for where a patient (or where appropriate in the case of a patient who is a child, the child's parent) agrees to participate in a consultation for a newly registered patient. Is there any need to expand this provision to cover the case of a child patient with a guardian or other adult with care of the child, on comparable lines to that provided for in paragraph 12(4) of schedule 6 (which relates to an application for inclusion in a list of patients)?

(b) If not, please explain why the provision is sufficient.

7. Is there an error in paragraph 33(3)(e) of schedule 6, as the modification of the "NHS dispute resolution procedure" (contained in paragraphs 91 and 92 of schedule 6) specified in that subparagraph (e) does not appear to make sense, and two subparagraphs (e) are specified?

8. Is there an error in the condition specified in paragraph 39(6)(b) of schedule 6, being a condition to be satisfied in a case of urgency when a prescriber may request a pharmacist to dispense an appliance before a prescription is issued or created? Is a comma omitted after "for a purpose", as the comma changes the meaning of the provision? (Cf. Paragraph 40(3)(a) of schedule 6).

9. In paragraph 58 of schedule 6, could it be clearer what "it" refers to after sub-paragraph (1)(d) and (2)(e)? Is it intended to be to the "the contractor" in each case?

10. In paragraph 62(5)(a)(ii) of schedule 6, reference is made to "the Board"; however, that term is not defined. Should this be a reference to "the Health Board" to capture the definition in regulation 3(1)? See also paragraph 75 (among others).

11. In paragraph 65(2)(a) of schedule 6, should the reference to "paragraphs 65 and 66" be to "paragraphs 66 and 67"?

12. In paragraph 70(2) of schedule 6, should the reference to "paragraph 67(b)" be to "paragraph 67(b) and (c)", given that policies are referred to in the latter sub-paragraph?

13. In paragraph 77(8) of schedule 6, should the reference to sub-paragraph (2) be to sub-paragraph (6), given that the latter relates to the annual review, whereas the former relates to the annual return?

14. In paragraph 81(2)(a)(i) of schedule 6, should reference to regulation 11(9) be to regulation 11(8), on the basis that there is no regulation 11(9)?

15. In paragraph 87 of schedule 6, should the reference to "that Act" be to "that section" (i.e. regulations or directions made under section 15 of the Patients Rights (Scotland) Act 2011), or is it specifically intended to include the Act as a whole?

16. In paragraph 89(3)(a) and (b) of schedule 6, should the references to "the first Health Board" be to "the second Health Board"? It appears (from the definition of "local resolution approved mediator") that a dispute is between the contractor and the second Health Board. It also appears that the first Health Board convenes a "local resolution panel" at the request of the second Health Board.

17. In paragraph 89(9) of schedule 6, should the reference to "sub-paragraph (4)" be to "sub-paragraph (6)", given that the local resolution panel is referred to in that latter paragraph but not that former paragraph?

18. In paragraph 94(4)(c) of schedule 6, should reference to the "Patient Rights (Scotland) Act 2016" be to the "Patient Rights (Scotland) Act 2011"? (we note the footnote also appears to be incorrect).

19. In paragraph 97(3) of schedule 6, should reference to paragraph 102 be to paragraph 101?

20. In paragraph 103(2)(j) of schedule 6, should there be a reference to "that person is a company and" (similar to the beginning of sub-paragraph (k))?
21. At the end of paragraph 109(1) of schedule 6, should there also be a reference to sub-paragraph 2(c)?
22. In paragraphs 109(2)(b) and 110,(4)(b) of schedule 6, should the references to "paragraph 91 and 92" be to "paragraphs 90 and 91"?
23. Paragraph 110(1) of schedule 6 requires a period of at least 28 days to elapse between service of the termination notice under paragraphs 101 to 108 and termination taking effect. It is subject to sub-paragraph (2), which makes an exception where a shorter notice period is necessary to protect the safety of the contractor's patients, or to protect itself from material financial loss.
- (a) Does this provision conflict with the references in paragraphs 101 to 108 to terminating "with immediate effect"?
- (b) Paragraphs 104, 106, 108, and 109 of schedule 6 already refer to the safety of the contractor's patients and protecting from material financial loss. Does the provision in paragraph 110(2) of schedule 6 conflict with, or at least unnecessarily duplicate, the references in these paragraphs, so as to make the meaning unclear?
24. Is there a missing paragraph reference at the end of paragraph 110(5) of schedule 6?
25. In the first and fifth entries of schedule 9, are the references to paragraph 2 of schedule 6 of these Regulations correct?
26. Is corrective action proposed?

The Scottish Government responded as follows:

1. Thank you for drawing this typographical error to our attention. The Scottish Government considers that the error is minor and self-evident, as the Regulations make no reference to a "podiatrist or chiropodist independent prescriber". Nor in our understanding is there otherwise a category of prescriber known as a "podiatrist or chiropodist prescriber".

The Scottish Government's view is that an error of this type could ordinarily be dealt with by correction slip. However, as an amending instrument will be necessary to make the amendments raised by other questions, the Scottish Government intends to make this correction by way of amendment at the same time.

2. No, this is not an error. The term "nurse independent / supplementary prescriber" is a particular sub-category of nurse in terms of the Nurses and Midwives (Parts of and Entries in the Register) Order of Council 2004 (S.I. 2004/1765) which establishes three separate categories of nurses who may issue prescriptions:

- (a) a community practitioner nurse prescriber;
- (b) a nurse independent prescriber;
- (c) a nurse independent/supplementary prescriber.

The definition of “independent nurse prescriber” given by the Regulations under consideration applies to all three of these three categories:

“independent nurse prescriber” means a person—

- (a) who is either engaged or employed by the contractor, or where the contractor is a partnership, is a partner in that partnership; and
- (b) who is registered in the Nursing and Midwifery Register; and
- (c) against whose name is recorded in that register an annotation signifying that they are qualified to order drugs, medicines and appliances as a community practitioner nurse prescriber, a nurse independent prescriber or a nurse independent/ supplementary prescriber;”

The definition of “supplementary prescriber” in the Regulations is intended to apply only to nurses whose entry in the Nursing and Midwifery Council Register indicates that they are a “nurse independent / supplementary prescriber” specifically. The definition of “independent nurse prescriber” given by the Regulations is intentionally broader.

3. Thank you for drawing this typographical error to our attention. The Scottish Government considers that the error is minor and self-evident.

The Scottish Government’s view is that an error of this type could ordinarily be dealt with by correction slip. However, as an amending instrument will be necessary to make the amendments raised by other questions, the Scottish Government intends to make this correction by way of amendment at the same time.

4. (a) The general enabling power in relation to regulation 13(7) is section 17O(2) which “makes provisions for any person entering, or who has entered, into a general medical services contract to be regarded as a health service body“.

Section 17O(4), extends that enabling provision to make clear that provision under section 17O(2) “may include provision ... where (a) a partnership is to be regarded as a health service body; and (b) there is a change in the membership of the partnership.”

Therefore regulations enabled by 17O(2) may apply to any contractor, including a partnership.

(b) No other enabling power is relied upon.

5. Notices served on or before 12 November 2017 will continue to have effect notwithstanding the revocation of the previous regulations. Anything which requires to be done under the previous regulations will have been done by the time the revocation of the previous regulations is effective.

6. (a) No, it is considered that there is no need to expand the drafting of paragraph 5(3) of Schedule 6. The Scottish Government’s view is that the current drafting is sufficient to allow adults, other than the child’s parents, who bring a child to the contractor to give consent on the child’s behalf. The Regulations provide a broad definition of the word “parent”:

“parent” includes, in relation to any child, any adult who, in the opinion of the contractor, is for the time being discharging in respect of that child the obligations normally attaching to a parent in respect of a child;ⁱ

Paragraph 12(4) of Schedule 6, to which this question refers, uses the term parent in a different context. It provides that an application for inclusion on a patient list may be made on behalf of a child by:

by either parent, or in the absence of both parents, the guardian or other adult person who has care of the child; ...

By specifying “either” or “both” parents the drafter implies that the drafter is only concerned with two people (ie the mother and father), and therefore parent here is to be understood in its natural and ordinary sense rather than as defined in regulation 3.

The Scottish Government notes that both this provision and the definition of “parent” have been extant since 2004.

(b) No.

7. Thank you for drawing this typographical error to our attention. This is a formatting error. The first occurrence of sub-paragraph (e) should in fact be head (c) of the list in preceding sub-paragraph (19). The second occurrence of sub-paragraph (e) should be on a separate line and is in fact paragraph 33(3)(e) of schedule 6 and the formatting should reflect that.

The Scottish Government intends to lay an amending instrument in early course to make this correction.

8. Thank you for drawing this typographical error to our attention. A comma should follow “for the purpose” in paragraph 39(6)(b) of schedule 6 as suggested. The Scottish Government considers that this error is minor and self-evident, in that the sentence is grammatically incorrect without the additional comma.

The Scottish Government’s view is that an error of this type could ordinarily be dealt with by correction slip. However, as an amending instrument will be necessary to make the amendments raised by other questions, the Scottish Government intends to make this correction by way of amendment at the same time.

9. We confirm that the word “it” does refer to the contractor as suggested in the question. As the use of “it” is the second reference to the contractor within that sentence, it is more efficient language to say “it” rather than repeat the phrase “the contractor”. The Scottish Government considers that the use of the word “it” to stand in for “the contractor” is established by Regulation 3(2).

10. Thank you for drawing this typographical error to our attention. The reference to “the Board” in paragraph 62(5)(a)(ii) of schedule 6 ought to be to the defined term “the Health Board”. The Scottish Government considers that this error is minor and self-evident, in that “the Board” is not a defined term in the Regulations and that sub-paragraph (5) refers to “the Health Board” elsewhere, as does the remainder of paragraph 62.

The Scottish Government’s view is that an error of this type could ordinarily be dealt with by correction slip. However, as an amending instrument will be necessary to make the

ⁱ Regulation 3(1), S.S.I. 2018/66.

amendments raised by other questions, the Scottish Government intends to make this correction by way of amendment at the same time.

11. Thank you for drawing this typographical error to our attention. The reference in paragraph 65(2)(a) of schedule 6 to “paragraphs 65 and 66” ought to be made to “paragraphs 66 and 67” instead. The Scottish Government considers that this error is minor and self-evident, in that paragraph 65 is at present referring to itself and paragraphs 66 and 67 are the only paragraphs which refer to the obligations of the parties.

The Scottish Government’s view is that an error of this type could ordinarily be dealt with by correction slip. However, as an amending instrument will be necessary to make the amendments raised by other questions, the Scottish Government intends to make this correction by way of amendment at the same time.

12. Thank you for drawing this to our attention. This was an error in the checking of cross references. The duties of the person nominated to work with the data protection officer in terms of paragraph 70(2) of schedule 6 should refer to matters “set out under paragraph 67(b) and (c)” as the question suggests.

The Scottish Government intends to lay an amending instrument in early course to make this correction.

13. Thank you for drawing this typographical error to our attention. The reference to sub-paragraph (2) within paragraph 77(8) of schedule 6 ought to be to sub-paragraph (6) instead. The Scottish Government considers that this is minor and self-evident as sub-paragraph (6) is the only sub-paragraph which refers to the review to which paragraph 77(8) seeks to refer back.

The Scottish Government’s view is that an error of this type could ordinarily be dealt with by correction slip. However, as an amending instrument will be necessary to make the amendments raised by other questions, the Scottish Government intends to make this correction by way of amendment at the same time.

14. Thank you for drawing this to our attention. The reference to regulation 11(9) in paragraph 81(2)(a)(i) ought to be to regulation 11(8). The Scottish Government considers that this is minor and self-evident as only sub-paragraphs (1) and (8) refer to obligations. As sub-paragraph (1) is already referred to by paragraph 81(2)(a)(i), the second reference must be to sub-paragraph (8).

The Scottish Government’s view is that an error of this type could ordinarily be dealt with by correction slip. However, as an amending instrument will be necessary to make the amendments raised by other questions, the Scottish Government intends to make this correction by way of amendment at the same time.

15. The Scottish Government accepts in principle that the reference to “that Act” is more broad than is strictly necessary. However, as no regulations or directions made under the other powers conferred by the Patient Rights (Scotland) Act 2011 will deal with NHS complaints processes, the broad reference has no practical effect on the duties on the contractor or the Health Board in this case.

16. Thank you for drawing this to our attention. Paragraph 89(3)(a) and (b) are intended to obligate the parties to attempt informal resolution and to bar them from beginning the more formal NHS dispute resolution procedure until the less formal local dispute resolution process is attempted. As the Health Board which is a party to the contract (and therefore

to the dispute) is defined as “the Second Health Board”, the references in paragraph 89(3)(a) and (b) should be to “the Second Health Board”.

The Scottish Government intends to lay an amending instrument in early course to make this correction.

17. Thank you for drawing this to our attention. The reference to paragraph 89(9) of schedule 6 to “sub-paragraph (4)” should be corrected to “sub-paragraph (6)”. The Scottish Government considers that this is minor and self-evident in that sub-paragraph (4) does not refer to the local dispute resolution panel at all, while sub-paragraph (6) does so refer.

The Scottish Government’s view is that an error of this type could ordinarily be dealt with by correction slip. However, as an amending instrument will be necessary to make the amendments raised by other questions, the Scottish Government intends to make this correction by way of amendment at the same time.

18. Thank you for drawing this to our attention. The reference in paragraph 94(c) of schedule 6 should be corrected to the “Patient Rights (Scotland) Act 2011”. The accompanying footnote should read “2011 asp 5”. The Scottish Government considers that this error is minor and self-evident.

The Scottish Government’s view is that an error of this type could ordinarily be dealt with by correction slip. However, as an amending instrument will be necessary to make the amendments raised by other questions, the Scottish Government intends to make this correction by way of amendment at the same time.

19. No. Paragraph 97 of schedule 6 deals with a situation in which a contractor who is an individual medical practitioner (ie a sole trader) has died.

Paragraph 101 deals with the Health Board’s right to terminate a contract in the case of a breach of Regulation 10. In the case of individual medical practitioners specifically, the applicable requirement is Regulation 10(1)(a):

“(a) in the case of a contract entered into with a medical practitioner, that practitioner must be a general medical practitioner;”

In the circumstances dealt with in paragraph 97, the medical practitioner is dead and therefore no longer meets the requirement in regulation 10(1)(a).

If the termination right in paragraph 101 applies despite paragraph 97, then the effect would be that death would be a breach of contract which would allow the Health Board to ignore the contractor’s personal representative. This is not the intention.

20. No, the Scottish Government did not consider that it would not be appropriate to add the suggested introductory line to paragraph 103(2)(j) of schedule 6.

Paragraph 103(2)(j)(i) deals with administrative receivership and receivership. The receivership process can apply to a limited liability partnership as well as a company. The intent is to preserve the Health Boards right to terminate where a contractor enters receivership whether they are a limited liability partnership or a company.

21. Thank you for bringing this error to our attention. Paragraph 109(1) ought to refer to all heads of paragraph 109(2). The Scottish Government intends to lay an amending instrument in early course to make this correction.

22. Thank you for drawing this to our attention. The two paragraphs referred to at paragraphs 109(2)(b) and 110(4)(b) of schedule 6 should be “paragraphs 90 and 91”. The Scottish Government considers this error to be minor and self-evident in that both 109(2)(b) and 110(4)(b) refer to the circumstances by which a dispute can be referred to the Scottish Ministers. Paragraphs 90 and 91 set out the only circumstances in which a dispute may be referred to the Scottish Ministers under these Regulations.

The Scottish Government’s view is that an error of this type could ordinarily be dealt with by correction slip. However, as an amending instrument will be necessary to make the amendments raised by other questions, the Scottish Government intends to make this correction by way of amendment at the same time.

23. (a) Paragraph 110 of schedule 6 requires a notice period of 28 days for a party terminating the contract pursuant to paragraphs 101 to 108. It is subject to sub-paragraph (2), which makes an exception where a shorter notice period is necessary to protect the safety of the contractor's patients, or to protect itself from material financial loss. It is considered that paragraphs 101 -108 and paragraph 110 are to be read cumulatively and it is therefore considered that there is no conflict.

For example, paragraph 102 enables the Health Board to serve notice of termination which may either be with immediate effect or with effect from such date as may be specified in the notice. Paragraph 110 overlays that provision by providing that except where issues of patient safety or material financial loss to the health service do not arise, the date specified must be not less than 28 days after the notice is served. Where patient safety and material financial loss are at issue, the 28 day minimum period does not apply, and termination may (but need not necessarily) be effected with immediate effect.

(b) For the reasons outlined above, the Scottish Government does not consider that the provisions in 104, 106 and 108 are in conflict. It is accepted that there is some duplication, although it is submitted that this has no effect on the operation of either provision.

24. Thank you for drawing this typographical error to our attention. The correct paragraph reference is “paragraphs 101 to 107”. The Scottish Government intends to lay an amending instrument in early course to make this correction.

25. Thank you for drawing this error to our attention. The references to “paragraph 2 of schedule 6” in the first and fifth entries of schedule 9 are incorrect. However, as paragraph 2 of schedule 6 contains no references to the previous regulations or the time at which obligations begin, the Scottish Government considers that these additional references beat the air and do not alter the meaning or extent of the revocation.

In the ordinary course, the Scottish Government would not propose corrective action for this type of issue. However, as an amending instrument will be necessary to make the amendments raised by other questions, the Scottish Government intends to make this correction by way of amendment at the same time.

26. The Scottish Government considers that many of the errors identified are minor and could ordinarily be dealt with by correction slip. However, as the corrections required by questions 7, 12, 16, 21 and 24 are not minor or self-evident, the Scottish Government intends to lay amending regulations in early course to correct the errors identified. The Scottish Government intends that the corrections outlined above will be laid in the same instrument as the corrections required to the National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2018.

As you may be aware these regulations are designed to implement an agreement between the Scottish Government and the British Medical Association as to the contractual terms for GPs. Whilst both parties worked hard to ensure that all matters were settled in advance of the Regulations being finalised, inevitably a number of changes required to be made late in the drafting process. This has caused a higher than usual number of cross referencing errors.

Annex B

National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2018 (SSI 2018/67)

On 26 February 2018, the Scottish Government was asked:

Regulation 2(a) refers to the "National Health (Primary Medical Services Section 17C Agreements [sic.] (Scotland) Regulations 2004". Should this be a reference to "the National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004"?

Regulation 3(1) includes definitions of "care home service" and "licensing authority" but these terms are not referred to in the Regulations. Is it intended that there should be a reference to these terms in the Regulations?

Regulation 3(1) defines a "limited liability partnership" as a limited liability partnership incorporated in accordance with section 2 of the Limited Partnerships Act 2000. Should this be a reference to the Limited Liability Partnerships Act 2000?

Regulation 3(1) includes a definition of the "Regional and Social Care Board". Should this be a definition of the Regional Health and Social Care Board?

Regulation 3(1) includes a definition of "relevant register". Part (c) of that definition refers to the Health Professions Council. Should this be a reference to the Health and Care Professions Council? See also the definition of "supplementary prescriber" part (d).

Regulation 3(1) includes a definition of "supplementary prescriber" which at the end of the definition refers to an annotation in the relevant register as a "nurse independent" / supplementary prescriber. Is there an error as the term which is defined in regulation 3(1) is an "independent nurse prescriber"?

In schedule 1, paragraph 44(7) there is a reference to a review referred to in sub-paragraph (2). Should this refer to sub-paragraph (5)?

In schedule 1, paragraph 56(9), should the reference to "sub-paragraph (4)" be to "sub-paragraph (6)"?

Schedule 1, paragraph 57(1) refers to "an NHS agreement". Should this be a reference to an NHS contract?

In schedule 1, paragraph 65(1), should reference to "a party to the agreement" be a reference to a party to the agreement other than the Health Board?

The heading for schedule 1, paragraph 73 does not appear to correspond to the provision. The heading refers to agreements with one or more companies limited by shares yet the provision refers to parties to the agreement being companies, partnerships or limited liability partnerships. Is corrective action proposed for the heading?

Paragraph 77 of schedule 1 requires a notice period of 28 days for a party terminating the agreement pursuant to paragraphs 67 to 74. It is subject to sub-paragraph (2), which makes an exception where a shorter notice period is necessary to protect the safety of the contractor's patients, or to protect itself from material financial loss.

Does this provision conflict with the references in paragraphs 67 to 74 to terminating "with immediate effect"?

Should the references to "parent" in schedule 2, paragraph 4 and schedule 3, paras 5(2)(b), 6(1)(a) and (3) also refer to guardians or other adult persons who have care of the child as they do in regulation 9(3)(a)(i)? If not, please explain why these provisions are sufficient.

In schedule 2, paragraph 5 enables providers to charge patients reasonable fees. If this provision is made in reliance on the enabling power at section 17E(3A), have directions been given for this purpose by the Scottish Ministers? If so, should this have been narrated in the preamble?

In schedule 2, paragraph 26(3)(a), a cross-reference to "paragraph 28(1) of schedule 2" is inserted. Should this reference be to "paragraph 26(1)", or even "paragraph 26(1) or (2)"?

In schedule 2, paragraph 26(3)(d), usual drafting practice would be to "insert" new sub-paragraphs, rather than providing that "there must be inserted" new sub-paragraphs.

Is there an error in schedule 2, paragraph 26(3)(d), where it inserts new sub-paragraph (19) into paragraph 58 of schedule 1? Head (d) does not seem to follow head (c) of new sub-paragraph (19).

Schedule 4, paragraph 13 refers to paragraph 85 of schedule 1. Should this be a reference to paragraph 83 of schedule 1?

1. In schedule 6, paragraph 3 there appears to be a formatting error. Is corrective action proposed?

The Scottish Government responded as follows:

Question 1. Thank you for drawing this typographical error to our attention. The Scottish Government intends to issue a corrective instrument to address this regrettable typographical error.

Question 2. Thank you for drawing the unnecessary retention of the definitions of "care home service" and "licensing authority" in these Regulations to our attention. The retention of these definitions is superfluous, as they simply beat the air. The Scottish Government intends to issue a corrective instrument to address this matter.

Question 3. Thank you for drawing to our attention that the word "Liability" has not been included into Limited Liability Partnerships Act 2002. The Scottish Government intends to issue a corrective instrument to address this matter

Question 4. Thank you for drawing this typographical error to our attention. The Scottish Government intends to issue a corrective instrument to include the missing word "Health" into the definition of the Regional Health and Social Care Board.

Question 5. Thank you for drawing this typographical error to our attention. This was caused by not inserting the word "Care" into the phrase Health and Care Professions Council in the definition of "relevant register". The Scottish Government intends to issue a corrective instrument to address this matter.

Question 6. No, we respectfully do not consider this to be an error. The term “nurse independent / supplementary prescriber” is a particular sub-category of nurse in terms of the Nurses and Midwives (Parts of and Entries in the Register) Order of Council 2004 (S.I. 2004/1765) which establishes three separate categories of nurses who may issue prescriptions:

- (a) a community practitioner nurse prescriber;
- (b) a nurse independent prescriber;
- (c) a nurse independent/supplementary prescriber.

The definition of “independent nurse prescriber” given by the Regulations under consideration applies to only two of these three categories:

“independent nurse prescriber” means a person—

- (a) who is either engaged or employed by the contractor, or where the contractor is a partnership, is a partner in that partnership; and
- (b) who is registered in the Nursing and Midwifery Register; and
- (c) against whose name is recorded in that register an annotation signifying that they are qualified to order drugs, medicines and appliances as a community practitioner nurse prescriber, a **nurse independent prescriber or a nurse independent/supplementary prescriber;**” (emphasis added).

The definition of “*supplementary prescriber*” in the Regulations is intended to apply only to nurses whose entry in the Nursing and Midwifery Council Registerⁱⁱ indicates that they are a “nurse independent / supplementary prescriber” specifically. The definition of “independent nurse prescriber” given by the Regulations is intentionally broader.

Question 7. Thank you for drawing this cross referencing error to our attention. The Scottish Government intends to issue a corrective instrument to address this matter so that paragraph 44(7) of schedule 1 refers to a “review referred to in sub-paragraph (5)”.

Question 8. We thank you for drawing this cross referencing error to our attention. The Scottish Government intends to issue a corrective instrument to address this matter so that paragraph 56(9) of schedule 1 refers to sub-paragraph (6).

Question 9. Thank you for drawing this matter to our attention. This should be a reference to an NHS contract. Nevertheless, the Scottish Ministers intends to correct this error at the next available opportunity, by corrective instrument.

Question 10. No. We do not consider a change is required. The term “party to the agreement” is defined in regulation 3 of the Regulations in such a way as to exclude a Health Board. Therefore in paragraph 65(1) the provision for “a party to the agreement” to withdraw from an agreement by serving written notice already excludes a Health Board.

ⁱⁱ The Nursing and Midwifery Council has a duty to establish and maintain the Register, Nursing and Midwifery Order (2001) 2002/253, Art. 5.

Question 11. Thank you for drawing this matter to our attention. We do not consider that this matter could give rise to any difficulty in interpretation of the Regulations. However, it is desirable that the headings fully reflect the content of the regulation to which they relate. The Scottish Government intends to issue an amending corrective instrument to address this matter.

Question 12. We do not consider that this matter could give rise to any difficulty or conflict in interpreting of the Regulations.

Paragraph 77 of schedule 1 requires a notice period of 28 days for a party terminating the agreement pursuant to paragraphs 67 to 74. It is subject to sub-paragraph (2), which makes an exception where a shorter notice period is necessary to protect the safety of the contractor's patients, or to protect itself from material financial loss.

It is considered that paragraphs 67 -74 and paragraph 77 are to be read cumulatively. For example, paragraph 67 enables the Health board to serve notice of termination which may either be with immediate effect or with effect from such date as may be specified in the notice. Paragraph 77 overlays that provision by providing that except where issues of patient safety or material financial loss to the health service do not arise, the date specified must be not less than 28 days after the notice is served. Where patient safety and material financial loss are at issue, the 28 day minimum period does not apply, and termination may (but need not necessarily) be effected with immediate effect.

Question 13. No, we consider that there is no need to expand the drafting of the references to "parent" in paragraph 4 of schedule 2, and paragraphs 5(2)(b), 6(1)(a) and (3) of schedule 3, to also refer to guardians or other adult persons who have care of the child as they do in in regulation 9(3)(a)(i) of schedule 1.

The existing wording is sufficient to apply to children who present with a guardian or other adult in its current form. The Regulations provide a broad definition of the word "parent": "parent" includes, in relation to any child, any adult who, in the opinion of the contractor, is for the time being discharging in respect of that child the obligations normally attaching to a parent in respect of a child;ⁱⁱⁱ

On the basis of this definition, any adult who is caring for the child would be capable of giving consent.

Regulation 9(3)(a)(i) uses the term parent in a different context. It provides that an application for inclusion on a patient list may be made on behalf of a child by: either parent, or in the absence of both parents, the guardian or other adult person who has care of the child.

In specifying "either" or "both" parents, this indicates that it means parent in its natural and ordinary sense rather than "parent" in the defined scene. It is the view of the Scottish Government that this drafting, unchanged since the previous Regulations were made in 2004, is sufficiently clear.

Question 14. Paragraph 5 of schedule 2, enables providers to charge patients reasonable fees. Paragraph 20 of the Explanatory Notes to the Primary Medical Services (Scotland) Act 2004 explains that new section 17E(3A) enables the regulations to require that

ⁱⁱⁱ Regulation 3(1), S.S.I. 2018/66.

payments made under section 17C arrangements for primary medical services are made in accordance with directions of Scottish Ministers.

Directions have not been made under section 17E(3A) for this purpose, nor is there any immediate intention to do so. There is therefore no statutory control on the level of fee which may be demanded and accepted, other than that it is reasonable. As such, we do not consider it necessary to include narrative to this effect in the preamble.

Question 15. Thank you for drawing this error in cross referencing to our attention. The context here is that the users of this schedule are Health Boards, GPs and their advisors. We will draw this cross referencing error, which should refer to paragraph 26(1) or (2), to their attention as an interim measure and consider that this will help avert any difficulty in interpretation of the Regulations meantime. The Scottish Government intends to rectify this error so as to refer to "paragraph 26(1) or (2)" by way of amending corrective instrument to amend at the next available opportunity.

Question 16. We note your comment with thanks.

Question 17. Thank you for drawing this typographical and formatting error to our attention. The second subparagraph (3)(d) in paragraph 26 should be subparagraph (3)(e) and should be aligned with subparagraph (3)(d). The Scottish Government intends to issue an amending corrective instrument to address this matter.

Question 18. Thank you for drawing this cross referencing error to our attention. Paragraph 13 of Schedule 4, should refer to paragraph 83 of schedule 1 rather than paragraph 85 of schedule 1. As detailed below, paragraph 85 does not deal with the rules relating to the disposal of clinical waste, whilst paragraph 83 does so. We intend to rectify this matter by means of an amending corrective instrument.

Schedule 4 requires the provider to comply with minimum standards for Practice Premises set out in that schedule. Paragraph 13, schedule 4 requires that there are arrangements for the storage and disposal of clinical waste and that these arrangements comply with the legislative requirements and national guidance in place from time to time in accordance with paragraph 85 of schedule 1.

Paragraph 83 of schedule 1, requires the provider to comply with all relevant legislation relating to disposal of clinical waste; and have regard to all relevant guidance issued by the Health Board and the Scottish Ministers.

Paragraph 85 of schedule 1 relates to the "duty of candour", and requires the provider to have arrangements in place which operate in accordance with Part 2 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016, and any regulations or directions made under that part of that Act.

Question 19. Thank you for drawing this matter to our attention. It is considered that this is a minor formatting error which has no adverse effect on the proper interpretation of the Regulations.

As you may be aware, the Regulations are designed to implement an agreement between the Scottish Government and the British Medical Association as to the contractual terms for GPs.

Whilst both parties worked hard to ensure that all matters were settled in advance of the Regulations being finalised, inevitably a number of changes were required and therefore

had to made late in the drafting process. This caused a higher than usual number of typographical and cross referencing errors, which you have identified.

The Scottish Government would normally propose to address those minor errors identified in the responses to Questions numbered 1, 2, 3, 4, 5, 7, 8, 9 and 17 by Correction Slip, given that they do not give rise to any interpretation difficulties of the Regulations.

However, because we propose to address the more substantial errors set out in responses to Questions numbered 11 and 15, by amending corrective instrument, we propose include those minor errors, in the same amending instrument.

The Scottish Government therefore intends to lay amending regulations in early course to correct all the errors identified. The corrections outlined above will be laid in the same instrument as the corrections required to the NHS (General Medical Services Contracts (Scotland)) Regulations 2018.

We again express our appreciation for bringing these errors to our attention.

