



The Scottish Parliament  
Pàrlamaid na h-Alba

## SUBORDINATE LEGISLATION COMMITTEE

### AGENDA

7th Meeting, 2013 (Session 4)

Tuesday 26 February 2013

The Committee will meet at 10.30 am in Committee Room 3.

1. **Instruments subject to affirmative procedure:** The Committee will consider the following—

[Police and Fire Reform \(Scotland\) Act 2012 \(Supplementary, Transitional, Transitory and Saving Provisions\) Order 2013 \[draft\];](#)  
[National Bus Travel Concession Scheme for Older and Disabled Persons \(Scotland\) Amendment Order 2013 \[draft\].](#)

2. **Instruments subject to negative procedure:** The Committee will consider the following—

[Police Service of Scotland Regulations 2013 \(SSI 2013/35\);](#)  
[Non-Domestic Rating \(Unoccupied Property\) \(Scotland\) Amendment Regulations 2013 \(SSI 2013/37\);](#)  
[Police Service of Scotland \(Special Constables\) Regulations 2013 \(SSI 2013/43\);](#)  
[Council Tax Reduction \(Scotland\) Amendment Regulations 2013 \(SSI 2013/48\);](#)  
[Council Tax Reduction \(State Pension Credit\) \(Scotland\) Amendment Regulations 2013 \(SSI 2013/49\);](#)  
[Personal Injuries \(NHS Charges\) \(Amounts\) \(Scotland\) Amendment Regulations 2013 \(SSI 2013/53\).](#)

3. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

[Police and Fire Reform \(Scotland\) Act 2012 \(Commencement No. 3 and Transitory Provision\) Order 2013 \(SSI 2013/47 \(C.4\)\);](#)  
[Police and Fire Reform \(Scotland\) Act 2012 \(Commencement No. 4, Transitory and Transitional Provisions\) Order 2013 \(SSI 2013/51 \(C.5\)\).](#)

4. **Victims and Witnesses (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.
5. **Aquaculture and Fisheries (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.

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The papers for this meeting are as follows—

**Agenda Items 1, 2 and 3**

Legal Brief (private)

SL/S4/13/7/1 (P)

**Agenda Item 2**

Instrument Responses

SL/S4/13/7/2

**Agenda Item 4**

[Victims and Witnesses \(Scotland\) Bill - as introduced](#)

[Victims and Witnesses \(Scotland\) Bill - Delegated Powers Memorandum](#)

Briefing Paper (private)

SL/S4/13/7/3 (P)

**Agenda Item 5**

[Aquaculture and Fisheries \(Scotland\) Bill - Stage 1 report](#)

Briefing Paper

SL/S4/13/7/4

**SUBORDINATE LEGISLATION COMMITTEE****7th Meeting, 2013 (Session 4)****Tuesday 26 February 2013****Instrument Responses****INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE****Police Service of Scotland Regulations 2013 (SSI 2013/35)****On 15 February 2013, the Scottish Government was asked:**

1. Regulation 2(1) defines “the Conduct Regulations” as the Police Service of Scotland (Conduct) Regulations 2013 and the Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013. That definition is then used in regulation 11(3)(c). Regulation 11(3)(d) makes reference to the Police Service of Scotland (Performance) Regulations 2013. Regulation 15 makes reference to the Police Federation (Scotland) Regulations 2013. It does not appear that any of these Regulations have as yet been made or laid before the Parliament, making it difficult for the Committee properly to scrutinise the effect of regulations 11 and 15. The Scottish Government is asked:

a. Why it was not possible to arrange the packaging of instruments that form part of the Police and Fire Reform (Scotland) Act 2012 implementation programme so that the Regulations mentioned above could have been made contemporaneously with this instrument?

b. Whether drafts of those Regulations could have been made available to the Committee to assist in its scrutiny of this instrument, all in terms of the undertaking given by the Minister for Parliamentary Business to the Committee in Session 3, which undertaking we understand to have been ratified by the present Minister for Parliamentary Business in his letter to the Convener dated 13 February 2013.

2. In regulation 2(1), “qualifying examination” is defined as having the same meaning as in the Police Service of Scotland (Promotion) Regulations 2013. However, that instrument does not contain a definition of “qualifying examination”, instead having four related definitions of “qualifying examination A (elementary)”, “qualifying examination A (advanced)”, “qualifying examination B” and “qualifying examination C”. The Scottish Government is accordingly asked whether it proposes to correct this definition, and if not what meaning the term “qualifying examination” has when used in this instrument, for example in regulation 11(2)(h)(i).

3. In regulation 5(7), the term “dependant” is used without being defined. No power has been taken to determine the meaning of the term (as is the case, say, in regulation 25(10)). The Scottish Government is asked to explain the meaning of “dependant” in context and to explain why this is considered sufficiently clear in the absence of definition, particularly as regulation 5 places certain restrictions on the

business activities of individuals and constables which may be capable of interfering with their Convention rights.

4. In regulation 7(4), reference is made to a term of appointment coming to an end on "...promotion, dismissal, the conclusion of disciplinary proceedings and regulation 10." [emphasis added] The Scottish Government is asked whether these are properly supposed to be alternative events which would bring a term of appointment to an end. If that is the case, the Scottish Government is asked whether this is sufficiently clear, given that the use of the word "and" suggests that the specified events are cumulative rather than alternative.

5. In regulation 24(1)(a), reference is made to "...incapacity benefit to which the constable is entitled under the Social Security (Incapacity for Work) Act 1994". However, that Act merely inserts a new section 30A which makes provision for incapacity benefit into the Social Security Contributions and Benefits Act 1992, rather than itself making substantive provision for the benefit. Does the Scottish Government agree that incapacity benefit is accordingly payable in terms of section 30A of the Social Security Contributions and Benefits Act 1992, rather than the Social Security (Incapacity for Work) Act 1994, and does it propose to correct this reference?

6. Regulation 31 makes provision for reckoning of service, which by virtue of regulation 31(1)(b) includes service in the other police forces mentioned in the definition of "police force" in regulation 2(1). However, the Police (Scotland) Regulations 2004 also made provision in regulation 43A for service as a police member of the Scottish Crime and Drug Enforcement Agency. It does not appear that the definition of "police force" in regulation 2(1) is sufficiently broad to include service with the SCDEA, and so any such service would appear to be excluded from the reckoning of service under regulation 31. The Scottish Government is asked whether the apparent exclusion of that service from reckonable service is intentional and, if it is not, how it proposes to remedy the matter.

7. In regulation 32(2)(a), reference is made to "a colony, protectorate or protected state within the meaning of the British Nationality Act 1948". However, the relevant provisions of that Act which defined those terms (sections 30 and 32) were repealed without any apparent saving on 1 January 1983 by section 52(8) of and Schedule 9 to the British Nationality Act 1981. Given that those terms accordingly appear to have no meaning in terms of the British Nationality Act 1948, so far as it remains in force, the Scottish Government is asked to explain what "colony", "protectorate" and "protected state" mean for the purposes of this provision.

8. Similarly, in regulation 32(2)(a) reference is also made to "a dependent territory within the meaning of the British Nationality Act 1981". The definition of "dependent territory" in section 50 of that Act was repealed by section 7 of and paragraph 1 of Schedule 2 to the British Overseas Territories Act 2002. It appears, from section 1(2) of the 2002 Act, that "dependent territories" are now referred to as British Overseas territories (with a consequent modification of Schedule 6 to the 1981 Act). While section 1(2) would have glossed the reference to "dependent territory" in the Police (Scotland) Regulations 1976 to that effect, it does not appear that the gloss will apply to these Regulations given that they post-date the coming into force

of the 2002 Act. The Scottish Government is accordingly asked to explain what “dependent territory” means for the purposes of this provision, and whether it intends to correct this apparent error.

9. Schedule 3 purports to revoke regulations 11, 12(4), (7) and (8) and 33 of, and paragraph 4 of Schedule 2 to, the Scottish Crime and Drug Enforcement Agency (Scotland) Regulations 2011. However, regulation 12 does not appear to have (or ever have had) a paragraph (7) or (8). The Scottish Government is asked to clarify what should be revoked by the references to paragraphs (7) and (8) and, if the references are in error, how it intends to correct them.

**The Scottish Government responded as follows:**

1a. Officials from the Scottish Government met the Clerks to the Subordinate Legislation Committee and the Justice Committee on 7 February 2013 to discuss the laying plan and packages of instruments to be laid and their running order. This was mentioned in the letter from the Minister for Parliamentary Business to the Convenor of the Committee dated 13 February 2013. We are not aware of any concern about the content of the packages arising out of that meeting but we did discuss the difficulty of striking a balance between laying packages of a manageable size for Parliament while permitting an overview.

The nature of the workforce package of instruments is such that they are all interwoven and contain dependencies on other aspects of implementation. Had we tried to lay all those that cross-reference each other in one package, that package would have involved more than twice as many instruments and would have had to be laid on 28 February, leaving Parliament with just the minimum 28 days to scrutinise a significantly larger number of instruments and might have resulted in Parliamentary criticism about time and resource for scrutiny. We felt it would be better instead for Parliament to have the opportunity to scrutinise in longer time a smaller package of instruments, on related subject-matter, with only general cross-references to names of instruments.

1b. The undertaking given by the Minister for Parliamentary Business was that, where possible, instruments would be laid in groups which do not refer to instruments that have not yet been laid. It was not possible on this occasion to do so because stakeholders required to be consulted on the instruments and some involved more discussion with stakeholders than others. In one case a workforce instrument cross-referenced in the instant package has changed significantly since consultation and sharing it would have been at best unhelpful and at worst misleading. The other instruments in question were still in the process of being drafted when the instant package was laid. Had it been possible to share drafts then we would have provided copies of them.

2. “qualifying examination” is a term defined for the purposes of regulation 11(2)(h)(i). That provision relates to the content of a constable’s personal record. A constable of the Police Service is most likely at 1 April 2013 to have come from a previous police force maintained under the Police (Scotland) Act 1967. Such a constable may have lengthy service and have sat various forms of qualifying examination. The wording in head (i) refers to “... pass *any* qualifying examination...”

[emphasis added] and that is to make it clear that there may be more than one type of examination. Reference in regulation 2(1) is therefore made to direct the reader towards the Police Service of Scotland (Promotion) Regulations 2013 (“Promotion Regulations”) in order to see all of the different types of qualifying examination. Qualifying examination in the context of regulation 11(2)(h)(i) therefore means any of the qualifying examinations referred to in the Promotion Regulations. The Scottish Government considers the meaning sufficiently clear to the reader and does not regard the definition as requiring correction.

3. To some extent this question raises a policy matter so hope the following explanation helpful. The term “dependant” in regulation 5(7) is not defined because it is intended to take its ordinary English language meaning: a person who depends on another for maintenance (per OED). Regulation 5 is about disclosure of interests and it is helpful that the term be construed broadly in this context. By contrast, regulation 25(10) is about entitlement to leave and therefore a determination power has been taken in order that “dependant” may be circumscribed in more detail if considered necessary to provide clarity for constables and, separately, to ensure that entitlements created in employment law for employees may be appropriately applied.

4. We are grateful to the Committee for pointing out the inadvertent error in regulation 7(4). Regulation 7(4) provides that the things mentioned are without prejudice to paragraph (3). The events listed are plainly alternative as it would not be possible for an appointment to come to an end on promotion and dismissal and other disciplinary proceedings and retirement. We are therefore of the view that the intention of the provision is clear because to apply any interpretation to the conjunction other than that of in the alternative would be to create a logical absurdity in what is essentially a list.

5. Regulation 24(1)(a) provides for the deduction from a constable’s pay of any short-term or long-term incapacity benefit to which the constable is entitled. In order to assist the reader as to what incapacity benefit is, the provision refers to the Act which created it, albeit by insertion into the 1992 Act. We acknowledge that it would have been better to refer to the 1992 Act directly or use the words “by virtue of” instead of “under” but note the statutory reference performs an essentially adjectival function directing the reader to where meaning can be found for the term “short-term or long-term incapacity benefit”. We note that the reference in regulation 24(1)(a) has been in the Police (Scotland) Regulations since 2004 but has not given rise to any uncertainty of effect such as to merit the Government being asked to adjust the reference. We will, however, give thought as to whether to amend this reference at the next available opportunity to make its meaning clearer.

6. The exclusion of reference to reckonable service with the SCDEA is intentional and a policy matter. The provision in regulation 43A of the Police (Scotland) Regulations 2004 operates in relation to service in relation to an appointment made under paragraph 7(2)(c) of schedule 2 to the Police, Public Order and Criminal Justice (Scotland) Act 2006. Head (c) is concerned with those individuals appointed as constables of the SCDEA. No constables of the SCDEA were ever appointed as all SCDEA officers are on secondment from other police forces. As such they accrue reckonable service by virtue of remaining constables of their home police forces. It would therefore be incorrect to make provision for past

reckonable service in relation to a category of individual who never existed and that is why no such provision is carried forward to the new Police Service.

7 & 8. The references in regulation 32(2)(a) to types of service are to historic types of service in places which, conceivably, a constable transferred to the Police Service on 1 April 2013 may have served many years ago. The passage of time has rendered this category very small indeed and within a few years there will be no-one left who can fall within it. However, we do not have data to confirm that there is no constable who benefits from this provision so we felt it appropriate to make some provision for this type of service. At the time when those types of service were served the service was with colonies, protectorates or protected states within the meaning of those Acts at that time and we are of the view that the only way to refer to service in the past is by reference to what it was in the past. Those terms obviously have no meaning now but as the context of the regulation is about past service we are of the view that the references to the Acts and terms there can only meaningfully be read as historic descriptors of service, e.g. the reference to the Secretary of State's past certification; to attempt to describe it with contemporary terminology would only serve to misdescribe the service that was actually performed. We are, however, content to consider removal of the provision once confirmation is forthcoming that no constable of the Police Service has any such past service.

9. We are grateful to the Committee for identifying this error. The revocations are intended to remove from the statute book subordinate legislation which has made amendment to the Police (Scotland) Regulations 2004 and which is, in consequence of those Regulations' revocation, to be spent. The intention was to revoke regulation 13(7) and (8) of S.S.I. 2011/61 and we apologise for this error. As the regulations purport to revoke a provision that does not exist there is no legal effect arising from this error and on 1 April 2013 the whole of S.S.I. 2011/61 will in any event be revoked by virtue of the repeal of the provisions it was made under in the Police, Public Order and Criminal Justice (Scotland) Act 2006. In order to remove any remaining confusion for the reader we undertake to revoke the reference to regulations 12(7) and (8) at the next available opportunity.



## **Non-Domestic Rating (Unoccupied Property) (Scotland) Amendment Regulations 2013 (SSI 2013/37)**

**On 14 February 2013, the Scottish Government was asked:**

1. Which enabling power is being relied on to make the new regulation 4(2) of the 1994 Regulations inserted by regulation 6 (which specifies that the rate relief is granted only to the extent compatible with Article 107(1) of the Treaty on the Functioning of the EU), given that the power in section 24B(3) is limited to prescribing the class of lands and heritages which are to continue to be treated as unoccupied? Why is the provision within the power relied on?

2. The Policy Note explains that the rates relief conferred by regulation 6 is intended to apply if the property was last previously occupied as a shop or office, or where there has been no previous use, where the use is as a shop or office. (Other conditions apply).

Regulation 4(1)(b) of the 1994 Regulations (inserted by regulation 6) requires that the lands and heritages to be treated as unoccupied were or are “in use as office premises” or “in use as shop premises” (as the case may be). Regulation 3 defines those terms. The meaning is “the sole or principal use of the lands and heritages takes place there in a building or part of a building that is used wholly or mainly for the” office or shop purposes, as the case may be. That requirement of whole or main use for office or shop purposes relates to a building or part building in which the lands and heritages are situated, and “the sole or principal use of the lands and heritages” must take place in such building or part.

Please explain therefore-

a. The intended meaning and effect of the new regulation 4(1)(b) read with the definitions in regulation 3,

b. Specifically, whether it is intended that the requirement for whole or main use for office or shop purposes relates to the building or part in which the rateable lands and heritages (the rating unit in question) are situated, or the lands and heritages themselves. Could this be clearer?

**The Scottish Government responded as follows:**

1. The power used to make regulation 4(2)

Section 24B of the Local Government (Scotland) Act 1966 allows Ministers to prescribe a class of lands and heritages that are to be treated as unoccupied, despite being in fact occupied. The result is that the class gains the rates relief that being treated as unoccupied attracts.

Rates relief can only be granted to the extent that European Union law permits such relief, and any provision would be outside devolved competence so far as it was incompatible with EU law (in terms of section 29(2)(d) of the Scotland Act 1998).

The Scottish Government considers it appropriate to make clear on the face of the legislation that the class of lands and heritages that qualify for relief is limited to those for which the relief can be compatibly granted. It considers it implicit that the power to prescribe a class includes the ability to provide that it is subject to limitations imposed by EU law. In any event, this instrument is also made in reliance of “all other powers enabling [the Scottish Ministers] to do so” and section 2(2) of the European Communities Act 1972 would allow regulation 4(2) to be made. Reference is made to *Vibixa Ltd v Komori UK Ltd and Ors* [2006] EWCA Civ 536.

## 2. The meaning of regulation 4(1)(b)

The meaning of regulation 4 is perhaps made more difficult to follow because rating legislation traditionally uses the term “lands and heritages” to describe the unit of property that is entered on the valuation roll.

For shops and offices, this could in practice be a part of a building, with the building being used by several different businesses that have separate entries on the valuation roll. It could be a single building with no additional land that is used by a single business. Or it could be a piece of land that includes a building used as a shop or office, with other parts of the land being used in other ways (an example might be a golf course with a shop).

The definitions of “use as office premises” and “use as shop premises” therefore use the concept of “sole or principal use”, and also that that use must take place in a building. That prevents arguments that, for example, an open air market stall is a shop. Assessors are familiar with the assessment of sole or principal use. The definitions of office use and shop use in the Regulations then refer to activities that are based on definitions in other legislation to describe what those uses are.

Regulation 4(1)(b) provides that in determining whether lands and heritages qualify to be treated as unoccupied, despite being occupied, regard is to be had to the last use when they were previously occupied. Where there was no previous occupation, the regard is to be had to the current use. If in either case the relevant use is as office premises or as shop premises, within the definitions of those, then the relief that the regulations enable will be available.

On the specific query, qualification for relief depends on the sole or principal use of the lands and heritages (i.e. the rating unit). That use must take place in a building. However, where a building is split into several rating units (i.e. several lands and heritages) the office use or shop use need not be the sole use (or even the principal use) of the building itself.

To return to the three scenarios explained above, the way the test applies to a single building with a single business is straightforward. Where the building is split into different rating units, it will be the use of the part of the building that is relevant for the rating unit. In the third instance, the determining factor will be the sole or principal use. For example, a supermarket with an open air car park may be solely used as a supermarket, despite the lands and heritages being only partly a building. In the golf course example, the test will be whether the golf course or the shop is the principal use.

The Scottish Government considers it clear that the principal use element of the qualification relates to the lands and heritages, not the building. However, that principal use must take place within a building.

The Policy Note attempts to explain in simpler language the more complex position outlined above. Policy Notes have that advantage; the legislation itself must achieve a high level of precision as to how to ascertain when a use does, and does not, qualify for a tax relief. The legislation aims to give definitions and a test that can be applied to particular circumstances to determine whether or not the relief can apply.

**Police Service of Scotland (Special Constables) Regulations 2013 (SSI 2013/43)**

**On 15 February 2013, the Scottish Government was asked:**

1. Regulation 2(1) defines “the deputy chief constable” as the deputy chief constable designated under regulation 4 of the Police Service of Scotland (Conduct) Regulations 2013. That definition is then used throughout Part 4 of the instrument. Additionally, paragraph 8 of the Policy Note indicates that the meaning of misconduct is to mirror that for regular constables in the Police Service of Scotland (Conduct) Regulations 2013. It does not appear that any of these Regulations have as yet been made or laid before the Parliament, making it difficult for the Committee properly to scrutinise the effect of Part 4 and in particular whether it delivers the stated policy intention. The Scottish Government is asked:

a. Why it was not possible to arrange the packaging of instruments that form part of the Police and Fire Reform (Scotland) Act 2012 implementation programme so that the Regulations mentioned above could have been made contemporaneously with this instrument?

b. Whether a draft of those Regulations could have been made available to the Committee to assist in its scrutiny of this instrument, all in terms of the undertaking given by the Minister for Parliamentary Business to the Committee in Session 3, which undertaking we understand to have been ratified by the present Minister for Parliamentary Business in his letter to the Convener dated 13 February 2013.

2. In regulation 4(4)(b), the term “dependant” is used without being defined. No power has been taken to determine the meaning of the term (as is the case, say, in regulation 25(10) of the Police Service of Scotland Regulations 2013, which provision has no direct equivalent in this instrument). The Scottish Government is asked to explain the meaning of “dependant” in context and to explain why this is considered sufficiently clear in the absence of definition, particularly as regulation 5 places certain restrictions on the business activities of individuals and special constables which may be capable of interfering with their Convention rights.

3. In regulation 7(1)(h), the term “qualifying examination” is used without being defined. The Scottish Government is asked to explain what the term means in this context, particularly as the Police Service of Scotland (Promotion) Regulations 2013, which provides for recognition of the former qualifying examinations, does not apply to special constables in terms of regulation 2(1).

4. Regulation 17(2)(b) provides that one of the disposals following a finding of misconduct is that a special constable may be required to resign from the Police Service, either forthwith or on a specified date, as an alternative to dismissal. The Scottish Government is asked to explain what steps may be taken should a special constable fail to resign as required, given that no provision appears to be made for this situation in contrast with the position under regulation 18(3) of the Police (Conduct) (Scotland) Regulations 1996 (applicable to regular constables) whereby the effect of failure to comply is dismissal.

**The Scottish Government responded as follows:**

1a. Officials from the Scottish Government met the Clerks to the Subordinate Legislation Committee and the Justice Committee on 7 February 2013 to discuss the laying plan and packages of instruments to be laid and their running order. This was mentioned in the letter from the Minister for Parliamentary Business to the Convenor of the Committee dated 13 February 2013. We are not aware of any concern about the content of the packages arising out of that meeting but we did discuss the difficulty of striking a balance between laying packages of a manageable size for Parliament while permitting an overview.

The nature of the workforce package of instruments is such that they are all interwoven and contain dependencies on other aspects of implementation. Had we tried to lay all those that cross-reference each other in one package, that package would have involved more than twice as many instruments and would have had to be laid on 28 February, leaving Parliament with just the minimum 28 days to scrutinise a significantly larger number of instruments and might have resulted in Parliamentary criticism about time and resource for scrutiny. We felt it would be better instead for Parliament to have the opportunity to scrutinise in longer time a smaller package of instruments, on related subject-matter, with only general cross-references to names of instruments.

We note that there is only one cross-reference in these Regulations: to the definition of deputy chief constable. That cross-reference is simply to point to which of the deputy chief constables has been designated. It does not have significant impact on the Regulations as it is a device for identifying the individual deputy chief constable who will exercise the functions under the Regulations. Separately, as regards the Policy Note aspect, the Committee will observe that misconduct is clearly defined in these Regulations without cross-reference to any other Regulations (see regulation 11 and Schedule 2). The Policy Note was simply intended to draw to the reader's attention that conduct constituting misconduct on the part of a special constable is no different to that applicable to a regular constable.

1b. The undertaking given by the Minister for Parliamentary Business was that, where possible, instruments would be laid in groups which do not refer to instruments that have not yet been laid. It was not possible on this occasion to do so because stakeholders required to be consulted on the other instrument. The other instrument in question was still in the process of being drafted when the instant package was laid. Had it been possible to share a draft then we would have provided a copy of it.

2. To some extent this question raises a policy matter so hope the following explanation helpful. The term "dependant" in regulation 4(4)(b) is not defined because it is intended to take its ordinary English language meaning: a person who depends on another for maintenance (per OED). Regulation 4 is about disclosure of interests and it is helpful that the term be construed broadly in this context. By contrast, regulation 25(10) of the Police Service of Scotland Regulations 2013 is about entitlement to leave and therefore a determination power has been taken there in order that "dependant" may be circumscribed in more detail to provide clarity for

constables and, separately, to ensure that entitlements created in employment law for employees may be appropriately applied.

3. Regulation 7(2)(h) relates to the content of a constable's personal record. In light of the Committee raising this issue we have looked further into the history of promotion of special constables. In line with stakeholder requests not to make substantive changes to the policy contained in workforce instruments, this provision was drafted to be consistent with that contained in the Police (Special Constables) Regulations 2008. We note that in 2008 the Police (Promotion) (Scotland) Regulations 1996 did not apply to special constables and there appears to be no explanation for the existence of the provision in the 2008 Regulations. Notwithstanding that, the inclusion of the provision creates no harm as it is simply of no effect. However, in order to remove uncertainty as to the meaning of the provision, we undertake to adjust the provision at the next appropriate opportunity and are grateful to the Committee for raising this point.

4. This question raises a policy matter and we hope the following explanation is helpful to the Committee. The different nature of special constables, who are volunteers, means that their conduct procedures are not simply a copy of those which apply to regular constables as different policy considerations apply. The current procedures were introduced to allow transparency around the termination of a special constable's service, and to introduce a right to a review of decisions taken. It is important to note that regulation 17(2)(b) is a *requirement* for a special constable to resign; it is not simply a request, it must be complied with. The decision notice will specify the date on which the resignation must take effect and the special constable's service effectively ends on that date. At that time, the special constable will be required to return their uniform and equipment and would not be permitted to return to duty.

## SUBORDINATE LEGISLATION COMMITTEE

7th Meeting, 2013 (Session 4)

Tuesday 26 February 2013

### Aquaculture and Fisheries (Scotland) Bill

### Response from the Scottish Government

#### Background

1. The Subordinate Legislation Committee reported on the delegated powers in the Aquaculture and Fisheries (Scotland) Bill on 18 December 2012 in its [62<sup>nd</sup> Report of 2012](#).
2. The response from the Scottish Government to this report is reproduced in the annex.
3. The Stage 1 debate is due to take place on Thursday 28 February 2013.

#### Scottish Government response

*Section 1(2) – (inserting section 4A(2), (3) and (5) of the Aquaculture and Fisheries (Scotland) Act 2007) - the Code of Good Practice for Scottish Finfish Aquaculture*

4. In its stage 1 report, the Committee drew the attention of the lead committee to this proposed power, which allows the Scottish Salmon Producers' Organisation ("SSPO") to issue the Code of Good Practice for Scottish Finfish Aquaculture. The Committee noted that any recommendations of the Code must (so far as possible) be reflected in farm management agreements and statements.
5. The Committee observed that the policy intention, as confirmed by the Scottish Government in a written response prior to the publication of the report, is to seek to ensure that good practice is adopted by members of the aquaculture industry, by means of the farm management agreements and statements. However, the Committee noted that the inserted section 4A of the Aquaculture and Fisheries (Scotland) Act 2007 contains no explanation or restriction that the Code must set out matters of good practice.
6. In its response to the Committee's report, the Scottish Government advised that it will bring forward a clarifying amendment at Stage 2. The amendment will seek to recognise that while the Code is published by the SSPO, a Code of Good Practice Management Group, of which the SSPO is but one member, is responsible for ensuring that it is kept fit for purpose.
7. In its response to the Committee's report, the Scottish Government also committed to bringing forward a further amendment to 4A to clarify that there is no direct link between a farm management agreement or statement and the Code of Good Practice.

*Section 3 – power to prescribe technical requirements for equipment used in fish farming*

8. The Committee expressed concerns as to the scope of Section 3(4)(b), so far as it could enable the regulations to confer functions on other persons apart from the Scottish Ministers to prescribe (by a form of subordinate legislation under the regulations) the technical requirements for equipment used in fish farming.

9. In its response to the Committee's report, the Scottish Government stated that it would not be its intention to delegate the function of setting the standards to a third party. The Scottish Government agreed to consider whether the provision could be adjusted, by way of an amendment at Stage 2, to clarify that intention.

10. The Committee also recommended that the Scottish Government considered in advance of Stage 2, in relation to section 3(6), whether this power could specify some appropriate maximum level of a daily or other periodic fine as the punishment for continuing offences which may be created in the regulations.

11. The Scottish Government agreed to give consideration to this matter.

*Section 20 – (inserting section 46F of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003) – Ministerial power to modify the good governance requirements*

12. In its report, the Committee noted that the Scottish Government had undertaken to amend the Bill at Stage 2 in relation to the powers in section 20. The Scottish Government has noted that as drafted the repeal of the good governance requirements placed on district salmon fishery boards, including the "basic" requirements in section 44(1) of the 2003 Act would be competent, and this is not the policy intention. The Committee will consider the Bill as amended in this respect after Stage 2.

13. The Scottish Government noted the Committee's comments.

*Section 22 – salmon carcass tagging*

14. The Committee was content with the powers in Section 22 in principle and noted that the Scottish Government intended to bring forward an amendment at Stage 2 to make the power subject to the affirmative procedure rather than the negative procedure as originally drafted.

15. The Scottish Government noted the comments of the Committee.

*Section 50 – power to charge in connection with fisheries functions*

16. The Committee considered that the powers to charge in connection with fisheries functions in section 50 were significant powers and recommended that the Scottish Government consider in advance of Stage 2 whether the power should be



subject to the affirmative procedure rather than the negative procedure as originally drafted.

17. In its response, the Scottish Government recognised that further Parliamentary scrutiny may be appropriate and agreed that the regulations should be subject to the affirmative procedure.

## Annex

### Correspondence from Scottish Government dated 19 February 2013

The Subordinate Legislation Committee's recommendations or comments are highlighted in bold and are followed by the Scottish Government's response.

#### Section 1(2) – (inserting section 4A (2), (3) and (5) of the Aquaculture and

**20. The Committee draws the status conferred on the Code of Good Practice for Scottish Finfish Aquaculture, issued by the Scottish Salmon Producers' Organisation to the attention of the lead Committee. It notes that any recommendations of the Code must (so far as possible) be reflected in farm management agreements and statements.**

**21. It observes that the policy intention as confirmed in the written response from the Scottish Government is to seek to ensure that good practice is adopted by members of the aquaculture industry, by means of the farm management agreements and statements. The inserted section 4A of the Aquaculture and Fisheries (Scotland) Act 2007 contains no explanation or restriction that the Code must set out matters of good practice.**

**22. The Scottish Government has also confirmed that the reference to the Code in the inserted section 4A (5) of the 2007 Act will be amended at Stage 2. The Committee will consider that amendment further after Stage 2.**

The Scottish Government has noted the comments of the Committee. The policy behind the provision was to require groups of farmers (or where that was not possible those operating under terms of statements) to work together to draw up their own set of arrangements in relation to a minimum of matters. In addition the agreements had to deal with operators joining and leaving areas, and the areas themselves had to be defined. These minimum standards may be understood, taken together as constituting "good practice".

A clarificatory amendment will be brought forward at Stage 2 which seeks to recognise that while the Code is published by the SSPO, a Code of Good Practice Management Group, of which the SSPO is but one member, is responsible for ensuring that it is kept fit for purpose.

In addition, the Scottish Government will also be looking to address the SLC's concerns and those of other stakeholders by bringing forward a further amendment to 4A so that there is no direct link between a farm management agreement or statement and the Code of Good Practice.

#### **Section 3 – power to prescribe technical requirements for equipment used in fish farming**

**35. The Committee therefore draws to the attention of the lead committee that section 3(4) (b) provides that regulations under section 3(1) may “confer functions on any person in relation to the prescribing of requirements.” The Committee has concerns as to the scope of this power, so far as it could enable the regulations to confer functions on other persons apart from the Scottish Ministers to prescribe (by a form of subordinate legislation under the regulations) the technical requirements for equipment used in fish farming.**

**36. The Committee recommends that the Scottish Government consider for Stage 2 how section 3(4) could more clearly distinguish between the power proposed to be delegated to the Scottish Ministers (only) to prescribe by subordinate legislation the requisite standards or how they would be set; and on the other hand functions which may be delegated to other persons in the regulations, in relation to how the technical requirements will be agreed and set.**

**37. The Committee also recommends that the Scottish Government considers in advance of Stage 2, in relation to section 3(6), whether this power could specify some appropriate maximum level of a daily or other periodic fine as the punishment for continuing offences which may be created in the regulations.**

The Scottish Government has noted the comments of the Committee. With regard to section 3(4)(b), the policy intention has always been that Scottish Ministers would prescribe the technical standards, having been informed by the Sub-Group established for that very purpose under the auspices of the Ministerial Group on Aquaculture (MGA). It would never be the intention to delegate the function of setting the standards to a third party. Accordingly we will consider whether the provision could be adjusted, by way of an amendment at Stage 2, to clarify that intention.

Further consideration will also be given to the question of specifying a daily or periodic fine, including the determination of a maximum (cumulative) level, recognising that this would need to be proportionate and sufficiently punitive to discourage future transgressions.

#### **Section 20 – (inserting section 46F of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003) – Ministerial power to modify the good governance requirements**

**43. The Committee notes that the Scottish Government has undertaken to consider an amendment at Stage 2 in relation to the powers in section 20 (inserting section 46F of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003). The Government has noted that as drafted the repeal of the good governance requirements placed on district salmon fishery boards, including the “basic” requirements in section 44(1) of the 2003 Act would be competent, and this is not the policy intention. The power of modification is intended to be used only for the purposes set out in the inserted section 46F (2) of the 2003 Act.**

**44. The Committee shall consider the Bill as amended in this respect after Stage 2.**

The Scottish Government has noted the comments of the Committee.

#### **Section 22 – salmon carcass tagging**

**49. The Committee is content with the powers in section 22 in principle.**

**50. The Committee notes that after reflection the Scottish Government has decided that the affirmative procedure would be a more appropriate level of scrutiny for regulations under the inserted section 21A of the 2003 Act, where the power in section 21A(3)(c) to modify Part 5 of the 2003 Act is used. It will bring forward an amendment at Stage 2. The Committee will consider this amendment after Stage 2.**

The Scottish Government has noted the comments of the Committee

#### **Section 50 – power to charge in connection with fisheries functions**

**58. The Committee considers that the powers to charge in connection with fisheries functions in section 50 are significant powers. The proposed regulations would specify which functions the charging regime will relate to within the wide range of functions described in subsection (2) of that section, the persons to be subject to charge, the amounts of charge, and other matters as listed in section 50(3).**

**59. Accordingly the Committee considers that the exercise of the powers in section 50 to make regulations should be subject to the affirmative procedure. The Committee considers that the Scottish Government should consider this further in advance of Stage 2.**

The Scottish Government has noted the comments of the Committee. The need to consult is explicit on the face of the Bill at 50(5). However the Scottish Government recognises that further Parliamentary scrutiny might well be appropriate and would agree with the Committee's recommendation that the regulations should be subject to affirmative procedure.