Delegated Powers and Law Reform Committee

23rd Report, 2014 (Session 4)

Subordinate Legislation

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Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (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; and
   (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.

Membership:

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Delegated Powers and Law Reform Committee

23rd Report, 2014 (Session 4)

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 18 March 2014, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment Regulations 2014 (SSI 2014/50);

   Town and Country Planning (Hazardous Substances) (Scotland) Amendment Regulations 2014 (SSI 2014/51);

   Brucellosis (Scotland) Amendment Order 2014 (SSI 2014/63);

   Brucellosis (Scotland) Amendment (No. 2) Order 2014 (SSI 2014/72);

   Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68);


2. The Committee’s recommendations in relation to those instruments are set out below.

3. The instrument that the Committee determined that it did not need to draw the Parliament’s attention to is set out at the end of this report.
POINTS RAISED: INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

**Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment Regulations 2014 (SSI 2014/50)** (Local Government and Regeneration Committee)

4. This instrument amends the Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Regulations 2003 (“the 2003 Regulations”) so as to make new provision regarding the declaration of interests by members of devolved public bodies following the issue of a revised Model Code of Conduct for members of such bodies in February 2014.

5. The instrument is due to come into force on 1 April 2014.

6. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced at the Annex.

7. Regulation 4 inserts a new regulation 4A into the 2003 Regulations. The new regulation 4A will apply where a members' code, including a revised or reissued members’ code, has effect from a date later than 31 March 2014. Regulation 4A(2) provides that a member to whom regulation 4A(1) applies shall give to the standards officer a notice of interests.

8. Under regulation 3 of the 2003 Regulations, every devolved public body has a standards officer except for devolved public bodies which are also National Park Authorities. National Park Authorities have a proper officer, and not a standards officer. The new regulation 4A(2) of the 2003 Regulations, as inserted by these Regulations, ought, therefore, to refer to the proper officer as well as the standards officer in order for it to apply to devolved public bodies which are also National Park Authorities. In the absence of such a reference, the Committee considers it doubtful that the new regulation 4A properly applies to National Park Authorities.

9. The Scottish Government has stated that regulation 4A is intended to apply to National Park Authorities, but that it considers that National Park Authorities would simply read the reference to “standards officer” as a reference to “proper officer” when construing the new regulation 4A. The Scottish Government also stated that it would draw the attention of the National Park Authorities to the omission in the regulation during the process of approving the National Park Authorities’ revised members’ codes.

10. The Committee does not consider that National Park Authorities should be expected to read the reference to the standards officer as a reference to the proper officer. The Committee further does not consider the Scottish Government’s intention to simply draw the matter to the attention of the National Park Authorities during the course of approving their revised codes of conduct to be appropriate. The Committee considers that where subordinate legislation imposes duties on individuals or bodies it ought to be clear from the face of the legislation what those duties are, to whom they apply and how they are to be fulfilled. The Committee considers that it would be possible for a National Park Authority to conclude, from the drafting of the new regulation 4A, that it does not apply to it as there is no reference to the proper officer. To the extent that
regulation 4A fails to refer to proper officer, therefore, the Committee considers this instrument to be defectively drafted.

11. The Committee accordingly draws the instrument to the attention of the Parliament under reporting ground (i). The drafting of regulation 4 is defective, as the new regulation 4A(2), which it inserts into the Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Regulations 2003 fails to refer to the “proper officer” as the person to whom members of devolved public bodies which are also National Park Authorities must give a notice of interests. The Committee also finds it highly unsatisfactory that the Scottish Government does not propose to correct this error prior to the instrument coming into force.
Town and Country Planning (Hazardous Substances) (Scotland) Amendment Regulations 2014 (SSI 2014/51) (Local Government and Regeneration Committee)

12. The Regulations implement Article 30 of Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances. Regulation 2 inserts “heavy fuel oils” to the list of hazardous substances and controlled quantities in Schedule 1 to the Town and Country Planning (Hazardous Substances) (Scotland) Regulations 1993 (“the 1993 Regulations”).

13. Regulation 3 contains provisions which confer transitional immunity from prosecution and contravention proceedings if certain requirements are met, for 6 months from 29 March 2014 when the Regulations come into force. During that time, an application for hazardous substances consent for uses involving heavy fuel oils may be made.

14. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced at the Annex.

15. The Government’s response to the Committee acknowledges that there has been a relatively short delay in implementing (transposing) Article 30 of Directive 2012/18/EU within the 1993 Regulations. These Regulations come into force on 29 March 2014. Article 31 of the Directive provides that Article 30 required to be transposed into domestic law by 14 February 2014. The Committee draws the explanation for that delay, and the effect of the transitional provision in regulation 3, to the attention of the lead committee.

16. The Committee therefore draws the following matters to the attention of the lead committee considering the Regulations:

17. Firstly, these Regulations come into force on 29 March 2014. Article 31 of the Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances provides that Article 30 (which these Regulations implement) required to be transposed into domestic law by 14 February 2014. Directive 2012/18/EU was published in July 2012.

18. The explanation provided by the Scottish Government for the relatively short delay in transposing the EU requirements is that there have been competing resource pressures within the policy department at the time when the instrument was due to be laid. There has also been a need to liaise with the Health and Safety Executive and with the UK administrations on the outcome of consultations on the proposals, which has precluded a substantially earlier transposition date.

19. Secondly, regulation 3 has effect in the situation where, as a result of the change in the treatment of heavy fuel oil (HFO) effected by the Regulations (from an HFO limit of 100 tonnes to HFOs being calculated within the total limit of 2500 tonnes of petroleum products), a person who does not presently need a hazardous substances consent would require consent immediately as from 29 March 2014. Regulation 3 provides for a transitional exemption from enforcement procedures for a 6 month period if
the conditions for exemption are met, to enable the persons affected to make an application for consent.

20. It appears to the Committee that the need for the exemption period to operate from 29 March until 28 September 2014 might have been avoided, had the instrument been made sufficiently in advance of 14 February, so that affected persons could have obtained consent in time for Article 30 of Directive 2012/18/EU being transposed into Scots law. The need for this exemption period, which provides transitional immunity from prosecution and contravention proceedings, results from the Regulations being laid before Parliament on 27 February with a coming into force date of 29 March, rather than having been planned and co-ordinated to implement the transposition deadline of 14 February.
Brucellosis (Scotland) Amendment Order 2014 (SSI 2014/63) (Rural Affairs, Climate Change and Environment Committee)

21. This instrument amends the Brucellosis (Scotland) Order 2009 to transfer responsibility for the submission of samples of processed milk for brucellosis testing to producers. At present the Animal Health Veterinary Laboratories Agency collects milk samples from these herds for testing.

22. It also provides that it is an offence not to comply with the requirements for sampling and testing of processed and unprocessed milk for brucellosis.

23. The instrument comes into force on 1 April 2014.

24. In considering the instrument, the Committee asked the Scottish Government for clarification of whether the maximum penalty provided in the order was permitted by the enabling power. The correspondence is reproduced at the Annex.

25. The Scottish Government agrees that there is an error in the penalty limits which the order sets for the new offence of failing to comply with the milk sampling requirements. To the extent that the order seeks to impose a higher penalty on conviction than that permitted by the enabling power the Committee is of the view that the order is *ultra vires* and requires to be corrected. The Committee notes that this matter is addressed by the Scottish Government in SSI 2014/72 which the Committee considers below.

26. The Committee draws the instrument to the attention of the Parliament under reporting ground (e) as the maximum penalty specified in article 7(9) to be inserted into the Brucellosis (Scotland) Order 2009 is not *intra vires* the enabling power (section 2(2) of the European Communities Act 1972).

27. Article 7(9) provides that the maximum period of imprisonment that can be imposed on conviction is 6 months. However, paragraph 1(1)(d) of Schedule 2 to the European Communities Act 1972 provides that the maximum period of imprisonment which can be imposed in the circumstances of this order is 3 months.
28. The purpose of the order is to correct the defect in the Brucellosis (Scotland) Amendment Order 2014 (SSI 2014/63) identified by the Committee above.

29. This order provides that the maximum period of imprisonment which can be imposed on conviction of the offence of failing to comply with the requirements for milk testing for brucellosis is three months and not six months as stated in SSI 2014/63.

30. The instrument is due to come into force on 1 April 2014. It is subject to the negative procedure and the 28 day rule has not been complied with.

31. The Scottish Government provided a letter to the Presiding Officer explaining the failure to comply with the 28 day rule. The correspondence is reproduced at the Annex.

32. The Scottish Government has taken the view that it is necessary to correct the penalty provision to be inserted by SSI 2014/63 before it comes into force. The Committee agrees that this is the appropriate course of action in order to ensure effective enforcement of the provisions in question and to ensure that the limits on the exercise of the enabling power in section 2(2) of the European Communities Act 1972 are properly observed.

33. The Committee draws this instrument to the attention of the Parliament on ground (j) as the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 have not been complied with.

34. The Committee considers the breach of the 28 day rule to be appropriate in the particular circumstances of this case. The Government has taken prompt action to ensure that the error in the penalties provided by SSI 2014/63 is corrected before that instrument comes into force on 1 April 2014.
Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68) (Justice Committee)

35. The purpose of this instrument is to make provision for dealing with behaviour of constables in the Police Service of Scotland which amounts to misconduct or gross misconduct. It comes into force on 1 April 2014.

36. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced at the Annex.

37. Regulation 25(8) confers a general discretion on the person appointed to determine an appeal under the regulations to decide how the appeal proceedings are to be conducted, subject to the express qualifications provided in regulation 25(8)(a), (b) and (c). Regulation 25(8)(b) provides that in a case where any disciplinary action mentioned in regulation 22(3)(d), (e) or (f) has been ordered, any advocate or solicitor representing the constable who is the subject of the appeal must be permitted to attend the appeal proceedings.

38. Regulation 7 provides that legal representation is available to a police constable in any misconduct hearing or appeal hearing held under the regulations. Regulation 25(8)(b) appears, however, to qualify that rule.

39. The Scottish Government has confirmed that the attendance of a constable’s legal representative at an appeal hearing is only mandatory in cases where disciplinary action mentioned in regulation 22(3)(d), (e) or (f), namely demotion in rank or dismissal with or without notice has been ordered. In all other appeal hearings, the constable’s legal representative may be permitted to attend only at the discretion of the person appointed to determine the appeal as conferred by regulation 25(8).

40. The Committee considers that regulation 7 purports to have general application when it is in fact qualified by regulation 25(8)(b). The qualification is not made express, however, but is to be inferred from the drafting of regulation 25(8)(b). The Committee considers that regulation 7 could be clearer so as to make it plain that the attendance of a constable’s legal representative at an appeal hearing is qualified by the effect of regulation 25(8)(b) and is not available as a matter of right in all appeal hearings, but rather is subject to the discretion of the person determining the appeal.

41. The Committee accordingly draws the instrument to the attention of the Parliament on reporting ground (h) as the form or meaning of regulation 7 could be clearer. Regulation 7 provides that a constable may be legally represented in any misconduct hearing or appeal hearing. However, the effect of regulation 25(8)(b) is that legal representation at an appeal hearing is subject to the discretion of the person determining the appeal and may, as such, be refused in cases other than those where disciplinary action constituting demotion in rank or dismissal has been ordered.

42. Regulation 16(6) provides that a constable may object to the appointment of any person under regulation 16. Regulation 16 provides for the appointment of a person to conduct misconduct proceedings, as well as the appointment of an
assessor to the proceedings and, in the case of a misconduct hearing, the appointment of a solicitor or an advocate. Regulation 16(7) states that such an objection must be made within three working days of receipt of the misconduct form sent to the constable by virtue of regulation 15(2).

43. Regulation 15(3) states the information required to be included in a misconduct form. It includes the name of the person appointed to conduct the misconduct proceedings, but it does not include information about the appointment of an assessor, a solicitor or an advocate, who are also persons who may be appointed under regulation 16, and to whose appointment the constable may accordingly object under regulation 16(6).

44. The Scottish Government considers that the list of matters of which a constable must be informed in regulation 15(3) is not exhaustive, and that additional information may be included. It also considers that there are other means by which a constable may be informed of the appointment of an assessor, solicitor or advocate under regulation 16, such as by way of a covering letter accompanying the misconduct form. As such, the Scottish Government does not consider that the drafting of the instrument precludes the effective exercise of a constable’s right to object to the appointment of any person under regulation 16, notwithstanding that the period within which that right is exercisable is tied to, and triggered by, receipt of the misconduct form.

45. The Committee considers that it would be preferable for the regulations to require the inclusion of information as to the appointment of an assessor, solicitor or advocate within the misconduct form itself, so as to remove the risk that a constable may fail to be informed of the appointment of such a person. The Committee considers it possible, in the event of such a failure, that the period within which the constable may object to the appointment of an assessor, solicitor or advocate in terms of regulation 16(6) may begin to run, or even expire without the constable having been properly informed of the appointments in respect of which he or she is entitled to object.

46. While the Committee accepts that the drafting of the two regulations does not prevent the effective exercise of a constable’s right to object under regulation 16(6), it also does not ensure the effective exercise of that right. The Committee considers that requiring the inclusion of information as to the appointment of an assessor, solicitor or advocate within the misconduct form itself by listing that information in regulation 15(3) would put the matter beyond doubt and remove any uncertainty.

47. The Committee accordingly draws regulations 15 and 16 to the attention of the lead committee. The lead committee may wish to consider whether the exercise of the right of a constable to object to the appointment of an assessor, a solicitor or an advocate to advise at misconduct proceedings, to be exercised within three working days of receipt of the misconduct form under regulation 15(2) is or could be frustrated by the fact that the appointment of such persons is not a matter of which the constable is required to be given notice in the misconduct form.
CRC Energy Efficiency Scheme (Amendment) Order 2014 (SI 2014/502) (Rural Affairs, Climate Change and Environment Committee)

48. The Order in Council makes amendments to the UK-wide Carbon Reduction Commitment and Energy Efficiency Scheme (“CRC”). The scheme is currently set out in the CRC Energy Efficiency Scheme Order 2013 (SSI 2013/1119, “the 2013 Order”), which simplified the previous CRC scheme. This Order is intended to further simplify that scheme, from the beginning of its initial phase (1 April 2014).

49. The CRC scheme is an emissions trading scheme in respect of greenhouse gases, under the Climate Change Act 2008. It applies to direct and indirect emissions from supplies of electricity and gas by public bodies and undertakings.

50. The Order has UK extent. It was made by the Privy Council on 5 March 2014 and subsequently laid before the Scottish Parliament, the UK Parliament and the Welsh and Northern Ireland assemblies on 10 March 2014. It comes into force in all jurisdictions of the UK on 1 April 2014.

51. The Scottish Ministers provided a letter to the Presiding Officer explaining the failure to comply with the 28 day rule. The correspondence is reproduced at the Annex.

52. The letter explains that the CRC is a joint scheme with England, Wales and Northern Ireland, and that the amendments require to come into force by 1 April 2014, being the date on which the next phase of the scheme begins. The reason given for failure to comply with the 28-day rule is the late addition of amendments to the scheme as a result of parallel changes being made to the treatment of the metallurgical and mineralogical sectors under the Climate Change Levy. In addition, the Committee notes that the Government Response to the consultation on the proposed changes (published by the Department for Energy and Climate Change on behalf of the UK administrations in February 2014) clearly describes the effect of the amendments planned to be made by the Order and coming into force on 1 April 2014. Accordingly those who will be affected by the changes in April 2014 appear to have had reasonable notice of them.

53. The Committee draws the instrument to the attention of the Parliament under ground (j). The requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (ILRA) have not been complied with.

54. The Committee finds the reasons for non-compliance to be acceptable in this case, since it is the result of a decision to include an additional policy in the CRC scheme, adequate notice of which appears to have been given to participants, and it is desirable that the scheme be implemented uniformly throughout the UK at the beginning of its next phase, on 1 April 2014.
NO POINTS RAISED

55. At its meeting on 18 March 2014, the Committee considered the following instruments and determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

**Rural Affairs, Climate Change and Environment**

Tuberculosis (Scotland) Amendment Order 2014 (SSI 2014/71).
ANNEX

Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment Regulations 2014 (SSI 2014/50)

On 5 March 2014, the Scottish Government was asked:

The instrument inserts a new Regulation 4A into the Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Regulations 2003. Regulation 4A(2) provides that each member to whom a code referred to in paragraph (1) applies shall give to the standards officer a notice of interests. Is inserted Regulation 4A intended to apply to devolved public bodies which are also National Park Authorities? If so, is it accepted that Regulation 4A(2) ought to refer to the proper officer in addition to the standards officer so as to be applicable to National Park Authorities which, by virtue of Regulation 3 of the 2003 Regulations, do not have a standards officer?

If the Scottish Government accepts that the new Regulation 4A(2) ought to refer to the proper officer as well as the standards officer, would the Scottish Government propose to take action to correct this?

The Scottish Government responded as follows:

Regulation 4A is intended to apply to devolved public bodies which are also National Park Authorities. The regulation places certain duties on a member to whom a members’ code referred to in paragraph (1) applies. The term “members’ code” is defined in section 28(1) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 as meaning a code of conduct for members of a devolved public body. The term “devolved public body” is in turn defined as meaning a body listed in schedule 3 to that Act and both National Park Authorities are listed in that schedule.

It is accepted that a reference to the proper officer should have been included in regulation 4A(2) and the Scottish Government apologises for this omission. There is not, however, thought to be any possibility that a National Park Authority or a member of such a body would apply regulation 4A(2) other than by reading it as imposing a duty to give notices to the proper officer. There is therefore no intention to make an amending instrument. The drafting error can be drawn to the attention of the National Park Authorities during the process of approving their new codes of conduct under section 3 of the 2000 Act.
Town and Country Planning (Hazardous Substances) (Scotland) Amendment Regulations 2014 (SSI 2014/51)

On 5 March 2014, the Scottish Government was asked:

1. These Regulations come into force on 29 March 2014. Article 31 of the Directive 2012/18/EU provides that Article 30 (which these Regulations implement) required to be transposed into domestic law by 14 February 2014. In the absence of explanation in the documents accompanying the instrument, please explain the reason for this apparent delay in implementing the EU Directive requirements.

2. Article 30 as above has required the addition of heavy fuel oils within the list of petroleum products specified in schedule 1 to the 1993 Regulations, for which the threshold controlled quantity is a total of 2500 tonnes of petroleum product. For heavy fuel oils, this appears to provide for a significantly relaxed threshold quantity requirement before the controls in the 1993 Regulations apply. Paragraph 6 of the Policy Note explains that currently the threshold is only 100 tonnes. The transitional exemption in regulation 3 appears to permit the presence of petroleum products (gasolines and naphthas, kerosenes, gas oils and heavy fuel oils) on, over or under land during the period from 29 March to 28 September 2014 without hazardous substance (“HS”) controls, where the presence would not have required HS consent in terms of the 1993 Regulations as they have effect immediately before this instrument comes into force - and there is no increase from the maximum quantity of product on the site in the year prior to 29 March 2014.

In the absence of a full explanation accompanying the instrument, please explain therefore the effect of regulation 3, and how it will operate to transitionally exempt for 6 months the presence of petroleum products on sites from HS controls. As regulation 2 appears to provide for the significantly relaxed controlled quantity threshold for heavy fuel oils only, in what circumstances would this provision permit the presence of petroleum products on sites, which otherwise would (without the benefit of the provision) mean that an offence could be committed under section 21 of the 1997 Act, or an HS contravention notice issued?

3. Again in the absence of explanation accompanying the instrument, please explain why regulation 3 is compatible with Articles 30 and 31 of Directive 2012/18/EU. As it appears that Article 30 (and in turn the controlled quantity requirement for heavy fuel oils as a hazardous substance which that Article requires) should have been transposed within the 1993 Regulations by 14 February 2014, but the regulation permits the presence of petroleum products on sites without hazardous substance enforcement controls from 29 March 2014 to 29 September 2014, please explain why regulation 3 does not authorise any incompatibility with EU law.

The Scottish Government responded as follows:

1. With regard to the first question, a small delay in transposition arose due to competing resource pressures within the policy department at the time when the instrument was due to be laid, and because the need to liaise closely with the
Health and Safety Executive and with the UK administrations regarding the outcome of GB wide consultations had precluded an substantially earlier transposition date.

2. With regard to the second question, at present a person holding up to 2,500 tonnes of petroleum products (consisting of gasolines and naphthas, kerosenes and gas oils) does not need hazardous substances consent. That person could also hold up to 100 tonnes of heavy fuel oil (“HFO”) without consent. Regulation 3 deals with the situation where, as a result of the recategorisation of HFO, a person who does not presently need consent will need consent from 29 March 2014. For example, a person holding 2,450 tonnes of petroleum products and 80 tonnes of HFO does not need a licence on 28 March but will need one on 29 March. Regulation 3 provides for a transitional relaxation of enforcement procedures for a period of 6 months. However, the exemption from enforcement action does not apply if the quantities held increases to more than the maximum held in the previous 12 months. The Scottish Government considers it unlikely that many sites will be affected by this transitional exemption.

3. With regard to the third question, the effect of regulation 3 is not that hazardous substances consent is not needed in accordance with Article 30 of Seveso III but rather that enforcement action is restricted. The exemption does not remove the need for consent but removes the possibility that a person could suddenly on these Regulations coming into force be in the position of committing an offence under section 21 of the Planning (Hazardous Substances) (Scotland) Act 1997 and open to enforcement action despite having complied with the Town and Country Planning (Hazardous Substances) (Scotland) Regulations 1993. If these factual circumstances do arise, the transitional exemption from enforcement action will enable someone in that position to obtain the necessary consent without allowing them to increase the quantities of the relevant substances above the maximum levels which they were present since 29 March 2013. In those circumstances it is not considered that regulation 3 is incompatible with Community law.
Brucellosis (Scotland) Amendment Order 2014 (SSI 2014/63)

On 4 March 2014, the Scottish Government was asked:

Article 7(9) to be inserted into the Brucellosis (Scotland) Order 2009 by article 2(3) of the Order provides for a maximum penalty of a period of imprisonment not exceeding 6 months on summary conviction for an offence under article 7(6) of the 2009 Order. Paragraph 1 of Schedule 2 to the European Communities Act 1972 provides that the maximum custodial sentence which can be imposed in exercise of the power in section 2(2) of that Act in the case of offences which can only be tried summarily is 3 months.

If the Scottish Government agrees it is not intra vires to make such provision in the proposed article 7(9) can the Scottish Government advise what corrective action it proposes to take?

The Scottish Government responded as follows:

The Scottish Government is grateful to the Committee for drawing to our attention the error in the penalty limits. The maximum term of imprisonment that may be imposed for breach of the milk sampling provisions should indeed be three months, in accordance with paragraph 1(1)(d) of Schedule 2 to the European Communities Act 1972.

We intend to bring forward an amendment to correct this provision in time for 1 April 2014 (the coming into force date of the instrument).
**Brucellosis (Scotland) Amendment (No. 2) Order 2014 (SSI 2014/72)**

**Breach of laying requirements: letter to Presiding Officer**

The above instrument was made by the Scottish Ministers under section 2(2) of the European Communities Act 1972 on 12 March 2014. It is being laid before the Scottish Parliament today and is to come into force on 31 March 2014.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 has not been complied with. In accordance with section 31(3) of that Act, this letter explains why.

SSI 2014/72 is required to correct an error in the Brucellosis (Scotland) Amendment Order 2014 (SSI 2014/63) which was identified by the Delegated Powers and Law Reform Committee.

The Committee drew the instrument to the attention of SGLD on account that article 7(9) to be inserted into the Brucellosis (Scotland) Order 2009 by article 2(3) of SSI 2014/63 provides for a maximum penalty of a period of imprisonment not exceeding 6 months on summary conviction for an offence under article 7(6) of the 2009 Order. Paragraph 1(1)(d) of Schedule 2 to the European Communities Act 1972 provides that the maximum custodial sentence which can be imposed in exercise of the power in section 2(2) of that Act, in the case of offences which can only be tried summarily, is 3 months. It is therefore necessary to make a correction to the new provision at article 7(9) by reducing the maximum allowed period of imprisonment from 6 months to 3 months.

SSI 2014/72 requires to be laid on 14 March 2014 so as to revoke on 31 March 2014 the provision which would otherwise operate to insert the error, and to insert a new article 7(9) containing the correct penalty provision to come into force on 1 April 2014, at the same time as the remaining amendments contained in SSI 2014/63 come into force.

Given that SSI 2014/63 is due to come into force on 1 April 2014, the Scottish Government’s view is, therefore, that it is necessary to breach the 28 day laying requirement to ensure that the error identified by the DPLRC is rectified in time for the coming into force of the amendments contained in SSI 2014/63 on 1 April 2014.
Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68)

On 7 March 2014, the Scottish Government was asked:

1. Regulation 16(1) requires the deputy chief constable to appoint another constable to conduct misconduct proceedings. Regulation 16(2)(b) provides that, in the case of a misconduct meeting, a constable appointed under paragraph (1) may appoint another constable to be an assessor. Regulation 16(3)(c) provides that in the case of a misconduct hearing, a constable appointed under paragraph (1) may appoint as an assessor another constable and an advocate or a solicitor. Regulation 16(6) provides that the constable who is the subject of the misconduct proceedings may object to the appointment of any person under that Regulation. Paragraph 7 states that such an objection must be made no later than three working days from receipt of the misconduct form, sent by virtue of Regulation 15(2), and must indicate the constable’s reasons for objecting.

Regulation 15(3) states the information required to be contained in a misconduct form sent by virtue of Regulation 15(2). In particular, paragraph (3)(h) requires the name of the person appointed to conduct the misconduct proceedings under Regulation 16(1) to be disclosed to the constable. There is no provision in Regulation 15(3) requiring the name of any person appointed as an assessor under regulation 16(2)(b) or, as the case may be, (3)(c), to be disclosed in the misconduct form. Given that the misconduct form appears to be the principal means by which a constable may learn of the appointment of a person under Regulation 16 to which he or she may object in the terms of Regulation 16(7), does the Scottish Government consider that the name of any person appointed as an assessor ought to be included within Regulation 15(3) as a matter of which the constable is required to be given notice? In this regard, I note that similar provision is made in the Police Service of Scotland (Performance) Regulations (SSI 2014/67). Regulation 33(2) of those Regulations refers to “the persons appointed under regulation 32(1) and (2)” as a matter of which the constable must be given notice in terms of Regulation 33 and to which he or she may object under Regulation 32(4). It would seem to be clear in that context that it is the appointment of both the chairing constable and any adviser appointed to assist the hearing that may be objected to by the constable under Regulation 32(4).

2. Regulation 7 permits a constable to be represented by a solicitor or advocate of his or her choice at any misconduct hearing or appeal hearing (provided that the appeal relates to the outcome of a misconduct hearing). By virtue of Regulation 2, “appeal hearing” means a hearing held to determine an appeal under Regulation 24. Regulation 25 concerns the procedure to be followed in an appeal under Regulation 24. In particular, Regulation 25(8) provides that an appeal hearing is to be conducted in such manner as the person determining the appeal determines, subject to Regulations 25(8)(a) to (c). Regulation 25(8)(b) provides that in a case where any disciplinary action mentioned in Regulation 22(3)(d) to (f) has been ordered, any advocate or solicitor representing the constable must be permitted to attend. The Scottish Government is asked to explain the relationship between Regulation 7 and Regulation 25(8)(b), and in particular, whether the latter is intended to qualify the former, given that Regulation 7 expressly permits legal representation of a constable in any appeal hearing,
whereas Regulation 25(8)(b) would appear to contemplate the possibility that legal representation may not be permitted in some appeal hearings.

**The Scottish Government responded as follows:**

1. For the right in regulation 16(6) to object to the appointment of an assessor to be effective, plainly the constable must be informed of the identity of that assessor. However, the Scottish Government does not consider that the lack of a statutory obligation to name the assessor in the misconduct form creates a barrier to the effective exercise of that right.

Regulation 15(3) lists the information which must be contained in a misconduct form. The list is not exhaustive and so further relevant information may be recorded in that form. Equally, information may be transmitted to the constable otherwise than by means of the misconduct form (e.g. by a covering letter sent with that form). It is anticipated that Police Service guidance and the Standard Operating Procedures to which all constables must adhere will require the constable to be informed timeously where an assessor has been appointed so that the right in regulation 16(6) may be exercised.

2. The policy intention is that the constable should be entitled to legal representation where there is a possibility that the constable may be demoted or dismissed. So a constable may be legally represented at a misconduct hearing (where those sanctions are available) or at an appeal hearing at which those sanctions may be upheld (being, necessarily, an appeal against the outcome of a misconduct hearing).

Regulation 7 makes general provision about legal representation which allows for this and establishes a process for notifying an intention to be legally represented. Regulation 25 then goes on to make specific provision about all aspects of the process to be followed at an appeal hearing. It confers a general discretion on the person determining the appeal to decide how the appeal hearing should be conducted, but subjects that to a number of express qualifications. One of those is that the constable’s legal representative must be permitted to attend where the appeal concerns a misconduct hearing at which demotion or dismissal has been ordered. The corollary is that, at the discretion of the person determining the appeal, the constable’s legal representative need not be permitted to attend if no such action was imposed at the misconduct hearing. To that extent, regulation 25(8)(b) can be seen as qualifying regulation 7.

While we are grateful to the Parliament for raising this point and agree that regulation 7 might have been expressed more narrowly to put the position beyond any doubt, the Scottish Government considers that the result of regulations 7 and 25 taken together is sufficiently clear. We will, however, consider whether any further clarification would be beneficial at the next available opportunity.
CRC Energy Efficiency Scheme (Amendment) Order 2014 (SI 2014/502)

Breach of laying requirements: letter to Presiding Officer

The CRC Energy Efficiency Scheme (Amendment) Order 2014 is being laid before the Scottish Parliament today, and will come into force on 1 April 2014.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) has not been complied with.

To meet the requirements of section 31(3) that Act, this letter explains why.

Reason for non-compliance

The Amending Order is the final part of CRC simplification and brings new benefits to participants in terms of increased recognition of onsite, self-supplied renewables, and the removal of CRC liabilities that may occur as a result of changes being made to the treatment of metallurgical and mineralogical (met/min) sectors under the Climate Change Levy (CCL). It also clarifies some aspects of the Order for participants.

The CRC is a partly devolved matter on which the Scottish Government work very closely with the UK Government and the other devolved administrations. The Regulations must be made in all four Parliaments/Assemblies at the same time. The timetable for the Amending Order has been very tight, owing to the late addition by the UK Government of the CCL issue delaying the start of the process, and the 1 April start date for the next phase of the CRC imposing an end date.

Any delay in making the changes beyond the start of the next phase of the CRC on 1 April 2014 would cause significant difficulties for government, and for undertakings that require to account for energy use under the Scheme. For example, we assess that the Amending Order would need to be re-drafted to include transitional arrangements, and that undertakings would need to account for emissions in phase 1 under two different accounting regimes. In policy terms, this would run counter to the core aims of simplification of the scheme, and effective use of resources.

Paul Wheelhouse, Minister for the Environment and Climate Change, wrote to the RACCE and DPLRC committees on 18 February advising them of the imminence of the laying of the Order and the reasons for our needing to breach Section 28(2) of the Interpretation and Legislative Reform Act.
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