



The Scottish Parliament  
Pàrlamaid na h-Alba

**JUSTICE COMMITTEE**

**AGENDA**

**10th Meeting, 2014 (Session 4)**

**Tuesday 25 March 2014**

The Committee will meet at 10.00 am in Committee Room 2.

1. **Decision on taking business in private:** The Committee will decide whether to take item 4 in private.
2. **Courts Reform (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Louise Johnson, National Worker - Legal Issues, Scottish Women's Aid;

Paul Brown, Principal Solicitor/Chief Executive, Legal Services Agency;

Sally Swinney, Chair, and Karen Gibbons, Vice Chair, Family Law Association;

and then from—

Alan Rogerson, Forum of Scottish Claims Managers;

Dave Moxham, Deputy General Secretary, Scottish Trades Union Congress;

Ronnie Conway, Co-ordinator in Scotland, Association of Personal Injury Lawyers;

Robert Milligan QC, Compass Chambers.

3. **Subordinate legislation:** The Committee will consider the following negative instruments—

Firemen's Pension Scheme (Amendment) (Scotland) Order 2014 (SSI 2014/59);

Firefighters' Pension Scheme (Scotland) Amendment Order 2014 (SSI 2014/60);

Police Pensions (Contributions) Amendment (Scotland) Regulations 2014 (SSI 2014/62);

Police Service of Scotland (Performance) Regulations 2014 (SSI 2014/67);

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

4. **Courts Reform (Scotland) Bill:** The Committee will further consider its approach to the scrutiny of the Bill at Stage 1.

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The papers for this meeting are as follows—

**Agenda item 2**

Private paper

J/S4/14/10/1 (P)

[Courts Reform \(Scotland\) Bill, accompanying documents and SPICe briefings](#)

[Written submissions received on the Bill](#)

**Agenda item 3**

Paper by the clerk

J/S4/14/10/2

[Firemen's Pension Scheme \(Amendment\) \(Scotland\) Order 2014 \(SSI 2014/59\)](#)

[Firefighters' Pension Scheme \(Scotland\) Amendment Order 2014 \(SSI 2014/60\)](#)

[Police Pensions \(Contributions\) Amendment \(Scotland\) Regulations 2014 \(SSI 2014/62\)](#)

[Police Service of Scotland \(Performance\) Regulations 2014 \(SSI 2014/67\)](#)

[Police Service of Scotland \(Conduct\) Regulations 2014 \(SSI 2014/68\)](#)

**Agenda item 4**

Private paper

J/S4/14/10/3 (P)

**Justice Committee**

**10<sup>th</sup> Meeting, 2013 (Session 4), Tuesday 25 March 2014**

**Subordinate legislation**

**Note by the clerk**

**Purpose**

1. This paper invites the Committee to consider the following negative instruments:
  - Firemen’s Pension Scheme (Amendment) (Scotland) Order 2014 (SSI 2014/59);
  - Firefighters’ Pension Scheme (Scotland) Amendment Order 2014 (SSI 2014/60);
  - Police Pensions (Contributions) Amendment (Scotland) Regulations 2014 (SSI 2014/62);
  - Police Service of Scotland (Performance) Regulations 2014 (SSI 2014/67);
  - Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68).
2. Further details on the procedure for negative instruments are set out in Annexe A attached to this paper.

**Firemen’s Pension Scheme (Amendment) (Scotland) Order 2014 (SSI 2014/59)**

**Firefighters’ Pension Scheme (Scotland) Amendment Order 2014 (SSI 2014/60)**

**Introduction**

3. The purpose of these instruments is to increase members’ contribution rates in public service pension schemes in accord with the 2010 UK Spending Review. This Review set out the UK Government’s intention to increase members’ contribution rates in public service pension schemes by an average of 3.2 per cent of pay by April 2014 with the increases spread across three years. The first increase was applied with effect from 1 April 2012 and also introduced “tiered” contribution rates which reflect that higher earners generally receive larger scheme benefits from final salary defined benefit schemes. Following further consideration of this policy and whether there were any viable alternatives, Scottish Ministers determined to apply the second round of increases. The Cabinet Secretary for Finance Employment and Sustainable Growth confirmed on 5 November 2013 that the third increase would be implemented from 1 April 2014.
4. The instruments come into force on 1 April 2014.
5. Further details on the purpose of the instruments can be found in the policy note (see below). Electronic copies of the instruments are available at:

<http://www.legislation.gov.uk/ssi/2014/59/contents/made>  
<http://www.legislation.gov.uk/ssi/2014/60/contents/made>

## **Consultation**

6. The policy note on the instrument confirms that a formal consultation was issued to representatives of firefighters and employers and relevant Scottish and UK Government Departments and that unions remain opposed in principle to any increases to members' contributions (three responses to the consultation were received).

## **Delegated Powers and Law Reform Committee consideration**

7. The Delegated Powers and Law Reform (DPLR) Committee considered these instruments at its meeting on 11 March 2014 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

## **Justice Committee consideration**

8. If the Committee agrees to report to the Parliament on these instruments, it is required to do so by 21 April 2014. Therefore, the Committee has the opportunity to return to these instruments at its meeting next week on 1 April 2014.

## **Policy Note:**

**Firemen's Pension Scheme (Amendment) (Scotland) Order 2014 (SSI 2014/59)**  
**Firefighters' Pension Scheme (Scotland) Amendment Order 2014 (SSI 2014/60)**

The above instruments were made in exercise of the powers conferred by the preserved section 26 (1) to (5) of the Fire Services Act 1947 and sections 34 and 60 of the Fire and Rescue Services Act 2004. Functions under these Acts as regards Scotland have been executively devolved to the Scottish Ministers. The instruments are subject to negative procedure.

## **Policy Objectives**

The Firemen's Pension Scheme Order 1992 (SI 1992/129) and the Firefighters' Pension Scheme (Scotland) Order 2007 (SSI 2007/199) require members of both firefighter pension Schemes to pay contributions to the relevant Scheme as a condition of membership. Although the Scottish Ministers have certain responsibilities in relation to the fire schemes, wider policy for occupational pensions is reserved to the UK Government.

The 2010 UK Spending Review set out the UK Government's intention to increase members' contribution rates in public service pension schemes by an average of 3.2 per cent of pay by April 2014 with the increases spread across three years. The first increase was applied with effect from 1 April 2012 and also introduced "tiered" contribution rates which reflect that higher earners generally receive larger scheme benefits from final salary defined benefit schemes. Following further consideration of this policy and whether there were any viable alternatives, Scottish Ministers determined to apply the second round of increases.

The Cabinet Secretary for Finance Employment and Sustainable Growth, John Swinney MSP, confirmed on 5 November 2013 that the third increase would be implemented from 1 April 2014 and the above instruments make provision for these increases.

### **Consultation**

A formal consultation was undertaken from 27 January to 14 February 2014. The consultation was issued to representatives of firefighters and employers and relevant Scottish and UK Government Departments. Unions remain opposed in principle to any increases to members' contributions. 3 responses were received to the consultation and a summary of the consultation responses will be made available on the Scottish Public Pensions Agency website [www.sppa.gov.uk](http://www.sppa.gov.uk).

### **Impact Assessments**

An equality impact statement on the introduction of this policy is being finalised and will reflect these instruments.

### **Financial Effects**

The increases are designed to raise on average increases in employees' contributions of 3.2% by April 2014 as part of the UK Government's policy Business and Regulatory Impact Assessment.

### **Business and Regulatory Impact Assessment**

This policy introduces the final of three increases to employee scheme contributions. The limited available data indicates the number of opt outs from the Schemes has not been affected by this policy. No Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Public Pensions Agency  
An Agency of the Scottish Government  
February 2014

## **Police Pensions (Contributions) Amendment (Scotland) Regulations 2014 (SSI 2014/62)**

### **Introduction**

9. The purpose of the instrument is to increase members' contribution rates in public service pension schemes in accord with the 2010 UK Spending Review.

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

11. Further details on the purpose of the instrument can be found in the policy note (see below). An electronic copy of the instrument is available at:

<http://www.legislation.gov.uk/ssi/2014/62/contents/made>

## Consultation

12. The policy note on the instrument confirms that a formal consultation was issued to representatives of police officers and employers, including the Police Negotiating Board, and relevant Scottish and UK Government Departments, and that staff associations remain opposed to any increases to members' contributions (680 responses to the consultation were received).

## Delegated Powers and Law Reform Committee consideration

13. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 11 March 2014 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

## Justice Committee consideration

14. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 21 April 2014. Therefore, the Committee has the opportunity to return to this instrument at its meeting next week on 1 April 2014.

## **Policy Note: Police Pensions (Contributions) Amendment (Scotland) Regulations 2014 (SSI 2014/62)**

The above instrument was made in exercise of the powers conferred by section 1 of the Police Pensions Act 1976. Functions under that Act as regards Scotland have been executively devolved to the Scottish Ministers. The instrument is subject to negative procedure.

## Policy Objectives

The Police Pension Regulations 1987 (SI 1987/257) and the Police Pensions (Scotland) Regulations 2007 (SSI 2007/201) require members of both police pension schemes to pay contributions to the relevant Scheme as a condition of membership. Although the Scottish Ministers have certain responsibilities in relation to the police schemes, wider policy for occupational pensions is reserved to the UK Government.

The 2010 UK Spending Review set out the UK Government's intention to increase members' contribution rates in public service pension schemes by an average of 3.2 per cent of pay by April 2014 with the increases spread across three years. The first increase was applied with effect from 1 April 2012 and also introduced "tiered" contribution rates which reflect that higher earners generally receive larger scheme benefits from final salary defined benefit schemes. Following further consideration of this policy and whether there were any viable alternatives, Scottish Ministers determined to apply the second round of increases.

The Cabinet Secretary for Finance Employment and Sustainable Growth, John Swinney MSP, confirmed on 5 November 2013 that the third increase would be implemented from 1 April 2014 and the above instrument makes provision for these increases.

## Consultation

To comply with the requirements of section 1 (1) of the Police Pensions Act 1976 a formal consultation was undertaken which included the Police Negotiating Board from 27 January to 14 February 2014. The consultation was issued to representatives of police officers and employers and relevant Scottish and UK Government Departments. Staff associations remain opposed to any increases to members' contributions. 680 responses were received to the consultation and a summary of the consultation responses will be made available on the Scottish Public Pensions Agency website [www.sppa.gov.uk](http://www.sppa.gov.uk).

## Impact Assessments

An equality impact statement on the introduction of this policy is being finalised and will reflect this instrument.

## Financial Effects

The increases are designed to raise on average increases in employees' contributions of 3.2% by April 2014 as part of the UK Government's policy.

## Business and Regulatory Impact Assessment

This policy introduces the final of three increases to employee scheme contributions. The limited available data indicates the number of opt outs from the Schemes has not been affected by this policy. No Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Public Pensions Agency  
An Agency of the Scottish Government  
February 2014

## Police Service of Scotland (Performance) Regulations 2014 (SSI 2014/67)

### Introduction

15. The purpose of the instrument is to introduce a new definition of unsatisfactory performance as "an inability or failure of the constable to perform the duties of the constable's role or rank (or both) to a satisfactory standard."

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

17. Further details on the purpose of the instrument can be found in the policy note (see below). An electronic copy of the instrument is available at: <http://www.legislation.gov.uk/ssi/2014/67/contents/made>

### Consultation

18. The policy note on the instrument confirms that key policing stakeholders have been involved in a working group to discuss and agree the main policy changes to the regulations and that a draft of the Regulations was issued for consultation to a range of policing stakeholders.

## **Delegated Powers and Law Reform Committee consideration**

19. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 11 March 2014 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

## **Justice Committee consideration**

20. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 21 April 2014. Therefore, the Committee has the opportunity to return to this instrument at its meeting next week on 1 April 2014.

## **Policy Note: Police Service of Scotland (Performance) Regulations 2014 (SSI 2014/67)**

1. The above instrument was made in exercise of the powers conferred under sections 48 and 125(1) of the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”). This instrument is subject to the negative procedure.

## **Policy Objectives**

2. The Police Service of Scotland (Performance) Regulations 2014 (“the 2014 Regulations”) create a process for managing the unsatisfactory performance of constables of the Police Service of Scotland that aims to be flexible, fairer and less bureaucratic than the procedures currently in place under the Police Service of Scotland (Performance) Regulations 2013 (“the 2013 Regulations”).

3. In introducing these procedures, the Police Service of Scotland will encourage managers to take responsibility for supporting the performance of their staff through informal action before turning to formal procedures, and following formal action to help them reach the standards of performance required in the office of constable. A separate guidance document will be published by the Scottish Government that will set out the principles and procedures behind the regulatory processes. This guidance has the full agreement of the main policing stakeholders.

4. The 2014 Regulations introduce a new definition of unsatisfactory performance as:  
“an inability or failure of the constable to perform the duties of the constable’s role or rank (or both) to a satisfactory standard.”

5. While the basic procedures set out in the 2014 Regulations are similar to those in the 2013 Regulations, several refinements have been made to introduce further flexibility, fairness and clarity to the performance process.

6. For example, an appeals process is introduced at each stage. This allows the subject constable to have any concerns about the process considered by a more senior manager, allowing a fairer outcome and avoiding unnecessary recourse to further performance procedures.

7. A more descriptive name is given to each stage in the process to emphasise the purpose of that stage. We have replaced first interview, second interview and



inefficiency hearing with performance meeting, progress meeting and performance hearing. The 2014 Regulations also set out that a date must be set for the officer to improve their performance “the improvement period” and that the officer must maintain that performance during a “validity period”. These changes will set clear time periods for the subject officer to reach an acceptable level of performance and show that this level must be maintained. The guidance backs up the 2014 Regulations by setting out the manager’s role in monitoring performance and working with the subject officer to improve their performance.

8. A more flexible process has been created for the final appeal, an appeal against the finding at performance hearing, which takes account of the management structures set out within the Police Service of Scotland. An appeal can now be heard by a Senior Officer, rather than the Chief Constable under the 2013 regulations, and the subject officer can request an appeal hearing to give them the opportunity to give supporting evidence in front of the officer hearing the appeal.

9. Throughout the 2014 Regulations new timescales have been set that give the subject officer and the Police Service of Scotland the appropriate opportunity to prepare for the different stages set out in the regulations.

### **Consultation**

10. The key policing stakeholders have been involved in a working group to discuss and agree the main policy changes to the regulations.

11. In accordance with section 54(2) of the 2012 Act, a draft of the Regulations was issued for consultation to the range of policing stakeholders listed below, from 26 August 2013 to 30 September 2013, and Scottish Ministers have taken account of the representations made:

- Association of Scottish Police Superintendents
- Chief Constable of the Police Service of Scotland
- Gay Police Association
- National Transgender Policing Association
- Scottish Chief Police Officers' Staff Association (representing senior police officers)
- Scottish Police Authority
- Scottish Police Federation
- Scottish Police Muslim Association
- Scottish Women's Development Forum
- SEMPER Scotland

### **Impacts**

12. No financial or equality issues were raised during the consultation with stakeholders and therefore no impact assessment has been prepared for these regulations.

Scottish Government  
Safer Communities Directorate  
February 2014

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

### **Introduction**

21. The purpose of the instrument is to introduce procedures which are more akin to modern employment practices and take into account ACAS principles. The Regulations set out the “Standards of Professional Behaviour” that constables should maintain during their service.

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

23. Further details on the purpose of the instrument can be found in the policy note (see below). An electronic copy of the instrument is available at:

<http://www.legislation.gov.uk/ssi/2014/68/contents/made>

### **Consultation**

24. The policy note on the instrument confirms that key policing stakeholders have been involved in a working group to discuss and agree the main policy changes to the regulations and that a draft of the Regulations was issued for consultation to a range of policing stakeholders.

### **Delegated Powers and Law Reform Committee consideration**

25. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meetings on 11 and 18 March 2014 and agreed to draw the instrument to the attention of the Parliament for the reason that 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.

26. In responding to this point, the Scottish Government acknowledged that regulation 7 could have been expressed more narrowly but that the result of regulations 7 and 25 taken together is sufficiently clear. However, they agreed to consider whether any further clarification would be beneficial at the next available opportunity.

27. In addition, the DPLR Committee agreed to draw regulations 15 and 16 to the attention of the Committee, suggesting that the 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.

28. The Scottish Government’s response indicates that they do not consider that the lack of a statutory obligation to name the assessor in the misconduct form creates a barrier to effective exercise of that right. They highlight that the list set out in regulation 15(3) of information that must be contained in a misconduct form is not exhaustive and so further information may be recorded in the form. In addition, they note that

information may be transmitted by means other than the form. Finally, they indicate that 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 the right in regulation 16(6) may be exercised.

29. The relevant extract from the DPLR Committee's report on the instrument is reproduced on page 11 of this paper.

### **Justice Committee consideration**

30. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 21 April 2014. Therefore, the Committee has the opportunity to return to this instrument at its meeting next week on 1 April 2014.

### **Policy Note: Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68)**

1. The above instrument was made in exercise of the powers conferred under sections 48 and 125(1) of the Police and Fire Reform (Scotland) Act 2012 ("the 2012 Act"). This instrument is subject to the negative procedure.

### **Policy Objectives**

2. The Police Service of Scotland (Conduct) Regulations 2014 ("the 2014 Regulations") modernise the process for managing misconduct by constables in the Police Service of Scotland and replace the procedures currently in place under the Police Service of Scotland (Conduct) Regulations 2013 ("the 2013 Regulations").

3. The 2014 Regulations introduce procedures which are more akin to modern employment practices and take into account ACAS principles; they are also part of a wider change to the handling of complaints and conduct within the Police Service of Scotland. These procedures will deal with complaints and conduct matters quickly, normally by first line managers, with the aim of resolving low level issues before they are escalated into the formal misconduct procedures.

4. The 2014 Regulations set out the "Standards of Professional Behaviour" that constables should maintain during their service and it is breaches of these standards that constitute misconduct. Serious breaches of the standards will amount to "gross misconduct" and may lead to demotion in rank or dismissal from the Service. The 2013 Regulations focused on a list of conduct issues that would constitute misconduct rather than looking at the overall standards expected of a constable.

5. The 2013 Regulations also looked at minor and trivial misconduct and allowed the Deputy Chief Constable to give an officer a warning, without the right of a full hearing or an appeal. The 2014 Regulations do not allow any sanctions without the right of appeal and where there has been any low level misconduct, and the Deputy Chief Constable deems that an investigation is not required, this will only result in improvement action which does not constitute a sanction to be kept on an officer's record.

6. The introduction of "misconduct proceedings" allows the Deputy Chief Constable to deal with different levels of misconduct either through a "misconduct

meeting” for allegations of misconduct or through a “misconduct hearing” for allegations of gross misconduct. These procedures make it clear to the subject officer the severity of the allegation and that a “misconduct hearing” may lead to their dismissal from the service.

7. While the hearings under the 2013 Regulations were conducted in an adversarial fashion and had become akin to criminal trials, the meetings and hearings under the 2014 Regulations will aim to establish the truth and give the subject officer a fair opportunity to make his/her case having considered the “Investigation Report”, any supporting documents, and all other relevant factors.

8. The disciplinary action that is now available to the person conducting the misconduct proceedings allows them to consider the evidence put before them and take a balanced view that can take into account mitigating factors. The full range of disciplinary action can be used for all proceedings whereas the 2013 Regulations did not allow warnings to be given under the disposals available following a hearing.

9. A more flexible process has been created for an appeal against the findings of the misconduct proceedings which takes account of the management structures set out within the Police Service of Scotland. An appeal can now be heard by a constable of a higher rank than the subject officer (an appeal under the 2013 Regulations was always heard by the Chief Constable).

10. Throughout the 2014 Regulations new timescales have been set that give the subject officer and the Police Service of Scotland the appropriate opportunity to prepare for the different stages set out in the regulations.

## **Consultation**

11. The key policing stakeholders have been involved in a working group to discuss and agree the main policy changes to the regulations.

12. In accordance with section 54(2) of the 2012 Act, a draft of the Regulations was issued for consultation to the range of policing stakeholders listed below, from 26 August 2013 to 30 September 2013, and Scottish Ministers have taken account of the representations made:

- Association of Scottish Police Superintendents
- Chief Constable of the Police Service of Scotland
- Gay Police Association
- National Transgender Policing Association
- Scottish Chief Police Officers' Staff Association (representing senior police officers)
- Scottish Police Authority
- Scottish Police Federation
- Scottish Police Muslim Association
- Scottish Women's Development Forum
- SEMPER Scotland

## Impacts

13. No financial or equality issues were raised during the consultation with stakeholders and therefore no impact assessment has been prepared for these regulations.

Scottish Government  
Safer Communities Directorate  
February 2014

### *Extract from the Delegated Powers and Law Reform Committee 23<sup>rd</sup> Report 2014*

#### **Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68) (Justice Committee)**

1. 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.
2. In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in the Appendix.
3. 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.
4. 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.
5. 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).
6. 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.
7. **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.**

8. 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).

9. 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).

10. 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.

11. 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.

12. 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.

**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.**

**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.



**ANNEXE A****Negative instruments: procedure**

Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).

Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.

If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.

Each negative instrument appears on the Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

**Guidance on subordinate legislation**

Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee’s web page at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/64215.aspx>