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Delegated Powers and Law Reform Committee

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

- 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; and
- i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 23 February 2016, the Committee agreed to draw the attention of the Parliament to the following instruments—
 - Utilities Contracts (Scotland) Regulations 2016 (SSI 2016/49)
 - Police Service of Scotland (Senior Officers) (Performance) Regulations 2016 (SSI 2016/51)
 - Concession Contracts (Scotland) Regulations 2016 (SSI 2016/65)
 - Seed (Licensing and Enforcement etc.) (Scotland) Regulations 2016 (SSI 2016/68)
 - Education (Fees, Awards and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2016 (SSI 2016/82)
2. The Committee's recommendations in relation to the above instruments are set out below.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments which are set out at the end of this report.

Points raised: instruments subject to negative procedure

Utilities Contracts (Scotland) Regulations 2016 (SSI 2016/49) (Infrastructure and Capital Investment)

4. These Regulations revoke and replace the Utilities Contracts (Scotland) Regulations 2012. Parts 1 to 4 implement, for Scotland, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors. These Parts impose obligations on utilities in relation to how they award contracts for the execution of works, the supply of products or the provision of services.
5. The Regulations make provision for how utilities should calculate the estimated value of a contract, for the purpose of determining whether or not the procurement requirements of the Regulations apply. They also set out various exclusions from the application of the Regulations, and set out the tests which utilities must apply, to determine which provisions apply where a contract contains elements which would be subject to these Regulations, and elements which would not.
6. The Regulations implement Directive 2014/25/EU, in setting out procedural rules for procurement exercises, the circumstances in which a business may be excluded from bidding for public contracts, the basis on which contracts may be awarded, and the circumstances in which contracts may be modified.
7. Part 5 of the Regulations makes provision for remedies in the case of breach of the requirements laid down by the Regulations.
8. The Regulations are subject to the negative procedure. Most of the provisions come into force on 18 April 2016. Certain provisions as to electronic communications come into force on 18 April 2017, and (for other purposes) on 18 October 2018.
9. The Committee sought explanation in relation to some drafting errors in the instrument. The correspondence is reproduced at Annexe A. The errors are set out in paragraphs 16 and 17 below.
10. The Scottish Government has considered that despite those errors the instrument is sufficiently clear as to its intended effect. It has proposed that the errors would be corrected by means of a correction slip. The use of a correction slip would require to be agreed between the Scottish Government and the Queen's Printer for Scotland. A correction slip would have the effect of adjusting the copy version of the instrument which appears on www.legislation.gov.uk, and further officially printed copies of the instrument, but it would not correct the original, signed instrument.

11. The Committee has not agreed that a correction slip is appropriate in this instance. Initially, it notes that several drafting errors appear in the operative provisions of the instrument. Generally, for a correction slip to be properly employed in relation to an error in the operative provisions, it should be an obvious, small scale, typing error. The error must (depending on what the SSI provides for) be self-evident, upon a very high test.
12. The Committee has not agreed that the repeated error which is set out at paragraph 16 below, which relates to a repeated mistake in not using the accurately defined term in the instrument, meets the very high test for correction by means of a slip. The Committee has taken into account that the term “services contract”, where incorrectly used in the instrument instead of “service contract”, is a significant term. The Committee has also taken into account that the definition of “service contract”, which is properly used in regulation 2(1), does not only refer to a contract which has as its object the provision of services. The definition expressly excludes contracts for the provision of services which are referred to in the definition of “works contract”, in regulation 2(1). Further, the error in referring to “services contract” occurs within the separate definition of “contract” in regulation 2(1), which is also a significant definition for the purposes of the whole instrument.
13. In relation to the minor error in regulation 3(1) which is explained in paragraph 16 below, the Scottish Government has confirmed that it is intended that “or to” in that provision should be read as “or for”. Again the Government has proposed to use a correction slip to adjust this error on the copy of the instrument which appears on legislation.gov.uk, and further official copies of the instrument. Again the Committee has not agreed that this particular error should be adjusted by means of a correction slip.
14. In particular the Committee has considered that it is not highly self-evident which word or words ought to be substituted for the erroneous word “to” in the provision. It might be “for”, as the Scottish Government claims. But equally it might be “on”, or “in relation to” – or some other words might have been omitted within the provision. The Committee has not agreed that a correction slip should be employed in this situation, where there are different options as to which word or words require to be substituted for an erroneous word, to give the provision its correct meaning.
15. **The Committee therefore draws the Regulations to the attention of the Parliament on the general reporting ground, as they contain some drafting errors.**
16. **Firstly, “services contract” is a significant term within the Regulations, which is referred to in regulations 2(1) (definition of “contract”), 35(3)(c), 61(1)(a), 77(10), 85(4)(b), and 85(8)(a) and (b). Those provisions should have referred to “service contract”, which is the term defined within regulation 2(1).**

- 17. Secondly, there is a minor error in regulation 3(1), which introduces the subject matter and application of the Regulations. The reference to “procedures for procurement for the award of a contract, or *to* the organisation of a design contest” is an error (italics added). The Scottish Government intends that “to” should be read as “for” in the provision. It is not self-evident however that that particular word should be read into the provision.**
- 18. The Committee does not agree with the Scottish Government’s proposal that these errors within the operative provisions of the instrument should be corrected by means of a correction slip. The Committee calls on the Scottish Government to lay an amending instrument to correct them, as soon as possible.**

Police Service of Scotland (Senior Officers) (Performance) Regulations 2016 (SSI 2016/51) (Justice)

19. This instrument provides for the procedures for dealing with cases where the performance of a constable of the Police Service of Scotland at or above the rank of assistant chief constable is considered to be unsatisfactory.
20. The instrument is subject to the negative procedure and comes into force on 1 April 2016.
21. The Committee sought explanation in relation to two drafting errors in the instrument, as set out in paragraphs 23 and 24 below. The correspondence is reproduced at Annexe B.
22. **The Committee draws the Regulations to the attention of the Parliament on the general reporting ground, as they contain two separate drafting errors, as follows:**
23. **Firstly, there is an error in regulation 17, in that the references to “the chief constable” in paragraph (8)(a) and (b) should instead be references to “the senior officer”.**
24. **Secondly, there is an omission in that the reference to the “Conduct Regulations” in the definition of “misconduct hearing” in rule 2 of the Police Appeals Tribunals (Scotland) Rules 2013 (“the Rules”) requires to be updated to refer instead to the “2014 Conduct Regulations”. This is required in consequence of other changes to the Rules made by the Regulations.**
25. **The Scottish Government has acknowledged these errors, and has undertaken to lay an amending instrument to deal with these points as soon as is reasonably practicable.**

Concession Contracts (Scotland) Regulations 2016 (SSI 2016/65) **(Infrastructure and Capital Investment)**

26. These Regulations implement, for Scotland, a Directive 2014/23/EU on the award of concession contracts. They impose obligations and specify procedures in respect of the award of a concession contract by contracting entities (which term normally includes contracting authorities and utilities). In particular—
- Part 1 sets out the meaning of certain concession contracts.
 - Part 2 sets out the scope of the Regulations (including reference to activities and to thresholds based on the estimated value of the procurement), and lays down some general principles applicable to a procurement within the scope of the Regulations.
 - Part 3 sets out rules to be followed in relation to the procurement procedure, and for making an award of a concession contract.
 - Part 4 makes provision for rules for the performance of a concession contract.
 - Part 5 contains provisions about remedies (and their facilitation) in relation to a procurement exercise within the Regulations.
 - Part 6 imposes requirements for monitoring, reporting on and reviewing the Regulations. Part 7 makes transitional and savings provisions, including provision for certain procurements commenced before the Regulations come into force.
27. The Regulations are subject to the negative procedure. In accordance with regulation 1, most of the provisions come into force on 18 April 2016.
28. In considering the instrument, the Committee sought explanation as to several drafting errors in the Regulations. The errors include incorrect references to EU legislation, errors in using significant, defined terms in the instrument, and a patently incorrect date used in a transitional provision. The errors are detailed in the following paragraphs. The correspondence is reproduced at Annexe C.
29. The Committee has considered that some of the errors are serious ones, and should be reported to the Parliament as apparent defective drafting. Other drafting errors are more minor, and so are reported under the Committee's general reporting ground (in accordance with rule 10.3.1 of the Standing Orders). The Scottish Government has however acknowledged the various drafting errors, and has undertaken to lay an amending instrument to correct them.

30. The Committee therefore draws the Regulations to the attention of the Parliament under the following reporting grounds, as they contain various drafting errors:
31. Firstly on ground (i), as the following provisions appear to be defectively drafted.
32. Paragraph 2 of the preamble narrates that the instrument makes “ambulatory references”ⁱ to 11 Directives, EC Regulations or Commission Decisions, so that those measures are to be construed as amended from time to time. The operative provisions of the instrument have omitted to make all of these ambulatory references apart from one (in regulation 32(18), relative to Directive 1999/93/EC).
33. The definition in regulation 2(1) of “contracting body” should have been a definition of “contracting entity”, meaning a contracting authority or utility. “Contracting entity” is an expression used many times in the instrument.
34. Regulation 63(1) makes transitional provision, where a procurement was commenced before 18th April 2016. The provision contains an exception which refers to regulation 47(1)(a) to (3). This exception should have covered the circumstances set out in regulation 47(1)(a), (2) and (3) (termination of concession contracts), and so not the circumstances set out in regulation 47(1)(b) and (c).
35. Regulation 63(2) makes a saving provision, where a procurement was commenced before 18th April 2016. The provision contains an exception in respect of a “service concession contract”. It was intended to refer to a “services concession contract” as defined by regulation 3(3). A “service concession” has a different meaning, contained in the “Concession Contracts Directive” 2014/23/EU, and that meaning is applied by virtue of regulation 2(2).
36. Secondly, on the general ground as the following provisions contain other drafting errors.
37. In regulation 51(5), there is a patent error as “GPS economic operator” is defined, but the term used in the regulation is “GPA economic operator”.
38. Regulation 64(2) makes a transitory provision before the full commencement of regulation 32(1) to (7), which contains rules as to electronic means of communication. There is a patent error, as the provision applies during a

ⁱ An “ambulatory reference” is in essence a reference to legislation which may be updated or amended at a later date. Some legislation may be amended over time. Properly using an ambulatory reference has the effect that the latest amended version of the legislation, rather than the version of legislation at the time when the instrument containing the reference was made, is referred to. An “ambulatory reference” could be said, therefore, to future proof the reference to legislation in an instrument.

period beginning on 18th April “2106” rather than 2016, which is the commencement date of most of the provisions of the Regulations.

- 39. The Scottish Government has acknowledged the various errors, and has undertaken to lay an amending instrument to correct them. The amendment would also come into force on 18 April 2016.**

Seed (Licensing and Enforcement etc.) (Scotland) Regulations 2016 (SSI 2016/68) (Rural Affairs, Climate Change and Environment)

40. This instrument makes provision in relation to the licensing of individuals involved in the marketing, inspection and analysis of seeds. The instrument revokes and replaces the Seeds (Registration, Licensing and Enforcement) (Scotland) Regulations 2006 (“the 2006 Regulations”).
41. In considering the instrument, the Committee sought an explanation as to whether paragraphs (2), (6) and (7) of regulation 15 sufficiently captured the Scottish Government’s policy intention, given that those paragraphs refer to notices or information to be given by Ministers to a “licence holder”. The Committee also asked about a particular aspect of the transitional arrangements set out in regulation 23. The correspondence is reproduced at Annexe D.
42. The Scottish Government explained that paragraphs (2), (6) and (7) of regulation 15, in referring only to a “licence holder” as the person to whom notices or information are required to be given in accordance with those paragraphs, contain errors. The policy intention is that persons who are not licence holders but who have simply applied for a licence under regulation 4, may also receive such information or notices. The definition of the term “licence holder” in regulation 2 does not include that latter group of persons and in the Committee’s view, cannot be read expansively so as to include such persons. The Committee accordingly concludes that the drafting of paragraphs (2), (6) and (7) of regulation 15 – when read with the definition of “licence holder” in regulation 2 – do not deliver in full the Scottish Government’s intended policy.
43. **The Committee accordingly draws the instrument to the Parliament’s attention under reporting ground (i) as paragraphs (2), (6) and (7) of regulation 15 appear to be defectively drafted. Those paragraphs require the Scottish Ministers to take certain steps in relation to a “licence holder”. The policy intention, however, is that certain of those steps are required to be taken in relation to persons who are not licence holders (having regard to the definition of that term in regulation 2) but who have simply applied for a licence under regulation 4. To the extent that paragraphs (2), (6) and (7) of regulation 15 fail to refer to the latter group of persons, those paragraphs do not appear to fully deliver the intended policy.**
44. **The Committee notes the Scottish Government’s intention to amend regulation 15 at the earliest available opportunity to correct these errors and encourages the Scottish Government to do so as soon as possible and, in any event, prior to commencement of the regulations on 1st July 2016.**

Education (Fees, Awards and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2016 (SSI 2016/82)
(Education and Culture)

45. This instrument makes a number of amendments to nine sets of regulations relating to student allowances, loans and bursaries.
46. In considering the instrument, the Committee raised two queries with the Scottish Government regarding the amendments made by regulation 12 to the Education Maintenance Allowances (Scotland) Regulations 2007 (“the EMAS Regulations”). The correspondence is reproduced at Annexe E.
47. Regulation 12 inserts new paragraphs (2) and (3) into regulation 2 of the EMAS regulations. Both new paragraphs refer to “paragraphs (1)(a)” of Schedule 1 to the EMAS regulations. The references to “paragraphs (1)(a)” should be references to “paragraphs 1(a)” (without brackets appearing around “1”). The Scottish Government undertook to amend this error at the next available opportunity.
48. **The Committee draws the instrument to the Parliament’s attention under the general reporting ground, as it contains a drafting error. New paragraphs (2) and (3) of regulation 2 of the Education Maintenance Allowances (Scotland) Regulations 2007, as inserted by regulation 12, each refer to “paragraphs (1)(a)”. The correct references should be to “paragraphs 1(a)” (without the brackets around “1”).**
49. **The Committee welcomes the Scottish Government’s commitment to amending this error at the next available opportunity.**

No points raised

50. At its meeting on 23 February 2016 the Committee considered the following instruments. The Committee determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

Equal Opportunities

Gender Recognition (Marriage and Civil Partnership Registration) (Scotland) Regulations 2016 (SSI 2016/66);

Gender Recognition (Marriage and Civil Partnership Registration) (Modification) (Scotland) Order 2016 (SSI 2016/67).

Finance

Scottish Landfill Tax (Qualifying Material) Order 2016 (SSI 2016/93);

Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2016 (SSI 2016/94).

Health and Sport

National Assistance (Assessment of Resources) Amendment (Scotland) (No. 2) Regulations 2016 (SSI 2016/80);

Healthcare Improvement Scotland (Delegation of Functions) Order 2016 (SSI 2016/86);

National Assistance (Sums for Personal Requirements) (Scotland) (No. 2) Regulations 2016 (SSI 2016/87).

Justice

Civic Government (Scotland) Act 1982 (Metal Dealers and Itinerant Metal Dealers) (Verification of Name and Address) Regulations 2016 (SSI 2016/73);

Firefighters' Compensation and Pension Schemes (Scotland) Amendment Order 2016 (SSI 2016/77);

Firefighters' Pension Scheme (Scotland) Amendment Regulations 2016 (SSI 2016/78);

Firemen's Pension Scheme (Amendment) (Scotland) Order 2016 (SSI 2016/79);

Restriction of Liberty Order etc. (Scotland) Amendment Regulations 2016 (SSI 2016/89);

Criminal Justice (Scotland) Act 2016 (Commencement No. 1 and Saving Provision) Order 2016 (SSI 2016/95 (C.11));

Scottish Fire and Rescue Service (Appointment of Chief Inspector) Order 2016 (SSI 2016/96).

Local Government and Regeneration

Building (Scotland) Amendment Regulations 2016 (SSI 2016/70);

Building (Energy Performance of Buildings) (Scotland) Amendment Regulations 2016 (SSI 2016/71);

Disabled Persons (Badges for Motor Vehicles) (Scotland) Amendment Regulations 2016 (SSI 2016/72);

Local Government Pension Scheme (Management and Investment of Funds) (Scotland) Amendment Regulations 2016 (SSI 2016/74);

Charities Accounts (Scotland) Amendment Regulations 2016 (SSI 2016/76);

Air Weapons and Licensing (Scotland) Act 2015 (Commencement No. 2 and Transitional Provisions) Order 2016 (SSI 2016/85 (C.10)).

Rural Affairs, Climate Change and Environment

Seed (Fees) (Scotland) Regulations 2016 (SSI 2016/69);

Plant Health (Scotland) Amendment Order 2016 (SSI 2016/83);

Wester Ross Marine Conservation Order 2016 (SSI 2016/88);

Loch Sunart to the Sound of Jura Marine Conservation Order 2016 (SSI 2016/90).

Welfare Reform

Council Tax Reduction (Scotland) Amendment Regulations 2016 (SSI 2016/81).

Annexe A

Utilities Contracts (Scotland) Regulations 2016 (SSI 2016/49)

On 5 February 2016, the Scottish Government was asked:

1. Regulation 2(1) includes a definition of “service contract”, but appears not to include a definition of “services contract”. In some provisions, the Regulations mention “service contract” (for instance, in regulation 53(7) and (8)). In other provisions, the Regulations mention “services contract” (for instance, in the definition of “contract” in regulation 2(1) and regulation 85(4)).

(a) Please confirm initially which provisions mention “service contract” and which mention “services contract”.

(b) Is it agreed that there are errors due to omitting a definition of “services contract”, and/or due to the different references to “services contract” and “service contract”?

2. In the second line of regulation 3(1) (subject-matter and application of these Regulations), is there an omission between “award of a contract, or” and “to the organisation of..”, or is there any other error?

3. In regulation 20(1)(d)(i)(aa), should “an international arbitration or conciliation *instance*” be “an international arbitration or conciliation *institution*”?

4. Regulation 20(2)(d) includes a definition of “programme material” for the purposes of the regulation. Is there an error, as it appears that the term is not used, but regulation 20(1)(b) mentions “programme provision”?

5. Is an amendment proposed to remedy errors, and if so when would it be proposed to be laid and come into force?

The Scottish Government responded as follows:

1. As regards regulation 2(1):

(a) The Scottish Government confirms the following:

“Service contract(s)” is mentioned in regulations 2(1) (definition of “procurement document”); 5(7); 15(1)(a); 16(11), (13), (15) and (16); 20(1) (and in heading); 21 (and in heading); 28(2)(a); 31; 48(4)(f); 51(3); 53(7) and (8); 58(4); 62(6) (three times); 69(4); 86(8); 87(1); 91(a) (twice) and (b); 92(2); and 95(1)(a); and

“Services contract(s)” is mentioned in regulations 2(1) (definition of “contract”); 35(1)(c); 61(1)(a); 77(10); 85(4)(b); and 85(8)(a) and (b).

(b) As can be seen above, “service contract” is defined in regulation 2(1) and is used a further 28 times in the body of the Regulations. The Scottish Government accepts that the 7 references to “services contract(s)” should have been to “service contract(s)” so as to make use of the defined term. However the Scottish Government

is of the view that it is sufficiently clear from the terms of the Regulations that the references to a “services contract” are meant to be to a “service contract”. The Scottish Government does not consider there to be confusion for the reader as there is no further definition of a “services contract” in the Regulations. In this context the Scottish Government considers that the instrument is sufficiently clear as to its intended effect and the points are minor errors. The Scottish Government proposes to correct the errors by way of correction slip.

2. The Scottish Government agrees that the word “to” between “award of a contract, or” and “the organisation of...” in the second line of regulation 3(1) should in fact be “for”. The Scottish Government considers this error to be unfortunate but minor and is of the view that it does not change the effect or interpretation of the provision as it is plain to the reader that the procurement rules apply to design contests. The Scottish Government considers that the error does not require a substantive technical amendment and proposes to amend the error by way of correction slip.

3. The Scottish Government does not consider the wording “an international arbitration or conciliation instance” in regulation 20(1)(d)(i)(aa) to be an error (*italics added*). The wording was selected to reflect the wording of the second indent of Article 21(c)(i) of Directive 2014/25/EU (the “**Directive**”) which the Regulations are transposing.

4. The Scottish Government considers that it is reasonable for regulation 20(2)(d) to include a definition of “programme material” as the term is used within the definition of “programme” in that regulation and it reflects the wording of Article 21(i) of the Directive which this provision is transposing.

5. The Scottish Government is grateful to the Delegated Powers and Law Reform Committee for drawing its attention to these points which will be addressed as appropriate as minor corrections rather than by an amending instrument.

Annexe B

Police Service of Scotland (Senior Officers) (Performance) Regulations 2016 (SSI 2016/51)

On 5 February 2016, the Scottish Government was asked:

1. Regulation 17(6) provides that the chief constable must seek to agree a date and time for the performance appeal meeting with the senior officer, and regulation 17(7) provides that, if no date and time are so agreed, the chief constable must specify a date and time for the meeting.

Regulation 17(8) provides that, if a date and time are so specified, and (a) the *chief constable* or the senior officer's police representative will not be available at that date and time; and (b) the *chief constable* proposes an alternative date and time which satisfy the relevant requirements, then the meeting must be postponed to the date and time proposed.

It appears that the references to the "chief constable" in regulation 17(8)(a) and (b) should be references to the "senior officer". Is this an error, and if so is any corrective action proposed?

2. Regulation 23(1) provides that, if the reporting officer refers the senior officer to a progress meeting, the reporting officer must send a notice in writing requiring the senior officer to attend such a meeting. Regulation 23(2) sets out the details which the notice must provide, which includes (at (e)) "any proposed attendance at the meeting of the reporting officer".

Regulation 24 sets out the procedure at a progress meeting. Regulation 24(2) provides that the meeting must be conducted by the reporting officer.

What is the purpose of the requirement at regulation 23(2)(e) to notify the senior officer of the proposed attendance of the reporting officer at the progress meeting, given that the reporting officer is required by regulation 24(2) to conduct the progress meeting. Does the Scottish Government consider that the provisions are sufficiently clear as to their intention, or is some corrective action proposed?

3. Regulation 35(2) provides that, no later than 3 working days from the conclusion of the performance hearing, the chairing member of the panel conducting the hearing must give both the senior officer and the Scottish Police Authority written notice of the panel's decision, the reason for the decision and any disposal ordered.

Regulation 35(3) provides that the Authority must deliver the notice given under paragraph (2) to the senior officer as soon as is practicable.

These provisions appear to require the notice to be given to the senior officer twice, once by the chairing member of the panel and once by the Authority. Is there some error, and if so is any corrective action proposed?

4. Regulation 40(2) makes consequential amendment to rule 2 (interpretation) of the Police Appeals Tribunals (Scotland) Rules 2013, including the removal of the definition of the “Conduct Regulations” and the introduction of new definitions of the “2013 Conduct Regulations” and the “2014 Conduct Regulations”. Various references in the Rules to the “Conduct Regulations” are also updated.

It appears that the definition of “misconduct hearing” in rule 2 includes a reference to the “Conduct Regulations” which is not being updated by the Regulations. Does the Scottish Government intend to update this reference also?

The Scottish Government responded as follows:

1. The references in regulation 17(8)(a) and (b) to the “chief constable” should indeed be references to the “senior officer”. The Scottish Government regrets this error and intends to make an amending instrument as soon as is reasonably practicable.

2. Regulation 23(2) specifies the detail which must be contained in a notice under regulation 23(1), including specification of who will attend a progress meeting. Since the reporting officer is required to conduct such a meeting that officer will also be required to attend that meeting. Accordingly, the requirement in regulation 23(2)(e) is compatible with the requirement in regulation 24(2).

3. The policy intention is that the regulation 35(2) notice should always be delivered to the senior officer in the Authority’s name under regulation 35(3), having been given to the Authority and the senior officer under regulation 35(2). This is necessary because the Authority is, in effect, the senior officer’s employer. The parties operating the arrangement (namely the panel and the Authority) will know what is expected of them in these circumstances and so it is envisaged that the regulation will operate without difficulty in practice. However, the Scottish Government will consider whether any further clarification of this arrangement may be beneficial at the next available opportunity.

4. The Scottish Government agrees that there is a reference to “misconduct hearing” in rule 2 of the Police Appeals Tribunal (Scotland) Rules 2013 and intends to update that reference as soon as is reasonably practicable.

Annexe C

Concession Contracts (Scotland) Regulations 2016 (SSI 2016/65)

On 5 February 2016, the Scottish Government was asked:

1. The preamble in paragraph 2 narrates that the instrument makes “ambulatory references” to 11 Directives, EC Regulations or Commission Decisions, so that those measures are to be construed as amended from time to time.

(a) Is it agreed that the operative provisions only appear to make one such reference, in relation to Directive 1999/93/EC (in regulation 32(18))?

(b) If so, are there errors in respect of the other apparent omissions?

2. (a) Regulation 2(1) contains a definition of “contracting body”. Is it agreed that this defined term is not used in the instrument, and so is the definition superfluous?

(b) “Contracting entity” is mentioned many times in the Regulations. This term is used in the “Concession Contracts Directive” (2014/23/EU), and so appears to be defined by virtue of regulation 2(2). However the definition of “contracting body” as above contains an exception for regulation 19- where “contracting entity” is defined in paragraph (12) for the purposes of that regulation only.

Is there accordingly any intention to have defined “contracting entity” for the purposes of the whole Regulations?

3. Regulation 4 defines “contracting authority” for the purposes of the Regulations. This means “State, regional or local authorities..., bodies governed by public law or associations formed by one or more such authorities or bodies *other than those authorities, bodies or associations which pursue one of the activities listed in Schedule 2 and award a concession contract for the pursuit of one of those activities.* [My italics]

(a) Is there any error within the words in italics, or could the meaning be made clearer?

(b) In particular, is the definition intended to mean an authority or body (as specified in the initial part of the definition) *which awards* a concession contract for the pursuit of one of those activities, but other than those authorities, bodies or associations which pursue one of the activities listed in Schedule 2? So for example, is there any intention that “and award” should be substituted by “, and which award” (which would change the meaning of the provision)?

4. Regulation 51(5) provides that, except in paragraph (1), references to an “economic operator” include a reference to a “GPA economic operator”. Should an exception also have been added in respect of paragraph (2)(b), as that provision refers to an economic operator which is *not* from a GPA state (or an EEA state)?

5. Also in regulation 51(5), there is an error as “GPS economic operator” is defined, but the term used in the regulation is “GPA economic operator”?
6. Regulation 63(2) contains an exception in respect of a “service concession contract”. Is this an error, as the defined term in regulation 2(1) is “services concession contract”?
7. There is an error in regulation 64(2) (transitory provision prior to full commencement of regulation 32(1) to (7)), as the provision applies during the period beginning on 18th April “2106” and ending immediately before 18th October 2018?
8. Regulation 63 contains an exception which refers to regulation 47(1)(a) to (3). However regulation 47 only contains paragraphs (1) to (3). Should this properly have referred to the whole of regulation 47 (including the first two lines of the regulation), or alternatively regulation 47(1)(a) to (c)?
9. Is an amendment proposed to remedy matters, and if so when it is proposed that this would be laid and commenced?

The Scottish Government responded as follows:

1. (a) The intention of the references as narrated in the preamble at paragraph 2 is to ensure that the Directive, Regulations and Commission Decision measures referred to are construed as ambulatory and amended from time to time. However, we acknowledge that interpretative provision should have also properly made ambulatory reference expressly in the instrument itself and the Regulations currently only make such operative provision in respect of one Directive, in regulation 32(18).

(b). Yes. We will correct the omissions by way of an amending instrument.

2. (a) The definition in regulation 2(1) of “contracting body” is erroneous, as this provision was intended instead to refer to “contracting entity” in respect of contracting authorities and utilities. We intend to correct this reference by way of an amending instrument.

(b) The definition in regulation 2(1) was intended to refer to “contracting entity” and to cover both contracting authorities and utilities in the whole of the Regulations. The corrected reference by way of an amending instrument will address this.

3. (a) The wording from this provision is taken directly from Article 6 of the Concession Contracts Directive” (2014/23/EU). The Scottish Government take the view that drafting the provision in this way is the correct approach to transposition of the Directive.

(b) The definition is intended to capture those authorities and bodies (as specified in the initial part of the definition) which pursue activities which are not listed in Schedule 2 and for which activities a concession contract may be awarded rather than to reference the activities for which a contracting authority may award a contract.

4. We do not consider that it is strictly necessary to add an exception in regulation 51(5) in respect of paragraph (1) of that regulation in relation to paragraph (2)(b) (an economic operator which is *not* from a GPA state (or an EEA state)). In our view the reference in paragraph (1) specifies duties to an economic operator from an EEA state which, taken with the wording of rest of the regulation already excepts an economic operator which is not from a GPA or EEA state, without the need for additional wording to that effect.

5. We consider the reference to “GPS” to be a typographical error in this context. We will correct this in an amending instrument.

6. We agree the correct wording should be “services” rather than “service” and we will correct the error in an amending instrument.

7. In regulation 64(2) we consider the error referring to “2106” to be an obvious typographical error, particularly given the reference to the end period of “18 October 2018”. We will correct this in an amending instrument.

8. The intended reference was to regulation 47(1)(a), (2) and (3) in order to make provision for situations in which an existing contract may be terminated in consequence of a substantial modification which triggers the requirement for a procurement under regulation 46(9). We will correct this error by way of amending instrument.

We are grateful to the Delegated Powers and Law Reform Committee for drawing our attention to these points. The Scottish Government will make an amending instrument to address the particular issues raised at paragraph 1, 2, 5, 6, 7 and 8 to come into force at the same time as the principal instrument.

Annexe D

Seed (Licensing and Enforcement etc.) (Scotland) Regulations 2016 (SSI 2016/68)

On 11 February 2016, the Scottish Government was asked:

1. Regulation 15(2) provides that before the Scottish Ministers take any decision referred to in regulation 15(1) they must give the “licence holder” a notice stating what they are proposing to do and the reasons for it; and the opportunity of making representations. Similarly, regulations 15(6) and (7) refer to giving notice to a “licence holder” of the fact that a decision referred to in paragraph (1) has been made, the reasons for the decision and the date from which it takes effect, as well as information about rights of appeal. One of the decisions referred to in regulation 15(1) is the decision to refuse to grant a licence under regulation 4(1)(b). A licence holder is defined in regulation 2(1) as a licensed crop inspector, a licensed professional seed operator, a licensed seed sampler or a licensed seed testing station.

It appears that, unless the application for a licence has been made by a person who already holds a licence, the person to whom notice or information is required to be given in accordance with paragraphs (2), (6) or (7) of regulation 15 is not, at the point where the notice or information is required to be given, properly described as a “licence holder” (having regard to the definition of that term in regulation 2(1)).

a) Is it the policy intention that the Scottish Ministers must give a person who is applying for a licence as of new notice or information in accordance with paragraphs (2), (6) and (7) of regulation 15?

b) If so, is the wording of those paragraphs, in referring only to a “licence holder”, sufficiently clear?

2. Regulation 23(4) provides that registrations granted under regulation 5(1) of the 2006 regulations are to continue to have effect until 31st December 2016, and the 2006 regulations continue to apply to any such registration. Regulation 23(5) provides that a registered person (as defined in regulation 2(1) of the 2006 Regulations) may apply to the Scottish Ministers in accordance with regulation 3(1)(a) of the 2016 regulations to be licensed as a professional seed operator. It appears that the effect of these provisions is to provide registered persons with a 6 month transitional period during which they may apply to become licensed professional seed operators. It also appears that the effect of the savings provision is that existing registrations will expire on 31st December 2016.

On that basis, it appears possible that an application for a licence could be made during the transitional period but not determined by 31st December 2016. In those circumstances, if the registration expires on 31st December 2016, the person concerned would not be authorised to operate as a seed merchant, seed packer or seed processor in the period between 31st December 2016 and the date their licence application is finally determined. Is this the policy intention, or is further provision

required to preserve the registration beyond 31st December 2016, until such date as the licence application is determined? By way of comparison, we note that regulation 4(7) preserves existing licences until the date of determination of an application for their renewal, thereby allowing licence holders to continue to operate pending final determination of an application.

The Scottish Government responded as follows:

1. In relation to regulation 15, the policy intention is that the Scottish Ministers must give a person who is applying for a licence as of new notice or information in accordance with paragraph (2), (6) or (7) of regulation 15 and that is certainly how the Scottish Ministers intend to apply those provisions in practice. We accept, however, that this could be clearer in the relevant provisions of the instrument which, as the Committee has noted, refer to a “licence holder”. The Scottish Government will therefore bring forward an instrument at the earliest available opportunity in order to clarify that.

2. In relation to regulation 23, the policy intention is that unless the holder of an existing registration as a seed merchant seed packer or seed processor has applied for and been granted a professional seed operator’s licence on or before 31 December 2016, the existing registration will expire on that date. There are currently around 129 existing registrations and the Scottish Government is putting in place administrative arrangements to communicate with existing registration holders even in advance of the coming into force date of the instrument on 1 July 2016, in order to ascertain whether they intend to apply for a professional seed operator’s licence to replace any existing registration. It is anticipated that the vast majority will wish to do so and therefore, subject to approval of any applications, most of those licences can be issued as soon as practicable after 1 July 2016. The instrument, however, builds in a 6-month transition period as it appreciates that there may be a handful of registration holders who are not in a position to confirm their intentions until after 1 July 2016 and, indeed, there may be a few who do not wish to apply for a licence at all to operate as a professional seed operator after 31 December 2016. However, during the transition period, the Scottish Government will continue to liaise with the holders of any existing registrations who have not submitted applications, with a view to ensuring that any licence applications which are intended to be submitted by existing registration holders can be dealt with before 31 December 2016. That being the case, the Scottish Government does not consider it necessary at this stage to preserve existing registrations beyond that date.

Annexe E

Education (Fees, Awards and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2016 (SSI 2016/82)

On 11 February 2016, the Scottish Government was asked:

1. Regulation 12 inserts new paragraphs (2) and (3) into regulation 2 of the Education Maintenance Allowances (Scotland) Regulations 2007 (“the EMAS regulations”). Paragraphs (2) and (3) set out new rules regarding the ordinary residence of a person who has moved to Scotland from another part of the UK or Islands for the purpose of undertaking a course of education.

Both new paragraphs begin with “In Schedule 1 for the purposes of paragraphs (1)(a)...”. Are the references to “paragraphs (1)(a)” intended to be references to “paragraphs 1(a)” or to subparagraph (1)(a) within a different paragraph in Schedule 1? If the intention is to refer to “paragraphs 1(a)”, is any corrective action proposed?

2. Schedule 2 of the EMAS regulations sets out rules to be applied for the purposes of determining whether a person has his or her ordinary residence in a particular place at a particular time. Schedule 2 is given effect by regulation 3(2). New paragraphs (2) and (3) of regulation 2 appear to insert further rules to be applied in the determination of the ordinary residence of a particular group of persons, namely those who have moved to Scotland from another part of the UK or Islands. Given the nature of the new provisions, please can you explain why it is considered to be clearer to insert them into regulation 2 rather than into Schedule 2, which already sets out rules regarding the determination of ordinary residence?

The Scottish Government responded as follows:

1. In relation to the new paragraphs (2) and (3) inserted into regulation 2 of the EMAS regulations, the intention is to refer to “paragraphs 1(a)” rather than “paragraphs (1)(a)”. The Scottish Government considers that it is clear from the context and the other numbered paragraphs listed in the inserted provisions that the reference is to paragraph 1(a) of Schedule 1. The Scottish Government would, however, intend to delete the brackets around the number 1 at the next available opportunity.

2. Whilst the Scottish Government accepts that the new provisions setting out rules regarding the ordinary residence of a person who has moved to Scotland from another part of the UK or Islands for the purpose of undertaking a course of education could have been inserted into either Schedule 2 or regulation 2 of the EMAS regulations, the Scottish Government is of the view that the most suitable place for the provisions is regulation 2. For the ease of the readers of the legislation, the Scottish Government

considers that it is important to be consistent with other similar legislation in this area. Both the Student Allowances (Scotland) Regulations 2007 and the Education (Fees) (Scotland) Regulations 2011 contain equivalent provisions setting out rules regarding the ordinary residence of a person who has moved to Scotland from another part of the UK or Islands for the purpose of undertaking a course of education and these provisions are found in their Interpretation regulations (number 2) rather than in their Schedules which also set out the rules to be applied for the purposes of determining whether a person has his or her ordinary residence in a particular place at a particular time.

