



The Scottish Parliament  
Pàrlamaid na h-Alba

# **Delegated Powers and Law Reform Committee**

## **59th Report, 2014 (Session 4)**

### **Subordinate Legislation**

**Published by the Scottish Parliament on 29 October 2014**

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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:

Richard Baker  
Nigel Don (Convener)  
Mike MacKenzie  
Margaret McCulloch  
Stuart McMillan (Deputy Convener)  
John Scott  
Stewart Stevenson

**Committee Clerking Team:**

**Clerk to the Committee**

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**Delegated Powers and Law Reform Committee**

**59th Report, 2014 (Session 4)**

**Subordinate Legislation**

The Committee reports to the Parliament as follows—

1. At its meeting on 28 October 2014, the Committee agreed to draw the attention of the Parliament to the following instruments—

Sulphur Content of Liquid Fuels (Scotland) Regulations 2014 (SSI 2014/258);

Bankruptcy and Debt Advice (Scotland) Act 2014 (Commencement No. 2, Savings and Transitionals) Order 2014 (SSI 2014/261 (C.23)).

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**

**[Sulphur Content of Liquid Fuels \(Scotland\) Regulations 2014 \(SSI 2014/258\)](#)**  
*(Rural Affairs, Climate Change and Environment Committee)*

4. The purpose of this instrument is to implement in relation to Scotland the provisions concerning heavy fuel oil and gas oil (excluding marine fuels) contained in Council Directive 2012/33/EU (relating to the sulphur content of marine fuels) , which amends Council Directive 1999/32/EC (relating to a reduction in the sulphur content of certain liquid fuels).

5. The instrument also revokes the Sulphur Content of Liquid Fuels (Scotland) Regulations 2007, save for certain transitional provisions.

6. In considering the instrument, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at Annex A.

7. The Committee identified a couple of drafting errors in the instrument which are explained in the next paragraph.

**8. The Committee draws the instrument to the attention of the Parliament on the general reporting ground, as it contains the following minor drafting errors:**

**(i) Regulation 4(1) (which prohibits the use of certain heavy fuel oils) states that it is subject to regulation 4(2) (limiting the application of regulation 4(1) until 1 January 2016 for certain uses). Regulation 4(1) should also be specified as subject to regulation 4(3) (which limits the application of regulation 4(1) as from 1 January 2016 for certain uses).**

**(ii) Paragraph 6 of the Schedule requires a person to whom a “sulphur content of liquid fuels permit” is intended to be transferred to notify SEPA of the intended transfer, within 21 days of the intended date of the transfer. The references to “intended” in paragraph 6 are made in error. The Scottish Government intends that the notification should be given by the person to whom a permit has been transferred, within 21 days after the date of the transfer.**

9. The Committee notes that the Scottish Government will correct these minor errors by amendment in due course.

**POINTS RAISED: INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE**

**[Bankruptcy and Debt Advice \(Scotland\) Act 2014 \(Commencement No. 2, Savings and Transitionals\) Order 2014 \(SSI 2014/261 \(C.23\)\)](#)**; (*Economy, Energy and Tourism Committee*)

10. This Order brings into force the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”) from 1 April 2015, insofar as it is not already in force. There is one exception - section 27 is not brought into force in relation to section 17G(7) of the Bankruptcy (Scotland) Act 1985. That provision purports to give powers to the sheriff to remit a case to the Accountant in Bankruptcy. As a result of amendments made to the 2014 Bill, the provision is no longer required. Pending repeal, it does not have any substantive effect.

11. The Order also makes saving and transitional provision, so the amendments in the 2014 Act (except as regards those listed in article 4(3)) do not apply to bankruptcies, where the petition to court or debtor application to the Accountant in Bankruptcy (“AIB”) for sequestration was presented or received before 1 April 2015.

12. In considering the instrument, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at Annex B.

13. Article 4(1) of the instrument raises an identical issue to one which the Committee has recently reported on, in relation to the transitional provisions in the Bankruptcy (Scotland) Regulations 2014 (SSI 2014/225) and the Bankruptcy Fees (Scotland) Regulations 2014 (SSI 2014/227). (A couple of other points were reported on for SSI 2014/225).

14. Article 4(1) provides that (except as mentioned in paragraph (3) and article 6), nothing brought into force by the Order has effect as regards any sequestration in respect of which (a) the petition is presented before 1 April 2015; or (b) a debtor application was made before that date. There is an inconsistent use of tense in this provision.

15. The Scottish Government in the correspondence has explained that as this commencement order was signed the day before those 2 instruments were considered by the Committee, the order was laid on 1 October containing the similar transitional provision.

**16. The Committee therefore draws the Order to the attention of the Parliament on the reporting ground (h), as the meaning of the saving provision in article 4(1) could be clearer. There could be a consistent use of tense in subparagraphs (a) and (b). Paragraph (1) could accordingly have made clearer that it applies to sequestrations proceeding either on a petition for sequestration presented, or on a debtor application made, before 1 April 2015 - regardless of whether the date of presentation of the petition or the date of making the debtor application was before, on or after the date of making this Order.**

**17. The Committee welcomes that the Scottish Government has undertaken to amend article 4(1), and the similar provisions in SSI 2014/225 and SSI 2014/227 which have already been reported on by the Committee, before the instruments will come into force.**



## **NO POINTS RAISED**

18. At its meeting on 28 October 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:

### ***Education and Culture***

Convener of the School Closure Review Panels (Scotland) Regulations 2014 (SSI 2014/262);

Members of a School Closure Review Panel (Scotland) Regulations 2014 (SSI 2014/263);

Royal Conservatoire of Scotland Order of Council 2014 (SSI 2014/268).

### ***Health and Sport***

Public Bodies (Joint Working) (Integration Scheme) (Scotland) Regulations 2014 [draft];

Public Bodies (Joint Working) (National Health and Wellbeing Outcomes) (Scotland) Regulations 2014 [draft];

Public Bodies (Joint Working) (Prescribed Health Board Functions) (Scotland) Regulations 2014 [draft];

Public Bodies (Joint Working) (Prescribed Local Authority Functions etc.) (Scotland) Regulations 2014 [draft].

### ***Infrastructure and Capital Investment***

Housing (Scotland) Act 2014 (Commencement No. 1, Transitional and Saving Provisions) Order 2014 (SSI 2014/264 (C.24)).

### ***Justice***

Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No. 1) Order 2014 [draft];

### ***Rural Affairs, Climate Change and Environment***

Scotland Act 1998 (Functions Exercisable in or as Regards Scotland) Order 2015 [draft];

Scotland Act 1998 (River Tweed) Amendment Order 2015 [draft].

**ANNEX A**

**Sulphur Content of Liquid Fuels (Scotland) Regulations 2014 (SSI 2014/258)**

**On 3 October 2014, the Scottish Government was asked:**

1. In regulation 2(1), “heavy fuel oil” is defined as “any petroleum-derived liquid fuel” which falls within one of the categories listed at (a) to (c), other than marine fuel and gas oil. The corresponding definition in Council Directive 1999/32/EC, as amended by Council Directive 2012/33/EU, defines “heavy fuel oil” (at paragraph 1 of Article 2) as “any petroleum-derived liquid fuel” which falls within category (a) other than marine fuel, or which falls within category (b) or (c) other than gas oil. The explanatory note and policy note do not provide an explanation for this change in definition in regulation 2(1) as compared with the Directive provision.

(a) Please explain why regulation 2(1) properly transposes the Directive in that respect?

(b) If there is an error, would the Scottish Government propose to correct this by an amendment?

2. Paragraph (1) of regulation 4, prohibiting the use of heavy fuel oil with a sulphur content exceeding 1% by mass, is expressed to be subject to paragraph (2), which limits the application of paragraph (1) until 1 January 2016 in respect of certain uses. Paragraph (3) also seems evidently to limit the application of paragraph (1) in respect of certain uses, as from 1 January 2016.

(a) Would the meaning of paragraph (1) be clearer therefore, if it specified that it is also subject to paragraph (3)? Or otherwise, please explain why it has been considered appropriate not to have made such provision?

(b) If that addition would be clearer, or if this is an oversight, would the Scottish Government propose to adjust the provision by an amendment?

3. Paragraph 6 of the Schedule sets out the procedure for the transfer of a sulphur content of liquid fuels permit (SCLFP). The person to whom a SCLFP is intended to be transferred must notify SEPA of the intended transfer within 21 days of the intended date of the transfer. [We note that this is a change from the requirement in the Sulphur Content of Liquid Fuels (Scotland) Regulations 2007, which require notification to be made within 21 days of the (actual) date of the transfer (Schedule 1, paragraph 6(b)).]

(a) Is it intended that paragraph 6 of the Schedule should refer to within 21 days before the intended date – or after?

(b) Depending on the intention, would the meaning be clearer by specifying “before” or “after” in place of “of”? If so, would the Scottish Government propose to adjust this by amendment?

(c) If it is the intention that notification must be made 21 days after the intended date of the transfer, what will be the effect where the actual date of transfer is different from the intended date of transfer? In this case, would the meaning be clearer by specifying “actual date” in place of “intended date”? If so, would the Scottish Government propose to adjust this by amendment?

**The Scottish Government responded as follows:**

1. As explained in the first paragraph of the Explanatory Note and in the Policy Note (which refers to land based fuels), this instrument implements the amendments made by Council Directive 2012/33/EU except in relation to marine fuels.

The approach to implementation is the same in England and Wales as it is in line with the amended definition set out in regulation 3 of the Sulphur Content of Liquid Fuels (England and Wales) (Amendment) Regulations 2014. As it also is in regulation 3 in the Sulphur Content of Liquid Fuels (Amendment) Regulations (Northern Ireland) 2014.

It is clear from the Directive definition and the Regulations that “marine fuel” and “gas oil” are mutually exclusive. As we are not transposing in respect of marine fuel, then the exclusion of marine fuels from paragraphs (b) and (c) of the definition makes no difference.

In relation to the exclusion of gas oil from paragraph (a), there is no overlap between the lists of CN codes in the first indent of the Directive definition of heavy fuel oil and of gas oil respectively, so oil that is gas oil by virtue of the first indent of the gas oil definition cannot be a heavy fuel oil. In relation to oil that is gas oil by virtue of the second indent of the Directive definition (ie not marine fuel and distils between the specified limits) this is not considered to fall within the first paragraph of the heavy fuel oil definition. Gas oils are intended to be distinct from the heavy fuel oils. The categories are mutually exclusive, and the definition in the Regulations has the same legal effect as in the Directive.

2. It was intended that regulation 4(1) should say “Subject to paragraphs (2) and (3)” rather than just referring to paragraph (2). Read as a whole, however, it is nevertheless clear that paragraph (1) is also subject to paragraph (3) and the Scottish Government is satisfied that a Court would have no difficulty in reading it this way. It is a drafting point that Scottish Government would address at the first opportunity to amend the Regulations for other purposes.

3. The references to “intended” in paragraph 6 of the Schedule are an inadvertent drafting error as the intention is the notification should be by the person to whom the permit has been transferred, and is to be within 21 days of the date of that transfer (as the duty lies on the person to whom the permit “has been transferred”, this is necessarily 21 days after the transfer).

Although it would have been clearer if the word “intended” had been omitted, as there has not been a sulphur content of liquid fuels permit in Scotland at any time

since the regime was first established in 2000, let alone one that falls to be transferred, it is considered that there is little chance of the provision having practical effect. The point will be addressed at the first opportunity to amend the Regulations for other purposes. It is in any event expected that the Regulations will be superseded by regulations made under section 18 of the Regulatory Reform (Scotland) Act 2014.

## **ANNEX B**

### **Bankruptcy and Debt Advice (Scotland) Act 2014 (Commencement No. 2, Savings and Transitionals) Order 2014 (SSI 2014/261 (C. 23))**

#### **On 3 October 2014, the Scottish Government was asked:**

Article 4(1) provides that except as mentioned in paragraph (3) and article 6, nothing brought into force by the Order has effect as regards any sequestration in respect of which (a) the petition is presented before 1 April 2015; or (b) a debtor application was made before that date.

(a) Please clarify the intended effect of this provision, in respect that the drafting makes a distinction between where a petition “is” presented, and where a debtor application “was” made before 1 April 2015.

(b) Is there any intention that the provision will apply where a petition is presented after the date of making these Regulations but before 1 April 2015, but it will apply where a debtor application was made on any date before 1 April 2015?  
Depending on the underlying intention, could the provision be made clearer?

#### **The Scottish Government responded as follows:**

The intention is to provide, subject to the exceptions in article 4(1) referred to, that from when the provisions of the Act come into force on 1 April 2015 they do not affect a sequestration which proceeds either on a petition for sequestration presented, or a debtor application made, before that date.

There is no intention, in particular, that provisions brought into force by the Order apply differently depending on whether a sequestration proceeds on a petition or debtor application presented or made after the Commencement Order is made.

As in our response of 9 September 2014 on the Bankruptcy (Scotland) Regulations 2014 (SSI 2014/225), and also on SSI 2014/227, the Government agrees it would have been preferable to use “is” instead of “was”, though this does not affect the operation of the provision, the effect of which is clear.

The Government notes the discussion at the Committee on 30 September. As the Commencement Order had been signed the day before, we proceeded to lay the Order before Parliament on 1 October. However, although in our view there could be no adverse result, in this case we would intend, as with those related SSIs, to amend article 4(1)(b) of this instrument before it has effect on 1 April 2015.

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland

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ISBN 978-1-78534-182-3

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