



House of Commons
Regulatory Reform Committee

**Proposal for the
Regulatory Reform
(Prison Officers)
(Industrial Action)
Order 2004**

Third Report of Session 2004–05

*Report, together with formal minutes and
written evidence*

*Ordered by The House of Commons
to be printed 14th December 2004*

HC 148
Published on 17th December 2004
by authority of the House of Commons
London: The Stationery Office Limited
£5.50

The Regulatory Reform Committee

The Regulatory Reform Committee is appointed to consider and report to the House of Commons on proposals for regulatory reform orders under the Regulatory Reform Act 2001 and, subsequently, any ensuing draft regulatory reform order. It will also consider any "subordinate provisions order" made under the same Act.

Current membership

Mr Peter Pike (*Labour, Burnley*) (Chairman)
Mr Russell Brown (*Labour, Dumfries*)
Brian Cotter (*Liberal Democrat, Weston-super-Mare*)
Mr Jeffrey M. Donaldson (*Democratic Unionist, Lagan Valley*)
Mr Dai Havard (*Labour, Merthyr Tydfil and Rhymney*)
Andy King (*Labour, Rugby and Kenilworth*)
Mr Mark Lazarowicz (*Labour, Edinburgh North and Leith*)
Mr Andrew Love (*Labour/Co-operative, Edmonton*)
Mr John MacDougall (*Labour, Central Fife*)
Chris Mole (*Labour, Ipswich*)
Mr Denis Murphy (*Labour, Wansbeck*)
Dr Doug Naysmith (*Labour/Co-operative, Bristol North West*)
Mr Archie Norman (*Conservative, Tunbridge Wells*)
Andrew Rosindell (*Conservative, Romford*)
Mr Anthony Steen (*Conservative, Totnes*)
Brian White (*Labour, Milton Keynes North East*)

Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 141, available on the Internet via www.parliament.uk.

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/regrefcom

A list of Reports of the Committee in the present Session of Parliament is at the back of this volume.

Committee staff

The current staff of the Committee are Mick Hillyard (Clerk), Stuart Deacon (Committee Specialist), Brian Dye (Committee Assistant) and Liz Booth (Secretary).

Contacts

All correspondence should be addressed to the Clerk of the Regulatory Reform Committee, Committee Office, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 2837; the Committee's email address is regrefcom@parliament.uk.

Contents

| | |
|---|-------------|
| Report | <i>Page</i> |
| Summary | 3 |
| 1 Report under Standing Order No. 141 | 5 |
| 2 Background to the proposal | 5 |
| 3 Extent of the proposal's application | 6 |
| 4 Assessment of the proposal against Standing Order No. 141 (6) criteria | 6 |
| Is it an appropriate use of delegated legislation? | 6 |
| Does it remove or reduce a burden? | 6 |
| Does it continue any necessary protection? | 7 |
| Does it prevent the exercise of rights and freedoms? | 9 |
| Have there been adequate consultations? | 10 |
| What is the estimate of costs, savings and other benefits? | 12 |
| Was it clearly drafted? | 12 |
| Are there other considerations to take into account? | 12 |
| 5 Conclusion | 12 |
| Appendix | 13 |
| Formal minutes | 16 |

Summary

The Government proposes to amend section 127 of the Criminal Justice and Public Order Act 1994 so that it ceases to apply in relation to prison officers employed by the Prison Service in Great Britain. Section 127 renders anyone who induces a prison officer to withhold his or her services or to commit a breach of discipline liable to civil action by the Secretary of State. According to the Statement by the Prison Service, the amendment of section 127 will re-instate the full statutory trade union rights of prison officers in England and Wales and in Scotland, thereby honouring a pre-election pledge from the present Government that goes back to 1997.

Following representations by private contractors, the Government has decided that section 127 will continue to apply in Northern Ireland and in relation to all custody officers and prison custody officers.

Having assessed the proposal against the Standing Order tests, we conclude that the proposal should be amended, to correct a drafting defect, before a draft order is laid before the House.

1 Report under Standing Order No. 141

1. We have examined the proposal for the Regulatory Reform (Prison Officers) (Industrial Action) Order 2004 in accordance with Standing Order No. 141 and we have concluded that the proposal should be amended before a draft order is laid before the House.

2 Background to the proposal

2. The Prison Service has set out the background to its proposal in section three of its explanatory statement. Section 127 of the Criminal Justice and Public Order Act 1994 (“the 1994 Act”) provides that a person owes a duty to the Secretary of State not to induce prison officers, custody officers and prison custody officers to withhold their services or to commit a breach of discipline. Loss or damage caused to the Secretary of State by a person who induces a prison officer to withhold his or her services or to commit a breach of discipline is actionable by the Secretary of State against that person.

3. The context of section 127 is that at common law, it is an actionable civil wrong for a person to induce another to breach a contract. To allow organised industrial action, it was necessary for statute to provide exemption from this common law liability. The Trade Union and Labour Relations (Consolidation) Act 1992 provides the necessary statutory exemption. Section 126 of the Criminal Justice and Public Order Act 1994 recognises prison officers’ rights under employment law, including the right to bring unfair dismissal proceedings and to join a trades union, but subject to the limitation of section 127. Section 127 was enacted to provide the safeguard against the possibility of industrial action in the prison service.

4. According to the Government, the effect of disapplying section 127 will restore the full trade union statutory rights to prison officers and honour a pre-election commitment.

5. At present, a legally binding agreement containing no-strike provisions governs industrial relations between the Prison Service in England and Wales and the Prison Officers Association (POA). This agreement will be terminated on 25 January 2005 when the 12 month notice given by POA to terminate the agreement expires. In Scotland, the Scottish Prison Service entered into a separate agreement with each of the Trades Unions it recognises for collective bargaining purposes. This agreement is similarly binding to the extent that the Prison Officers Association (Scotland) (POA(S)) has contracted not to induce, authorise or support any form of industrial action by its members. Section 127 will continue to apply in respect of Northern Ireland as well as to custody officers and prison custody officers.

6. In written evidence, the Prison Service informed us that Representatives from HM Prison Service and the Prison Officers Association (POA) had successfully negotiated a new legally binding collective agreement called the Joint Industrial Relations Procedural Agreement (JIRPA) and that this had been ratified by the membership and signed by representatives from the POA and the Prison Service on 11 November 2004. The JIRPA will replace the existing agreement in January 2005. The Government intends at the same

time to implement the Order to amend section 127 of the Criminal Justice and Public Order Act 1994.¹

7. Where legally binding agreements are absent, as in the private prison sector and in Northern Ireland, the Government has decided that the protection currently provided by section 127 should continue. This would leave the position regarding prison officers in Northern Ireland and custody officers and prison custody officers everywhere unchanged.

3 Extent of the proposal's application

8. The Order extends to the UK. Since employment and industrial relations legislation is a reserved matter, the amendment of section 127 of the 1994 Act in so far as it applies to Scotland is a matter for the Secretary of State rather than the Scottish Executive. The disapplication of section 127 will not apply in Northern Ireland on the grounds that, unlike England, Scotland and Wales, there is currently no legally enforceable agreement in place.

4 Assessment of the proposal against Standing Order No. 141 (6) criteria

Is it an appropriate use of delegated legislation?

9. The proposal to repeal section 127 of the of the Criminal Justice and Public Order Act 1994 in relation to some prison officers contains some controversial aspects, specifically the Secretary of State's decision to limit disapplication of section 127 to only England and Wales and to Scotland and only in those sectors within those countries that have in place a legally binding no-strike agreement between employers and employees. Some respondents to the Government's consultation, including the Prison Service Union (PSU), criticised the Government's decision to continue to apply section 127 in certain areas. We do not, however, consider that this fact makes the proposal inappropriate for delegated legislation. **We conclude that the proposal appears to be appropriate for delegated legislation.**

Does it remove or reduce a burden?

10. The Prison Service states that the proposal removes an existing burden. According to the explanatory statement, section 127(1) of the Criminal Justice and Public Order Act 1994 is a "burden" for the purposes of the Regulatory Reform Act 2001 in the sense of being a restriction on the public at large.² We decided to explore this claim more fully with the Prison Service. We found it difficult to see what activity the general public would be carrying on that would be affected by this restriction.³ We suspected that the restriction is principally a burden on trade unions representing prison and custody officers as it affects them in the activity of carrying on their functions as a trade union. We asked the Prison

1 Appendix A, Q2

2 Explanatory statement, page 8

3 To be capable of reform under section one of the Regulatory Reform Act, legislation must have the effect of imposing burdens "affecting persons in the carrying on of any activity."

Service to explain how section 127(1) could be a burden on the general public at large as described by the explanatory statement, page 8, and specifically in the carrying on of what activity members of the public would be affected. In its written response, the Prison Service agrees that it is difficult to see how the repeal of section 127 affects any activity of the public at large. The Prison Service also pointed out that the prohibition in section 127 is directed at “any person” and could include, for example, a union official not employed directly by HM Prison Service. Despite these weaknesses in the description in the explanatory statement, **we are satisfied that the proposal removes a statutory burden within the terms of the Regulatory Reform Act 2001.**

Does it continue any necessary protection?

11. Under current arrangements, the protection against organised industrial action by prison officers, custody officers and prison custody officers is provided by section 127 of the 1994 Act. As noted above, for some prison officers, this protection is reinforced by a legally binding agreement that currently exists between the Prison Service and the POA and its Scottish counterpart (POA(S)) not to take strike action. In the Government’s view, section 127 can be disapplied on the grounds that where such a legally binding agreement exists the necessary protection is maintained. The Government points out that over recent years there has been an improvement in industrial relations within the public prison service and that with legally binding agreements in place, no necessary protection will be lost by the introduction of this proposal. On the face of it, the replacement of the current statutory restriction by a legally binding agreement looks as if it would have little practical effect and would continue to provide the necessary protections. Indeed, it is clear from the explanatory statement that the Prison Service considers that the Order would not be made without the protection from the risk of strike action or coordinated breaches of discipline in the public prisons conferred by the two agreements (one for England and Wales and one for Scotland).⁴ We questioned the Prison Service about the risk that the protection afforded by these agreements may be less robust than that conferred by section 127.

12. First, we questioned the Prison Service about the agreements being terminable after 12 months notice had been given. This potential risk is acknowledged by the Prison Service, but it appears to judge as remote the possibility that the union may not wish to negotiate a further agreement.⁵ Although this risk may be remote, any protection provided by an agreement would appear to be of no longer duration than a 12 month rolling period.⁶ We asked the Prison Service about how it proposes to deal with the possibility of legally binding agreements being terminated by one of the parties and specifically whether the Prison Service would seek to reapply section 127 of the 1994 Act. The Prison Service told us that if this set of circumstances happened the Prison Service might decide to return to Parliament to re-enact by primary legislation the provisions of section 127 which are now being removed. At the present time this is thought to be unlikely.

4 For example, see the *Further Consultation Document*, March 2004, especially comments on Northern Ireland and private prisons and page 7.

5 Appendix A, Q2

6 See explanatory statement, page 10

13. Secondly, we questioned the Prison Service about the complicated position in Scotland where there are four parties to the agreement (the Scottish Prison Service and three unions), but only the POA(S) has agreed not to induce industrial action.⁷ This suggests that the agreement offers no protection in respect of the other two unions and so in our view has the potential to provide less protection than is provided by section 127 and that claimed by the Prison Service. When we questioned the Prison Service we were told that within Scotland all the recognised trade unions had signed a comprehensive Partnership Agreement with Scottish Prison Service Management which committed the trade unions and management to work together to promote the success of the Scottish Prison Service in a competitive environment.⁸ The Prison Service also told us that the Partnership Agreement had been very successful and had strengthened further the appreciation that for recognised trade unions' members within the Scottish Prison Service their interests were not best served by industrial action.⁹ The Prison Service also noted that the existing so-called Voluntary Agreement in Scotland is generally wider than section 127 as it covers all staff groups.¹⁰ The Prison Service pointed out that the legally binding coverage of the Voluntary Agreement in Scotland is the same as section 127 – with the exception of senior operational managers who are represented by the Public and Commercial Services Union (PCS) – and it was felt that the vocational ethos and numbers associated with this latter group of staff meant that they were highly unlikely to take industrial action.¹¹ According to the Prison Service, non-POA signatories to the Voluntary Agreement are considered to be committed to resolving issues through the industrial relations procedural agreement.¹²

14. Thirdly, we asked the Prison Service what protection in Scotland would be available in the event that staff leave the union that is party to a legally binding agreement and join unions that are not party to such agreements. We note that the Prison Service Union (PSU) already represents some prison officers¹³ and that in Scotland there are two unions besides the POA(S) which represent prison officers. We also note the possibility that these unions, as well as others such as the GMB, may succeed in recruiting current members of the POA or POA(S), particularly if those staff felt that their existing unions were not standing up to the employers. We point out that section 127, as it currently applies, provides that any person contravenes subsection (1) if he induces a prison officer to withhold his services or to commit a breach of discipline whereas the Voluntary Agreement provides a right of action only against the POA or the POA(S). If prison officers become members of other unions, or if someone other than a union induces industrial action, the agreements are immaterial and provide no protection. The Prison Service told us that the position in Scotland was no different to that in England and Wales in this respect. If members moved from the POA(S), which is formally recognised by Scottish Prison Service to represent prison officer staff through collective bargaining, they effectively give up their voice in the established process of collective bargaining.¹⁴ The Prison Service also noted that the threat

7 See explanatory statement, Annex C, clause 4.10

8 Appendix A, Q3

9 *ibid*

10 *ibid*

11 *ibid*

12 *ibid*

13 see explanatory statement, page 22, para 2

14 Appendix A, Q4

of industrial action by a smaller trade union (even if it managed to meet all of the statutory requirements and tests for it to be regarded as lawful) is not seen as constituting a significant threat to the delivery of services within Scottish Prison Service. The Prison Service added that if the collective bargaining power of the POA should significantly diminish in favour of another trade union, the formal recognition of the POA as the trade union with recognition rights for the prison officer staff group would be reviewed.¹⁵ To the extent that the current limitation on the inducement of strike action by staff in public prisons would be replaced by a legally binding agreement that similarly restricts industrial action, the proposal would have little practical effect on the ground.

15. We are not entirely convinced by these arguments. It seems to us that the arrangements referred to above do not provide the same degree of protection from inducements to strike or commit breaches of discipline as is provided by section 127. Rather the position appears to be that necessary protection will be maintained in relation to those unions who have entered into such arrangements for so long as those arrangements remain in place. The acknowledgement by the Prison Service that, in the unlikely event of there ceasing to be legally binding agreements with the relevant trades unions, it would be necessary to re-impose section 127 in relation to prison officers in Great Britain appears effectively to concede the point. We consider that the proposal could be amended so that, instead of disapplying section 127 altogether as regards certain groups of prison officer, it suspends the application of section 127 in relation to any trades union for so long as that union is contractually bound not to induce industrial action or breaches of discipline by prison officers. In this way the protection of the section would remain in relation to other persons and unions and would resume in relation to a trades union which ceased to be contractually bound. However, the interests that are protected by section 127 are primarily those of the Secretary of State and the Prison Service. They will not wish to proceed with the proposal unless they are satisfied that it will provide them with adequate protection. **We therefore consider that, although the proposal does not maintain existing protections, it is appropriate in the circumstances to leave it to the Secretary of State to determine whether the protection it does provide is adequate.**

Does it prevent the exercise of rights and freedoms?

16. The Prison Service claims that the proposal does not prevent any person from continuing to exercise any right or freedom. Moreover, it argues that the changes restore the full trade union statutory rights of state employed prison officers in England and Wales and in Scotland within the context of a contractual dispute resolution process that limits industrial action. As noted above, the restoration of full trade union statutory rights would not extend to prison officers in Northern Ireland or private prison staff (custody officers and prison custody officers) wherever they are located in the UK. Despite the Government's decision to continue to apply section 127 in some areas, **we conclude that the proposal does not prevent any person from continuing to exercise any right or freedom which he or she might reasonably expect to continue to exercise.**

15 *ibid*

Have there been adequate consultations?

17. The proposal involved two separate consultations. The initial consultation period ran from 15 December 2003 to 9 February 2004, a period of only eight weeks instead of the normal 12 weeks, on the grounds that the issue had been subject to preliminary consultation between the major stakeholders and had been reported in the press and that the proposal has a very narrow focus. At the end of that consultation, a consortium of Private Custodial Service providers stated that if section 127 was removed in its entirety then there would be no necessary protection in place because of the absence of a legally enforceable collective agreement between themselves and their recognised trades unions. The Minister accepted that point and took the decision to amend the proposed Order so as not to disapply section 127 in respect of prison officers in Northern Ireland and custody officers and prison custody officers employed by the private sector. The Prison Service then conducted a second consultation, which ran from 26 March until 21 May 2004, which was another eight week period. We note the department's explanation for the short consultation periods, but we wish to emphasise that departments are expected to comply fully with Cabinet Office guidance on the length of consultation.

18. The consultation documents were sent to 137 individuals and organisations. A list of those consulted is reproduced at Annex A to the explanatory statement. The double consultation produced eight substantive responses, comprising three in the initial period and five for the further consultation.

19. In general terms, the responses were divided on the issue of whether section 127 should be disapplied. The responses followed the predictable division between both sides of industry. For example, in a joint response, the private providers of Justice Services stated that as private sector companies involved in court escorting, prisons and other custodial facilities they have relied upon the protection of section 127 in avoiding the possibility of industrial action. They commented that it was uncertain that the recognition agreements that they have in place with recognised unions were legally binding, implying that it was equally uncertain that they provided the same degree of protection against industrial action. The private companies also commented that the removal of section 127 could cause a shift in the balance of industrial relations and would have a detrimental effect on future moves to contract-out public prisons.¹⁶

20. On the other hand, PSU (Prison Service Union) strongly criticised the Government's declaration not to disapply section 127 unless legally binding agreements were in place. PSU pointed out that some private companies would do anything to avoid granting recognition and collective bargaining rights to any independent trade union and that the Government's proposal would provide a disincentive to such companies. PSU said that it had recognition agreements with a number of private custodial companies, including Premier Custodial Group Ltd, and that its partnership agreement included clauses preventing industrial action of any description. PSU pointed out that some of its agreements were legally binding and that it was confident that its agreements with similar clauses with other companies, which currently were not legally enforceable, could be made legally binding. PSU commented that, unlike the public prisons, industrial action in the private sector was not seen as a first resort. PSU pointed out that the Government's

¹⁶ See their submission to the consultation.

intention to disapply section 127 had been widely canvassed and that private companies have had time to get legally binding agreements in place. PSU argued that the Government should correct the unfairness of section 127 and disapply section 127 for everyone, including those in the private custodial sector. PSU concluded by saying that if the Government believed industrial action is inappropriate in the custodial field, then it should be outlawed, whereas if it is content for industrial action to be used, then it should disapply section 127 for everyone.

21. As noted above, PSU also criticised the Government's decision not to disapply section 127 in relation to private companies supplying custody services because its retention would provide a disincentive for such companies to recognise independent trade unions.¹⁷ In response to this point, the Government stated that it is its intention to disapply section 127 in its entirety, but only where equivalent protection is available following disapplication.¹⁸ We asked the Government, what, if anything, it was doing to encourage unions and companies to reach such agreements. The Prison Service told us that each of the private sector contractors which provide custodial places had been informed of the Government's expectation that they would enter into legally binding collective agreements with their respective recognised Trade Unions/ Staff Associations. The Prison Service added that consultation with each individual contractor continued with regard to what is required to demonstrate that effective steps have been taken to allow section 127 to be disapplied in each case, but the continuing discussions are at different stages with each contractor.

22. Public and Commercial Services Union (PCS) also supported the disapplication, but considered that it should also extend to workers in Northern Ireland and to custody officers in the private sector. PCS pointed out that some private custody companies had resisted numerous requests for union recognition from POA, PCS and its predecessor unions. GMB, which has a long standing policy to oppose "no-strike" agreements where arbitration is automatically reached, argued that the proposal does not provide the necessary protection to its members.

23. The POA said it was fully committed to the repeal of section 127. Nicky Padfield of the Institute of Criminology (Cambridge University) argued that to provide prison officers with the right to strike, but only on the grounds that the main union has agreed not to use it, is controversial. She argued that the Prison Act 1952 was inappropriate today and called for a wider review of the Act. Ms Padfield criticised the wide powers available under the Regulatory Reform Act 2001 and the reduced period for the initial consultation.¹⁹

24. We acknowledge that the Prison Service has provided a very clear and helpful commentary on the responses to its consultation, including a point by point summary of each submission.

25. The Consultation on the proposal for a Regulatory Reform Order appears to have been the subject of, and taken appropriate account of, adequate consultations.

¹⁷ See their submission to the consultation.

¹⁸ See their submission to the consultation.

¹⁹ See their submission to the consultation.

What is the estimate of costs, savings and other benefits?

26. The Prison Service explanatory statement concludes that the proposal is designed to be cost neutral on the grounds that as the full trade union statutory rights of prison staff would be re-instated, the contractual limitations mean that these rights would be voluntarily restricted. As regards benefits other than savings, the Prison Service statement makes clear that the proposal honours the Government's pre-election pledges, although, as the Prison Service points out, the changes in themselves would not have a great deal of practical impact. **We are satisfied that the proposals have been the subject of, and taken appropriate account of, estimates of increases or reductions in costs or other benefits which may result from the implementation of the proposed order.**

Was it clearly drafted?

27. Although the draft Order is very straightforward, we found that the consequential amendment in article 3(2) was misguided, as the definition which it purports to amend was repealed by regulations 3(1) and 24(e) of the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (S.I. 2003/1673). In short, article 3(2) should have been omitted. In reply we were told that the Prison Service was unaware of the repeal in question, which had come into force only 18 days before the proposal was laid. They regretted this oversight and would amend the Order before it is laid before Parliament under section 8 of the Regulatory Reform Act 2001.²⁰

Are there other considerations to take into account?

28. In scrutinising this proposal we have considered whether any other issues arise which we are required by our Standing Order to take into account and are satisfied that there are none.

5 Conclusion

29. **We consider that the proposal should be amended as referred to in paragraph 27 above before a draft Order is laid before the House.**

Appendix

Letter from HM Prison Service to the Clerk of the Committee

Proposal for the Regulatory Reform (Prison Officers) (Industrial Action) Order 2004: response to request for information

Q 1 Section 127 seems to constitute a “burden” on trade unions which represent Prison Officers because it affects those unions in the carrying on of their activities. But could the Department explain how that section is a “burden” on the “general public at large” (Explanatory Document page 8? In the carrying on of what activity are members of the public affected?

A1 The Prison Service recognises that where a burden is removed or reduced under the Regulatory Reform Act, the burden must affect persons in the carrying on of an activity. It agrees that while the repeal of section 127 clearly affects the carrying on of trade union activities, it is difficult to see how it affects any activity of the public at large (although the prohibition in section 127 is directed at "any person" and could include, for example, a union official not employed directly by HM Prison Service).

Q 2 The Department claims that with legally enforceable collective agreements in place, section 127 is no longer necessary. How does the government propose to deal with the possibility of the legally binding voluntary agreements being terminated by one of the parties? Would the Department seek to re-apply section 127 of the 1994 Act?

A2 On 25th January 2004 the POA decided to give the requisite 12 months' notice of termination of the Voluntary Agreement as there were one or two aspects of the dispute resolutions procedure contained in the legally binding collective agreement - or Voluntary Agreement (VA) as it was referred to - that they wished to re-negotiate.

Representatives from HM Prison Service and the POA successfully negotiated a new legally binding collective agreement called the Joint Industrial Relations Procedural Agreement (JIRPA). The POA has undertaken that it will not induce, authorise or support any form of industrial action by any of its members employed in the Prison Service relating to a dispute concerning any matter, whether covered by the agreement or otherwise.

The JIRPA was ratified by the membership and signed by Colin Moses (POA National Chair) and Phil Wheatley (Director General HM Prison Service) on 11 November 2004 and will replace the VA in January 2005.

If this set of circumstances happened again the Prison Service might decide to return to Parliament to re-enact by primary legislation the provisions of section 127 which are now being removed although at the present time this is thought to be unlikely.

Q 3 In Scotland, of the three unions that are party to the legally binding voluntary agreement, only the POA(S) has agreed not to induce etc. industrial action (clause 4.10). To the extent that the scope of the legally binding voluntary agreements is therefore much narrower than that of Section 127, does the Department accept that the Scottish agreement provides less protection than that currently provided by Section 127.

A3 Within Scotland it should be noted that all of the recognised trade unions have signed a comprehensive Partnership Agreement with SPS Management which commits the trade unions and management to work together to promote the success of the Scottish Prison Service in a competitive environment. This Agreement has been very successful. It has if anything strengthened further the commitment exemplified within the Voluntary Agreement that industrial action is considered as being antipathetic to the effective pursuance of the interests of the recognised trade unions' members within the

SPS. It should also be noted that the Voluntary Agreement in Scotland takes an all-encompassing approach to the regulation of employment relations and dispute resolution. In that respect it is wider than s127 as it covers all staff groups.

With regard to the non-POA signatories to the Voluntary Agreement, these trade unions are, through the Voluntary Agreement, committed to resolving issues through the industrial relations procedural agreement. The use of ACAS conciliation and binding independent arbitration provides inherent advantages to them as compared with the alternative of balloting their membership for industrial action. This is because with regard to presentation to their members, they can point to a situation where a dispute has been resolved fairly without the requirement to call for industrial action. Industrial action, with loss of pay and other risks, is generally not a popular choice among trade union members when there is an appropriate alternative such as the Voluntary Agreement. With regard to the outcomes that may flow from use of the Voluntary Agreement, we are advised that in the 30 or so years the ACAS Independent Arbitration system has been running in the UK, only one Arbitrator's Award has been rejected and that by an employer. The breach of an ACAS Arbitrator's Award by any trade union would immediately isolate it within the Trade Union community as ACAS's role in dispute resolution carries with it the highest regard within the trade union movement.

With regard to staff groups, the legally binding coverage of the Voluntary Agreement in Scotland is the same as s127 – with the exception of senior operational managers who are represented by the Public & Commercial Services Union (PCS). In conducting a risk assessment with regard to the question of their inclusion or exclusion from the legally binding aspect of the Voluntary Agreement, it was felt by SPS Management that the vocational ethos and numbers associated with this group of staff meant that they were highly unlikely to take industrial action. Coverage would have also led to practical difficulties for PCS in signing the voluntary agreement as they represent a number of other non-operational staff groups within SPS, none of whom are covered by s127. It is worthy of note that in the recent civil service-wide industrial action called by the PCS UK membership, no senior manager took part.

Q 4 In Scotland, what protection would be available in the event that staff leave the union that is party to a legally binding agreement and join unions that are not party to such agreements?

The position in Scotland is no different to that in England and Wales in this respect. The POA(s) are the trade union formally recognised by SPS to represent prison officer staff through collective bargaining. That is mainly because they are the Trade Union that can count the great majority of prison officers employed by SPS within their membership. It follows that if prison officers chose to be members of another trade union which does not have formal recognition rights (and with significantly less bargaining power due to the small proportion of staff who are members), they would effectively give up their voice in the collective bargaining process.

It is worth pointing out that such a possibility is not something that is restricted to a development in the future as is suggested by the question, but exists now. In Scotland, there is currently at least one other Trade Union that a small number of Prison Officer staff are members of. That Trade Union is not recognised by SPS and is not a signatory to the Voluntary Agreement.

The threat of industrial action by a smaller trade union (even if it managed to meet all of the statutory requirements and tests for it to be regarded as lawful) is not seen as constituting a significant threat to the delivery of services within SPS. That is because the small proportion of staff involved in any such action could be relatively easily backfilled from (the much larger) staff group who are not members of the trade union concerned.

It is, of course, recognised that the process of employment relations is dynamic and that the environment in which they are conducted is subject to change. In order to support the current climate of positive relations that are being underlined by developments in partnership working, it is necessary to alter the supporting framework to reflect the improvements that have been made. In this case it means replacing a statutory prohibition on industrial action with a voluntary agreement not to undertake industrial action. Not to do so would be detrimental to the positive developments that have taken place.

It seems unlikely in the present employment relations environment that significantly large numbers of POA members would choose to leave the POA to become members of another Trade Union. However, in theory it is possible. In such a theoretical event, where the collective bargaining power of the POA was significantly diminished in favour of another Trade Union, the formal recognition of the POA as the trade union with recognition rights for the prison officer staff group would likely fall to be reviewed. Any proposal to formally recognise another trade union as representing Prison Officers (jointly or singly) would of course at that time address a wide range of issues including the agreement of a dispute resolution process and a voluntary arrangement with regard to the avoidance of industrial action as part of any formal recognition proposals.

Q 5 In its response, the Prison Service Union (PSU) criticises the Government's decision not to dis-apply section 127 in relation to private companies supplying custodial services on grounds, amongst others, that its retention would provide a disincentive for such companies to recognise independent trades unions. In response to this point the Government states that it is its intention to dis-apply section 127 in its entirety, but only where equivalent protection is available following dis-application. What, if anything, is the Government doing to encourage unions and companies to reach such voluntary agreements?

A5 The Government has informed each of the private sector contractors who provide custodial places of its expectation that they will enter into legally binding collective agreements with their respective recognised Trade Unions/ Staff Associations.

Consultations with each individual contractor continues with regard to what is required to demonstrate that effective steps have been taken to allow section 127 to be dis-applied in each case. These discussions are at different stages with each contractor and are currently ongoing.

Q 6 Explain the exclusion of article 3(2) given the repeal of the definition of "Prison Officer" by regulations 3(1) and 24(e) of the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (S.I. 2003/1673)

The Prison Service were unaware of the repeal in question which had come into force only 18 days before the proposals were laid before Parliament. They regret this oversight and undertake that the draft order will be amended before it is laid before Parliament under section 4 of the Regulatory Reform Act 2001.

Q 7 Please confirm that the Proposal is compatible with EU legislation.

A7 The Prison Service can confirm that in its view the Proposal is compatible with EU legislation.

Formal minutes

Tuesday 14 December 2004

Members present:

Mr Peter Pike, in the Chair

Mr Mark Lazarowicz

Brian White

Mr Denis Murphy

The Committee deliberated.

Draft Report [Proposal for the Regulatory Reform (Prison Officers) (Industrial Action) Order 2004], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 29 read and agreed to.

Resolved, That the Report be the Third Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

A paper was ordered to be appended to the Report.

Ordered, That the Appendix to the Report be reported to the House.

[Adjourned till Tuesday 18 January 2005 at 9.30 am.]

Reports from the Regulatory Reform Committee in the last Session of Parliament

Session 2003-04

| | | |
|-----------------------|---|------|
| First | Proposal for the Regulatory Reform (Sunday Trading) Order 2004 | 108 |
| First Special Report | Government Response to the Committee's First Special Report, Session 2002-03: <i>The operation of the Regulatory Reform Act 2001: a progress report</i> | 256 |
| Second | Proposal for the Regulatory Reform (Patents) Order 2004 | 337 |
| Third | Draft Regulatory Reform (Sunday Trading) Order 2004 | 338 |
| Fourth | Proposal for the Regulatory Reform (Museum of London) (Location of Premises) Order 2004 | 414 |
| Fifth | Proposal for the Regulatory Reform (National Health Service Charitable Trust Accounts and Audit) Order 2004 | 438 |
| Sixth | Proposal for the Regulatory Reform (Local Commissioner for Wales) Order 2004 | 553 |
| Seventh | Draft Regulatory Reform (Museum of London) (Location of Premises) Order 2004 | 594 |
| Eighth | Draft Regulatory Reform (Patents) Order 2004 | 683 |
| Second Special Report | Draft Regulatory Reform (Museum of London) (Location of Premises) Order 2004 | 818 |
| Ninth | Proposal for the Regulatory Reform (Trading Stamps) Order 2004 | 817 |
| Tenth | Draft Regulatory Reform (Local Commissioner for Wales) Order 2004 | 900 |
| Eleventh | Proposal for the Regulatory Reform (Fire Safety) Order 2004 | 684 |
| Twelfth | Proposal for the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2004 | 1056 |
| Thirteenth | Draft Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2004 | 1246 |
| Fourteenth | Proposal for the Regulatory Reform (Execution of Deeds and Documents) Order 2004 | 1271 |

Report from the Regulatory Reform Committee in the present Session of Parliament

Session 2004-05

| | | |
|-------|---|-----|
| First | Proposal for the Regulatory Reform (Joint Nature Conservation Committee) Order 2005 | 117 |
|-------|---|-----|

All reports are available from The Stationery Office.