Delegated Powers and Law Reform Committee

52nd Report, 2014 (Session 4)

Subordinate Legislation

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Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (a) any—
   (i) subordinate legislation laid before the Parliament or requiring the consent of the
   Parliament under section 9 of the Public Bodies Act 2011;
   (ii) [deleted]
   (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to
determine whether the attention of the Parliament should be drawn to any of the
matters mentioned in Rule 10.3.1;
(b) proposed powers to make subordinate legislation in particular Bills or other
proposed legislation;
(c) general questions relating to powers to make subordinate legislation;
(d) whether any proposed delegated powers in particular Bills or other legislation
should be expressed as a power to make subordinate legislation;
(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of
the 2010 Act; and
(f) proposed changes to the procedure to which subordinate legislation laid before
the Parliament is subject.
(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

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

Clerk to the Committee
Euan Donald

Assistant Clerk
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The Committee reports to the Parliament as follows—

1. At its meeting on 30 September 2014, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Bankruptcy (Scotland) Regulations 2014 (SSI 2014/225);
   Bankruptcy Fees (Scotland) Regulations 2014 (SSI 2014/227);
   Local Government Pension Scheme (Transitional Provisions and Savings) (Scotland) Regulations 2014 (SSI 2014/233);

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.
4. These Regulations make new provision in connection with changes to the Bankruptcy (Scotland) Act 1985 made by the Bankruptcy and Debt Advice (Scotland) Act 2014. In particular, they make provision in connection with the new Minimal Asset Process ("MAP"), and in connection with debtors who are sequestrated undertaking a course of financial education, if required to do so by their trustee.

5. The Regulations also substantially re-enact, with modifications, the Bankruptcy (Scotland) Regulations 2008 so far as those Regulations made provision in relation to certain matters.

6. The instrument comes into force on 1 April 2015. Generally, the 2008 Regulations will continue to apply where a petition for sequestration is presented before that date, or a debtor application for sequestration was made before that date.

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

8. There are a couple of drafting errors in the instrument, as set out below. There is also a failure to follow normal drafting practice, as various provisions in the notes within the Forms in Schedule 1 are not drafted in gender-neutral terms. This is also explained below.

9. The Committee also sought an explanation in relation to the clarity of the significant saving provision in regulation 24(1)(a). Regulation 24(1)(a) provides that (except as mentioned in paragraph (2) of the regulation), the Regulations have no effect as regards any sequestration in respect of which (i) the petition is presented before 1 April 2015; or (ii) a debtor application was made before that date.

10. The Scottish Government in the correspondence has acknowledged that it may have been preferable, for consistency with regulation 24(1)(a)(i), to have used “is” instead of “was” in regulation 24(1)(a)(ii). The Government considers that the effect of the provision is clear. The intended effect is that regulation 24(1) applies to sequestrations where either a petition for sequestration is presented to the court, or where a debtor application is 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 these Regulations).

11. The Committee would accept that the provision is not defectively drafted. However the Committee is entitled to report on a provision, where the drafting clarity could be improved. The Committee has seen that consistency and clarity of drafting is particularly important in the case of transitional or savings provisions which have substantive legal effects on persons.
12. The Committee considers therefore that the meaning of 24(1)(a) could be clearer, if a consistent approach was to be taken in the drafting. The clearest, most explicit way of implementing the intended effect of this saving provision may not be to substitute “is” for “was” in subparagraph (a)(ii), as the Government suggests. This is because, where the present tense is used in a statute, it generally looks to the future. The Committee considers that regulation 24(1) could have made more explicit that it applies to sequestrations where either a petition for sequestration is presented, or where a debtor application is made, before 1st 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 these Regulations).

13. The Scottish Government has not indicated in the correspondence that (although regulation 24(1) could be framed more consistently) it will amend the provision. Given that there is an undertaking to amend the drafting errors set out below, the Committee considers that this amendment could straightforwardly add in a suitable change to regulation 24.

14. The Committee draws the Regulations to the attention of the Parliament on the general reporting ground, for these reasons:

15. First, the Regulations contain a couple of minor drafting errors. Regulation 19 refers to section 54D(4)(b) or (6)(b), without specifying that these are provisions of the 1985 Act. Page 27 also contains notes for the completion of the Form 4 statement of assets and liabilities contained in Schedule 1, but the page is duplicated with page 26.

16. The Scottish Government has undertaken to correct these errors by means of amending Regulations, which would be laid before the Parliament before these Regulations come into force on 1 April 2015.

17. Second, there is a failure to follow normal drafting practice, as various provisions in the notes within the Forms in Schedule 1 are not drafted in gender-neutral terms. This applies at pages 34, 37, 39, 41, 124 (at paragraph 3), and 127 (at paragraph 3) of the Regulations.

18. The Scottish Government has undertaken to correct those provisions if and when other amendments to the relevant forms in Schedule 1 are to be made, or if in future the Regulations were to be revoked and the relevant provisions re-enacted. However an amending instrument will be brought forward to correct the minor errors described above, and so the Committee considers that the various non gender-neutral references should be amended at the same time, before these Regulations come into force on 1 April 2015.

19. The Committee also draws the Regulations to the attention of the Parliament on the reporting ground (h), as the meaning of the saving provision in paragraph (a) of regulation 24(1) could be clearer. There could be a consistent use of tense in subparagraphs (i) and (iii). Paragraph (a) 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 these Regulations.

20. The Scottish Government has indicated that it may have been more consistent to have used “is” instead of “was” in regulation 24(1)(a)(ii), but it has not indicated that the provision will be amended. The Committee considers that regulation 24(1) should be amended at the same time as the minor errors set out above are corrected, to provide better clarity and consistency of provision.
Bankruptcy Fees (Scotland) Regulations 2014 (SSI 2014/227) (Economy, Energy and Tourism Committee)

21. The instrument prescribes the fees and outlays payable to the Accountant in Bankruptcy (“AiB”) in respect of its functions under the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”).

22. It also revokes the Bankruptcy Fees etc. (Scotland) Regulations 2012 (“the 2012 Regulations”), subject to a saving for petitions and applications for sequestration lodged or trust deeds granted before 1 April 2015.

23. The instrument comes into force on 1 April 2015.

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

25. The Committee sought an explanation in relation to the clarity of the significant saving provision in regulation 13(1). Regulation 13(1) provides that (except as mentioned in paragraph (4) of the regulation), the Regulations have no effect as regards any sequestration in respect of which (i) the petition is presented before 1 April 2015; or (ii) a debtor application was made before that date. Regulation 13(1) is in the same terms as regulation 24(1)(a) of the Bankruptcy (Scotland) Regulations 2014 (SSI 2014/225) discussed above, and the response provided by the Scottish Government on the point is the same as for that instrument. Accordingly the Committee refers to the explanation provided in relation to SSI 2014/225, at paragraphs 9 to 12 of this report, as being equally relevant to regulation 13(1) of the Bankruptcy Fees (Scotland) Regulations 2014.

26. The Committee therefore draws the instrument to the attention of the Parliament on the reporting ground (h), as the meaning of the saving provision in regulation 13(1) could be clearer. There could be a consistent use of tense in subparagraphs (a) and (b). Regulation 13(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 these Regulations.
27. These Regulations set out the transitional and savings provisions relating to members of the Local Government Pension Scheme 2009 ("the 2009 Scheme"), which is to be replaced by a new Local Government Pension Scheme by the Local Government Pension Scheme (Scotland) Regulations 2014 (SSI 2014/164) with effect from 1 April 2015 ("the 2015 Scheme").

28. The general effect of the Regulations is to protect the benefits accrued by members of the 2009 Scheme before 1 April 2015. Regulation 2 and Schedule 1 revoke (subject to savings) the regulations which constitute the 2009 Scheme and its predecessor Schemes. Regulation 3 preserves the membership and benefits accrued in the previous Schemes.

29. Regulation 4 provides that an active member who was within 10 years of normal pension age under the 2009 Scheme on 1 April 2012 is entitled to draw benefits on retirement which are no less than they would have been able to draw if the 2009 Scheme had continued to exist. Regulation 5 provides for automatic transfer into the 2015 Scheme of persons who are members of the 2009 Scheme on 31st March 2015.

30. The Regulations come into force on 1 April 2015. Very similar Regulations have been made for England and Wales (SI 2014/525).

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

32. The Scottish Government has acknowledged in the correspondence that there is an error in regulation 17 (survivor benefits). Regulation 17(13)(a)(i) specifies a condition when membership of the local government pension scheme, for the purposes of the calculation of a survivor pension payable in accordance with the requirements of regulation 17(10) to (12), shall include "additional membership" under certain provisions of the 1998 or 2009 Schemes.

33. The condition stated in regulation 17(13)(a)(i) is that a surviving spouse or civil partner was married or in a civil partnership at any time whilst the deceased was in active membership of the Scheme after 31 March 1972. This should provide also that the spouse or civil partner was married to the deceased member of the Scheme.

34. The Government’s response has not commented on the effect of this error. However, it is apparent that regulation 17(13)(a)(i) fails to give effect to the intended policy, and therefore the provision appears to be defectively drafted. As drafted, the condition will be implemented where a spouse or civil partner was married or in a civil partnership to anyone at any time while the deceased was in active membership of the pension scheme after 31 March 1972 – and not only married or in civil partnership with the deceased.
35. There are also a couple of more minor errors in the instrument, as set out below.

36. The Committee therefore draws the Regulations to the attention of the Parliament on the reporting ground (i) as the drafting of regulation 17(13)(a)(i) appears to be defective.

37. Regulation 17(13)(a)(i) specifies a condition when membership of the local government pension scheme, for the purposes of the calculation of a survivor pension payable in accordance with the requirements of regulation 17(10) to (12), shall include additional membership under certain provisions of the 1998 or 2009 Schemes. The specified condition is that a surviving spouse or civil partner was married or in a civil partnership at any time whilst the deceased was in active membership of the Scheme after 31 March 1972. This should provide also that the spouse or civil partner was married to the deceased member of the Scheme.

38. The Committee also draws the Regulations to the attention of the Parliament on the general reporting ground, as they contain a couple of more minor drafting errors.

39. Firstly, in regulation 1(4), there is an error in the definition of “the 1998 Transitional Regulations”, as the citation of the Regulations is incorrect. The words “(Scotland)” and “(Transitional Provisions)” are inverted.

40. Secondly, in regulation 17(13)(a) the reference to regulation 41(a) to (d) of the 1998 Regulations should be to regulation 41(4)(a) to (d) of those Regulations.

41. The Scottish Government has undertaken to lay an amending instrument to correct those errors timeously for these Regulations coming into force.
POINTS RAISED: INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Rules of the Scottish Land Court Order 2014 (SSI 2014/229)
(Justice Committee)

42. The purpose of the Order is to set out rules governing the practice and procedure to be followed in the Scottish Land Court with effect from 22 September 2014. The Order also revokes the previous rules, contained in the Scottish Land Court Rules 1992 (SI 1992/2656).

43. The Order came into force on 22 September 2014.

44. In considering the instrument, the Committee asked the Scottish Land Court for an explanation of certain matters. The correspondence is reproduced at Annex D.

45. There are some drafting errors in the instrument, as set out below. There is also a failure to follow normal drafting practice, as various provisions in the order are not drafted in gender-neutral terms. This is also explained below.

46. The Committee also sought an explanation why the instrument, which is subject to the default laying requirement, was laid just prior to a Scottish Parliament recess period and came into force immediately after that recess on 22 September 2014, with the result that the Committee had no opportunity to scrutinise it prior to it coming into force. The Committee asked why the instrument could not have been laid before or after the recess, to enable such scrutiny to take place.

47. The Scottish Land Court’s response states that it regrets the inadvertent failure to give the Committee time to scrutinise the rules before they came into force, and acknowledges that the court should have been more alive to the effect which the two separate periods of recess have had on the Parliamentary timetable this year. The response explains that the court wished to ensure that the new rules were enacted before its Chairman Lord McGhee retires in October and that the coming into force date was chosen accordingly. It further explains that there were unexpected delays in having the instrument signed by members of the court and approved by the Scottish Ministers.

48. The Committee draws the instrument to the attention of the Parliament on the general reporting ground for these reasons:

49. Firstly there are some minor drafting errors, as follows:

   (a) The reference in rule 20(1) to the rights conferred by paragraphs (2) and (5) of this rule should be to the rights conferred by paragraphs (2) and (6);

   (b) Rule 50(1) refers to “the process in the case” under rule 49. The reference should be to “the process in the application”, as that is the term defined by rule 49; and
(c) The reference in rule 97(3) to a written submission under paragraph (1) of that rule should be to a written submission under paragraph (2).

50. Secondly there is a failure to follow normal drafting practice, as various provisions in the order are not drafted in gender-neutral terms. This applies in rules 7(1), 58(4), 96(8) and 106(4) in the Schedule to the Order.

51. Separately, the Committee notes that it would have been useful had the planned timing of the instrument allowed a period longer than 2 sitting days between the date when it was laid before the Parliament and the date when the provisions were brought into force, to afford the Committee the opportunity to scrutinise the instrument before the commencement date. The Committee also notes the explanation of the timetable given by the Scottish Land Court, and that the court regrets the inadvertent failure to allow time for scrutiny.
NO POINTS RAISED

52. At its meeting on 30 September 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:

**Economy, Energy and Tourism**

Bankruptcy and Debt Advice (Scotland) Act 2014 (Consequential Provisions) Order 2014 [draft];

Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014 [draft];

Common Financial Tool etc. (Scotland) Regulations 2014 [draft];

Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 [draft].


**Health and Sport**

Public Bodies (Joint Working) (Scotland) Act 2014 (Commencement No. 2) Order 2014 (SSI 2014/231 (C.21));

**Infrastructure and Capital Investment**


**Justice**

Bankruptcy (Scotland) Regulations 2014 (SSI 2014/225)

On 2 September 2014, the Scottish Government was asked:

(1) Section 1A(5) of the Bankruptcy (Scotland) Act 1985 provides that regulations under subsection (1)(b) (in relation to maintenance of the register of insolvencies) may prescribe circumstances where information need not be included in the register, if in the opinion of the Accountant in Bankruptcy inclusion of the information would be likely to jeopardise the safety or welfare of any person. Regulation 4(2) does not so prescribe circumstances. It generally sub-delegates to the Accountant in Bankruptcy the power to determine that information need not be included in the register where he or she is of the opinion that inclusion of the information would be likely to put any person at risk of violence or otherwise jeopardise the safety or welfare of any person. Accordingly standing the terms of the enabling power in section 1A(5)-

(a) does the Scottish Government consider it to be sufficiently clear from the terms of the Regulations which circumstances are prescribed, where information need not be included in the register if in the opinion of the Accountant in Bankruptcy inclusion of the information would be likely to jeopardise the safety or welfare of any person,

(b) please clarify why it is considered to be a proper use of the enabling powers that regulation 4(2) generally sub-delegates the matter to the Accountant in Bankruptcy (rather than prescribing circumstances in terms of section 1A(5))?

(2) Unlike other provisions in the instrument, regulation 19 (certificate of deferral) refers to section 54D(4)(b) or (6)(b), without specifying that these are provisions of the 1985 Act. Would you agree this is an error and if so, would the Scottish Government propose to correct it?

(3) Page 27 of the instrument contains notes for the completion of the Form 4 statement of assets and liabilities in Schedule 1, but the page is duplicated with page 26. Is this an error, and if so, would you propose to correct it?

(4) Regulation 24(1)(a) provides that except as mentioned in paragraph (2), the Regulations have no effect as regards any sequestration in respect of which (i) the petition is presented before 1 April 2015; or (ii) 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?
Various provisions in the notes within the Forms in Schedule 1 are not drafted in gender-neutral terms (with various references to "him" and "his"). This applies at pages 34, 37, 39, 41, 124 (at paragraph 3), 127 (at paragraph 3) of the Regulations. While we appreciate that the 1985 Act is not drafted throughout in gender-neutral terms, please explain why the opportunity has not been taken to make these various references in the Regulations gender-neutral (given that they appear in notes which are designed to assist persons to complete the prescribed forms).

The Scottish Government responded as follows:

(1)(a) The Scottish Government considers that it is sufficiently clear in regulation 4(2) of the Regulations that the circumstances prescribed where information need not be included in the register of insolvencies are any circumstances—

- where the Accountant in Bankruptcy is of the opinion that inclusion of the information would be likely to put any person at risk of violence
- where the Accountant in bankruptcy is otherwise of the opinion that inclusion of the information would be likely to jeopardise the safety or welfare of any person.

(1)(b) The power in section 1A(1)(b) of the Bankruptcy (Scotland) Act 1985 ("the 1985 Act") to prescribe the form of the register of insolvencies is a broad power, with section 1A(5) setting out an example of particular provision which may be made in the regulations.

The Scottish Government considers that it is permissible for the power to be used to prescribe circumstances in a broad way consistent with the delegation of discretion to the Accountant in Bankruptcy in section 1A(1)(b) and (5) of the 1985 Act itself. That expressly provides for the Accountant in Bankruptcy to have the function of maintaining the register of insolvencies including determining whether, in the circumstances prescribed, inclusion of information in the register would be likely to jeopardise the safety and welfare of any person.

The Scottish Government therefore considers that regulation 4(2) is an appropriate use of the enabling power in section 1A(1)(b) and (5) of the 1985 Act. The Scottish Government considers that is particularly the case given the inevitable difficulty in setting out exhaustively situations where the Accountant in Bankruptcy might reasonably form the view that inclusion of information in the register would be likely to jeopardise the safety and welfare of any person.

2. The Scottish Government agrees that in regulation 19 the words “of the 1985 Act” have been mistakenly omitted after “section 54D(4)(b) or (6)(b)”. While the Scottish Government considers that, taken together with the Form 28 itself (which makes clear on its face that it is the form of certificate of discharge in terms of section 54D(4)(b) and (6)(b) of the 1985 Act), the position is nevertheless clear, the Scottish Government would propose to correct this oversight by amending Regulations to be made and laid before the Regulations come into force on 1st April 2015.
3. The Scottish Government agrees that page 27 of the Regulations duplicates page 26 and that this is an error. The Scottish Government does not consider that this error has any material adverse effect on the Form 4 (set out at pages 22 to 32 of the Regulations) but would nevertheless propose to correct this oversight by amending Regulations to be made and laid before the Regulations come into force on 1st April 2015.

(4)(a) The intended effect of regulation 24(1) is to provide, subject to paragraph (2), that from when they come into force on 1st April 2015 the Regulations have no effect in relation to a sequestration which proceeds either on a petition for sequestration presented, or a debtor application made, before that date (and regardless, in particular, of whether the date of presentation of the petition or date of making the debtor application is before, on or after the date of making the Regulations) and that the Bankruptcy (Scotland) Regulations 2008 continue to have effect in relation to any such sequestration.

(4)(b) There is no intention that regulation 24(1) will apply in a different way depending on whether a sequestration proceeds on a petition or on a debtor application. In particular there is no intention that Regulation 24(1) will apply—

- in the case of a sequestration which proceeds on a petition, only where the petition is presented after the date of making these Regulations but before 1st April 2015

- in the case of a sequestration which proceeds on a debtor application, where the debtor application was made on any date before 1st April 2015 (including a date on or before the date of making these Regulations).

While it is agreed that it may have been preferable, for consistency with regulation 24(1)(a)(i), to use “is” instead of “was” in regulation 24(1)(a)(ii) it is considered that this does not have any material effect on the operation of the provision, the effect of which is clear. Regulation 24(1) applies to sequestrations proceeding either on a petition for sequestration presented, or on a debtor application made, before 1st 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 these Regulations).

5. The Scottish Government agrees that it would have been preferable for the various provisions in the notes within the Forms in Schedule 1 to the Regulations to have been drafted in gender-neutral terms. The fact that they are not so drafted is an oversight. The Scottish Government does not, however, consider that the fact that the various provisions are not in gender-neutral terms has any material adverse effect on the Forms concerned and that the notes are nevertheless clear. If and when other amendments to the relevant Forms in Schedule 1 to the Regulations are to be made, or the Regulations are to be revoked and relevant provision re-enacted, the Scottish Government will ensure that gender-neutral drafting is used.
Bankruptcy Fees (Scotland) Regulations 2014 (SSI 2014/227)

On 2 September 2014, the Scottish Government was asked:

Regulation 13(1) provides that except as mentioned in paragraph (4), the Regulations have no effect as regards any sequestration in respect of which (i) the petition is presented before 1 April 2015; or (ii) 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:

(a) The intended effect of regulation 13(1) is to provide, subject to paragraph (4), that from when they come into force on 1st April 2015 the Regulations have no effect in relation to a sequestration which proceeds either on a petition for sequestration presented, or a debtor application made, before that date and that the Bankruptcy Fees etc. (Scotland) Regulations 2012 continue to have effect in relation to any such sequestration.

(b) There is no intention that regulation 13(1) will apply where a petition is presented after the date of making these Regulations but before 1st April 2015 but will apply where a debtor application was made on any date before 1st April 2015. While it is agreed that it may have been preferable, for consistency with regulation 13(1)(a), to use “is” instead of “was” in regulation 13(1)(b) it is considered that this does not have any material effect on the operation of the provision, the effect of which is clear: regulation 13(1) applies to sequestrations proceeding either on a petition for sequestration presented, or on a debtor application made, before 1st 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 these Regulations).
ANNEX C

Local Government Pension Scheme (Transitional Provisions and Savings) (Scotland) Regulations 2014 (SSI 2014/233)

On 12 September 2014, the Scottish Government was asked:

1(a) In regulation 17(13)(a)(i), is there an omission of “with the deceased” between “at any time” and “whilst the deceased”?

(b) If you agree there is an error, what is the effect given that the sub-paragraph (i) provides for a condition that a surviving spouse or civil partner was married or in a civil partnership at any time whilst the deceased was in active membership of the 2009 Scheme after 31 March 1972, without further provision that the spouse or civil partner was married to the deceased member of the Scheme?

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

2. In regulation 1(4), there is an error in the definition of “the 1998 Transitional Regulations”, as the citation of the Regulations is incorrect (the Local Government Pension Scheme (Scotland) (Transitional Provisions) Regulations 1998)? If you agree, would the Scottish Government propose to correct this by an amendment?

The Scottish Government responded as follows:

It is agreed that in regulation 17(13)(a)(i), there is an omission of “with the deceased” between “at any time” and “whilst the deceased”. The Scottish Government proposes to amend the text by an amending instrument before the regulations come into force.

It is agreed that in regulation 1(4) there is an error in the definition of “the 1998 Transitional Regulations”, as the citation of the Regulations is incorrect. The Scottish Government proposes to amend the text by an amending instrument before the regulations come into force.
Rules of the Scottish Land Court Order 2014 (SSI 2014/229)

On 11 September 2014, the Scottish Government was asked:

1. The instrument is subject to the default laying requirement in section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. It was laid on 21 August 2014 and comes into force on 22 September 2014. The Scottish Parliament is in recess from 23 August 2014 until 21 September 2014 (inclusive). Accordingly the Committee will not have an opportunity to scrutinise the legal and technical validity of the instrument prior to it coming into force.

Can the Scottish Government /Scottish Land Court explain why the instrument could not have been laid either before or after the recess, to afford the Committee the opportunity of scrutinising it?

2. In the Schedule to the instrument, rule 7(1) uses a gender-specific pronoun in referring to the Principal Clerk of the court. Normal drafting practice is to avoid the use of gender-specific pronouns. Can you explain why there has been a failure to follow normal practice in this case, and would you propose to take any corrective action?

The question applies equally in respect of rules 58(4), 96(8) and 106(4).

3. Rule 14 concerns the lodging of answers and other responses. Paragraphs (5) and (7) of rule 14 provide for what may happen “where a party asks for an order by virtue of paragraph (4)”. Paragraph (6) provides for what may happen “where a respondent asks for an order in terms of paragraph (4)”. Standing the use of the word “party” on the one hand and “respondent” on the other, are the provisions in paragraphs (5) and (7) intended to apply in different circumstances to the provision in paragraph (6)? Further, where an order is sought “by virtue of paragraph 4”, is this intended to mean something different to where an order is sought “in terms of paragraph 4”?

Depending on the intention, is the meaning of the provisions in paragraphs (5), (6) and (7) considered to be sufficiently clear, and if so why?

4. In rule 20(1) should the reference to “paragraphs (2) and (5)” be to “paragraphs (2) and (6)”? If so, is any corrective action proposed?

5. Rule 21(2) provides for the appointment of a person as a commissioner for the purpose of taking possession or copies etc. of material relevant to a hearing. Does the Scottish Government / Scottish Land Court consider both the form and meaning of the paragraph to be sufficiently clear, and if so why? Alternatively, could the form or meaning be made clearer by the use of further divisions within the paragraph? If so, is any corrective action proposed?

6. Rule 40 provides for the remit of matters by the court to a person specially qualified by skill and experience. Rule 42 provides for the appointment by the court
of a person with special qualifications to give evidence to the court. The remit under rule 40 must occur before the issue of the final order “in the application”, while the appointment under rule 42 must be made before the issue of the final order “in a case”.

What does the Scottish Government/Scottish Land Court consider to be the effect of referring to the final order “in the application” on the one hand, and the final order “in the case” on the other? Specifically, are the two terms intended to have a different meaning and is that meaning considered to be sufficiently clear? If so, please explain why.

7. In rule 50(1), what is the intended meaning of “the process in the case under rule 49”, and does this require further definition? We note that “the process in the application” is defined under rule 49(3), but not “the process in the case”.

8. Rules 61 and 62 provide respectively for dispensing with the hearing of an appeal to the court, and where an appeal hearing is set down, the lodging of an outline of argument with the court. There appears to be no provision enabling the court to fix an appeal hearing. This is in contrast to rule 19(1), which expressly confers power on the court to fix a hearing in relation to an application to the court. It is also in contrast to rule 73 of the Scottish Land Court Rules 1992, which expressly requires the court to appoint a time and place for an appeal hearing.

In the absence of express provision, does the Scottish Government / Scottish Land Court consider that the rules enable the court to fix an appeal hearing?

The same question applies in relation to rules 68 and 69, with regard to the fixing of a hearing for an internal appeal.

9. In rule 97(3) should the reference to a written submission under paragraph (1) be to a written submission under paragraph (2)? If so, is any corrective action proposed?

10. Rule 97(4) provides that, at taxation, the party found liable in expenses is not entitled to be heard in relation to any item unless intimation has been given under paragraph (3) to the party found entitled to expenses, unless the auditor finds that the failure to intimate arose due to mistake, oversight or other excusable cause.

What is the intended position where the party found liable in expenses fails to identify the item in his or her written submission to the auditor under paragraph (2)? Is the policy intention that the auditor should be enabled to allow the party to be heard if satisfied that the failure to identify the item in submissions to the auditor arose due to mistake, oversight or other excusable cause? We note that that appears to be the position under rule 42.2(6) of the Rules of the Court of Session (SI 1994/1443) in relation to taxation of expenses in that court, although we appreciate the intention may of course be different in relation to the Scottish Land Court.

Depending on the intention, is any corrective action necessary?
11. The term “initial application” is used in rule 104(2)(b)(i). What is its intended meaning, and does it require further definition?

12. The Explanatory Note states that the Rules govern the practice and procedure to be followed in the Scottish Land Court with effect from 1st September 2014. Does the Scottish Government / Scottish Land Court agree that the reference to the 1st September 2014 is erroneous, and does it propose to take any corrective action?

The Scottish Land Court responded as follows:

1. We regret having inadvertently failed to give the Committee time to scrutinise the Rules before they come into force and acknowledge that we should have been more alive to the effect which the two separate periods of recess have had on the Parliamentary timetable this year. The exercise of drafting and revising of the Rules has been a time-consuming and complex process, mainly driven by Lord McGhie and requiring to be fitted in among his other judicial responsibilities as time permitted. The Court wished to ensure that the new Rules were enacted before Lord McGhie retires in October and the coming into force date was chosen accordingly. The text of the Rules and the SSI were finalised in July, but the process of having the Instrument signed by the members of Court and approved by Scottish Ministers took slightly longer than had been hoped. Regrettably this led to the Rules being laid later than intended.

2. The general approach taken in drafting the Rules was to use gender-neutral terminology, but as you will be aware this can sometimes become cumbersome. Given that the Principal Clerk at the date of making the Rules is a woman, it was felt that it was appropriate to use the feminine pronoun on the few occasions where the repeated use of the term “the Principal Clerk” would have sounded awkward and unnatural.

3. We think that the meaning of paragraphs (5), (6) and (7) in Rule 14 is sufficiently clear. As regards the use of the words “in terms of” in paragraph (6) as opposed to “by virtue of” in paragraphs (5) and (7), no difference in meaning is intended. As noted above, we have tried to avoid any inconsistencies in terminology but one or two have remained. We do not see this one as posing any problem in the present context.

As regards the use of “respondent” rather than “party” in paragraph (6), this is intentional. Paragraph (6) makes clear that the court can still consider a request by a respondent for an order in his or her favour even if the original application does not proceed. For example, paragraph (4) would allow a respondent to make what in other courts would be known as a counterclaim against the applicant; paragraph (6) ensures that the respondent’s counterclaim can proceed even if the applicant decides not to proceed with the application.

4. The reference in Rule 20(1) should be to paragraphs (2) to (6), as you say. We will ask for this to be corrected by way of correction slip.
5. We consider that the form and meaning of the provision in Rule 21(2) is sufficiently clear. The formal procedure for what is referred to in other courts as “commission and diligence” is seldom necessary. In most circumstances an order under Rule 21(1) will be sufficient.

6. No difference in meaning is intended by the use of “application” in Rule 40 as opposed to “case” in Rule 42. As noted above, we have tried to avoid any inconsistencies in terminology but a few have slipped through. We see no risk of real confusion.

7. Again, no difference is intended by the use of “application” in one instance and “case” in the other and we see no risk of real confusion.

8. We consider that there is no doubt that the Court has power to order an appeal hearing. If not covered by Rule 19(1) it would be covered by Rule 1 and is any event implicit in the power of a Court to regulate its procedure.

9. We have already asked for this error on Rule 97(3) to be corrected by way of correction slip.

10. The intention of Rule 97(4) is as you describe. A party is entitled to be heard where notice has been given and may not otherwise be heard without permission.

11. We think the meaning of the term “initial application” in Rule 104(2)(b)(i) is clear enough in context. It is intended to refer to the lodging of the initiating writ (normally a completed application form) in a new application. Where issues of statutory time bar arise it may be important to know when an application has been validly made.

12. The reference in the Explanatory Note should be to 22 September 2014. We will ask for this to be corrected by way of correction slip.
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