Delegated Powers and Law Reform Committee

Subordinate Legislation
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Delegated Powers and Law Reform Committee

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

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

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;

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.

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Introduction

1. At its meeting on 4 October 2016, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Courts Reform (Scotland) Act 2014 (Relevant Officer and Consequential Provisions) Order 2016 [draft]

   Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2016 (SSI 2016/290)

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 that are set out at the end of this report.
Points raised: Instruments subject to affirmative procedure

**Courts Reform (Scotland) Act 2014 (Relevant Officer and Consequential Provisions) Order 2016 [draft] (Justice)**

4. This Order contains several provisions which amend primary and secondary legislation, in consequence of various provisions of the Courts Reform (Scotland) Act 2014 (“the 2014 Act”) being brought into force on 28 November 2016. The consequential amendments principally concern the introduction of “simple procedure” in the Sheriff Court under Part 3 of the 2014 Act.

5. Article 2 of the Order adds the auditor of the Sheriff Appeal Court to the list of “relevant officers” in section 107 of the 2014 Act. This means that fees orders under section 107 of that Act may provide for the charging of fees by the auditor of the Sheriff Appeal Court.

6. The Order is subject to the affirmative procedure. If approved by Parliament, it would come into force on 28 November 2016.

7. In considering the instrument, the Committee sought further explanation from the Scottish Government in relation to the transitional provision in article 4(1) of the Order. The correspondence is reproduced at Annexe A.

8. The Scottish Government has acknowledged in the correspondence that there is a drafting error in article 4(1). The Government proposes that, if the Order is approved by the Parliament under the affirmative procedure, the error could be corrected in the Minister’s signing copy of the instrument.

9. Article 4(1) provides that the several modifications of primary and secondary legislation which are set out in schedule 1 other than paragraph 7, do not apply to small claims in the sheriff court. (A “small claim” is defined by section 35(2) of the Sheriff Courts (Scotland) Act 1971.) The reference to paragraph 7 is an error. The Scottish Government intends that the modifications contained in paragraph 8 of the schedule should apply to small claims, and those in paragraph 7 should not so apply.

10. It appears that, unless the error is corrected, the transitional provision will not operate correctly. It is intended by the Scottish Government that the various consequential amendments of transitional provisions which are contained in two other Orders of 2015 must apply to small claims. Those amendments are made by paragraph 8 of schedule 1.
11. It is also intended that the Small Claims (Scotland) Amendment Order 2007 should continue to apply in relation to small claims. As drafted, article 4(1) revokes the 2007 Order in relation to small claims. The 2007 Order made significant changes to small claims procedure. These include that the maximum monetary amount for a claim was increased from £750 to £3000.

12. The Committee considers therefore that article 4(1) fails significantly to implement the underlying intentions for the transitional provision.

13. The Committee does not accept the Scottish Government’s proposal that the error might be corrected in the Minister’s signing copy. Such adjustments are usually limited to minor or printing points, where either the error is in a provision which is not part of the operative provisions (such as in a footnote), or where the error is self-evident upon a high test. In this instance, the reference containing the error is material to the correct operation of the transitional provision. It is also not highly self-evident, on reading the instrument, that the reference to paragraph 7 in article 4(1) is intended to refer to paragraph 8.

14. The Committee also notes that the draft Order has already been laid before Parliament, so making this change would alter the terms of the Order as laid, and after its approval by Parliament (assuming it is approved). The draft Order has also been published, as laid, on legislation.gov.uk, in the section of the website for draft Scottish statutory instruments.

15. The Committee draws the Order to the attention of the Parliament on the reporting ground (i), as article 4(1) appears to be defectively drafted. Article 4(1) makes transitional provision that the several modifications of primary and secondary legislation which are set out in schedule 1, other than paragraph 7, do not apply to small claims in the sheriff court. The reference to paragraph 7 is an error. The Scottish Government intends that the modifications contained in paragraph 8 of the schedule should apply to small claims. The revocation in paragraph 7 should not so apply.

16. The Committee also reports that it does not accept the Scottish Government’s proposal that the error could be corrected in the Minister’s signing copy, should the Parliament affirm the draft Order. The error in the transitional provision is neither highly self-evident nor insignificant. The draft Order has also been published on legislation.gov.uk.

17. The Committee recommends that the draft Order should be withdrawn and re-laid in the correct terms, for approval by Parliament. If re-laying the Order raises a difficulty, the Scottish Government could alternatively consider laying an amending instrument, to correct the error timeously for this instrument coming into force on 28 November 2016.
Points raised: Instruments subject to negative procedure

Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2016 (SSI 2016/290) (Justice)

18. The Regulations amend the Civil Legal Aid (Scotland) Fees Regulations 1989 (‘the 1989 Regulations’) to provide for the legal aid fees allowable to solicitors in simple procedure cases in the sheriff court.

19. The fees in such cases are to be calculated in accordance with new Schedule 2A of the 1989 Regulations, as inserted by this instrument. Schedule 2A provides for detailed fees at a rate equivalent to those presently allowable to solicitors for assistance by way of representation in terms of the Advice and Assistance (Scotland) Regulations 1996.

20. The Regulations are subject to the negative procedure and will come into force on 28 November 2016.

21. In considering the instrument, the Committee sought clarification from the Scottish Government regarding two apparent drafting errors. The correspondence is reproduced at Annexe B.

22. In relation to the first error, the Scottish Government’s response acknowledges that its policy intention (of applying the new legal aid fees schedule to all simple procedure cases) “would better be achieved by referring to simple procedure cases within the meaning of section 72(9) [of the 2014 Act], rather than referring (as in the present instrument) to section 72(3).”

23. However the Scottish Government considers that the reference in the present instrument to section 72(3) covers all of the simple procedure cases which might arise under those provisions of the Act which will be in force as of 28 November 2016, and so achieves the stated policy.

24. The Committee accepts that section 72(3) lists all the types of case which may be brought subject to simple procedure in the first phase of commencement of the provisions relating to simple procedure, and which have effect from 28 November 2016. However the Committee’s view is that the section 72(3) does not contain a definition of the term “simple procedure case”. Rather it lists types of proceedings which may only be brought subject to simple procedure. In order to find out what a simple procedure case is, the reader needs to look to section 72(9).

25. While it is likely that in practice “simple procedure case” as it is used in the instrument would be given its intended meaning by users of the instrument, it would as the Government acknowledges have been better to use the definition in section 72(9). That was the approach taken in the other three instruments laid
recently which give effect to the limited implementation of simple procedure under the 2014 Act.

26. Not using that definition on this occasion necessitates a further amendment to the 1989 Regulations some time in advance of the second phase of commencement of the simple procedure provisions, and the Government has undertaken to make such an amendment. Had the full section 72(9) definition been used in this instrument however, no such amendment would be needed.

27. In relation to the second error, the Scottish Government acknowledges that there has been an error in paragraph 2 of the table of fees as set out in the schedule to the instrument. The entry in paragraph 2 sets a fee for time spent by a solicitor or a solicitor’s clerk in carrying out work “other than that prescribed in paragraphs 3 to 6” of the table. There is no exception for work prescribed in paragraph 7 of the table (photocopying).

28. The Scottish Government’s response confirms that the policy intention is not to allow a fee for time spent by a solicitor or solicitor’s clerk on photocopying. The relevant reference should accordingly be to work “other than that prescribed in paragraphs 3 to 7” (not “3 to 6”).

29. The Government considers that this is a self-evident error, particularly in the context of a clear statement in the Explanatory Note to the instrument that the fees prescribed are equivalent to those presently allowable to solicitors for advice by way of representation under the Advice and Assistance (Scotland) Regulations 1996. It accordingly proposes to correct the error by correction slip.

30. The Committee considers that the error is relatively minor in nature and is unlikely in practice to interfere with delivery of the Government’s policy, given that users of the instrument are likely to be aware of the intended read-across to current legal aid fees in other forms of court action.

31. However the Committee does not consider that the error is self-evident in nature. As drafted, the provision enables time spent photocopying to be charged for by solicitors under paragraph 2 rather than in accordance with paragraph 7 of the table of fees. It is not inconceivable that that could correctly give effect to the policy intention. It is necessary to look beyond the instrument, specifically to the Schedule to the Advice and Assistance (Scotland) Regulations 1996, to confirm what the policy intention actually is. Accordingly the Committee does not find the error to be one which could only be interpreted in one way.

32. The Committee draws the Parliament’s attention to the instrument under the general reporting ground in the following respects:

   I. Regulation 2(2)(c) of the instrument contains a drafting error. New regulation 5(2)(ba) in the Civil Legal Aid (Scotland) Fees Regulations 1989 (‘the 1989 Regulations’) as inserted by regulation 2(2)(c) of the instrument defines a simple procedure case with reference to section 72(3) of the Courts Reform (Scotland) Act 2014 (‘the 2014 Act’). Section 72(3) does not contain a
definition of simple procedure case. Rather it lists types of proceedings which may only be brought subject to simple procedure. The definition of “simple procedure case” is found instead in section 72(9) of the 2014 Act.

The Committee notes that the Scottish Government intends to amend the definition of “simple procedure case” in the 1989 Regulations some time in advance of the date on which the remaining provisions of the 2014 Act relating to simple procedure come into force. That date is expected to be no earlier than September 2017.

II. There is a drafting error in paragraph 2 of the table of civil legal aid fees in new Schedule 2A to the 1989 Regulations as inserted by regulation 2(3) and the schedule to this instrument. The entry in paragraph 2 sets a fee for time spent by a solicitor or solicitor’s clerk in carrying out work “other than that prescribed in paragraphs 3 to 6” of the table. The reference should be to work “other than that prescribed in paragraphs 3 to 7”.

33. The Committee notes that the Scottish Government intends to correct this error by correction slip but calls on the Scottish Government to correct the error by amending instrument rather than by correction slip, as the error does not appear to members of the Committee to be self-evident in nature.
No points raised

34. At its meeting on 4 October 2016, the Committee considered the following instruments. The Committee determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit.

**Finance and Constitution**

Budget (Scotland) Act 2016 Amendment Regulations 2016 [draft]

**Local Government and Communities**

Representation of the People (Absent Voting at Local Government Elections) (Scotland) Amendment (No. 2) Regulations 2016 (SSI 2016/264)

Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No. 1) Regulations 2016 (SSI 2016/298 (C.28))
Annexe A

Courts Reform (Scotland) Act 2014 (Relevant Officer and Consequential Provisions) Order 2016 [draft]

On 22 September 2016, the Scottish Government was asked:

(a) Is there an error in the transitional provision in article 4(1) which appears incorrectly to except paragraph 7 from the modifications in schedule 1 which do not apply to a small claim? If so, which provision should be referred to in place of paragraph 7?

(b) Would corrective action be proposed?

The Scottish Government responded as follows:

(a) The Scottish Government thanks the Delegated Powers and Law Reform Committee for drawing attention to article 4(1). The reference to paragraph 7 of schedule 1 (revocation of the Small Claims (Scotland) Amendment Order 2007) is indeed an error since the reference should be to paragraph 8 (consequential amendment of transitory provisions). The Small Claims (Scotland) Amendment Order 2007 amended the Small Claims (Scotland) Order 1988 – the subject of paragraph 4 – so paragraphs 4 and 7 of schedule 1 must be treated equivalently. Indeed, all of paragraphs 1 to 7 of schedule 1 are of a similar nature and must be treated equivalently.

Paragraph 8 is different from all other paragraphs of schedule 1 in that it is clear that the amendments set out there must apply to small claims in process for the amendments to function meaningfully. Essentially, paragraph 8 revises the assumption in earlier courts reform orders that there would be a single point of transition from summary cause procedure to simple procedure. The Courts Reform (Scotland) Act 2014 (Commencement No. 7, Transitional and Saving Provisions) Order 2016 now provides for a two phase transition so paragraph 8 allows the pre-existing transitory provisions to function for the period when there are live small claims and simple procedure cases at the same time.

The Scottish Government considers that to give meaning to the Order it would be necessary for the reference to be read as relating to paragraph 8.

(b) The Scottish Government proposes that the typographical error be corrected in the Minister’s signing copy, should the Parliament affirm the draft as the Scottish Government hopes it will.
Annexe B

Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2016 (SSI 2016/290)

On 16 September 2016, the Scottish Government was asked:

1. Regulation 2(2)(c) of the instrument inserts new regulation 5(2)(ba) in the Civil Legal Aid (Scotland) (Fees) Regulations 1989 (‘the 1989 Regulations’). That sub-paragraph defines a simple procedure case with reference to section 72(3) of the Courts Reform (Scotland) Act 2014.

It appears however that section 72(3) of the 2014 Act does not list all proceedings which come within the definition of “simple procedure case” for the purposes of Part 3 of the 2014 Act. Instead, a wider definition of “simple procedure case” for the purposes of Part 3 is provided in section 72(9) of the 2014 Act. Section 72(9) provides:

Proceedings that—
(a) are subject to simple procedure under subsection (3) or by virtue of any other enactment,
(b) are brought subject to simple procedure under section 74, or
(c) are continued subject to simple procedure by virtue of section 78 or 79, are referred to in this Part as a “simple procedure case”.

We note that the section 72(9) definition of “simple procedure case” is also used elsewhere in the 2014 Act in relation to legal aid. Paragraph 23 of schedule 5 amends Part 2 of Schedule 2 of the Legal Aid (Scotland) Act 1986 to provide that civil legal aid is not available in certain categories of simple procedure case (i.e. proceedings equivalent to what are currently small claims). “Simple procedure case” is defined here - in new paragraph 3A of Part 2 of Schedule 2 - with reference to section 72(9) of the 2014 Act, and not to section 72(3).

Accordingly:

a) Is it the Scottish Government’s policy intention that the legal aid fees for all simple procedure cases for which civil legal aid is available are to be calculated in accordance with new Schedule 2A of the 1989 Regulations?

b) If so, please explain how regulation 2(2)(c) of the instrument gives effect to that policy intention, standing that it refers to simple procedure cases within the meaning of section 72(3) of the 2014 Act as opposed to within the meaning of section 72(9) of that Act?

2. Regulation 5(3) and the schedule to the instrument insert new Schedule 2A in the 1989 Regulations. The entry in paragraph 2 of the table of fees contained in that schedule sets a fee for time spent (a) by a solicitor and (b) by a solicitor’s clerk in carrying out work “other than that prescribed in paragraphs 3 to 6” of the table. However there appears to be no exception for work prescribed in paragraph 7 of the table (photocopying).

By contrast, time spent carrying out photocopying work is excluded from the fee which may be charged under paragraph 2 in the equivalent table of fees for sheriff court
proceedings (Schedule 5 of the 1989 Regulations), on which the fee structure for simple procedure cases is said to be based. Paragraph 6 is the paragraph dealing with photocopying fees in Schedule 5 of the 1989 Regulations, whereas the equivalent provision in new Schedule 2A is paragraph 7.

   a) Please explain if it is the policy intention that the fee for time spent by a solicitor or solicitor’s clerk on photocopying as prescribed in paragraph 7 is to be calculated in accordance with paragraph 2 of the table of fees in new Schedule 2A to the 1989 Regulations.

   b) If not, is any corrective action proposed in respect of paragraph 2?

The Scottish Government responded as follows:

1. (a) It is the policy intention that the legal aid fees for all simple procedure cases for which civil legal aid is available should be calculated in accordance with new Schedule 2A of the 1989 Regulations.

   (b) The Scottish Government thanks the Committee for pointing out that this policy would better be achieved by referring to simple procedure cases within the meaning of section 72(9), rather than referring (as in the present instrument) to section 72(3).

However, the Scottish Government considers that the present reference to section 72(3) covers all of the simple procedure cases which might arise under the provisions of the Act which will be in force as of 28th November 2016, and so achieves the stated policy.

When the remaining provisions of the Act relating to simple procedure are fully commenced, which is expected to be no earlier than September 2017, it will be necessary to refer to the definition of a simple procedure case in section 72(9). The Scottish Government will make this amendment at that time, or earlier should an appropriate opportunity arise.

2. The Scottish Government thanks the Committee for pointing out this typographical error. The policy intention is not to allow a fee for time spent by a solicitor or solicitor’s clerk on photocopying. The reference should be to work “other than that prescribed in paragraphs 3 to 7” (not “3 to 6”).

The Scottish Government considers that this is a self-evident error, particularly in the context of a clear statement in the Explanatory Note that the fees prescribed in inserted Schedule 2A are equivalent to those presently allowable to solicitors for assistance by way of representation in terms of schedule 3 of the Advice and Assistance (Scotland) Regulations 1996 (S.I. 1996/2447).

The Scottish Government proposes to correct this minor error by correction slip.