



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 11 March 2014

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**Tuesday 11 March 2014**

**CONTENTS**

	<b>Col.</b>
<b>DECISION ON TAKING BUSINESS IN PRIVATE .....</b>	<b>1345</b>
<b>INSTRUMENT SUBJECT TO AFFIRMATIVE PROCEDURE .....</b>	<b>1346</b>
Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 [Draft] .....	1346
<b>INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE.....</b>	<b>1347</b>
National Health Service (Superannuation Scheme) (Scotland) Amendment Regulations 2014 (SSI 2014/43) .....	1347
Teachers' Superannuation (Scotland) Amendment Regulations 2014 (SSI 2014/44).....	1347
Coatbridge College (Transfer and Closure) (Scotland) Order 2014 (SSI 2014/52) .....	1348
Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Amendment Regulations 2014 (SSI 2014/53).....	1348
High Hedges (Scotland) Act 2013 (Supplementary Provision) Order 2014 (SSI 2014/55).....	1348
Road Works (Inspection Fees) (Scotland) Amendment Regulations 2014 (SSI 2014/56) .....	1348
Personal Injuries (NHS Charges) (Amounts) (Scotland) Amendment Regulations 2014 (SSI 2014/57)	1348
Scottish Road Works Register (Prescribed Fees) Regulations 2014 (SSI 2014/58) .....	1348
Firemen's Pension Scheme (Amendment) (Scotland) Order 2014 (SSI 2014/59) .....	1348
Firefighters' Pension Scheme (Scotland) Amendment Order 2014 (SSI 2014/60).....	1348
National Health Service (Optical Charges and Payments) (Scotland) Amendment Regulations 2014 (SSI 2014/61) .....	1348
Police Pensions (Contributions) Amendment (Scotland) Regulations 2014 (SSI 2014/62).....	1348
Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment Order 2014 (SSI 2014/64) .....	1348
Carers (Waiving of Charges for Support) (Scotland) Regulations 2014 (SSI 2014/65).....	1348
Community Care (Joint Working etc) (Scotland) Amendment Regulations 2014 (SSI 2014/66) .....	1348
Police Service of Scotland (Performance) Regulations 2014 (SSI 2014/67) .....	1349
<b>INSTRUMENT NOT SUBJECT TO PARLIAMENTARY PROCEDURE .....</b>	<b>1349</b>
High Hedges (Scotland) Act 2013 (Commencement) Order 2014 (SSI 2014/54) .....	1349
<b>BANKRUPTCY AND DEBT ADVICE (SCOTLAND) BILL: AFTER STAGE 2.....</b>	<b>1350</b>
<b>COURTS REFORM (SCOTLAND) BILL: STAGE 1 .....</b>	<b>1351</b>

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**DELEGATED POWERS AND LAW REFORM COMMITTEE**

**9<sup>th</sup> Meeting 2014, Session 4**

**CONVENER**

\*Nigel Don (Angus North and Mearns) (SNP)

**DEPUTY CONVENER**

\*Stuart McMillan (West Scotland) (SNP)

**COMMITTEE MEMBERS**

\*Richard Baker (North East Scotland) (Lab)

\*Mike MacKenzie (Highlands and Islands) (SNP)

\*Margaret McCulloch (Central Scotland) (Lab)

\*John Scott (Ayr) (Con)

Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

\*attended

**CLERK TO THE COMMITTEE**

Euan Donald

**LOCATION**

Committee Room 5



**Scottish Parliament**  
**Delegated Powers and Law**  
**Reform Committee**

*Tuesday 11 March 2014*

[The Convener *opened the meeting at 11:34*]

**Decision on Taking Business in**  
**Private**

**The Convener (Nigel Don):** I welcome members to the ninth meeting in 2014 of the Delegated Powers and Law Reform Committee. I ask members to switch off mobile phones, please.

Under agenda item 1, it is proposed that the committee take item 7 in private to allow us to further consider the delegated powers provisions contained in the Revenue Scotland and Tax Powers Bill, to inform the drafting of the committee's report on the bill at stage 1. Does the committee agree to take item 7 in private?

**Members** *indicated agreement.*

**The Convener:** It is worth noting at this point that Stewart Stevenson gives his apologies. He was here for the pre-meeting briefing, but he has had to go to other business.

**Instrument subject to Affirmative**  
**Procedure**

**Agricultural Holdings (Scotland) Act 2003**  
**Remedial Order 2014 [Draft]**

11:35

**The Convener:** We come to agenda item 2. Members will recall that the committee considered a draft of the order during its pre-laying consultation stage in January and February of this year. A revised draft of the remedial order has now been laid before the Parliament for approval under the affirmative procedure, along with an accompanying statement of observations and reasons as required by the Convention Rights (Compliance) (Scotland) Act 2001. The statement comments on any written observations submitted within the consultation period, including the report submitted by this committee.

The committee is required to scrutinise the draft order in the same manner as it would any other instrument, applying the reporting grounds set out in rule 10.3 of standing orders. Members will have seen the revised draft order and the briefing paper from our legal advisers. If members have no comments, do we agree to report that we are content with the draft remedial order and the accompanying statement of observations and reasons?

**Members** *indicated agreement.*

## Instruments subject to Negative Procedure

### National Health Service (Superannuation Scheme) (Scotland) Amendment Regulations 2014 (SSI 2014/43)

### Teachers' Superannuation (Scotland) Amendment Regulations 2014 (SSI 2014/44)

11:36

**The Convener:** We come to agenda item 3. Our legal advisers have raised the same points in relation to both Scottish statutory instrument 2014/43 and SSI 2014/44. The committee may consider that there has been unjustifiable delay in the laying of the regulations before the Parliament, as they were made on 13 February 2014 and laid on 24 February 2014. Although the delay does not affect the validity of the regulations, it amounts to a failure to comply with the laying requirement in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 that an instrument must be laid as soon as practicable after it is made.

The committee may consider that the delay in laying the regulations is unusual and is not satisfactory. However, in its response to the committee the Scottish Government has offered apologies and notes that steps will be taken to try to ensure that the omission is not repeated.

Does the committee agree to draw both sets of regulations to the attention of the Parliament on reporting ground (d), as there has been an unjustifiable delay in publication or laying of the regulations? Does the committee also agree to draw both sets of regulations to the attention of the Parliament on reporting ground (j) as there has been a failure to comply with the requirement that an instrument must be laid as soon as practicable after it is made?

**John Scott (Ayr) (Con):** I agree with that. I am disappointed that the Presiding Officer was not notified, as should have been the case. I assume that the apology will include an apology to her.

**The Convener:** I imagine that that is the case.

**Mike MacKenzie (Highlands and Islands) (SNP):** It seems to me that there is a case for both Governments to apologise, given that at least some of the delay was due to the United Kingdom Government.

**The Convener:** Indeed. Are we content with those observations?

**Members** *indicated agreement.*

**The Convener:** Does the committee agree to note, however, that steps are being taken by the Scottish Government to ensure that the omission is not repeated?

**Members** *indicated agreement.*

### Coatbridge College (Transfer and Closure) (Scotland) Order 2014 (SSI 2014/52)

### Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Amendment Regulations 2014 (SSI 2014/53)

### High Hedges (Scotland) Act 2013 (Supplementary Provision) Order 2014 (SSI 2014/55)

### Road Works (Inspection Fees) (Scotland) Amendment Regulations 2014 (SSI 2014/56)

### Personal Injuries (NHS Charges) (Amounts) (Scotland) Amendment Regulations 2014 (SSI 2014/57)

### Scottish Road Works Register (Prescribed Fees) Regulations 2014 (SSI 2014/58)

### Firemen's Pension Scheme (Amendment) (Scotland) Order 2014 (SSI 2014/59)

### Firefighters' Pension Scheme (Scotland) Amendment Order 2014 (SSI 2014/60)

### National Health Service (Optical Charges and Payments) (Scotland) Amendment Regulations 2014 (SSI 2014/61)

### Police Pensions (Contributions) Amendment (Scotland) Regulations 2014 (SSI 2014/62)

### Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment Order 2014 (SSI 2014/64)

### Carers (Waiving of Charges for Support) (Scotland) Regulations 2014 (SSI 2014/65)

### Community Care (Joint Working etc) (Scotland) Amendment Regulations 2014 (SSI 2014/66)

**Police Service of Scotland (Performance)  
Regulations 2014 (SSI 2014/67)**

*The committee agreed that no points arose on the instruments.*

**The Convener:** In relation to SSI 2014/62, the committee may wish to write to the Scottish Government to seek an update on the plan to consolidate the police pensions scheme in the Police Pensions Regulations 1987 (SI 1987/257).

**Instrument not subject to  
Parliamentary Procedure**

**High Hedges (Scotland) Act 2013  
(Commencement) Order 2014 (SSI 2014/54)**

11:40

*The committee agreed that no points arose on the instrument.*

**Bankruptcy and Debt Advice  
(Scotland) Bill: After Stage 2**

11:41

**The Convener:** Agenda item 5 is consideration of the delegated powers provisions in the bill after stage 2. Members will have noted that the Scottish Government has provided a supplementary delegated powers memorandum and will have seen the briefing paper.

Stage 3 consideration of the bill is due to take place on Thursday 20 March. The deadline for lodging amendments is 4.30 on Friday 14 March—this Friday—so the committee may wish to agree on its conclusions today.

Does the committee agree to report that it is content with those provisions in the bill that were amended at stage 2 to insert or substantially alter provisions conferring powers to make subordinate legislation?

**Members** *indicated agreement.*

## Courts Reform (Scotland) Bill: Stage 1

11:41

**The Convener:** The purpose of agenda item 6 is for the committee to consider the delegated powers in the Courts Reform (Scotland) Bill at stage 1.

In considering the bill, the committee is invited to agree the questions that it wishes to ask the Scottish Government about the delegated powers in the bill. It is suggested that those questions be raised in written correspondence. The responses received will help to inform a draft report on the bill, and the committee will have the opportunity to consider them at a future meeting before the draft report is considered.

Section 2(1) of the bill will confer power on the Scottish ministers to create or abolish sheriffdoms and sheriff court districts, and to change the boundaries of such sheriffdoms and districts. In addition, it will enable ministers to open new sheriff courts, to change the location of sheriff courts and to close sheriff courts. The Scottish ministers may make an order only after receiving a proposal from the Scottish courts and tribunals service, which may make a proposal only with the agreement of the Lord President. The Scottish courts and tribunals service will also be placed under a duty to consult parties who are likely to have an interest, prior to making such a proposal. Once such a proposal has been made, if the Scottish ministers decide to make an order, they must have regard to the proposal and may make the order only with the consent of the Lord President and the Scottish courts and tribunals service.

The power will update and reorder the powers to alter sheriffdoms and sheriff court districts that are contained in sections 2(1) and 3(2) of the Sheriff Courts (Scotland) Act 1971. Under those provisions, the Scottish ministers can make changes only with the consent of the Lord President of the Court of Session and the Scottish Court Service, with the latter being placed under a duty to consult parties who are likely to have an interest. That means that the Scottish Court Service must consult before the Scottish ministers make an order, to which the Lord President must consent. That must include further consultation with, for example, sheriffs principal. It is considered that, in policy terms, that process is bureaucratic and not well sequenced. The provisions in section 2 of the bill are intended to make the process more straightforward from a policy perspective.

Does the committee agree to ask the Scottish Government to explain further why it considers the exercise of the power in section 2 to be a matter of the efficient organisation of court services in Scotland, such that the negative procedure is thought to be appropriate; and, given the potentially significant effect of court closures and other alterations on users of the courts, and the consequent implications for access to justice, whether it considers that the affirmative procedure would afford a more appropriate level of parliamentary scrutiny?

If members have no comments, is the committee content to ask those questions?

**Members indicated agreement.**

11:45

**The Convener:** Section 41 will confer power on the Scottish ministers to provide by order that the jurisdiction of a sheriff of a specified sheriffdom, who sits at a specified sheriff court, will extend territorially throughout Scotland for the purposes of dealing with specified kinds of civil proceedings. Such an order may be made only with the consent of the Lord President of the Court of Session under section 41(3). Section 41 provides that the power cannot be exercised to remove the jurisdiction of any other sheriff court to deal with the proceedings specified or to provide that a specified court deal with only one type of civil proceedings.

The power will permit the establishment of a specialist personal injury court in Edinburgh sheriff court and will allow a similar court to be established in any other sheriff court. It will also permit the Scottish ministers to establish specialist courts for other types of civil proceedings, if it is thought in the future that there is a need to do so. The power is not limited to enabling the creation of a personal injury court, to cater for the possibility that it will become desirable in the future to provide for further types of proceedings to be subject to all-Scotland jurisdiction.

Does the committee therefore agree to ask the Scottish Government to explain further why section 41(1) proposes to confer power on the Scottish ministers to create a specialist court for types of civil proceedings other than personal injury proceedings; whether—given that the Scottish civil courts review, the Government's consultation on the bill, and the policy memorandum discuss only the advantages and disadvantages of creating a specialist personal injury court, and not the advantages and disadvantages of creating any other type of specialist sheriff court—the power ought to be subject to a higher level of parliamentary scrutiny than that which is afforded by the negative



procedure or to consultation, or both, when it is used to create a specialist sheriff court for types of proceedings other than personal injury proceedings; and whether, irrespective of whether the power is used to create a specialist personal injury court or a specialist court for other types of civil proceedings, the affirmative procedure would afford a more appropriate level of parliamentary scrutiny, given the potentially significant effect of the creation of specialist courts on users of the courts and the implications for access to justice?

**Members indicated agreement.**

**The Convener:** Section 82 will enable the Scottish ministers to provide by order for a sheriff to have competence to make certain types of orders, including interim orders, that would have effect and be capable of being enforced outside the sheriff's sheriffdom, as well as within that sheriffdom. An order that is made under section 82 may not affect interdicts or interim interdicts, as provision for such orders to have effect and be enforced outwith the sheriffdom is already set out in sections 80 and 81.

The power permits the Scottish ministers to provide different provisions for different categories or descriptions of relevant orders, and to set out the circumstances, conditions and proceedings in which the sheriff is to have such extended competence. Ministers may also make provision about jurisdiction in relation to proceedings for the orders and the transfer of such proceedings, and about the enforcement of orders that are made in the exercise of the extended competence of the sheriff.

Does the committee agree to ask the Scottish Government why it considers that types of orders other than interdicts and interim interdicts might benefit from having effect and being capable of being enforced outside the sheriffdom in which they are made?

**Members indicated agreement.**

**The Convener:** Section 93 sets out the scope for permitting lay representation on behalf of non-natural persons—that is, companies, partnerships and other corporate bodies—in non-simple procedure cases in the sheriff court, the sheriff appeal court and the Court of Session. The decision on whether to permit lay representation lies with the court, which may grant permission when the conditions in subsection (3) are satisfied. Those conditions are that

“the non-natural person is unable to pay for the services of a legal representative to conduct the proceedings, ... the lay representative is a suitable person to conduct the proceedings”—

whether they are a suitable person to conduct the proceedings is to be assessed in the light of subsection (4)—

“and ... it is in the interests of justice to grant permission.”

In deciding whether it is in the interests of justice, the court must have regard, in particular, to the non-natural person's prospects of success in the proceedings and the likely complexity of the proceedings.

Section 94(1) will enable the Court of Session to make further provision, by act of sederunt, about the granting of permission under section 93 and about the conduct of proceedings by lay representatives. Subsection (2) contains an illustrative list of the matters that provision under subsection (1) may include.

Does the committee agree to ask the Scottish Government to explain whether the power in section 94(1)(a) is intended to enable provision to be made only about the procedure for granting permission under section 93, or whether it is intended to add to the provision in section 93(3) in some substantive way? Does the committee also agree to ask why, if the former is the case, the power is drawn more widely than that, and why, if the latter is the case, it is considered appropriate to confer the power on the Court of Session, to be exercised by act of sederunt?

**Members indicated agreement.**

**The Convener:** Section 96 provides powers for the Court of Session to make rules of court by act of sederunt to regulate practice and procedure in the Court of Session. It replaces sections 5 and 5A of the Court of Session Act 1988 with a new section 5.

New section 5(1) contains a broad, general power to make provision regarding procedure and practice. Subsection (2) contains specific, illustrative examples of the sort of matters that are procedure and practice for the purposes of the power, which include conduct and management of proceedings in the Court of Session, the form of documents used, appeals against decisions, awards of expenses and the representation of parties by those who are otherwise not qualified to do so. Given the width of subsection (1), subsection (2) is not intended to be exhaustive and expressly provides that subsection (1) is not limited by the specific examples of the power in subsection (2).

Subsection (3) allows those acts of sederunt to make various types of ancillary provision. Subsection (4) clarifies that the new powers do not affect any existing power to make court rules.

Section 97(1) provides a broad power for the Court of Session to make rules of court by act of sederunt to regulate practice and procedure in civil proceedings in the sheriff court and the sheriff appeal court. It replaces the power in section 32 of the Sheriff Courts (Scotland) Act 1971, in so far as

rules of the sheriff court are concerned, and extends the power to enable provision to be made about the new sheriff appeal court.

Section 97(1) contains a broad, general power to make provision regarding procedure and practice. Section 97(2) contains specific, illustrative examples of the sort of matters that are procedure and practice for the purposes of the power, which include conduct and management of proceedings in the sheriff courts and sheriff appeal court, the forms of documents used, appeals against decisions, awards of expenses and the representation of parties by those who are otherwise not qualified to do so. Given the width of subsection (1), subsection (2) is not intended to be exhaustive and expressly provides that subsection (1) is not limited by the specific examples of the power in subsection (2). The examples are broadly similar to those contained in the equivalent power to make rules for the Court of Session, with variations that reflect the courts' different jurisdictions.

In relation to sections 96 and 97(1), does the committee agree to ask the Scottish Government to explain: the limits of the powers in new section 5(1)(b) of the 1988 act and section 97(1)(b) of the bill to make provision for or about any matter incidental or ancillary to such proceedings; whether the powers permit the court to make provision in relation to matters other than the procedure and practice in the Court of Session, the sheriff court and the sheriff appeal court, including issues of substance that arise in those proceedings; in what way the powers in new section 5(1)(b) of the 1988 act as inserted by section 96 in respect of the Court of Session, and in section 97(1)(b) in respect of the sheriff court and the sheriff appeal court, differ from the powers in new section 5(3) of the 1988 act and section 97(4) of the bill respectively to make incidental, supplemental, consequential, transitional, transitory or saving provision in any act of sederunt made under those sections, and why separate provision to that effect is required; whether the provision that may be made by virtue of new section 5(3) of the 1988 act or section 97(4) of the bill is limited to such provision as is necessary or expedient for the purposes of the act of sederunt in question or extends more broadly to make general incidental provision—and if so, incidental to what; and whether the power in new section 5(1) of the 1988 act or section 97(1) of the bill would permit the court to regulate proceedings for contempt of court arising in civil proceedings, or whether specific provision would be appropriate to make that clear?

**Members** *indicated agreement.*

**The Convener:** Thank you.

Sections 34 and 35 are new provisions, which implement the recommendations of the Scottish civil courts review in relation to the desirability of greater specialisation in the sheriff courts. Section 34 permits the Lord President to determine, by direction, categories of cases in the sheriff courts that should be heard by judicial officers who specialise in that category of case. The categories may be determined by subject matter, value or other criteria, as the Lord President considers appropriate.

Does the committee agree to ask the Scottish Government to clarify why section 34 does not provide that directions that may be issued under that section require to be published, and what the intentions are in relation to publication?

**Members** *indicated agreement.*

**The Convener:** Thank you.

11:55

*Meeting continued in private until 12:01.*

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