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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Subordinate Legislation considered on 18th April 2017**



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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 the following (and any additional matter added under Rule 6.1.5A)—

(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; and

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

(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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# Committee Membership



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# Introduction

1. At its meeting on 18 April 2017, the Committee agreed to draw to the attention of the Parliament the following instruments—

Damages (Personal Injury) (Scotland) Order 2017 (SSI 2017/96)

Bankruptcy Fees (Scotland) Revocation Regulations 2017 (SSI 2017/97)

2. The Committee's recommendations in relation to the above instruments are set out in the next chapter of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out at the end of this report.

# Points raised: instruments subject to negative procedure

[Damages \(Personal Injury\) \(Scotland\) Order 2017 \(SSI 2017/96\)](#) (Justice)

## Purpose

4. The Order is made under section 1 of the Damages Act 1996. The Order prescribes a new rate of return (“the discount rate<sup>i</sup>”), to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury. A new discount rate of minus 0.75% has been set, with effect from 28 March 2017.
5. The objective of a court’s award of damages for personal injury is to put the pursuer in the case in the same position financially, as they would have been if it had not been for the injury. The courts must take this rate into account, unless a party to an action shows that another rate would be more appropriate in the particular case.
6. The Order has also revoked the Damages (Personal Injury) (Scotland) Order 2002, which set the former discount rate at 2.5%. This rate was considered appropriate at that time, with reference to investment in index linked government securities (ILGS). However, there have been significant changes in the markets since 2002.
7. The Order is subject to the negative procedure and came into force on 28 March 2017.

## Breach of the "28 day rule"

8. The Order fails to comply with the “28 day rule” contained in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”). It was laid before the Parliament on 27 March, and came into force the day after.
9. The “28 day rule” provides that where a Scottish statutory instrument is subject to the negative procedure, it must be laid at least 28 days before the instrument comes into force. A breach of the rule does not affect the validity of the Order.
10. In accordance with section 31 of ILRA, the Deputy Director, Justice Directorate of the Scottish Government wrote to the Presiding Officer, to explain why the requirements of section 28(2) have not been met in this case. The correspondence has been reproduced at Annex A.
11. The correspondence explains that any delay between the making of the Order and its entry into force would prejudice settlements of claims for damages for personal injury. Such a delay would lead to delays in the courts or in reaching settlements, while one party or the other may have sought to postpone cases, to obtain the benefit of the new discount rate. Prior to making the Order, the Scottish Government received representations to that effect.

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<sup>i</sup> The ‘discount rate’ is used to determine how much cash needs to be paid at the time of the award, to provide a capital sum which can be used to yield exactly enough to cover the anticipated needs and lost earnings every year, for as long as they are expected to continue.

12. The Scottish Government also explains in the correspondence that where a pursuer in a case receives damages which (owing to an incorrect discount rate being applied) do not cover their future pecuniary losses, this is contrary to the ‘full compensation principle’. The effect can be particularly concerning in cases involving catastrophic injuries, where long term care is involved.
13. The Damages (Personal Injury) Order 2017 has set the same new discount rate for England and Wales. That Order was laid at Westminster on 27 February and came into force on 20 March, 2017. That timing has respected the ‘21 day rule’ for negative procedure instruments applying at Westminster.
14. The Committee therefore sought clarification from the Scottish Government why the rule was complied with in England and Wales, but despite that the Scottish Ministers decided to breach the 28 day rule (see Annex B). The written response explains that there has been a deliberate decision to take a different approach for Scotland, for the reason outlined above. The reasons for the Ministry of Justice’s approach for the equivalent Order “were a matter for the Lord Chancellor, in the light of the circumstances applicable in England and Wales at the time”. The Committee clarified informally with the Scottish Government Legal Directorate that they have been unable to obtain further detail of those circumstances.
15. While the reason provided for the breach of the rule is clear and specific to this Order, the timing of laying the Order just in advance of the Easter Parliamentary recess has meant that this Committee and the lead Committee are only in a position to consider the Order in the week commencing 17 April - 3 weeks after the Order has been brought into force.

**The Committee draws the Order to the attention of the Parliament under reporting ground (j). The instrument fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**

**The Order was laid before the Parliament on 27 March and came into force on 28 March 2017. It does not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.**

**The Committee finds the failure to comply with section 28 to be acceptable in the circumstances as outlined in the letter from the Deputy Director, Justice Directorate of the Scottish Government to the Presiding Officer, dated 27 March 2017, supplemented by a written response to the Committee on the Order.**

[Bankruptcy Fees \(Scotland\) Revocation Regulations 2017 \(SSI 2017/97\)](#) (Economy, Jobs and Fair Work)

### **Purpose**

16. The instrument revokes the Bankruptcy Fees (Scotland) Regulations 2017 (“the Fees Regulations”) which updated provision for fees and outlays payable to the Accountant in Bankruptcy, and when and in what manner fees and outlays are due

for payment. The Fees Regulations also revoked the Bankruptcy Fees (Scotland) Regulations 2014.

17. The instrument is subject to the negative procedure and came into force on 28 March 2017.

### **Breach of the "28 day rule"**

18. Similar to the Damages (Personal Injury) (Scotland) Order 2017 (SSI 2017/96) referred to in this report, these Regulations also fail to comply with the "28 day rule" contained in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA").
19. This instrument was made and laid before the Parliament on 27 March 2017 and came into force on 28 March 2017. It therefore fails to comply with the requirements of section 28(2) of ILRA.
20. The Committee considered the reasons provided in the letter to the Presiding Officer for the Scottish Government's decision to breach the "28 day rule" (See Annex C). The letter provided by the Accountant in Bankruptcy, as responsible authority, on behalf of the Scottish Ministers explains that the Fees Regulations are revoked due to concerns raised by the Economy, Jobs and Fair Work Committee at its meeting on 21 March 2017. The Fees Regulations were due to come into force on 3 April 2017 and, in order to prevent them having effect, it has been necessary not to comply with section 28(2) in this case.

**The Committee draws the instrument to the attention of the Parliament under reporting ground (j), as there has been a failure to lay the instrument in accordance with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**

**The Regulations were made and laid before the Parliament on 27 March 2017 and came into force on 28 March. They do not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.**

**The Committee finds the failure to comply with section 28(2) to be acceptable in the circumstances. The reasons for doing so are outlined in the letter from the Accountant in Bankruptcy on behalf of the Scottish Ministers to the Presiding Officer dated 27 March 2017.**

# No points raised

## **Health and Sport**

Registration of Social Workers and Social Service Workers in Care Services (Scotland) Amendment Regulations 2017 [draft]

Regulation of Care (Social Service Workers) (Scotland) Amendment Order 2017 (SSI 2017/95)

Carers (Scotland) Act 2016 (Commencement No. 1) Regulations 2017 (SSI 2017/94)

## **Justice**

Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (Commencement No. 1 and Transitional Provision) Regulations 2017 (SSI 2017/93)

Criminal Justice (Scotland) Act 2016 (Commencement No. 4, Transitional, Transitory and Saving Provisions) Order 2017 (SSI 2017/99)

## **Rural Economy and Connectivity**

Common Agricultural Policy (Direct Payments etc.) (Scotland) Amendment Regulations 2017 (SSI 2017/98)

# Annex A

## **Damages (Personal Injury) (Scotland) Order 2017 (SSI 2017/96)**

### **Breach of laying requirements: letter to the Presiding Officer**

27 March 2017

Dear Presiding Officer

The above instrument was made under section section 1 of the Damages Act 1996 (c.48), as amended by the Scotland Act 1998 (Consequential Modifications) (No. 2) Order 1999 (S.I. 1999/1820, schedule 2, para 126), today, 27 March 2017. It is being laid before the Scottish Parliament today and comes into force on 28 March 2017.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) has not been complied with. To meet the requirements of section 31(3) that Act, this letter explains why.

The aim of an award of damages for personal injury is to put the pursuer in the same position, financially, as they would have been had it not been for the injury.

Section 1 of the Damages Act 1996 provides that Scottish Ministers can determine the return to be expected from the investment of a sum awarded as damages for future monetary loss (e.g. wages) in an action for personal injury. This is commonly known as the discount rate.

The discount rate is used to determine how much cash needs to be paid at the time of the award to provide a capital sum which can be used to yield exactly enough to cover the anticipated needs and lost earnings every year, for as long as they are expected to continue. It should ensure that a successful pursuer is neither under nor over compensated.

The reason for not complying with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 is that any delay between the making of the Order and its entry into effect in law would prejudice settlements of claims for damages for personal injury. This would lead to delays in the courts or in reaching settlements while one party or the other sought to postpone cases so as to obtain the benefit of the new rate.

We have already received representations to this effect in response to the fact that Scottish Ministers have been reviewing the rate prior to setting it in this instrument.

Where a pursuer receives damages which do not cover their future pecuniary losses, this is contrary to the full compensation principle described above and the effect can be particularly concerning in cases involving catastrophic injuries where long term future care is involved.

# Annex B

## **Damages (Personal Injury) (Scotland) Order 2017 (SSI 2017/96)**

### **Issues raised with the Scottish Government:**

On 29 March 2017, the legal adviser asked for an explanation of the following matter:

As referred to at paragraphs 9 and 10 of the policy note for the Order, it adopts the same 'discount rate' as has been set in England and Wales by the Damages (Personal Injury) Order 2017 (S.I. 2017/206). That Order was laid at Westminster on 27 February 2017 and came into force on 20th March 2017. It appears therefore that the Order has complied with the '21 day rule' which applies to instruments which are subject to negative procedure and laid at Westminster.

The letter from the Deputy Director, Justice Directorate in the Scottish Government to the Presiding Officer of 27 March explains that the reason for not complying with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ('ILRA') was to avoid any delay between the making of the Order and its coming into force.

Please explain therefore—

(1) why S.I. 2017/206 was laid and brought into force in compliance with the "21 day rule" (notwithstanding that the effect was a period of delay between the laying of the Order and its coming into force), and

(2) why despite that position it has been considered appropriate that the Scottish Order should breach the requirement in section 28(2) of ILRA, by being brought into force on the day after laying?

### **The Scottish Government replied:**

Thank you for your questions on the Damages (Personal Injury) (Scotland) Order 2017 (SSI 2017/96).

In response to question (1), the Scottish Government is aware that S.I. 2017/206 was laid and brought into force in compliance with the "21 day rule" applicable to Westminster. This is a departure from the approach taken by the Lord Chancellor the previous time the discount rate was set for England and Wales when the Damages (Personal Injury) Order 2001 (S.I. 2001/2301) was laid before the UK Parliament on 27 June 2001 and came into force the following day. The reasons for the Ministry of Justice's approach in relation to the recent Order were a matter for the Lord Chancellor in the light of circumstances applicable in England and Wales at the time.

In response to question (2), the Scottish Government view is that within Scotland there is no material change to the drivers which necessitated the breach of the 21 day rule in 2001 in England and Wales, and in 2002 in Scotland, when the Scottish Ministers last set the discount rate in the Damages (Personal Injury)(Scotland) Order 2002 (S.S.I. 2002/46 ) which was laid on 7 February 2002 and came into force the next day. It remains the case that any delay between the making of the Order and its entry into effect may prejudice settlements of claims for damages for personal injury. This would lead to delays in the

courts or in reaching settlements while one party or another sought to postpone cases so as to obtain the benefit of the new rate.

In the period following the announcement of the Lord Chancellor on 27 February that the discount rate was to be changed for England and Wales and what that new rate would be, as we indicated in our letter of 27 March to the Presiding Officer, the Scottish Government received representations which outlined concerns that should there be any delay in the time between the Scottish Government reviewing the rate and any change coming into effect that there would be prejudice in relation to settlements. We were made aware that there are cases in Scotland which are close to resolution which would be likely to suffer prejudice should there be delay. This informed our view that the correct approach was for the Order to come into force the day after being made and laid. Unfortunately this required the Scottish Government to breach the 28 day rule.

The decision was not reached lightly but the discount rate is an important mechanism for ensuring that where someone is awarded damages for a personal injury which includes future monetary loss, such as loss of earnings, that the award they get is capable of meeting those future needs. For many people who suffer life changing catastrophic injuries knowing that their award will for example meet their future care needs is vital to ensuring their quality of life.

# Annex C

## **Bankruptcy Fees (Scotland) Revocation Regulations 2017 (SSI 2017/97)**

### **Breach of laying requirements: letter to the Presiding Officer**

27 March 2017

Dear Presiding Officer

The Bankruptcy Fees (Scotland) Revocation Regulations 2017 (S.S.I. 2017/97) were made on 27 March 2017 by the Scottish Ministers under sections 69A and 72(1A) of the Bankruptcy (Scotland) Act 1985 and sections 205 and 225(2) of the Bankruptcy (Scotland) Act 2016. They are being laid before the Scottish Parliament today, 27 March 2017 and come into force on 28 March 2017.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) has not been complied with. To meet the requirements of section 31(3) that Act, this letter explains why.

The instrument revokes the Bankruptcy Fees (Scotland) Regulations 2017 (S.S.I. 2017/37) which were laid before the Parliament on 20 February 2017. The reason for revoking those Regulations is concerns raised by the Economy, Jobs and Fair Work Committee at its meeting on 21 March 2017. Those Regulations are due to come into force on 3 April 2017 and in order to prevent them having effect, it has been necessary to not comply with section 28(2) in this case.

