JH/00/36/A (revised)

The Scottish Parliament

JUSTICE AND HOME AFFAIRS COMMITTEE

AGENDA

36th Meeting, 2000 (Session 1)

Wednesday 6 December 2000

The Committee will meet at 9.30 am in the Chamber, Assembly Hall, the Mound, Edinburgh

1. **Item in private:** The Committee will decide whether to take item 5 in private.

2. **Subordinate legislation:** The Committee will consider the following negative instrument—

   The Divorce etc. (Pensions) (Scotland) Amendment Regulations 2000 (SSI 2000/392)

3. **Petition:** The Committee will consider correspondence from the Minister for Justice and the petitioner on petition PE102 by James Ward.

4. **Self-regulation of the police:** The Committee will take evidence from—

   Chief Superintendent Nicol McMillan and Superintendent Fred McManus, the Association of Scottish Police Superintendents;

   Chief Constable Andrew Brown, the Association of Chief Police Officers in Scotland; and

   Douglas Kiel, the Scottish Police Federation.

5. **Self-regulation of the police:** The Committee will consider how to proceed with its inquiry into self-regulation of the police.

Andrew Mylne
Clerk to the Committee, Tel 85206

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The following papers are attached for this meeting:

Agenda item 2	
Note by the Senior Assistant Clerk (copy of SSI and Executive note attached)	JH/00/36/1
Letter to the Clerk from the Scottish Executive	JH/00/36/2
Extract from the 42nd Report, 2000, of the Subordinate Legislation Committee	JH/00/36/6
Extract from the *Journal of the Law Society of Scotland* (reproduced with permission)	
Agenda item 3	
Note by the Clerk (correspondence attached)	JH/00/36/3
Agenda item 4	
Note by SPICe (to follow)	

Papers not circulated:

Agenda item 4

Members may wish to consider *A Fair Cop – Report by HM Inspector of the Constabulary*, copies of which are available from the Document Supply Centre or at the following website: http://www.scotland.gov.uk/hmic/docs/afcp-00.asp

JUSTICE AND HOME AFFAIRS COMMITTEE

Papers for information circulated for the 36th meeting, 2000

Note by Safeguarding Communities – Reducing Offending (SACRO) on the Scottish Consortium on Crime and Criminal Justice (SCCJ) Report	JH/00/36/4
Letter from Dr David Colvin, Vice Chair of the SCCJ of 29 November	JH/00/36/5
Extract from the *Journal of the Law Society of Scotland* on legal aid (reproduced with permission)	
Minutes of the 35th meeting	JH/00/35/M

Subordinate legislation:

The following negative SSIs were laid on 28 November and are expected to be referred to the Committee—

- Act of Sederunt (Fees of Sheriff Officers) 2000 (SSI 2000/419)
- Act of Sederunt (Fees of Solicitors in the Sheriff Court) 2000 (SSI 2000/420) laid under section 40 of the Sheriff Courts (Scotland) Act 1907.

Both are subject to annulment until 24 January 2001.

Legal Aid Inquiry

Due to representations from a number of organisations, the initial **deadline** for any interested individual or organisation to submit written evidence has been **extended to 21 December**. Please see the revised Committee News Release on the Justice and Home Affairs Committee web page on the parliament website.

JH/00/36/1

JUSTICE AND HOME AFFAIRS COMMITTEE

The Divorce etc. (Pensions) (Scotland) Amendment Regulations 2000

Note by the Senior Assistant Clerk

Background

These Regulations amend the Divorce etc. (Pensions) (Scotland) Regulations 2000 to provide for the calculation and verification of relevant state pensions scheme benefits. This is in order to establish the value of matrimonial property on divorce or nullity of marriage (so-called "pension splitting").

Any SERPS member must apply to the Benefits Agency for a valuation. These Regulations specify that the SERPS valuation must be done in such a manner as may be approved by the Government Actuary.

The net value of the whole of the matrimonial property (including any SERPS pension) must be divided fairly by the courts on divorce. From 1 December 2000, pension sharing will be an option for divorcing couples. If couples chose this option, a credit from the SERPS pension to be shared will be transferred to a new fund in the name of the other spouse.

View of the Subordinate Legislation Committee

The Subordinate Legislation Committee considered the Regulations at its meetings on 14 and 21 November. Its 42nd report, 2000, draws the attention of the Committee to two issues relating to paragraph (3) of the new regulation 3A (inserted by this instrument).

In its original covering note (attached), the Executive claimed that these changes were necessary because new Department of Social Security (DSS) Regulations were being made to implement the reserved aspects of the Welfare Reform and Pensions Act 1999 throughout the UK. It explained that these set out how benefits under a State Earning Related Pension Scheme (SERPS) must be valued for the purposes of pension sharing, and that the Scottish Regulations had been drafted to be consistent both with them and with the Scottish matrimonial property regime.

The value of any SERPS benefits needed to be valued as at the "relevant date" under the Family Law (Scotland) Act 1985, usually the date on which the couple separated. Regulation 3A(3) of these Regulations allows for the "relevant date" also to be calculated as the date on which the request for valuation is received (if that date is not more than 12 months after the "relevant date" as defined in the 1985 Act). In its note, the Executive explained that "it would be onerous to force parties to pay for a valuation as at a date which might be only a month or so different from a date when a free valuation had been received" (paragraph 5).

The Subordinate Legislation Committee takes the view that, by allowing a different date to be set in certain cases from that established under the 1985 Act, the Regulations were departing from the terms of that Act, since the relevant provision of the Act does not provide for "anything that would include substituting a date that

differs from that specified". As such, in the Committee's view, the Regulations are *ultra vires*.

In response to other comments by the Committee, the Executive has also now explained that its original understanding about DSS policy that had motivated the inclusion of the offending provision turned out to be incorrect. The Committee reported "its surprise at this response".

The Executive's view

The Executive has now written to this Committee (JH/00/36/2) explaining that, because of the misunderstanding about the DSS position, it now regards paragraph (3) of the new regulation 3A to be unnecessary and should be revoked. The letter does not say whether the Executive also now accepts that the provision is *ultra vires* (the Subordinate Legislation's view is merely "noted").

However, the Executive is not prepared to withdraw the present Regulations, since the other provisions of them remain necessary, and need to come into force on 1 December (the same day on which the principal Regulations come into force).

Instead, it promises to bring forward further amending Regulations to remove the offending provision, and says it intends to do so by Friday 8 December. The Executive does not expect this to have an adverse effect on any individual.

Procedure

Under Rule 10.4, these Regulations are subject to negative procedure which means that they come into force and remain in force unless the Parliament passes a resolution, not later than 40 days after the instrument is laid, calling for its annulment. Any MSP may lodge a motion seeking to annul such an instrument and, if such a motion is lodged, there must be a debate on the instrument at a meeting of the Committee.

The instrument was laid on 9 November and is subject to annulment under the Parliament's standing orders until 18 December. The instrument comes into force on 1 December, exactly 21 days after it was laid. (Where an instrument comes into force less than 21 days after being laid, the Executive is required to provide an explanation to the Presiding Officer. Such an explanation is not required in this case.)

In terms of procedure, unless a motion for annulment is lodged, no further action is required by the Committee.

In this case, given the clear view of the Subordinate Legislation Committee that a provision of these Regulations is both incompetent and erroneous, the Committee may wish to write to the Minister expressing its concern about the way in which the Department has handled the process of amending these Regulations.

30 November 2000 ALISON E TAYLOR

EXECUTIVE NOTE

THE DIVORCE ETC. (PENSIONS) (SCOTLAND) AMENDMENT REGULATIONS 2000 (S.S.I. 2000/ 392)

1. These Regulations are made in exercise of the powers conferred by sections 10(8) and (8A) of the Family Law (Scotland) Act 1985, as substituted and inserted respectively by the Welfare Reform and Pensions Act 1999[1].

2. The instrument is subject to negative resolution procedure.

Policy Objectives

3. The instrument provides for the calculation and verification of state scheme pension benefits (such as the State Earnings Related Pension Scheme (SERPS)), for the purposes of establishing the value of matrimonial property on divorce or nullity of marriage. The valuation of matrimonial property forms part of Scottish family law and is a devolved matter. The Regulations amend the Divorce etc. (Pensions)(Scotland) Regulations 2000 (SSI 2000/112). The instrument will come into effect on 1 December 2000.

4. It is necessary because new Department of Social Security regulations[2] are being made to implement the reserved aspects of Welfare Reform and Pensions Act 1999 throughout the UK. These lay out how benefits under a SERPS arrangement must be valued for the purposes of pension sharing, and the Scottish regulations have been drafted to be consistent both with them and with the Scottish matrimonial property regime.

5. The value of any SERPS benefits forms part of the matrimonial property of a divorcing couple. This needs to be valued as at the "relevant date" under the Family Law (Scotland) Act 1985 – usually the date on which the couple separated. As in SSI 2000/112, however, we have allowed cases where the "relevant date" is recent to use a valuation as at the date of receiving the request. We recognise that this approach departs slightly from the principles of family law, but it would be onerous to force parties to pay for a valuation as at a date which might be only a month or so different from a date when a free valuation had been received. This approach also lays less of a burden on the pension funds that will have to calculate the valuation. We have struck a balance between principle and practicality.

6. The SERPS member must apply to the Benefits Agency for a valuation. These regulations specify that the SERPS valuation must be done in such manner as may be approved by the Government Actuary.

7. The net value of the whole of the matrimonial property (including any personal, occupational or SERPS pensions) must be divided fairly by the courts on divorce. From 1 December, pension sharing will be one option for divorcing couples. If this is chosen, a credit from the SERPS pension to be shared will be transferred to a new fund in the name of

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[1] The powers were brought into force on 15 April 2000 by The Welfare Reform and Pensions Act 1999 (Commencement No 6) Order 2000 (SSI 2000/111)

[2] The Sharing of State Scheme Rights (Provision of Information and Valuation) (No. 2) Regulations 2000 (SI 2000 No 2914)

the other spouse. It will not be possible to transfer credits out of SERPS into a personal or occupational pension arrangement.

Consultation

8. The following bodies were consulted in the preparation of the instrument:-

- The Law Society of Scotland

- Members of the DSS Pensions on Divorce Consultation Panel, including:
  - Association of British Insurers
  - Association of Consulting Actuaries
  - Institute of Actuaries and Faculty of Actuaries
  - National Association of Pension Funds
  - Society of Pension Consultants

9. In considering the Divorce etc. (Pensions)(Scotland) Regulations 2000 (SSI 2000/112), the Justice and Home Affairs Committee was concerned that the Law Society of Scotland should be consulted on any further regulations. We have tried to ensure that the maximum time was available for those who are knowledgeable on the subject to make comments. The DSS regulations were made on 28 September and the draft Scottish Regulations were sent out on 6 October, with comments requested by 31 October. We regret that this means that the Justice and Home Affairs Committee has now only a limited time to consider the new regulations.

10. We received comments from the National Association of Pension Funds and from an actuary, Harry Smith. We have revised regulation 3A(3) in the light of the comments that were received. The Law Society of Scotland responded, saying that it had no comments to make.

11. No further representations were received about the Divorce etc (Pensions)(Scotland) Regulations 2000, and these are accordingly not otherwise amended.

Financial effects

12. An assessment of the cost to business of the provisions of the Welfare Reform and Pensions Act 1999, including these regulations, is detailed in the Regulatory Impact Assessment for that Act. A copy of this Assessment has previously been placed in the Information Centre.

Scottish Executive Justice Department
9 November 2000

JH/00/36/2

SCOTTISH EXECUTIVE

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Mr Andrew Mylne
Clerk
Justice and Home Affairs Committee
Committee Chambers
Scottish Parliament
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Date: 29 November 2000

Dear Mr Mylne

THE DIVORCE ETC (PENSIONS) (SCOTLAND) AMENDMENT REGULATIONS 2000 (SSI 2000 / 392)

I understand that the Justice and Home Affairs Committee is to consider on Wednesday 6 December the report of the Subordinate Legislation Committee concerning the Divorce etc. (Pensions) (Scotland) Amendment Regulations 2000 (SSI 2000 / 392). I should be grateful if you would draw this letter to the attention of the Members of the Justice and Home Affairs Committee.

The instrument provides for the calculation and verification of state scheme pension benefits (such as the State Earnings Related Pension Scheme (SERPS)) for the purpose of establishing the value of matrimonial property on divorce or nullity of marriage in Scotland. The instrument is part of a package of legislation, most of which is reserved to the UK Parliament, which is due to come into effect on 1 December.

The Subordinate Legislation Committee was concerned about the provision that would insert Regulation 3A(3) into the principal Regulations. Regulation 3A(3) would provide that the date for the purpose of calculating and verifying the value of the benefits should be one of two dates.

The first date is the date on which the request for valuation is received, if that date is not more than 12 months after the "relevant date" as defined in Section 10(3) of the Family Law (Scotland) Act 1985. This would allow for the valuation of relevant state scheme rights to be at the current valuation of those rights.

The second date would apply where a request for valuation is received more than 12 months after the "relevant date". In such a circumstance, the date would be the "relevant date" as defined in Section 10(3) of the Act.

It was considered that it would be onerous to force parties to pay for an historical valuation of state scheme benefits, if this valuation was to be at a date that was within a short space of time from a date on which a free valuation had been received. However, the Justice Department now understands that the

Department of Social Security has no plans to charge for the provision of a valuation of state scheme rights. In light of this, the Justice Department regards the provision in Regulation 3A(3) as redundant.

The Department also notes that the Subordinate Legislation Committee has raised doubts about the vires of this provision.

Consequently, the Department's is committed to quickly bring forward amending Regulations to remove Regulation 3A(3). We will endeavour to do this by the end of next week. Given the circumstances, it is also the Department's intention that the amending Regulations will be issued free.

The Department considers that the changes that are proposed would not cause prejudice to anyone. If the Executive can bring forward and bring into effect the amending Regulations by 8 December, then SSI 2000/392 would affect only those divorces that are commenced between 1 and 7 December and that involve SERPS valuations. We have considered carefully and have reached the view that the changes we are proposing to make to the Regulations will not have any bearing on the valuation of SERPS in any individual case.

I am copying this letter to the Clerk of the Subordinate Legislation Committee.

Yours sincerely

Paul M Parr

PAUL M PARR

JH/00/36/6

Justice and Home Affairs Committee

The Divorce etc. (Pensions) (Scotland) Amendment Regulations 2000, (SSI 2000/392)

Extract from the 42nd Report, 2000 of the Subordinate Legislation Committee

1. The Regulations amend The Divorce etc. (Pensions) (Scotland) Regulations made on 18th April this year to provide for pension splitting on divorce. In particular, they make provision for the splitting of state scheme benefits, as defined in the Family Law (Scotland) Act 1985. The Regulations come into force on the same day as the principal Regulations.

2. The Committee noted that the relevant date for establishing the value of matrimonial property on divorce is defined in the Act. It appeared to the Committee that new regulation 3A(3) of the principal Regulations, as inserted by regulation 2(1) of the amending Regulations, allows the value of pension benefits in some circumstances to be established at a date different from that specified in the Act. Accordingly, the Committee requested an explanation from the Scottish Executive as to *vires* for this provision.

3. The Executive explained in its response, reprinted at Appendix C, that in terms of section 10(8) of the Family Law (Scotland) Act 1985, as substituted by paragraph 8 of Schedule 12 to the Welfare Reform and Pensions Act 1999, the Scottish Ministers may by regulations make provision about calculation and verification, in relation to the valuation for the purposes of this Act, of benefits under a pension arrangement or relevant state scheme rights.

4. The Scottish Executive Justice Department considered this provision to provide *vires* to set the date on which the value of relevant state scheme rights is to be calculated and verified.

5. Whilst the Committee acknowledges that paragraph 8 of Schedule 12 to the Welfare Reform and Pensions Act 1999 provides for calculation and verification in relation to the valuation, the Committee does not consider that this subsection provides for anything that would include substituting a date that differs from that specified in the Act as the “relevant date”.

6. The Committee does not consider the enabling power to contain express statement or implication for the substitution by regulation of “relevant date” as defined in subsection (3) of section 10 of the Act.

7. **The Committee therefore draws the attention of the Parliament and the lead committee to the instrument on the grounds that, in so far as it purports to substitute a date for the purposes of valuation of pension rights different from that specified in the parent Act, it is *ultra vires* the parent Act.**

8. The Committee found difficulty in reconciling the provisions of regulation 3A(2) and regulation 3A(3) and asked the Executive for further explanation of the meaning of the provisions.

9. The Executive explained that the purpose of regulation 3A(2) is to provide that the value of the benefits in relevant state scheme rights shall be calculated and verified in a manner that is to be approved by the Government Actuary.

10. The value that is arrived at, after calculating and verifying the value of benefits in a manner approved by the Government Actuary, is the value of relevant state scheme rights as at the relevant date as defined at section 10(3) of the 1985 Act.

11. However, regulation 3A(3) provides that the date for the purpose only of calculating and verifying the value of the benefits in an approved manner shall be one of two dates. The first date is the date on which the request for valuation is received. That date will be the date for the purpose of valuing any benefits in relevant state scheme rights where a request for valuation is received not more than 12 months after the relevant date as defined in section 10(3) of the Act. In effect, this allows for the valuation of relevant state scheme rights to be at the current valuation of those rights.

12. The second date applies where a request for valuation is received more than 12 months after the relevant date as defined in section 10(3) of the Act. In a case where the request for valuation of benefits in relevant state scheme rights is received more than 12 months after the relevant date, then the date for the purpose of calculating and verifying benefits shall be the relevant date again as defined in section 10(3) of the 1985 Act. In effect, this provides for an historical valuation in circumstances where the request for valuation is more than 12 months from the relevant date.

13. The Executive considers that there is *vires* to make such provision by virtue of section 10(8). In practice, the valuation will be provided to the pension scheme member by the Benefits Agency after consulting tables and factors that will be established by the Government Actuary. In establishing these tables and factors, the Government Actuary will take into account regulation 3A.

14. The Committee notes the explanation provided by the Executive which confirms that the intention of the Executive is, as indicated above, to substitute in certain circumstances as the relevant date a date different from that specified in the parent Act. In the Committee's view, as stated above to do so is *ultra vires*.

15. **The Committee therefore draws the attention of the Parliament and the lead committee to the instrument on the grounds that its form or meaning required explanation provided by the Executive.**

16. The Committee was puzzled by the references in the Executive Note to charging for valuations of pension rights and therefore asked for information on what these charges might be, how they arise and how they relate to the Regulations.

17. The Executive explained that the charging regime for valuation of pension rights in the context of pension sharing on divorce is a matter that is reserved to the UK Government and a matter for the Department of Social Security (DSS) and therefore could not be provided for in the Regulations.

18. The Executive further explained, however, that the Justice Department had been operating under the misapprehension that it was the intention of the DSS to charge for the provision of a historical valuation of state scheme rights. It was for this reason that the Department has provided at regulation 3A(3) for a current valuation to be used in relation to state scheme rights except where the request for such a valuation is more than 12 months from the relevant date. The Department now understands that the DSS has no plans to charge for the provision of a valuation of state scheme rights. It will therefore consult with the DSS about the practical arrangements that will be put into place as a result of regulation 3A(3) and, as necessary, will bring forward further amendment to the principal Regulations.

19. While the policy behind the Regulations is a matter for the lead Committee and not the Subordinate Legislation Committee, the Committee could not refrain from expressing its surprise at this response. Not only are the provisions in question *ultra vires* in the view of the Committee but it now appears that they have been based on a misapprehension of the facts.

20. **The Committee therefore draws the attention of the Parliament and the lead committee to the Regulations on the grounds that the meaning required further explanation, supplied by the Executive.**

Appendix C

THE DIVORCE ETC (PENSIONS) (SCOTLAND) AMENDMENT REGULATIONS 2000 (SSI 2000/392)

On 14 November 2000, the Clerk to the Committee wrote in the following terms –

"1. The Committee noted that the relevant date for establishing the value of matrimonial property on divorce is defined in the Act. It appears to the Committee that new regulation 3A(3) of the principal regulations as inserted by regulation 2(1) "allows the value of pension benefits in some circumstances to be established at a date different from that specified in the Act. The Committee accordingly requests an explanation from the Committee as to *vires* for this provision.

2. The Committee finds difficulty in reconciling the provisions of regulation 3A(2) and regulation 3A(3) and asks the Executive for a further explanation of what precisely is meant by these provisions.

3. The Committee is puzzled by the references in the Explanatory Memorandum to charging for valuations of pension rights and therefore also asks for information on what these charges might be, how they arise and how they relate to the Regulations."

The Scottish Executive Justice Department responds as follows:-

Question 1

In terms of section 10(8) of the Family Law (Scotland) Act 1985, as substituted by paragraph 8 of Schedule 12 to the Welfare Reform and Pensions Act 1999, the Scottish Ministers may by regulations make provision about calculation and verification in relation to the valuation for the purposes of this Act of benefits under a pension arrangement or relevant state scheme rights.

The Department considers that this provision gives them *vires* to set the date on which the value of relevant state scheme rights is to be calculated and verified as provided for at regulation 3A(3). The value of relevant state scheme rights as at that date is then for the purposes of the Act the value of the pension as at the relevant date for the purpose of section 10.

Question 2

The purpose of regulation 3A(2) is to provide that the value of the benefits in relevant state scheme rights shall be calculated and verified in a manner that is to be approved by the Government Actuary. The value that is arrived at after calculating and verifying the value of benefits in a manner approved by the Government Actuary is the value of relevant state scheme rights as at the relevant date as defined at section 10(3) of the 1985 Act.

However, regulation 3A(3) provides that the date for the purpose only of calculating and verifying the value of the benefits in an approved manner shall be one of two dates. The first date is the date on which the request for valuation is received. That date will be the date for the purpose of valuing any benefits in relevant state scheme rights where a request for valuation is received not more than 12 months after the relevant date as defined in section 10(3) of the Act. In effect, this allows for the valuation of relevant state scheme rights to be at the current valuation of those rights.

The second date applies where a request for valuation is received more than 12 months after the relevant date as defined in section 10(3) of the Act. In a case where the request for valuation of benefits in relevant state scheme rights is received more than 12 months after the relevant date then the date for the purpose of calculating and verifying benefits shall be the relevant date again as defined in section 10(3) of the 1985 Act. In effect this provides for an historical valuation in circumstances where the request for valuation is more than 12 months from the relevant date.

As discussed in relation to question 1 it is considered that there is *vires* to make such provision by virtue of section 10(8).

In practice, the valuation will be provided to the pension member by the Benefits Agency after consulting tables and factors that will be established by the Government Actuary. In establishing these tables and factors, the Government Actuary will take into account regulation 3A.

Question 3

The charging regime for valuation of pension rights in the context of pension sharing on divorce is a matter that is reserved to the UK Government and cannot be provided for in SSI 2000/392. It is a matter for the Department of Social Security. However, the Justice Department had up until now been operating under the misapprehension that it was the intention of the DSS to charge for the provision of a historical valuation of state scheme rights. It was for this reason that the Department has provided at regulation 3A(3) for a current valuation to be used in relation to state scheme rights except where the request for such a valuation is more than 12 months from the relevant date. The Department now understands that the DSS have no plans to charge for the provision of a valuation of state scheme rights. In light of this the Department will consult further with the DSS about the practical arrangements that will be put into place as a result of regulation 3A(3) and as necessary bring forward further amendments to the principal Regulations.

16 November 2000
For: Scottish Executive Justice Department

Provisions which will enable the value of pension rights to be shared on divorce come into force on 1 December. Harry Smith outlines what it all means.

Pension and Divorce

PROVIDING PENSION provision on divorce

PENSION rights have had to be considered in divorce settlements in Scotland for some considerable time. Until now there was, however, only one possible approach, as the actual pension rights could not be transferred in any way or form to the spouse of the pension scheme member. This article considers the forthcoming changes. For simplicity, I will refer throughout to the husband as the pension scheme member.

The Value of Pension Rights

It is worth stressing just how important pensions are now in the UK economy. There are over 22 million people with pensions that will need to be taken into account on divorce. Private sector schemes alone have a capital value of more than £1,000 billion, which is over £50,000 for each family in the UK. For many families, therefore, they will be the biggest single asset, often exceeding in value the equity in the family home.

Pension rights are valuable assets, which are usually built up over the course of a marriage. Conceptually they are like building society accounts or endowment policies. The snag with pension rights is that they do not have a market value in the same way as these types of assets, or as would a house or car. Although pension rights are generally described by reference to the amount of the annual pension and other benefits, they do, however, still have a capital value. This is actuarially determined as the capital amount required to replace the pension rights.

Family lawyers are well used to scheduling the values of the assets of a marriage and determining the way in which they are to be divided between the couple. These schedules of assets must include the capital value of the pension rights. This is the only way of dealing fairly with, on the one hand, pension rights, and, on the other hand, assets such as houses, cars and bank accounts.

This has been the approach adopted to date since the introduction of the Family Law (Scotland) Act 1985, both before and after the Pensions Act 1995. The pension scheme member kept his pension rights (perforce), and the value of these was offset against the other assets. Since 1996 it has also been possible to use "earmarking" orders if there were insufficient assets in the marriage to allow a fair division to be effected immediately.

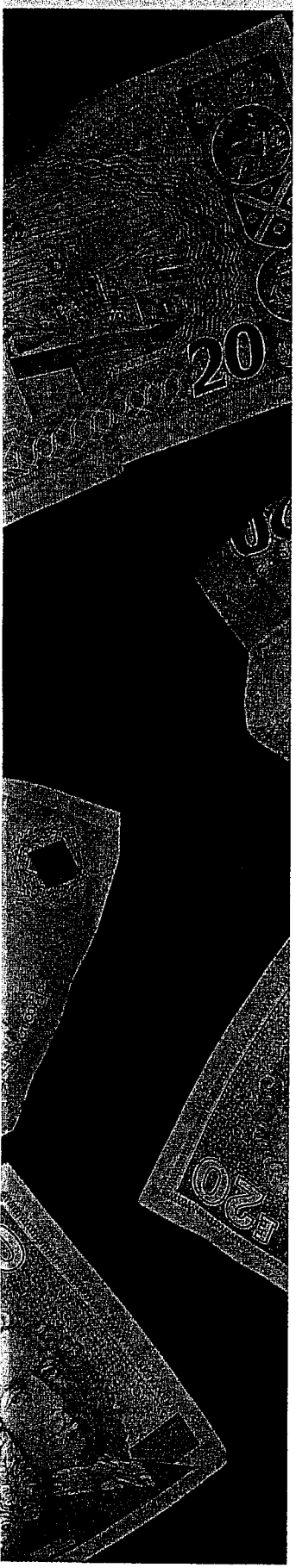
A New Principle

The Welfare Reform and Pensions Act 1999 (WRPA 99) introduces an entirely new principle into pension fund law. Previously (for all practical purposes) there had been no way of taking benefits away from a pension scheme member. This is precisely what the WRPA 99 introduces. It enables the value of the pension scheme member's pension rights to be shared (or split as it was originally known) between the pension scheme member and his ex-wife.

The importance of this is that the ex-wife's future pension rights can be entirely separated from the pension scheme member's pension rights. The essence of pension sharing is that the pension scheme member's rights are diminished and the ex-wife of the pension scheme member has a pension right created for her independently which she can deal with as is appropriate in her own circumstances.

The only drawback is that the benefit does have to be in the form of a pension, with the usual restrictions. It cannot be available as immediate cash. However, in this age of inadequate state pensions, pension rights are highly attractive assets.

It is important to remember that this is



only an option; the current practice of offsetting the capital value against the other assets remains available. This new option will be available for all divorce actions commenced on or after 1 December 2000. It can only be actioned, however, at the time of divorce. While a separation agreement may determine that sharing of the pension rights will take place, the pension scheme cannot accept an instruction until the divorce occurs. The instruction can be in the form of a court order or a minute of agreement between the two parties. It should be noted that this latter approach is not available for divorces in England and Wales, and many English based pension schemes may not realise that it is a valid method in the Scottish context.

What is shared?

It is the capital value of the pension rights that will be shared. That is as it should be. It is a stated policy intention of the legislation that a pension share should be cost neutral to the pension scheme, and thus the total capital value after sharing must be no greater than it was before. If the couple are about the same age, this will mean that the annual pension set up for the ex-wife will be less than her ex-husband's annual pension because her expectation of life is longer than his. In a more extreme case, it would clearly be quite unfair to share a pension payable to an old man with a young wife on the basis of the same amounts per annum to each.

The regulations are clear that the capital value that is used by the pension scheme must be the Cash Equivalent Transfer Value (CETV). Even pensions in payment, which do not have CETVs at present, will use the CETV; schemes will be required to provide them from December 2000.

The regulations are equally clear that the split does not have to be 50/50; anything between 100/0 and 0/100 is acceptable. This may be used to achieve a satisfactory division of all the assets. In addition, there are a significant number of circumstances where the CETV is not an accurate assessment of the value of a pension. The differences between a reasonable and fair value and the CETV can be enormous. For example, for an active member of the Armed Forces Pension Scheme the real value can be three times the CETV. It is essential to consider this before determining the amount of the pension share.

It is also important to realise the effect of timing. Where the pension rights are offset against other assets, this is done as at the Relevant Date. This is usually the date of separation, and is frequently some years prior to the date of divorce. The same approach is to be applied to pension sharing, but this will create significant practical problems.

The new pension rights for the ex-wife will be purchased at some date in the few months after the divorce. If only the value at the date of separation is considered, this will probably result in the husband losing less pension, and the ex-wife getting less pension than was intended. The differences can be very large. It will be necessary, therefore, when determining the amount of the share to take account also of the current value of the appropriate portion of the pension rights. Note that this is not an issue in England and Wales where the concept of the Relevant Date does not exist, and many English based pension schemes may not be aware of the Scottish situation.

How does it work in practice?

Many public sector pension schemes, such as the Principal Civil Service Scheme, are "unfunded"; that is to say there is no fund of investments backing the pension rights. The pension scheme member's benefits will be paid out of future taxation. In these schemes, pension sharing must be implemented by giving the ex-wife membership of the scheme in her own right. The WRPA 99 therefore introduces an entirely new category of pension scheme member. This category is similar in many ways to that of deferred pensioners (that is pensions for ex-employees), but their detailed rights are not identical.

Note that the ex-wife does not have access in the form of cash to the value of the shared pension rights. In these unfunded schemes it may not be possible to take the CETV of the pension rights and transfer it to another scheme.

Most private schemes are "funded", that is to say there is a fund of investments backing the pension rights. In these schemes there may be up to four possibilities:

- The internal option, under which the ex-wife becomes a deferred member of the pension scheme;
- The external option, using the value of the shared pension to buy a Personal Pension for the ex-wife with a provider chosen by the ex-wife;
- The external option, transferring the value of the shared pension to another approved pension scheme;
- If the ex-wife does not make a positive choice, the pension scheme can establish a pension with the scheme's "default provider".

It must be remembered that the internal option will not always be available. The pension scheme normally has the right to decide whether or not it is prepared to allow this option, as there is extra expense for the pension scheme in catering from an additional category of member. The exception to this is that the scheme may be forced to offer the internal option if it is "underfunded" (ie there are not enough investments in the fund to meet the requirements of the Regulator). This is in order to protect the ex-wife since, when a pension scheme is underfunded, it has the right to reduce its CETV. In these circumstances it may be better for the ex-wife to become a member of the pension scheme, because in the long run the pension scheme is likely to pay the full benefits.

The second option is that the ex-wife can simply use the value of the shared pension to buy a Personal Pension from a pension provider of her own choice. The amount will be the agreed share of the CETV, less any part of the charges that the ex-wife has agreed to pay.

This action will discharge the scheme from its obligations as regards the shared pension.

The third option is that, if the ex-wife is an active member of an approved occupational pension scheme, a transfer may be made to that scheme, providing the scheme is willing to accept the transfer.

The fourth possibility is that of the default provider. The scheme will simply make a payment to an external provider of its own choice to purchase benefits in the name of the ex-wife. This will only happen where the ex-wife gives no instructions, and the pension scheme will thus have a way to discharge its liability.

If the pension to be shared is a personal pension or an occupational pension of the defined contribution (money purchase) type, then the form of the pension for the ex-wife is simply a fund of units (or equivalent) in the pension policy or scheme.

In a defined benefit (final salary) scheme the situation is more complicated. First the pension rights of the scheme member have to be expressed in the form of a capital value. This will normally be the CETV. The ex-wife can then have a pension bought for her - based on her own age at the time of the share. Thus, even after a 50/50 capital split, the two remaining pensions, one for the member and one for the ex-wife, will not usually be equal in amount - although their capital values will be equal.

The Regulations clearly establish that the obligation for meeting the charges falls on the divorcing couple

It is required for a defined benefit scheme that the value-for-money implicit in the calculation of the pension for the ex-wife should be the same as that which the pension scheme gives to its new members when it accepts CETVs from other pension schemes.

Where the pension is of the "accumulating fund" type, that is a Personal Pension or defined contribution (money purchase) scheme, the situation is usually straightforward. The scheme member has the value of his own fund decreased by the amount of the pension share. Thus, for example, if it is agreed to share on a 50/50 basis, the scheme member simply has his holding reduced by one half. The pension scheme then continues as before with the member's future contributions being added to this diminished fund.

There can be complications if the pension policy is with profits and there are questions regarding the amount of terminal bonuses that can be valued.

In schemes where it is the benefits that are defined, usually by reference to the salary near retirement, the situation is more complicated. As described above, the ex-wife will be granted a pension the amount of which is not equal to the pension scheme member's pension even if the share has been on a 50/50 basis. (The values of the two pensions will be equal.)

The amount of the member's pension that has been given up will be recorded at the time of the pension share, and this will be increased in accordance with inflation as specified in the scheme rules. The increases will usually be "Limited Price Indexation" which is inflation as measured by the Retail Prices Index, but limited so that the average increase between the time of the share and retirement does not exceed 5% per annum. When the scheme member reaches retirement age the pension is calculated in the usual way. It is then reduced by the amount of the pension given up at the time of the pension share, with this reduction indexed as described above.

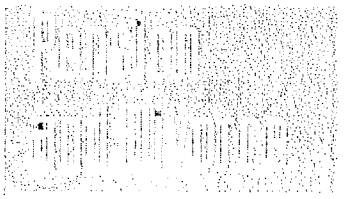
The Regulations clearly establish that the obligation for meeting the charges falls on the divorcing couple, except to the extent that the pension scheme has to incur costs in setting up computer and other systems to carry out the administrative work.

The charges which the pension scheme can impose on the divorcing couple must relate to the actual costs incurred by the pension scheme and must be reasonable. They can be paid by the pension scheme member, the ex-wife or by a combination of them. They must be paid at the time of establishing the pension share either in cash or by reducing the value of either or both pensions. In the absence of a choice being exercised, the default position is that they will be deducted from the value of the pension scheme member's pension rights.

The Government has the power to impose a maximum amount on these charges. At present this power is not being used, since the Government was anxious not to impose a maximum which could become a standard charge. It is expected that the charge will generally be in the range £750 - £1,000. It is unlikely to be wise, therefore, to pursue a pension share where the value of the pension is small, say less than £10,000 or so, since the cost of the share will absorb a disproportionate part of the value of the pension.

The Regulations also set out a regime of what actions are required and within what timescales. These requirements apply to both the solicitor on behalf of his client and to the pension scheme. Some of the timescales are quite short. It is vital that the process is carefully managed to ensure that the requirements are met and that the pension scheme discharges its obligations correctly.

Harry H Smith is a partner with consulting actuaries A R H Collins & Co, specialising in the valuation of pension loss



The Pensions on Divorce (Provision of Information) Regulations S.I. 2000 No 1048

The Pensions on Divorce (Charging Regulations) S.I. 2000 No 1049

The Divorce etc. (Notification & Treatment of Pensions) Regulations S.I. 2000 1050

The Pensions on Divorce etc.(Pension Sharing) (Scotland) Regulations S.I. 2000 1051

The Pension Sharing (Valuation) Regulations S.I. 2000 No 1052

The Pension (Implementation and Discharge of Liability) Regulations S.I. 2000 No 1053

The Pension Sharing (Pension Credit Benefit) Regulations S.I. 2000 1054

The Pension Sharing (Safeguarded Rights) Regulations S.I. 2000 No 1055

The Retirement Benefits Schemes (Sharing of Pensions on Divorce or

Annulment) Regulations S.I. 2000 No 1085;

The Retirement Benefit Schemes (Restriction on Discretion to Approve)

(Self-Administered Schemes) (Amendment) Regulations S.I. 2000 No 1086;

The Retirement Benefit Schemes (Restriction on Discretion to Approve) Excepted Provisions Regulations S.I. 2000 No 1087

The Retirement Benefits Schemes (Restrictions on Discretion to Approve)

(Additional Voluntary Contributions)(Amendments) Regulations S.I. 2000 No 1088;

The Finance Act 1999, Schedule 10, Paragraph 18 (First and Second Appointed Days) Order S.I. 2000 No 1093.

The Pension (Consequential and Miscellaneous Amendments) Regulations S.I. 2000 No 2691

The Sharing of State Scheme Rights (Provision of Information and Valuation) Regulations S.I. 2000 No 2693

The Divorce etc. (Pensions)(Scotland) Regulations SSI 2000 No 112;

The Divorce etc. (Pensions)(Scotland) Amendment Regulations SSI 2000 No XX (forthcoming);

JUSTICE AND HOME AFFAIRS COMMITTEE

Petition PE102 by James Ward

Note by the Clerk

Background

This petition was first considered by the Committee at the 18th meeting, 2000 (15 May 2000). The Committee agreed to write to the Minister for Justice to ask whether the issues raised in the petition were to be considered as part of the Executive's general review of diligence (referred to during the Stage 1 debate on the Abolition of Poindings and Warrant Sales Bill). The answer to that question turned out to be no. The Committee also agreed to invite written evidence from relevant organisations. Evidence was received from the Law Society of Scotland, Money Advice Scotland and the Accountant in Bankruptcy.

That evidence was considered at the 29th meeting on 27 September. The Committee agreed to refer the petition to the Executive, asking whether it would consider improving the information available to individuals facing sequestration, and whether it was satisfied that the current law was compatible with ECHR. I wrote to the Minister for Justice on the Committee's behalf on 5 October.

I attach the Minister's reply. That reply was copied to the petitioner, who has now written to the Minister querying some of the points made in the Minister's letter. The petitioner's letter is also attached.

The Minister makes clear that he is satisfied on the ECHR-compliance point. He also agrees with the evidence of the Accountant in Bankruptcy (circulated for the 25th meeting as paper JH/00/25/18) that the current law is satisfactory. So far as the provision of information is concerned, the Minister refers to a recent leaflet produced by the Accountant in Bankruptcy (copy attached) and says he will consider whether other relevant documentation could be made more helpful.

In his letter, the petitioner raises some points that relate directly to the circumstances of his own sequestration, and the Committee – in line with its previously-stated view that it cannot consider individual cases – might wish to disregard these. However, he also challenges the Minister's view about the fairness of the current law, pointing out that the right to petition for recall of sequestration is different from a right of appeal. In particular, he claims that no legal aid is available in such cases and alleges that the position of the Accountant in Bankruptcy in such a procedure may give rise to conflicts of interest.

Options

The Committee now needs to decide how to dispose of this petition. If it is satisfied with the Minister's response deals with the points raised in the petition, it may wish simply to close the petition.

If, however, it feels that there are important issues that remain outstanding – including those raised by the petitioner in his latest letter to the Minister – then it may wish to defer a final decision until it has seen the Minister's response.

29 November 2000 ANDREW MYLNE

Recall of sequestration

Publications / AB17

ACCOUNTANT IN BANKRUPTCY

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1. Introduction

1.1 This leaflet is aimed at those people who find they have been made bankrupt and their estate sequestrated when this could have been avoided; that is to say, they are not really insolvent and are in a position to satisfy the demands of their creditors.

1.2 For various reasons, it can and does happen that sequestration is awarded when it could have been avoided. This sometimes happens because the petition or the court summons has been ignored or because payment was tendered to the petitioning creditor too late for the court to be notified. Being made bankrupt is a very serious situation to be in. It is possible to have the sequestration recalled but the process is not straightforward and if a petition for recall is to succeed, it is essential to go about it in the right way.

2. Legislation

Sections 16 and 17 of the Bankruptcy (Scotland) Act 1985, which are reproduced at the end of this booklet, explain the statutory provisions relating to the presentation of a petition for recall of a sequestration. The purpose of this booklet is to highlight some of the practical issues involved so that the process is not more drawn out and expensive than it needs to be.

3. Seeking advice on recall procedure

In most cases it will be the debtor who will petition for recall. The procedure is complex and it is essential for the debtor to instruct a solicitor. Few solicitors are expert in this field and the procedures will be unfamiliar to many. The Law Society of Scotland can direct you to a solicitor who specialises in insolvency matters and the Office of the Accountant in Bankruptcy can also give non-legal advice if requested.

4. Presentation of a petition for recall

A petition for recall of a sequestration must be presented in the Court of Session and if a local solicitor is employed he will require to instruct an Edinburgh agent. This makes it an expensive process right away and, in the vast majority of cases, the debtor will have to bear the costs.

5. Continued administration of the sequestration

Even if a petition for recall has been presented to the court, the law requires the interim or permanent trustee to ignore it and to continue with the administration of the sequestration. This means that the trustee must carry out his normal duties (and continue to run up fees) meantime. The most the trustee can do is to avoid, if he can, taking any drastic or irrevocable action with regard to the disposal of assets or of the debtor's business, and then only if he is convinced there is a genuine prospect of the sequestration being recalled.

6. Co-operation between the debtor and the trustee

It is particularly important for the debtor to co-operate fully with the trustee while waiting for his petition to be dealt with because it is within the trustee's powers to object [lodge answers] to the petition for recall, either on his own behalf or on behalf of the creditors. It is unlikely that the court will grant a recall in the face of the trustee's objections.

7. Information on all debts

The trustee must be informed about all the debts because in most circumstances they will all have to be paid before the sequestration will be recalled. However, it is possible that one, or some, of the creditors may be willing to accept an arrangement for the debtor to pay off the debt after the sequestration is recalled. In such circumstances it will be in the debtor's

interest that the creditors concerned send a letter to the trustee confirming this.

8. Debtor trading

If the debtor is trading at the date of sequestration and decides to petition for recall, the trustee may allow trading to continue. It is extremely unlikely that this will be allowed indefinitely and there will probably be a time limit set for the presentation of the petition so that any risk of losses arising from trading is kept to a minimum. Additionally, the trustee may make his agreement to continue trading conditional upon a third party underwriting any trading losses.

9. Notification of sequestration

Even if a petition for recall has been presented, the trustee is still obliged to place a notice of the sequestration in the Edinburgh Gazette. The trustee must also write to the creditors advising them of the sequestration and inviting them to submit claims.

10. Advance arrangements for payment of claims

Where the petition for recall has been presented on the basis that all creditors have been paid, the money or adequate security must be lodged in advance or the trustee will be obliged to lodge answers to the petition and will not withdraw his objection until his own fees and expenses and all of the creditors' claims have been paid over in full. That is to say, it will not be sufficient to lodge funds with the trustee or a solicitor for disbursement after the recall has been granted.

11. Contractual or statutory interest

Contractual or statutory interest will need to be added to the debts from the date of sequestration until the date of payment, otherwise the debt due will be the amount outstanding as at the date of sequestration. Some creditors will

probably object to the recall if there is a post-sequestration debt outstanding, e.g. Inland Revenue and Customs & Excise have insisted on all outstanding liabilities being settled, not just the debt due at the date of sequestration.

While this may not be precisely according to the provisions of the Act, failure to adhere to the request may result in the petition for recall being refused and the need for a further petition being presented, at additional cost.

12. Payment of trustee's fees

In the vast majority of cases, the trustee's fees and outlays will be met from the funds in the debtor's estate or from any funds provided by a third party to secure the recall of the sequestration. Even if the sequestration has not run for any great length of time, there may still have been a lot of investigative and procedural work already carried out. It is not possible to give an estimate of the average cost but whoever accepts responsibility for meeting the trustee's fees and outlays can expect them to be substantial; the longer a case goes on, the more the fees accumulate and recall should therefore be sought as soon as possible. If these costs cannot be agreed prior to the recall being granted, they may subsequently be determined by the Accountant in Bankruptcy who is however, obliged to charge a fee for this service.

13. After recall

Once a sequestration has been recalled, all the assets and property remaining, after the creditors' claims and the trustee's fees have been paid, will be restored to the debtor.

Appendix

[Sections 16 and 17 of the Bankruptcy (Scotland) Act 1985]

Petitions for recall of sequestration

16. (1) A petition for recall of an award of sequestration may be presented to the Court of Session by—

(a) the debtor, any creditor or any other person having an interest (notwithstanding that he was a petitioner, or concurred in the petition, for the sequestration);

(b) the interim trustee, the permanent trustee, or the Accountant in Bankruptcy.

(2) The petitioner shall serve upon the debtor, any person who was a petitioner, or concurred in the petition, for the sequestration, the interim trustee or permanent trustee and the Accountant in Bankruptcy, a copy of the petition along with a notice stating that the recipient of the notice may lodge answers to the petition within 14 days of the service of the notice.

(3) At the same time as service is made under subsection (2) above, the petitioner shall publish a notice in the Edinburgh Gazette stating that a petition has been presented under this section and that any person having an interest may lodge answers to the petition within 14 days of the publication of the notice.

(4) Subject to section 41(1)(b) of this Act, a petition under this section be presented—

(a) within 10 weeks after the date of the award of sequestration; but

(b) at any time if the petition is presented on any of the grounds mentioned in paragraphs (a) to (c) of section 17(1) of this Act.

(5) Notwithstanding that a petition has been presented under this section, the proceedings in the sequestration shall continue (subject to section 17(6) of this Act) as if that petition had not been presented until the recall is granted.

(6) Where—

(a) a petitioner under this section; or

(b) a person who has lodged answers to the petition, withdraws or dies,

any person entitled to present or, as the case may be, lodge answers to a petition under this section may be sisted in his place.

NOTE

1 As amended by the Bankruptcy (Scotland) Act 1993 (c. 6), Sched. 1, para. 5 (effective 1st April 1993: S.I. 1993 No. 438).

Recall of sequestration

17. (1) The Court of Session may recall an award of sequestration if it is satisfied that in all the circumstances of the case (including those arising after the date of the award of sequestration) it is appropriate to do so and, without prejudice to the foregoing generality, may recall the award if it is satisfied that—

(a) the debtor has paid his debts in full or has given sufficient security for their payment;

(b) a majority in value of the creditors reside in a country other than Scotland and that it is more appropriate for the debtor's estate to be administered in that other country; or

(c) one or more other awards of sequestration of the estate or analogous remedies (as defined in section 10(5) of this Act) have been granted.

(2) Where one or more awards of sequestration of the debtor's estate have been granted, the court may, after such intimation as it considers necessary, recall an award whether or not the one in respect of which the petition for recall was presented.

(3) On recalling an award of sequestration, the court—

(a) shall make provision for the payment of the outlays and remuneration of the interim trustee and permanent trustee by directing that such payment shall be made out of the debtor's estate or by requiring any person who was a party to the petition for sequestration to pay the whole or any part of the said outlays and remuneration;

(b) without prejudice to subsection (7) below, may direct that payment of the expenses of a creditor who was a petitioner, or concurred in the petition, for sequestration shall be made out of the debtor's estate;

(c) may make any further order that it considers necessary or reasonable in all the circumstances of the case.

(4) Subject to subsection (5) below, the effect of the recall of an award of sequestration shall be, so far as practicable, to restore the debtor and any other

person affected by the sequestration to the position he would have been in if the sequestration had not been awarded.

(5) A recall of an award of sequestration shall not—

(a) affect the interruption of prescription caused by the presentation of the petition for sequestration or the submission of a claim under section 22 or 48 of this Act;

(b) invalidate any transaction entered into before such recall by the interim trustee or permanent trustee with a person acting in good faith.

(6) Where the court considers that it is inappropriate to recall or to refuse to recall an award of sequestration forthwith, it may order that the proceedings in the sequestration shall continue but shall be subject to such conditions as it may think fit.

(7) The court may make such order in relation to the expenses in a petition for recall as it thinks fit.

(8) The clerk of court shall send—

(a) a certified copy of any order recalling an award of sequestration to the keeper of the register of inhibitions and adjudications for recording in that register; and

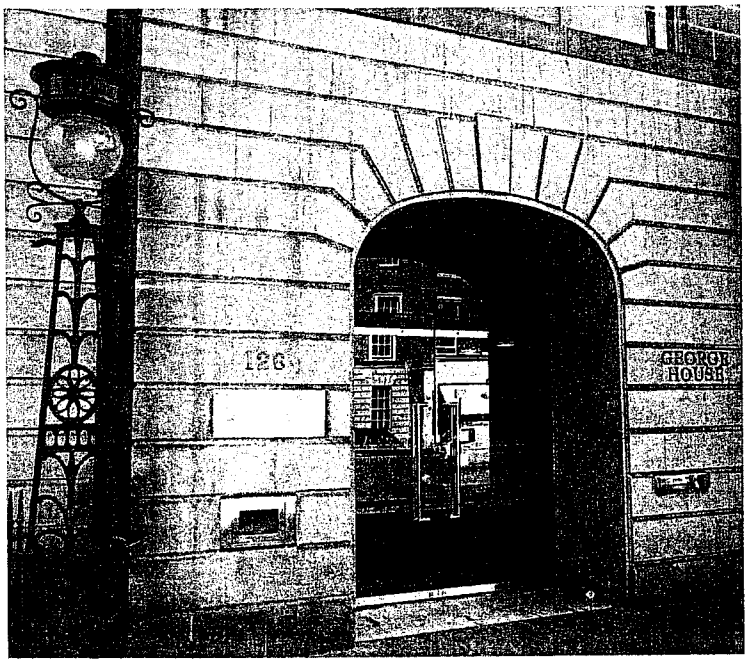
(b) a copy of any order recalling or refusing to recall an award of sequestration, or of any order under section 41(1)(b)(ii) of this Act, to—

(i) the Accountant in Bankruptcy; and

(ii) the permanent trustee (if any) who shall insert it in the sederunt book.

.....

Accountant in Bankruptcy



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Publications

Annual Report

Notes for Guidance

AB1 Debtor's guide
AB2 Completing the debtor's application forms
AB3 Completing the statement of assets & liabilities
AB4 Creditor's guide
AB5 Petitions
AB6 Apparent insolvency
AB7 Trust deeds
AB8 Sequestration (brief guide)
AB9 Sequestration: debtor rights
AB10 Sequestration: creditor rights
AB11 Statutory meeting of creditors
AB12 Debtor discharge
AB13 Debtor: what happens to my home?
AB14 Register of insolvencies
AB15a Search request form (sequestrations)
AB15b Search request form (companies)
AB16 Introduction to sequestration
AB17 RECALL OF SEQUESTRATION

This booklet has been prepared by the Accountant in Bankruptcy for general guidance only. It is not a detailed statement of law nor is it intended to be comprehensive.

IN DEFENS

ACCOUNTANT IN BANKRUPTCY

JH/00/36/A

NOTES FOR THE MEETING OF THE JUSTICE COMMITTEE ON MONDAY 20 NOVEMBER 2000 CONSORTIUM REPORT

Short, medium and long term action by SACRO

Short Term
Fuller consideration of implications at **SACRO Board** meeting 13 December 2000 and development of SACRO **Action Plan** at Board Away Day 15 January 2001.

SACRO is rapidly expanding provision of services to give all Courts options of full range of appropriate sentences. Currently SACRO is negotiating new restorative justice and personal change programmes for 11-16 year olds (Aberdeen, Edinburgh, East Dumbartonshire, North Lanarkshire, East, North and South Ayrshire). Henry McLeish, when he visited the SACRO Young Offender Mediation Service in Fife, said it should be available in every local authority area.

Continue **media** work on the **effectiveness of community sentences compared with custodial sentences** and on **relevance and benefits of restorative justice to victims, offenders and communities.**

Fines are inappropriate for people in severe economic circumstances. Of those fined, 10% are imprisoned for default. Research tells us that the vast majority of these people cannot afford to pay the fine. In 1999, over 200 people were imprisoned for defaulting on a fine of less than £50, over 1000 for defaulting on a fine of less than £100. Therefore, SACRO will continue to press for **implementation of S235 of the Criminal Proceedings (Scotland) Act 1995 to prevent the imprisonment of fine defaulters, where the fine is less than £500.** Donald Dewar himself was reported as saying "I have argued for, and still believe in the abolition of imprisonment as a punishment for non-payment of fines." [Munro, M.(1998) in *Scottish Journal of Criminal Justice Studies*, vol. 4, pp. 50-51.]

Medium Term

- **SACRO will seek to increase availability of availability of restorative justice services,** particularly mediation and reparation for adults and young people. This **give victims a better deal**, puts victims at centre of the process, involves them and satisfies them. It also enables matters to be dealt with at an early stage; ensures offenders take responsibility; allows them to make amends as deemed appropriate by the victim, and the community to be involved in accepting the offender. There is **increasing international evidence that restorative justice reduces offending.**

  Currently Mediation and Reparation for adults is only available in Edinburgh, N&S Lanarkshire and Aberdeen. Capacity is not adequate for demand from Procurators Fiscal, particularly in Edinburgh. Recent Scottish Executive circular on rolling out of pilot diversion schemes has not given a priority to this. This indicates a lack of priority for victim perspective or addressing issues of **"postcode justice".**

  Scottish Executive is sympathetic to **restorative justice** being made available at **all stages** of the criminal justice process:

  community mediation to heal divisions within communities;
  diversion by Procurators Fiscal ;
  available to reporters and to Children's Panels for the above the reasons
  available to courts as a disposal e.g. Community Service Orders could include restorative tasks;

within prisons – prisoner/prisoner; prisoner/officer; pre-release victim offender mediation

but resources will be required particularly to roll-out Mediation and Reparation services. Some immediate savings would result e.g. to the Legal Aid Fund if cases are diverted from prosecution.

- Also SACRO will seek to provide more services directed to the objectives of the Consortium report:
  more youth services;
  bail rollout;
  more supported accommodation which aims to change the circumstances at the root of offending;
  special accommodation for women in Glasgow;
  safe houses for young people;
  more groupwork/**personal change programmes;**
  support/information at a special women's court;
  support/information at drugs court;
  support police by providing community mediation; juvenile shoplifting scheme;
  more throughcare – currently only available in Edinburgh and the Lothians;
  more **alcohol and drugs services which address offending behaviour** as well as issues around misuse – unique compared with general alcohol or drugs advice/counselling services which are otherwise all that is available in most parts of Scotland. Needed to ensure continuity of treatment and identification of issues of concern at interface with prison i.e. at point of remand and pre/post release.

Long Term

- **SACRO will press for Legislative changes**:
  to ensure **changes in sentencing-**
  as mentioned, S235 Criminal Proceedings (Scotland) Act 1995 (would stop imprisonment for non-payment of fine for failure to have a TV licence and for offences associated with prostitution);

  except for very serious offences, **no women or young people imprisoned, as advocated by Prof Pat Carlen;**

  no short sentences and **restrict length of sentences**, for some offences;

  custodial sentence only after **Social Enquiry Report;**

  allow pilot use of **electronic tagging**, with associated support and programmes for bail; early release; in lieu of short sentences; enhance supervision of a community sentence;

  give **statutory expression of criteria for imprisonment** e.g. dangerousness

  to enhance **existing sentences**:
  CSOs-more flexible and allied to restorative tasks
  SAOs revised

  to **improve public perception**:
  - provide information/advice/guidance to ensure consistency, fairness and cost-effectiveness in sentences, while retaining judicial discretion;
  - require **sentencers to elaborate to public on reasons** for sentence, expected outcome and cost (with **Court Press Officers**-to properly explain sentences and to challenge mis-reporting.)

- SACRO will press for **evaluation of effectiveness of whole system, including prison sentences.**
- SACRO will continue to advocate a proper study of the **use of cannabis** is undertaken. The Consortium report identifies that for most, this is their only crime and we should therefore study this criminalisation of young people given that it is now recognised that over 50% of young people will at least experiment with cannabis at some stage.

SUSAN MATHESON
CHIEF EXECUTIVE
SACRO

JH/00/36/5

JUSTICE AND HOME AFFAIRS COMMITTEE

RESTORATIVE JUSTICE

Letter from Dr David Colvin, Vice Chair, Scottish Consortium on Crime and Criminal Justice

Dear Miss Groves,

SCOTTISH CONSORTIUM ON CRIME AND CRIMINAL JUSTICE

Thank you for your letter and for your arrangements for our representations at the Justice and Home Affairs Committee. I have passed on a few minor amendments to the record of our meeting to Catherine Johnstone as suggested.

You also asked for information on the Consortium's views on the age of criminal responsibility. These are contained in Section 5 in the full report. In this it is made plain that the Consortium recommends " that the case should be considered for raising the age of criminal responsibility to the same age as that in which young people move into the adult criminal justice system which we believe should be 18 years". The reasoning behind this recommendation is contained in the various other paragraphs in section 5 of the report and paragraph 13 of the summary.

I have asked Susan Matheson of SACRO to send the information about the Kirkcaldy project to you directly, Should there be any other matter you wish to be cleared up do not hesitate to let me know.

David Colvin
29 November 2000

Community Legal Services

DELIVERING LEGAL SERVICES

to the co

Roger Mackenzie asks what might be in the pipeline following Jim Wallace's announcement that he is establishing a working group to deliver proposals for setting up a community legal service

WHEN Jim Wallace announced the formation of a working group to consider "whether our communities have the comprehensive, well-signposted, well-connected legal and advice services which they require" the suspicion from many in the profession may have been that he was merely creating a ruse to avoid the real issue of the underfunding of our civil legal aid system.

If an inclination to cynicism is temporarily cast aside, it might be that his speech to mark the Scottish Legal Aid Board's 50th anniversary last month was deliberately couched in vague terms because the Justice Department's working group really is going to convene with a blank page and, perhaps critically, with a determination to be as far removed as possible from the English experience which has enveloped the Legal Aid Board under an all-encompassing scheme of community legal services.

The Justice Minister noted in his address "one thing that has come clearly out of the meetings is the huge range and variety of advice available across Scotland, how it has developed to meet different needs and how it relies on a variety of funding mechanisms.

"Our aim is not to set up some new centrally controlled service. We recognise the valuable work which is already done by the wide range of bodies providing advice, legal services and representation. Our first objective is to stimulate local partnerships which will draw together what is there and in a spirit of co-operation work out how best to meet the needs of the client".

But what does Jim Wallace mean when he talks about the key being "the development of local partnerships which will bring together the main components - private solicitors, law centres, advice centres and advice agencies in such a way that they are complementary and their services are well-signposted" with the aim of ensuring "that advice, legal information and representation should be available to a uniform standard, although not necessarily provided in a uniform way, across Scotland"?

Lynn Welsh, Secretary of the Scottish Association of Law Centres, is clear that as a starting point "community legal services" is the wrong badge under which to begin looking at improved access to justice.

"We want change here to be as far-reaching as it has been in England, but in a different way. More money needs to be injected into legal advice services to enable an expansion of non-private solicitor advice. I can only presume that people in Shetland or Inverness have the same problems of accessing justice, but services offered by law centres are concentrated mainly in the west of Scotland".

So what does the Justice Minister envisage when he refers to local partnerships? Lynn Welsh cites Paisley, where she is based as principal solicitor at the Social Inclusion Partnership funded law centre, as being a good example of strong co-operation between public and private advice agencies. "We have a good relationship with the local Faculty here, but the problem is that in general we don't know enough about each other. Private practice has been excluded from the process to some extent and that doesn't help to develop trust.

"The notion of a system of community legal services is achievable, and if the working group is open-minded to suggestions and ensures that groups aren't forced into a contest to compete for available money, then something useful can come out of this process".

Paul Brown, principal solicitor of the Legal Services Agency, agrees that fundamental to the consultation process is an open approach

AS an example of community legal services in iction, the In-Court Advice service at Edinburgh Sheriff Court is the only in-court idvice service in Scotland offering advice over i wide range of civil proceedings.

Having now been running for three and a half 'ears, project line manager Liz Cameron said he service has "evolved to meet the needs of :s users and serves as an encouragement to roposed initiatives elsewhere in Scotland vhile adding practical experience to the current ebate about community legal services".

The remit of the project is to "give advice and nformation to unrepresented litigants and potential litigants involved in small claims, summary cause and applications under the Debtors (Scotland) Act 1987.

Full time adviser Susan Fallone has an office next to the court on the sixth floor of the court building where most of the cases are heard. More than half the 2600 enquiries are taken up with defenders in summary cause actions for the recovery of heritable property, usually brought by City of Edinburgh Council who are made aware of the in-court service by means of an insert sent with the summons.

In that instance, Susan Fallone's role is to "empower individuals who find themselves in court". She finds that "after discussing their case, many feel able to contact the council's housing departments themselves to reach an agreement and avoid having to appear in court. Those who do have to appear are supported in whatever way necessary, for example being provided by a written aide-memoire of what to say to the sheriff".

It's a service which is welcomed by sheriffs and solicitors. "Sheriffs are complimentary about the service, they prefer defenders to have seen an adviser and be briefed as to the basics of court procedures rather than appearing with little idea of what to expect".

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and a determination not to set groups against each other.

"Those who are proposing partnership working need to be clearer about what they mean. Adversarial debate and choice is paramount in this human rights era. Legal services goes to the heart of citizenship. The Executive must be willing to hear all views and it's encouraging that so many people are being invited to sit on the working group."

Paul Brown is adamant that whatever does emerge should not be some kind of Executive-led behemoth. "An agency like ours is based on a clear idea of community. I don't know what is meant by community legal services, but I know it cannot be a Government organised provision. In England, it seems that it has been adopted as a nice cuddly banner, but it doesn't mean very much if it doesn't have anything to do with community.

" I would urge the Executive to give the Legal Aid Board the power to issue grants. At present civil legal aid withers on the vine. It needs wholesale upgrading or risks dying out.

"This needs to be a process of genuine co-operation, openness and a fair financial approach to all."

Mike Dailly, Principal Solicitor at the Govan Law Centre, said: "We need a guarantee that proposals for community legal services will be without prejudice to the existing advice and assistance scheme. Any developments will have to be additional to what we have under the present civil legal aid system.

" The working group will have to take on board the fact that the backbone remains private practice solicitors. I deal with many firms who have extensive expertise in areas of social welfare law and it would be perverse if any system of community legal services was developed at the expense of what we already have.

"It's also essential that the principle of equality of arms is a paramount consideration. Citizens need to have access to qualified representation and have choice. Voluntary lay representation by and large doesn't work; it confuses advocacy with representation. Representation requires proper skills and understanding of the law, protecting the client's legal position. In that respect there is no-one better qualified than a solicitor. Citizens have the right to access people of calibre to represent them."

So should solicitors in private practice view any comprehensive system of community legal advice as a threat? Mike Dailly thinks not. "Solicitors in law centres have provided a powerful resource for communities, without conflict with private practice colleagues. The only concerns will be if the new venture is to be paid for at the expense of the existing system.

"I welcome Jim Wallace's plan to have some sort of joined-up strategy for community legal services, but not if it's a strategy resulting in access to justice on the cheap. This debate is of such importance that in addition to the working group we need to engage discussion in an open forum where all meaningful views can be heard".

Gerry Brown, Convener of the Law Society of Scotland's Legal Aid Committee, welcomed the Society's invitation to participate in discussion on how to develop a system of community legal services. He agrees that the first task of the working group is to define what the discussion is about: "We would like to know what is meant by community legal services, only when that is determined will we be able to come up with a programme to put it into effect.

"We also need to ask whether it is required by the public and, if so, how it will be delivered. It should be recognised that solicitors in legal practice are major providers of early advice and assistance on a variety of topics throughout Scotland.

"It's essential that this process starts with a blank sheet of paper,

Jim Wallace: "Our aim is not to set up some new centrally controlled service"

Gerry Brown: "We should be wary of drawing comparisons with the English experience"

enefits too are evident when defenders are eferred to the in-court adviser prior to the nitiation of an action in a small claim or ummary cause case. "Court staff have eported that the presence of the adviser has educed stress and improved morale as they re now able to point litigants in the direction f help rather than turning them away to fend or themselves," said Liz Cameron. In this ituation the adviser will provide procedural dvice as well as help in the preparation of tatements of claim and defences.

A mediation service runs in tandem, with ases referred to mediation at varying stages throughout the action from raising to recall of decree.

While adviser Susan Fallone's role isn't really to represent litigants in proofs and full hearings, she does do so on occasions where "in her judgment the circumstances warrant such a course of action", such as where someone is unable to present their case adequately by virtue of age or mental illness.

Research by Elaine Samuel of Edinburgh University on behalf of the Scottish Office indicates that within its own terms, the project can be rated as a success in assisting the administration of justice. Sheriffs and local solicitors speak positively that their work has been made easier as a result of unrepresented litigants being armed with information and assistance.

In a recent report to the Social Inclusion Committee of the Scottish Parliament, Liz Cameron wrote "there will always be a need for the provision of sound, and readily available, in-court advice and assistance for the many litigants who come to court unrepresented and, in many instances, totally bewildered". Ensuring similar provision across the country would be a reasonable starting point for any examination of community legal services.

Community Legal Services

In England, Community Legal Services is defined as an "idea for people to find help easily and feel confident in the quality of service they get from legal service providers." According to the official website, the CLS aims to "ensure that people can get information and help about their legal rights and understand how to enforce them in the right place and at the right time".

Community Legal Service Partnerships include solicitors, Citizens' Advice Bureaux, law centres, local authority services (including libraries) and community centres, organised and supported by Community Legal Service Partnerships, with the aim of covering every area of England and Wales.

"Any developments will have to be additional to what we have under the present civil legal aid system"

Mike Dailly, Govan Law Centre

nothing should be pre-judged. And we then have to be brave enough to face the question of whether we have a system that satisfies the need. Discussions must reflect the distinctive social, economic and geographic problems of Scotland and we should therefore be wary of drawing any comparisons with the English experience".

Chairman of SLAB Jean Couper said: "The Board welcomes the Minister's announcement and we look forward to working with others to develop effective, practical proposals for a community legal service providing a high quality service for the public. This is an important step forward for the development of legal information, advice and representation services, including civil legal aid, in Scotland and we are delighted to be playing an active role in the creation of an effective and co-ordinated service for the people of Scotland.

"Shortly we will invite organisations to submit proposals for pilot projects relating to community legal services for civil matters, with a view to the first pilot projects being selected in the early part of 2001. The pilot projects will be possible when Part V of the Legal Aid (Scotland) Act 1986 is enacted.

"The Board is expanding its policy and research function to support the development of future legal aid policy and best practice. Some of the staff within our Policy Unit will be involved in setting up and evaluating these pilot projects. The unit will also carry out research into the reasons behind trends in the delivery of legal aid, particularly the decline in the number of applications for civil legal aid. The results of the pilots and the research will, I am sure, be of interest to the working group as it develops its ideas for the community legal service."

JH/00/35/M

The Scottish Parliament

JUSTICE AND HOME AFFAIRS COMMITTEE

MINUTES

35th Meeting, 2000 (Session 1)

Tuesday 28 November 2000

Present:

Scott Barrie
Gordon Jackson (Deputy Convener)
Mrs Lyndsay McIntosh
Alasdair Morgan (Convener)
Christine Grahame
Maureen Macmillan
Pauline McNeill

Also present: Iain Gray, Deputy Minister for Justice.

Apologies were received from Phil Gallie, Michael Matheson and Euan Robson.

The meeting opened at 9.31 am.

1. **Subordinate legislation:** Iain Gray, Deputy Minister for Justice, moved (S1M-1339) That the Justice and Home Affairs Committee recommends that the draft Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2000 be approved. After debate, the motion was agreed to. It was agreed that a draft report would be circulated by e-mail for approval.

2. **European documents:** The Committee considered the following European Documents—

   972: Initiative by the Federal Republic of Germany for a Framework Decision on criminal law protection against fraudulent or unfair anti-competitive conduct in relation to the award of public contracts in the common market;

   1600: Revised draft Framework Decision on the standing of victims in criminal procedure;

   1224: Note from the incoming Presidency on a programme of measures to implement the principle of mutual recognition of decisions in criminal matters;

1259: Communication from Portugal, France, Sweden and Belgium seeking the adoption by the Council of a Decision setting up a provisional judicial co-operation unit (EUROJUST 5);

1260: Communication from Portugal, France, Sweden and Belgium seeking the adoption by the Council of two Decisions, one setting up a provisional co-operation unit and the other setting up EUROJUST with a view to reinforcing the fight against serious organised crime (EUROJUST 6);

1385: Communication from Portugal, France, Sweden and Belgium seeking the adoption by the Council of a Decisions to establish EUROJUST with a view to reinforcing the fight against serious organised crime (EUROJUST 8);

1300: Commission Communication on mutual recognition of final decisions in criminal matters;

1390: Proposed Council Regulation extending the programme of incentives and exchanges for legal practitioners in the area of civil law (Grotius – civil).

The Committee agreed to invite written evidence on documents 1600 and 1224 from an appropriate academic witness and from the Law Society of Scotland. It also agreed that the letter to the Minister for Justice that the Committee agreed to at the previous meeting should express concern about the implications for Scots criminal law of decisions taken at European Union level. A briefing on current European Union activity in justice and home affairs would be organised.

3. **Visit to courts in Glasgow:** Pauline McNeill reported to the Committee on a visit by her and Michael Matheson on 27 November to the courts in Glasgow organised by the Glasgow Bar Association. The Committee agreed to accept an invitation for a further visit from the Sheriff Principal of Glasgow and Strathkelvin.

4. **Delegate for European visit:** The Committee agreed that the Convener would represent the Committee on a study visit to the European Parliament, and that the Deputy Convener would be the reserve.

The meeting closed at 10.06 am.

Andrew Mylne, Clerk to the Committee