

EXPLANATORY DOCUMENT
for
Draft Public Services Reform (Registers of Scotland) Order 2020

Introduction

Power to remove or reduce burdens

1. This Explanatory Document has been prepared in respect of the draft Public Services Reform (Registers of (Scotland) Order 2020 (“the draft Order”), which, if affirmed, will be made in exercise of powers conferred by section 17 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act.”), which is an enabling power allowing the removal or reduction of ‘burdens’, as defined in section 17(2) of the 2010 Act. The definition of ‘burden’ in that section includes an obstacle to best regulatory practice. In terms of

Office of National Statistics reclassification of Registers of Scotland

2. The need for the draft Order has been triggered by the Office of National Statistics (“the ONS”) reclassification of Registers of Scotland (“RoS”) to central government, which means that the legal regime governing RoS in the Public Finance and Accountability (Scotland) Act 2000 (“the PFA Act”) and the UK national budgeting regime are no longer aligned. The draft Order, if affirmed, will remove the inconsistency between the two regimes, which is an obstacle to best regulatory practice.

“Super-affirmative” parliamentary procedure

3. The draft Order is subject to the two-stage “super-affirmative” parliamentary procedure set out in sections 25 to 27 of the 2010 Act. During the first stage, Scottish Ministers were required to consult interested parties and lay before the Scottish Parliament a proposed draft of the Order and a proposed Explanatory Document for a period of 60 days for the purposes of consultation. These documents must also be sent to interested parties. Scottish Ministers must have regard to any representations made to them about the draft Order.

4. Following that statutory consultation period of 60 days (the first stage of the “super-affirmative” procedure), in terms of section 25(2)(b) of the 2010 Act a draft Order must be laid for approval by resolution of the Parliament, accompanied by a copy of the Explanatory Document (the second stage of the “super-affirmative” procedure). The second stage of the “super-affirmative” procedure is equivalent to normal affirmative procedure. This document is a copy of the Explanatory Document required by section 25(2)(b) (ii) of the 2010 Act.

Repeal of section 9 of the Public Finance and Accountability (Scotland) Act 2000

5. The draft Order, if affirmed, will primarily repeal section 9 of the Public Finance and Accountability (Scotland) Act 2000 (“the PFA Act”), which will be removal of the obstacle to best regulatory practice. It will also have a consequential free-standing provision made under section 17(9)(b) of the 2010 Act. The consequential free-standing provision will compel RoS on the coming into force of the Order to pay its accumulated reserves into the Scottish Consolidated Fund.

Amendment to the Budget (Scotland) Act 2019

6. In anticipation of the Order coming into force, an amendment will be made to schedule 1 of the Budget (Scotland) 2019 to add a new purpose to that schedule to authorise payment of grant by Scottish Ministers to RoS. The new purpose (purpose 21) will be added by the Budget (Scotland) Act 2019 Amendment Regulations 2020.

Requirements of the Public Services Reform (Scotland) Act 2010

7. The proposed draft Order and the proposed draft Explanatory Document were laid before the Scottish Parliament on 15th November 2019 and sent to interested parties in terms of 26(1) and (2)(a)(i) and (ii) and (b) of the 2010 Act.

8. The proposed Explanatory Document contained the details set out in section 27(1) of the 2010 Act (under exception of the details required by section 27(1)(f) which relate to the consultation undertaken under section 26)33.

9. Section 27(1) of the 2010 Act has the following relevant requirements in relation to the explanatory document. It must—

- (a) explain under which power (or powers) in this Part the provision contained in the draft order is made,
- (b) introduce and give reasons for the provision,
- (d) in the case of an order under section 17(1)—
 - (i) explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied, and
 - (ii) include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens (within the meaning of that section).

Power (or powers) the provision contained in the draft order is made

10. The provision in the draft Order is made under section 17(1) of the 2010 Act. Section 17 of that Act is largely based on section 1 of the Legislative and Regulatory Reform Act 2006 which is to do with removing or reducing burdens in legislation. For the purposes of section 1, “burden” is defined to mean any of the following– (a) a financial cost; (b) an administrative inconvenience; (c) an obstacle to efficiency, productivity or profitability; or (d) a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.

11. The Scottish legislation goes beyond the definition in section 1 of the Legislative and Regulatory Reform Act 2006 and includes an extra category of “obstacle to best regulatory practice” which is defined in section 17(4) of the 2010 Act as practice under which (in particular) regulatory activities should be—

- (a) carried out in a way that is transparent, accountable, proportionate and consistent,
- (b) targeted only at such cases as require action.

12. This definition drew on best regulatory principles as defined in section 21 of the Legislative and Regulatory Reform Act 2006 (originated by the Better Regulation Task Force in 1997), but married the principles with “obstacles” to widen the scope of section 17 through the addition of this new category of burden. Section 9 of the PFA Act is an obstacle to best

regulatory practice because it is inconsistent with the budgeting regulatory regime ROS is now subject to having been classified to central government (see paragraphs – to -).

Background and reasons for the provision

Registers of Scotland

13. The Registers of Scotland were established as a trading fund under the Government Trading Funds Act 1973 in 1996. Transitional provision was made on devolution for the trading fund to continue to exist: Art. 22 of the Scotland Act 1998 (Transitory and Transitional Provisions) (Finance) Order 1999. Section 9(1) of the PFA Act came into effect on the expiry of that transitional provision and currently provides that sums (other than payments of or in connection with land and buildings transaction tax) received by the Keeper of the Registers of Scotland in connection with the exercise of the Keeper's functions are to be retained by the Keeper and applied to meet expenditure. Registers have accumulated reserves that has been retained under this provision of c. £70 million.

ONS reclassification of RoS

14. ONS has recommended, in accordance with international standards, that for the purposes of national accounting statistics Registers of Scotland should be classified as part of central government, and not as a separate public corporation. While the Treasury may exercise a degree of discretion as to timing, that recommendation will be followed by the Treasury for the purposes of national accounting and financial reporting standards. The Land Registry for England and Wales, established as a government trading fund by an order under the Government Trading Funds Act 1973 in 1993, has been similarly reclassified.

Reclassification of RoS/ consequences in relation to public expenditure control and the budgeting rules

15. Reclassification of Registers of Scotland as part of central government has consequences in relation to public expenditure control and the budgeting rules that are applicable. The financial system of devolved Scotland is embedded in the UK public expenditure system and is subject to macro-economic controls at the UK level, as well as the regime for control of spending exercised by the Scottish Parliament through the annual Budget Act and Committee scrutiny.

16. The Secretary of State makes payments into the Scottish Consolidated Fund: see s.64(2) Scotland Act 1998. The Treasury can designate the receipts in respect of which Ministers must make payments to the Secretary of State and which are charged on the Fund: s.64(5) – (7) Scotland Act 1998. The Treasury may also require Ministers to provide information: s.96 Scotland Act 1998. The funding received by the Scottish Parliament from the UK Government is subject to the same public expenditure control and government accounting regime as UK Government Departments and is subject to non-statutory arrangements, including Departmental Expenditure Limits (DEL).

17. At present, in terms of section 9 of the PFA Act, the receipts of RoS are not paid into the Scottish Consolidated Fund, and are not available to be granted by Parliament out of the Scottish Consolidated Fund to other parts of the Scottish Administration or to the other bodies and office holders which receive payments out of the Scottish Consolidated Fund. Nor

can the Scottish Parliament control the use of resources for the purposes of the Keeper's functions. For the purposes of national accounting and public expenditure control the Registers of Scotland has been treated until now as a public corporation: see *HM Treasury's Consolidated Budgeting Guidance: 2019 to 2020*, Chapter 11, which means that the Keeper's transactions are, for most purposes, outside of the budgeting of the Scottish Consolidated Fund.

18. With reclassification however, for the purposes of national accounting and public expenditure control, the RoS would be treated as falling within the central government sector as an Arm's Length Body (ALB), and not as a public corporation. In terms of *HM Treasury's Consolidated Budgeting Guidance: 2019 to 2020*, the income and receipts of Registers of Scotland would impact on the budgeting of the Scottish Consolidated Fund and its resource consumption would score in the same way as spending from the Scottish Consolidated Fund, with expenditure funded by the use of reserves counting as spending.

19. The above rules are matters of macro-economic policy which are the responsibility of the UK Government. Without adjustment to or repeal of section 9 of the PFA Act, sums received by the Keeper would not be paid into the Scottish Consolidated Fund, and the Parliament would not be able to control the use of resources for the purpose of the Keeper's functions. Yet, for the Treasury's national accounting and public expenditure control purposes, both are to be recorded in budgeting of the Scottish Consolidated Fund. This may have various implications. With regard to the accumulated reserves of Registers of Scotland, it means that for the purposes of public expenditure control, its use may exceed DEL set by the Treasury, but there would be no means by which the Scottish Parliament could control the amount that is to be used for the purposes of the Keeper's functions.

Repeal of section 9 of the PFA Act

20. Repeal of section 9 will remove a burden for the Scottish Parliament from that provision. Section 9 is an obstacle to best regulatory practice and, accordingly, in terms of section 17(2)(c) of the 2010 Act, a "burden" for the purposes of section 17(1). "Best regulatory practice" is defined in section 17(4) as "practice under which (in particular) regulatory activities should be – (a) carried on in a way that is transparent, accountable, proportionate and consistent, (b) targeted only at such cases as require action".

21. The regime for controlling public funds, in the hands of public bodies, may properly be characterised as a "regulatory activity" for the purposes of removing a burden: it is an activity which regulates, in the public interest, the collection, holding and expenditure of public funds. In the context of the change in classification of the RoS, section 9 is an obstacle to that regime being applied in a way that is accountable, transparent and consistent. It would be an obstacle because despite the income and use of the resources by the Keeper being considered for public expenditure controls to be income and spending scored against the Scottish Consolidated Fund, that income and use of resources would not be subject to the control of the Scottish Parliament in a transparent way consistently with the position of other ALBs whose income and use of resources is scored against the Scottish Consolidated Fund.

22. In the context of the use of section 17 to remove an obstacle to best regulatory practice, the "person" from whom the "burden" is lifted may be the regulator and also, or alternatively, the body being regulated; both, as a matter of principle, benefit from the application of a system of regulation which meets best regulatory practice. Removing an

“obstacle to best regulatory practice” may be characterised as the removal of a burden from persons regulated.

Consequential provision

23. The consequential provision compelling RoS to pay accumulated reserves into the Scottish Consolidated Fund ensures that the new, transparent and consistent legal and budgetary regimes are freed from legacy problems which leaving accumulated reserves unpaid into the Scottish Consolidated Fund would cause and is therefore considered appropriate by Scottish Ministers.

Why the Scottish Ministers consider that the conditions in section 18(2) of the 2010 Act (where relevant) are satisfied

24. In terms of section 18(1) of the 2010 Act, the Scottish Ministers may not make provision under section 17(1) of that Act, unless they consider that the conditions in section 18(2), where relevant, are satisfied in relation to the provision. Those conditions are that—

- (a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means,
- (b) the effect of the provision is proportionate to the policy objective,
- (c) *the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it,*
- (d) the provision does not remove any necessary protection,
- (e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

25. The Scottish Ministers consider that the conditions in section 18(2), where relevant, are satisfied in relation to the provision for the reasons given below.

The policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means

26. The policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means. The alignment of the legal regulatory regime in the PFA Act and the budgetary regime described in paragraphs 15 to 19, can only in practice be achieved by repeal (or significant adjustment to) section 9 of the PFA Act. The only alternative would be if there was a radical change of approach to budgeting taken by the UK Government, and this was reflected in a new *HM Treasury’s Consolidated Budgeting Guidance*. Since that Guidance has applied satisfactorily for many years to all UK Departments and no better approach is readily ascertainable, such an alternative could not satisfactorily be secured.

The effect of the provision is proportionate to the policy objective

27. Scottish Ministers consider the effect of the provision is proportionate to the policy objective of removing the obstacle to best regulatory practice. The current quasi-trading fund status of RoS is abolished by repeal of section 9 of the PFA Act. The Land Registry for England and Wales, established as a government trading fund by an order under the Government Trading Funds Act 1973 in 1993, was similarly reclassified by ONS and its trading fund status abolished to achieve regulatory alignment. The effect of the provision

need have no impact on the day to day activities of RoS or its delivery of services to the public. Its effect is also proportionate in that it is internal to the accounting only of the Scottish Administration.

The provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it,

28. Scottish Ministers consider the provision taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it. There is a clear public interest in removing the obstacle to best regulatory practice as described above. It is not clear, on the other hand, that any one is adversely affected by the provision. The effect of the provision also, as stated in paragraph 27, need have no impact on the day to day activities of RoS or its delivery of services to the public or its financing its activities.

The provision does not remove any necessary protection

29. Scottish Ministers consider that the provision does not remove any necessary protection. Examples of protections given in the legislation are protections in relation to—

- (a) the independence of judicial decision-making, or decision-making of a judicial nature,
- by a person occupying a judicial office,
- (b) civil liberties,
- (c) health and safety of persons,
- (d) the environment,
- (e) cultural heritage (including access, through display, exhibition or otherwise, to cultural heritage).

30. It is not clear that any protections of any kind are removed by the provision let alone any of the type listed as examples in the 2010 Act. The Keeper will continue to be a Non-Ministerial Office Holder, who is not subject to the direction of Scottish Ministers in relation to the exercise of the Keeper's statutory functions.

The provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

31. Scottish Ministers consider the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

Consultation under section 26 of the 2010 Act

32. Section 27(1)(f) of the 2010 Act requires that an Explanatory Document laid before the Scottish Parliament under section 25(2)(b)(ii) of the Act must give details of: -

- any consultation undertaken under section 26,
- any representations received as a result of the consultation, and
- the changes (if any) made to the proposed draft order as a result of those representations.

33. Secondly in terms of section 26(1) of that Act:

“If the Scottish Ministers propose to make an order under section 14 or 17(1) they must—

- (a) consult such organisations as appear to them to be representative of interests substantially affected by the proposals,
- (b) where the proposals relate to the functions of one or more persons, bodies or office-holders, consult those persons, bodies or office-holders, or persons appearing to them to be representative of those persons, bodies or office-holders,
- (c) in such cases as they consider appropriate, consult the Scottish Law Commission, and
- (d) consult such other persons as they consider appropriate.

34. Following the laying of the draft Order and proposed explanatory document on 15 November 2019, Scottish Ministers generally invited representations but also in consultation with RoS, specifically consulted RoS and the following persons suggested by RoS as likely to be affected by the Order or have an interest in the Order, namely:

- Scottish Law Society
- Lord President
- Scottish Courts and Tribunal Service
- Accountant in Bankruptcy
- Crofting Commission
- Scottish Law Commission
- Revenue Scotland
- Ordnance Survey

35. The number of responses were limited with only 9 persons making representations. None of the responses questioned the legal basis of the draft Order or suggested that an Order in the terms of the draft Order could not be properly made. In fact none of those responding had any comments on the actual text of the draft Order. Because the responses were so limited, the explanatory document can give details of each response.

Law Society of Scotland

36. The Law Society of Scotland representing over 11,000 Scottish solicitors said they appreciated that the effect of the Order was that the organisation’s full income and expenditure would fall within the Scottish Government’s budgeting boundary and RoS would no longer be able to maintain and manage their reserves, it was essential that RoS were given adequate funding to ensure appropriate resource in order to comply with their statutory functions, achieve their ambitions as set out in their Corporate Plan for 2019 to 2024 and plan for the longer term, i.e. post 2024 following Land Registration Completion. The focus of their response therefore was that RoS in future be adequately funded. They were however pleased to note that the Explanatory Document to accompany the order states that the Order “need have no impact on the day to day activities of RoS or its delivery of services to the public”. They were also pleased to note that there was no change to the Keeper’s status as a Non-Ministerial Office Holder who is not subject to the direction of Scottish Ministers. This was important to maintain a separation of powers and independent decision making.

Revenue Scotland

37. Revenue Scotland had no comment to make on the Order itself. Their consideration of the Order and the accompanying documents had been primarily focused on the concern that Registers of Scotland would still be able to conduct the services that it currently provides

and a need for assurance that, following the change of status, the basis for the amount charged by Registers of Scotland for its data services would not be significantly altered.

*Malcolm M. Combe, Senior Lecturer in Law,
Law School, University of Strathclyde*

38. Mr Crombie acknowledged that a change in classification of RoS meant budgetary change for Registers of Scotland was in turn inevitable but he hoped that that Registers of Scotland would continue to be funded in the future in a way that allowed its important work to continue, not least in relation to the new register planned as a result of Part 3 of the Land Reform (Scotland) Act 2016.

Professor Stewart Brymer, solicitor in private practice and part-time academic

39. Professor Brymer was completely against the Order, which he thought itself had the effect of reclassifying RoS to part of central government. He thought RoS would suffer if it came under government control. He was also concerned that RoS might not in future be adequately resourced.

Ordnance Survey

40. OS had no comments

Scottish Law Commission

41. SLC said that taking into account the nature of their organisational remit, they had no view to express on the Order itself or the changes in the regulatory framework that will follow. However, they did wish to draw the attention of Ministers to areas of overlap between their work and that of RoS which they hoped would be borne in mind when revised funding arrangements for RoS were developed.

Dr Jill Robbie, Glasgow University Law School

42. Dr Robbie said she had no comments on the technicalities of the draft Order but hoped the changes it effected would not lead to reduced funding for RoS.

PCS Union/ RoS Branch

43. PCS Union/ RoS Branch said that they had no concerns about the reserve being maintained and administered under the Scottish Consolidated Fund as long as the liabilities on the reserve are acknowledged and recognised. PCS were concerned that RoS funding was so closely tied to the commercial property market, this may cause RoS to have need to access a reserve of cash to deal with fluctuations in the market caused by the economic impact of BREXIT or other significant events impacting on the Scottish Economy.

44. For many years, RoS had managed the staffing budget of RoS well ensuring that they had the requisite staffing for the duties and objectives of Registers and setting their fees at an appropriate level to account for this. In essence RoS was well used to being able to wash its face on budgetary management of all aspects of the business and the day to day activities of RoS. Therefore the administration of the reserve should not impact on the commitment of Scottish Ministers and RoS management to those commitments under “Fair Work”, however

in the circumstances that RoS will no longer manage the reserve set against liabilities we could realistically encounter, it was important that Ministers restate their commitment for staff to : -

a) No Compulsory Redundancy

b) Staff being able to enjoy the full rewards of Scottish Public Sector Pay Policy.

Registers of Scotland

45. The Keeper of the Registers replied personally to the consultation. She first said that she was reassured that the explanatory document stated that there was no need for this change to have any impact on day-to-day operations and that her status as a non-ministerial office-holder within the Scottish Administration will be unaffected. In particular, she was reassured that the delivery of her specific statutory functions would remain independent of the direction of Scottish Ministers. She believed this independence to be vitally important to maintain the confidence of the citizens of Scotland that decisions about specific land and other legal document registration are not subject to political direction.

46. She also ended by saying that if this change to the RoS funding arrangements took place as described in the Order, she and her staff would do everything within their power to make this change work and minimise the risks that Scottish Government are exposed to as a result of this change.

47. The major part of her detailed response outlined the financial risks that SG would be taking on if the Order went through and SG had to underwrite the risks. The previous system of holding a significant reserve as a match against risks had worked well and there was no compelling reason to change it.

48. On the draft of the Order she would prefer that 'reserves' be called 'retained profits'.

Changes as a result of representations

49. Scottish Ministers do not propose to amend the draft Order in the light of the consultation representations but are grateful to all those who contributed.