

COURTS REFORM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Courts Reform (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The policy objective of the Bill is to address the problems identified in the Scottish Civil Courts Review¹ headed by Lord Gill, then Lord Justice Clerk, and now Lord President of the Court of Session. The Review concluded that the Scottish civil courts provide a service to the public that is "slow, inefficient and expensive". It went on to say that "minor modifications to the status quo are no longer an option. The court system has to be reformed both structurally and functionally".

4. The review made 206 recommendations for change. The Scottish Government has accepted the majority of these recommendations. Many of the recommendations of the Review will be implemented by court rules made by act of sederunt as they concern matters which either do not require primary legislation or are more appropriate for setting out in court rules as they concern the day to day routine workings of the courts. The Bill seeks to establish the framework for the civil courts in Scotland recommended by the Review within which the detailed arrangements may be made by court rules.

5. The provisions in Part 1 of the Bill are principally designed to give effect to those recommendations of the Scottish Civil Courts Review which relate to the sheriff court. The principal changes included in this Part involve:

- The increase in the privative jurisdiction, now to be called the exclusive competence, of the sheriff court from £5,000 to £150,000;

¹ <http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform>

- The creation of a new judicial office in the sheriff court to be known as the summary sheriff with concurrent jurisdiction with sheriffs but in a more restricted range of both civil and criminal matters;
- The ability for the Scottish Ministers to confer an all-Scotland jurisdiction on a sheriff in a specified sheriffdom sitting at a specified sheriff court for the purposes of dealing with specified types of civil proceedings; and
- Provision for the designation of sheriffs and summary sheriffs as specialists in particular types of sheriff court case.
- The abolition of honorary sheriffs

6. It was recognised at an early stage that the introduction of such fundamental changes by way of amendment to the Sheriff Courts (Scotland) Acts of 1907 and 1971 would almost inevitably result in a very unsatisfactory and fractured product which would be very difficult for legal practitioners and others. The opportunity has therefore been taken to reproduce the relevant provisions which will now sit together in this single Part of the Bill, though changes have been made to many of the provisions which are being re-enacted.

7. The provisions in Part 2 of the Bill create a new Sheriff Appeal Court ensuring that summary criminal and civil appeals from sheriff courts are heard at an appropriate level.

- Chapter 1 establishes the Sheriff Appeal Court.
- Chapter 2 deals with matters relating to the appointment of Appeal Sheriffs.
- Chapter 3 provides for the organisation of business in the Sheriff Appeal Court.
- Chapter 4 sets out details relating to the administration of the Sheriff Appeal Court.

8. Part 3 of the Bill sets out the provisions relating to civil procedure in Scotland.

- Chapter 1 relates to the sheriff court. It makes provision relating:
 - to civil jury trials;
 - to the introduction of a new simple procedure which replaces the procedures for summary cause and small claims actions;
 - to interdicts and other orders which have an effect beyond the boundary of the sheriffdom in which they are made;
 - to the execution of deeds relating to heritage; and
 - to interim orders.
- Chapter 2 relates to the Court of Session and makes provision relating to judicial review by introducing time limits and a leave or permission stage. It also makes provision about interim orders and warrants for ejection.
- Chapter 3 deals with the remitting of cases to and from the Court of Session and also the remit of cases to the Scottish Land Court.
- Chapter 4 provides for the representation of non-natural persons (e.g., companies) in simple procedure and other civil proceedings.
- Chapter 5 makes provision for jury service in Scotland.

This document relates to the Courts Reform (Scotland) Bill (SP Bill 46) as introduced in the Scottish Parliament on 6 February 2014

- Chapter 6 contains various enabling sections which will allow the Court of Session to regulate its procedure and that of the sheriff courts and the Sheriff Appeal Courts. It will also give the Court of Session the power to regulate fees in the courts.
 - Chapter 7 makes provision for the Inner House of the Court of Session to make orders relating to vexatious litigants and for the courts to make orders relating to vexatious behaviour.
9. Part 4 of the Bill provides for appeals from the sheriff court to the Sheriff Appeal Court and from there to the Court of Session. It also makes provision for appeals to the Supreme Court.
10. Part 5 of the Bill relates to criminal appeals from summary proceedings to the Sheriff Appeal Court and from there to the High Court.
11. Part 6 makes provision for the establishing, relocating, and disestablishing of justice of the peace courts. It provides for summary sheriffs to sit in justice of the peace courts. It also abolishes the office of stipendiary magistrate.
12. Part 7 provides for the merging of the Scottish Court Service and the Scottish Tribunal Service to form the Scottish Courts and Tribunals Service.
13. Part 8 contains general and ancillary provisions

Rationale for subordinate legislation

14. The Bill contains a number of delegated powers provisions. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered the importance of each matter against:
- the need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
 - the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation;
 - the need to ensure proper use of parliamentary time;
 - the possible frequency of amendment; and
 - the need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.
15. The relevant provisions are described in detail below. For each provision, this memorandum sets out:
- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
 - why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and

- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

16. Subordinate legislation is required to implement the Scottish Government's policy and some form of parliamentary procedure is appropriate. For the decision on negative or affirmative procedure, the Scottish Government has considered carefully the degree of Parliamentary scrutiny that is thought to be required for the instrument, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. The balance reflects the views of the Government on the importance of the matters being delegated by the Parliament.

17. A number of the powers are the responsibility of the court to make through acts of adjournal and acts of sederunt. These are to be made by Scottish statutory instrument by virtue of section 27(2)(d) and (e) of the Interpretation and Legislative Reform (Scotland) Act 2010.

GENERAL SUBORDINATE LEGISLATION PROVISION

18. Section 124 contains general subordinate legislation provisions. Subsection (1) provides that the power to make an order under the Bill includes the power to make different provision for different purposes or areas and permits the powers to be used to make incidental, supplemental, consequential, transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient. The general position is that the powers exercisable by Ministers by order are subject to negative procedure. The exceptions are orders under those sections listed in subsection (2) which are subject to affirmative procedure, as well as the commencement order in section 129 for which there is no Parliamentary procedure.

SUBORDINATE LEGISLATION POWERS - DETAIL

Section 2(1) - Power to alter sheriffdoms, sheriff court districts and sheriff courts

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

19. This provision allows for the creation or abolition of sheriffdoms and sheriff court districts and for changes to the boundaries of such sheriffdoms and districts. In addition it allows for the opening of new sheriff courts, or change of location, or the closing of specified sheriff courts. Section 2 essentially replicates, but re-orders, the process for the exercise of Minister's order making powers to alter sheriffdoms and sheriff court districts in sections 2(1) and 3(2) of the Sheriff Courts (Scotland) Act 1971, with the associated ancillary powers, and merges the two powers into one. Under subsection (4) and (5), the Scottish Ministers may only make an order after receiving a proposal that they do so from the Scottish Courts and Tribunals Service (who may only make a proposal with the agreement of the Lord President of the Court of Session). The Scottish Courts and Tribunal Service is placed under a duty to consult parties who are likely to have an interest prior to making such a proposal (subsection (3)).

20. Further, the consent of the Lord President and the Scottish Courts and Tribunals Service is required for the making of an order which results from the proposal, prior to it being made by the Scottish Ministers.

Reason for taking power

21. The power is required to allow flexibility in the organisation of the sheriffdoms and sheriff court districts, and the opening or closure of sheriff courts to take account of changing court usage and population changes. This is necessary to allow for the efficient organisation of court services in Scotland.

Choice of procedure

22. This power is narrow in scope and intended only to be used to maximise efficiency, furthermore it may only be made at the request and with the consent of the Lord President and the Scottish Courts Tribunal Service, who are required to have consulted upon their proposals prior to submitting them to Ministers. Accordingly, the negative procedure is considered to offer sufficient parliamentary scrutiny.

Section 23(5) - Further provision about tribunals

Power conferred on: Court of Session
Power exercisable by: Act of sederunt
Parliamentary procedure: None

Provision

23. This provision allows the Court of Session to provide for the procedure for, or make procedural changes relating to, tribunals constituted by the First Minister under section 21 of the Bill. Such tribunals investigate and report on whether a person holding judicial office is unfit to hold the office by reason of inability, neglect of duty or misconduct. Section 24 replicates section 12C of the Sheriff Court Act 1971.

Reason for taking power

24. The administrative detail of the tribunal's procedural rules is better suited for subordinate legislation. This power will also provide the Court of the Session with the flexibility to ensure that the procedure followed in such a tribunal is fit for purpose and efficient.

Choice of procedure

25. While not a part of the court or tribunal system, the tribunal established under section 21 is one which by virtue of section 23(2) and (4) has the appearance and function similar to a court or tribunal. As such, its rules logically fall to be treated in a similar way. To preserve the tribunal procedure from political interference, in accordance with the principle of separation of powers, such acts of sederunt are usually not subject to Parliamentary scrutiny.

Section 25(2) - Removal from office

Power conferred on: **The First Minister**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Negative**

Provision

26. This provision provides that a person may be removed by the First Minister from the office of sheriff principal, sheriff, or summary sheriff, following the conclusion of a tribunal constituted under section 21, which has found that the individual is unfit, only by way of an order made by statutory instrument.

Reason for taking power

27. Section 25(2) replaces section 12E(3) of the Sheriff Courts (Scotland) Act 1971 and replicates the procedure which requires an order made by the First Minister in order to remove a sheriff principal or sheriff from office following a report from a tribunal to the First Minister that the person is unfit by reason of inability, neglect of duty or misbehaviour. An order made under this subsection is now required for the removal of a summary sheriff treating such an office holder in the same way as sheriffs principal and sheriffs who are also full time permanent judiciary appointed by Her Majesty. It is considered appropriate that the power to make the order is given to the First Minister rather than the Scottish Ministers as it is the First Minister who recommends the appointment of sheriffs principal and sheriffs by virtue of section 95(4) of the Scotland Act and of summary sheriffs by virtue of section 5(3) of the Bill.

Choice of procedure

28. An order under this section will be made subject to the negative procedure. This action would only be taken at the end of a thorough, independent, tribunal based process, at the conclusion of which the report of the tribunal will have been laid before the Parliament in accordance with section 24(2). The effect of the power on a judicial officer is the same as that imposed by section 12E of the Sheriff Court (Scotland) Act 1971, which is also subject to the negative procedure. It is therefore considered that the negative procedure will offer sufficient Parliamentary scrutiny.

Section 28(1) – Power to fix sittings of sheriff courts

Power conferred on: **The sheriff principal of a sheriffdom**
Power exercisable by: **Order**
Parliamentary procedure: **None**

Provision

29. This provides that the sheriff principal may, by order prescribe for his or her respective sheriffdom: the number of sittings of sheriff courts to be held at each place which has been designated for holding such courts, the days and time of day on which those sittings are to be held and the description of the type of court business to be dealt with at those sittings.

Reason for taking power

30. This section provides for the re-enactment and updating of section 17 of the Sheriff Courts (Scotland) Act 1971 which made similar provision for the sheriff principal to fix sittings of sheriff courts by order. Decisions on when an individual sheriff court will sit and what business it will deal with at any given time are considered best left to the sheriff principal, who has the responsibility for the efficient disposal of business throughout the sheriffdom (section 27). This also ensures maximum flexibility and adaptability in the organisation of court business to meet the needs of court users.

Choice of procedure

31. As the making of an order under this section is a purely administrative act, exercised by a member of the judiciary in accordance with their obligations under the Bill, it is not appropriate for such an order to be subject to Parliamentary procedure.

Section 39(5) - Exclusive competence

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

32. Section 39 provides that the sheriff court has exclusive competence over civil proceedings where an order of value is sought, if the value of the order is £150,000 or below. The provision determines the forum in which a claim of value may be sought, in that a claim less than or equal to the sum set out in section 39(1)(b)(ii) may not be brought at first instance in the Court of Session. Subsection (5) allows the Scottish Ministers to amend that sum by order.

Reason for taking power

33. In order to keep track with inflation, or otherwise adjust the limit in order to ensure better management of cases in the courts, it is considered desirable that this figure be adjustable by means of an order. It is not considered appropriate for the variation of this sum to require primary legislation; subordinate legislation provides the appropriate level of flexibility to keep pace with the changing needs of the court and its users, or to deal with unexpected occurrences.

Choice of procedure

34. The variation of the figure which will govern access to the Court of Session is recognised by the Scottish Government as being one which will have an effect upon an individual's access (at first instance) to the highest civil court in Scotland, with resultant effects on the cost of such a case and upon the requirement to employ counsel. Accordingly the Scottish Government believes that it is appropriate that this power is subject to affirmative procedure.

Section 39(7) - Exclusive competence

Power conferred on: **The Court of Session**

Power exercisable by: **Act of sederunt**

Parliamentary procedure: **None**

Provision

35. Section 39(7) provides for the Court of Session by act of sederunt to set out how the value of an order is calculated, for the purpose of determining whether it falls within the exclusive competence of the sheriff court. Subsection (8) provides that such an act may make different provision for different purposes.

Reason for taking power

36. The act of sederunt, in providing for the way in which the court calculates the value of an order, may have to provide for a variety of circumstances: for example, where the sum sought is a recurring payment over a period of time, or where there are complex matters of claim and counter claim from two or more parties to a case. The calculation of the value of a claim will therefore require detailed rules dealing with a variety of circumstances which may be complex and may require to be amended quickly to deal with new situations arising from time to time.

Choice of procedure

37. The Court of Session has various powers to regulate civil court procedure by act of sederunt. The method of calculation is more readily discernible by the Court than Ministers, and as it concerns the management and administration of individual court cases it is considered that this is best set out by act of sederunt. To preserve the courts from political interference, in accordance with the principle of the separation of powers, acts of sederunt are not usually subject to Parliamentary scrutiny.

Section 41(1) - Power to confer all-Scotland jurisdiction for specified cases

Power conferred on: **The Scottish Ministers**

Power exercisable by: **Order made by Scottish statutory instrument**

Parliamentary procedure: **Negative**

Provision

38. Section 41 provides that the Scottish Ministers may by order stipulate that the jurisdiction of a sheriff of a specified sheriffdom sitting at a specified sheriff court will extend territorially throughout Scotland for the purposes of dealing with specified kinds of civil proceedings. Such an order may only be made with the consent of the Lord President of the Court of Session under section 41(3).

39. The power cannot be exercised to remove the jurisdiction of any other sheriff to deal with the proceedings specified, nor can it be used to provide that a specified court deal only with one type of civil proceedings.

Reason for taking power

40. The Scottish Civil Courts Review recommended that there should be a specialist personal injury court in Edinburgh Sheriff Court. The policy of the Bill however is a more general one; to permit the Scottish Ministers to provide that the jurisdiction of a sheriff in a specified sheriff court extends throughout Scotland for the purpose of dealing with specified types of civil proceedings.

41. Therefore, this power will permit the establishment of a specialist personal injury court in Edinburgh Sheriff Court, but it would also allow a similar court to be established in Glasgow, or indeed any other sheriff court. It would also permit Ministers to establish specialist courts for other types of civil proceedings if it were to be thought in the future that there was a need to do so.

42. It is considered that the power to do this should be flexible, both to meet existing needs, to assess the effect of such a designation and also to adapt quickly to changes that may be required and so secondary legislation is considered appropriate. The power is not limited to personal injury cases in order to cater for the possibility that it might in the future be desired to provide for further types of procedure to be subject to all-Scotland jurisdiction,

Choice of procedure

43. This power will be used to widen the choice available to court users as to where to raise their court action, and cannot remove the jurisdiction of the existing sheriff courts in the types of case identified for specialisation, nor remove the range of case which may be heard at the specified courts. It relates to administrative decision making and accordingly negative parliamentary procedure is considered appropriate.

Section 43(3) – Summary sheriff: civil competence and jurisdiction

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

44. Section 43 sets out that summary sheriffs may exercise all of the jurisdiction and powers of a sheriff in relation to civil proceedings, but their competence is restricted to the proceedings and matters listed in schedule 1. Subsection (3) provides that the schedule may be amended by the Scottish Ministers. By virtue of the operation of section 45, which provides that honorary sheriffs are to have the same jurisdiction and powers as a summary sheriff, the use of this power will also affect the civil competence of that judicial officer.

Reason for taking power

45. The power is required to enable the lists and definitions in schedule 1 to be kept up-to-date with any variations and amendments to the types of actions and applications that fall within the areas of competence of summary and honorary sheriffs, or if it decided that new powers or competences should be conferred. It will also allow the Scottish Ministers to make changes if necessary following a review of the operation of the provisions in practice.

Choice of procedure

46. As this power relates to the competence and jurisdiction of summary sheriffs rather than administrative and procedural matters, it is appropriate that it should be subject to the affirmative procedure.

Section 55(3) – Power to fix sittings of the Sheriff Appeal Court

Power conferred on: The President of the Sheriff Appeal Court
Power exercisable by: Order
Parliamentary procedure: None

Provision

47. This provides that the President of the Sheriff Appeal Court may, by order prescribe: the number of sittings of the courts and where each sitting is to be held, the days and time of day on which those sittings are to be held and the description of the type of court business to be dealt with at those sittings.

Reason for taking power

48. This section provides a power for the President of the Sheriff Appeal Court similar to that given to a sheriff principal under section 28(1) of the Bill which made provision for the sheriff principal to fix sittings of sheriff courts by order. Decisions on when the Sheriff Appeal Court will sit and what business it will deal with at any given time are considered best left to the President of the Sheriff Appeal Court, who has the responsibility for the efficient disposal of court business (section 54). This also ensures maximum flexibility and adaptability in the organisation of court business to the meet the needs of court users.

Choice of procedure

49. As the making of an order under this section is a purely administrative act, exercised by a member of the judiciary in accordance with their obligations under the Bill, it is not appropriate for such an order to be subject to Parliamentary procedure.

Section 70(5) – Simple procedure

Power conferred on: The Court of Session
Power exercisable by: Act of sederunt
Parliamentary procedure: None

Provision

50. “Simple procedure” (which will replace summary cause and small claims actions) will be a new single set of rules for cases for £5000 or less which will be dealt with mainly by the new summary sheriffs. The rules must reflect as far as possible the principles set out in section 72 of the Bill. They will be based on a problem-solving or interventionist approach, closer to the inquisitorial approach taken in some other jurisdictions. Section 70(3) sets out the monetary thresholds that will apply to simple procedure, and subsection (5), (in a similar way to the

operation of section 39(7)) provides for the Court of Session by act of sederunt to set out how the calculation of the sum of money referred to in subsection (3) is determined, with subsection (6) providing that such an act may make different provision for different purposes.

Reason for taking power

51. The act of sederunt, in providing for the way in which the court determines the calculation of the sum, may have to provide for circumstances such as where the sum sought is a recurring payment over a period of time. This type of provision may require to be detailed and to be amended quickly to deal with new situations arising from time to time. Therefore, it is best placed in subordinate legislation.

Choice of procedure

52. The Court of Session has various powers to regulate civil procedure by act of sederunt. The method of calculation is more readily discernible by the Court than Ministers, and as it concerns the management and administration of individual court cases it is considered that this is best set out by act of sederunt. To preserve the courts from political interference, in accordance with the principle of the separation of powers, acts of sederunt are not usually subject to Parliamentary scrutiny.

Section 70(9) - Simple procedure

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

53. Section 70(3) sets out the monetary thresholds that will apply to simple procedure. Subsection (9) allows the Scottish Ministers to change the thresholds.

Reason for taking power

54. The threshold set will over time be devalued in real terms owing to inflation. The power will allow the Scottish Ministers to adjust for that. Further, Ministers may otherwise adjust the limit in order to ensure better management of cases in the courts, making policy decisions as to which cases may be best placed as being subject to simple procedure. It is considered desirable therefore that this figure be adjustable by means of subordinate legislation, providing the appropriate level of flexibility.

Choice of procedure

55. The variation of the figure which will determine whether any case must be raised as proceedings subject to simple procedure will have implications as to the way in which the court approaches the case (section 72), the evidential rules which apply (section 74), and the question of expenses (section 77). As it affects cases generally, it has implications for a large number of types of civil proceedings in the courts. Accordingly the Scottish Government believes that it is appropriate that this power is subject to affirmative procedure.

Section 71(5) - Proceedings for aliment of small amounts under simple procedure

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

56. Section 71 re-enacts and modifies section 3 of the Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963. It allows claims for aliment to be brought under simple procedure if the aliment claimed is less than £35 per week for an under 18 year old and £70 per week for all other cases.

Reason for taking power

57. The threshold set will over time be devalued in real terms owing to inflation. The power will allow the Scottish Ministers to adjust the threshold as they see fit to keep pace with inflation which may require to be varied at relatively frequent intervals.

Choice of procedure

58. This is a power that, in contrast with section 70(9), is limited in scope. Whereas section 70(9) applies to the general limit of £5000 for actions under simple procedure (which will replace summary cause and small claims actions), section 71(5) is applicable only to one type of proceeding, aliment. It is considered that an order subject to negative parliamentary procedure is appropriate.

Section 77(1) - Expenses in simple procedure cases

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

59. Section 77(1) allows the Scottish Ministers to prescribe by order such categories of simple procedure cases for which the expenses awarded may not exceed a certain sum, or for which no award of expenses may be made. Section 77(2) makes it clear that these categories can be defined by reference to the value of the claim or the subject matter of the claim. An order under subsection (1) could therefore specify one category where the value of the claim was under £3,000 and another where the claim was between £3,001 and £5,000 (which would correspond to the divisions currently between small claims and summary cause actions). Accordingly the power can be used to provide in the first category that no expenses can be claimed and under the second that only limited expenses could be claimed. An order under subsection (1) could specify some types of civil proceedings where different rules for expenses could apply, for example Personal Injury actions. Furthermore, exceptions in specified categories may be made in an order under subsection (3).

60. The provisions in any order made under this section are subject to the provisions in subsection (4) to (7).

Reason for taking power

61. The power allows the Scottish Ministers to vary thresholds for expenses in different types of actions, both because of inflation and where as a matter of policy, other factors which relate to a particular type of civil proceedings indicate that special rules on expense should apply. The thresholds may need to be adjusted on a relatively frequent basis and be flexible to the changing needs of court users. It is considered that subordinate legislation is appropriate for this.

Choice of procedure

62. This is a power which can affect a wide range and number of cases, covering the kinds of actions which are currently raised under summary cause or small claims procedure, including such diverse subjects as personal injury actions and housing cases. It is therefore considered therefore that it is appropriate for this power to be subject to the affirmative procedure.

Section 82(2) - Power to enable sheriff to make orders having effect outside sheriffdom

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

63. Section 82 enables the Scottish Ministers to provide by order for the types of orders, including interim orders, which a sheriff has competence to make which would be capable of having effect, and be able to be enforced, outwith the sheriffdom in which they were granted, as well as within that sheriffdom. An order under this section may not affect interdicts or interim interdicts, (provision for those orders to have effect and be enforced outwith the sheriffdom are already set out in sections 80 and 81). The power permits Scottish Ministers to provide different provisions for different categories or descriptions of relevant orders, and set out the circumstances, conditions and proceedings where the sheriff is to have an extended competence. Ministers may also make provision about jurisdiction in relation to proceedings for the orders, the transfer of such proceedings and about the enforcement of the orders made in the exercise of the extended competence of the sheriff.

Reason for taking power

64. At present interdicts have been identified in sections 80 and 81 as a type of proceedings which would benefit from extended competence. However, in order to ensure that if the need arises, other types of civil proceedings could benefit from similar arrangements, without the need in each instance for primary legislation, this power is needed. This is in keeping with the Bill being one which establishes a framework under which the civil courts can adapt their administration and arrangements to the changing needs and circumstances of court users, without the need at each turn for primary legislation to effect relatively minor changes.

Choice of procedure

65. As this matter is about management of legal processes and the enforcement of various kinds of orders (other than interdicts) outwith the sheriffdom in which they were granted, it is considered that the negative procedure is appropriate.

Section 94(1) - Lay representation: supplementary provision

Power conferred on: Court of Session
Power exercisable by: Act of sederunt
Parliamentary procedure: None

Provision

66. Section 94 enables the Court of Session to make further provision by act of sederunt, about granting permission for lay representatives to conduct proceedings on behalf of a non-natural person under section 93 and generally, about the conduct of proceedings by lay representatives. This empowers the court, in line with the purpose of the Bill, to have a degree of control over the conduct of proceedings before it. It also provides a further safeguard for the Court to ensure that unsuitable lay representatives may be prevented from appearing in the courts.

Reason for taking power

67. This power concerns procedural matters in the civil courts and the representation of companies and other non-natural persons, and it is considered that it is appropriate that the Court makes its own provision by means of act of sederunt. An act of sederunt allows the court to set out detailed rules on the use of lay representatives. As rules of procedure they may require frequent amendment to deal with new eventualities or to adapt to changing circumstances. It is therefore considered appropriate that they be set out in secondary legislation, as at present.

Choice of procedure

68. The Court of Session has various powers to regulate civil procedure by act of sederunt. As this concerns empowering the court to deal with the management and administration of individual court cases it is considered that this is best set out by act of sederunt. To preserve the courts from political interference, in accordance with the principle of the separation of powers, acts of sederunt are not usually subject to Parliamentary scrutiny.

Section 96 – Power to regulate procedure etc. in the Court of Session (inserted section 5 of the Court of Session Act 1988)

Power conferred on: Court of Session
Power exercisable by: Act of sederunt
Parliamentary procedure: None

Provision

69. Section 96 provides powers for the Court of Session to make rules of court by act of sederunt to regulate practice and procedure in the Court of Session. It replaces section 5 and 5A of the Court of Session Act 1988 with a new section 5, widening the powers available to the court with the aim of enabling it to take more control over its proceedings by permitting active judicial management of the proceedings before it. The new section 5 sets out a wide enabling power in subsection (1). Subsection (2) puts beyond doubt what the power in subsection (1) includes, but expressly provides that subsection (1) is not limited by the specific examples of the power in subsection (2).

Reason for taking power

70. The rules of practice and procedure in the Court of Session will relate to the management of cases before the court and rules under which those cases must be conducted. Therefore, they require to be detailed and lengthy, and very often deal with administrative matters. As rules of procedure they may require frequent amendment to deal with new eventualities or to adapt to changing circumstances. It is therefore considered appropriate that they be set out in secondary legislation, as at present.

Choice of procedure

71. These are the main powers the Court of Session will use to regulate its own practice and procedure. To preserve the courts from political interference, in accordance with the principle of the separation of powers, acts of sederunt are not usually subject to Parliamentary scrutiny.

Section 97(1) - Power to regulate procedure, etc. in sheriff court and Sheriff Appeal Court

Power conferred on: Court of Session

Power exercisable by: Act of sederunt

Parliamentary procedure: None

Provision

72. Section 97(1) provides powers for the Court of Session to make rules of court by act of sederunt to regulate practice and procedure in the sheriff court and the Sheriff Appeal Court. Subsection (1)(a) makes it clear that the provision relates only to civil proceedings. This section replaces section 32 of the Sheriff Courts (Scotland) Act 1971, widening the powers available to the court with the aim of enabling it to take more control over its proceedings by permitting active judicial management of the proceedings before it. The provisions set out a wide enabling power in subsection (1). Subsection (2) puts beyond doubt what the power in (1) includes, but expressly provides that subsection (1) is not limited by the specific examples of the power in subsection (2). In relation to its use to make rules on simple procedure, section 97 is to be interpreted in light of sections 70(2), 72, 73(1) and 73(2)(a). Section 72 sets out that such rules will be based on a problem solving or interventionist approach. The new approach to be adopted provides that rules which result from the exercise of the powers in section 97 (as they relate to simple procedure) as far as possible ensure the sheriff hearing the case is able to carry out the functions and role set out in that section.

Reason for taking power

73. The rules of practice and procedure in the sheriff court and Sheriff Appeal Court will relate to the management of cases before the court and rules under which those cases must be conducted. They therefore require to be detailed and lengthy, and very often deal with administrative matters. As rules of procedure they may require frequent amendment to deal with new eventualities or to adapt to changing circumstances. It is therefore considered appropriate that they be set out in secondary legislation, as at present.

Choice of procedure

74. These are the main powers the Court of Session will use to regulate practice and procedure in the sheriff court and Sheriff Appeal Court. To preserve the courts from political interference, in accordance with the principle of the separation of powers, acts of sederunt are not usually subject to Parliamentary scrutiny.

Section 98 –Power to regulate fees in the Court of Session (inserted section 5ZA(1) of the Court of Session Act 1988)

Power conferred on: Court of Session

Power exercisable by: Act of sederunt

Parliamentary procedure: Negative

Provision

75. Section 98 inserts a new section 5ZA into the Court of Session Act 1988 regarding the power of the Court of Session to regulate fees. It provides for the Court to make provision for or about fees by act of sederunt for a number of different specified categories of persons in the court. The act of sederunt may not make provision for or about the fees that the Scottish Ministers may regulate through section 33 of the Legal Aid (Scotland) Act 1986.

Reason for taking power

The regulation of fees of those who work for and within the courts needs to be flexible as fee tables need to be updated on a regular basis to take into account factors such as the rate of inflation or changes to business practices. It is necessary that the table of fees can be updated and adapt quickly in response to changing circumstances, it is therefore appropriate for those fees to be set out in and be able to be amended by subordinate legislation. *Choice of procedure*

76. It is considered appropriate that this is dealt with through an act of sederunt as it concerns the day to day routine workings of the courts. In consolidating the fee regulating powers in the Court of Session and sheriff court into a single statute, it becomes apparent that there is an inconsistency in the procedure applying to fee regulation in the Court of Session, which is presently subject to no Parliamentary procedure, and that in the sheriff court, which is subject to negative procedure. The Scottish Government considers that there should be consistency in the procedure applying to acts of sederunt regulating fees in the Court of Session and those regulating fees in the sheriff court, and that that an act of sederunt made under this provision should accordingly be subject to the negative procedure.

Section 98 – Power to regulate fees in the Court of Session (inserted section 5ZA(1)(f) of the Court of Session Act 1988)

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

77. This provision will permit the Scottish Ministers to add to the list of those categories of person whose fees in the Court of Session may be regulated by the Court by act of sederunt

under new section 5ZA(1) of the Court of Session Act 1988. Prior to making an order under this section the Scottish Ministers must consult the Lord President of the Court of Session.

Reason for taking power

78. The power is required to ensure the list of those whose fees are regulated by the Court can be kept up-to-date. This could be required as new types of actions and procedures are introduced may require other roles to be involved.

Choice of procedure

79. This power may only be used for the limited circumstance of amending the list of persons whose fees may be regulated by the Court of Session through act of sederunt. Its effect is limited to fees charged in relation to proceedings of the court. As such it is narrow in scope. Furthermore prior to it being used the Scottish Ministers are required to consult the Lord President of the Court of Session. Consistent with the other powers governing the regulation of fees, it is considered that the negative procedure is appropriate.

Section 99(1) - Power to regulate fees in the sheriff court and the Sheriff Appeal Court

Power conferred on: The Court of Session
Power exercisable by: Act of sederunt
Parliamentary procedure: Negative

Provision

80. Section 99 provides that the Court of Session may make provision for or about fees by act of sederunt for a number of different specified categories of person in the sheriff court and Sheriff Appeal Court. The act of sederunt may not make provision for or about the fees that the Scottish Ministers may regulate through section 33 of the Legal Aid (Scotland) Act 1986.

Reason for taking power

81. The regulation of fees of those who work for and within the courts needs to be flexible as fee tables need to be updated on a regular basis to take into account factors such as the rate of inflation or changes to business practices. It is necessary that the table of fees can be updated and adapt quickly in response to changing circumstances, it is therefore appropriate for those fees to be set out in and be able to be amended by subordinate legislation. *Choice of procedure*

82. It is considered appropriate that this is dealt with through court rules as they concern the day to day routine workings of the courts. The requirement for the negative procedure replicates the arrangements under section 40 of the 1907 Act, which this provision updates and replaces.

Section 99(1)(f) – Power to regulate fees in the sheriff court and Sheriff Appeal Court

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

83. This provision will permit the Scottish Ministers to add to the list of those categories of person whose fees in the sheriff court and the Sheriff Appeal Court may be regulated by the Court of Session by act of sederunt under section 99(1). Prior to making an order under this section the Scottish Ministers must consult the Lord President of the Court of Session.

Reason for taking power

84. The power is required to ensure the list of those whose fees are regulated by the Court can be kept up-to-date. This could be required as new types of actions and procedures are introduced may require other roles to be involved.

Choice of procedure

85. This power may only be used for the limited circumstance of amending the list of persons whose fees may be regulated by the Court of Session through act of sederunt. Its effect is limited to fees charged in relation to proceedings of the court. As such it is narrow in scope. Furthermore prior to it being used the Scottish Ministers are required to consult the Lord President of the Court of Session. Consistent with the other powers relating to the regulation of fees, it is considered that the negative procedure is appropriate.

Section 102(1) - Power to make orders in relation to vexatious behaviour

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

86. Section 102 provides for the Scottish Ministers to make regulations which will confer on the Court of Session, the sheriff court, or the Sheriff Appeal Court a power to make an order in relation to a person behaving in a vexatious manner. These powers to make a court order will provide the courts with much more control over those who take steps which are vexatious during court proceedings or who raise vexatious proceedings, obliging those persons who are the subject of an order to seek the permission of the court before being able to raise actions or take further steps in certain actions. The regulations will also authorise certain courts to make orders which have a similar preventative effect over a person's actions in other civil proceedings in other Scottish Courts. The provisions allows the conferral of similar powers of control of vexatious litigants to be given to Scottish courts as is currently enjoyed by the Courts of England and Wales through their system of Civil Restraint Orders.

87. Regulations made under section 102(1) may make incidental, supplemental, consequential, transitional, transitory or saving provision.

Reason for taking power

88. A power is required to ensure flexibility in order to allow the system to develop and adapt if necessary, mirroring the ability of the courts of England and Wales to vary and adapt their inherent powers in this area without the need for primary legislation. Regulations will also be able to go into a greater level of administrative detail than primary legislation, making provision for the way in which courts may treat different degrees of vexatious behaviour at different levels of the court system. Incidental and supplemental provision may be required to ensure that provision made under section 102 is capable of achieving the policy of ensuring that the courts can control vexatious litigants while maintaining access to justice. Without the power to make incidental, supplemental and consequential provision it might be necessary to return to the Parliament, through subsequent primary legislation, to deal with matters that are clearly within the scope and policy intentions of the original Bill. That would not be an effective use of Parliamentary resources.

Choice of procedure

89. The provision permits regulations which will empower the court, and concern court practice and procedure. However, as they permit some restriction on the actions of vexatious person by the courts, and as they permit the making of incidental and supplemental provision (but not the amendment of primary legislation) it is considered that regulations are appropriate. This power is narrow in scope, relating only to vexatious behaviour, furthermore it may only be made with the consent of the Lord President. Accordingly, the negative procedure is considered to offer sufficient parliamentary scrutiny.

Section 109 — Appeals: granting of leave and assessment of grounds of appeal (inserted section 31A(1) and (2) of the Court of Session Act 1988)

Power conferred on: The Court of Session
Power exercisable by: Act of sederunt
Parliamentary procedure: None

Provision

90. Section 109 introduces a new section 31A into the Court of Session Act 1988. Section 31A(1) gives a power to the Court of Session to provide, by act of sederunt, for any applications for leave or permission to appeal to the Inner House of the Court of Session, to be determined by a single judge of the Inner House. Section 31A(2) gives a power for the Court of Session to provide, by act of sederunt, for any appeal proceedings to be considered initially (and, where required, after leave or permission has been granted) by a single judge of the Inner House. Further detail on the content of any act of sederunt made to cover either of these matters is then set out in section 31A(3).

Reason for taking power

91. This power relates to matters of court procedure, and specifically the arrangements for appeals to the Inner House of the Court of Session. It will require to cover matters of administrative detail and be easily updated, it is considered appropriate that this be a matter for provision through rules of court.

Choice of procedure

92. The Court of Session has various powers to regulate its own procedure by act of sederunt. To preserve the courts from political interference, in accordance with the principle of the separation of powers, Acts of Sederunt are not usually subject to Parliamentary scrutiny.

Section 113 – Appeals from the Sheriff Appeal Court to the High Court (inserted section 194ZF of the Criminal Procedure (Scotland) Act 1995)

Power conferred on: The High Court
Power exercisable by: Act of adjournal
Parliamentary procedure: None

Provision

93. The Bill inserts a new Part 10ZA into the Criminal Procedure (Scotland) Act 1995 which provides for appeals in criminal cases from the Sheriff Appeal Court to the High Court. The new section 194ZF makes further provision for applications for permission to appeal including how they are to be considered and determined. Subsection (1)(c)(ii) provides for the High Court to specify by act of adjournal documents or other information that may be taken as a basis for consideration of an application. Whereas acts of sederunt apply to civil proceedings, rules on criminal proceedings are made by act of adjournal.

Reason for taking power

94. As this is a procedural matter relating to appeals from the Sheriff Appeal Court to the High Court, secondary legislation by means of rules of court is considered appropriate.

Choice of procedure

95. The High Court has various powers to regulate criminal court procedure by act of adjournal. To preserve the courts from political interference, in accordance with the principle of the separation of powers, acts of adjournal are not subject to Parliamentary scrutiny.

Section 120(2) – The Scottish Courts and Tribunals Service (inserted section 61A of the Judiciary and Courts (Scotland) Act 2008)

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

96. Section 122 renames the Scottish Court Service as the Scottish Courts and Tribunals Service (“SCTS”). It inserts a new section 61A into the Judiciary and Courts (Scotland) Act 2008 (“the 2008 Act”), giving the SCTS the function of providing administrative support to the Scottish Tribunals (to be established by the Tribunals (Scotland) Bill, if passed by the Parliament) and their members. Subsection 1(c) gives the Scottish Ministers the ability to specify by order other tribunals to which the SCTS can provide administrative support.

Reason for taking power

97. The SCTS will provide administrative support to tribunal jurisdictions once they are transferred in to the Scottish Tribunals. In addition, it will provide administrative support to those tribunals which it is intended should transfer-in, under the transitional arrangements in paragraph 3 of schedule 3 to the Bill. Where appropriate, the Scottish Ministers will use this power to give the SCTS the function of providing support to Tribunals which do not fall into either of these categories. This might be for tribunals which it is not intended should transfer-in to the Scottish Tribunals or for newly created Tribunals.

Choice of procedure

98. The negative procedure is considered appropriate for adding to the list of tribunals which the SCTS supports as this is an operational and administrative matter.

Section 124(2) – Definition of “family proceedings”

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

99. This provides that the Scottish Ministers may modify the definition of “family proceedings” as set out in section 124(1). Under schedule 1 of the Bill, “family proceedings” are to comprise part of the concurrent jurisdiction of sheriffs and summary sheriffs, further “family proceedings” are (in most circumstances) excluded from the application of section 39 of the Bill (exclusive competence).

Reason for taking power

100. The power is required to enable the definition of “family proceedings” to be kept up-to-date as new types of actions and applications are introduced that are relevant to this area of law. It will also allow the Scottish Ministers to make changes if necessary following a review of the operation of the provisions in practice.

Choice of procedure

101. As the definition of “family proceedings” informs the competence of the summary sheriff, (whose competence may be varied through subordinate legislation subject to affirmative procedure) and has implications for what civil proceedings may be made subject to the application of section 39 (the exclusive competence (formerly privative limit) of the sheriff court), (which may also be varied by subordinate legislation subject to affirmative procedure) it is appropriate that the exercise of this power also be subject to affirmative parliamentary procedure.

Section 128 – Ancillary provision

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Affirmative/negative**

Provision

102. Section 126(1) provides that the Scottish Ministers may by order make freestanding ancillary provision, namely incidental, supplementary, consequential, transitional, transitory or savings provisions which they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of the enacted Bill. Subsection (2) provides that such an order may modify any enactment, instrument or document (including the Bill).

Reason for taking power

103. This is a complex and technical Bill. The framework which it establishes is intended to last for many years. If it is to do so, and to continue to operate effectively, there will inevitably be need for provision to be made to take account both of experience in the operation of the Bill's provisions and of changes in the factual and legal environment in which the courts operate. It would not be an effective use of Parliament's time to deal with such matters through subsequent primary legislation. It is considered that such matters can be best addressed and fleshed out through subordinate legislation. The power is restricted in that it can only be used for the purposes of, or in connection with the Bill, or for the purposes of giving full effect to, any provision of the Bill.

Choice of procedure

104. An order under this section is subject to the negative procedure except where it adds to, replaces or omits any part of the text of an Act, in which case the order is subject to the affirmative procedure. These procedures provide the necessary safeguards with regard to the type of legislation which can be made.

Section 127 – Commencement

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **None**

Provision

105. Section 127(2) enables the Scottish Ministers to commence the Bill by conferring a power on Ministers, by order, to bring the provisions of the Bill into force on such day as the Scottish Ministers appoint. Section 129(2) provides that such an order may include transitional, transitory or saving provision.

Reason for taking power

106. It is standard for Ministers to have powers over the commencement of Bills. It is considered appropriate for the substantive provisions of the Bill to be commenced at such a time as the Scottish Ministers consider to be suitable.

Choice of procedure

107. 89. As is now usual for commencement orders, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

Schedule 3, paragraph 3(5) – The Scottish Courts and Tribunals Service

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

108. Paragraph 3(1) of schedule 3 provides for the administration of tribunals by the SCTS during the period before the listed tribunals' jurisdictions are transferred in to the Scottish Tribunals under the Tribunals (Scotland) Bill (if that Bill is passed by the Parliament). This also provides that until the functions of the listed tribunals are transferred in, the SCTS shall have the function of providing administrative support for them as if they already were.

109. Paragraph 3(3) provides for people holding the position of President of an existing tribunal to be able to act as one of the judicial members of the SCTS under paragraph 2(2)(g) of the schedule 3 to the 2008 Act during the period before their tribunals' jurisdictions are transferred in to the Scottish Tribunals.

110. Paragraph 3(5) allows the Scottish Ministers by order to add a new reference to a tribunal or to an office in that tribunal to these lists, so that the transitional provisions described above apply to them.

Reason for taking power

111. Under section 26(2) of the Tribunals (Scotland) Bill, the Scottish Ministers can list new tribunals in schedule 1 to that Bill, if the intention is that they should be transferred in to the Scottish Tribunals under that Bill. This power allows the Scottish Ministers to apply the transitional provisions described above to these newly listed tribunals.

Choice of procedure

112. Orders made under section 26(2) of the Tribunals (Scotland) Bill will be subject to the affirmative procedure. As this power will be complementary to the power in section 26(2) of that Bill and similarly deals with the decision to transfer in an existing tribunal in to the Scottish Tribunals, the affirmative procedure is considered appropriate.

Schedule 4, paragraph 12(2) – Public Records (Scotland) Act 1937

Power conferred on: **The High Court**
Power exercisable by: **Act of adjournal/Act of sederunt**
Parliamentary procedure: **None**

Provision

113. Paragraph 12(2) of schedule 4 inserts a new section 1A (Sheriff Appeal Court records) into the Public Records (Scotland) Act 1937. This provision is consequential on the creation of the new Sheriff Appeal Court. It allows the High Court and the Court of Session (as appropriate) to prescribe the times and conditions for the new court's records to be transmitted to the Keeper of the Records of Scotland.

Reason for taking power

114. This provision mirrors that in section 1 of the Public Records (Scotland) Act 1937 which deals with the transmission of High Court and Court of Session records by act of adjournal or sederunt (as the case may be). As it is a procedural matter which relates to the records of the Sheriff Appeal Court and ensures that they are preserved on the same basis as the High Court and the Court of Session, secondary legislation is considered appropriate.

Choice of procedure

115. The High Court and Court of Session have various powers to regulate criminal courts' procedure and civil courts' procedure by act of adjournal or sederunt respectively. To preserve the courts from political interference, in accordance with the principle of the separation of powers, acts of adjournal or sederunt are not subject to parliamentary scrutiny.

This document relates to the Courts Reform (Scotland) Bill (SP Bill 46) as introduced in the Scottish Parliament on 6 February 2014

COURTS REFORM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM