SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers & Law Reform Committee in its consideration of the Courts Reform (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

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

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

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: Affirmative
Amended or new power: Amended

Provision

3. 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 (the “SCTS”). The SCTS can only make a proposal with the agreement of the Lord President of the Court of Session under section 2(2). The SCTS is placed under a duty to consult parties who are likely to have an interest prior to making such a proposal (subsection (3)). The content of the subordinate legislation making powers in section 2(1) remains unchanged from that set out in the original Delegated Powers Memorandum

4. Further, the consent of the Lord President and the SCTS is required for the making of an order which results from the proposal, prior to it being made by the Scottish Ministers.
This document relates to the Courts Reform (Scotland) Bill as amended at Stage 2 (SP Bill 46A)

Reason for taking power

5. 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

6. The Delegated Powers & Law Reform Committee in its consideration of the Bill at Stage 1 felt that given the potentially significant effect of court closures and other alterations on users of the courts and the implications for access to justice, that the affirmative procedure would provide a more suitable level of parliamentary scrutiny. The Scottish Government agreed to bring forward a Stage 2 amendment to that effect and section 122(2)(a) of the Bill has been amended with the effect that orders under section 2(1) are now subject to affirmative procedure instead of negative procedure.

Section 39(7) – Exclusive competence

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Court of Session</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Act of sederunt</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Laid no procedure</td>
</tr>
<tr>
<td>Amended or new power:</td>
<td>Amended</td>
</tr>
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</table>

Provision

7. Section 39(7) provides for the Court of Session by act of sederunt to set out how the value of an order is, or the aggregate total of orders of value are, 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

8. The power was amended at Stage 2 to clarify that the Court may make rules for determining the aggregate total value of orders sought in proceedings. This allows rules to be drawn up relative to the calculation of the value of the orders where the proceedings relate to multiple orders. The regulation of such calculations by rules is required given the level of detail which may be needed (dealing with a variety of complex circumstances) and that the detail of such regulation may require to be amended quickly to deal with new situations arising from time to time.

Choice of procedure

9. 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 procedure. Accordingly, this act of sederunt is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.
Section 60(2B)(b) – Records of the Sheriff Appeal Court

**Power conferred on:** Court of Session  
**Power exercisable by:** Act of sederunt  
**Parliamentary procedure:** Laid no procedure  
**Amended or new power:** New

**Provision**

10. This provision allows the Court of Session to make rules setting out an alternative to electronic signatures as a means of authentication of the Sheriff Appeal Court records.

**Reason for taking power**

11. This provision delivers extra flexibility in an area where technological change might render the notion of an electronic “signature” antiquated (e.g. we might start routinely using biometric data).

**Choice of procedure**

12. 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 court records, 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 procedure. Accordingly, this act of sederunt is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 70(6A) – Simple procedure

**Power conferred on:** Court of Session  
**Power exercisable by:** Act of sederunt  
**Parliamentary procedure:** Laid no procedure  
**Amended or new power:** New

**Provision**

13. This provision allows the Court of Session to make rules setting out how the court decides whether a particular case falls within the categories of case which must be taken under simple procedure.

**Reason for taking power**

14. This provision is designed to ensure that the Court of Session can make rules of court to assist in determining whether individual proceedings fall into the definition of proceedings set out in section 70(3), and therefore are ones which must be brought under simple procedure. It allows the Court to choose to preserve the most useful aspects of the existing case law which currently sets out the method employed by the courts in determining which cases fall within a category of case which must be brought subject to summary cause procedure. The current case law is set out in the case of Milmor Properties v W & T investments Co. Ltd. [2000].
Choice of procedure

15. 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 procedure. Accordingly, this act of sederunt is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 96 – Power to regulate procedure in the Court of Session

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</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Laid no procedure</td>
</tr>
<tr>
<td>Amended or new power:</td>
<td>Amended</td>
</tr>
</tbody>
</table>

Provision

16. The content of the subordinate legislation making powers in section 96 remains unchanged from that set out in the original Delegated Powers Memorandum. However the section no longer makes an amendment to section 5 of the Court of Session Act 1988, which currently contains the Court’s rule making powers relative to the Court of Session. Instead it enacts the rule making powers as provisions of the Courts Reform (Scotland) Bill. The effect of this is that acts of sederunt made under this section will now benefit from the interpretative regime set out in the Interpretation and Legislative Reform (Scotland) Act 2010, (the “2010 Act”) instead of the interpretative regime set out in the Interpretation Act 1978.

Reason for taking power

17. The purpose behind the change to the power is to better allow consistency between the court rules made for all the civil courts. The court rules made for the sheriff court and Sheriff Appeal Court under section 97 of the Bill will already be interpreted under the rules of statutory interpretation in the 2010 Act and the amendment will mean that rules in the Court of Session will also be interpreted in this way. The amendment assists in the delivery of section 2(3)(c) of the Scottish Civil Justice Councils and Criminal Legal Assistance Act 2013 which provides that practice and procedure should, where appropriate, be similar in all civil courts.

Choice of procedure

18. The choice of no procedure remains unchanged. 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 procedure. Accordingly, this act of sederunt is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.
Section 97(2)(q) – Power to regulate procedure in the Court of Session

Power conferred on: Court of Session
Power exercisable by: Act of sederunt
Parliamentary procedure: Laid no procedure
Amended or new power: Amended

Provision

19. Section 97(2) gives examples of provision that can be made in rules of court by an act of sederunt. Section 97(2)(q) provides for rules to be made for determining which Appeal Sheriff is to preside at a sitting of the Sheriff Appeal Court.

Reason for taking power

20. Section 97(2)(q) was amended at stage 2 to clarify that the power to make rules about which Appeal Sheriff is to preside in the Sheriff Appeal Court is exercisable where the Court is constituted of more than one Appeal Sheriff. The amendment does not expand the subordinate legislation making power under section 97, but it is one of a number of amendments made at Stage 2 that adjust the drafting of the Bill to clarify the intention that the Sheriff Appeal Court can be constituted by one or more Appeal Sheriffs.

Choice of procedure

21. 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 procedure. Accordingly, this act of sederunt is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 98(1) – Power to regulate fees in the Court of Session

Power conferred on: Court of Session
Power exercisable by: Act of sederunt
Parliamentary procedure: Negative
Amended or new power: Amended

Provision

22. The content of the subordinate legislation making power conferred on the Court of Session in section 98 remains unchanged from that set out in the original Delegated Powers Memorandum. However, the section no longer makes an amendment to the Court of Session Act 1988; inserting this power as section 5ZA. Instead it enacts the powers as provisions of the Courts Reform (Scotland) Bill.

Reason for taking power

23. In a similar way to the powers under section 96, the move of these powers means that subordinate legislation made under this section will benefit from the interpretative regime set out in the 2010 Act. Further, given the move of the powers on rules of court to the Bill, it makes
better sense in terms of the structure of the Bill and for the end user of the legislation to finds the provisions on rules and on fees in the same place.

**Choice of procedure**

24. The choice of negative resolution procedure remains for the same reasons set out in the original Delegated Power Memorandum. There was 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 considered 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(1)(f) – Power to specify persons whose fees may be regulated by the Court of Session**

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order made by Scottish Statutory Instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative</td>
</tr>
<tr>
<td>Amended or new power:</td>
<td>Amended</td>
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</tbody>
</table>

**Provision**

25. The content of the power conferred on Scottish Ministers under this section remains unchanged from that set out in the original Delegated Powers Memorandum. However as set out above, the Bill no longer makes an amendment to the Court of Session Act 1988; inserting this power as section 5ZA. Instead it enacts the powers as provisions of the Courts Reform (Scotland) Bill.

**Reason for taking power**

26. In the same way as the court’s powers under this section, the move of these powers means that subordinate legislation made under this section will benefit from the interpretative regime set out in the 2010 Act and again, the location of this power makes better sense in terms of the structure of the Bill and for the end user of the legislation.

**Choice of procedure**

27. The choice of negative resolution procedure remains for the same reasons set out in the original Delegated Power Memorandum. 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 102A(1) – Power to provide for fees for SCTS, court clerks and other officers

Power conferred on: The Scottish Ministers  
Power exercisable by: Order made by Scottish statutory instrument  
Parliamentary procedure: Negative  
Amended or new power: New

Provision

28. Section 102A(1) provides the Scottish Ministers with the power to make provision for the charging of fees in relation to the functions of the Scottish Courts and Tribunals Service (SCTS) or a “relevant officer” (as defined in section 102A(3)). It consolidates the existing provisions in the Court of Law Fees (Scotland) Act 1895, setting out the powers in clearer language. It reflects, for example, the reality that it is now for the Scottish Ministers rather than the Secretary of State to set court fees, and that these fees should generally be payable to the SCTS rather than to named officers of court.

Reason for taking power

29. Fees in respect of the functions carried out by the SCTS and by the relevant officers require to be able to be amended and varied on a regular basis to keep pace with inflation, new or redundant court processes, and changes in technology. Further the power to exempt certain categories of person from the requirement to pay fees needs to be kept under regular review to ensure access to justice. Provisions relative to fees are administratively detailed and it is not appropriate that they be set out in primary legislation. The power is therefore required to ensure that the fees in respect of the functions carried out by the SCTS and by the relevant officers can be easily varied. Further subordinate legislation is the appropriate place to set out the required administrative detail in relation to the various types of service and their relative fee.

Choice of procedure

30. The effect of this power is limited to fees charged in relation to functions of the SCTS and relevant officers connected to the court. As such it is narrow in scope. Negative procedure is considered appropriate for a technical or administrative matter such as this. Further, this power does not allow for an amendment to primary legislation. It is therefore considered that the negative procedure is appropriate in this instance.

Section 102A(4) – Power to provide for fees for SCTS, court clerks and other officers

Power conferred on: The Scottish Ministers  
Power exercisable by: Order made by Scottish statutory instrument  
Parliamentary procedure: Affirmative  
Amended or new power: New

Provision

31. Section 102A(3) defines the phrases “relevant officer” and “Scottish Courts” as used in section 102A(1). Section 102A(4) provides the Scottish Ministers with a power to change either or both of these definitions.
Reason for taking power

32. The power is linked to the power set out in section 102A(1). It is required to ensure the list of courts and relevant officers about which the power in section 102A(1) can be exercised can be kept up-to-date. This could be required as new types of actions and procedures are introduced which may require other relevant officers to be involved. The Bill is designed to ensure that future adaptations to the court system can be managed from within the Courts Reform (Scotland) Bill framework, without requiring new primary legislation. The ability to add or remove courts or relevant officers from the ambit of this section as the system changes from time to time is therefore required.

Choice of procedure

33. As this is a power to make a textual modification to primary legislation, it is appropriate that it be made subject to the affirmative procedure.

Section 102B(7) – Sanction for counsel in the sheriff court and Sheriff Appeal Court

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Act of Sederunt</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Laid no procedure, when amended by section 97 and negative, when amended by section 99</td>
</tr>
<tr>
<td>Amended or new power:</td>
<td>New</td>
</tr>
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34. Section 102B sets out the rule to be applied by the sheriff or the Sheriff Appeal Court in determining whether to sanction the employment of counsel for the purposes of any relevant rules on expense due by the parties. Subsection (7) provides that the provisions of section 102B are subject to provision in an act of sederunt made by the Court of Session under section 97.

Reason for taking power

35. Subsection (7) is clarificatory and makes clear that an act of sederunt under section 97 or 99 could modify the provision in section 102B. It is appropriate that this section may be amended by act of sederunt given it relates to court procedure and practice and may affect the fees of those who practice in the court. It requires to be able to be amended in this way in order that the rules on sanction for counsel can be adapted to meet the needs of the court and litigants.

Choice of procedure

36. As set out above, an act of sederunt under section 97 will attract no procedure. While the choice of no procedure with regard to an instrument which can make an amendment to primary legislation may seem unusual, it is normal in the context of rules of court. This section relates solely to rules of court procedure and the Court of Session has long had, and will continue to have under the bill, the power to amend primary legislation, provided that it is for the purpose of court rules. Given the limitation on the purpose of this power, and 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 subject to no procedure. The use of section 97 if used for varying this section should attract no different procedure that when the section is being used for other purposes. Accordingly this act of sederunt is subject to the default laying requirement in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.
This document relates to the Courts Reform (Scotland) Bill as amended at Stage 2 (SP Bill 46A)

37. As set out above the choice of negative resolution procedure for an act of sederunt under section 99, as it affects this section, is required for the same reasons set out in the original Delegated Power Memorandum. Again the use of section 99 if used when varying this section should attract no different procedure to that when the section is being used for other purposes.

Section 117(4) - Power to establish, relocate and disestablish justice of the peace courts

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

Provision

38. This provision makes amendment to section 59 and 81(3)(a) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, which provides for the establishment, relocation and disestablishment of justice of the peace courts by order made by the Scottish Ministers. The process for the exercise of Minister’s order making powers is modified by this section. Sections 59(2) and (6) are amended to have the effect that order may not be made by Ministers unless they have received a proposal to do so from the SCTS. Sections 59(7) and (7A), are substituted for sections 59(7A)-(7D), with the effect that the SCTS can only make such a proposal with the agreement of the Lord President of the Court of Session, and that SCTS is placed under a duty to consult parties who are likely to have an interest prior to making such a proposal.

39. Further, the consent of the Lord President and the SCTS 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

40. The power is required to allow flexibility in the organisation of justice of the peace courts taking into account changing court usage and population changes. This is necessary to allow for the efficient organisation of court services in Scotland.

Choice of procedure

41. The Delegated Powers & Law Reform Committee in its consideration of the Bill at Stage 1 felt that given the potentially significant effect of court closures and other alterations on users of the courts and the implications for access to justice, that the affirmative procedure would provide a more suitable level of parliamentary scrutiny. The Scottish Government agreed to bring forward a Stage 2 amendment to that effect and section 81(3) of the 2007 Act has been amended with the effect that orders under section 59(2) or (6) are now subject to affirmative resolution procedure instead of negative resolution procedure.
COURTS REFORM (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM