Delegated Powers and Law Reform Committee

29th Report, 2014 (Session 4)

Courts Reform (Scotland) Bill

Published by the Scottish Parliament on 23 April 2014
Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (a) any—
   (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   (ii) [deleted]
   (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
   (c) general questions relating to powers to make subordinate legislation;
   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
   (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
   (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
   (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
   (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
The Committee reports to the Parliament as follows—

1. At its meetings on 11 March and 1 and 22 April the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Courts Reform (Scotland) Bill at stage 1 (“the Bill”). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).

OVERVIEW OF BILL

3. This Bill was introduced by the Scottish Government 6 February 2014. The Justice Committee is the lead committee.

4. The Bill makes wide-ranging provision for the structural and functional reform of the Scottish civil courts system, following the recommendations made in September 2009 in the Scottish Civil Courts Review (“SCCR”) headed by Lord Gill, then Lord Justice Clerk and now Lord President of the Court of Session.

5. The Committee understands that many of the recommendations will not be implemented directly by the Bill. The Scottish Government’s intention is for the Bill to establish the framework for the civil courts as recommended by the SCCR, with the detailed arrangements being made by court rules by act of sederunt.

6. The Bill also makes changes to the criminal justice system. The provisions on sheriff courts will impact directly on criminal cases as well as civil ones, as will the
creation of the new Sheriff Appeal Court. Part 5 of the Bill makes provision for
criminal appeals, while Part 6 deals with Justice of the Peace Courts.

DELEGATED POWERS PROVISIONS

7. The Committee considered each of the delegated powers in the Bill. At its
first consideration of the Bill, the Committee determined that it did not need to
draw the attention of the Parliament to the following delegated powers:

- Section 23(5) – Further provision about tribunals
- Section 25(2) – Removal from office
- Section 39(5) – Exclusive competence
- Section 39(7) – Exclusive competence
- Section 43(3) – Summary sheriff: civil competence and jurisdiction
- Section 70(5) – Simple procedure
- Section 70(9) – Simple procedure
- Section 71(5) – Proceedings for aliment of small amounts under simple
  procedure
- Section 77(1) – Expenses in simple procedure cases
- Section 98 – Power to regulate fees in the Court of Session (inserts new
  section 5ZA(1) in the Court of Session Act 1988).
- Section 98 – Power to regulate fees in the Court of Session (inserts new
  section 5ZA(1)(f) in the Court of Session Act 1988)
- Section 99(1) – Power to regulate fees in the sheriff court and the Sheriff
  Appeal Court
- Section 99(1)(f) – Power to regulate fees in the sheriff court and the Sheriff
  Appeal Court
- Section 102(1) – Power to make orders in relation to vexatious behaviour
- Section 109 – Appeals: granting of leave or permission and assessment of
  grounds of appeal (inserts section 31A(1) and (2) in the Court of Session Act
  1988)
- Section 113 – Appeals from the Sheriff Appeal Court to the High Court
  (inserts section 194ZF in the Criminal Procedure (Scotland) Act 1995)
- Section 120(2) – The Scottish Courts and Tribunals Service (inserts section 61A(1)(c) in the Judiciary and Courts (Scotland) Act 2008)
- Section 124(2) – Definition of “family proceedings”
- Section 126 – Ancillary provision
- Section 127(2) – Commencement
- Schedule 3, paragraph 3(5) – The Scottish Courts and Tribunals Service
- Schedule 4, paragraph 12(2) – Public Records (Scotland) Act 1937
- Section 27(4) – Power to make directions in the exercise of responsibility for ensuring the efficient disposal of business
- Section 28(1) – Power to fix sittings of sheriff courts
- Section 29(2) – Lord President’s power to exercise functions under sections 27 and 28
- Section 30(2) – Power to authorise a sheriff principal to act in another sheriffdom
- Section 31(1) and (3) – Power to direct a sheriff or summary sheriff to act in another sheriffdom
- Section 32(1) – Power to re-allocate sheriffs principal, sheriffs and summary sheriffs between sheriffdoms
- Section 33(1) and (2) – Allocation of sheriffs and summary sheriffs to sheriff court districts
- Section 35(2) and (5) – Designation of specialist judiciary
- Section 54(4) – Power to make directions in the exercise of responsibility for ensuring the efficient disposal of business
- Section 55(3) – Power to fix sittings of sheriff courts.

8. At its meeting of 11 March the Committee agreed to write to the Scottish Government to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the Annex.

9. In light of the written responses received, the Committee agreed that it was content with the following delegated powers:

- Section 2(1) – Power to alter sheriffdoms, sheriff courts districts and sheriff courts
• Section 82(2) – Power to enable sheriff to make orders having effect outside sheriffdom
• Section 94(1) – Lay representation: supplementary provision
• Section 34(1) – Determination of categories of case for purposes of judicial specialisation

10. However, insofar as the power in section 2(1) is concerned, it should be noted that the Committee’s contentment is only as a consequence of the Scottish Government’s commitment to lodge an amendment at stage 2 amending the parliamentary procedure to which this power is subject.

11. Section 2(1) confers power on the Scottish Ministers to create or abolish sheriffdoms and sheriff court districts and to change the boundaries of such sheriffdoms and districts. In addition, it enables Ministers to open new sheriff courts, change the location of sheriff courts and to close sheriff courts. The power updates and re-orders the power to alter sheriffdoms and sheriff court districts in sections 2(1) and 3(2) of the Sheriff Courts (Scotland) Act 1971. The power is subject to the negative procedure.

12. The Committee considers that it is appropriate for the Scottish Ministers (in agreement with the Scottish Courts and Tribunals Service and the Lord President) to continue to have a power, by order, to alter sheriffdoms and sheriff court districts, and to open and close courts. However, given the potentially significant effect of court closures and other alterations on users of the courts and the implications for access to justice, the affirmative procedure would provide a more suitable level of parliamentary scrutiny.

13. The Scottish Government has indicated in correspondence that it has reflected on the implications for access to justice and the interest generated by the most recent orders that were laid on this subject under the current legislation. On this basis, it confirms that in response to the Committee’s concern, it will bring forward a stage 2 amendment to make the power subject to the affirmative procedure.

14. The Committee therefore welcomes the Scottish Government’s commitment to bring forward an amendment at stage 2 to make the power in section 2(1) subject to the affirmative procedure.

15. The Committee’s comments, and where appropriate, recommendations on the remaining delegated powers in the Bill are detailed below.

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

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<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>order</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>negative</td>
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</tbody>
</table>

16. Section 41(1) confers power on the Scottish Ministers by order to provide 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). The power may be used to provide for an individual sheriff court to hear cases from all over Scotland in specified kinds of proceedings, such as personal injury actions.

17. Section 41 provides that the power cannot be exercised to remove the jurisdiction of any other sheriff court to deal with the proceedings specified, nor can it be used to provide that a specified court deal with only one type of civil proceedings.

18. The Committee notes that the case for creating an all-Scotland personal injury court is canvassed in detail in both the SCCR and the Policy Memorandum for the Bill, but that there is no discussion of what other all-Scotland (or specialist) courts the Scottish Government anticipates might be created, or the merits of creating such additional specialist courts.

19. The Committee asked the Scottish Government why the scope of the proposed power extends beyond the creation of an all-Scotland personal injury court. In its response the Scottish Government reiterates its view that the power is required to give sufficient flexibility to the courts. Given the changing demands of the justice system, the Government considers it necessary for the courts to respond quickly and appropriately to future changes in those demands and the priorities of civil justice.

20. The Committee observes that this response does not fully explain why that flexibility is required, nor what sort of other civil proceedings might be appropriate for specialisation and why.

21. The Committee accordingly recommends that, where the power is being exercised to create a specialist court other than a specialist personal injury court, exercise of the power be subject to a consultation requirement. This would ensure that court users and other stakeholders are provided with an opportunity to make representations on any proposals to exercise the power in a way which has not been subject to consultation through the Bill process.

22. The Committee recommends that the Scottish Ministers consider bringing forward an amendment at stage 2 to impose a consultation requirement prior to the exercise of the power in section 41(1) to create an all-Scotland sheriff court other than for the purposes of personal injury proceedings.

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

Section 97 – Power to regulate procedure etc. in the sheriff court and the Sheriff Appeal Court

Powers conferred on: the Court of Session
Powers exercisable by: act of sederunt
23. Section 96 confers a broad general power on the Court of Session to regulate by act of sederunt the procedure and practice to be followed in proceedings in the Court, and any matter incidental or ancillary to such proceedings. It does so by substituting a new section 5(1) in the Court of Session Act 1988 ("the 1988 Act"). Section 97(1) of the Bill confers a similar power on the Court in relation to proceedings in the sheriff court and the Sheriff Appeal Court.

24. The Explanatory Notes to the Bill explain that the powers in sections 96 and 97 are designed to substantially widen the existing powers of the Court of Session to regulate its own practice and procedure, and the practice and procedure of the sheriff courts.

25. The Committee notes that while it is appropriate for the Court to have a broad discretion to regulate its practice and procedure without parliamentary interference, the Bill should also respect matters which are properly reserved to the legislature and Ministers.

26. In particular, the Committee notes that, to the extent that the sections confer power on the Court to make provision for or about any matter incidental or ancillary to proceedings in the civil courts, they are much broader than the powers which the Court currently has. The current powers (in section 5 of the 1988 Act and section 32 of the Sheriff Courts (Scotland) Act 1971) are expressed as powers to regulate and prescribe the procedure and practice to be followed in proceedings in the court, and any matters incidental or relating to any such procedure or practice.

27. In correspondence with the Committee, the Scottish Government confirmed that the intention is to enable the court to regulate matters which “while in the Government’s view clearly appropriate for court rules, would arguably not amount to the regulation of the “procedure and practice to be followed in civil proceedings””. The Scottish Government gives as an example the intention that the court be able to make provision about payments other than expenses which parties may be required to make in respect of their conduct relating to court proceedings. A 1996 act of sederunt which purported to make such provision was held to be ultra vires section 5 of the 1988 Act by the Court of Session in the 1998 case, Taylor v Marshall’s Food Group. It would not be ultra vires the proposed new power.

28. The Scottish Government also confirmed that while the list of examples given in subsection (2) of new section 5 of the 1988 Act and section 97 of the Bill is intended to give a flavour of the matters which might be considered to be “incidental or ancillary to civil proceedings”, the list is not exhaustive and the powers are not limited in any way by the examples given.

29. The Committee accordingly notes that it will be for the Court of Session in making any particular act of sederunt to determine what is incidental or ancillary to proceedings in the courts. The Committee observes that the line between matters which go beyond procedure and practice but are related to it, and matters which are more substantive in nature, is a very fine one. The words of the
provisions in the Bill do not give any guidance as to where that line is to be drawn. While the Government’s intention is that the power will only be used to make provision about matters which “are properly within the purview of the Courts in relation to the conduct and management of civil proceedings”, the Committee observes that neither the Parliament nor the Scottish Ministers will be in a position to regulate or enforce the manner of exercise of the powers.

30. The Committee further observes that while for example a rule governing the availability of an appeal from a court to a higher court might not be a matter of practice or procedure (as was held by the Inner House of the Court of Session in the 2012 case of *KP and MRK v the Secretary of State for the Home Department*), it might conceivably be considered a matter “incidental or ancillary to court proceedings” and therefore *intra vires* the proposed new powers in the Bill. That is notwithstanding the fact that the availability of appeal rights, and in particular rules which cut down the substance of a right of appeal, were considered in that case to be matters appropriate for legislation by Parliament and the executive, and not for regulation by the courts by way of court rules.

31. Separately, the Committee has considered the powers in new section 5(3) of the 1988 Act and section 97(4) of the Bill to make incidental or supplemental provision in an act of sederunt made under section 5(1) of the 1988 Act or section 97(4) of the Bill. Those powers are being taken *in addition to* the wide powers discussed above to make provision for or about any matter incidental or ancillary to court proceedings. The effect is that the Bill proposes to confer power on the Court of Session to make provision which is *incidental or supplemental* to provision for or about a matter which is already *incidental or ancillary* to court proceedings. In the Committee’s view, that substantially widens the scope of matters about which provision can be made in court rules, and potentially extends it even further beyond matters of procedure and practice.

32. In this regard, the Committee observes that if it is considered appropriate for the Court of Session under section 5(1) of the 1988 Act (or section 97(1) of the Bill for the sheriff court) to regulate a matter which is incidental to proceedings in the court, then the court should also have the machinery to make it work. The Committee accordingly considers that a power to make transitional, transitory or saving provision, and possibly consequential provision, for the purposes of such an act of sederunt might be desirable. However, it does not consider that the Scottish Government has fully explained why the court also needs power to make provision which is incidental or supplementary to matters which are in themselves incidental or ancillary to court proceedings.

33. Lastly, the Committee observes the proposal in the Bill that court rules made by act of sederunt under section 5(1) of the 1988 Act and section 97(1) of the Bill would not be subject to any parliamentary procedure, and as such were the Parliament to be concerned about the Court’s interpretation as to what was incidental to proceedings, provision made under these powers could not be subject to annulment by the Parliament.

34. The Committee accordingly draws the lead committee’s attention to section 5(1) of the Court of Session Act 1988 (as inserted by section 96 of the Bill) and section 97(1) of the Bill. These sections confer much broader
powers on the Court of Session to regulate matters in the civil courts by way of court rules than those powers which it currently has. The powers are not restricted to making provision about practice and procedure in the civil courts. Rather they extend to making provision for or about any matter which is incidental or ancillary to proceedings in those courts. As such the powers could potentially be used to make provision about matters which affect the substantive rights of litigants, and which would normally be the preserve of the legislature and of Ministers.

35. The powers are supplemented (in section 5(3) of the 1998 Act and section 97(4) of the Bill) by powers to include in an act of sederunt provision which is incidental or supplemental to provision for or about any matter incidental or ancillary to court proceedings. The Committee draws the lead committee’s attention to the fact that these provisions widen even further the scope of matters about which provision may be made in court rules, and that in the Committee’s view the Scottish Government has not provided a satisfactory reason for taking these additional powers.

36. Lastly, the Committee draws the lead committee’s attention to the proposal in the Bill that court rules made by act of sederunt under section 5(1) of the 1988 Act and section 97(1) of the Bill would not be subject to any parliamentary procedure, and as such were the Parliament to be concerned about the Court’s interpretation as to what was incidental to proceedings, provision made under these powers could not be subject to annulment by the Parliament.
Correspondence with the Scottish Government—

On 11 March 2014, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

1. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 11 March and seeks an explanation of the following matters:

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

   Power conferred on:    the Scottish Ministers  
   Power exercisable by:  order  
   Parliamentary procedure: negative procedure

   2. Section 2(1) of the Bill confers power on the Scottish Ministers to create or abolish sheriffdoms and sheriff court districts and to change the boundaries of such sheriffdoms and districts. In addition, it enables Ministers to open new sheriff courts, change the location of sheriff courts and to close sheriff courts. The Scottish Ministers may only make an order after receiving a proposal from the Scottish Courts and Tribunals Service, who may only make a proposal with the agreement of the Lord President. The Scottish Courts and Tribunals Service is also placed under a duty to consult parties who are likely to have an interest, prior to making such a proposal. If following such a proposal the Scottish Ministers decide to make an order, they must have regard to the proposal and may make the order only with the consent of the Lord President and the Scottish Courts and Tribunals Service.

   3. The Committee asks the Scottish Government:

   - To explain further why it considers exercise of the power in section 2 to be a matter of the efficient organisation of court services in Scotland, such that the negative procedure is thought to be appropriate; and
   - Given the potentially significant effect of court closures and other alterations on users of the courts, and the consequent implications for access to justice, whether it considers that the affirmative procedure would afford a more appropriate level of Parliamentary scrutiny?

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

   Power conferred on:    the Scottish Ministers  
   Power exercisable by:  order  
   Parliamentary procedure: negative

   4. Section 41 confers power on the Scottish Ministers by order to provide 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).

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

6. The Committee asks the Scottish Government:
   - To explain further why section 41(1) proposes to confer power on the Scottish Ministers to create a specialist court for types of civil proceedings other than personal injury proceedings;
   - Given that the Scottish Civil Courts Review, the Government's consultation on the Bill, and the Policy Memorandum discuss only the advantages and disadvantages of creating a specialist personal injury court, and not the advantages or disadvantages of creating any other type of specialist sheriff court, whether the power ought to be subject to a higher level of Parliamentary scrutiny than the proposed negative procedure or require consultation (or both) where it is used to create a specialist sheriff court for types of proceedings other than personal injury proceedings; and
   - Irrespective of whether the power is used to create a specialist personal injury court or a specialist court for other types of civil proceedings, whether the affirmative procedure would afford a more appropriate level of Parliamentary scrutiny, given the potentially significant effect of the creation of specialist courts on users of the courts and the implications for access to justice.

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

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<tbody>
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<td>Parliamentary procedure:</td>
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7. Section 82 enables the Scottish Ministers to provide by order for a sheriff to have competence to make certain types of orders, including interim orders, having effect (and being capable of being enforced) outside the sheriff’s sheriffdom, as well as within that sheriffdom. The power permits the 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 this extended competence.

8. The Committee asks the Scottish Government why it considers that other types of orders, apart from interdicts and interim interdicts, might
benefit from having effect (and being capable of being enforced) outside the sheriffdom in which they are made?

Section 94(1) – Lay representation: supplementary provision

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<th>Power conferred on:</th>
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<tr>
<td>Power exercisable by:</td>
<td>act of sederunt</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>laid no procedure</td>
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9. Section 93 of the Bill sets out the scope for permitting lay representation on behalf of non-natural persons in non-simple procedure cases in the sheriff court, the Sheriff Appeal Court and the Court of Session. The decision on whether to permit lay representation lies with the court, who may grant permission where the conditions in subsection (3) are satisfied.

10. Section 94(1) enables the Court of Session to make further provision, by act of sederunt (a) about granting permission under section 93 and (b) about the conduct of proceedings by lay representatives. Subsection (2) contains an illustrative list of the matters which provision under subsection (1) may include.

11. The Committee asks the Scottish Government to explain the following:

- Whether the power in section 94(1)(a) is intended to enable provision to be made only about the procedure for granting permission under section 93, or whether it is intended to add to the provision in section 93(3) in some substantive way.

- If it is the former, why is the power drawn more widely than that? And if it is the latter, why is it considered appropriate to confer the power on the Court of Session, to be exercised by act of sederunt?

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

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

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</tr>
<tr>
<td>Parliamentary procedure:</td>
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12. 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 sections 5 and 5A of the Court of Session Act 1988 (“the 1988 Act”) with a new section 5.
13. Section 97(1) provides a broad power for the Court of Session to make rules of court by act of sederunt to regulate practice and procedure in civil proceedings in the sheriff court and the Sheriff Appeal Court. It is a replacement for the power in section 32 of the Sheriff Courts (Scotland) Act 1971 ("the 1971 Act") Act insofar as rules of the sheriff court are concerned, with an extension of the powers to enable provision to be made about the new Sheriff Appeal Court.

14. In relation to section 96 and 97(1) the Committee asks the Scottish Government to explain:

- The limits of the powers in new section 5(1)(b) of the 1988 Act and section 97(1)(b) of the Bill to make provision for or about any matter incidental or ancillary to such proceedings;

- Whether the powers permit the Court to make provision in relation to matters other than the procedure and practice in the Court of Session, the Sheriff Court and the Sheriff Appeal Court, including issues of substance which arise in those proceedings;

- In what way the powers in the new section 5(1)(b) of the 1988 Act as inserted by section 96 in respect of the Court of Session and section 97(1)(b) in respect of the Sheriff Court and the Sheriff Appeal Court differ from the powers in the new section 5(3) and section 97(4) of the Bill respectively to make incidental, supplemental, consequential, transitional, transitory or saving provision in any act of sederunt made under those sections and why separate provision to that effect is required;

- Whether the provision which may be made by virtue of the new section 5(3) of the 1988 Act or section 97(4) of the Bill is limited to such provision as is necessary or expedient for the purposes of the act of sederunt in question or whether it extends more broadly to make general incidental provision and if so incidental to what;

- Whether the power in the new section 5(1) of the 1988 Act or section 97(1) of the Bill would permit the Court to regulate proceedings for contempt of court arising in civil proceedings or whether specific provision would be appropriate to make this clear.

Section 34(1) – Determination of categories of case for purposes of judicial specialisation

Section 35(2) and (5) - Designation of specialist judiciary

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<thead>
<tr>
<th>Powers conferred on:</th>
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<tbody>
<tr>
<td>Powers exercisable by:</td>
<td>direction/designation</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>none</td>
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15. Sections 34 and 35 are new provisions which implement the recommendations of the Scottish Civil Courts Review in relation to the desirability of greater specialisation in the sheriff courts.

16. Section 34 permits the Lord President to determine, by direction, categories of cases within the sheriff courts which should be heard by judicial officers who specialise in that category of case. The categories may be determined by subject matter, value or other criteria as the Lord President considers appropriate.

17. The Committee asks the Scottish Government for clarification as to why section 34 does not provide that directions which may be issued under that section require to be published, and what the intentions are in relation to publication?

On 18 March 2014, the Scottish Government responded as follows:
Thank you for your letter of 11 March 2014 setting out the various questions raised by the Delegated Powers and Law Reform Committee. We respond below.

The Committee asks the Scottish Government:

- To explain further why it considers exercise of the power in section 2 to be a matter of the efficient organisation of court services in Scotland, such that the negative procedure is thought to be appropriate; and

The Government is grateful to the Committee for raising the question of appropriate procedure and given all the circumstances has reflected on this. As the Committee will be aware any order under this provision may only be made at the request and with the consent of the Lord President and the Scottish Courts and Tribunal Service, and that the latter must consult on their proposals prior to submitting them to Ministers. In addition, orders under the current legislation that this section replaces (sections 2(1) and 3(2) of the Sheriff Courts (Scotland) Act 1971) are subject to the negative procedure. Accordingly, the Government considered that this should remain the case as it would offer sufficient parliamentary scrutiny.

- Given the potentially significant effect of court closures and other alterations on users of the courts, and the consequent implications for access to justice, whether it considers that the affirmative procedure would afford a more appropriate level of Parliamentary scrutiny?

The Government has reflected on the implications for access to justice and the interest generated by the most recent orders that were laid on this subject under the current legislation. On this basis, the Government is content to confirm that in response to the Committee’s concern, it will bring forward a Stage 2 amendment to make the section 2 power subject to affirmative procedure.
The Committee asks the Scottish Government:

- To explain further why section 41(1) proposes to confer power on the Scottish Ministers to create a specialist court for types of civil proceedings other than personal injury proceedings;

Whilst the Scottish Civil Courts Review (SCCR) recommended a specialist personal injury court, the Government took the view when developing the provisions that the opportunity should be taken to provide sufficient flexibility to the Courts. Given the changing demands in our justice system the Government believes that this provision will allow for the Courts to respond quickly and appropriately to any future changes in the priorities and demands of civil justice.

- Given that the Scottish Civil Courts Review, the Government's consultation on the Bill, and the Policy Memorandum discuss only the advantages and disadvantages of creating a specialist personal injury court, and not the advantages or disadvantages of creating any other type of specialist sheriff court, whether the power ought to be subject to a higher level of Parliamentary scrutiny than the proposed negative procedure or require consultation (or both) where it is used to create a specialist sheriff court for types of proceedings other than personal injury proceedings; and

- Irrespective of whether the power is used to create a specialist personal injury court or a specialist court for other types of civil proceedings, whether the affirmative procedure would afford a more appropriate level of Parliamentary scrutiny, given the potentially significant effect of the creation of specialist courts on users of the courts and the implications for access to justice.

The Government thanks the Committee for raising these points. This power will be used initially to establish the specialist personal injury court as set out in the SCCR. In future this power may be used to establish similar courts for other types of civil procedure. In either case, the Government does not believe that this should require a higher level of Parliamentary scrutiny or for a consultation to be set out in legislation. Any specialist court set up under this power would be in addition to the service currently provided by the sheriff courts: litigants would be afforded the choice of using the new, specialist court or of raising their actions in the local sheriff court, as at present. Therefore, the Government believes there would be no detrimental effect on access to justice for any court users, and, as such, that the negative procedure would be sufficient.

The Committee asks the Scottish Government why it considers that other types of orders, apart from interdicts and interim interdicts, might benefit from having effect (and being capable of being enforced) outside the sheriffdom in which they are made?

The Government refers the Committee to paragraph 168 of Chapter 4 of the Scottish Civil Courts Review, where it was noted that the present territorial limit on the enforceability of a sheriff’s orders “can create difficulties in cases involving domestic abuse and in regulatory and enforcement proceedings at the instance of
local authorities or public bodies”. In relation to the latter category of proceedings, the Review noted the difficulties which could occur because the boundaries of sheriffdoms did not always coincide with those of other public authorities, such as (for example) local authorities. The order making power in section 82(2) will allow the Government to ensure other types of orders that would benefit from being enforceable beyond the boundary of the sheriffdom would be able to be covered without the necessity of primary legislation. Indeed, this provision is intended to ensure that the administration and arrangements in the courts can be adapted without the need for primary legislation for what would be relatively minor changes.

The Committee asks the Scottish Government to explain the following:

- Whether the power in section 94(1)(a) is intended to enable provision to be made only about the procedure for granting permission under section 93, or whether it is intended to add to the provision in section 93(3) in some substantive way.

- If it is the former, why is the power drawn more widely than that? And if it is the latter, why is it considered appropriate to confer the power on the Court of Session, to be exercised by act of sederunt?

The purpose of the power in section 94(1)(a) is intended primarily to allow the courts to provide for the procedure relating to the granting of permission. It is drawn in slightly broader terms in order to enable it to deal with related matters such as those identified in paragraphs (c) and (f) of subsection (2), which might otherwise be argued to relate to something other than the procedure for granting of permission under section 93 (being concerned, respectively, with the requirements of authorisation by the non-natural person and with restrictions applying to proceedings other than those to which an application for permission under section 93(2) relates). The tests to be applied in terms of section 93(3) are set out in subsections (4) to (6) of that section, and it is not intended that the power in section 94(1)(a) be used to add to this provision in a substantive way.

In relation to section 96 and 97(1) the Committee asks the Scottish Government to explain:

- The limits of the powers in new section 5(1)(b) of the 1988 Act and section 97(1)(b) of the Bill to make provision for or about any matter incidental or ancillary to such proceedings;

Section 5(a) of the Court of Session Act 1988 Act (“the 1988 Act”) states that: “The Court shall have power by act of sederunt—
(a) to regulate and prescribe the procedure and practice to be followed in various categories of causes in the Court or in execution or diligence following on such causes, whether originating in the said Court or brought there by way of appeal, removal, remit, stated case, or other like process, and any matters incidental or relating to any such procedure or practice…”
Section 32(1) of the Sheriff Courts (Scotland) Act 1971 (“the 1971 Act”) enables the Court of Session by act of sederunt to “regulate and prescribe the procedure and practice to be followed in any civil proceedings in the sheriff court (including any matters incidental or relating to any such procedure or practice)".

A key purpose of the revision to the powers of the Court of Session is to ensure that the Court has sufficient powers to implement the changes to court practice and procedure and related matters which were recommended by the Scottish Civil Courts Review.

The new section 5(1)(b) of the 1998 Act and section 97(1)(b) differ from the existing section 5 of the 1998 Act and section 32(1) of the 1971 Act in conferring a power to make provision for or about any matter incidental or ancillary to civil proceedings in the relevant court, rather than to matters incidental or ancillary to procedure or practice. Subsection (2) of the new section 5 also differs from the existing section 5 in expressing the particular matters in paragraphs (a) to (r) as examples of the general power in subsection (1). This represents a deliberate departure from the approach of the First Division in Taylor v Marshall’s Food Group 1998 SC 841, where it was held that section 5(a) of the 1998 was intended to cover only a defined range of matters relative to procedure and practice (and so that an act of sederunt purporting to introduce a system of pursuers’ offers was ultra vires that section).

The intended scope of this power is illustrated by the list of matters set out in subsection (2) of each of new section 5(2) of the 1998 Act and section 97 of the Bill. A number of the matters set out these paragraphs, while in the Government’s view clearly appropriate for court rules, would arguably not amount to the regulation of the “procedure and practice to be followed in civil proceedings”. One example is paragraph (k) - other payments parties may be required to make in respect of their conduct relating to civil proceedings – which would allow for rules to establish a system similar to that found in Taylor to be beyond the existing power in section 5. Another is paragraph (l), allowing rules to regulate “the payment, investment or application of any sum of money awarded … to or respect of a person under a legal disability.”

- Whether the powers permit the Court to make provision in relation to matters other than the procedure and practice in the Court of Session, the Sheriff Court and the Sheriff Appeal Court, including issues of substance which arise in those proceedings;

The purpose of the provision is to ensure that the courts have sufficient power in relation to the procedure and practice in the Court of Session, sheriff courts and Sheriff Appeal Court. As already noted, this goes beyond practice and procedure, strictly viewed; but it does not extend to making rules about issues of substance which arise in civil proceedings. This is in line with existing case law on the interpretation of section 5 of the 1988 Act, which makes it clear that the power conferred by that section does not extend to matters of substance. See KP v MRK v The Secretary of State for the Home Department [2012] CSIH 38, in which the Inner House concluded that an act of sederunt purporting to impose a new test for leave to appeal against a decision of the Upper Tribunal (reflecting the “second-
appeals test” introduced for England and Wales by Tribunals, Courts and Enforcement Act 2007) was ultra vires section 5. Although, as noted, the drafting of the powers deliberately departs from the wording considered by the Inner House in this case, the powers in new section 5(1) of the 1988 Act and section 97(1) of the Bill must be read in context. While it is the intention to make it clear that they extend to regulating matters beyond pure practice and procedure, it is only to matters incidental or ancillary to civil proceedings (with the list in subsection (2) giving a flavour of what those other matters might be) that are properly within the purview of the Courts in relation to the conduct and management of civil proceedings.

- In what way the powers in the new section 5(1)(b) of the 1988 Act as inserted by section 96 in respect of the Court of Session and section 97(1)(b) in respect of the Sheriff Court and the Sheriff Appeal Court differ from the powers in the new section 5(3) and section 97(4) of the Bill respectively to make incidental, supplemental, consequential, transitional, transitory or saving provision in any act of sederunt made under those sections and why separate provision to that effect is required;

The powers in the new section 5(3) and section 97(4) are narrower in that they are linked to provision made by the act of sederunt itself. The powers in section 5(1)(b) and 97(1)(b) are more substantive in that they enable provision to made about matters that are incidental or related to procedure and practice, even where the act of sederunt might not otherwise be making provision about practice or procedure. Section 97(4) reflects the existing powers in section 32(2) of the Sheriff Courts (Scotland) Act 1971, but with the addition of reference to transitional, transitory and saving provision. It was thought helpful to enable such provision to be made to deal with transitional cases where an act of sederunt makes a change to procedure. It was also thought desirable to bring the new section 5 into line with this, for the sake of consistency.

- Whether the provision which may be made by virtue of the new section 5(3) of the 1988 Act or section 97(4) of the Bill is limited to such provision as is necessary or expedient for the purposes of the act of sederunt in question or whether it extends more broadly to make general incidental provision and if so incidental to what;

The Government’s view is that the powers in section 5(3) and 97(4) are necessarily linked to provision made by the act of sederunt.

- Whether the power in the new section 5(1) of the 1988 Act or section 97(1) of the Bill would permit the Court to regulate proceedings for contempt of court arising in civil proceedings or whether specific provision would be appropriate to make this clear.

In relation to contempt of court in civil proceedings in the sheriff court, section 125(1)(b) sets out that contempt of court (which arises in, or in connection with, civil proceedings; or relates to an order made in civil proceedings) is included in the definition of ‘civil proceedings’. That will apply for the purposes of section
97(1)(a). Section 125(1)(b) does not of course apply to the new section 5 inserted into the Court of Session Act 1988. But the new section 5(1)(a) covers all proceedings in the Court of Session and therefore is wide enough to cover contempt of court proceedings in that Court.

The Committee asks the Scottish Government for clarification as to why section 34 does not provide that directions which may be issued under that section require to be published, and what the intentions are in relation to publication?

The publishing of Directions of the Lord President is at the discretion of the Lord President as there is no formal statutory provision. The Scottish Government has discussed these provisions with the Lord President’s Private Office who have confirmed that it is their intention to publish these Directions in every case. The Government is content with this position and does not believe that statutory provision is required.
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