Delegated Powers and Law Reform Committee

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill at Stage 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.

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Delegated Powers and Law Reform Committee
Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill at Stage 1, 31st Report, Session 4 (2015)
Introduction

1. At its meetings on 28 April and 19 May, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill ("the Bill")\(^i\). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Bill was introduced by the Cabinet Secretary for Justice on 19 March 2015. It makes provision to reform and modernise the law governing the holding of fatal accident inquiries (FAIs) in Scotland. It largely implements the legislative recommendations made in the 2009 Review of Fatal Accident Inquiry Legislation\(^ii\), led by the Rt. Hon. The Lord Cullen of Whitekirk KT, the former Lord President of the Court of Session.

3. The current law on FAIs is contained in the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 ("the 1976 Act"). The Bill repeals the 1976 Act and re-enacts it with modifications. It continues to provide for the Lord Advocate to be head of the system of investigation of deaths in Scotland, and for mandatory public inquiries to be held in relation to certain deaths. It also continues to provide that a discretionary inquiry may be held under certain circumstances, and for public inquiries into deaths to be held in the sheriff court.

4. However, the Bill also makes a number of changes to the current system, including adding a further category of mandatory FAI (where a child dies while in secure accommodation), and permitting a discretionary inquiry to be held into the death of a Scottish person abroad (other than service personnel), where the person’s body has been repatriated to Scotland. Procedural changes include provision enabling an FAI to be held in any sheriffdom in Scotland regardless of the place of death or any accident causing the death, and enabling the Lord Advocate to initiate further judicial proceedings into a death which has already been the subject of an FAI.

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\(^i\) Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill [as introduced] available here: [http://www.scottish.parliament.uk/S4_Bills/Fatal%20Accidents%20(Scotland)%20Bill/b63s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Fatal%20Accidents%20(Scotland)%20Bill/b63s4-introd.pdf)

Delegated Powers Provisions

5. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”). The Committee first considered the Bill at its meeting on 28 April 2015. At that meeting, the Committee agreed that it did not need to draw the attention of the Parliament to the following powers:

- Section 11(1) – Places at which inquiries may be held
- Section 39(1) – Ancillary provision
- Section 40(2) – Commencement
- Schedule 1, paragraph 2(1) – Transitional arrangements

6. At the same meeting, the Committee agreed to write to the Scottish Government to raise questions on the powers in section 34(1) (power to regulate procedure etc.). The correspondence was considered by the Committee at its meeting on 19 May 2015 and is reproduced at the Annex.
Recommendation

7. The Committee comments on the powers in section 34(1) as follows:

Provision

8. Section 34(1) confers wide powers on the Court of Session to make rules by act of sederunt to regulate (a) the practice and procedure to be followed at FAIs in the sheriff court, and (b) matters which are incidental or ancillary to such FAIs. Section 7 of the 1976 Act currently confers power on the Scottish Ministers to make rules about FAIs. Section 34 of the Bill widens the rule-making powers and confers them on the Court of Session, with a view to enabling the Court “to make the kind of comprehensive and self-contained powers envisaged by Lord Cullen”.

9. Section 34(2) contains an illustrative list of examples of the provision which may be made under the general power in subsection (1), but subsection (1) is not limited by those specific examples. The examples include: provision about the process by which a person becomes a participant in an inquiry; action to be taken by the procurator fiscal before the start of an inquiry; and the giving and publication of responses to any recommendations made by a sheriff in the course of his or her determination.

10. Other sections of the Bill set out additional matters which an act of sederunt under section 34(1) must or may make provision about. Provision must be made under section 34(1) about matters to be dealt with at a preliminary inquiry hearing and about things that the procurator fiscal and participants in the inquiry must do before such a hearing (section 15(4)). Provision must also be made about the agreement of facts before an inquiry (section 17(1)). Provision may be made about a number of additional procedural matters including: categories of persons who must be given notice of the hearing of an inquiry (section 16(2)(b)); the powers of the sheriff in relation to inquiry proceedings (section 18(2)(b)); and the process which a sheriff must follow in deciding whether part of a determination is to be withheld from publication (section 26(5)).

11. By virtue of section 34(3), an act of sederunt under subsection (1) may make the full range of ancillary provision, i.e. incidental, supplemental, consequential, transitional, transitory or saving provision.

12. Before making the act of sederunt, the Court of Session must consult the Scottish Civil Justice Council (“SCJC”), and take into consideration any views expressed by the SCJC. Those requirements do not apply where the act of sederunt embodies draft rules submitted to the Court by the SCJC.

13. The power is subject to the ‘laid only’ procedure provided for under section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. Regulations are not subject to further Parliamentary scrutiny.
Comment

14. The Committee notes that this is an extremely wide power to make provision about practice and procedure in FAI proceedings, and matters incidental or ancillary to FAIs. It mirrors the powers conferred on the Court of Session by the Courts Reform (Scotland) Act 2014 ("the 2014 Act") to make rules of practice and procedure in the Court of Session (section 103 of that Act) and in the sheriff court (section 104). The DPM explains that in the Government’s view, it is appropriate for rules of practice and procedure at inquiries to be set out in secondary legislation made by the Court of Session, as is the position for the rules of courts and tribunals.

15. The Committee is content in principle with delegation of the power to the Court of Session, to be exercised by act of sederunt. Regarding the scope of the power however, the Committee notes that the Parliament is being asked to confer a much wider power on the Court than is currently conferred on the Scottish Ministers by section 7 of the 1976 Act. The Committee also notes that while it is appropriate for the Court of Session to regulate practice and procedure at inquiries without parliamentary interference, the Bill should also respect matters which are properly reserved to the legislature and Ministers.

16. In correspondence with the Committee, the Scottish Government explained that maximum flexibility is required to deliver Lord Cullen’s recommendation regarding inquiry powers. It pointed out that the power is in the same terms as the powers conferred on the Court of Session in sections 103 and 104 of the 2014 Act.

17. The Committee considers however that the Scottish Government has not explained why the 2014 Act powers constitute a relevant precedent. Those powers were conferred in the context of giving the Court of Session far-reaching powers to reform its own procedures and practice as part of a radical overhaul and modernisation of the civil court system. The Committee notes that the same powers may not be needed to bring about the more modest reforms to inquiry proceedings which are contemplated by this Act.

18. The Scottish Government also explained its view that the power in section 34(1)(b) is limited by the implicit requirement that there must be a material connection to fatal accident inquiries. While the Committee agrees that this is the case, it notes that it is not only matters of practice and procedure which might have a material connection to FAIs; matters of substance might also have such a connection.

19. With regard to the boundary between matters which go beyond practice and procedure but are related to it, and matters which are more substantive in nature, the Scottish Government does not consider that the substantive rights of persons at an inquiry could be incidental or ancillary to an inquiry. What is designed to be caught by section 34(1)(b) are matters relating to proceedings at an inquiry. Given that section 34(1)(b) currently refers to “matters which are incidental or ancillary to an inquiry”, the Committee accordingly recommends that the wording of section 34(1)(b) be tightened to more accurately reflect that policy intention.

20. Further, in the Government’s view, “the courts are well placed to determine which matters relate to practice and procedure (e.g. the conduct and management of inquiry proceedings) and matters which are of a more substantial nature”. The Committee notes however that there will be no-one, other than the courts themselves,
to enforce the manner in which the Court of Session uses the powers to make rules. Exercise of the powers will not be subject to parliamentary scrutiny, and the executive cannot require the powers to be used in a particular way because the Scottish Ministers are, by statute, independent of the Court.

21. Separately, the Committee notes the additional power in section 34(3) of the Bill to make incidental or supplemental provision in an act of sederunt made under section 34(1)(b) of the Bill. That power is being taken in addition to the wide power discussed above to make provision for or about any matter incidental or ancillary to an inquiry. The effect is that power is being conferred 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 an inquiry. In the Committee’s view, that substantially widens the scope of matters about which provision can be made in inquiry rules, and potentially extends it even further beyond matters of procedure and practice.

22. The Scottish Government's response explains that section 34(3) is a narrower power than section 34(1)(b) in that provision made under it must be linked to other provision made by the act of sederunt itself, which must in turn be limited to matters which are incidental or ancillary to an inquiry. The Committee accepts that section 34(3) is narrower in scope than section 34(1)(b). However, the Government's response does not address the point that section 34(3) widens the scope of section 34(1)(b), and the Committee was seeking some justification for that. In particular, the response does not explain why the extra flexibility is required, beyond once again referring to the precedent in the 2014 Act.

23. The Committee does not therefore consider that the Scottish Government has made a convincing case about why the court also needs to be able to do things which are incidental or supplementary to matters which are in themselves already incidental to inquiry proceedings. Accordingly the Committee draws this matter to the lead committee’s attention.

24. The Committee accordingly (a) recommends that the power in section 34(1)(b) is narrowed so as to limit the ancillary power to matters ancillary to inquiry proceedings in line with the policy intention explained in the Scottish Government’s response and (b) draws the lead committee's attention to the general breadth and scope of section 34(1) of the Bill.

25. The justification given for the width of the power is the need for maximum flexibility to implement the recommendations arising from Lord Cullen’s review. A further justification is that the 2014 Act confers powers in the same terms on the Court of Session to make rules about proceedings in that court and in the sheriff court. However in the Committee’s view the Scottish Government has not explained why the 2014 Act powers constitute a relevant precedent. Those powers were conferred in the context of giving the Court of Session far-reaching powers to reform its own procedures and practice as part of a radical overhaul and modernisation of the civil court system.

26. The Committee notes that the same powers may not be needed to bring about the more modest reforms to inquiry proceedings which are contemplated by this Bill.
27. The powers in section 34(1) are supplemented by power in section 34(3) to include in an act of sederunt provision which is incidental or supplemental to provision for or about any matter incidental or ancillary to an inquiry.

28. The Committee draws the lead Committee’s attention to the fact that this provision widens even further the scope of matters about which provision may be made in inquiry rules, and that in the Committee’s view the Scottish Government has not provided a satisfactory reason for taking the additional power.

29. Lastly, the Committee draws the lead committee’s attention to the proposal in the Bill that inquiry rules made by act of sederunt under section 34(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 an inquiry, provision made under these powers could not be subject to annulment by the Parliament.
Correspondence with the Scottish Government

On 29 April 2015, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

Section 34(1) – Power to regulate procedure, etc.

Power conferred on: the Court of Session
Power exercisable by: act of sederunt
Parliamentary procedure: laid, no procedure

Provision

1. Section 34(1) confers wide powers on the Court of Session to make rules by act of sederunt to regulate (a) the practice and procedure to be followed at FAIs in the sheriff court, and (b) matters which are incidental or ancillary to such FAIs. Section 7 of the 1976 Act currently confers power on the Lord Advocate to make rules about FAIs. Section 34 of the Bill widens the rule-making powers and confers them on the Court of Session, with a view to enabling the Court “to make the kind of comprehensive and self-contained powers envisaged by Lord Cullen”.

2. Section 34(2) contains an illustrative list of examples of the provision which may be made under the general power in subsection (1), but subsection (1) is not limited by those specific examples. The examples include: provision about the process by which a person becomes a participant in an inquiry; action to be taken by the procurator fiscal before the start of an inquiry; and the giving and publication of responses to any recommendations made by a sheriff in the course of his or her determination.

3. Other sections of the Bill set out additional matters which an act of sederunt under section 34(1) must or may make provision about. Provision must be made under section 34(1) about matters to be dealt with at a preliminary inquiry hearing and about things that the procurator fiscal and participants in the inquiry must do before such a hearing (section 15(4)). Provision must also be made about the agreement of facts before an inquiry (section 17(1)). Provision may be made about a number of additional procedural matters including: categories of persons who must be given notice of the hearing of an inquiry (section 16(2)(b)); the powers of the sheriff in relation to inquiry proceedings (section 18(2)(b)); and the process which a sheriff must follow in deciding whether part of a determination is to be withheld from publication (section 26(5)).

4. By virtue of section 34(3), an act of sederunt under subsection (1) may make the full range of ancillary provision, i.e. incidental, supplemental, consequential, transitional, transitory or saving provision.

5. The Committee therefore asks the Scottish Government:

In the context of providing a broad discretion to the Court to regulate inquiry practice and procedure without parliamentary interference, but also to respect matters properly reserved to the legislature and Ministers—
• the limits of the power in section 34(1)(b) to make provision for or about *any matter incidental or ancillary to an inquiry*;

• whether such power permits the Court to make provision in relation to matters other than procedure and practice in inquiry proceedings, including issues of substance relating to inquiry proceedings;

• the interaction between the power in section 34(1)(b) and the power in section 34(3), and in particular why the Court requires the power in section 34(3) to make provision which is incidental or supplemental to matters which are in themselves incidental or ancillary to inquiries.

**On 8 May 2015, the Scottish Government responded as follows:**

As a preliminary point, the Scottish Government would point out that the functions of the Lord Advocate referred to were transferred to the Secretary of State by virtue of the Transfer of Functions (Lord Advocate and the Secretary of State) Order 1999 (S.I. 1999/678), and from the Secretary of State to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998. Therefore the most recent revising instrument in relation to the current inquiry rules (S.S.I. 2007/478) was made by the Scottish Ministers. The Scottish Government also makes the general point that consistency has been sought with the rule-making powers in the Courts Reform (Scotland) Act 2014.

In response to each of the 3 points put to the Scottish Government:

• The power in section 34(1)(b) is limited by the implicit requirement that there must be material in connection to fatal accident inquiries. It would not be sufficient to rely on section 34(1)(a) only because there may be a need for rules about matters that are not strictly matters of practice or procedure. Relevant precedents are sections 103(1)(b) and 104(1)(b) of the Courts Reform (Scotland) Act 2014. The Scottish Government considers that the approach proposed allows for maximum flexibility to deliver Lord Cullen’s recommendation concerning inquiry rules – the broadening of rule-making powers is deliberate in this regard whilst remaining limited by the main purpose of the power.

• The Scottish Government does not consider that the substantive rights of participants in an inquiry, or other persons, could be considered to be incidental or ancillary to the inquiry. The Government’s view therefore is that the power in section 34 could only be used to regulate matters relating to proceedings at an inquiry. The courts are well placed to determine which matters relate to practice and procedure (e.g. the conduct and management of inquiry proceedings) and matters which are of a more substantial nature.

• Section 34(3) is the narrower power in that provision made under it must be linked to other provision made by the act of sederunt itself; further the power is also limited by the main purpose of the power in subsection (1). The power in section 34(1)(b) is more substantive in that it enables provision to be made about matters that are incidental or related to procedure or practice, even where the act of sederunt might not otherwise be making provision about practice or procedure. Again, the relevant precedents are sections 103(3) and 104(4) of the Courts Reform (Scotland) Act 2014.
We hope that the Committee will find the information provided helpful.