Delegated Powers and Law Reform Committee

Inquiries into Deaths (Scotland) Bill at Stage 1
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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.
## Committee Membership

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Introduction

1. At its meeting on 16 June 2015, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Inquiries into Deaths (Scotland) Bill (“the Bill”)¹. 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 Patricia Ferguson MSP on 1 June 2015. The Bill seeks to re-enact, with amendments the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. The Bill also has amendments to give effect to many of the legislative recommendations made in the 2009 Review of Fatal Accident Inquiry Legislation², led by the Rt. Hon. The Lord Cullen of Whitekirk KT, the former Lord President of the Court of Session. The Bill has some similarities with the Scottish Government’s Inquiries into Fatal Accidents and Sudden Deaths etc. Scotland (Bill)³. The Bill’s Policy Memorandum provides explanation of the differences:

The main amendments made in this Bill which go beyond the Cullen recommendations and which are different from the Government’s FAI Bill are designed to achieve three overarching policy objectives—

- extending the scope of mandatory FAIs,
- to place families of the deceased at the heart of the inquiry process and to give them their proper place in relation to the investigation of the death of their loved one,
- to ensure that lessons are learned from the death and enforced for the purpose of ensuring the future safety of Scottish citizens.

¹ Inquiries into Deaths etc. (Scotland) Bill [as introduced] available here: http://www.scottish.parliament.uk/S4_Bills/Inquiries%20into%20Deaths%20Scotland%20Bill/b71s4-introd.pdf
³ 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
Delegated Powers Provisions

3. The Committee considered the Bill at its meeting on 16 June 2015. At that meeting, the Committee agreed that it did not need to draw the attention of the Parliament to the following powers:

- Section 36(1) – Ancillary provision
- Section 39(2) – Commencement
- Schedule 1, paragraph 2(1) – Transitional arrangements
Recommendation

4. The Committee’s comments on the remaining power in the Bill 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

5. 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 deaths inquiry proceedings in the sheriff court, and (b) matters which are incidental or ancillary to such inquiries. Section 7 of the 1976 Act currently confers power on the Scottish Ministers to make rules about Fatal Accident Inquiries (FAI). 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 acts of sederunt concerning the procedure and practice to be followed in the inquiry proceedings.” (Explanatory Notes to the Bill)

6. As in the Scottish Government Bill, 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.

7. In addition, provision may be made under subsection (2)(j) about “the financial assistance which may be given, on such conditions as may be specified in the rules, to enable [legal] representation to be given” to participants in an inquiry. There is no equivalent provision in the Scottish Government Bill.

8. Other sections of the Bill set out additional matters which an act of sederunt under section 34(1) may make provision about. This includes provision about additional classes of persons to be notified under section 7 regarding whether the Lord Advocate intends to apply for an inquiry (section 7(4)(g)) and about the powers of the sheriff in relation to inquiry proceedings (section 16(2)).

9. 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.

10. 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.
11. 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

12. The Committee notes, as it did in relation to the Scottish Government Bill, that this is an extremely wide power to make provision about practice and procedure in deaths inquiry proceedings, and matters incidental or ancillary to such inquiries. 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).

13. 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 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.

14. As a Members’ Bill, there is no obligation upon the member to produce a delegated powers memorandum (DPM). The powers contained in the Bill, however, for the most part mirror the powers within the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill ("the Scottish Government Bill") and as such consideration of the power in section 34 has been informed by the DPM supporting that Bill and subsequent correspondence with the Scottish Government about the equivalent power in that Bill.

15. In relation to the equivalent power in the Scottish Government Bill (also numbered section 34(1)), the 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.

16. The Committee considered however that the Scottish Government had 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 noted that the same powers may not be needed to bring about the more modest reforms to inquiry proceedings which are contemplated by this Act.

17. 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 agreed that this is the case, it noted 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.
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 explained that it 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 recommended that the wording of section 34(1)(b) be tightened to more accurately reflect that policy intention.

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 noted 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.

The Committee reaches the same conclusions in relation to section 34 of the Member’s Bill. In addition, there is a specific example in this Bill of how the power might be used by the Court to make substantive provision. As mentioned above, the Bill expressly provides that provision may be made by the Court of Session under section 34(1) about “the financial assistance which may be given, on such conditions as may be specified in the rules, to enable [legal] representation to be given” to participants in an inquiry (section 34(2)(j)). While the matter of expenses is an aspect of court procedure and accordingly appropriate for regulation by the Court of Session, the provision of financial assistance (such as legal aid) for legal proceedings is a substantive matter normally dealt with by the executive or the legislature. The Committee may accordingly wish to recommend that section 34(2)(j) of the Bill be removed at Stage 2.

Separately, the Committee noted in relation to the equivalent power in the Scottish Government Bill 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.

The Committee reports that it is not clear 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.

The Committee (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”, (b) recommends that section 34(2)(j) (provision enabling the Court
of Session to make provision regarding financial assistance to enable persons to be represented before inquiry proceedings) be removed and (c) draws the lead committee’s attention to the general breadth and scope of section 34(1) of the Bill.

24. The Committee provides the following explanation of the matters it draws to the lead committee’s attention:

25. In relation to the power in the Scottish Government Bill equivalent to section 34(1), 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 it is not clear that 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.

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.