

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this memorandum do not form part of the Bill, are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The policy objective of the Bill is to make the civil justice system more accessible, affordable and equitable. It will introduce measures to make the costs of civil action more predictable, to extend the funding options for pursuers, and to bring more equality to the funding relationship between pursuers and defenders in personal injury actions.
4. The provisions in the Bill take forward recommendations from Sheriff Principal James A. Taylor's Review of the Expenses and Funding of Civil Litigation¹, published in September 2013. The Scottish Government issued its response² to the review in June 2014 and the Bill will implement the recommendations identified in the response as falling within the Scottish Government's remit. The Scottish Government is also working with other

¹ <http://www.gov.scot/About/Review/taylor-review/Report>

² <http://www.gov.scot/Resource/0045/00451822.pdf>

partners to support the wider delivery of the reforms, for example some recommendations fall within the powers and remit of the Scottish Civil Justice Council.

5. The opportunity is also being taken in the Bill to implement a small number of outstanding recommendations from the Rt Hon Lord Gill's Report of the Scottish Civil Courts Review (the "SCCR")³. These recommendations relate to group proceedings and auditors of court.

6. Many of the recommendations of the Review will be implemented by rules to be made by the Court of Session on the recommendation of the Scottish Civil Justice Council as they concern matters which either do not require primary legislation or are more appropriate for setting out in rules as they concern the routine organisation of civil litigation. Except for the special case of group procedure rules (see paragraphs 36 to 41 below) the relevant rule-making powers already exist and are in sections 103 and 104 of the Courts Reform (Scotland) Act 2014 (although as further described below consequential adjustments are made to these powers in section 12 of the Bill). That Act is referred to as the "2014 Act" in this Memorandum.

Rationale for subordinate legislation

7. The Bill contains a number of delegated powers provisions. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered the importance of each matter against:

- the need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- the principle that rules of court should be drafted under judicial supervision;

³ Published in two volumes, September 2009:
volume 1: <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>
volume 2: <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=4>

- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation;
- the need to ensure proper use of parliamentary time;
- the possible frequency of amendment; and
- the need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

8. The relevant provisions are described in detail below. For each provision, this memorandum sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

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

10. Some of the powers are the responsibility of the Court of Session to make through acts of sederunt. These are to be made by Scottish statutory instrument by virtue of section 27(2)(d) and (e) of the Interpretation and Legislative Reform (Scotland) Act 2010.

Delegated Powers

Section 4(1) – Power to cap success fees under success fee agreements

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

11. This provision permits the Scottish Ministers to make regulations, subject to the affirmative procedure, to stipulate the maximum amount of the success fee provided for under a success fee agreement and payable to a provider of legal services, usually a solicitor. “Success fee agreement” is a term defined in section 1 of the Bill used to cover all types of speculative fee agreements and damages based agreements, which are both types of “no win, no fee” (or sometimes “no win, lower fee”) agreements, entered into in connection with actual, or contemplated, civil proceedings.

12. In a speculative fee agreement an enhanced fee will normally be charged in the event of success. The success fee is usually calculated either with reference to the fee element of the judicial expenses payable by the unsuccessful party or by reference to the hourly rate agreed by the solicitor and client. This contrasts with damages based agreements whereby the success fee is calculated as a percentage of the client's damages or recovered funds.

13. The term “success fee” is used in the Bill on the basis that, in both of these types of agreements, there is a fee to be paid in the event of success but none, or a lower one, if the action is lost.

14. It is intended that the power will be used to set the maximum amount of the success fee as a percentage of the damages and will be based on a sliding scale depending on the size of the damages payment. This will be irrespective of whether the success fee agreement is a speculative fee agreement or a damages based agreement. By virtue of section 19(1)(b) regulations may include different provision for different purposes, therefore regulations can set different caps for different types of civil proceedings as had been recommended by Sheriff Principal Taylor. The caps suggested by Sheriff Principal Taylor are set out in the Financial Memorandum for the Bill.

Reason for taking power

15. The policy objective of success fee agreement is to increase access to justice by increasing the funding options for pursuers in order that meritorious claims may be pursued and in doing so provide a greater level of certainty, predictability and transparency for pursuers.

16. The power will allow the Scottish Ministers to deal with new eventualities or to adapt to changing circumstances in relation to success fees in order that the proportion of the success fee will always remain proportionate and predictable. The Scottish Government considers that it would be unduly inflexible if the caps could only be changed by further primary legislation.

Choice of procedure

17. As this power relates to one of the principal reforms in the Bill, the need to provide greater certainty, predictability and transparency in success fee agreements, thus increasing access to justice, the Scottish Government believes that it is appropriate that this power is subject to affirmative procedure. The caps will impact on the financial position of clients and success fee agreement providers respectively.

Section 5(1)(b) – Success fee agreements - exclusion of specified proceedings

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

Provision

18. The provisions of the Bill on success fee agreements are intended to increase access to justice by increasing the funding options for pursuers who are seeking a sum of damages in order that meritorious claims may be pursued and, in doing so, provide a greater level of certainty, predictability and transparency in relation to how much this will cost pursuers. The principal remedy in a family action is rarely the pursuit of a sum of money by way of damages, though a division of matrimonial assets or a financial award by way of maintenance of children may be an issue. The use of success fee agreements in which the success fee is calculated by reference to the amount of damages awarded or settled on is therefore inappropriate in relation to family actions. Success fee agreements are therefore not permitted to be used in relation to family actions under section 5(1)(a).

19. Section 5(1)(b) empowers the Scottish Ministers, by regulations, to specify other types of proceedings in respect of which success fee agreements are not permitted to be used. By virtue of section 19(1), regulations may include ancillary provision or different provision for different purposes.

Reason for taking power

20. It may be that some kinds of proceedings other than family proceedings will be thought to be inappropriate for funding by success fee agreements in the future and this provision permits Scottish Ministers to specify those proceedings. The Scottish Government considers that it would be disproportionate for there to have to be further primary legislation to extend the categories of proceedings for which success fee agreements are not permitted to be used.

Choice of procedure

21. The advantages of success fee agreements in terms of providing another funding option for pursuers should not be withheld lightly, and, for that reason, it is considered that an order under section 5(1)(b) should be subject to affirmative parliamentary procedure. Regulations would impact on the financial position of clients and providers respectively.

Section 6(8) – Success fee agreements and personal injury claims

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

Provision

22. Section 6 makes provision in respect of success fee agreements and personal injury claims, including death from personal injuries.

23. Subsections (4) to (6) make provision about damages obtained (whether by settlement or by award of the court or tribunal) in respect of future loss. Such damages are not to be included in the amount of damages used to calculate the success fee under a success fee agreement if they are to be paid by way of periodical payment. It is possible, however, that the future element of the damages may be paid as part of a lump sum.

24. There are two possibilities in relation to a future element of lump sum damages set out in subsection (5). The success fee agreement can specify that a lump sum payment for future loss is to be included in the calculation of the success fee if the lump sum meets the following conditions:

- it does not exceed £1 million; or
- it exceeds £1 million and, first, the legal services provider has not advised the recipient to accept that the future element be paid in periodical instalments but, second, the condition in subsection (6) is satisfied.

Otherwise, the success fee agreement must provide that any future element will not be included in the relevant amount of damages used for the calculation of the success fee.

25. Subsection (6) sets out the condition which is that, either the damages are awarded by a court or tribunal which has stated that it is satisfied that it is in the recipient's best interests that the future element be paid as a lump sum rather than in periodical instalments, or, where the damages are agreed, it is certified by an independent actuary that it is the actuary's view that it is in the recipient's best interests that the future element be paid as a lump sum rather than in periodical payments. The actuary must have consulted the recipient personally in the absence of the provider. As the solicitor has a financial interest in whether damages are awarded as a lump sum or a periodical payment, and as periodical payments can only be ordered with the agreement of the pursuer, the solicitor must not have advised the client to accept a periodical payment and must not be present in any interview with the actuary.

26. Subsection (8) confers a power that the Scottish Ministers may, through regulations subject to the affirmative procedure, adjust the sums specified in subsection (5) which will trigger the provisions in subsections (5) and (6). By virtue of section 19(1), regulations may include ancillary provision or different provision for different purposes.

Reason for taking power

27. The threshold set will over time be devalued in real terms owing to inflation. The power will allow the Scottish Ministers to adjust the threshold as they see fit to keep pace with inflation. It will also allow the Scottish Ministers to deal with new eventualities or to adapt to changing circumstances. The Scottish Government considers that it would be unduly inflexible if the sums could only be changed by further primary legislation.

Choice of procedure

28. This is a power that is limited in scope which may require to be used at relatively infrequent intervals.

29. Regulations would impact on the financial position of clients and success fee agreement providers respectively and the Scottish Government considers that affirmative procedure is appropriate.

Section 7(3) – Form, content etc of success fee agreements

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

Provision

30. Section 7 is intended to support the policy intention of enhancing the certainty, predictability and transparency of success fee agreements. It therefore makes provision to permit the Scottish Ministers to specify their form and content. Subsections (1) and (2) provide that agreements must be in writing and must specify the basis for determining the success fee. Subsections (3) confer powers on the Scottish Ministers, through regulations subject to the affirmative procedure, to make further provision about the form and content etc. of success fee agreements, which may include the elements specified in the list in subsection (3). By virtue of section 19(1), regulations may include ancillary provision or different provision for different purposes.

Reason for taking power

31. Details relating to the form and content of success fee agreements may require to be prescribed in more detail than is provided for in the Bill. The content of success fee agreements may require regular amendment to deal with new eventualities or to adapt to changing circumstances. It is therefore considered appropriate that the content and form of success fee agreements be set out in secondary legislation. Whilst key matters are set out in primary legislation (subsections (1) and (2) referred to) the Scottish Government considers that there should be flexibility to make further detailed provision if that is considered necessary.

Choice of procedure

32. Given the importance of the use of success fee agreements in providing additional funding options for parties seeking to enforce their rights, it is considered that the power to make rules on such agreements should be subject to affirmative parliamentary procedure.

Section 12 – Minor and consequential modifications to rule making powers

Power conferred on: The Court of Session

Power exercisable by: Act of sederunt

Parliamentary procedure: Laid only

Provision

33. Section 9 of the Bill provides for awards of expenses to be paid to charity in certain circumstances rather than to a party to civil proceedings which is the usual practice. Section 10(3) provides that the courts may make awards of expenses against third party funders and intermediaries (again persons who are not the parties to civil proceedings). Section 11 of the Bill provides for awards of expenses against legal representatives whereas the usual practice is for awards to be made against a party. Section 12 makes minor and consequential modifications to sections 103(2) and 104(2) of the 2014 Act which are the “core” rule making powers for the Scottish civil courts. These modifications are to illustrative lists of the sorts of provision that can be made by act of sederunt and are intended to clarify that rules of court can make further provision about the matters referred to in sections 9 to 11 of the Bill. Since the lists modified are illustrative only the Scottish Government does not consider that there is a substantive extension to the rule-making powers as already legislated for by the Parliament in the 2014 Act.

Reason for taking power

34. The Scottish Government considers it would be undesirable if there were any doubt as to the power to make rules about the matters provided for in sections 9 to 11 of the Bill. Moreover, the Scottish Government considers that the illustrative lists in sections 103(2) and 104(2) of the 2014 Act should be kept up to date in terms of wider developments in civil procedure in practice, so that there is clarity and transparency.

Choice of procedure

35. Since the modifications are to pre-existing powers the procedure will remain laid-only procedure. The default laying requirement will continue to apply (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

Section 18(1) – Group procedure: rules

Power conferred on: The Court of Session

Power exercisable by: Act of sederunt

Parliamentary procedure: Laid only

Provision

36. Section 17 of the Bill provides for the first time that there is to be a form of procedure in the Court of Session known as “group procedure”. Section 18(1) provides wide enabling powers for the Court of Session to make rules by act of sederunt to regulate practice and procedure to be followed in group proceedings. Subsection (2) puts beyond doubt what the power in (1) includes, but expressly provides that subsection (1) is not limited by the specific examples of the power in subsection (2). This is a similar approach to the approach for the “core” rule-making power of the Court of Session in section 103(1) and (2) of the 2014 Act.

37. Subsection (3) makes it clear that an act of sederunt under subsection (1) may not deviate or diverge from the provisions of section 17.

38. By virtue of subsection (4), acts of sederunt may include ancillary provision as may be required. This provision is similar to section 103(3) of the 2014 Act.

39. Subsection (5) provides that the power to make group procedure rules is without prejudice to other rule-making powers of the Court, whether in an enactment or at common law. This provision is similar to section 103(4) of the 2014 Act and section 103(1) of that Act is an example of an enabling power that might be combined with the new power proposed.

Reason for taking power

40. Both the Scottish Law Commission⁴ and the SCCR recommended that a group proceedings procedure should be introduced for the first time in Scotland and that this should be done by rules of court. The rules of

⁴ <https://www.scotlawcom.gov.uk/files/3112/7989/6877/rep154.pdf>

practice and procedure relating to group proceedings in the Court of Session will relate to the management of such proceedings before the court and the rules under which those proceedings must be conducted. They will very often deal with administrative matters. As rules of procedure, they may require regular amendment to deal with how the new group proceedings procedure develops, new eventualities or to adapt to changing circumstances. It is therefore considered appropriate that they be set out in secondary legislation. This is of course the position for the other rules of courts and tribunals.

Choice of procedure

41. This will be the main power the Court of Session will use to regulate the practice and procedure to be followed in group proceedings in the Court. To preserve the courts from political interference, and in accordance with the principle of the separation of powers, acts of sederunt are not usually subject to Parliamentary scrutiny. This is consistent with the position of section 103 of the 2014 Act. The default laying requirement applies.

Section 20(1) – Ancillary provision

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

Provision

42. Section 20(1) provides that the Scottish Ministers may by regulations make freestanding ancillary provision, namely incidental, supplementary, consequential, transitional, transitory or savings provisions which they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of the enacted Bill or provision made under it. Provision made under the Bill includes both regulations and group procedure rules made under section 18(1). Subsection (2) provides that such regulations may modify any enactment (including the Bill).

Reason for taking power

43. The Scottish Government considers it appropriate to take power to deal with anything that might emerge in the course of implementing the Act, for example interactions with secondary legislation or older statutes or rules of law. Without the power proposed it would be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter

that is clearly within the policy intentions of the original Bill and this would not be an effective use of Parliamentary or Government resource.

44. It is considered that such matters can be best addressed through subordinate legislation. The power is restricted in that it can only be used for the purposes of, in connection with, or for the purpose of giving full effect to the Bill, or provision made under it.

45. The Scottish Government considers this power to be particularly relevant given the degree of decision making authority that will be in the hands of rule-makers in the case of group procedure rules. Whilst the Scottish Government has not identified, at the time of introducing the Bill, any requirements for primary or secondary legislation to be amended so as to allow for group procedure, it is not impossible that a particular form of group procedure drawn up by rule makers would require consequential amendment of legislation in order for it to properly function. Should that be the case, and should the modification required be outwith the bounds of rules of court, the Scottish Government considers that Ministers should have power to make appropriate provision via regulations.

Choice of procedure

46. By virtue of section 19(3), regulations under section 20(1) are subject to the negative procedure except where they add to, replace or omit any part of the text of an Act, in which case they are subject to the affirmative procedure. These procedures provide the necessary safeguards with regard to the type of legislation which can be made.

Section 22(2) – Commencement

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid only

Provision

47. Section 22(2) enables the Scottish Ministers to commence the Bill by conferring a power on Ministers, by regulations, to bring the provisions of the Bill into force on such day as the Scottish Ministers appoint. Section 22(3) provides that such regulations may include transitional, transitory or saving provision and make different provision for different purposes.

Reason for taking power

48. It is standard for Ministers to have powers over the commencement of Bills. It is considered appropriate for the substantive provisions of the Bill to be commenced at such a time as the Scottish Ministers consider to be suitable. The Scottish Government's commencement policy for Part 3 of the Bill (auditors of court), in particular, requires to reflect that most auditors of court are not currently employees of the SCTS and therefore there should be appropriate, staggered transition from the current position to the future position set out in that Part.

Choice of procedure

49. As is now usual for commencement regulations, the default laying requirement applies.

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