

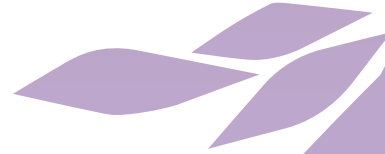


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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill as amended at Stage 2



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(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;

(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.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 17 April 2018, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill as amended at Stage 2 ("the Bill").ⁱ The Committee submits this report to the Parliament under Rule 9.7.9 of the Standing Orders.
2. The Bill was introduced by the Cabinet Secretary for Justice, Michael Matheson MSP on 1 June 2017. The lead Committee is the Justice Committee.
3. A number of amendments were made to the Bill at Stage 2, which was completed on 6 March 2018.
4. The Scottish Government has provided the Parliament with a supplementary memorandum ("SDPM") on the delegated powers provisions in the Bill.ⁱⁱ
5. The Committee previously reported on the delegated powers provision in this Bill at Stage 1 in its [52th Report, 2017](#).

ⁱ The Bill as amended at Stage 2 can be found [here](#).

ⁱⁱ The Supplementary Delegated Powers Memorandum can be found [here](#).

Delegated Powers

6. The Committee considered each of the delegated powers provisions in the Bill as amended at Stage 2.
7. The Committee determined that it did not need to draw the Parliament's attention to the delegated powers in the following provisions:
 - Section 5(1) (amended at Stage 2) - Success fee agreements - exclusion for certain matters
 - Section 6(8) (removed at Stage 2) - Success fee agreements and personal injury claims; and
 - Section 15 (amended at Stage 2) - Guidance issued by the Auditor of the Court of Session.

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**
- **Changes at Stage 2: New paragraph in illustrative list and power to modify Part 1 of the Act restricted to section 7**

Provision

8. Section 7(1) and (2) provide that a success fee agreement must be in writing and must specify the basis on which the amount of the success fee is to be determined. These provisions remain unamended in the Bill following Stage 2.
9. Likewise section 7(3) continues to provide that the Scottish Ministers may by regulations make further provision about success fee agreements. This includes, in particular, provision about: (a) their form and content (including their terms); (b) the manner in which they may be entered into; (c) their modification and termination; (d) the resolution of disputes in relation to such agreements; and (e) the consequences of failure to comply with the requirements of subsection (1) or (2) or the regulations.
10. A new paragraph (f) has been inserted into section 7(3) at Stage 2. This provides that regulations may make provision about the application of Part 1 (of the Bill as enacted), or any provision made under it, where a recipient receives relevant services from more than one provider in connection with the same matter.
11. Furthermore, at introduction, subsection (4) provided that regulations under subsection (3) may modify Part 1 of the Bill regarding success fee agreements. As amended at Stage 2 subsection (4) is restricted. It now provides that regulations

- under subsection (3) may modify section 7 (rather than Part 1) so as to (a) add text to it, (b) modify any text added under paragraph (a).
12. In terms of section 19(2) of the Bill, regulations made under section 7(3) continue to be subject to the affirmative procedure.
 13. The Supplementary DPM explains that new paragraph (f) in section 7(3) would allow regulations to be made preventing a pursuer from being liable to pay two or more success fees.
 14. In relation to subsection (4), the Scottish Government's position is that the amendment responds to this Committee's Stage 1 report. It notes that none of the text that the Parliament agrees for Part 1 of the Bill at Stage 3 can be removed by regulations made under section 7(3).
 15. The Supplementary DPM explains (in line with the Government's response to this Committee at Stage 1) that the purpose of section 7(3) and (4) is to augment the current provisions of the Bill in relation to success fee agreements where it is considered desirable to have future provision about the mandatory terms of success fee agreements or their enforcement. It states that such provision would be brought forward only after consultation on the regulation of success fee agreements with stakeholders and therefore cannot be included in the Bill at present. The regulations would mean that any new provisions could be set out in section 7, rather than in freestanding regulations, which would mean that all the mandatory terms that relate to success fee agreements would be found in the primary legislation.

Consideration

16. The Committee is content with the insertion of new paragraph (f) of section 7(3). This responds to the Justice Committee's policy observation that the Bill should be amended to prohibit legal advisers from seeking to avoid the operation of the caps on success fee agreements to be set in regulations made under section 4 of the Bill.
17. In relation to the amendments made to section 7(4), this Committee reported to the lead Committee at Stage 1 that the unusually wide scope of section 7(4) to enable amendments to be made to Part 1 of the Bill had not been sufficiently justified by the Scottish Government. Unless specific examples could be provided by the Scottish Government to explain why the modification to Part 1 of the Bill was necessary and proportionate, the Committee could not see why the power in subsection (3) alone to make further provision about success fee agreements in regulations was insufficient.
18. The Committee notes that the scope of section 7(4) has been limited. However, it considers that subsection (4) as amended at Stage 2 continues to be very wide in scope. Regulations made under the power can amend any provision in section 7 (rather than being limited, for example, to amendments to the illustrative list in section 7(3)(a) to (f)). Although regulations may not remove text contained in section 7, it could add text to it, and therefore change its meaning, and modify any text that has been added, which could further change that meaning.
19. The Committee considers that the power in subsection (3) is already expressed broadly to allow the Scottish Ministers to "make further provision about success fee agreements", including about the matters set out in paragraphs (a) to (f). The Scottish Government justifies section 7(3) and (4) on the basis that they would allow

further provision to be made about the mandatory terms of success fee agreements or their enforcement. However, subsection (3) alone already appears to be broad enough to allow such further provision to be made. It therefore remains unclear why subsection (4), as amended at Stage 2, is necessary.

20. Furthermore, in addition to authorising amendments to the mandatory requirements for success fee agreements in section 7(1) and (2), amended subsection (4) has the effect of authorising regulations made under subsection (3) to modify the nature of the regulation-making power contained in that subsection. In the absence of specific reasons for taking the power in subsection (4), the Committee considers that it is not in a position to be clear about the necessity for having such an unusual power.

Recommendation

21. **The Committee draws the Parliament's attention to section 7(4) of the Bill as amended at Stage 2 on the basis that it still appears to be unnecessary for the reasons outlined above.**

Proposed Amendment at Stage 3

22. The day before the Committee agreed this report, it [received a letter from the Minister for Parliamentary Business, Joe Fitzpatrick](#), notifying the Committee that the Government intends to bring forward an amendment providing for a new delegated power at Stage 3 of the Bill. The proposed amendment is expected to provide additional delegated power provisions in the Bill to take into account an amendment agreed at Stage 2 related to group proceedings (sometimes known as “class actions” or “multi-party actions”). While section 17 of the Bill as introduced provided for an “opt-in” procedure for group proceedings, the amendment at Stage 2 widened the provisions to also allow for “opt-out” proceedings.
23. As the amendment has yet to be lodged, the Committee did not want to delay the publication of this report given the Stage 3 debate is scheduled for Thursday 26 April. It will therefore consider the delegated powers provision in the proposed amendment at its next meeting where it will decide whether it requires to publish a supplementary report.

