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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 at Stage 1



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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 meetings on 12 September, 3 October and 8 November 2017 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (the “Bill”) at Stage 1.ⁱ The Committee submits this report to the lead Committee for the Bill (the Justice Committee) under Rule 9.6.2 of Standing Orders.
2. The Scottish Government has produced a Delegated Powers Memorandum (“DPM”) on the delegated powers provisions in the Bill.ⁱⁱ

ⁱ Available at: [http://www.parliament.scot/Civil%20Litigation%20\(Expenses%20and%20Group%20Proceedings\)%20\(Scotland\)%20Bill/SPBill14S052017.pdf](http://www.parliament.scot/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14S052017.pdf)

ⁱⁱ Available at: [http://www.parliament.scot/Civil%20Litigation%20\(Expenses%20and%20Group%20Proceedings\)%20\(Scotland\)%20Bill/SPBill14_DPM_S052017.pdf](http://www.parliament.scot/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14_DPM_S052017.pdf)

Overview of the Bill

3. This Government Bill was introduced by the Cabinet Secretary for Justice, Michael Matheson MSP, on 1 June 2017.
4. The Policy Memorandum explains that the overall policy aim of the Bill is to improve access to justice in civil actions by:
 - (a) making the costs of civil court actions more predictable;
 - (b) increasing funding options for pursuers in civil actions; and
 - (c) introducing a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions.
5. The Bill implements recommendations made by Sheriff Principal Taylor in his Report on the Review of Expenses and Funding of Civil Litigation in Scotland, published in September 2013 (the “Taylor Review”).ⁱⁱⁱ The Scottish Government's response to the Taylor Review was issued in June 2014.^{iv}
6. The Bill also enacts some unimplemented recommendations made by Lord Gill in his Report on the Scottish Civil Courts Review, published in September 2009.^v These recommendations relate to group proceedings and auditors of court.
7. The Bill itself is split into the following five parts:
 - **Part 1** regulates “success fee agreements”; i.e. agreements between legal representatives and their clients under which no fee, or a reduced fee, is payable if the client is unsuccessful in a claim which is or may be the subject of litigation, with a fee, or a higher fee, being payable if the client is successful. These are sometimes known as “no win no fee” (or “no win lower fee”) agreements. This Part of the Bill removes the legal rule preventing solicitors from enforcing damages-based agreements (“DBAs”), which are a particular form of success fee agreement. It allows the Scottish Ministers to make regulations capping the amount of the fees to be paid under success fee agreements.
 - **Part 2** deals with various aspects of expenses in civil litigation. It restricts the ability of the court to award expenses to the defender in a personal injury action – known as qualified one-way cost shifting (“QOCS”). It allows the court to order a payment to be made to a charity where a party is represented free of charge. Part 2 also requires the disclosure of the identity of a third party funder who has a financial interest in the outcome of litigation, and allows the court to award expenses against that person. It also enables the court to award expenses against a legal representative who has seriously breached his or her duties to the court.

ⁱⁱⁱ Available at: <http://www.gov.scot/Topics/archive/reviews/taylor-review/Report>

^{iv} Available at: <http://www.gov.scot/Resource/0045/00451822.pdf>

^v Available at: <http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform>

- **Part 3** brings the offices of the Auditor of the Court of Session, auditor of the sheriff appeal court and auditor of the sheriff court within the remit of the Scottish Courts and Tribunal Services (SCTS). The office-holders are to become members of staff of SCTS.
- **Part 4** makes provision for a new form of procedure in the Court of Session known as “group procedure”. This will allow one person (to be known as a “representative party”) to bring one set of proceedings on behalf of two or more people who have connected claims.
- **Part 5** makes general provision about regulations, ancillary provision, references to “the court”, commencement and the short title of the Bill.

Consideration of the Bill

8. At its meeting on Tuesday 12 September 2017, the Committee agreed to write to the Scottish Government to raise questions in relation to three of the delegated powers in the Bill. The Committee's questions, and the response received from the Scottish Government to them, is included in the **Annex**.
9. The Committee was content with the delegated powers in the Bill except where noted below.

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**

Provisions

10. Section 7 provides that a success fee agreement must be in writing (subsection (1)) and must specify the basis on which the amount of the success fee is to be determined (subsection 2).
11. The delegated power is contained in section 7(3), which provides that the “*Scottish Ministers may by regulations make further provision about success fee agreements including 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.*”
12. Subsection (4) provides that regulations under subsection (3) may modify Part 1 of the Bill regarding success fee agreements.
13. In terms of section 19(2) of the Bill, regulations made under section 7(3) are subject to the affirmative procedure.
14. The DPM states that section 7 is intended to support the policy intention of enhancing the certainty, predictability and transparency of success fee agreements.
15. In particular, the Scottish Government’s position in the DPM is that details relating to the form and content of success fee agreements may require to be prescribed in more detail than is provided in the Bill. Furthermore, the content of success fee agreements may require regular amendment to deal with new eventualities or to adapt to changing circumstances. It states that key matters are set out in subsections (1) and (2) but that there should be flexibility to provide further for the content and form of success fee agreements in secondary legislation if that is considered necessary.
16. The DPM indicates that the affirmative procedure is appropriate given the importance of the use of success fee agreements in providing additional funding options for parties seeking to enforce their rights.

17. The Committee asked the Scottish Government to explain why the power to amend Part 1 of the Bill in subsection (4) is necessary and proportionate. In particular, the Committee asked if the power could be expressed more narrowly and still obtain the policy objective of enhancing the certainty, predictability and transparency of success fee agreements. It also asked for examples of the sorts of modifications that the Scottish Government considers may need to be made to the provisions in Part 1 using the powers in section 7(3) and (4).
18. These questions were asked in circumstances where the DPM does not consider the extension made by subsection (4) to the scope of the power in subsection (3).
19. In its response, the Scottish Government stated that it did not consider that the power in subsections (3) and (4) were unjustified or unduly wide. It argued that provision made in terms of subsection (4) would be limited to the matters permissible in terms of subsection (3).
20. The Scottish Government also argued that amendments to Part 1 of the Bill may become necessary in the future depending on the experience of the operation of success fee agreements in the years ahead. This would allow the Scottish Government to react to any anomalies or abuses concerning success fee agreements that may emerge and that could hinder the policy objective of certainty, predictability and transparency of success fee agreements.

Comments

21. The Committee is content that, in principle, the power in section 7(3) is necessary to regulate the technical detail relating to success fee agreements.
22. However, subsection (4) is particularly broad. It is not confined to amending section 7 of the Bill. Instead, modification may be made to any section within Part 1 of the Bill relating to success fee agreements by regulations made under section 7(3).
23. Special justification is required for regulation-making powers that allow amendments to be made to primary legislation. Such powers may not be acceptable where they would have the effect of authorising a fundamental change to the basis of the legislation or to address issues of policy and principle. However, it can be acceptable to use such powers to address points of a minor, administrative or technical nature.
24. The Committee considers that the affirmative procedure would afford the Parliament the opportunity to undertake enhanced scrutiny in relation to any proposed amendment to Part 1 of the Bill.
25. However, on the prior question of whether subsection (4) is appropriate in principle, the Committee considers that the Scottish Government's argument, that provision made in terms of subsection (4) would be limited to the matters permissible in terms of subsection (3), offers limited reassurance. This is because the power is expressed broadly to allow the Scottish Ministers to "*make further provision about success fee agreements*". Although paragraphs (a) to (e) provide details of the provision which such regulations may include in particular, the use of the word "including" in subsection (3) indicates that the regulations may include other matters which are not encompassed by paragraphs (a) to (e). It is not clear why the further provision cannot be made in regulations without the additional power to modify Part 1 of the Bill.

26. As noted above, the Scottish Government's position is that the power to amend Part 1 of the Bill would allow it to react to any anomalies or abuses concerning success fee agreements that may emerge. The Committee recognises that those offering success fee agreements may seek to work around the constraints placed on such agreements in Part 1 of the Bill, and that these issues may in some circumstances be technical in nature.
27. However, the Committee asked for examples of the sorts of modifications to Part 1 of the Bill that the Scottish Government considers it may need to make. The response does not provide any specific examples. The Committee therefore remains unclear why the unusually wide power in subsection (4) is necessary and proportionate. This is particularly where that power would allow the Scottish Government to amend the policy choices relating to the operation of success fee agreements contained in the Bill as enacted.

Recommendation

28. **The Committee recommends to the Parliament that although it is content that the affirmative procedure applies to regulations made under section 7(3), the unusually wide scope of section 7(4) to enable amendments to be made to Part 1 of the Bill has not been sufficiently justified by the Scottish Government. Unless specific examples can be provided by the Scottish Government to explain why the modification to Part 1 of the Bill is necessary and proportionate, the Committee cannot see why the power in subsection (3) alone to make further provision about success fee agreements in regulations is insufficient.**

Annex

CORRESPONDENCE WITH THE SCOTTISH GOVERNMENT

LETTER TO THE SCOTTISH GOVERNMENT FROM THE COMMITTEE (13 SEPTEMBER 2017)

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill at Stage 1

The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 12 September and seeks an explanation of the following matters:

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**

Section 5(1) provides that a success fee agreement must not be entered into in connection with a matter which may be the subject of: (a) family proceedings; or (b) other civil proceedings of a description specified by the Scottish Ministers in regulations.

Paragraph 20 of the Delegated Powers Memorandum indicates that the Scottish Government's position is that there may be types of proceedings other than family proceedings where the use of success fee agreements would be inappropriate. In those circumstances, 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.

However, with the exception of family actions, the Committee is not aware of any other areas where Sheriff Principal Taylor identified in his report that it would be inappropriate for success fee agreements to be used.

The Committee therefore asks the Scottish Government to explain further why it requires a power to exclude other types of civil proceedings in the future. If there were other such areas, what prohibits the Scottish Government from identifying them now and placing them on the face of the Bill?

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**

Section 7(3) provides that the Scottish Ministers may by regulations make further provision about success fee agreements. This includes, in particular, provision about the matters listed at paragraphs (a) to (e).

Subsection (4) provides that regulations under subsection (3) may modify Part 1 of the Bill. However, the Delegated Powers Memorandum does not explain why a power of this breadth is necessary or proportionate.

The Committee therefore asks the Scottish Government to explain why the power in subsection (4) is necessary and proportionate. Could the power be expressed more narrowly and still obtain the policy objective of enhancing the certainty, predictability and transparency of success fee agreements?

In particular, the Committee asks the Scottish Government to explain why it is considered necessary to take a power to amend all of Part 1 of the Bill and to provide examples of the sorts of modifications that it considers may need to be made to the provisions in Part 1 using the powers in section 7(3) and (4).

Section 9(3) – Lord President to designate a charity

- **Power conferred on: The Lord President of the Court of Session**
- **Power exercisable by: Designation**
- **Parliamentary procedure: None**

Paragraphs 33 and 34 of the Delegated Powers Memorandum indicate that the modifications made by section 12 of the Bill to sections 103(2) and 104(2) of the Courts Reform (Scotland) Act 2014 will, among other things, clarify that provision can be made by rules of court about the matters referred to in sections 9 to 11 of the Bill.

However, it is notable that, unlike sections 8(6), 10(5) and 11(3) of the Bill, no reference is made in section 9 to the possibility of further provision being made about the matters covered by that section (i.e. in relation to the ordering of expenses to be paid to a Scottish charity) by act of sederunt under sections 103 and 104 of the 2014 Act.

The Committee therefore asks the Scottish Government to explain why section 9 does not include a provision equivalent to sections 8(6), 10(5) and 11(3) of the Bill.

RESPONSE FROM THE SCOTTISH GOVERNMENT (26 SEPTEMBER 2017)

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill at Stage 1

Thank you for your letter of 13 September 2017 to James Hynd, the Head of the Cabinet, Parliament and Governance Division of the Scottish Government, setting out questions raised by the Delegated Powers and Law Reform Committee in relation to the above Bill. I am replying on behalf of the Scottish Government as I am part of the Bill team.

The Scottish Government was asked in relation to section 5(1)(b):

To explain further why it requires a power to exclude other types of civil proceedings in the future. If there were other such areas, what prohibits the Scottish Government from identifying them now and placing them on the face of the Bill?

The Scottish Government responds as follows:

The Committee is correct in pointing out that Sheriff Principal James Taylor only recommended that it would be inappropriate for success fee agreements to be used in family actions. This is because the resolution sought in family proceedings will not

necessarily be a financial award (though that may be part of the resolution) from which a success fee could be paid: as Sheriff Principal Taylor notes, the court may require to make a range of different orders dealing with various aspects of matrimonial breakdown aside from purely financial matters. This may turn out to be the case in other kinds of proceedings as well.

The Scottish Government has an open mind as to whether there are any other types of civil proceedings which should be excluded from the use of success fee agreements. That is not to say, however, that it might become apparent in the future that a particular kind of civil proceedings might be inappropriate for the use of success fee agreements. For example, a new type of civil proceedings created by future legislation which could be legislation of the UK Parliament. The power in section 5(1)(b) is intended to avoid the possibility – however remote – that it might become necessary to exclude that kind of civil proceedings by regulations.

The Scottish Government was asked in relation to section 7(4):

To explain why the power in subsection (4) is necessary and proportionate. Could the power be expressed more narrowly and still obtain the policy objective of enhancing the certainty, predictability and transparency of success fee agreements?

In particular, the Committee asked the Scottish Government to explain why it is considered necessary to take a power to amend all of Part 1 of the Bill and to provide examples of the sorts of modifications that it considers may need to be made to the provisions in Part 1 using the powers in section 7(3) and (4).

The Scottish Government responds as follows:

The Scottish Government does not accept that the power in subsections (3) and (4) is unjustified or unduly wide. Provision in exercise of subsection (4) would be limited to the matters permissible in terms of subsection (3) and would be made in pursuance of the important policy objective of certainty, predictability and transparency of success fee agreements. Amendments to Part 1 of the Bill may become necessary in the future depending on the experience of the operation of success fee agreements in the years ahead. The Scottish Government would wish to be able to react to any anomalies or abuses concerning success fee agreements that may emerge and that could imperil the policy objectives referred to.

The Scottish Government was asked in relation to section 9(3):

To explain why section 9 does not include a provision equivalent to sections 8(6), 10(5) and 11(3) of the Bill.

The Scottish Government responds as follows:

The Scottish Government takes the view that court rules could be made under the core rule making powers in sections 103 and 104 of the Courts Reform (Scotland) Act 2014 about payments to charities. Sections 8(6), 10(5) and 11(3) of the Bill allow court rules to make provision for exceptions or limitations to the provision made in those sections. As it is intended that rules of court ancillary to section 9 would be in the nature of complementary or supplementary provisions, no specific provision about court rules is needed in that section.

We hope that the Committee will find the information provided helpful.

