



The Scottish Parliament
Pàrlamaid na h-Alba

Clerk to the Delegated Powers and Law Reform Committee
Room T1.01
Scottish Parliament
0131 348 5212
DPLR.Committee@scottish.parliament.uk

James Hynd
Head of Cabinet, Parliament and Governance Division
Scottish Government

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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.

Please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Tuesday 26 September.

Thank you.

Euan Donald
Clerk to the Delegated Powers and Law Reform Committee