

PAPER 4.1B: COURTS REFORM (SCOTLAND) BILL – SECTIONS 96, 97, 98 and 99**CHAPTER 6**

REGULATION OF PROCEDURE AND FEES

*Procedure***96 Power to regulate procedure etc. in the Court of Session**

In the Court of Session Act 1988, for sections 5 (power to regulate procedure etc. by act of sederunt) and 5A (rules for lay representation) substitute—

“5 Power to regulate procedure etc. in the Court of Session

(1) The Court may by act of sederunt make provision for or about—

- (a) the procedure and practice to be followed in proceedings in the Court,
- (b) any matter incidental or ancillary to such proceedings.

(2) Without limiting that generality, the power in subsection (1) includes power to make provision for or about—

- (a) execution or diligence following on such proceedings,
- (b) avoiding the need for, or mitigating the length and complexity of, such proceedings, including—
 - (i) encouraging settlement of disputes and the use of alternative dispute resolution procedures,
 - (ii) action to be taken before such proceedings are brought by persons who will be party to the proceedings,
- (c) other aspects of the conduct and management of such proceedings, including the use of technology,
- (d) simplifying the language used in connection with such proceedings or matters incidental or ancillary to them,
- (e) the form of any document to be used in connection with such proceedings, matters incidental or ancillary to them or matters specified in this subsection,
- (f) appeals against a decision of the Court,
- (g) applications that may be made to the Court,
- (h) time limits in relation to proceedings mentioned in subsection (1), matters incidental or ancillary to them or matters specified in this subsection,
- (i) the steps that the Court may take where there has been an abuse of process by a party to such proceedings,
- (j) expenses that may be awarded to parties to such proceedings,
- (k) other payments such parties may be required to make in respect of their conduct relating to such proceedings,
- (l) the payment, investment or application of any sum of money awarded in such proceedings to or in respect of a person under a legal disability,
- (m) the representation of parties to such proceedings, and others, including representation by persons who—
 - (i) are neither solicitors nor advocates, or
 - (ii) do not have the right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990,
- (n) the functions and rights of persons appointed by the Court in connection with such proceedings,

- (o) witnesses and evidence, including modifying the rules of evidence as they apply to such proceedings,
 - (p) the quorum for a Division of the Inner House considering purely procedural matters and, in the case of an extra Division, as to which judge is to preside and to sign any judgment or interlocutor pronounced by the extra Division,
 - (q) such other matters as the Court thinks necessary or appropriate for the purposes of carrying out or giving effect to the provisions of any enactment (including this Act) relating to such proceedings or matters incidental or ancillary to them.
- (3) An act of sederunt under subsection (1) may make—
- (a) incidental, supplemental, consequential, transitional, transitory or saving provision,
 - (b) provision amending, repealing or revoking any enactment (whether passed or made before or after this section comes into force) relating to matters with respect to which an act of sederunt may be made,
 - (c) different provision for different purposes.
- (4) This section is without prejudice to—
- (a) any enactment that enables the Court to make rules (by act of sederunt or otherwise) regulating the practice and procedure to be followed in proceedings to which this section applies, or
 - (b) the inherent powers of the Court.”.

97 Power to regulate procedure etc. in the sheriff court and the Sheriff Appeal Court

- (1) The Court of Session may by act of sederunt make provision for or about—
- (a) the procedure and practice to be followed in civil proceedings in the sheriff court or in the Sheriff Appeal Court,
 - (b) any matter incidental or ancillary to such proceedings.
- (2) Without limiting that generality, the power in subsection (1) includes power to make provision for or about—
- (a) execution or diligence following on such proceedings,
 - (b) avoiding the need for, or mitigating the length and complexity of, such proceedings, including—
 - (i) encouraging settlement of disputes and the use of alternative dispute resolution procedures,
 - (ii) action to be taken before such proceedings are brought by persons who will be party to the proceedings,
 - (c) other aspects of the conduct and management of such proceedings, including the use of technology,
 - (d) simplifying the language used in connection with such proceedings or matters incidental or ancillary to them,
 - (e) the form of any document to be used in connection with such proceedings, matters incidental or ancillary to them or matters specified in this subsection,
 - (f) appeals against a decision of a sheriff or the Sheriff Appeal Court,
 - (g) applications that may be made to a sheriff or the Sheriff Appeal Court,
 - (h) time limits in relation to proceedings mentioned in subsection (1), matters incidental or ancillary to them or matters specified in this subsection,
 - (i) the steps that a sheriff or the Sheriff Appeal Court may take where there has been an abuse of process by a party to such proceedings,
 - (j) expenses that may be awarded to parties to such proceedings,

- (k) other payments such parties may be required to make in respect of their conduct relating to such proceedings,
 - (l) the payment, investment or application of any sum of money awarded in such proceedings to or in respect of a person under a legal disability,
 - (m) the representation of parties to such proceedings, and others, including representation by persons who—
 - (i) are neither solicitors nor advocates, or
 - (ii) do not have the right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990,
 - (n) the functions and rights of persons appointed by a sheriff or the Sheriff Appeal Court in connection with such proceedings,
 - (o) witnesses and evidence, including modifying the rules of evidence as they apply to such proceedings,
 - (p) the quorum for sittings of the Sheriff Appeal Court,
 - (q) determining which Appeal Sheriff is to preside at such sittings,
 - (r) such other matters as the Court of Session thinks necessary or appropriate for the purposes of carrying out or giving effect to the provisions of any enactment (including this Act) relating to such proceedings or matters incidental or ancillary to them.
- (3) Nothing in an act of sederunt under subsection (1) is to derogate from the provisions of sections 70 to 78 (simple procedure).
- (4) An act of sederunt under subsection (1) may make—
- (a) incidental, supplemental, consequential, transitional, transitory or saving provision,
 - (b) provision amending, repealing or revoking any enactment relating to matters with respect to which an act of sederunt under subsection (1) may be made,
 - (c) different provision for different purposes.
- (5) Before making an act of sederunt under subsection (1) with respect to any matter, the Court of Session must—
- (a) consult the Scottish Civil Justice Council, and
 - (b) take into consideration any views expressed by the Council with respect to that matter.
- (6) Subsection (5) does not apply in relation to an act of sederunt that embodies, with or without modifications, draft rules submitted by the Scottish Civil Justice Council to the Court of Session.
- (7) This section is without prejudice to—
- (a) any enactment that enables the Court of Session to make rules (by act of sederunt or otherwise) regulating the practice and procedure to be followed in proceedings to which this section applies, or
 - (b) the inherent powers of a sheriff or the Sheriff Appeal Court.

Fees

98 Power to regulate fees in the Court of Session

In the Court of Session Act 1988, after section 5(as substituted by section 96 of this Act) insert—

“5ZA Power to regulate fees

- (1) The Court may, in relation to any proceedings in the Court (including any execution or diligence following such proceedings), by act of sederunt make provision for or about the fees of—
- (a) solicitors,
 - (b) messengers-at-arms,
 - (c) persons acting under the Execution of Diligence (Scotland) Act 1926,
 - (d) witnesses,

- (e) shorthand writers,
 - (f) such other persons, or persons of such descriptions, as the Scottish Ministers may by order specify.
- (2) An act of sederunt under subsection (1) may not make any provision for or about the fees that the Scottish Ministers may regulate under or by virtue of section 33 of the Legal Aid (Scotland) Act 1986 (fees and outlays of solicitors and counsel).
- (3) An act of sederunt under subsection (1) and an order under subsection (1)(f) may make—
- (a) incidental, supplemental, consequential, transitional, transitory or saving provision,
 - (b) different provision for different purposes.
- (4) Before making an order under subsection (1)(f), the Scottish Ministers must consult the Lord President.
- (5) An act of sederunt under subsection (1) is subject to the negative procedure.
- (6) An order under subsection (1)(f) is subject to the negative procedure.”

99 Power to regulate fees in the sheriff court and the Sheriff Appeal Court

- (1) The Court of Session may, in relation to civil proceedings in the sheriff court or the Sheriff Appeal Court (including any execution or diligence following such proceedings), by act of sederunt make provision for or about the fees of—
- (a) solicitors,
 - (b) sheriff officers,
 - (c) persons acting under the Execution of Diligence (Scotland) Act 1926,
 - (d) witnesses,
 - (e) shorthand writers,
 - (f) such other persons, or persons of such descriptions, as the Scottish Ministers may by order specify.
- (2) An act of sederunt under subsection (1) may not make any provision for or about the fees that the Scottish Ministers may regulate under or by virtue of section 33 of the Legal Aid (Scotland) Act 1986 (fees and outlays of solicitors and counsel).
- (3) An act of sederunt under subsection (1) may make—
- (a) incidental, supplemental, consequential, transitional, transitory or saving provision,
 - (b) different provision for different purposes.
- (4) Before making an order under subsection (1)(f), the Scottish Ministers must consult the Lord President of the Court of Session.
- (5) An act of sederunt under subsection (1) is subject to the negative procedure.

Explanatory Notes:

Chapter 6 – Regulation of procedure and fees

146. Sections 96 and 97 provide powers for the Court of Session to make rules of court by act of sederunt to regulate procedure in the Court of Session (section 96) and in the sheriff court and the Sheriff Appeal Court (section 97). The powers to make rules of court are intended to be broadly similar, but with specific variations required to take account of the different jurisdictions of the courts.

147. Given the critical role which rules of court will therefore have in implementing the SCCR, the powers granted in sections 96 and 97 provide the vires for rules of court made in respect of the matters enumerated in those sections.

*Procedure**Section 96 – Power to regulate procedure etc in the Court of Session*

148. Section 96 replaces sections 5 and 5A of the 1988 Act with a new section 5, which gives the Court of Session a power to make provision in acts of sederunt concerning the procedure and practice of the Court of Session. Subsection (1) of new section 5 contains a broad, general power to make provision regarding procedure and practice. Subsection (2) contains some specific, illustrative examples of the sort of matters which are procedure and practice for the purposes of this power, including the conduct and management of proceedings in the Court of Session, the forms of documents used, appeals against decisions, awards of expenses and the representation of parties by those otherwise not qualified to do so. Given the width of subsection (1), subsection (2) is not designed to be exhaustive, rather it demonstrates a widening of what can be described as practice and procedure.

149. The approach to the description of the powers of the Court contrasts with the specific and narrower powers contained in the original version of section 5 of the 1988 Act and is designed to effect a substantial widening of the powers of the Court of Session to regulate its practice and procedure.

150. Subsection (3) of new section 5 allows these acts of sederunt to make various types of ancillary provision, and subsection (4) clarifies that these new powers do not affect any existing power to make court rules.

Section 97 – Power to regulate procedure etc. in the sheriff court and the Sheriff Appeal Court

151. Section 97 is a replacement for the power to make rules of court in relation to the sheriff court in section 32 of the 1971 Act and extends the power to rules in relation to the Sheriff Appeal Court. It gives the Court of Session a broad power to make acts of sederunt concerning the procedure and practice to be followed in civil proceedings in the sheriff court and Sheriff Appeal Court. Subsection (1) contains a broad general power to make provision regarding procedure and practice. Subsection (2) contains some specific illustrative examples of the sort of matters which are procedure and practice for the purposes of this power, including the conduct and management of proceedings in the sheriff court and Sheriff Appeal Court, the forms of documents used, appeals against decisions, awards of expenses and the representation of parties by those otherwise not qualified to do so.

152. While of a similar nature to section 32 of the 1971 Act, the wider general illustrative examples set out in subsection (2) demonstrate a substantial widening of what can be described as practice and procedure.

153. Subsection (3) provides that the rule-making power is subject to the provisions in sections 70 to 78 concerning simple procedure. Subsection (4) allows these acts of sederunt to make various types of ancillary provision. Subsections (5) and (6) require the Court of Session to consult with the Scottish Civil Justice Council when making acts of sederunt which were not prepared in draft by the Council. Subsection (8) clarifies that these new powers do not affect any existing power to make court rules.

*Fees**Section 98 – Power to regulate fees in the Court of Session*

154. Section 98 inserts a new section 5ZA into the Court of Session Act 1988, which gives the Court of Session a broad power to make acts of sederunt concerning the fees, including the fees recoverable in an award of judicial expenses, of various office-holders and persons in relation to proceedings in the Court of Session. After consulting the Lord President, the Scottish Ministers can, by order (subject to negative procedure by virtue of section 122(3)), specify new persons in respect of whom this power may be exercised.

Section 99 – Power to regulate fees in the sheriff court and the Sheriff Appeal Court

155. Section 99 is a replacement for section 40 of the 1971 Act. It gives the Court of Session a broad power to make acts of sederunt concerning the fees, including the fees recoverable in an award of judicial expenses, of various office-holders and persons in relation to proceedings in the sheriff court and Sheriff Appeal Court. After consulting the Lord President, the Scottish Ministers can, by order (subject to negative procedure by virtue of section 122(3)), specify new persons in respect of whom this power may be exercised.