

COURTS REFORM (SCOTLAND) ACT 2014

EXPLANATORY NOTES

THE ACT

Part 4 – Procedure and Fees

176. The former Lord President of the Court of Session Lord Gill, who led the Scottish Civil Courts Review, has said that the reforms should be made effective through new rules of court. Whilst the Part 4 sets out the reformed framework for the civil courts system in Scotland, the detail will be provided in rules of court.
177. **Part 4** also provides for the Court to have the ability to regulate fees in the Court of Session, as it does in the sheriff court and Sheriff Appeal Court, and the powers from the various acts have been rationalised into the Act to achieve this, clearly conferring on the Court power to regulate the fees of certain persons in the exercise of their functions in the Court of Session. This will bring together the powers of the Court of Session to regulate fees and remove the need to rely on the meaning of section 5 of the Court of Session Act 1988, particularly when regulating fees with regard to messenger-at-arms and shorthand writers.

Procedure

178. **Sections 103** and **104** 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 103) and in the sheriff court and the Sheriff Appeal Court (section 104). 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.
179. Given the critical role which rules of court will therefore have in implementing the Scottish Civil Courts Review, the powers granted in sections 103 and 104 provide the powers for rules of court made in respect of the matters enumerated in those sections.

Section 103 – Power to regulate procedure etc. in the Court of Session

180. **Section 103** replaces sections 5 and 5A of the Court of Session Act 1988 which are repealed in schedule 5, paragraph 30(3). Section 103 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) 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.
181. 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 Court of Session Act 1988 and is designed to effect a substantial widening of the powers of the

Court of Session to regulate its practice and procedure. By virtue of Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 the Scottish Civil Justice Council will continue to draft civil procedure rules.

182. Subsection (3) 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 or otherwise regulate procedure or practice (see the discussion of the Scottish courts' inherent powers with reference to section 47).

Section 104 – Power to regulate procedure etc. in the sheriff court and the Sheriff Appeal Court

183. **Section 104** is a replacement for the power to make rules of court in relation to the sheriff court in section 32 of the Sheriff Courts (Scotland) Act 1971 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 so to do.
184. Whilst 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.
185. Subsection (3) provides that the rule-making power is subject to the provisions in sections 72 to 82 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 (7) clarifies that these new powers do not affect any existing power to make court rules or otherwise regulate procedure or practice. See also sections 75 and 76 which make special provision about simple procedure rules.

Fees of solicitors etc.

Section 105 – Power to regulate fees in the Court of Session

186. **Section 105** 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. An act of sederunt under section 105(1) is subject to the negative procedure by virtue of subsection (5)). After consulting the Lord President, the Scottish Ministers can, by order (subject to the negative procedure by virtue of section 133(3)), specify additional persons in respect of whom this power may be exercised.
187. **Section 105(2)** specifically excludes the fees that the Scottish Ministers regulate under section 33 of the Legal Aid (Scotland) Act 1986 (fees and outlays of solicitors and counsel) from those listed in section 105(1).

Section 106 – Power to regulate fees in the sheriff court and the Sheriff Appeal Court

188. **Section 106** is a replacement for section 40 of the Sheriff Courts (Scotland) Act 1907 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. An act of sederunt under section 106(1) is subject to the negative procedure by virtue of subsection (5)). After consulting the Lord President, the Scottish Ministers can, by order (subject to the negative procedure by virtue of section 133(3)), specify additional persons in respect of whom this power may be exercised.

Court fees

Section 107 – Power to provide for fees for SCTS, court clerks and other officers

189. **Section 107** effectively restates and modernises the power conferred on the Scottish Ministers by section 2 of the Court of Law Fees (Scotland) Act 1895. Section 2 of the 1895 Act is consequentially repealed by schedule 5, paragraph 26. This consolidates and updates the law, for example by enabling an order on court fees to explicitly revoke an earlier order by virtue of section 6 of the Interpretation and Legislative Reform (Scotland) Act 2010.
190. This power permits the Scottish Ministers to set the fees that may be charged by the SCTS and (what the section describes as) “relevant officers” in relation their functions in providing court services. The power permits the Scottish Ministers (by order subject to the negative procedure) to make provision exempting persons from fees and provides that there may be different fees for different courts and types of proceeding. Subsection (4) permits the Scottish Ministers to modify the list of courts or officers covered by this section, by order. Such an order is subject to the affirmative procedure.

Section 108 – Sanction for counsel in the sheriff court and the Sheriff Appeal Court

191. **Section 108** sets out the test to be applied by a court in considering whether to grant sanction for the employment of counsel (that is to say advocates or solicitor advocates) in the sheriff court and the Sheriff Appeal Court, when determining the level of expenses which may be due. In terms of this test, the court is required to sanction the employment of counsel if it considers that to do so is reasonable in all the circumstances of the case. In deciding whether granting sanction would be reasonable, the court must have regard to the criteria set out in subsection (3), which include “the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel”. The Court of Session is able to modify these provisions through court rules made in an act of sederunt under section 104(1) or section 106(1) of the Act. Generally, the expectation is that solicitors will conduct sheriff court and Sheriff Appeal Court litigation (without prejudice for arrangements for party litigants or lay representatives).