

Briefing for the Citizen Participation and Public Petitions Committee on [petition PE2205](#): Extend access to justice by reforming court rules in equality and human rights claims, lodged by Daniel Donaldson

Overview of issues raised by the petition

The petitioner is concerned that complex court procedures in Scotland make it difficult for ordinary people to enforce their rights. In particular, he notes that the financial limit for claims made under Simple Procedure is £5,000, in comparison to a £10,000 limit for Small Claims procedure in England and Wales.

He is calling for:

- the £5,000 threshold for Simple Procedure claims to be removed or raised for claims under the Equality Act 2010 and the Human Rights Act 1998
- for “qualified one-way costs shifting” to be extended to cover equality and human rights claims.

Current court processes

- **Simple Procedure** is a simplified type of court procedure, designed to be used for relatively low value claims, without the need for specialist legal advice. It is used in the sheriff courts. [Further information about Simple Procedure](#) is available from the website of the Scottish Courts and Tribunals Service.
- There are other forms of court procedure in the sheriff courts, including Summary Cause and Ordinary Procedure. Both are more complicated, so that it will usually be advisable to have the help of a solicitor to bring a case.
- There are other types of court action relevant to the issues highlighted by the petitioner. **Judicial review** is a type of court procedure which can be used to look at the administrative fairness of a decision by a public body. It is an important option in human rights claims, and may be relevant in equality claims too. Employment-related equality claims can be raised at an Employment Tribunal.
- Judicial review claims can only be raised in Scotland’s most senior court, the Court of Session. Procedure in the Court of Session is very complex, meaning that specialist “advocates” must be used¹, in addition to a

¹ It is always open to an individual to represent themselves in any action. However, the more complex the action, the more risky this approach is. It is not recommended for most types of court case.

solicitor, to present the case. This makes court action in the Court of Session expensive.

- Employment Tribunals have procedures which are also designed to be used without legal representation. Parties will usually bear their own legal costs, so the rules discussed below for legal expenses do not apply.

Legal expenses

- A key risk in legal action is having to pay the other side's legal expenses if you lose your case. Legal expenses are the costs relating to bringing a court case, including solicitor's fees, court fees and costs for things like getting evidence from experts. This means that, when considering taking legal action, a person must consider not only how they will pay their own legal expenses but how they will pay for the other side's costs if they lose.
- The standard rule is that "expenses follow success", so that the winning party is usually entitled to claim their legal expenses (note that there are limits in legislation, so that full costs will not generally be covered) from the losing party. The courts can use their discretion to vary this rule, and sometimes court rules themselves make alternative provision.
- **Qualified one-way costs shifting** (QOCS – pronounced "kwocks") refers to court procedural rules which change the standard position in relation to liability for legal expenses. Where QOCS applies, the pursuer (person raising legal action) is not liable for the defender's (the person defending legal action) legal expenses if they lose. However, the defender remains liable for the pursuer's legal expenses if the pursuer wins. The pursuer must conduct their case in an honest and reasonable way.
- QOCS is generally used in court actions where there is a recognised imbalance between the positions of the parties. It is used for personal injury claims in Scotland, where the defender is usually an insurer or large business with experience of court action, and the pursuer is usually an individual who will not have dealt with complex court action before.
- Simple Procedure uses maximum thresholds to cap the money which can be claimed for legal expenses. These are broadly related to the amount claimed by the pursuer. This means expenses are roughly proportionate to the value of the claim, and that parties know the maximum level of liability in advance.

Legal aid

- Legal aid provides financial support to enable people on low and moderate incomes to access legal advice. Civil Legal Aid is the type of legal aid used for representation in civil court actions, such as actions relating to equality issues or human rights. Advice and Assistance may also be relevant for initial advice on an equality or human rights-related legal problem.
- The SPICe briefing [Legal aid – how it works](#) has more information on eligibility, including financial eligibility, for legal aid. Note in particular that

an award of legal aid protects the recipient from having an award of legal expenses made against them if they lose the case (although the court has discretion on this issue).

- The petitioner notes that “the legal aid position has not improved”. There are significant concerns about the availability of solicitors offering legal aid from some stakeholders. The Equality, Human Rights and Civil Justice Committee recently [undertook an inquiry into legal aid](#). It noted [the existence of “legal aid deserts”](#) – geographical areas or subject matters for which it was very difficult to access legally-aided legal advice.

Alternative options

- The petition calls for the Simple Procedure threshold to be increased. This would mean more cases could be dealt with via a procedure designed to be used by non-lawyers. They would also benefit from a capped system of legal expenses.
- However, the financial threshold in Simple Procedure is a rough proxy for the complexity of the case. The more complex a case, the more likely someone will need legal advice and representation to present it effectively². There are lots of circumstances where someone who does not have a detailed understanding of the law is unlikely to be able to present a claim effectively. This may be an issue for human rights claims and more complex equality claims.
- QOCS provides protection for the person raising a claim against an award of legal expenses should they lose. This reduces the financial risks of court action. For complex cases, legal expenses could run into the £10,000s (or even £100,000s). Thus, QOCS could be a useful way of shielding pursuers from the risks of bringing human rights and equality cases. However, QOCS significantly disadvantages defenders, in particular where these are also individuals or small businesses/bodies.
- Judicial review (which is a common way of raising human rights claims) could be seen as having the type of dynamics QOCS is designed to protect against. In all cases there will be a (probably well-resourced) public body as a defender and often an individual as a pursuer. However, the last time this issue was considered in depth in Scotland, [the recommendation was not to extend QOCS to judicial review proceedings](#)³.
- There are other mechanisms to protect people from some of the risks of raising legal action. **Protective Expenses Orders** can be used by the courts to limit liability for legal expenses should a pursuer lose their case.

² Note that using Simple Procedure does not prevent someone from seeking advice and/or representation from a solicitor. However, the costs of doing so can only be claimed up to the capped expenses thresholds. Civil Legal Aid (for representation in a court case) is only available for claims worth more than £3,000.

³ Sheriff Principal Taylor. (2013) [Review of Expenses and Funding of Civil Litigation in Scotland](#). Chapter 8, paragraph 55.

However, the courts have discretion in how they choose to use them, creating uncertainty about whether and how they will apply.

- **Group actions** allow lots of people facing the same issue to bring court action together, thus sharing the costs and risks related to legal action. However, they will not be appropriate in all cases.
- Setting up a new tribunal (or extending the issues a current tribunal can deal with) is a further option for creating a more user-friendly forum for dealing with disputes. However, concerns around pursuing complex claims without legal advice and representation are also relevant in this context.

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