

This document relates to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (SP Bill 14) as introduced in the Scottish Parliament on 1 June 2017

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill, introduced in the Scottish Parliament on 1 June 2017.

2. The following other accompanying documents are published separately:

- a Financial Memorandum (SP Bill 14–FM);
- a Policy Memorandum (SP Bill 14–PM);
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 14—LC).

3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

The Bill – an overview

5. Traditionally in Scotland litigation has been funded in one of three ways – through private funding, legal aid, or through trade union funding. In the last 20 - 30 years this situation has changed. Increased pressure on

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public funding for legal aid and a decline in trade union membership has resulted in a decline in those types of funding for civil cases. In turn this has led to the rise of speculative funding in the form of speculative fee agreements and damages based agreements to fill the void.

6. The Bill seeks to support the aims set out in the Policy Memorandum by introducing legislative provision to increase access to justice in civil actions by:

- making the costs of civil court action more predictable
- increasing funding options for pursuing civil actions
- introducing a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions.

7. The provisions in the Bill take forward recommendations from Sheriff Principal James A. Taylor's Review of the Expenses and Funding of Civil Litigation¹, published in September 2013. The Scottish Government issued its response² to the review in June 2014 and the Bill will implement the recommendations identified in the response as falling within the Scottish Government's remit. The Scottish Government is also working with other partners to support the wider delivery of the reforms, for example some recommendations fall within the powers and remit of the Scottish Civil Justice Council.

8. The opportunity is also being taken in the Bill to implement a small number of outstanding recommendations from the Rt Hon Lord Gill's Report of the Scottish Civil Courts Review (the "SCCR")³. These recommendations relate to group proceedings (sometimes known as multi-party or "class" actions) and the auditors of court.

¹ <http://www.gov.scot/About/Review/taylor-review/Report>

² <http://www.gov.scot/Resource/0045/00451822.pdf>

³ Published in two volumes, September 2009:

volume 1: <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>

volume 2: <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=4>

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9. The Bill is split into five parts:

Part 1: Success fee agreements — sets out the definition of “success fee agreements” to cover all types of speculative fee agreements and damages based agreements. It provides for damages based agreements to be enforceable by solicitors in Scotland. It confers powers on the Scottish Ministers, through regulations, to stipulate the maximum amount of damages that can be considered in the calculation of the success fee and to make further provision about the form and content of success fee agreements. It contains an exclusion for matters which may be the subject of family proceedings or other civil proceedings that may be specified by the Scottish Ministers in regulations. It also makes special provision for success fee agreements relating to personal injury claims.

Part 2: Expenses in civil litigation — restricts the court’s ability to make an award of expenses against a person making a personal injury claim, provided the person conducts the proceedings in an appropriate manner. This is known as “qualified one-way cost shifting” or “QOCS”. It provides the courts with the power to award expenses against a third-party funder with a financial interest in the litigation and places a requirement on the party in receipt of the financial assistance to disclose to the court the identity of the third party funder and nature of the assistance. It gives the courts the power to require a payment to be made to a charity registered in Scotland which is designated by the Lord President of the Court of Session where expenses are awarded to a party to the proceedings who is represented free of charge. It enshrines in statute the power of the courts to make legal representatives personally liable for expenses where they breach their duties to the court.

Part 3: Auditor of court — makes provision for auditors of court (the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court, and auditors of sheriff courts) to become salaried positions appointed and employed by the Scottish Courts and Tribunal Services (“SCTS”). It places a duty on the Auditor of the Court of Session to issue guidance to auditors of court about the exercise of their functions and on SCTS to publish details of auditors’ work and fees generated by taxations.

Part 4: Group proceedings — makes provision for group proceedings to be developed for Scotland, available as an “opt-in” procedure in the Court of Session.

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Part 5: General provision — includes provision in relation to subordinate legislation, interpretation and commencement.

10. A glossary of terms is set out at paragraph 11 of the Policy Memorandum for the Bill.

Commentary on sections

Part 1 – Success fee agreements

Section 1 – Success fee agreements

11. This section sets out the definition of a “success fee agreement”, a term to be used to cover all types of speculative fee agreements and damages based agreements (“DBAs”), which are both types of “no win, no fee” agreements, entered into in connection with actual or contemplated civil proceedings. The term is used in the Bill on the basis that in both of these types of agreements there is a fee to be paid in the event of success (the “success fee”) but none, or a lower one, if the action is lost. The definition includes but is not limited to speculative fee agreements that fall within section 61A of the Solicitors (Scotland) Act 1980.

Section 2 – Enforceability

12. Section 2 provides that a success fee agreement, and in particular a damages based agreement⁴, is not unenforceable only because it is *pactum de quota litis* (that is an agreement by a legal provider to accept a share of the proceeds of the litigation if it is successful, which would, but for this provision, otherwise be unenforceable). This means that solicitors in Scotland will be able for the first time to enter into damages based agreements. So far as other legal services providers are concerned, damages based agreements can be arranged between providers and clients regardless of whether the recipient of the services receives them directly from the supplier (where the arrangement is between a client and their solicitor for proceedings in the sheriff court) or via services arranged by the provider (a solicitor instructing an advocate on the client’s behalf, or a claims management company instructing a solicitor and/or an advocate).

⁴ An agreement under which a lawyer’s fee is calculated as a percentage of their client’s damages if the case is won, but no fee is payable if it is lost (though a lower fee may be payable in commercial cases).

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Subsection (2) provides that the abolition of the rule against an agreement for a share of the litigation does not affect other grounds under which a success fee agreement may be unenforceable under the law of contract.

Section 3 – Expenses in the event of success

13. This section provides that, where a success fee agreement has been entered into, the provider of the relevant legal services is entitled to retain any expenses recovered from the unsuccessful party, in addition to the agreed success fee. The agreement may, however, make contrary provision. Subsection (3) qualifies this rule in legal aid cases by providing that this provision is subject to section 17(2A) of the Legal Aid (Scotland) Act 1986 which states that any expenses in favour of any party in any proceedings in respect of which they are or have been in receipt of civil legal aid shall be paid to the Scottish Legal Aid Board, unless regulations under that section provide otherwise⁵.

Section 4 – Power to cap success fees

14. Section 4 confers powers on the Scottish Ministers, through regulations subject to the affirmative procedure (see section 19(2)), to stipulate the maximum amount of the success fee provided for under a success fee agreement. It is intended that the power will be used to set the maximum amount of the success fee as a percentage of the damages and will be based on a sliding scale depending on the size of the damages payment. By virtue of section 19(1)(b) regulations may include different provision for different purposes, therefore regulations can set different caps for different types of civil proceedings.

15. Subsections (3) and (4) provide that, if another enactment restricts the amount of the success fee, the maximum fee that is allowed is the lower of the amount allowed under that enactment and the amount allowed under regulations under this section. An example of another enactment restricting the amount of a success fee is the Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992, which allows for a 100% fee uplift in certain cases.

⁵ See regulation 39 of the Civil Legal Aid (Scotland) Regulations 2002.

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16. Subsection (5) provides that a success fee agreement is unenforceable to the extent that it provides for a success fee that is higher than the fee allowed for in regulations made under this section.

Section 5 – Exclusion for family proceedings and other proceedings

17. This section sets out that matters which may be the subject of family proceedings, as defined in section 135 of the Courts Reform (Scotland) Act 2014, or other civil proceedings that may be specified by the Scottish Ministers in regulations subject to affirmative procedure (see section 19(2)), may not be the subject of a success fee agreement.

Section 6 – Personal injury claims

18. Section 6 makes provision in respect of personal injury claims, including death from personal injuries (subsection (1)). Subsections (2) and (3) provide that the recipient of the relevant legal services (ie the client) is not required to make any payment other than the success fee, except for any sums in respect of insurance premiums in connection with the claim. The provider of the relevant legal services (usually a solicitor) will be liable to meet the outlays incurred in providing the services (for example, counsel's fees) from any expenses recovered from the defender and the success fee.

19. Subsections (4) to (6) make provision about damages obtained (whether by settlement or by award of the court or tribunal) in respect of future loss. Such damages are not to be included in the amount of damages used to calculate the success fee if they are to be paid by way of periodical payment.

20. There are two possibilities in relation to a future element of lump sum damages set out in subsection (5). The success fee agreement can specify that a lump sum payment for future loss is to be included in the calculation of the success fee if the lump sum meets the following conditions:

- it does not exceed £1 million; or
- it exceeds £1 million and, first, the legal services provider has not advised the recipient to accept that the future element be paid in

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periodical instalments but, second, the condition in subsection (6) is satisfied.

Otherwise, the success fee agreement must provide that any future element will not be included in the relevant amount of damages used for the calculation of the success fee.

Example

A child has suffered cerebral palsy as a result of clinical negligence. The child will require lifelong care. The damages awarded by the court, or agreed in a settlement by the parties, will be intended to provide for the lifetime care of the child. If it is agreed that the future element of the damages (covering the lifelong care) will be paid by periodical payments, these sums will not be included in the calculation of the solicitor's success fee.

It is, however, apparently rare for periodical payments to be agreed. Sheriff Principal Taylor indicated that periodical payments will only be in contemplation if the level of damages is expected to exceed £2 million. Such cases happen rarely in Scotland.

It is therefore more likely that the future element of damages will be paid as part of a lump sum. This will therefore be liable to be included in the calculation of the solicitor's success fee. The question of whether the future loss is compensated by means of a lump sum or by periodical payments presents a potential conflict of interest as the solicitor will be significantly better remunerated if the pursuer receives a lump sum.

The solution in section 6(4) to (6) is that there should be some form of independent scrutiny of the settlement where the lump sum exceeds £1,000,000 and the solicitor has not advised the family of the child suffering from cerebral palsy that the future element of the damages be paid in periodical instalments (in which case it would not be included in the calculation of the success fee).

If the child's damages are awarded by a court or tribunal, the court or tribunal must state that it is satisfied that it is in the child's best interests that the future element of the damages should be paid as a lump sum

rather than in periodical instalments.

If, however, the child's damages are agreed by settlement of the case, an independent actuary must certify – after consulting the family without the solicitor being present – that, in the actuary's view, it is in the best interests of the child that the future element of the damages covering the lifelong care be paid as a lump sum and not in periodical instalments.

21. Subsection (6) sets out the condition which is that either the damages are awarded by a court or tribunal which has stated that it is satisfied that it is in the recipient's best interests that the future element be paid as a lump sum rather than in periodical instalments or, where the damages are agreed, it is certified by an independent actuary that it is the actuary's view that it is in the recipient's best interests that the future element be paid as a lump sum rather than in periodical payments. The actuary must have consulted the recipient personally in the absence of the provider. As the solicitor has a financial interest in whether damages are awarded as a lump sum or a periodical payment, and as periodical payments can only be ordered with the agreement of the pursuer, the solicitor must not have advised the client to accept a periodical payment and must not be present in any interview with the actuary.

22. Subsection (7) provides that a success fee agreement is unenforceable to the extent that it makes provision contrary to subsections (2) or (4).

23. Subsection (8) confers a power that the Scottish Ministers may, through regulations subject to the affirmative procedure (see section 19(2)), adjust the sums specified in subsection (5)(a) and (b).

24. Subsection (9) explains what is meant by "personal injuries" in this section. That term includes diseases as well as physical or mental impairment.

Section 7 – Form, content etc.

25. This section makes provision for the form and content of success fee agreements. Subsections (1) and (2) provide that agreements must be in writing and must specify the basis for determining the success fee.

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Subsections (3) and (4) confer powers on the Scottish Ministers, through regulations subject to the affirmative procedure (see section 19(2)), to make further provision about the form and content etc. of success fee agreements, which may include the elements specified in the list in subsection (3).

Part 2: Expenses in civil litigation

Section 8 – Restriction on pursuers’ liability for expenses in personal injury claims

26. Section 8 makes provision for a qualified one-way costs shifting (“QOCS”) regime in Scotland for claims for personal injuries and appeals in civil proceedings for personal injuries, including clinical negligence. Subsection (2) provides that the court must not make an award of expenses against the pursuer of the claim or appeal for personal injuries where they have conducted proceedings in an appropriate manner. Subsection (3) makes it clear that this does not prevent the court from making an award of expenses in relation to any other type of claim made in the same set of proceedings. Subsection (4) sets out the tests for considering if the person has acted in an inappropriate manner. Subsection (5) sets out that the standard of proof for “fraudulent representation” in subsection (4)(a) is the balance of probabilities. Subsection (6) gives the court the power to restrict the types of claims to which QOCS can be applied by an act of sederunt under section 103(1) or section 104(1) of the Courts Reform (Scotland) Act 2014. Subsection (7) explains what is meant by “personal injuries” in this section. That term includes diseases as well as physical or mental impairment.

Section 9 – Expenses where party is represented free of charge

27. This section allows the court to order that a payment be made to a charity, which is to be designated by the Lord President of the Court of Session, where expenses are awarded to a party to the proceedings which is represented for free, or partly for free. Subsection (3) requires that the designated charity is registered in Scotland and has a charitable purpose of improving access to justice in respect of civil proceedings in Scotland. Examples of such charities are Citizens Advice Scotland and Justice Scotland.

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28. This section applies to representation by solicitors, advocates or others who are authorised to conduct civil litigation on behalf of a party.

Section 10 – Third party funding of civil litigation

29. Section 10 requires that a party receiving financial assistance from another person who has a financial interest in, but is not a party to, the proceedings must disclose to the court the identity of the funder, details of the assistance being provided and the funder's financial interest. Subsection (3) confers a power on the court to make an award of expenses against the third party funder and any intermediary. Subsection (4) makes clear that payments from the Scottish Legal Aid Fund are not subject to this requirement. There is already a requirement for legal aid funding to be disclosed under the Legal Aid (Scotland) Act 1986. Subsection (5) provides that further provision relating to these issues may be made in Court rules by means of an act of sederunt.

Section 11 – Awards of expenses against legal representatives

30. This section gives power to the civil courts to make an award of expenses against a legal representative in the proceedings who has committed a serious breach of their duties to the court⁶. Subsection (3) provides that limitations of this rule may be made in rules of court rules by means of an act of sederunt.

Section 12 – Minor and consequential modifications to rule making powers

31. This section makes consequential modifications to the Courts Reform (Scotland) Act 2014 in consequence of section 11. This reflects that the core rule-making powers for the civil courts are in sections 103 and 104 of that Act. The modifications clarify that provision may be made in act of sederunt about expenses awarded to or against persons other than the parties.

⁶ See Paterson, Alan (2007) Duties to the court. In: Law, practice and conduct for solicitors. University of Strathclyde at <http://strathprints.strath.ac.uk/4793/>.

Part 3: Auditors of court

Section 13 – Auditors of court

32. Section 13 makes provision for the continuation of the offices of the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court, and auditor of the sheriff court. These are collectively known as auditors of court. The office of the Auditor of the Court of Session currently has a statutory basis in the Court of Session Act 1821 whereas the other auditors of court exist by virtue of commissions issued by the President of the Sheriff Appeal Court and the sheriffs principal of the sheriffdoms, respectively. Section 13 gives all auditors of court a statutory basis.

33. Subsections (3) and (4) provide that the Scottish Courts and Tribunal Service (“SCTS”) is responsible for the appointment of individuals to these offices and the terms of appointment. Subsection (5) sets out that all these auditors of court will be members of SCTS staff⁷. Subsection (6) provides that the Auditor of the Court of Session will continue to be a member of the College of Justice⁸. Subsection (7) gives effect to the schedule of modifications of enactments concerning the auditors of court (as further described in paragraph 51).

⁷ It is proposed that the auditors of court become office-holders in the Scottish Administration by virtue of an Order under section 126(8)(b) of the Scotland Act 1998. Section 64(3) of the Scotland Act 1998 requires office-holders in the Scottish Administration to pay sums received into the Scottish Consolidated Fund. In the case of auditors of court this will include receipts from extra-judicial taxations. It is therefore unnecessary for the Bill to include any provision about where receipts are to be paid.

⁸ The judges of the Court of Session are the Senators of the College of Justice. Advocates, Writers to the Signet, Solicitors to the Supreme Courts, Macers and Supreme Courts staff are also all considered to be members of the College of Justice. Membership of the College does not, today, have any practical consequences. Nevertheless, the existence and membership of the College has a symbolic importance, since it reflects the commitment of all the members of the College to the administration of justice in the Supreme Courts of Scotland, and their involvement, through their different roles, in that common endeavour.

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Section 14 – Auditors’ functions

34. Section 14 sets out the functions of the auditors of court. Subsection (1) provides that it is their role to carry out judicial taxations⁹ and other functions set out in statute (the word “enactment” includes rules of court by virtue of schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010). Subsection (2) makes express provision that an auditor can carry out other taxations. Subsection (3) allows sheriff court auditors to tax accounts relating to actions in any of the sheriff courts in Scotland – in other words there will be a break from previous practice in terms of which a commission as sheriff court auditor would only cover one sheriffdom.

Section 15 – Guidance

35. This section confers a duty on the Auditor of the Court of Session to issue written guidance to the other auditors of court about the exercise of their functions. Subsection (2) requires that this guidance must relate to the types and levels of expenses that may be allowed in a taxation. The other auditors of court (as well as the Auditor of the Court of Session) are required to have regard to the guidance (subsection (3)) which must be published (subsection (4)) and may be revised as appropriate from time to time (subsection (5)).

Section 16 – Reports

36. Section 16 places a duty on the SCTS to publish an annual report of the number of judicial and other taxations carried out by auditors of court during a financial year and the payments received for that work. Subsection (4) defines a ‘judicial taxation’ for the purposes of the report.

Part 4: Group proceedings

Section 17 – Group proceedings

37. Section 17 provides for a new court procedure known as ‘group procedure’ that will be available only in the Court of Session. Group

⁹ Judicial taxation is the process where the amount properly payable by virtue of an award of expenses is determined. The auditor through the process of taxation adjudicates on disputes as to that amount, applying the law as to expenses to the factual position. The amounts may be significant to the parties.

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proceedings are similar to what is known as “multi-party actions” or “class actions” in other jurisdictions. Group procedure is intended to be available for both private law and public law (judicial review) proceedings.

38. Subsection (2) sets out the circumstances in which a representative party may bring group proceedings. Although there is no upper limit on the numbers in the group, there must be at least two people within the group. Each member must have a separate claim in the proceedings.

39. Subsection (3) provides that people must explicitly opt-in to the group procedure for their claim to be considered in the group proceedings. In other words, the Bill excludes what is sometimes known as “opt-out” procedure.

40. Subsection (4) provides that the representative party may or may not be a member of the group. That person must be authorised by the Court as the representative party and further provision may be made about this in rules made by act of sederunt under section 18(1) and (2)(a). There may only be one representative party (subsection (5)).

41. Subsection (6) requires that group proceedings may only be brought with the permission of the Court. Subsection (7) provides that permission will only be given if the claims made in the proceedings are related to each other. An act of sederunt under section 18(1) may make further provision about circumstances in which permission may be refused.

42. Subsection (8) confers authority on the representative party to represent each member in the group and make decisions in group proceedings on their behalf. This is subject to any limiting provision in the agreement between the group or in an act of sederunt under section 18(1).

43. Subsection (9) provides that group proceedings will not be jury actions by virtue of section 11 of the Court of Session Act 1988.

Section 18 – Group procedure: rules

44. Section 18 gives the Court of Session the power to make provision by an act of sederunt about group procedure. As mentioned in paragraph 30, the core rule-making powers for the Court of Session are in the Courts Reform (Scotland) Act 2014, and subsection (4) expressly provides that

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this section does not affect the Court's power to make rules under other enactments, including that Act.

45. Subsection (2) gives non-exhaustive examples of things that provision may be made about:

- who can bring proceedings on behalf of the group and what actions are to be taken by a representative party, for example whether they must draw up a scheme of division for damages claimed or other documentation;
- the types of claims that are excluded from group procedure;
- rules about refusal of permission to bring group proceedings and appeal against a decision to grant or refuse permission;
- rules about group proceedings not being subject to the exclusive competence limit in the sheriff court as provided for in section 39 of the Courts Reform (Scotland) Act 2014. Under this section, a case of a value of £100,000 or less must be heard in the sheriff court unless permission is granted for the case to be heard in the Court of Session. As group proceedings are confined to the Court of Session, section 39 may need to be modified or disapplied in relation to them;
- rules about adding claims to or removing claims from group proceedings after they have been commenced; and
- what actions taken by the representative will need the Court's permission.

46. Subsection (3) ensures that any rules must not contradict the requirements of section 17. Subsection (4) makes provision about ancillary matters which may be incorporated in the rules and allows them to modify enactments and to make different provision for different purposes, and subsection (5) clarifies that this section does not affect any other power the Court has to regulate its practice and procedure.

Part 5: General provision

Section 19 – Regulations

47. Section 19(1) allows regulations to include ancillary provision and make different provision for different purposes. Subsections (2) to (4) also

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make provision about the parliamentary procedure which applies to different sets of regulations. This section does not apply to group procedure rules under section 18 because they are in the form of an act of sederunt rather than regulations.

Section 20 – Ancillary provision

48. Section 20 allows the Scottish Ministers, by order, to make “standalone” ancillary provision in relation to the Act or provision made under it, including in group procedure rules. By virtue of section 19(3) any ancillary provision amending primary legislation will be subject to the affirmative procedure, otherwise ancillary provision will be subject to the negative procedure.

Section 21 – Meaning of “court”

49. This section provides that, in relation to proceedings in the sheriff court, references to the “court” throughout the Bill include references to a sheriff. This includes the Sheriff Personal Injury Court established by the All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015.

Section 22 – Commencement

50. This section makes provision in relation to the commencement of the Bill. By virtue of section 19(4), commencement regulations made by the Scottish Ministers are subject to the “laid only” procedure.

Schedule – Auditor of the court of session: modification of enactments

51. The schedule is introduced by section 13(7). Paragraphs 1 and 2 repeal the existing legislative provision for the office of the Auditor of Court of Session, namely the Court of Session Act 1821 and certain sections of the Administration of Justice (Scotland) Act 1933. Paragraph 4 repeals section 36(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 which is a redundant amendment to the Legal Aid (Scotland) Act 1986 that has never been brought into force. The Scottish Government does not propose to commence section 36(4) referred to and therefore it should be repealed.

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