

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

---

## Financial Memorandum

### Introduction

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is 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:
  - Explanatory Notes (SP Bill 14–EN);
  - a Policy Memorandum (SP Bill 14–PM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 14–LC).
3. This Financial Memorandum has been prepared by the Scottish Government to set out the costs associated with the measures introduced by the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.
4. The Bill provides the legal framework to implement a number of key recommendations from Sheriff Principal Taylor's Report of the Review of Expenses and Funding of Civil Litigation in Scotland ("the Taylor Review")<sup>1</sup>. These recommendations relate to success fee agreements and expenses in civil litigation.

---

<sup>1</sup> Published September 2013. See:  
<http://www.gov.scot/Resource/0043/00438205.pdf>

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

5. 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").<sup>2</sup> These recommendations relate to group proceedings (multiparty actions) and auditors of court.

6. The estimates of costs contained in this Memorandum are compiled from information provided by those bodies affected by this Bill. The figures and projections provided are the best estimates available for the costs and savings that will be generated as a result of the provisions contained in this Bill.

7. This Financial Memorandum assumes that most of the Bill provisions will take effect in the financial year 2018-2019.

## Overview

8. 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 (they are currently only enforceable if entered into with a claims management company). 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.

---

<sup>2</sup> 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>

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

- Part 2: Expenses in civil litigation — places a restriction on the court regarding making 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 (the sheriff courts, the Sheriff Appeal Court and the Court of Session) with the power to award expenses against a third-party funder 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 codifies the power of the courts to make legal representatives personally liable for expenses where they breach their duties to the court.
- Part 3: Auditors 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 the SCTS to publish details of auditors’ work and fees generated by taxations.
- Part 4: Group proceedings — makes provision for a group procedure to be introduced in Scotland, available as an “opt-in” procedure in the Court of Session.
- Part 5: General provision — includes provision in relation to subordinate legislation, interpretation and commencement.

9. The Civil Justice Statistics in Scotland 2015-16<sup>3</sup> indicates that since 2012-13, the number of civil law court cases has remained stable. This contrasts with the downward trend observed in the preceding four years. The majority of the cases affected by the Bill’s provisions will relate to personal injury and damages. Table 1 gives details of the latest statistics relating to these.

---

<sup>3</sup> See <http://www.gov.scot/Resource/0051/00515767.pdf>.

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

Table 1 – Personal injury and damages in Scotland 2013-14 to 2015-16<sup>4</sup>

Type of action	2013-14	2014-15	2015-16
Personal injury	8,287	9,210	8,766
Damages	3,195	2,351	2,296

10. No categorised breakdown of damages cases is available but Table 2 gives a breakdown of personal injury cases.

Table 2: Personal injury cases initiated and disposed of in the civil courts, by case type, 2013-14 to 2015-16<sup>5</sup>

Case type	2013-14		2014-15		2015-16	
	Initiated	Disposed	Initiated	Disposed	Initiated	Disposed
Road traffic accident	4,770	3,893	5,143	3,970	4,897	4,197
Accident at work	1,797	1,653	1,817	1,623	1,721	1,560
Clinical negligence	262	178	629	195	388	238
Asbestos	320	598	458	633	300	430
Other	1,138	1,079	1,163	941	1,460	1,108
<b>Totals</b>	<b>8,287</b>	<b>7,401</b>	<b>9,210</b>	<b>7,362</b>	<b>8,766</b>	<b>7,533</b>

<sup>4</sup> Source - Civil Justice Statistics in Scotland 2015-16 (<http://www.gov.scot/Publications/2017/03/5915/1>)

<sup>5</sup> Source - Civil Justice Statistics in Scotland 2015-16 (<http://www.gov.scot/Publications/2017/03/5915/1>)

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

11. Whilst personal injury cases therefore typically account for a substantial proportion of court business, very few of these personal injury cases are funded by legal aid. Figures on legally aided personal injury cases are provided in table 3 below.

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

**Table 3: Legal Aid - Personal injury cases**

	<b>2013-14</b>	<b>2014-15</b>	<b>2015-16</b>	<b>2016-17<sup>6</sup></b>
Applications for full civil legal aid received	392	337	294	239
Grants of full civil legal aid made (certificates issued) <sup>7</sup>	156	127	114	99
Total cost (inc VAT) of payments on full civil legal aid cases	£4.6M	£2.4M	£2.3M	£1.4M
Average case cost of full civil legal aid cases	£23,000	£15,700	£17,400	£12,000

12. This comparison of the court and legal aid statistics makes it clear that most personal injury cases are funded by other methods than by legal aid. For example, in 2015-16, there were 8,766 personal injury cases initiated, but of those, only 239 (2.7%) involved an application for legal aid of which 99 (1.1%) received a full grant of legal aid. The Bill will further widen those alternative funding options.

13. The Bill is mainly permissive in its provisions and therefore will not directly impose an extra financial burden on stakeholders. There are, however, potential financial implications for local authorities, as well as other bodies, individuals, and businesses, which might be subject to claims for personal injury.

14. The exceptions to the above are the provisions relating to the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court, and the independent sheriff court auditors<sup>8</sup>. These are all self-employed posts which will become posts within the SCTS when each office-holder is succeeded in office.

15. There is difficulty in providing figures for most of the areas provided for in the Bill. There are a number of reasons for this.

<sup>6</sup> 2016-17 figures are preliminary management info

<sup>7</sup> Note that not all applications are granted.

<sup>8</sup> That is, the auditors who are not at present employed by the Scottish Courts and Tribunals Service.

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

- As the Bill is permissive, it is not known what the take up will be for the new options available in civil litigation. Much will depend on market practice.
- Those professionals mainly affected by the proposals are civil court practitioners and there are no relevant official or comprehensive statistics or financial details regarding these activities for the private sector.
- Statistics are often not available from law firms as the information is regarded as commercially sensitive.

16. The rationale of the main Bill proposals on success fee agreements (particularly damages based agreements) and qualified one way costs shifting (QOCS) is to give reassurance to individuals who may be swithering about whether or not to pursue a claim (particularly personal injury claims) on the grounds that they are concerned about (a) how much they might have to pay their own lawyer and (b) how much it might cost if the case is lost and they have to pay expenses to the defender.

17. The foreword to Sheriff Principal Taylor's Review does contain some indicative figures on costs. It notes that, following the disclosure by some firms of solicitors of their normal terms of business (on a confidential basis), the average award of damages in a personal injury sheriff court ordinary cause action is £9511 and the average solicitor's fee in an award of judicial expenses is £4980. These figures are relatively low and it is anticipated that those cases currently inhibited from coming to court which will be assisted by the Bill's provisions are likely to be on average of a lower value.

18. Details of the finances of the Auditor of the Court of Session and those sheriff court auditors who are self-employed are currently not matters of public record. The Bill will change this situation by requiring the publication of annual reports of judicial and other taxations.

## Part 1: Success fee agreements

### Background

19. Speculative fee agreements and damages based agreements (DBAs) are both types of success fee agreements or "no win, no fee" agreements,

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

although in the case of DBAs some may be “no win, lower fee” agreements. In both cases, there is a fee to be paid in the event of success (the “success fee”) which is different from the fee that is payable in the event of a loss. Consequently, the Bill generally treats both types of agreement as a form of “success fee agreement”.

20. Following the introduction of section 61A of the Solicitors (Scotland) Act 1980<sup>9</sup> solicitors may agree to act on a speculative basis under three different types of speculative fee agreement.

- Type I - a solicitor may agree to accept party and party expenses with a success fee payable by their client of up to 100% of the fee element of the judicial account.
- Type II - a solicitor may agree to accept agent and client expenses in the event of the case being successful, without any percentage increase for success. This will cover work done before the start of the litigation together with any other work carried out by the solicitor which the auditor considers to be fair and reasonable.
- Type III - a solicitor may enter into a written fee agreement with their client with a stated hourly rate and a success fee calculated as a percentage uplift of that rate. The agreement will provide that the judicial account is prepared on an agent and client basis.

21. Success fees are not recoverable from the unsuccessful opponent. Should they be successful, pursuers who have entered into a speculative fee agreement with their solicitors are therefore required to pay success fees out of their own funds. In practice, success fees are often taken out of funds recovered in the litigation. For this and other reasons, including the potential incentives that speculative fee agreements may offer lawyers, some commentators have argued that such agreements may not always be in the best interests of the client.

22. Many solicitors firms have imposed a voluntary cap on the success fees that they charge, for example, by guaranteeing in their speculative fee agreement that no more than 20% or 25% will be deducted from the monetary award.

---

<sup>9</sup> With effect from 4 July 1992 by virtue of section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

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

23. Whilst pursuers may be charged no fees by their own solicitor under a speculative fee agreement if their case is unsuccessful, they may still be liable for their opponents' expenses. Depending on the agreement with their solicitor, unsuccessful litigants may also be liable for their own outlays. It may be possible for pursuers to take out after the event ("ATE") insurance to cover themselves against the risk of being found liable for their opponent's expenses. In the event of success, the ATE insurance premium is not recoverable from the defender and must be absorbed either by the pursuer or by their solicitor.

24. Research published in 1998 on the funding of personal injury litigation in Scotland found that speculative fee agreements were relatively rare.<sup>10</sup> By 2009, however, a large proportion of actions for personal injury in Scotland were reportedly funded on the basis of speculative fee agreements of one type or another<sup>11</sup>. This was despite the reportedly high cost or unavailability of ATE insurance in Scotland and the fact that success fees and ATE insurance premiums are not recoverable from an unsuccessful opponent.

25. The other type of speculative fee agreement is a DBA. These are a type of 'no win no fee' arrangement under which the lawyer is only paid if the case is successful and receives no payment if the case is lost. With DBAs, the payment that lawyers receive can be calculated as a proportion of the damages awarded to the pursuer. In contrast, under a speculative fee agreement lawyers' success fees are an uplift on the lawyer's base costs. In Scotland, the position with DBAs differs between solicitors and advocates. Advocates are expressly forbidden by the Faculty of Advocates from entering into DBAs, whereas the Law Society of Scotland's Practice Rules do not contain a specific prohibition. However, such agreements are unenforceable if entered into by solicitors on the basis that they fall within the category of contracts which are *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 invalid).

---

<sup>10</sup> John Blackie et al, Funding Issues in Personal Injury Litigation (1998).

<sup>11</sup> As reported by respondents to the Consultation Paper of the Scottish Civil Courts Review - See Report of the Scottish Civil Courts Review (2009), Volume 2, page 95

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

26. The provision in this Part of the Bill increases options and provide a greater level of transparency and simplicity for pursuers entering into success fee agreements (both speculative fee agreements and DBAs). The Bill confers powers on the Scottish Ministers, through regulations, to stipulate the maximum proportion of damages that can be included in the solicitor's success fee and to make further provision about success fee agreements. It provides for DBAs to be enforceable by solicitors in Scotland. It also provides 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.

### Power to cap success fees

27. Specifically, section 4 of the Bill will enable the introduction of caps on the amount of a damages award in all success fee agreements which can be included in the legal provider's success fee in regulations. Sheriff Principal Taylor recommended the introduction of the sliding scale of percentage caps as shown in Table 4 below. The Bill gives the Scottish Ministers the powers to set the caps by regulations.

Table 4: Sheriff Principal Taylor's recommended sliding caps for personal injury cases

Type of case	Cap (all caps include VAT)
personal injury cases	up to 20% for the first £100,000 of damages up to 10% for the next £400,000 up to 2.5% of damages over £500,000
all other civil court actions	up to 50% of the monetary award recovered

### Costs on the Scottish Administration

28. There are no direct costs on the Scottish Administration. However, it is possible that one result of the provision of sliding caps may be to encourage more people to pursue a claim against the Scottish Government or the SCTS as the success fee will be limited. Should this potential increase in actions arise, then it may lead to an increase in the levels of

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

public funds being spent on defending such actions and in paying out any awards of damages.

29. There are no further costs on the Scottish Government expected as a result of this provision. Whilst the SCTS may be affected by an increase in court business, court fees are set at rates to effect full cost recovery and there should be no detrimental financial impact<sup>12</sup>.

### Costs on local authorities

30. There are no direct costs on local authorities. However, again, it is possible that the provision of sliding caps may affect local authorities if the sliding cap encourages more people to pursue a claim as the success fee is limited. Should this potential increase arise, it may lead to an increase in the amount of public funds being spent on defending these actions and paying out any awards of damages.

### Costs on other bodies, individuals and businesses

31. There are no direct costs on other bodies such as NHS Scotland, individuals, and businesses. However, the provision of sliding caps is intended to encourage more people to make a claim as the success fee is limited. That may lead to an increase in costs for some businesses in respect of the costs of defending any such actions and potentially paying any damages awarded. Individuals are less likely to be sued and are therefore unlikely to be affected in the same way.

32. The provision of sliding caps is intended to make the costs to individuals of pursuing court action more predictable.

33. An issue may arise for those lawyers who normally act for pursuers and who rely on income from damages claims to ensure profitability. Such lawyers who currently charge more than the perceived market rate could potentially see a reduction in profits owing to the cap on the level of success fee they are able to charge. However, Sheriff Principal Taylor noted in his report that such is the competition between law firms in this area that most firms charge less than the proposed statutory caps and some do not charge an enhanced fee at all in the event of success.

---

<sup>12</sup> See the Court Fees (Miscellaneous Amendments) (Scotland) Order 2016 which came into force on 28 November 2016.

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

34. Some, if not all, claims management companies (“CMCs”) will be affected by this measure. There is anecdotal evidence that some CMCs are charging up to 33% of damages. The cap will mean that such firms’ income will decrease as pursuers benefit from the cap on success fees.

35. The reduction in income for pursuer lawyers and CMCs may be mitigated by the provisions in section 3 which 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. However, it qualifies this 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 he is or has been in receipt of civil legal aid shall be paid to the Scottish Legal Aid Board (“SLAB”), unless regulations under that section provide otherwise.

36. As far as individual pursuers in personal injury claims are concerned, section 6 provides that they are not required to make any payment other than from the success fee, except for any sums in respect of insurance premiums in connection with the claim. This means that the expenses of the case must be paid by the legal provider.

37. The legal provider will look to recoup their expenses from the success fee. In most cases, there will not be any difficulty. It is possible that some pursuer lawyers may be adversely affected on occasions where sanction for counsel is not granted. In a successful case where sanction is not granted and the damages awarded are less than expected, there may be unrecoverable expenses, e.g., counsel’s fees and expert witness’ fees, which exceed the award. It is considered that this will be very rare, but on the occasions where it does happen, it will leave the lawyer with responsibility for making sure that both the pursuer’s and defender’s expenses are paid in full. Law firms are not obliged to enter into success fee agreements and those who currently do model cash flow and risks so as to be able to bear the financial implications of the minority of cases such as this.

38. The introduction of sliding caps should not have an impact on the Legal Aid Fund. The provision is aimed at those pursuers who do not qualify for legal aid. Those who do qualify for legal aid will receive

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

assistance on the same basis as at present. However, some of those who qualify for legal aid may choose a DBA as they may be attracted by its simplicity as a funding method or because the legal firm acting for them does not offer legal aid<sup>13</sup>. Others may choose to be funded through legal aid rather than a success fee agreement as the legal aid route would lead to them being in receipt of the total amount of the damages, not a proportion, in the event of success.

## Enforceability

### Background

39. “Enforceability” is the term used to indicate that lawyers can offer the type of success fee agreement and enforce payment from the client.

40. In a speculative fee agreement, an enhanced fee will normally be charged in the event of success. The success fee is calculated either with reference to the fee element of the judicial expenses payable by the unsuccessful party or by reference to the hourly rate agreed by the solicitor and client. Under both speculative fee agreements and DBAs, no fees or, very occasionally, lower fees are charged by the client’s solicitor if the case is lost.

41. Critically, under a DBA the lawyer has a direct financial interest in the value of damages awarded, which is not the case under a speculative fee agreement. Under a DBA a lawyer would have to assess the likely damages available in a case, the costs likely to be incurred and the perceived chances of success. A key difference is that under a speculative fee agreement the successful pursuer would have to pay the success fee from their damages (currently the successful client is not exposed to any costs). Under a DBA the successful client would have to pay their lawyer a proportion of their damages.

42. As stated in paragraph 25 above, solicitors are unable to enter into DBAs at present though some larger firms of solicitors have

---

<sup>13</sup> The firm might take the view that, removed from the Scottish Legal Aid Board requirements of supervision and sanction, the firm under the DBA can instruct better counsel and expert witnesses so the DBA is “better” than legal aid even though the client has to give some of their damages to the firm.

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

circumnavigated this prohibition by creating their own claims management companies (CMCs). CMCs are currently unregulated in Scotland, but such regulation will be considered in the Review of the Regulation of Legal Services announced on 25 April 2017<sup>14</sup>. Section 2 of the Bill will change this by allowing Scottish solicitors to enter into DBAs for the first time.

### Costs on the Scottish Administration

43. The wider choice of funding methods may lead to an increase in the number of actions raised affecting both the Scottish Government and the SCTS which may be subject to a claim. It is not possible to quantify this. Individuals may be encouraged by the change to make a claim. This potential increase in actions against them may lead to public funds being spent on defending these actions and in paying out increased amounts of damages.

44. There are not likely to be further costs on the Scottish Government resulting from this provision. The SCTS may be affected by an increase in court business but there should be no financial impact owing to the courts having fees set at full-cost recovery.

### Costs on local authorities

45. The wider choice of funding methods may lead to an increase in the number of actions raised affecting local authorities which may be subject to a claim. It is not possible to quantify this. Individuals may be encouraged by the change to make a claim. An increase in valid claims is likely to lead to councils being liable for increased amounts of damages.

### Costs on other bodies, individuals and businesses

46. The wider choice of funding methods may also lead to an increase in the number of actions raised affecting NHS Scotland health boards and other bodies or individuals who may be subject to a claim. It is not possible to quantify this. Individuals may be encouraged by the change to make a claim. An increase in valid claims is likely to lead to NHS Scotland health boards and other defenders being liable for increased amounts of damages.

---

<sup>14</sup> <http://www.gov.scot/About/Review/Regulation-Legal-Services>

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

47. Some concerns were raised in the consultation that under a DBA, the lawyer has a direct financial interest in the value of damages awarded, which is currently not the case under a speculative fee agreement. Under a DBA, a lawyer would have to assess the likely damages available in a case, the costs likely to be incurred and the perceived chances of success.

48. Meritorious cases that previously were unable to secure funding may now so do. If that happens, defenders may face a greater number of cases.

49. As solicitors will be able to enter into DBAs, there is likely to be an impact on the number of cases being handled by CMCs owing to greater competition. Those entering a DBA with a solicitor will have greater certainty as to what their fees will be. Some CMCs charge a fee which is excluded from the 'no win no fee' agreement for referral to a solicitor. This might encourage pursuers to use solicitors who handle the case from start to finish with no hidden/extra fees. It may be that law firms operating CMCs will wind them down and run claims management from within the firm, but this is a matter for the market to determine, subject to the Review of the Regulation of Legal Services.

50. The introduction of solicitor DBAs should not have an impact on the Legal Aid Fund. The provision is aimed at those pursuers who do not qualify for legal aid. Those who do qualify for legal aid will receive assistance on the same basis as at present. However, some of those who qualify for legal aid may choose a DBA as they may be attracted by its simplicity as a funding method or because the legal firm acting for them does not offer legal aid. Others may choose to be funded through legal aid rather than a success fee agreement as the legal aid route would lead to them being in receipt of the total amount of the damages, not a proportion, in the event of success.

## Part 2 – Expenses in civil litigation

### Background

51. Part 2 of the Bill places a restriction on the court from making an award of expenses against a person making a personal injury claim provided the person conducts the proceedings in an appropriate manner as defined in by the Bill (qualified one-way costs shifting). It provides the courts with the power to award expenses against a third-party funder and

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

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 Scottish civil courts the power to award expenses to a party in civil proceedings who is in receipt of free legal services and establishes a requirement that the award is payable to a charity registered in Scotland which is designated by the Lord President of the Court of Session. It incorporates in statute the power of the Scottish Civil Courts to make solicitors personally liable for expenses occasioned by their own fault or where they are guilty of an abuse of process, extended to cover all those with rights of audience. Lastly, this Part of the Bill makes minor and consequential modifications to rule making powers.

### Qualified one way costs shifting

52. Section 6(2) of the Bill provides for what is known as qualified one-way costs shifting (“QOCS”). Even in a relatively modest claim, legal expenses can mount up. In many cases, the legal costs will exceed the amount at issue in the proceedings. If a pursuer’s expenses would exceed the likely benefit of the litigation, then it is likely that the case will not be pursued. Concern about the cost of losing a case can deter members of the public from bringing a genuine claim. Liability for expenses is a crucial component of access to justice but can act as a barrier to access to justice.

53. The general rule in litigation is therefore that “expenses follow success” – the unsuccessful party bears the successful party’s expenses. In other words, the costs are shifted. In personal injury litigation, most pursuers are private individuals without the financial means to fund the loss of a litigation, whilst the vast majority of defenders have the strength of an insurance company behind them.

54. The proposals in section 1 of the Bill on success fee agreements limit the potential liability of a pursuer in such personal injury cases to his or her own solicitor, but they do nothing to limit the potential liability of the unsuccessful pursuer to pay the expenses of the defender, if the defender is successful. Pursuers may therefore still be deterred from making use of the courts for a meritorious claim even if they have the benefit of a success fee agreement.

55. Section 8 of the Bill means that the court must not make an award of expenses against the pursuer of a claim or appeal in civil proceedings for

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

personal injuries, including clinical negligence, where they have conducted proceedings in an appropriate manner. Consequently, defenders will generally be ordered to pay the expenses of successful claimants, but, subject to certain exceptions, they will not recover their own expenses even if they successfully defend the claim.

56. Parties which have a valid case will therefore be able to bring a personal injury claim, but at proportionate cost, and without having to worry about paying the expenses of the defender if they lose. QOCS will therefore introduce equality of arms between pursuers and defenders, most of whom will be or will have the backing of insurance companies in personal injury actions so that the costs become more appropriate.

57. The effect of this provision on defenders is likely to be as follows. Firstly, in cases in which they are successful they would now be liable for their own expenses instead of recovering their costs from unsuccessful pursuers (unless an award of expenses is made under section 8(3) in the particular circumstances provided for in section 8(4)). Secondly, the proposal may result in an increased volume of cases pursued by pursuers. Thirdly, defenders may be more constrained in the amount of legal costs they are willing to incur as they will now be liable for their own costs, regardless of the outcome of the case under the proposal. Knowing they must pay for their own legal spending with certainty may reduce the amount defenders spend overall.

58. However, the effect on defenders may be less than would first appear. Sheriff Principal Taylor noted: “Jackson LJ observed in his Preliminary Report that in a sample of between 22,000 and 23,000 notified claims obtained from an insurer, costs orders against claimants were obtained in only 0.1% of the sample.” Sheriff Principal Taylor commented: “While I do not have equivalent statistics for this jurisdiction, all qualitative evidence and my own experience point to the position being broadly the same.”<sup>15</sup> This means that defenders very rarely press for expenses in cases that they win. As a result, their marginal loss owing to these changes would be very limited.

---

<sup>15</sup> SP Taylor: Review of Expenses and Funding of Civil Litigation in Scotland, p170, para 50 cf Jackson LJ, Review of Civil Litigation Costs: Preliminary Report, Vol. 1, (2009), Chapter 25, paragraph 2.6.

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

59. The fact that defenders will no longer be able to recoup their expenses from the pursuer may lead to more cases being settled out of court. Defenders will have to balance the cost of going to court with the risk of losing a case. For example, if expenses in a case exceed the expected payout, insurers may settle rather than go to court even if they consider it likely that they will be successful in the case. A very common type of action is a personal injury claim for whiplash following a road traffic accident. According to the UK Government the average payout in 2015 was around £1,850<sup>16</sup>. Whiplash is notoriously difficult to verify and unless there is obvious fraud, insurers will not defend such cases as they will not recoup their expenses.

### Costs on the Scottish Administration

60. The introduction of QOCS might lead to an increase in the number of personal injury claims as it will permit more pursuers, who may have been inhibited by the potential liability to the costs of defenders, to bring meritorious claims. Pursuers are unlikely to raise actions with little prospect of success and the Bill provides protections for defenders where the pursuers have acted inappropriately. This may lead to an increase in the number of cases in which the Scottish Government or the SCTS are defenders. It is not possible to quantify this. This potential increase in actions against them may lead to public funds being spent on defending these actions and in paying out any awards of damages.

61. There are no further costs on the Scottish Government resulting from this provision. The SCTS may be affected by an increase in court business but there should be no financial impact owing to the courts having fees set at full-cost recovery.

### Costs on local authorities

62. For reasons discussed above, the introduction of QOCS might lead to an increase in the number of personal injury claims as it will permit more pursuers, who may have been inhibited by the potential liability to the costs

---

<sup>16</sup> See “Reforming the soft tissue injury (whiplash) claims process” consultation, p 7 which can be viewed at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/579193/RPC-3432\\_2\\_-\\_MoJ\\_Reforming\\_the\\_soft\\_tissue\\_injury\\_whiplash\\_process\\_-\\_IA\\_c\\_-\\_opinion.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/579193/RPC-3432_2_-_MoJ_Reforming_the_soft_tissue_injury_whiplash_process_-_IA_c_-_opinion.pdf).

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

of defenders, to bring meritorious claims. This may lead to an increase in the number of cases in which local authorities are defenders. It is not possible to quantify this. This potential increase in actions against them may lead to increased costs in defending these actions and in paying out any awards of damages.

### Costs on other bodies, individuals and businesses

63. As with local authorities above, the introduction of QOCS might lead to an increase in the number of personal injury claims as it will permit more pursuers, who may have been inhibited by the potential liability to the costs of defenders, to bring meritorious claims. This may lead to an increase in the number of cases in which NHS Scotland health boards and other bodies, individuals, and businesses are defenders. It is not possible to quantify this. This potential increase in actions against them may lead to increased costs in defending these actions and in paying out any awards of damages.

64. As pursuers will no longer be generally liable for defendant costs in the event of losing a case, there will be no need to use ATE insurance. The effect is not likely to be great as it is understood that the high cost of ATE insurance, which is set at around 30% of the amount insured, means that it is not very prevalent in Scotland. This will be seen as advantageous to pursuers as ATE insurance is one of the 'surprise' hidden costs levied on pursuers by CMCs advertising 'no win, no fee'.

### Expenses where party is represented free of charge

65. The purpose of an award of expenses in litigation is to compensate the successful party for having to pay for legal representation. Sheriff Principal Taylor noted that the extent of a party's potential liability in expenses has an important tactical influence on the conduct of other parties to a litigation. The potential liability to meet the other side's expenses is often a powerful motivation for settling a case. Taylor was unaware of any case in which expenses had been awarded in favour of a party who had been represented *pro bono* that is, represented free of charge, rather than on the basis of a success fee agreement, in which fees would only be charged in the event of success). On this basis, it was suggested that such a party might be at a disadvantage in relation to prospects of settlement. This is because:

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

- If solicitors and counsel do not seek judicial expenses when representing clients pro bono, this may encourage their opponents to be more obdurate and protract proceedings unnecessarily – they should not benefit from the fact that the opponent was represented pro bono.
- If the opponent of a party represented pro bono is aware that an award of expenses is unlikely to be made against them, there is not a level playing field when negotiating a settlement.
- The vast majority of respondents to the consultation by Taylor were in favour of an express power to make it clear that the courts should have the power to make an award of expenses where the successful party has been represented on a pro bono basis.
- This provides equality of treatment to litigants who are represented pro bono, because awards can still be made against them if they lose.
- The potential for an award of expenses even in favour of a pro bono represented party may deter litigants whose claim is without merit.

## Costs

66. The only effect of this is that the court may make an order for expenses to be paid even when a party is represented free of charge. The beneficiary will be a charity registered in the Scottish Charity Register with a charitable purpose of improving access to justice. It is not possible to quantify the monies that will be received by the charity designated by the Lord President of the Court of Session as it is not known how many *pro bono* cases there will be and the expenses awarded in each case will be different.

## Third party funding

67. Third party funding refers to the provision of financial support for a litigation by individuals or companies with no pre-existing interest in the litigation. The Bill provides that it will be competent to award expenses against a person who has an interest in a litigation, but who is not a party. A person having an interest in a litigation would be a person who funds it, in whole or in part, and who has a financial stake in the outcome. This would include success fee agreements provided by claims management companies.

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

### Costs

68. This only affects pursuers who are looking for alternative methods of funding by widening their choice of funding methods. The third party funder and any intermediary may be liable to an award of expenses against them.

### Award of expenses against legal representatives

69. The Bill provides for an award of expenses to be made against a legal representative in a case where the court considers that they have committed a serious breach of their duties. This only affects legal representatives and is already an option open to the court although very rarely exercised.

### Part 3 – Auditors of court

70. This provision affects the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court, and those auditors of the sheriff court who are not already employees of the SCTS<sup>17</sup>.

71. The individual who is Auditor of the Court of Session also holds the post of auditor of the Sheriff Appeal Court at present. His earnings are not a matter of public record. He performs both judicial and extra-judicial taxations and takes a percentage of the value of the account as taxed.

Table 5

Year	Fees claimed by the Auditor of the Court of Session
2014/15	£106,836
2015/16	£148,957
2016/17	£76,014

<sup>17</sup> A majority of the auditors of the sheriff court are sheriff clerks and already employed by SCTS. Some auditors, however, are self-employed or in the case of the two Edinburgh Sheriff Court auditors, employed by or partners in solicitor firms.

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

72. Table 5 gives some detail of the fees claimed by the present Auditor of the Court of Session from the Scottish Government – his other income is additional to this. These are monies the Scottish Government pays to the Auditor to reimburse the Auditor for the loss of fees incurred from those litigants who are exempt from paying a court fee such as legally aided litigants and those receiving a passporting benefit (includes lodging/cancellation fees plus any fee fund dues). The Auditor's income will also include the earnings made from other judicial taxations, extra-judicial audits and fee assessments. The Auditor of the Court of Session is responsible for the costs relating to 4 members of staff which was £114,740 in wages in 2016. The Auditor also pays rental to the SCTS for accommodation, the rental being £24,360 in 2016.

73. It is proposed that the Auditor of the Court of Session will become a member of SCTS staff. Although the current earnings of the present Auditor of the Court of Session are not confirmed, it is likely that the post in future will involve a lower rate of remuneration. This will not affect the present Auditor as it is envisaged that transitional provision will allow the Auditor to continue in post as a self-employed person.

## Costs on the Scottish Administration

74. There are not expected to be any costs on the Scottish Government as a result of the provisions relating to auditor of court except for a saving of £13,000 per annum which is currently paid to the Auditor of the Court of Session as a stipend.

75. SCTS will become responsible for the employment of the Auditor of the Court of Session and the auditor of the Sheriff Appeal Court as well as an increased number of auditors of the sheriff court. This will lead to an increase in its staff budget and other costs. However, it is considered that the changes will be to benefit of the SCTS. Although the Auditor of the Court of Session's income is not a matter of public record, it is thought to be substantial. Table 5 gives an indication of the fees paid for taxation by the Scottish Government alone and this represent only a small proportion of the fees that the Auditor will receive from other bodies, businesses, and individuals. Some of those fees will relate to very high value civil commercial cases. Under the arrangements provided for in the Bill, the SCTS will receive all fees in both judicial and extra judicial taxations in all the Scottish courts. Although this income is unquantifiable, it is expected to

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

more than cover the increase in staff costs and other expenditure<sup>18</sup>. For example, the figure in Table 5 indicates that the Auditor claimed nearly £149,000 from the Scottish Government alone in 2015-16. This income alone covered the Auditor's staff and accommodation costs.

## Costs on local authorities

76. Guidance issued by the Auditor of the Court of Session as to what expenses are allowed and at what level is likely to lead to fewer cases being put forward for taxation and therefore costs generated in that way will be reduced.

## Costs on other bodies, individuals and businesses

77. Guidance issued by the Auditor of the Court of Session (as head of profession) as to what expenses are allowed and at what level is likely to lead to fewer cases being put forward for taxation and therefore costs generated in that way will be reduced.

## Part 4: Group proceedings

### Background

78. At present, it is not possible to bring group proceedings (also known as a multi-party action or a class action) in Scotland. Individuals seeking redress must raise their own individual action.

79. The provision in the Bill allows for group procedure to be developed for Scotland for the first time. It will be available as an "opt-in" only procedure in the Court of Session and the representative of the group does not need to be a member of the group. Specifically, it will give the Court of Session the power to make rules by an act of sederunt for group proceedings where two or more persons have a separate claim which may be the subject of civil proceedings.

---

<sup>18</sup> 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. By virtue of section 64(3) a sum received by an office-holder in the Scottish Administration must be paid into the Scottish Consolidated Fund. In the case of auditors of court this would include receipts in relation to extra-judicial taxation.

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

80. The Scottish Government does not consider that there are likely to be a large number of actions using this procedure, though large numbers of pursuers may be party to some of the actions leading to an increase in personal injury and damages claims as those who have suffered injury may be encouraged by the possibility of opting-in to group proceedings.

81. It is not possible at this stage to quantify the number of actions that will be brought and how many pursuers will use the new provision. The Civil Justice Statistics in Scotland 2015-16 indicate that 300 asbestos related claims were raised in the Scottish courts in 2015-16<sup>19</sup>. In addition 386 clinical negligence cases were raised. These are examples of the type of cases that might be considered suitable for multi-party actions. Another example is that of the Volkswagen car emissions issue. An article and video in 'the Herald' stated that Thompsons Solicitors, "has 800 of the claims, with an estimated 400 with other solicitors"<sup>20</sup>.

### Costs on the Scottish Administration

82. The Bill's provisions relating to group proceedings are not expected to have cost implications for the Scottish Government or the SCTS except in the event that they are subject to group proceedings, in which case the effect is likely to be the same as that outlined below for other bodies, individuals and businesses. Group procedure will be provided for by Court of Session rules.

83. It is considered that the introduction of group proceedings will also have an effect on SCTS court business. Permitting group proceedings only in the Court of Session is likely to increase the number of claims heard in the Court of Session and possibly lead to fewer cases in the Sheriff Personal Injury Court and the other sheriff courts. As court fees are now set at rates which reflect full cost recovery<sup>21</sup>, it is not considered that there will be any financial impact on SCTS as a result of more or fewer cases in the specific courts.

---

<sup>19</sup> See <http://www.gov.scot/Resource/0051/00515767.pdf>, tables 15-17.

<sup>20</sup> See

[http://www.heraldscotland.com/news/15181197.Video\\_VW\\_faces\\_5\\_million\\_legal\\_claim\\_in\\_biggest\\_ever\\_Scots\\_class\\_action\\_over\\_emissions\\_scandal/](http://www.heraldscotland.com/news/15181197.Video_VW_faces_5_million_legal_claim_in_biggest_ever_Scots_class_action_over_emissions_scandal/).

<sup>21</sup> See the Court Fees (Miscellaneous Amendments) (Scotland) Order 2016 which came into force on 28 November 2016.

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

### Costs on local authorities

84. Local authorities will only be affected by the provision if they are subject to group proceedings in which case the effect is likely to be the same as that outlined below for other bodies, individuals and businesses.

### Costs on other bodies, individuals and businesses

85. Other authorities, for example NHS Scotland health boards, and companies or individuals who might be subject to a group proceeding may be affected by the provision.

86. A disaster or other event leading group proceeding is likely to lead to an increased number of pursuers as some of those with a claim may be more willing to opt into group proceedings rather than take on the burdens of litigating as an individual. If such a group proceeding action is successful, it is probable that more pursuers will be awarded damages than if each had to claim as an individual leading to the total damages bill to the defender being higher. It is not possible at this stage to put any figures on this. In mitigation of this increase, the fact that a number of claims are to be heard in one action in the Court of Session may lead to a reduction in legal costs of a larger number of claims in the Court of Session, the Sheriff Personal Injury Court, and the other sheriff courts, especially if sanction for counsel was likely to be granted in the lower courts.

87. On the other hand, if a number of pursuers opt in to a multi-party action, the costs of defending that action may well be less than defending a number of individual cases.

88. Individual pursuers may be better off as a result of the possibility of multi-party actions, especially those who do not proceed on the basis of funding by a success fee agreement or legal aid. This is because legal costs will be shared between the various parties which have opted into the action.

89. It is difficult to quantify what the financial effect will be for defenders in group proceedings. This type of action is likely to be rare. Disasters like Piper Alpha or the ICL Stockline factory explosion might have led to group proceedings being instigated on behalf of the victims. Other examples where such proceedings may be appropriate are the mesh implants issue and the Volkswagen car emissions issue. On the latter, there are indication

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

that there are over 1200 Scots prepared to sue Volkswagen over this issue<sup>22</sup>. At present, that would require over 1200 individual actions in the sheriff courts. The introduction of group proceedings has the potential to reduce this to just one representative action in the Court of Session. The costs of this one case would be spread across all the 1,200 plus pursuers. The defender would also have reduced costs as they would only have to defend the one court action rather than the 1,200 or more. In addition, if the defender was unsuccessful they would only be liable for the pursuers' expenses in the representative case. Against this, as has been alluded to above, the group proceeding may lead to more pursuers and that in turn may lead to the unsuccessful defender having a higher damages bill.

90. The introduction of group proceedings may have an effect on the Legal Aid Fund. In the example above a proportion of the 1,200 pursuers may qualify for legal aid. If, for example, 5% so qualified<sup>23</sup>, under the present arrangements the Legal Aid Fund would provide assistance to 60 pursuers. The effect of the introduction of group proceedings would be that the Legal Aid Fund would only have to provide assistance in respect of 5% of the costs of the group action. It is considered unlikely that 5% of the cost of the representative case will exceed the total cost of 60 individual cases. The effect of the introduction of group proceedings may, therefore, lead to less call on the Legal Aid Fund.

---

<sup>22</sup> <https://www.pressreader.com/uk/the-herald/20170327/281887298139623>

<sup>23</sup> 5% is a percentage chosen for illustrative purposes only. It is considerably higher than the percentage of personal injury cases which are funded by legal aid at present (see table 3 above).

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

## Financial Memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -

[www.parliament.scot](http://www.parliament.scot)

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:

[www.parliament.scot/documents](http://www.parliament.scot/documents)