Contract (Formation and Remedies) (Scotland) Bill

[As amended at Stage 2]

Revised Financial Memorandum

Introduction

1. As required under Rule 9.7.8B of the Parliament's Standing Orders, this revised Financial Memorandum is published to accompany the Contract (Formation and Remedies) Bill, introduced in the Scottish Parliament on 2 October 2025, as amended at Stage 2.

2. This revised 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.

Costs on the Scottish Administration

3. Disputes concerning contracts, such as failure to provide goods or services, fall to be resolved by the parties. This might include raising court proceedings or other dispute resolution processes. The proposals in the Bill are not thought to have the potential to result in costs to the Scottish Administration other than those associated generally with the enactment of any new legislation. These are, for instance, printing and publication costs which are regarded as routine running costs rather than being attributable to the Bill.

4. Insofar as the Scottish Government enters into contracts under Scots law, there might be minimal training costs associated with the changes brought about by the legislation, which are likely to be covered by Continuing Professional Development for legal professionals drafting contracts (see below).

Costs on Scottish Courts and Tribunals Service

5. Given that the overall policy intent of the Bill is to produce legal rules that are as clear, certain and accessible as possible, costs to the Scottish Courts and Tribunals Service (the SCTS) might be reduced should fewer disputes arise. This in turn would reduce the need for court proceedings to resolve such disputes, although it is possible

that the number of cases initiated may increase, at least for an initial period, as the new provisions are tested.

Part 1 of the Bill

6. Part 1 contains a statement of the law on formation of contract, bringing as much as possible of that law into one place. It has not been possible to identify the annual number of court proceedings that involve disputes about the formation of a contract. The SCTS are unable to provide this information as this level of detail is not required or recorded within their case management systems. While the discussion that follows includes estimates of possible cost increases based on a 25% increase in the average annual number of cases,[1] the Scottish Government considers that, over the long-term, there will be fewer disputes on formation of contract as a result of the clarity provided by the Bill's provisions.

7. Questions about whether or not a contract has been formed are likely to be raised as part of the defence to an action already initiated rather than by the pursuer initiating an action. The most common type of court proceedings raised for breach of contract is an action for payment (other types of remedy that might be sought include interdict, specific implement or damages).

8. Taken from the SCTS management information for civil business and information provided by the SCTS, the average number of actions for payment (otherwise referred to as debt actions) raised in the sheriff court (including commercial actions) between 2019/20 and 2023/24 is 28,847 per year.[2]

9. Costs to the SCTS will vary depending on the stage at which a case is settled/decided. The SCTS estimates that if an action was defended and reached proof in the sheriff court, the costs to the SCTS will be in the region of £1,685 (based on an optimal 5 hours daily sitting time in the sheriff court). These costs include staff and judicial time.

10. It is recognised there may be an element of cost recovery from court fees, which are payable by parties at different stages in the proceedings. However, any level of cost recovery to the SCTS is difficult to estimate and will be dependent on:

- the type of civil action;
- the length and complexity of the case; and,
- whether parties qualify for fee exemption.

11. There will also be separate costs to the parties, where they appoint legal representation.

[1] The Scottish Government has used a figure of 25% which it considers to be a reasonable top-end estimate.
[2] In 2019/20 there were 34,820 actions raised; in 2020/21 there were 21,364; in 2021/22 there were 27,230; in 2022/23 there were 31,474; and in 2023/24 there were 29,347 actions.

12. The Scottish Government does not expect every defended action to raise questions about whether a contract has been formed or not. Most actions for payment are undefended, with around 16% defended in 2023/24 which, applied to the average number of actions for payment, would be an average of 4,616 defended cases. Assuming, therefore, that 25% of defended cases raise such questions, the following cost estimates for SCTS represent a 1% and 5% rise in the number of average defended actions for payment which proceed to proof.

- No increase (1,154 cases[3]): £1,944,490
- 1% increase (1,166 cases): £1,964,710 (+ £20,220)
- 5% increase (1,212 cases): £2,042,220 (+ £97,730).

13. In the Court of Session the average number of debt actions (including commercial actions) raised between 2019/20 and 2023/24 is 11 per year.[4] The SCTS are unable to provide information about the percentage of actions defended as the data required to provide this level of detail is under development and will be published in due course once development is complete.

14. As mentioned above, the costs to the SCTS will vary depending on the stage at which a case is settled/ decided. The SCTS estimates that if an action was defended and reached proof in the Court of Session, the costs to the SCTS will be in the region of £2,210 (based on an optimal 5 hours daily sitting time in the Outer House of the Court of Session). These costs include staff and judicial time.

15. As information on the number of debt actions that are defended is not available or recorded, for the purposes of this Memorandum, the Scottish Government has assumed that all actions would be defended, in particular given that the sums sought are likely to be greater than £100,000 (which is the privative jurisdiction of the Court of Session in actions for payment). Assuming that 25% of the average number of actions raised in the Court of Session raise issues of contract formation then the following costs estimate for the SCTS as a result of an increase in actions would be as follows:

- No increase (3 cases[5]): £6,630
- 5% increase (4 cases[6]): £8,840 (+ £2,210).

Part 2 of the Bill

16. Part 2 of the Bill deals with aspects of the law of remedies for breach of contract. It has not been possible to identify the annual number of court proceedings that involve the remedies contained in Part 2 of the Bill. The SCTS are unable to provide this information as this level of detail is not required or recorded within their case

[3] That is, one quarter of the number of average of defended cases.
[4] In 2019/20 there was 1 action raised; in 2020/21 there were 12; in 2021/22 there were 14; in 2022/23 there were 19; and in 2023/24 there were 19 actions.
[5] That is, one quarter of the 11 average cases raised in the Court of Session.
[6] Both a 1% and 5% increase in actions raised result in a functional rise of 1 case. Therefore the figure for a 5% increase alone has been included here.

management systems. With the exception of provisions regarding contributory negligence,[7] that Part is concerned with what are known as 'defensive' or 'self-help' remedies. These are remedies exercised by parties themselves and do not require court proceedings to be raised. While the discussion that follows includes estimates of possible cost increases based on a 33% increase in the average annual number of cases, the Scottish Government considers that, over the long-term, there will be fewer disputes as a result of the clarity provided by the Bill's provisions.

17. Regarding the other aspect of the law dealt with in that Part, contributory negligence, this is very probably pled as part of a defence to an already subsisting legal action for damages rather than being the cause of raising court proceedings. With regard to retention, while it is a self-help remedy it is also a defence and it is likely to be plead as part of subsisting legal actions for damages. Amendments made to re-state and reform of the law of retention at Stage 2 of the Bill may increase the number of cases in which the defence is plead, although the increased clarity of the law might be expected to reduce this in the long-run.[8]

18. The average number of actions for damages raised in the sheriff court (including commercial actions) between 2019/20 and 2023/24 is 1,911,[9] of which 77% were defended (an average 1,472 cases annually). Assuming, therefore, that 33% of defended cases raise such questions, the following cost estimates for SCTS represent a 1% and 5% rise in the number of average defended actions for payment which proceed to proof.

- No increase (491 cases[10]): £827,335
- 1% increase (496 cases): £835,760 (+ £8,425)
- 5% increase (516 cases): £869,460 (+ £42,125).

19. In the Court of Session, the average number of actions for damages (including commercial actions) raised between 2019/20 and 2023/24 is 193,[11] of which it is not possible to say how many were defended. Assuming that all cases are defended and that 33% of cases raise the defence of contributory negligence and/or retention giving the following estimate.

- No increase (65 cases[13]): £143,650
- 1% increase (66 cases): £145,860 (+ £2,210)
- 5% increase (69 cases): £152,490 (+ £8,840).

[7] Contributory negligence is when a pursuer is found, to some extent, to be responsible and this can lead to a reduction of the amount they might otherwise have been awarded.
[8] Accordingly, rather than assuming a 25% increase as in the Financial Memorandum published at the Bill's Introduction this revised Financial Memorandum assumes a 33% increase.
[9] In 2019/20 there were 3,674 actions raised; in 2020/21 there were 1,206; in 2021/22 there were 1,141; in 2022/23 there were 1,554; and in 2023/24 there were 1,977 actions.
[10] That is, one third of the 1,472 average of defended cases.
[11] In 2019/20 there were 242 actions raised; in 2020/21 there were 223; in 2021/22 there were 216; in 2022/23 there were 152; and in 2023/24 there were 129 actions.
[13] That is, one third of the 193 average of defended cases.

20. While it is difficult to estimate the likely costs which will arise for the SCTS as a result of the Bill, the Scottish Government is of the view that it is more likely than not that there will be no significant additional costs to the SCTS. This is based on the expected low number of cases involving questions of formation of contract, contributory negligence, retention as a defence and because the self-help remedies in Part 2 of the Bill do not involve the court.

21. Based on the assumptions made in this section, the total costs to SCTS of the Bill might be as below.

- 1% increase in cases: + £30,855
- 5% increase in cases: + £150,905.

Costs on local authorities

22. The Scottish Government does not anticipate any costs related to the proposals to be borne by local authorities beyond the training costs of local authority staff associated with the reform of the law of contract, which is likely to be covered by Continuing Professional Development for legal professionals drafting contracts (see below).

Costs on other bodies, individuals and businesses

Costs on Scottish Legal Aid Board (SLAB)

23. Whilst any new law may be such that parties seeking to rely on it require professional advice, the Scottish Government does not anticipate that the proposed reforms would result in any significant additional demand for legal aid. Legal aid is available in disputes involving breach of contract and the Bill does not propose to change this.

24. Part 1 contains a statement of the law on formation of contract, bringing as much as possible of that law into one place. Questions about whether or not a contract has been formed are likely to be raised as part of a defence to an action already initiated, for instance for a breach of contract. Part 2 of the Bill deals with aspects of the law of remedies for breach of contract. With the exception of provisions regarding contributory negligence and retention insofar as it is plead as a defence, that Part is concerned with what are known as ‘defensive’ or ‘self-help’ remedies. These are remedies exercised by parties themselves and do not require court proceedings to be raised, and should not have a consequent impact on the legal aid fund beyond Advice and Assistance payments (A&A).

Full Civil Legal Aid

25. An individual[14] seeking advice or to raise civil proceedings would have to meet the eligibility criteria and find a legal aid solicitor willing to undertake the work. The Scottish Legal Aid Board (SLAB) also must be satisfied that it is reasonable to pursue or defend the case, meaning it has a reasonable chance of success.

26. For full Civil Legal Aid, the eligibility criteria is that an individual must have annual disposable income below £3,521 and disposable capital less than £7,853. The number of applications and the total sum paid will vary from year to year. In addition, with full Civil Legal Aid there may be a contribution to costs due from the assisted person depending on their financial situation. SLAB may also recover costs if money or property are awarded by the courts as part of its disposal, but this will vary from case to case and cannot be estimated.

27. From information provided by SLAB there were 21 applications for legal aid in 2022/23 involving breach of contract, of which 14 were granted. In 2023/24 there were 20 applications and 7 were granted. Figures available as part of SLAB's Annual Report show that for cases categorised as 'breach of contract' for the year 2022/23, the average case cost was £2,840 while for the year 2023/24, it was £7,226.

28. The clarity brought about by the Bill might increase the number of applications that are granted for full civil legal aid which could lead to SLAB considering there is, under the merits test, more chance of success in these types of dispute cases. Over the long-term, however, the Scottish Government considers that the clarity will lead to a decrease in the number of disputes on these matters. Assuming, therefore, an upper figure of 22 applications per year and that these are all granted, then using the average case costs for the years 2022/23 and 2023/24 as the bottom and top end of the range produces the following estimate:

- 12 cases (no increase): £34,080 – £86,172
- 25 applications: £71,000 - £180,650 (+ £36,920 - £94,478).

Advice and Assistance

29. Advice and Assistance is available for those seeking initial advice in relation to a civil legal dispute. The eligibility criteria for A&A is that an individual must have less than £1,716 in capital (which includes savings), and earn less than £245 per week. In the same Annual Report mentioned above, figures show that 30 applications for Advice and Assistance were granted which involved breach of contract, costing around £9,000 (this is the same figure for the period 2022/23). The average cost was £273 for 2022/23 and £316 for 2023/24. From information provided by SLAB there were 52 applications for legal aid in 2022/23 and in 2023/24 there were 64 applications. Again, over the long-term, the Scottish Government is of the view that the clarity brought about by the Bill will lead to a decrease in the number of disputes on these matters

[14] Companies, for instance, cannot apply for legal aid.

30. Assuming that the Bill increases the number of applications that are granted in the short-term, then an estimate of 45 applications granted and using the average case costs for the years 2022/23 and 2023/24 as the bottom and top end of the range produces the following estimate:

- 30 cases (no change): £8,190 – £9,480
- 45 cases: £12,285 - £14,220 (+ £4,095 – £4,740).

31. Adding the costs of full civil legal aid and A&A together, the range of potential annual costs on the legal aid fund might be:

- No increase - £42,270 – £95,652
- Increase in number of cases granted - £83,285 - £194,870 (+ £41,015 – £99,218).

Costs to individuals and businesses

32. The introduction of the Bill would give rise to a period of adaptation for those directly affected, and incur some retraining costs for practitioners, but the Scottish Government does not expect there to be significant cost implications for individuals or businesses resulting from the Bill's provisions.

33. Legal professionals are most likely to be impacted directly by the reform of the law given their need to be up-to-date with changes in legislation and practice. Anticipated costs are likely to be borne by firms in making their staff aware of the changes to the law affected by the Bill. An initial training and familiarisation cost, principally for solicitors but perhaps also for other professionals in relevant fields, would be likely. Generally, familiarisation costs of any change in the law will be incurred by those providing training within legal firms. However, the provision of such training is typically already provided for within a firm's budget, with the cost of maintaining solicitors' and other professionals' legal knowledge being covered by the firm's fee earning income.

34. Scottish solicitors are required to undertake 20 hours of Continuing Professional Development (CPD) each year and familiarisation training on changes to the law would typically count towards this figure. Those solicitors affected could choose to spend some of their time on training in this area in the relevant year and therefore there might be no overall increased cost in doing so if they undertake training on this topic rather than on another topic. If there is a need for additional training on the law in this area, some firms will be able to do the training in-house (larger firms often provide some in-house training for staff) and/or solicitors could access training and CPD via other providers. The Law Society of Scotland's CPD costs for members (i.e., solicitors) is:[15] 3 hours training = £120.75 + VAT; 6 hours training = £253.05 + VAT. There are a number of other providers of CPD and legal training in Scotland. It is difficult to estimate how many practitioners will seek CPD sessions, as individual practitioners are responsible

[15] Non-members (i.e. non-solicitors) can attend these sessions too but at a higher rate.

for evaluating their own needs for further training or education. However, based on the options available to undertake CPD, it is likely that initial training in relation to this Bill would not represent a significant additional cost to law firms.

35. With regards to individual and small businesses, the overall policy aim is to produce rules that are as clear, certain and accessible as possible. This will benefit individuals and businesses who will be able to access much of the law on formation of contract in one place together with clear law on some aspects of remedies for breach of contract. The clarity and accessibility of the law will be of benefit to individuals and businesses who may lack legal assistance.

Summary of assumed increase in costs

36. The following represents a summary of the assumed increase of costs as a result of the Bill, which might be expected to occur over 3 years from commencement.

Assumed increase in costs to the Scottish Administration: £30,855 – £150,905

37. The Scottish Government estimates the annual costs in each year over the 3-year timescale might be in the following range (the costs of producing and publishing guidance should fall entirely within the first year):

Year 1 – £3,086 – £15,091 (up to 10% of the assumed increase)

Year 2 – £7,714 – £37,726 (up to 25% of the assumed increase)

Year 3 – £20,056 – £98,088 (up to 65% of the assumed increase)

Assumed increase in costs to Other Bodies: £41,015 – £99,218)

38. The Scottish Government estimates the annual costs in each year over the 3-year timescale might be in the following range:

Year 1 - £6,153 - £14,883 (up to 15% of the assumed increase)

Year 2 - £14,355 - £34,726 (up to 35% of the assumed increase)

Year 3 - £20,508 - £49,609 (up to 50% of the assumed increase)

Total assumed increase in costs: £71,870– £250,123

39. The Scottish Government estimates the total annual costs in each year over the 3-year timescale might be in the following range -

Year 1 - £9,239 - £29,974

Year 2 - £22,069 - £72,452

Year 3 - £40,564 - £147,697

This document relates to the Contract (Formation and Remedies) (Scotland) Bill (SP Bill 76A) as amended at Stage 2

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